above that principle comes into operation when once a judgment of the High Court has replaced that of the lower Court and in those cases the High Court would not be competent to review or revise its own judgment.

The High Court would also not be then entitled to issue any notice for enhancement of sentence in the exercise of its revisional powers under S. 439 (1) of the Criminal P. C.

Where however the High Court in exercise of its revisional power over the judgments of the lower Courts under S. 439 (1) issues a notice for enhancement of sentence and gives an opportunity to the accused of being heard either personally or by pleader in his own defence under S. 439 (2) the right which is given by S. 439 (6) to him also to show cause against his conviction comes into existence and this right of his cannot be negatived by having resort to the provisions of either S. 369 or S. 430 of the Criminal P. C.

Section 369 in terms provides, "save as otherwise provided in this Code" and S. 439 (6) would be an otherwise provision which is saved by this 'non-obstante' clause appearing in S. 369. It is significant to note that both these amendments, the one in S. 369 and the other in Section 439 were enacted by S. 119 of Act XVIII of 1923 and the very purpose of these simultaneous amendments would appear to be to effectuate the right given to the accused to show cause against his conviction as enacted in S. 439 (6) of the Criminal Procedure Code.

(47) It may also be noted that the right which is thus conferred on the accused under S. 439 (6) is not an unlimited or unfettered right as observed by Mr. Justice Mahajan in AIR 1945 Lah 130 (T). In the case of trials by jury where an accused person has been convicted on the verdict of a jury and is called upon under S. 439 (2) of the Criminal P. C. to show cause why his sentence should not be enhanced he is entitled under S. 439 (6) to show cause against his conviction, but only so far as S. 423 (2) of the Code allows and has not an unlimited right of impugning the conviction on the evidence.

It has been held by the Allahabad High Court in — Emperor v. Bhishwanath, AIR 1936 All 850 (Z4) that the combined effect of Ss. 439 (6) and 423 (2) is to entitle the accused to question the conviction by showing only that the Judge misdirected the jury or that the jury misunderstood the law laid down by the Judge in his charge.

(48) A similar conclusion was reached by the majority of the Judges in — Superintendent and Remembrancer of Legal Affairs, Bengal v. Jnanendra Nath Ghose, AIR 1929 Cal 747 (Z5), where it was held that a person who had been convicted on his own plea of "guilty" under S. 271 (2) of the Criminal P. C., in showing cause against a notice for enhancement of sentence, could only while showing cause against his conviction attack the propriety or legality of sentence but could not withdraw the plea of 'guilty' or go behind such a plea as a confession of the facts charged.

(49) There are no doubt two other judgments, one of the Bombay High Court in AIR 1933 Bom 153 (Z2) and the other of the Rangoon High Court in — Nga Ywa v. King-Emperer, AIR 1935 Rang 49 (Z6) which appear to run counter to the 'ratio decidendi' of these decisions of the Allahabad and the Calcutta High Courts respectively but we are not called upon to resolve that conflict, if any.

Suffice it to say that the right which is conferred on the accused of showing cause against his conviction under S. 439 (6) of the Criminal P. C. is a right which accrues to him on a notice for enhancement of sentence being served upon him and he is entitled to exercise the same irrespective of what has happened in the past unless and until there is a judgment of the High Court already pronounced against his conviction after a full hearing in the presence of both the parties on notice being issued by the High Court in that behalf.

This right of his is not curtailed by anything contained in the earlier provisions of S. 439 nor by anything contained in either S. 369 or S. 430 of the Criminal P. C.

(50) We are therefore of the opinion that the decision reached by the High Court of Bombay in the case under appeal was wrong and must be reversed. We accordingly allow the appeal and remand the matter back to the High Court of Judicature at Bombay with a direction that it shall allow the Appellant to show cause against his conviction and dispose of the same according to law.

BY THE COURT:

(51) The appeal is allowed and the order of the High Court of Bombay is set aside, and the matter is sent back to the High Court with a direction that it shall allow the appellant an opportunity to show cause against his conviction and dispose of the matter according to law.

V.R.B. Appeal allowed.

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*AIR 1955 SC 661 (Vol. 42, C. 101 Nov.)

(From Patna: AIR 1953 Pat 87)

6th September, 1955

S. R. DAS Ag. C. J., BOSE, BHAGWATI, JAGANNADHADAS, VENKATARAMA AYYAR, SINHA AND IMAM JJ.

Bengal Immunity Co. Ltd., Appellants v. State of Bihar and others, Respondents; The State of West Bengal and others, Interveners.

Civil Appeal No. 159 of 1953.

Whether the delivery State will be entitled to tax such a sale or purchase will depend on the other provisions of the Constitution. The assignment of a fictional situs to a sale or purchase has no bearing or effect on the other aspects of the sale or purchase, e.g., its inter-State character or its export or import character which are entirely different topics. This fixing of situs for a sale or purchase in any particular State either under the general law or under the fiction does not conclude the matter.

It has yet to be ascertained whether that sale or purchase which by virtue of the Explanation has taken place in the delivery State was made in the course of inter-State trade or commerce. For this purpose the Explanation can have no relevancy or application at all. (1953) 4 SCR 1069: AIR 1953 SC 252, Overruled. (Paras 33, 153)

(m) Constitution of India, Art. 286(2) — Scope — (1953) 4 SCR 1069: AIR 1953 SC 252, Overruled.

(Per Majority, Jagannadhadas, Venkatarama Ayyar and Sinha JJ. Contra): Article 286(2) cannot be regarded as subject to the States taxing power, and it cannot be said that the protection of Art. 286 (2) could not have been intended to be larger. Dissenting view in AIR 1953 SC 252 and in AIR 1953 SC 833, Approved. (Para 34)

(n) Constitution of India, Art. 286 (1)(a) Explanation and (2) — General and special rule — (Interpretation of Statutes — General and Special enactments) — (Civil P. C. (1908) Pre.) AIR 1953 Pat 87, Reversed. (View of Bhagwati J. in (1953) 4 SCR 1069: AIR 1953 SC 252, Overruled).

(Per Majority, Jagannadhadas, Venkatarama Ayyar and Sinha JJ. Contra): It cannot be said that cl. (2) contains the enunciation of the general rule and the Explanation embodies a particular or special rule. The two provisions do not relate to the same subject and, therefore, it is not possible to hold that one is the enunciation of a general rule and the other the enunciation of a particular or special rule on one and the same subject.

The principle of construction that the particular or special rule must control or cut down the general rule cannot be called in aid in construing cl. (2) and the Explanation of cl. (1) (a). AIR 1953 Pat 87, Reversed and view of Bhagwati J. in (1953) 4 SCR 1069: AIR 1953 SC 252, Overruled. (Paras 35, 103, 168)

Anno: AIR Com.: C. P. C. Pre., N. 7.

(o) Interpretation of Statutes — Constitution statutes — (Constitution of India, Art. 286(1)(a) Explanation and (2) — (Civil P. C. (1908) Pre.)

(Per S. R. Das Ag. C. J., Bose, Bhagwati and Imam JJ.): The mere circumstance that a provision in the Constitution will, on a proper construction, take effect on the happening of a future event can, by itself, be no ground for not giving effect to the plain language of that provision.

The fact that the Explanation to Art. 286(1)(a) in so far as it relates to inter-State sales, may not have an immediate operation until Parliament lifts the ban under cl. (2) need not unnecessarily oppress or lead the Court to adopt a forced construction only to give the whole of it an immediate and present operation. (Para 37)

Anno: AIR Com.: C. P. C. Pre. N. 7.

(p) Constitution of India, Art. 286 (1) (a) Explanation and (2) — Scope.

(Per S. R. Das Ag. C. J., Bose, Bhagwati and Imam JJ.): It is not correct to say that the Explanation can have no immediate operation at all. It certainly has immediate operation to render sales and purchases which fall within the explanation to be outside sales and purchases so as immediately to take away the taxing power of all States other than the delivery State with respect to them. Further cases may arise in which purchases or sales which are outside cl. (2) may, nevertheless, fall within and be immediately governed by the Explanation. (Para 38)

(q) Constitution of India, Art. 286 (1) (a) and Explanation — Effect.

(Per S. R. Das Ag. C. J., Bose, Bhagwati and Imam JJ.): It is not correct to say that cl. (1)(a) read with the Explanation is wholly useless. It may well be argued that there was scope for the operation of cl. (1)(a) and the Explanation as and when the President exercised the powers vested in him by the Proviso to cl. (2). (Para 39)

(r) Interpretation of Statutes — Hardship — (Civil P. C. (1908), Pre.) — (Constitution of India, Art. 286 (2)).

(Per S. R. Das Ag. C. J., Bose, Bhagwati and Imam JJ.): The Court should not be called upon to discard the cardinal rule of interpretation for mitigating a hardship, which after all may be entirely fanciful, when the Constitution itself has expressly provided for another authority more competent to evaluate the correct position to do the needful. (Para 43)

Anno: AIR Com.: C. P. C., Pre. N. 7.

(s) Constitution of India, Art. 286 — Purpose of.

(Per S. R. Das Ag. C. J., Bose, Bhagwati and Immam JJ.): The different parts of the Article look upon sales and purchases from different perspectives and place different bans on the taxing power of the States at different angles. The circumstance that the bans may in given cases overlap is no justification for concluding that the subject-matter of the different provisions is the same. It is not correct to say that the only purpose of Art. 286 is to eliminate multiple taxation. (Paras 44, 105)

(t) Constitution of India, Art. 286 (1) (a) Explanation and (2) — Bihar Sales Tax Act (19 of 1947) — Validity — (1953) 4 SCR 1069: AIR 1953 SC 252, Overruled.

(Per Majority, Jagannadhadas, Venkatarama Ayyar and Sinha JJ. Contra): Article 286(2) puts an absolute restriction on the taxing power of the States where transactions of sale or purchase take place in the course of inter-State trade or commerce unless and until the ban is lifted by Parliament within the terms thereof and until such ban is lifted no delivery State within the meaning of the Explanation to Art. 286 (1) (a) much less the other States are in a position to impose a tax on transactions of sale or purchase covered by the Explanation, and the majority decision in AIR 1953 SC 252 in so far as it decides to the contrary cannot be accepted as well founded on principle or authority.

The charging section of the Bihar Act read with the relevant definitions cannot operate to tax inter-State sales or purchases and it must be held that as Parliament has not otherwise provided, the Act, in so far as it purports to tax sales or purchases that take place in the course of inter-State trade or commerce, is unconstitutional, illegal and void. The Act imposes tax on subjects divisible in their nature but does not exclude in express terms subjects exempted by the Constitution.

In such a situation the Act need not be declared wholly ultra vires and void, for it is feasible to separate taxes levied on authorised subjects from those levied on exempted subjects and to exclude the latter in the assessment of the tax. In these

circumstances it is difficult to say that the scheme of taxing inter-State sales forms such an integral part of the entire scheme of taxation on sales or purchases of goods as to be inextricably interwoven with it.

There is no reason to presume that had the Bihar Legislature known that the provisions of the Act might be held bad in so far as they imposed or authorised the imposition of a tax on inter-State trade or commerce even though Parliament had not by law provided otherwise it would, nevertheless, not have passed the rest of the Act. (Order was issued directing that, until Parliament by law provided otherwise, the State of Bihar do forbear and abstain from imposing sales tax on out-of-State dealers in respect of sales or purchases that had taken place in the course of inter-State trade or commerce even though the goods had been delivered as a direct result of such sales or purchases for consumption in Bihar).

(Per Bhagwati J.): All the provisions contained in Bihar Sales Tax Act with regard to the registration of the outside dealer, the maintenance of the books of account, submission of returns by him to the Sales Tax authorities of the State of Bihar, the production and inspection of books of account before the Sales Tax authorities, the search of the premises of the outside dealer by them and the imposition of penalties on him by reason of his non-compliance with the various provisions contained in the Act amongst others are unwarranted and the illegitimate exercise of the powers incidental to the power of taxing sales or purchases conferred upon the State of Bihar by Art. 246(3) and the Entry 54 in List II of Sch. 7 to the Constitution and do not affect non-resident businessmen who are outside the territories of the State of Bihar. (1953) 4 SCR 1069: AIR 1953 SC 252, Overruled. (Paras 48, 51, 52, 110, 113, 137, 184)

(u) Constitution of India, Art. 226 — Infringement of fundamental rights — AIR 1953 Pat 87, Reversed.

(Per S. R. Das Ag. C. J., Bose, Bhagwati and Imam JJ.): In the Bihar Act (19 of 1947) there are various provisions laying down conditions which dealers must comply with or submit to. The provisions in the Act undoubtedly constitute restrictions on the fundamental right to carry on business which is guaranteed to every citizen of India by Art. 19 (1) (g) of the Constitution. If the Act is ultra vires the Constitution and consequently void these onerous conditions can never be justified as reasonable restrictions within the meaning of cl. (6) of that Article. AIR 1953 Pat 87, Reversed. (Paras 5, 145)

Anno: AIR Com.: Const. of India, Art. 226 N. 16.

(v) Constitution of India, Art. 286 (1) (a) and Explanation and (2) — Scope.

(Per Bhagwati J.): It cannot be held that if Art. 286(2) applies to the class of sales covered by Art. 286 (1) (a) and the Explanation thereto it would result in discrimination against local trade in favour of inter-State trade and it will be inconsistent with the provisions of Part 13 of the Constitution.

The consumers within a State who would resort to transactions of purchase across the border with a view to avoid the payment of the intra-State sales tax would be comparatively few and could in conceivable cases be caught within the net by imposing a tax on goods of a non-discriminatory nature within the meaning of Art. 304 (a). This reason is therefore no deterrent to holding that the ban under Art. 286(2) is absolute and unaffected by Art. 286(1)(a) and the Explanation thereto. (Para 104)

(w) Constitution of India, Art. 286 (1) (a) and Explanation and (2) — Scope.

(Per Bhagwati J.): It cannot be said that the Constitution itself has divided transactions of sale or purchase in the course of inter-State trade and commerce into two distinct categories, one falling within Art. 286(1)(a) and the Explanation thereto and the other falling within Art. 286 (2). The transaction of sale or purchase would be one but it is subject to the imposition of distinct bans having regard to the view-point from which it is being looked at.

If it is looked at from the view-point of its being an outside or an inside sale it may be caught within the ban of Art. 286 (1) (a). If it is looked at from the view-point of its being a transaction in the course of inter-State trade or commerce it may be caught within the ban imposed by Art. 286 (2). These bans are mutually exclusive and may have to be applied to the same transaction of sale or purchase, one ban not necessarily excluding the other. (Para 106)

(x) Constitution of India, Art. 286 — Tax on purchase.

(Per Bhagwati J.): A transaction of sale or purchase is not a unilateral transaction but a bilateral one and when it is looked at from the point of view of a sale or purchase it is one transaction which has two facets. From the point of view of a seller it is a sale transaction and from the point of view of a purchaser it is a purchase transaction. When therefore the transaction is one on which a tax on sale or purchase can be levied it does not necessarily mean that only a sales tax can be levied and not a purchase tax. (The inside dealer may therefore be taxed on his purchases or if he sells in retail to actual consumers in the State he may be taxed on the sales. (Para 110)

(y) Constitution of India, Art. 286 — Validity of tax — Inconvenience in recovering tax.

(Per Bhagwati J.): The convenience or inconvenience of collecting a sales tax or a purchase tax is not a relevant consideration when one is considering the validity or otherwise of such a tax. AIR 1949 FC 18, Rel. on. (Para 110)

(z) Interpretation of Statutes — Harmonious construction — (Civil P. C. (1908), Preamble).

(Per Venkatarama Ayyar J.): It is a cardinal rule of construction that when there are in a Statute two provisions which are in conflict with each other such that both of them cannot stand, they should, if possible, be so interpreted that effect can be given to both, and that a construction which renders either of them inoperative and useless should not be adopted except in the last resort. This is what is known as the rule of harmonious construction. (Para 168)

Anno: AIR Com.: C. P. C., Pre. N. 7.

(za) Constitution of India, Arts. 245, 246, 286 Sales tax legislation operating on non-resident persons.

(Per Venkatarama Ayyar J. in a dissenting judgment): A law enacted by the Indian Legislature in respect of the matters enumerated in the appropriate lists would be valid provided it is for the territory entrusted to their charge; whether it was so or not would depend on whether there was sufficient territorial connection between the person who is sought to be charged or proceeded against under the law and the country which enacts the law; and when such connection exists, the law is not strictly speaking extra-territorial, and it is not

ultra vires on the ground that the person is not residing within the State which enacts the law.

A sales tax legislation of a State which is otherwise valid is not ultra vires on the ground that the person proposed to be taxed is not resident within the territorial limits of the State: Case law discussed.
(Para 197)

(zb) **Interpretation of Statutes — Repeal and re-enactment of statutes — (Civil P. C. (1908), Preamble).**

(Per Venkatarama Ayyar J.): It is a well-settled rule of construction that when a statute is repealed and re-enacted and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them under the repealed Act, because the Legislature is presumed to be acquainted with the construction which the Courts have put upon the words, and when they repeat the same words, they must be taken to have accepted the interpretation put on them by the Court as correctly reflecting the legislative mind.
(Para 197)

Anno: AIR Com.: C. P. C. Pre. N. 7.

(zc) **Constitution of India, Arts. 248, 246 — Extra-territorial operation.**

(Per Venkatarama Ayyar J. in a dissenting judgment): The powers of the Union and the State under Ss. 99(1) and 100 of the Government of India Act, 1935, as also under Arts. 245 (1) and 246 in respect of the matters mentioned in their respective lists have the same content and quality, and if legislation with extra-territorial operation is within the competence of this Union, it is equally within the competence of the State.

The words "extra-territorial operation" are used in two different senses as connoting firstly, laws in respect of acts or events which take place inside the State but have operation outside, and secondly, laws with reference to the nationals of a State in respect of their acts outside; in its former sense, the laws are strictly speaking intra-territorial though loosely termed 'extra-territorial' and under Art. 245 (1) it is within the competence of the Parliament and of the State Legislature to enact laws with extra-territorial operation in that sense.

The words "laws with extra-territorial operation" in Art. 245 (2) must be understood in their strict sense as having reference to the laws of a State for their nationals in respect of acts done outside the State. Otherwise, the provision would be redundant as regards legislation by Parliament and inconsistent as regards laws enacted by States.
(Paras 199, 200)

(zd) **Constitution of India, Art. 286(1) Explanation — Scope.**

(Per Venkatarama Ayyar J. in dissenting judgment): When Art. 286 (1) (a) and the Explanation refer to a sale or purchase, they merely conform to the terms of Entry 54 in List 2 of 7th Schedule, and these words cannot therefore be construed as splitting up the power to tax sales into two parts, one available against the purchaser at all times, as in the very nature of it he must be within the State, and the other against a seller if he is within jurisdiction.

The power is one and indivisible to be exercised when the conditions mentioned in the Explanation are satisfied against either a seller or buyer as the Legislature might determine. To hold that the tax could be imposed on a seller only if he is within the State would be to add words to the Explanation which are not there, and for this, there is no justification.
(Paras 205, 206)

(ze) **Constitution of India, Art. 286 (1) (a) Explanation — Actual delivery.**

(Per Venkatarama Ayyar J. in a dissenting judgment): The expression "actual delivery" in the Explanation to Art. 286(1)(a) means delivery of the goods to the purchaser or his agent, and delivery to the common carrier is not actual delivery.
(Para 210)

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The Judgment of S. R. Das Ag. C. J., Bose & Imam JJ. was delivered by

DAS Ag. C. J.

This appeal, filed under a certificate of fitness granted by the High Court of Patna, is directed against the judgment of that High Court pronounced on 4-12-1952 whereby it dismissed the application made by the appellant company under Art. 226 of the Constitution praying for an appropriate writ or order quashing "the proceedings issued by the opposite parties for the purpose of levying and realising a tax which is not lawfully leviable on the petitioners" and for another ancillary reliefs.

(2) The relevant facts appearing from the petition filed in support of the appellant company's aforesaid application are as follows: The appellant company is an incorporated company carrying on the business of manufacturing and selling various sera, vaccines, biological products & medicines. Its registered head office is at Calcutta & its laboratory & factory are at Baranagar in the district of 24-Perganas in West Bengal.

It is registered as a dealer under the Bengal Finance (Sales Tax) Act and its registered number is S. L. 683A. Its products have extensive sales throughout the Union of India and abroad. The goods are despatched from Calcutta by rail, steamer or air against orders accepted by the appellant company in Calcutta.

The appellant company has neither any agent or manager in Bihar nor any office, godown or laboratory in that State. On 24-10-1951 the Assistant Superintendent of Commercial Taxes, Bihar wrote a letter to the appellant company which concluded as follows:

"Necessary action may therefore be taken to get your firm registered under the Bihar

Sales Tax Act. Steps may kindly be taken to deposit Bihar Sales Tax dues in any Bihar Treasury at an early date under intimation to this Department."

On 18-12-1951 a notice was issued by the Superintendent, Commercial Taxes, Central Circle Bihar, Patna calling upon the appellant company (i) to apply for registration and (ii) to submit returns showing its turnover for the period commencing from 26-1-1950 and ending with 30-9-1951. This notice was issued under S. 13 (5), Bihar Sales Tax Act, 1947 (hereinafter called the Act) read with R. 28. It was drawn up according to Form No. 8 prescribed by the rules and was headed "Notice of hearing under S. 13 (5)".

The reason for issuing this notice, as recited therein, was that on information which had come to his possession the Superintendent was satisfied that the appellant company was liable to pay tax but had nevertheless wilfully failed to apply for registration under the Act. Thereafter there was some correspondence between the appellant company and the Bihar Sales Tax authorities to which it is not necessary to refer in detail. Suffice it to say that while the appellant company denied its liability on the ground 'inter alia', that it was not resident in Bihar, it carried on no business there, none of its sales took place in Bihar and that it did not collect any sales tax from any person of that State, the Bihar Sales Tax authorities maintained that under S. 33, which was substantially based on Art. 286 of the Constitution and was inserted in the Act by the President's Adaptation Order promulgated on 4-4-1951, all sales in West Bengal or any other State under which the goods had been delivered in the State of Bihar as a direct result of the sale for the purpose of consumption in that State were liable to Bihar Sales Tax.

Eventually on 29-5-1952 the Assistant Superintendent of Sales Tax, Bihar called upon the appellant company to comply with the notice by 14-6-1952 and threatened that, in default of compliance, he would proceed to take steps for assessment to the best of his judgment.

The appellant company by its letter dated 7-6-1952 characterised the notice under S. 13 (5) as ultra vires and entirely illegal and called upon the Superintendent to forthwith rescind and cancel the same. On 10-6-1952 the appellant company presented before the High Court at Patna a petition under Art. 226 claiming the reliefs hereinbefore mentioned.

The respondents did not file any affidavit in opposition controverting any of the allegations of facts made in the petition and it must, accordingly, be taken that those facts are aditted as correct by the respondents. The High Court dismissed the petition on 4-12-1952 but on the next day issued a certificate, under Art. 132 (1) of the Constitution, that the case involved a substantial question of law as to the interpretation of the Constitution. Hence the present appeal.

(3) In view of the importance of the issues involved in this appeal the States of Madras, Uttar Pradesh, Madhya Pradesh, West Bengal, Orissa, Punjab, Pepsu, Mysore, Travancore-Cochin and Rajasthan applied for and obtained leave to intervene in this appeal. Similar leave was applied for by and was granted to Tata Iron and Steel Company Ltd., and one M. K. Kuriakose. The State of West Bengal, Tata Iron and Steel Company Ltd., and M. K. Kuriakose have supported the appellant company while the rest of the interveners have opposed the appeal.

(4) Before the High Court the question of maintainability of the petition was raised by the respondents as a preliminary objection and it was answered in their favour by the High Court. In its judgment the High Court noticed that facts had not been investigated nor had the liability of the appellant company been determined and that in fact no order of assessment had been made. It pointed out that it was not a case for the Sales Tax Officer usurping a jurisdiction not vested in him by law or acting in excess of his jurisdiction or acting 'mala fide'.

The High Court took the view that the Act undoubtedly conferred jurisdiction on the Sales Tax Officer to investigate the question of liability of a dealer to Sales Tax under the Act and accordingly he was acting well within his jurisdiction in issuing the impugned notice. If on assessment the Sales Tax Officer erroneously holds the appellant liable to any tax, the Act provides for rectifying that error by appeal or revision under Ss. 24 and 25 of the Act.

According to the High Court such a decision, however erroneous, will nevertheless, be a decision within the ambit of his jurisdiction and the High Court cannot interfere with it by a writ of prohibition or certiorari to quash. The High Court accordingly held that the petition was not maintainable and was liable to be dismissed.

(5) We are unable to agree with the above conclusion. In reaching that conclusion, the High Court appears to have overlooked the fact that the main contention of the appellant company, as set forth in its petition, is that the Act, in so far as it purports to tax a non-resident dealer in respect of an inter-state sale or purchase of goods, is 'ultra vires' the Constitution and wholly illegal.

In the impugned Act there are various provisions laying down conditions which dealers must comply with or submit to, namely, to give only a few instances, compulsory registration of dealers (S. 10), filing of returns (S. 12),

attendance and production of evidence in support of the return (S. 13), production, inspection and seizure of books of account or documents and search of premises (S. 17).

Section 26 prescribes penalties for contravention of the provisions of the Act. These & other like provisions in the Act undoubtedly constitute restrictions on the fundamental right to carry on business which is guaranteed to every citizen of India by Art. 19 (1) (g) of the Constitution. If, as contended, the Act is 'ultra vires' the Constitution and consequently void these onerous conditions can never be justified as reasonable restrictions within the meaning of Cl. (6) of that Article as this Court held in the case of — 'Mohammad Yasin v. Town Area Committee, Jalalabad', AIR 1952 SC 115 (A). The same view was also expressed in the — 'State of Bombay v. United Motors (India) Ltd', AIR 1953 SC 252 (B) at p. 256, and again only recently in — 'Himmatlal Harilal v. State of Madhya Pradesh', AIR 1954 SC 403 at p. 405 (C).

(6) It is urged that the appellant being a company is not a citizen and cannot, therefore, claim any fundamental right under Art. 19 which is available only to citizens and, therefore, the decisions of this Court referred to above have no application. While it is noteworthy that the second case mentioned above was concerned with the rights of a company, it is, nevertheless, unnecessary, for the purposes of this appeal, to decide whether a juristic person like a company is a citizen as defined in Part II of the Constitution and as such entitled to the benefits of Art. 19.

Nor is it necessary to consider whether there has been any infraction of the right to equal protection of the laws guaranteed by Art. 14 in that being a juristic person it cannot claim any of the rights under Art. 19 which only citizens can do. It is also true that Art. 31 which protects citizens and non-citizens alike cannot be availed of as it deals with deprivation of property otherwise than by way of levying or collecting taxes as held by this Court in — 'Ramjilal v. Income-tax Officer, Mohindargarh', AIR 1951 SC 97 (D), and that, therefore, the Act does not constitute an infringement of the fundamental right to property under that Article. It is, however, clear from Art. 265 that no tax can be levied or collected except by authority of law which must mean a good and valid law.

The contention of the appellant company is that the Act which authorises the assessment, levying and collection of sales tax on inter-state trade contravenes and constitutes an infringement of Art. 286 and is, therefore, 'ultra vires', void and unenforceable. If, therefore, this contention be well founded, the remedy by way of a writ must, on principle and authority, be available to the party aggrieved.

(7) It has been argued that the application was premature, for there has, so far, been no investigation or finding on facts and no assessment under S. 13 of the Act. The appellant company, contending, as it does, that the Act is 'ultra vires' and void, should have ignored the notice served on it and should not have rushed into Court at this stage.

This line of argument appears to us to be utterly untenable. In the first place, it ignores the plain fact that this notice, calling upon the appellant company to forthwith get itself registered as a dealer, and to submit a return and to deposit the tax in a treasury in Bihar, places upon it considerable hardship, harassment and liability which, if the Act is void under Art. 265 read with Art. 286 constitute, 'in presenti', an encroachment on & an infringement of its right which entitles it to immediately appeal to the appropriate Court for redress.

In the next place, as was said by this Court in — 'Commissioner of Police, Bombay v. Gordhandas Bhanji', AIR 1952 SC 16 at pp. 21-22 (E), when an order or notice emanates from the State Government or any of its responsible officers directing a person to do something, then, although the order or notice may eventually transpire to be 'ultra vires' and bad in law, it is obviously one which 'prima facie' compels obedience as a matter of prudence and precaution.

It is, therefore, not reasonable to expect the person served with such an order or notice to ignore it on the ground that it is illegal, for he can only do so at his own risk and peril. This Court has said in the last mentioned case that a person placed in such a situation has the right to be told definitely by the proper legal authority exactly where he stands and what he may or may not do.

(8) Another plea advanced by the respondent State is that the appellant company is not entitled to take proceedings praying for the issue of prerogative writs under Art. 226 as it has adequate alternative remedy under the impugned Act by way of appeal or revision. The answer to this plea is short and simple.

The remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself 'ultra vires' and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is 'ultra vires' the powers of the legislature which enacted it and as such void and prays for appropriate relief under Art. 226.

As said by this Court in — 'Himmatlal Harilal Mehta v. State of Madhya Pradesh', (C), (supra) this plea of the State stands negatived by the decision of this Court in — 'State of Bombay v. United Motors (India) Ltd.', (B), (supra). We are, therefore, of the opinion, for reasons stated above, that the High Court was not right in holding that the petition under Art. 226 was misconceived or was not maintainable. It will, therefore, have to be examined and decided on merits.

(9) Coming, then, to the merits of the petition, the principal question is whether the tax threatened to be levied on the sales made by the appellant company and implemented by delivery in the circumstances and manner mentioned in its petition is leviable by the State of Bihar. The legal capacity of the State of Bihar to tax these sales is questioned on the following grounds, namely:

(A) that the sales sought to be taxed having taken place in the course of inter-State trade or commerce and Parliament not having by law provided otherwise, all State are debarred from imposing tax on such sales by reason of Art. 286 (2);

(B) that even if the ban under Art. 286 (2) did not apply, the State of Bihar is not competent to impose tax on such sales on a correct reading of Art. 246 (3) read with Entry 54 of List II in the Seventh Schedule and Art. 286 (1);

(C) that the Bihar Sales Tax Act, 1947 can have no extra-territorial operation and cannot, therefore, impose tax on such sales by a non-resident seller;

(D) that on a true construction of the Act itself, it does not apply to the sales sought to be taxed.

(10) Re (A): The main contraversy in this appeal has centred round this ground. It raises a question of construction of Art. 286 of the Constitution. In the judgment under appeal, the High Court took the view that sales or purchases in the course of inter-State trade or commerce referred to in Art. 286 (2) must be construed so as to exclude the particular class of sales or purchases described in the Explanation to Cl. (a) of Art. 286 (1) and that, therefore, the provisions of the Bihar Sales Tax Act, 1947, in so far as, they purported to impose tax on such sales, were not in conflict which Art. 286 (2) as so construed.

After this decision of the Patna High Court, the question came up for consideration before a Constitution Bench of this Court in — 'State of Bombay v. United Motors (India) Ltd.', (B), (supra). The majority of that Bench held that Art. 286 (1) (a), read with the Explanation thereto and construed in the light of Arts. 301 and 304, prohibited the taxation of sales or purchases involving inter-States elements by all States except the State in which the goods were actually delivered for the purpose of consumption therein and that Cl. (2) of Art. 286 did not affect the power of the State in which delivery of the goods was so made to tax the sales or purchases of the kind mentioned in the Explanation, the effect of which was to convert such inter-State transactions into intra-State transactions and to take them out of the operation of Cl. (2) of that Article.

It is quite clear that if this majority view is to prevail, this ground urged by learned counsel for the appellant company and strongly supported by the learned Attorney-General appearing for the interveners, the State of West Bengal and Tata Iron and Steel Company Ltd., and by learned counsel for M. K. Kuriakose must fail.

It has, accordingly, been pressed upon us that we are not bound by the majority decision in that appeal from Bombay and that it is still open to us to examine and ascertain for ourselves the true meaning, import and scope of the Article in question. Learned counsel for some of the interveners question our authority to go behind the majority decision. It is, therefore, necessary at this stage to determine this preliminary question before entering upon a detailed discussion on the question of construction of Art. 286.

(11) In England, the Court of Appeal has imposed upon its power of review of earlier precedents a limitation, subject to certain exceptions. The limitation thus accepted is that it is bound to follow its own decisions and those of courts of Co-ordinate jurisdiction, and the "full" Court is in the same position in this respect as a division Court consisting of three members.

The only exceptions to this rule are: (1) the Court is entitled and bound to decide which of the two conflicting decisions of its own it will follow; (2) the Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion stand with a decision of the House of Lords: and (3) the Court is not bound to follow a decision of its own, if it is satisfied that the decision was given 'per incuriam', e. g., where a Statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier Court.

See — 'Young v. Bristol Aeroplane Co. Ltd.', 1944 KB 718 (F), which, on appeal to the House of Lords, was approved by Viscount Simon in — 'Young v. Bristol Aeroplane Co., Ltd', 1946 AC 163 at p. 169 (G). A decision of the House of Lords upon a question of law is conclusive and binds the House in subsequent case. An erroneous decision of the House of Lords can be set right only by an Act of

Parliament. (See — 'London Street Tramways Co., Ltd. v. London County Council', 1898 AC 375 (H)). This limitation was repeated by Lord Wright in — 'Radcliffe v. Ribble Motor Services Ltd', 1939 AC 215 at p. 245 (I).

(12) The High Court in Australia, which is the highest Court in that Common-wealth, has not adopted such a rigid rule. In the — 'Tramways case', 1914-18 CLR 54 (J), the rule was thus laid down by Griffith C. J. at p. 58:

"In my opinion, it is impossible to maintain an abstract proposition that Court is either legally or technically bound by previous decisions. Indeed, it may, in a proper case, be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong, as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired Statute, or is contrary to a decision of another Court which this Court is bound to follow; not, I think, upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter was 'res integra'. Otherwise there would be grave danger of want of continuity in the interpretation of law."

In the same case Barton, J. in the concluding paragraph of his judgment at p. 69 expressed himself thus:

"In conclusion, I would say that I never thought that it was not open to this Court to review its previous decision upon good cause. The question is not whether the Court can do so, but whether it will, having due regard to the need for continuity and consistency in the judicial decision.

Changes in the number of appointed Justices can, I take, it never of themselves furnish a reason for review. That the prior decision was that of little more than half their number might be urged with greater fairness, but it cannot be urged against — 'Whybrow's case', 11 CLR 1 (J1), which was decided by the whole Court then in existence save the Justice who as President of the Arbitration Court, was a party respondent to the order 'nisi'.

But the Court can always listen to argument as to whether it ought to review a particular decision, and the strongst reason for an overruling is that a decision is manifestly wrong and its continuance is injurious to the public interest."

It is interesting to note that in that case all the Judges agreed that the decision in — 'Whybrow's case', (J1), was to be treated as open to review (Per Griffith C. J., at p. 58) although in the end, after reviewing the position afresh in the light of new arguments advanced before it, the Court came to the same conclusion. — 'Amalgamated Society of Engineers v. Adelaide Steamship Co.', 1920-28 CLR 129 (K), may also be referred to as an instance where the High Court of Australia departed from its previous decision.

(13) In the United States of America there have been a considerable number of cases in which the Supreme Court has explicitly and avowedly overruled its prior decisions but there have been more instances in which the doctrines declared in prior cases have been in part evaded or modified without explicit repudiation. (Willoughby — Constitution of the United States, 2nd Edn., Vol. 1, pp. 74-75). In — 'State of Washington v. Dawson & Co.', (1924) 264 US 219 (L), Brandies J., in his dissenting judgment said:

"The doctrine of 'stare decisis' should not deter us from overruling that case and those which follow it. The decisions are recent ones. They have not been acquiesced in. They have not created a rule of property around which vested interests have clustered. They affect solely matters of a transitory nature. On the other hand, they affect seriously the lives of men, women and children, and the general welfare. 'Stare decisis' is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the Courts have disregarded its admonition are many".

In a foot-note to this judgment the learned Judge set out a large number of instances where the earlier decisions had been overruled. In another dissenting judgment in — 'David Burnet v. Coronado Oil & Gas Co.', (1931) 285 US 393 (M), the same learned Judge, after quoting a passage from the judgment of Lurton J., in — 'Hertz v. Woodman', (1909) 218 US 205 at p. 212 (N), proceeded to say:

" 'Stare decisis' is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled right. Compare — 'National Bank of Genesee v. Whitney', (1881) 103 US 99 (O). This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning recognising that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function".

In his separate but concurring judgment in — 'Mark Graves v. People of the State of New York', (1939) 306 US 466 (P), Frankfurter J., observed:

"Judicial exegesis is unavoidable with reference to an Act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding

future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it".

In this case two previous decisions were expressly overruled and two more were impliedly overruled.

(14) We now come to the Privy Council which, prior to the commencement of our Constitution was the highest Court of Appeal to hear appeals from the Indian High Courts. In re Payment of Compensation to Civil Servants, AIR 1929 PC 84 at p. 87 (Q), in repelling the contention that the Board was bound in law, & without examination, to follow an earlier decision whether they considered it right or wrong the Marquess of Reading said:

"Their Lordships are unable to hold that this proposition stated in such an extreme form is established. It may well be said that the Board would hesitate long before disturbing a solemn decision by a previous Board, which raised an identical or even a similar issue for determination; but for the proposition that the Board is, in all circumstances, bound to follow a previous decision, as it were, blindfold, they are unable to discover any adequate authority. In other words, no inflexible rule, which falls in all circumstances to be applied, has been laid down."

In the — 'Attorney-General of Ontario v. Canada Temperance Federation', AIR 1946 PC 88 (R). Viscount Simon stated the practice of the Board in the following terms:

"Their Lordships do not doubt that in tendering humble advice to His Majesty, they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more than one occasion the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong.

But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by Governments and subjects".

Finally, in — 'Phanindra Chandra Neogy v. The King', AIR 1949 PC 117 (S), Lord Simonds said at p. 118:

"Their Lordships' then have before them a decision upon facts which in no material respect differ from those of the present case. Even so, it is, as they recognise, competent for them humbly to tender advice to His Majesty inconsistent with a previous decision, though it can only be in most exceptional circumstances that such a course should be taken ..... Recognising the possibility, they have heard full argument and, having done so, see no reason to doubt the validity of the reasoning or the correctness of the conclusion in — 'H. H. B. Gill v. The King', AIR 1948 PC 128 (T), and they do not think it necessary to repeat what was said there".

(15) In considering the applicability of the principles laid down in the decisions hereinbefore mentioned, it should be borne in mind that the English decisions may well have been influenced by considerations which can no longer apply to the circumstances prevailing in India. The error, if any, of the Court of Appeal in England, may be corrected by the House of Lords or eventually by Parliament by a simple majority.

The mistakes, if any, made by the High Court of Australia, if not corrected by itself in a subsequent case, could be set right by the Privy Council when appeals were taken there or by the appropriate legislative authority. An error made by the House of Lords or the Privy Council can easily be rectified by Parliament by a simple majority by an amending statute. But in a country governed by a federal Constitution, such as the United States of America and the Union of India are, it is by no means easy to amend the Constitution if an erroneous interpretation is put upon it by this Court. (See Art. 368 of our Constitution).

An erroneous interpretation of the Constitution may quite conceivably be perpetuated or may at any rate remain unrectified for a considerable time to the great detriment to public well being. The considerations adverted to in the decisions of the Supreme Court of America quoted above are, therefore, apposite and apply in full force in determining whether a previous decision of this Court should or should not be disregarded or overruled. There is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public.

Article 141 which lays down that the law declared by this Court shall be binding on all Courts within the territory of India quite obviously refers to Courts other than this Court. The corresponding provision of the Government of India Act, 1935 also makes it clear that the Courts contemplated are the Subordinate Courts.

(16) There are several circumstances relating to the majority decision of the Court in — 'State of Bombay v. United Motors (India) Ltd.', (B), (supra) to which reference must be made. That appeal was heard immediately before the hearing of the appeal reported as — 'State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory', AIR 1953 SC 333 (U), commenced. The two appeals were, as a matter of fact, heard one after the other and judgments were reserved in both of them. The Constitution of the Benches was, however, different. In the first appeal one of the Judges

of that Bench expressly differed from the majority decision and another learned Judge did not accept the majority decision on many points. In the second appeal one Judge of the Bench, who was not a party to the first appeal, differed from the majority decision in the first appeal. The result, therefore, was that the majority decision was definitely differed from by two Judges.

Bhagwati J., has now in the judgment he has written in the present appeal which we have had the advantage of reading reconsidered the matter and on further reflection he thinks that the majority decision on the present issue was erroneous and he now agrees substantially with the view of Art. 286 (1) (a) read with the Explanation and Art. 286 (2) which was expressed in the two minority judgments referred to above and which is adopted in the judgment now being delivered in the present appeal.

If Bhagwati J., had then expressed the views he is now doing, then the majority in the Bombay appeal would have been 3 to 2 and if we add the opinion of the dissenting Judge in the Travancore-Cochin appeal then judicial opinion would have been divided 3 to 3. In this juxtaposition it is difficult to give the majority decision in the Bombay appeal that amount of sanctity and reverence which is usually attributed to an unretracted majority decision of this Court.

(17) The majority decision does not merely determine the rights of the two contending parties to the Bombay appeal. Its effect is far-reaching as it affects the rights of all consuming public. It authorises the imposition and levying of a tax by the State on an interpretation of a constitutional provision which appears to us to be unsupportable. To follow that interpretation will result in perpetuating what, with humility we say, is an error and in perpetuating a tax burden imposed on the people which, according to our considered opinion, is manifestly and wholly unauthorised.

It is not an ordinary pronouncement declaring the rights of two private individuals 'inter se'. It involves an adjudication on the taxing power of the States as against the consuming public generally. If the decision is erroneous, as indeed we conceive it to be, we owe it to that public to protect them against the illegal tax burdens which the States are seeking to impose on the strength of that erroneous recent decision.

(18) The third circumstance is that there appears to be some vagueness, if not inconsistency, in the majority judgment itself. At p. 1084 (of 1953-4 SCR 1069 (B)), of the authorised report the majority judgment says:

"The expression 'for the purpose of consumption in that State' must, in our opinion, be understood as having reference not merely to the individual importer or purchaser but as contemplating distribution eventually to consumers in general within the State. Thus all buyers within the State of delivery from out-of-State sellers, except those buying for re-export out of the State, would be within the scope of the Explanation and liable to be taxed by the State on their inter-State transactions." This passage seems to suggest that it is only the buyers falling within the Explanation who are liable to be taxed by what has been called in the discussion before us as the delivery State. According to this passage, read by itself, the out-of-State sellers are not considered liable to be taxed on the sales. The whole trend of the rest of the majority judgment and the actual decision therein run counter to this conclusion, for the out-of-State sellers were, by reason of the Explanation, subjected to the taxing power of the delivery State.

Indeed, Bihar is claiming to tax the appellant company, an out-of -the State seller, by virtue of the majority decision and all other States intervening and supporting Bihar read the judgment in that way and none of them accepts the quoted passage as containing the actual 'ratio decidendi' of the majority judgment. This confusion, we consider, is also a cogent reason for re-examining that decision.

(19) Reference is made to the doctrine of finality of judicial decisions and it is pressed upon us that we should not reverse our previous decision except in cases where a material provision of law has been overlooked or where the decision has proceeded upon the mistaken assumption of the cortinuance of a repealed or expired statute and that we should not differ from a previous decision merely because a contrary view appears to us to be preferable.

It is needless for us to say that we should not lightly dissent from a previous pronouncement of this Court. Our power of review, which undoubtedly exists, must be exercised with due care and caution and only for advancing the public well-being in the light of the surrounding circumstances of each case brought to our notice but we do not consider it right to confine our power within rigidly fixed limits as suggested before us.

If on a re-examination of the question we come to the conclusion, as indeed we have, that the previous majority decision was plainly erroneous then it will be our duty to say so and not to perpetuate our mistake even when one learned Judge who was party to the previous decision considers it incorrect on further reflection. We should do so all the more readily as our decision is on a constitutional question and our erroneous decision has im-

posed illegal tax burden on the consuming public and has otherwise given rise to public inconvenience or hardship, for it is by no means easy to amend the Constitution.

Sometimes frivolous attempts may be made to question our previous decisions but if the reasons on which our decisions are founded are sound they will by themselves be sufficient safeguard against such frivolous attempts. Further, the doctrine of 'stare decisis' has hardly any application to an isolated and stray decision of the Court very recently made and not followed by a series of decisions based thereon.

The problem before us does not involve overruling a series of decisions but only involves the question as to whether we should approve or disapprove, follow or overrule, a very recent previous decision as a precedent. In any case, the doctrine of 'stare decisis' is not an inflexible rule of law and cannot be permitted to perpetuate our errors to the detriment to the general welfare of the public or a considerable section thereof.

(20) It is pointed out that all the States are realising sales tax in respect of sales or purchases of goods where the goods are actually delivered for consumption within their respective boundaries on the faith of our previous decision and a reversal of that decision will upset the economy of the States and will indeed render them liable to refund moneys already collected by them as taxes. This circumstance, it is pressed upon us, should alone deter us from differing from the previous decision.

We are not impressed by this argument. It has not yet been decided by this Court that moneys paid under a mutual mistake of law induced by a wrong judicial interpretation of a statute or the Constitution must necessarily be refundable as money had and received. If, as contended, moneys so paid are in law refundable the States cannot complain any more than a private individual in similar circumstances could do. Finally, if the State economy is upset the appeal must be to Parliament which under Article 286(2) itself has ample power to make suitable legislation.

(21) The impugned decision is a recent one. The judicial opinion was divided, if not evenly balanced. One of the four Judges who formed the majority has revised his opinion as stated above. The decision on the point noted above seems to be somewhat inconsistent and is, at any rate, not quite clear. It has encouraged the imposition of tax burdens on the consuming public on an interpretation of the Constitution which appears to us to be plainly erroneous.

It has given rise to considerable inconvenience and hardship to business people who have not acquiesced in it by any means. To rectify the error by the legislative process is difficult, for a constitutional amendment requires a specified majority which may not always be available and if it involves an amendment of the legislative lists it will require the consent of a requisite number of the States which, in this instance, cannot reasonably be expected.

In the premises, we think that it is precisely a case where, in the public interests, the meaning, scope and effect of Art. 286 should be re-examined afresh in the light of the fresh arguments now advanced before us and the experience we have since acquired. In our judgment the majority decision in — 'State of Bombay v. United Motors (India) Ltd. (B) (supra) is, in the circumstances alluded to, open to review and we are entitled to re-examine Art. 286 in order to ascertain its true meaning, scope and effect so far as it is necessary for the purposes of this appeal and we proceed on this basis.

(22) It is a sound rule of construction of a statute firmly established in England as far back as 1584 when — 'Heydon's case', (1584) 3 Co Rep 7a (V) was decided that—

".....for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:

1st. What was the common law before the making of the Act,

2nd. What was the mischief and defect for which the common law did not provide,

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and

4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and 'pro privato commodo', and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, 'pro bono publico'".

In — 'In re, Mayfair Property Co.', (1898) 2 Ch 28 at p. 35 (W) Lindley M. R. in 1898 found the rule "as necessary now as it was when Lord Coke reported 'Heydon's case (V)'. In — 'Eastman Photographic Material Co. v. Comptroller General of Patents, Designs and Trade Marks', 1898 AC 571 at p. 576 (X) Earl of Halsbury re-affirmed the rule as follows:

"My Lords, it appears to me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy.

These three being compared I cannot doubt the conclusion."

It appears to us that this rule is equally applicable to the construction of Art. 286 of our Constitution. In order to properly interpret the provisions of that Article it is, therefore, necessary to consider how the matter stood immediately before the Constitution came into force, what the mischief was for which the old law did not provide and the remedy which has been provided by the Constitution to cure that mischief.

(23) The position with respect to taxation on sales or purchases of goods that prevailed in the country had better be stated in the language of Patanjali Sastri C. J. who delivered the majority judgment in the — 'State of Bombay v. United Motors (India) Ltd. (B)' (supra). After expressing the view, based on the authority of the — 'Wallace Brothers Co. Ltd. v. Commr. of Income Tax, Bombay', AIR 1948 PC 118 (Y) that in the case of sales tax, it was not necessary that the sale should take place within the territorial limits of the State in the sense that all the ingredients of a sale, like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State and that, broadly speaking, local activities of buying and selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course that such activities ultimately resulted in a concluded sale to be taxed, the learned Chief Justice proceeded to say:

"In exercise of the legislative power conferred upon them in substantially similar terms by the Government of India Act, 1935, the Provincial Legislatures enacted Sales Tax laws for their respective Provinces, acting on the principle of territorial nexus referred to above; that is to say, they picked out one or more of the ingredients constituting a sale and made them the basis of their sales tax legislation. Assam and Bengal made, among other things, the actual existence of the goods in the Province at the time of the contract of sale the test of taxability. In Bihar the production or manufacture of the goods in the Province was made an additional ground. A net of the widest range perhaps was laid in the Central Provinces and Berar where it was sufficient if the goods were actually "found" in the Province at any time after the Contract of Sale or Purchase in respect thereof was made. Whether the territorial nexus put forward as the basis of the taxing power in each case would be sustained as sufficient was a matter of doubt not having been tested in a Court of law. And such claims to taxing power led to multiple taxation of the same transaction by Provinces and cumulation of the burden falling ultimately on the consuming public. This situation posed to the Constitution makers the problem of restricting the taxing power on sales or purchases involving inter-State elements, and alleviating the tax burden on the consumer. At the same time they were evidently anxious to maintain the State power of imposing non-discriminatory taxes on goods imported from other States, while upholding the economic unity of India by providing for the freedom of inter-State trade and commerce. In their attempt to harmonise and achieve these somewhat conflicting objectives, they enacted Arts. 286, 301 and 304."

Leaving out, for the moment, the question as to whether Arts. 301 and 304 have any bearing on the question of construction of Article 286, as to which we entertain a contrary opinion, the above passage quite adequately depicts the picture of chaos and confusion that was brought about in inter-State trade or commerce by indiscriminate exercise of taxing power by the different Provincial Legislatures founded on the theory of territorial nexus between the respective Provinces and the sales or purchases sought to be taxed. It was to cure this mischief of multiple taxation and to preserve the free flow of inter-State trade or commerce in the Union of India regarded as one economic unit without any provincial barrier that the Constitution makers adopted Art. 286 in the Constitution which runs as follows :

"286. (1) No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.— For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase take place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such

tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

(24) Article 286 is in Part XII of the Constitution which deals with "Finance, Property, Contracts and Suits." It is one of the several Articles which are grouped under the heading "Miscellaneous Financial Provisions" in Chapter I of that Part. It is to be noted that it has not found a place in Part XI, Chapter I whereof deals with "Legislative Relations" including "Distribution of Legislative Powers" between Parliament and the Legislatures of States. The marginal note to Art. 286 is "Restrictions as to imposition of tax on the sale or purchase of goods", which, unlike the marginal notes in Acts of the British Parliament, is part of the Constitution as passed by the Constituent Assembly, 'prima facie', furnishes some clue as to the meaning and purpose of the Article. Apart from the marginal note, the very language of that Article makes it abundantly clear that its object is to place restrictions on the legislative power of the States with respect to the imposition of taxes on the sales or purchases of goods.

It will be recalled that S. 100(3), Government of India Act, 1935 read with Entry 48 of List II of the Seventh Schedule to that Act gave power to the Provincial Legislatures to make laws with respect to "Taxes on sale of goods and on advertisements." Pursuant to the legislative power thus conferred on them, the Provincial Legislatures enacted Sales Tax Acts for their respective Provinces. Although in most of those Acts "Sale" was first defined as meaning transfer of the property in the goods, so as to make the passing of the property within the Province the principal basis for the imposition of the tax, yet by means of Explanations to that definition, those Acts gave extended meanings to that word and thereby enlarged the scope of their operation.

The imposition of tax on the sales or purchases of goods on the basis of a very slight territorial connection or nexus resulted in what has been graphically described by Patanjali Sastri C. J. in the passage quoted above from the majority judgment in the Bombay appeal. This imposition of multiple taxes on one and the same transaction of sale or purchase was certainly calculated to hamper and discourage free flow of trade within India regarded as one economic unit. This undesirable state of affairs had to be put right.

Therefore, while the Constitution makers by Art. 246(3) read with Entry 54 in List II of the Seventh Schedule to the Constitution conferred power on the Legislatures of Part A and Part B States to make law with respect to "Taxes on the sale or purchase of goods other than newspapers" they at the same time by Art. 286 clamped on that legislative power several fetters. Broadly speaking, the fetters thus placed on the taxing power of the States are that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place, (a) outside the State or (b) in the course of import or export or (c) except in so far as Parliament otherwise provides, in the course of inter-State trade or commerce and lastly (d) that no law made by the Legislature of a State imposing or authorising the imposition of a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

It should be noted that these are four separate and independent restrictions placed upon the legislative competency of the States to make a law with respect to matters enumerated in Entry 54 of List II. In order to make the ban effective and to leave no loophole the Constitution makers have considered the different aspects of sales or purchases of goods and placed checks on the legislative power of the States at different angles. Thus in cl. (1)(a) of Art. 286 the question of the situs of a sale or purchase engaged their attention and they forged a fetter on the basis of such situs to cure the mischief of multiple taxation by the States on the basis of the nexus theory.

In cl. (1)(b) they considered sales or purchases from the point of view of our foreign trade and placed a ban on the States' taxing power in order to make our foreign trade free from any interference by the States by way of a tax impost. In cl. (2) they looked at sales or purchases in their inter-State character and imposed another ban in the interest of the freedom of internal trade. Finally, in cl. (3) the Constitution makers' attention was rivetted on the character and quality of the goods themselves and they placed a fourth restriction on the States' power of imposing tax on sales or purchases of goods declared to be essential for the life of the community.

These several bans may overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one

has nothing to do with and is not dependent on the other or others. The States' legislative power with respect to a sale or purchase may be hit by one or more of these bans. Thus, take the case of a sale of goods declared by Parliament as essential by a seller in West Bengal to a purchaser in Bihar in which goods are actually delivered as a direct result of such sale for consumption in the State of Bihar.

A law made by West Bengal without the assent of the President taxing this sale will be unconstitutional because (1) it will offend Art. 286(1)(a) as the sale has taken place outside the territory by virtue of the Explanation to cl. (1)(a); (2) it will also offend Art. 286 (2) as the sale has taken place in the course of inter-State trade or commerce and (3) such law will also be contrary to Art. 286(3) as the goods are essential commodities and the President's assent to the law was not obtained as required by Cl. (3) of Art. 286. This appears to us to be the general scheme of that Article.

(25) We come now to the particular bans. Although the Legislatures of the States were empowered by Art. 246(3) read with Entry 54 of List II to make a law with respect to taxes on sales or purchases of goods, the different State Legislatures, as already mentioned, considered themselves free to make a law imposing tax on sales or purchases of goods provided they had some territorial nexus with such sales or purchases, e.g., that one or other of the ingredients or events which go to make up a sale or purchase was found to exist or had happened within their respective territories. Whether they were right or wrong in so acting is a question which has not been finally decided by the Courts but the fact is that they did so.

This resulted in multiple taxation which manifestly prejudiced the interests of the ultimate consumers and also hampered the free flow of inter-State trade or commerce. So the Constitution makers had to cure that mischief. The first thing that they did was to take away the States' taxing power with respect to sales or purchases which took place outside their respective territories. This they did by cl. (1)(a). If the matter had been left there, the solution would have been imperfect, for then the question as to which sale or purchase takes place outside a State would yet have remained open. So the Constitution makers had to explain what an outside sale was and this they did by the Explanation set forth in cl. (1).

The language employed in framing the Explanation, however, has given scope for argument to counsel and presented considerable difficulties to the Court in ascertaining its purpose and intendment. If the Explanation simply said "For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place outside a State when the goods have actually been delivered for the purpose of consumption in another State, notwithstanding the fact, etc., etc.", then none of the difficulties would have arisen at all. But why, it is asked, did the Constitution makers seek to explain what was an outside sale or purchase by saying that a sale or purchase was to be deemed to take place inside the particular State mentioned in the Explanation?

Was the purpose of the Explanation only to explain what was an outside sale or purchase or was it also its purpose to allot or assign a particular class of sales or purchases of the kind mentioned therein to a particular State so as to put the question of situs of the sales or purchases of that description beyond the pale of controversy? These are questions which arise and are raised because of the somewhat involved language of the Explanation. Four different views as to the true meaning and effect of the Explanation have been suggested for our consideration and arguments have been advanced for and against the correctness of each of them. In the view we have taken, it is not necessary for us to express any final opinion in the matter. We propose accordingly to note the possible views and record very briefly the criticisms relating to each of those views and the suggested answers to such criticisms.

(26) One view which has been called the strict view is this. In cl. (1)(a) the Constitution makers have placed a ban on the taxing power of the States with respect to sales or purchases which take place outside the State. If the matter had been left there the ban would have been imperfect, for the argument would have still remained as to where a particular sale or purchase took place. Does a sale or purchase take place at the place where the contract of sale is made, or where the property in the goods passes or where the goods are delivered? These questions are answered by the Explanation.

That Explanation is "for the purposes of sub-clause (a)" i.e., for the purpose of explaining which sale or purchase is to be regarded as having taken place outside a State. By saying that a particular sale or purchase is to be deemed to take place in a particular State the Explanation only indicates that such sale or purchase has taken place outside all other States. The Explanation is neither an Exception nor a Proviso but only explains what is an outside sale referred to in sub-cl. (a). This it does by creating a fiction. That fiction is only for the purposes of sub-cl. (a) and cannot be extended to any other purpose.

It should be limited to its avowed purpose. To say that this Explanation confers

legislative power on what for the sake of brevity has been called the delivery State is to use it for a collateral purpose which is not permissible. Further, it is utterly illogical and untenable to say that Article 286 which was introduced in the Constitution to place 'restrictions' on the legislative powers of the States, by a side wind, as it were, gave enlarged legislative powers to the State of delivery by an explanation sandwiched between two 'restrictions'.

This construction runs counter to the entire scheme of the Article and the Explanation and one may see no justification for imputing such indirect and oblique purpose to this Article. Had the Constitution makers so desired they could have done so in a more direct and straightforward way. To hold that the Explanation has, besides its declared purpose, another hidden purpose of conferring or enlarging legislative power is to build up a fanciful argument merely on the unfelicitous and involved language used in the Explanation although it is distinctly not the purpose of the Explanation and although it does not purport substantively and 'proprio vigore', to confer any legislative power on any State.

Its only purpose is to explain what an outside sale is, so that, by one stroke, as it were, it takes away the taxing power, in respect of sales or purchases of the kind referred to in the Explanation, of all States other than the State where such sales or purchases are, by the Explanation, to be deemed to have taken place. This view of the Explanation was taken in the dissenting judgment in the case of the — 'State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory (U)', (supra). The view that the Explanation is only for the purposes of sub-cl. (a) of cl. (1) and cannot be carried over to cl. (2) was also taken in the dissenting judgment in the 'State of Bombay v. United Motors (India) Ltd. (B)', (supra) at p. 265.

(27) The criticism that has been levelled against this strict view of the Explanation is that it will not entirely eliminate the claims of the States to tax sales or purchases on the basis of the nexus theory. Suppose, it is said, Parliament lifts the ban placed on inter-State trade or commerce by cl. (2), all States will, in that situation, claim the right to tax sales or purchases if any one of the ingredients or events making up the sale is to be found to exist or to have happened in that State. It has been suggested in reply to this criticism that this apprehension is not at all well-founded. When Parliament will lift the ban imposed by cl. (2), the Explanation will continue to operate, so that inter-State sales or purchases falling within it will still be deemed to have taken place in the delivery State and, therefore, outside all other States none of which latter States will, by reason of the ban imposed by cl. (1)(a), be entitled to tax such sale.

The ban under cl. (2) being lifted, the delivery State will become free to tax such sales or purchases in exercise of the taxing power conferred on it by Art. 246(3) read with Entry 54, in List II. Then, it is asked, what will happen to those sales or purchases which do not fall within the Explanation? After Parliament lifts the ban under cl. (2) which State will tax sales or purchases in which goods are actually delivered in a particular State, not for consumption in that State but, say, for re-export to another State for consumption? One of the suggested answers was that those sales or purchases were not likely to be numerous, for ordinarily a dealer would not actually get the goods imported into a State only for re-exporting the same to another State for consumption in the last mentioned State but would find it more convenient and economical to arrange for the delivery of the goods straight to the last mentioned State.

A further suggestion was that it might well be that when Parliament would by law lift the ban of cl. (2) it would, by the same law, provide which of the States would tax such inter-State sales or purchases which were not covered by the Explanation and on what basis. This suggested answer, in its turn, raises a question as to the scope and ambit of the legislative power conferred on Parliament by cl. (2). The opening words of cl. (2), namely, "Except 'in so far as' Parliament may by law otherwise provide" clearly indicate that the lifting of the ban may be total or partial, that is to say, Parliament may lift the ban wholly and unconditionally or it may lift it to such extent as it may think fit to do and on such terms as it pleases.

It is to be remembered that under Entry 42 of List I Parliament alone may make law with respect to inter-State trade or commerce. It is, therefore, conceded that in exercise of its legislative powers under that entry read with Art. 286(2) Parliament may make a law permitting the States to tax inter-State sales or purchases of certain commodities only. It is also not questioned that Parliament may, by way of regulating inter-State trade or commerce, fix a ceiling rate of tax on sales or purchases of goods which the law made by the States under Entry 54 of List II, may not exceed. Can Parliament also override the Explanation? If not, cannot Parliament at least provide which of the States may tax inter-State sales or purchases of goods which do not fall within the Explanation?

These are some of the questions which may arise as and when Parliament will choose.

to make a law in exercise of the powers conferred on it and it will then be time enough to discuss and decide those questions. It is not for the Courts to advise Parliament in advance as to the scope of its legislative competency under cl. (2) and, therefore, we only note those questions and leave them here.

(28) The second view as to the meaning and effect of the Explanation is that it once for all fixes the situs of a sale or purchase so that one knows when such a sale or purchase is outside a State and when it is inside a State. To put it differently, States are told when a sale or purchase is inside a particular State and, therefore, the States are also told when a sale or purchase is outside a State. In short the Explanation not only explains what is an outside sale or purchase but also actually fixes the situs of a sale or purchase in a particular State.

This view of the Explanation was taken in the majority decision in 'State of Bombay v. United Motors (India) Ltd. (B)' (supra). The majority decision quite clearly concedes that the Explanation does not, by itself, confer any legislative power on any State, not even the delivery State, with respect to sales or purchases of the kind mentioned therein but as it fixes the situs of such sales or purchases in the delivery State that State is left free to tax them in exercise of its legislative powers under Art. 246(3) read with Entry 54 of List II.

The criticism offered against this view is, first of all, that it uses the Explanation for a purpose which is beyond that of sub-cl. (a). This view turns the fiction created expressly for sub-cl. (a) into a reality fixing the location of such sales and purchases for all purposes. In the next place this view ignores the existence of cl. (2) which imposes a different ban on the legislative power of all States including the delivery State also, so that as long as Parliament does not lift the ban no State, not even the delivery State, may tax sales or purchases which take place in the course of inter-State trade or commerce, even though they may fall within the Explanation. The further objection is that this view also does not completely eliminate the confusion arising from the nexus theory. Suppose Parliament lifts the ban under cl. (2), which State will tax sales or purchases which do not come within the Explanation? The same answer was suggested as was done in reply to similar objections to the first view. That, as we have said, will call for decision if and when Parliament exercises its legislative powers under cl. (2).

(29) The third view, which was adumbrated and discussed in the separate judgment of Bhagwati J. in the case of 'State of Bombay v. United Motors (India) Ltd. (B)' (supra) is that the Explanation concerns itself with notionally fixing the situs of sales or purchases in the delivery State only but in no way affects the taxing power of the State in which, under the general law relating to the sale of goods, the property in the goods has passed. The result of this view is said to be that the State in which the sales or purchases are to be deemed to have taken place may tax them but the State in which, under the general law relating to the sale of goods, the property in the goods has passed may also tax them if and when Parliament lifts the ban of cl. (2).

This view, it is said, is open to all the criticisms to which the second view is subject and in addition to that a further objection has been suggested against this view, namely, that it will perpetuate double, if not multiple, taxation on one and the same transaction of sale or purchase at least after Parliament lifts the ban.

(30) A fourth view has also been suggested before us as a possible view although it was not put forward on the previous occasion. It is founded on the 'non-obstante' clause in the Explanation. It is said that cl. (1)(a) and the Explanation concern themselves with only two States, namely the title State, i.e., the State in which, under the general law, title to the goods passes to the purchaser and the delivery State, i.e., the State in which goods are actually delivered as a direct result of the sale or purchase for consumption in that State. The purpose of the Explanation is said to be to demarcate the taxing power of only these two States by taking out the sales or purchases of the kind mentioned therein from the sphere of the taxing power of the title State and subjecting them to the taxing power of the delivery State.

In the juxtaposition of those two States clause (1)(a) read with the Explanation provides that the title State cannot tax because such sales or purchases are, by the fiction, made to take place outside its territory and that the delivery State can tax because the sales or purchases in question are, by the fiction, made to take place inside its territory. In short the result of clause (1)(a) read with the Explanation, according to this view, is that the State which cannot tax such sales or purchases on the ground that they have taken place outside its territory is only that State in which the property in the goods has passed.

The criticism is immediately put forward that if cl. (1)(a) and the Explanation are limited in their operation only to the two States mentioned above then the other States which also claimed to tax on the strength of the nexus theory, e.g., the State where the contract was made, or the State where the goods were produced or manufactured or were found, will be outside the ban and the mischief of multiple

taxation which the Constitution makers were out to curb will continue to be rampant and unabated. This view is also subjected to some of the other criticisms mentioned in connection with the other views of the Explanation.

(31) As we have already stated, we do not desire, on this occasion, to express any opinion on the validity claimed for or the infirmities imputed to any of these several views, for, in our opinion, it is not necessary to do so for disposing of this appeal. Whichever view is taken of the Explanation it should be limited to the purpose the Constitution makers had in view when they incorporated it in cl. (1). It is quite obvious that it created a legal fiction. Legal fictions are created only for some definite purpose. Here the avowed purpose of the Explanation is to explain what an outside sale referred to in sub-cl. (a) is.

The judicial decisions referred to in the dissenting judgment in 'State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory (U)' (supra) at pp. 342 and 343 and the case of — 'East End Dwellings Co. Ltd. v. Finsbury Borough Council', 1952 AC 109 at p. 132 (Z) clearly indicate that a legal fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field. It should further be remembered that the dominant, if not the sole, purpose of Art. 286 is to place restrictions on the legislative powers of the States, subject to certain conditions in some cases and with that end in view Art. 286 imposes several bans on the taxing power of the States in relation to sales or purchases viewed from different angles and according to their different aspects.

In some cases the ban is absolute as, for example, with regard to outside sales covered by cl. (1)(a) read with the Explanation, or with regard to imports and exports covered by cl. (1)(b) and in some cases it is conditional, e.g., in the cases of inter-State sales or purchases under cl. (2) which is, in terms, made subject to the proviso thereto and also to the power of Parliament to lift the ban. Again, in some cases the bans may overlap but nevertheless, they are distinct and independent of each other. The operative provisions of the several parts of Art. 286, namely, cl. (1)(a), cl. (1)(b), cl. (2) and cl. (3) are manifestly intended to deal with different topics and, therefore, one cannot be projected or read into another.

On a careful and anxious consideration of the matter in the light of the fresh arguments advanced and discussions held on the present occasion we are definitely of the opinion that the Explanation in cl. (1)(a) cannot be legitimately extended to cl. (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of cl. (2). Indeed, in 'State of Bombay v. United Motors (India) Ltd. (B)' (supra) at p. 258 and again at p. 259 the majority judgment also accepted the position that the Explanation was not an exception or proviso either to Cl. (1)(a) or to Cl. (2).

If, therefore, the Explanation cannot be read into Cl. (2) because of the express language of the Explanation and also because of the difference in the subject-matter of the operative provisions of the two clauses, then it must follow that, except in so far as Parliament may by law provide otherwise, no State law can impose or authorise the imposition of any tax on sales or purchases when such sales or purchases take place in the course of inter-State trade or commerce and irrespective of whether such sales or purchases do or not fall within the Explanation.

It is not necessary, for the purposes of this appeal, to enter upon a discussion as to what is exactly meant by inter-State trade or commerce or by the phrase "in the course of", for, it is common ground that the sales or purchases made by the appellant company which are sought to be taxed by the State of Bihar actually took place in the course of inter-State trade or commerce.

Parliament not having by law otherwise provided, no State law can, therefore, tax these sales or purchases, that is to say, Bihar cannot tax by reason of Cl. (2) although they fall within the Explanation and other States cannot tax by reason of both Cl. (1) (a) read with the Explanation and Cl. (2). This conclusion leads us now to consider the arguments by which the respondent State and the intervening states which support the respondent State seek to get over this position.

(32) In the forefront is placed the argument that found favour with the majority of the Bench which decided the case of — 'State of Bombay v. United Motors (India) Ltd.', (B). (supra). That argument is to be found in the majority judgment at pp. 258-259. Shortly put, the majority opinion was that the operation of Cl. (2) stood excluded as a result of the legal fiction enacted in the Explanation. In their view, the effect of the Explanation in regard to inter-State dealings was to invest what, in truth, was an inter-State transaction with an intra-State character in relation to the State of delivery and Cl. (2) could, therefore, have no application.

They recognised that the legal fiction was to operate "for the purposes of sub-clause (a) of Cl. (1) and that that meant merely that the explanation was designed to explain the meaning of the expression "Outside the State" in Cl. (1) (a). They, nevertheless, came to the conclusion that when once it was determined with the aid of the fictional test that a particular sale or purchase had taken place within

the taxing State, it followed as a corollary, that the transaction lost its inter-State character and fell outside the purview of Cl. (2), not because the fiction created by the Explanation was used for the purpose of Cl. (2), but because such sale or purchase became, in the eye of the law, a purely local transaction.

In his own inimitable language the learned Chief Justice, who wrote and delivered the majority judgment, concluded the discussion on this point by saying that the statutory fiction completely masked the inter-State character of the sale or purchase which, as a collateral result of such masking, fell outside the scope of Cl. (2). In spite of the great respect we always entertain for the opinions of the then learned Chief Justice and the other learned Judges who constituted the majority we are unable to accept the aforesaid arguments or the conclusions as correct for the reasons we now proceed to state.

(33) The 'situs' of an intangible concept like a sale can only be fixed notionally by the application of artificial rules invented either by Judges as part of the judge-made law of the land, or by some legislative authority. But as far as we know, no fixed rule of universal application has yet been definitely and finally evolved for determining this for all purposes. There are many conflicting theories:

One, which is more popular and frequently put forward and is referred to and may, indeed, be urged to have been adopted by the Constitution in the 'non-obstante' clause of the Explanation, favours the place where the property in the goods passes, another which is said to be the American view and which was adopted in — 'G. Govindarajulu Naidu & Co. v. State of Madras', AIR 1953 Mad 116 (Z1), fixes upon the place where the contract is concluded, a third which prevails in the continental countries of Europe prefers the place where the goods sold are actually delivered, a fourth points to the place where the essential ingredients which go to make up a sale are most densely grouped.

In this situation if the Explanation were not there and the ban under Cl. (2) were to be raised unconditionally it would become necessary for the Courts to reach a conclusion and choose between these conflicting views. Art. 286 (1) (a), it should be noted, does not say that an inside sale may be taxed. It only says that no outside sale shall be taxed. Now if a State claims that the sale is inside because part of its ingredients lies within its boundaries, by the same logic it is also an outside sale because the remaining parts are outside its territories and if it is an outside sale it cannot be taxed whether or not it can be deemed to be inside for some particular purpose.

The prohibition of Art. 286 (1) (a) is against taxing an outside sale and if the sale is outside even partially it may well be argued that no State legislature can override the Constitution by deeming it to be an inside sale. Therefore, if the last of the aforesaid theories were to be adopted, then either no State would be able to tax, or all having the requisite nexus would be able to do so. But this, in our opinion, is the very mischief which the Constitution makers wished to avoid and that, as we understand the majority judgment in the Bombay case, was their view also.

So that view can be placed on one side. On any one of the other views the 'situs' would have to be fixed artificially in one place and then one would have to apply the logic of the majority decision and hold that as soon as the 'situs' is determined to be in one place by judicial fiction, i. e., a fiction enunciated by judicial decision, the inter-State character of the transaction must cease. The majority hold that this is the result when the 'situs' is placed in only one State, namely, the delivery State, because of the fiction which the Explanation creates. The same result would have to follow logically if the 'situs' were to be established by judicial fiction instead of by a constitutional one.

The reasoning of the majority, pushed to its logical conclusion, will inevitably lead us to hold that all inter-State transactions must eventually be converted into intra-State transactions and, therefore, become amenable to the taxing power of the State within whose territories they are, by the constitutional or judicial fiction, to be deemed to take place. In this view there will remain no inter-State transaction on which Cl. (2) may possibly operate.

The argument which leads to this astounding conclusion has only to be stated to be rejected. The truth is that what is an inter-State sale or purchase continues to be so irrespective of the State where the sale is to be located either under the general law when it is finally determined what the general law is or by the fiction created by the Explanation. The 'situs' of a sale or purchase is wholly irrelevant as regards its inter-State character.

We find no cogent reason in support of the argument that a fiction created for certain definitely expressed purposes, namely, the purposes of Cl. (1) (a) can legitimately be used for the entirely foreign and collateral purpose of destroying the inter-State character of the transaction and converting it into an intra-State sale or purchase. Such metamorphosis appears to us to be beyond the purpose and purview of Cl. (1) (a) and the Explanation thereto. When we apply a fiction all we do is to assume that the situation created by the fiction is true. Therefore, the same consequences must flow

from the fiction as would have flown had the facts supposed to be true been the actual facts from the start.

Now, even when the 'situs' of a sale or purchase is in fact inside a State, with no essential ingredient taking place outside, nevertheless, if it takes place in the course of inter-State trade or commerce, it will be hit by Cl. (2). If the sales or purchases are in the course of inter-State trade or commerce the stream of inter-State trade or commerce will catch up in its vortex all such sales or purchases which take place in its course wherever the 'situs' of the sales or purchases may be. All that the Explanation does is to shift the 'situs' from point A in the stream to point X also in the stream. It does not lift the sales or purchases out of the stream in those cases where they form part of the stream.

The shifting of the 'situs' of a sale or purchase from its actual 'situs' under the general law to a fictional 'situs' under the Explanation takes the sale or purchase out of the taxing power of all States other than the State where the 'situs' is fictionally fixed. That is all that Cl. (1) (a) and the Explanation do. Whether the delivery State will be entitled to tax such a sale or purchase will depend on the other provisions of the Constitution. The assignment of a fictional 'situs' to a sale or purchase has no bearing or effect on the other aspects of the sale or purchase, e. g., its inter-State character or its export or import character which are entirely different topics.

This fixing of a 'situs' for a sale or purchase in any particular State either under the general law or under the fiction does not conclude the matter. It has yet to be ascertained whether that sale or purchase which by virtue of the Explanation has taken place in the delivery State was made in the course of inter-State trade or commerce. For this purpose the explanation can have no relevancy or application at all.

(34) Another argument adumbrated in the majority judgment in — 'State of Bombay v. United Motors (India) Ltd.', (B), (supra) at pp. 257-259 & elaborated before us is that just as the freedom of trade referred to in Art. 301 has been made to give way to the States' power of imposing non-discriminatory taxes by Art. 304 so must Art. 286 (2) be regarded as subject to the States' taxing power, for the protection of Art. 286 (2) could not have been intended to be larger.

This argument was refuted by the dissenting judgment in that — 'Bombay case', (supra) at pp. 264-265 and p. 273 and also by the dissenting judgment in — 'State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory', (U), (supra) at p. 345. Nothing that we have heard on the present occasion induces us to depart from the views expressed on this subject in those dissenting judgments.

(35) It is next urged that the Explanation in effect operates as an exception or a proviso to Cl. (2). This view runs directly counter to the express language of the Explanation itself. So the argument is formulated in a slightly different way. It is said that Cl. (2) contains the enunciation of the general rule & the Explanation embodies a particular or special rule. According to a cardinal rule of construction the particular or special rule must control or cut down the general rule.

This view was adopted by the High Court in the judgment under appeal and also found favour with one of the Judges in the — 'Bombay case', (B), (supra). It appears to us that this argument overlooks the basic fact that Cl. (1) (a) to which is appended the Explanation and Cl. (2) deal with different topics altogether. The Explanation is concerned with explaining what is an outside sale or purchase by fixing a fictional 'situs'. It cannot be read as a provision independent of Cl. (1) (a).

It does not, by itself and in terms, confer any legislative power on any State. It is true that the Explanation may apply to fix the 'situs' of many inter-State transactions but that is only for ascertaining, for the purposes of Cl. (1)(a), whether it has taken place inside or outside a particular State. The inter-State aspect of the sales or purchases is not within the purview of Cl. (1) (a) which looks at sales or purchases from the point of view of their location only. Cl. (2), on the other hand, takes note of the inter-State character of sales or purchases which is an entirely different topic.

The two provisions do not relate to the same subject and, therefore, it is not possible to hold that one is the enunciation of a general rule and the other the enunciation of a particular or special rule on one and the same subject. The principle of construction relied upon cannot, in our opinion, be called in aid in construing Cl. (2) and the Explanation of Cl. (1) (a). If the Explanation cuts down Cl. (2), it must also, on a parity of reasoning, cut down Cl. (3) which, as will hereinafter be explained more fully, could not possibly have been intended by the Constitution makers.

It must also cut down Cl. (1) (b) dealing with import and export; but to hold that would run counter to the decision in — 'State of Travancore-Cochin v. Bombay Co. Ltd.', AIR 1952 SC 366 (Z2). In our opinion to use the Explanation to cut down the operation of Cl. (2) or Cl. (3) will be to use it for a purpose other than its legitimate and avowed purpose.

(36) The same argument is put in a slightly different way and in a more attractive form. It is said that we must construe Art. 286 as a

whole and give meaning to every part of it. Sales or purchases which fall within the Explanation to Cl. (1) (a) clearly partake of the character of inter-State transactions. Therefore, if we construe Cl. (2) of Art. 286 literally and strictly then the whole of Cl. (1) (a) and the Explanation will be redundant and useless and will have no immediate operation and will remain a dead letter, at any rate, until Parliament, in exercise of its powers under Cl. (2), lifts the ban.

We must, it is urged, make an attempt to avoid such a result and adopt such a construction as will not only give effect to each part of the Article but also make each part applicable 'in presenti'. That, it is pointed out, can well be done if Cl. (2) is interpreted in a restricted manner. The argument runs — give full and immediate effect to the Explanation and then leave Cl. (2) to govern or operate on cases which do not fall within the Explanation.

In effect this argument means that we must treat all transactions of sales or purchases falling within the Explanation as outside Cl. (2). Shorn of its thin veneer of disguise this argument is nothing more than the argument that the Explanation, in effect, operates as an exception to Cl. (2) and all the criticisms applicable to that construction will apply 'mutatis mutandis' to the argument in the present form. Apart from that there are obvious fallacies which render the argument utterly unacceptable. We now proceed to deal with these fallacies 'seriatim'.

(37) (i) In the first place, the mere circumstance that a provision in the Constitution will, on a proper construction, take effect on the happening of a future event can, by itself, be no ground for not giving effect to the plain language of that provision. Take the very next provision in Art. 286 itself, namely, Cl. (3). It has no present application and its usefulness will ensue only when Parliament by law declares certain goods to be essential for the life of the community.

The fact that the Explanation, in so far as it relates to inter-State sales, may not have an immediate operation until Parliament lifts the ban under Cl. (2) need not unnecessarily oppress us or lead us to adopt a forced construction only to give the whole of it an immediate and present operation.

(38)(ii) In the second place, it is not correct to say that the Explanation, construed as suggested above, can have no immediate operation at all. It certainly has immediate operation to render sales and purchases which fall within the explanation to be outside sales and purchases so as immediately to take away the taxing power of all States other than the delivery State with respect to them. Further cases may arise in which purchases or sales which are outside Cl. (2) may, nevertheless, fall within and be immediately governed by the Explanation. We do not wish to express any opinion on hypothetical cases but the following illustration will show that on a given view of the law the Explanation would be called into play despite the fact that Cl. (2) was not attracted.

Take, for instance, a case where both the seller and the buyer reside and carry on business in Gurgaon in the State of Punjab. Let us say that the seller has a godown in the State of Delhi where his goods are stored and that the buyer has also a retail shop at Connaught Circus also in the State of Delhi. The buyer and the seller enter into a contract at Gurgaon for the sale of certain goods and a term of the contract is that the goods contracted to be sold will be actually delivered from the seller's godown to the buyer's retail shop, both in the State of Delhi, for consumption in the State of Delhi. Pursuant to this contract made in Gurgaon in the State of Punjab, the buyer pays the full price of the goods at Gurgaon and the seller hands over to the buyer also at Guargaon a delivery order addressed to the seller's godown-keeper in Delhi to deliver the goods to the buyer's retail shop.

As a direct result of this sale the seller's godown-keeper, on the presentation of this delivery order, actually delivers the goods to the buyer's retail shop at Connaught Circus for consumption in the State of Delhi. On one view of the law, the 'situs' of such a sale would be Gurgaon. We need not decide that it is, because that type of case is not before us and there may be other views to consider, but it is certainly a possible view.

It is also possible to hold that this is not Inter-State trade or commerce, because there is no movement of goods across a State boundary. Again, we need not decide that because that also may be controversial. But given these two postulates, the transaction would fall squarely within the Explanation and yet it would not come within Cl. (2), for there is no movement of the goods across the border of any State and both the seller and the buyer are in the same place. Surely, the Explanation will, 'in presenti', govern such cases irrespective of whether Parliament has lifted the ban under Cl. (2).

If these postulates are accepted then by the virtue of Cl. (1) (a) read with the Explanation the State of Delhi alone will be entitled to impose a tax on such a sale or purchase and the State of Punjab will be precluded from doing so by reason of the fictional 'situs' assigned to such a sale or purchase by the Explanation, although the contract was made, price was paid and symbolical or constructive delivery of the goods by the handing over of

his turn sells the goods in retail to actual consumers. There can be no objection to insisting upon all inside dealers getting themselves registered and submitting returns showing goods imported and sold by them and bringing their annual turnovers to tax which they will pass on to the actual consumers. Call it a purchase tax vis-a-vis the earlier transaction under which the goods were delivered in Bihar for consumption in that State or call it a Sales tax 'vis-a-vis' the subsequent local sales by the Bihar dealer to actual consumers in Bihar, the State will get the full revenue on these local sales or purchases from the local sellers.

There can be no doubt that sales or purchases of this kind to or from one dealer to another dealer actually form the bulk of inter-State trade or commerce. To take them out of cl. (2) will be to make the protection of inter-State trade or commerce wholly illusory and to rob cl. (2) of the best part of its content and utility. Ordinarily individual local consumers buy goods in the local market and do not generally bring goods for their personal consumption from outside dealers. It is only in exceptional cases that a local consumer will be energetic enough to bring goods from outside the State for his consumption and their number will be small. It is only those stray individual consumers who are energetic enough to get goods direct from a dealer in another State and may be willing to pay freight, etc., and undertake the risk of loss or damage who may evade the tax.

The difficulty in tracing such stray actual local consumers cannot be any cogent reason for adopting the unnatural construction sought to be put upon Cl. (2) of Article 286. If big Bihar purchasers, e.g., Tata Iron & Steel Co. Ltd., who are very heavy consumers of coal, prefer to get their supply of coal from Raniganj coal fields in West Bengal for consumption in their large factories at Tatanagar in Bihar to getting their supplies from the Jharia coal fields in Bihar and thereby evade sales tax to the detriment of the revenues of the State of Bihar, then again there is Parliament to mitigate such hardship by making suitable laws in exercise of its power under Art. 286(2). Such supposed hardship is, in our view, no ground for putting a forced and unnatural interpretation upon Art. 286.

(44) (c) The third reason in support of a restricted construction of Art. 286(2) is thus formulated: The purpose of Article 286 being to eliminate multiple taxation and Art. 286 (1)(a) having already achieved that purpose with regard to the class falling within the Explanation, it was no longer necessary for that purpose to apply Art. 286(2) to that class. This reasoning appears to us to be untenable. It overlooks the patent fact that the different parts of the Article look upon sales and purchases from different perspectives & place different bans on the taxing power of the States at different angles. The circumstance that the bans may in given cases overlap is no justification for concluding that the subject-matter of the different provisions is the same. The line of reasoning assumes that the only purpose of Art. 286 is to eliminate multiple taxation. The purposes of the different parts of the Article have to be ascertained from the language of the Article itself read in the light of the contemporary history of the legislative activities of the different States with respect to taxes on sales or purchases of goods and the chaos and confusion that arose and the havoc that ensued as a result of those activities.

There was multiple taxation which imposed a heavy burden on the consumers and which was also calculated to impede and hinder the free flow of inter-State trade or commerce. The Constitution makers, therefore, imposed several bans on the taxing power of the States with respect to sales or purchases, namely, first on the basis of their 'situs', secondly and thirdly on the basis of the character of the transactions, e.g., foreign trade or inter-State trade and fourthly on the basis of the nature or quality of the goods sold or purchased, i.e., whether they have been declared to be essential to the life of the community.

As regards inter-State trade or commerce the clear intention of the Constitution makers was to place an absolute ban for the time being, subject to the proviso, and to give some time to Parliament to study the situation and to evaluate the result of the ban and to lift the ban to such extent as it thought fit in the interest of the general public and that of inter-State trade or commerce. If the matter is approached in this way it becomes abundantly clear that this part of the argument we are now considering proceeds on a wrong assumption of the purpose of the Constitution.

(45) (d) A restricted construction of Art. 286(2) is said to be necessary and called for because the Constitution itself has divided inter-State sales or purchases into two categories and in regard to one class it has itself provided both as to which State will tax them and under what condition and in regard to the other class the Constitution has imposed a ban in general terms and granted power to Parliament in general terms to relax such ban as Parliament thinks fit. This is clearly begging the question and does not require any elaborate refutation.

(46) (e) Another string to the bow is that because of the legal fiction created by the Explanation the inter-State sales or purchases

were converted into intra-State transactions. This, it will be recalled, was the reasoning adopted in the majority decision in — 'State of Bombay v. United Motors (India) Ltd. (B)', (supra). We are unable to accept this argument for the reasons given above which need not be repeated here.

(47) It is said that the picture of harassment and inconvenience to the traders referred to in the dissenting judgments is more imaginary than real. It is pointed out that it is only big traders who will have sales of their goods in all the States in the Union of India. Those big traders maintain a large staff of clerks and accountants and there can be no difficulty if they are obliged to file returns in each State where they sell their goods. This argument overlooks the practical effects of the different sales tax laws enacted by different States. All big traders will have to get themselves registered in each State, study the Sales Tax Acts of each State, conform to the requirements of all State laws which are by no means uniform and, finally, may be simultaneously called upon to produce their books of account in support of their returns before the officers of each State.

Anybody who has any practical experience of the working of the Sales tax laws of the different States knows how long books are detained by the officers of each State during assessment proceedings. There are different stages of these proceedings, original, appellate and revisional and there will be as many proceedings under each heading as there are States where the goods are sold. The harassment to traders is quite obvious and needs no exaggeration. On the other hand if any risk to the economy of the States ensues from the construction of Art. 286 which commends itself to us, the appeal must be to Parliament which can by the law made under the opening words of Cl. (2) mitigate that risk.

(48) For all the foregoing reasons we are definitely of opinion that, until Parliament by law made in exercise of the powers vested in it by Clause (2) provides otherwise, no State can impose or authorise the imposition of any tax on sales or purchases of goods when such sales or purchases take place in the course of inter-State trade or commerce and the majority decision in — 'State of Bombay v. United Motors (India) Ltd. (B)', (supra) in so far as it decides to the contrary cannot be accepted as well founded on principle or authority.

(49) In the view we have taken on question (A) it is not necessary for us, on this occasion, to discuss the other questions (B), (C) or (D). All that remains to be seen is whether as a result of our finding on question (A) the Bihar Sales Tax Act, 1947 is 'ultra vires' and void in its entirety or it is only bad in so far as it seeks to impose a sales tax on out-of-State sellers in respect of inter-State sales or purchases. This will depend on whether the objectionable parts of the Act are severable from the rest of its provisions. It will be necessary here to refer to a few provisions of the Act.

(50) The long title of the Act is "An Act to provide for the levy of a tax on sales of goods in Bihar". The preamble recites that "It is necessary to make an addition to the revenues of Bihar and for that purpose to impose a tax on the sale of goods in Bihar". The Act extends to the whole of the State of Bihar. "Dealer" was originally defined in S. 2(c) as meaning:

"any person who sells or supplies any goods in Bihar whether for commission, remuneration or otherwise and includes any firm or a Hindu joint family and any society, club or association which sells or supplies goods to its members".

By the Bihar Finance Act, 1950 the words "in Bihar" were omitted from this definition. Clause (g) of the same section defines sale. That definition has undergone various changes from time to time. The period we are concerned with in this appeal is from 26-1-1950 to 30-9-1951. Between 1-10-1948 and 31-3-1951 which covers the earlier part of the relevant period the clause stood as follows:—

"Sale" means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge of pledge:

Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale:

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930), the sale of any goods—

(i) which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in Sec. 4 of that Act is made, or

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof,

shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar:

Provided further that the sale of goods in respect of a forward contract, whether goods under such contract are actually delivered or not, shall be deemed to have taken place on the date originally agreed upon for delivery".

This definition was amended and between 1-4-1951 and 31-3-1952 which covers the latter part of the relevant period it read as follows:

"sale" means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge:

Provided that a transfer of goods on hire purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale:

Provided further that the sale of goods in respect of a forward contract, whether goods under such contract are actually delivered or not, shall be deemed to have taken place on the date originally agreed upon for delivery.

Explanation.— The sale of any goods actually delivered in Bihar as a direct result of such sale for the purpose of consumption in Bihar shall be deemed for the purpose of this Act to have taken place in Bihar, notwithstanding the fact that under the general law relating to sale of goods, the property in the goods has, by reason of such sale, passed in another State".

It will be noted that the Explanation which is substantially a reproduction of the Explanation to Art. 286(1)(a) was introduced for the first time by this amendment.

(51) "Turn over" is defined in section 2(i). The charging section is S. 4 which provides, amongst other things, that subject to the provisions of Sections 5, 6, 7 and 8 and with effect from the commencement of the Act every dealer whose gross turn over during the year immediately preceding the date of such commencement on sales which have taken place both in and outside Bihar exceeds Rs. 10,000 shall be liable to pay tax under this Act on sales which have taken place in Bihar and from the date of such commencement. It will be noticed that although the long title and the preamble refer to the sale of goods in Bihar the words "in Bihar" were deleted from the definition of the word "sale" in S. 2(g).

There are various provisions for working out the scheme of the Act to which no detailed reference need be made. It may, however, be pointed out that a new section was inserted by the Adaptation of Laws (Third Amendment) Order, 1951 which substantially reproduced the provisions of Article 286(1) and (2). Although, therefore, the charging section read with the definition of "dealer" and "sale" may be wide enough to cover inter-State sales, the new section 33 makes all those provisions subject to its provisions which are nothing but a reproduction of the corresponding provisions of Article 286.

In view of the interpretation we have put upon Article 286 it must follow that the charging section of the Act read with the relevant definitions cannot operate to tax inter-State sales or purchases and it must be held that as Parliament has not otherwise provided, the Act, in so far as it purports to tax sales or purchases that take place in the course of inter-State trade or commerce, is unconstitutional, illegal and void.

This being the position the question arises whether the Act is bad 'in toto' or is bad only in so far as it offends the provisions of Article 286 as construed above. It appears to us that the Act imposes tax on subjects divisible in their nature but does not exclude in express terms subjects exempted by the Constitution. In such a situation the Act need not be declared wholly 'ultra vires' and void, for it is feasible to separate taxes levied on authorised subjects from those levied on exempted subjects and to exclude the latter in the assessment of the tax.

In these circumstances it is difficult to say that the scheme of taxing inter-State sales forms such an integral part of the entire scheme of taxation on sales or purchases of goods as to be inextricably interwoven with it. There is no reason to presume that had the Bihar Legislature known that the provisions of the Act might be held bad in so far as they imposed or authorised the imposition of a tax on inter-State trade or commerce even though Parliament had not by law provided otherwise it would, nevertheless, not have passed the rest of the Act.

(52) The result, therefore, is that this appeal must be allowed and we issue an order directing that, until Parliament by law provides otherwise, the State of Bihar do forbear and abstain from imposing Sales tax on out-of-State dealers in respect of sales or purchases that have taken place in the course of inter-State trade or commerce even though the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar. The State must pay the costs of the appellant in this Court and in the Court below. The interveners must bear and pay their own costs.

BHAGWATI J.

(53) I agree with the reasoning and the conclusions reached in the judgment just delivered by my Brother S. R. Das. In so far however as I was a party to the judgment in — 'AIR 1953 SC 252 (B)', it is but proper that I should record my reasons for doing so.

(54) The Appellant is a company incorporated under the Indian Companies Act hav-

ing its registered office at No. 153, Dharamtala Street, Calcutta and laboratory and factory at Baranagore in the District of 24 Parganas in West Bengal and carrying on business of manufacturing and selling various Sera, vaccines, biological products and medicines, etc., in Calcutta. The Appellant has extensive sales of its products throughout the whole of the Union of India and the goods are despatched by the Appellant from Calcutta by rail, steamer or air against orders accepted at Calcutta and all sales take place within the State of West Bengal. The Appellant has no offices, agents, managers, godowns or laboratories in the State of Bihar. It is not a resident of Bihar nor has a place of business in Bihar and does not enter into any transaction of sale within the State of Bihar.

(55) On 24-10-1951 the Assistant Superintendent of Commercial Taxes, headquarters Patna, wrote to the Appellant to get itself registered under the Bihar Sales Tax Act and to take necessary steps to deposit the Bihar Sales Tax dues in any Bihar treasury at an early date, contending that all sales in West Bengal in which the goods had been delivered in the State of Bihar as a direct result of the sale for the purpose of consumption in Bihar were leviable to Bihar Sales Tax with effect from 26-1-1950.

The Appellant denied the right of the State of Bihar to tax the sales effected in West Bengal and by his letter dated 18-12-1951 the Superintendent of Commercial Taxes, Central Circle, Bihar sent a notice under Sec. 13(5) of the Bihar Sales Tax Act to the Appellant calling upon it to apply for registration and to submit the return, showing its turn-over for the period from 26-1-1950 to 30-9-1951.

(56) Correspondence thereafter ensued in which both the parties made futile attempts to convince each other of the legality of the stand taken by it. The Appellant asserted that it was not liable to assessment under the Bihar Sales Tax Act and denied the authority of the State of Bihar to levy sales tax upon the Appellant. The Assistant Superintendent of Commercial Taxes, Central Circle, Bihar, ultimately by his letter dated 28-5-1952 rejected the contention of the Appellant and asked it to comply with the notice under Section 13 (5), Bihar Sales Tax Act, failing which he threatened to proceed to take steps for assessment to the best of his judgment. The Appellant thereupon by its letter dated 7-6-1952 called upon the Superintendent of Commercial Taxes, Central Circle, Bihar to forthwith rescind and cancel the notice issued under S. 13(5), Bihar Sales Tax Act, as the said notice was 'ultra vires' of the Constitution and also the Bihar Sales Tax Act and was entirely illegal and inoperative.

(57) As the aforesaid demand was not complied with the Appellant filed in the High Court of Judicature at Patna a petition under Art. 226 of the Constitution asking for appropriate reliefs by way of issue of a writ of 'mandamus, certiorari' and prohibition and any other appropriate writs or orders quashing the proceedings issued for the purpose of levying and realising a tax which was not lawfully leviable on the Appellant and asking the Appellant to file a return and register itself as a dealer.

The State of Bihar, respondent 1, the Superintendent of Commercial Taxes, Central Circle, Patna, Respondent 2 and Assistant Superintendent of Commercial Taxes, Central Circle, Bihar, Respondent 3 were the opposite parties to the petition. They did not file any affidavit in reply. The facts alleged by the Appellant were not denied but arguments on questions of law arising out of the petition were addressed by the Government Pleader appearing for them before the High Court. The High Court held:

(1) That the Respondent 3 was acting within his jurisdiction in issuing the notice under S. 13(5) and holding that the applicant was liable to pay the tax, that if he made an assessment under S. 13 (5) the Act provided a right of appeal whereby any error of law might be corrected by the Appellate authorities prescribed under the Act, that Ss. 24 and 25 of the Act furnished a complete and effective machinery for appeal and revision against assessments made under the Act and that there was therefore no warrant for issuing a writ under Art. 226 of the Constitution;

(2) That the phrase "sale or purchase in the course of inter-State trade or commerce" in Art. 286(2) must be construed so as to exclude the particular class of sales or purchases described in the explanation to Art. 286(1) and that therefore the amended cls. (c) and (g) of S. 2 and S. 33, Bihar Sales Tax Act, were not in conflict with Art. 286 (2):

(3) That the Bihar Sales Tax Act was in pith and substance not a law with respect to sale of goods but a law imposing tax on the sale of goods and the legislation fell entirely within Item 54 of List II of the Seventh Schedule to the Constitution, viz., taxes on the sale or purchase of goods other than newspapers and that the Act could not therefore be said to be invalid under Art. 254;

(4) That the Bihar Sales Tax Act had been enacted for the purpose of imposing tax on the sale of goods and not for regulating inter-State or intra-State trade and commerce and that therefore the Act did not contravene in any way Art. 304; and

(5) That the Act was also not invalid on the ground that it was extra-territorial in ope-

ration, that the jurisdiction to tax existed not only in regard to persons or property but also as regards the business done within the State, that it was not necessary for the purposes of jurisdiction that the entire transaction of sale should have taken place within the territories, that on the other hand the fact that the goods were delivered in Bihar for consumption constituted sufficient nexus or territorial connection which conferred jurisdiction upon the Bihar legislature to impose the tax and that the explanation to Art. 286(1)(a) expressly conferred upon the State power to tax sales or purchases of goods which were actually delivered for consumption inside the State.

The High Court therefore dismissed the petition with costs.

(58) The Appellant applied for leave to appeal to this Court and the High Court granted the requisite certificate under Art. 132(1) of the Constitution.

(59) At the hearing of the appeal before us the State of West Bengal, Tata Iron & Steel Company, Calcutta, the State of Madras, the State of Mysore, the State of Uttar Pradesh, the State of Orissa, the State of Pepsu, the State of Rajasthan, the State of Madhya Pradesh, the State of Travancore-Cochin, the State of West Punjab and one M. K. Kuriakose applied for and were granted leave to intervene and counsel for the Interveners appeared before us and urged their respective points of view.

(60) The first question as regards the maintainability of a petition for writ under Art. 226 on the facts disclosed in the petition can be disposed of very shortly in the words of Mahajan C. J. in AIR 1954 SC 403 at pp. 405-406 (C) where he repelled a similar contention urged by the Advocate-General of the State of Madhya Pradesh :

"The learned Advocate-General of the State ..... however contended that on the principle enunciated by the Privy Council in — 'Raleigh Investment Co. v. Governor-General-in-Council', AIR 1947 PC 78 (Z3), jurisdiction to question assessment otherwise than by use of the machinery expressly provided by the Act, was inconsistent with the statutory obligation to pay, arising by virtue of the assessment and that the liability to pay the sales tax under the Act is a special liability created by the Act itself which at the same time gives a special and particular remedy which ought to be resorted to, and therefore the remedy by a writ ought not to be allowed to be used for evading the provisions of the Act, especially a fiscal Act. .....

In our opinion the contentions raised by the learned Advocate-General are not well founded. It is plain that the State evinced an intention that it could certainly proceed to apply the penal provisions of the Act against the appellant if it failed to make the return or to meet the demand and in order to escape from such serious consequences threatened without authority of law, and infringing fundamental rights, relief by way of a writ of mandamus was clearly the appropriate relief.

In AIR 1952 SC 115 (A) it was held by this Court that a licence fee on a business not only takes away the property of the licensee but also operates as a restriction on his fundamental right to carry on his business and therefore if the imposition of a licence fee is without authority of law it can be challenged by way of an application under Art. 32, a 'fortiori' also under Art. 226. These observations have apposite application to the circumstances of the present case. Explanation II to S. 2(g) of the Act having been declared 'ultra vires', any imposition of sales tax on the appellant in Madhya Pradesh is without the authority of law, and that being so a threat by the State by using the coercive machinery of the impugned Act to realize it from the appellant is a sufficient infringement of his fundamental right under Art. 19(1)(g) and it was clearly entitled to relief under Art. 226 of the Constitution.

The contention that because remedy under the impugned Act was available to the appellant it was disentitled to relief under Article 226 stands negatived by the decision of this Court in AIR 1953 SC 252 (B), above referred to. There it was held that the principle that a court will not issue a prerogative writ when an adequate alternative remedy was available could not apply where a party came to the court with an allegation that his fundamental right had been infringed and sought relief under Art. 226. Moreover, the remedy provided by the Act is of an onerous and burdensome character. Before the appellant can avail of it he has to deposit the whole amount of the tax. Such a provision can hardly be described as an adequate alternative remedy."

This sufficiently disposes of that contention and I am of the opinion that the High Court was in error when it held that there was no warrant for issuing a writ under Art. 226 of the Constitution on the facts disclosed in the Appellant's petition.

(61) On the merits Shri N. C. Chatterjee appearing for the Appellant urged:

(1) That Art. 286 put a fetter on State Legislature and the explanation did not confer any power on any State Legislature to levy any taxes but was meant to explain only cl. 1 (a), i.e., what was an outside sale or purchase and that it did not remove any restrictions or fetters and did not convert any inter-State sale or purchase into an intra-State or local or domestic transaction;

(2) That Art. 286(2) in Part XII was meant.

to implement the supremacy of Parliament with regard to inter-State trade or commerce and it put an embargo on the power of State Legislature to levy any tax on sale or purchase with respect to inter-State trade or commerce and that it was only when the embargo was lifted by appropriate Parliamentary legislation that State Legislature could levy any tax on sales or purchases in the course of inter-State trade or commerce; and

(3) That legislative competence of a State Legislature was derived from Art. 246 read with the lists of the Seventh Schedule to the Constitution, that under Art. 245(2) only Parliament was given the power to enact legislation with extra-territorial operation and the State Legislatures had no such power, and that the combined effect of Art. 246(3) and Art. 245 read with Item 54 of List II was that the State Legislature was only competent to make laws imposing tax on sale or purchase of goods for the whole or part of that State.

(62) The determination of these questions involves a construction of the provisions of Art. 286 (1) and (2) of the Constitution and their true scope and effect. These provisions read as follows:

"Article 286. (1) No law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.— For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951."

They are enacted in Part XII of the Constitution which relates to finance, property, contracts and suits and fall under the caption of 'Miscellaneous Financial Provisions'. Their main purpose is to lay down the restrictions on State Legislatures to enact laws imposing or authorising the imposition of tax on the sale or purchase of goods. Article 286(1) lays down such restrictions where such sale or purchase takes place— (a) outside the State, or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India. Article 286(2) lays down such restrictions where such sale or purchase takes place in the course of inter-State trade or commerce.

Article 286(1) is hedged in with the explanation and Art. 286(2) is hedged in with the exception "in so far as Parliament may by law otherwise provide" and the proviso under which the President might direct that any tax which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution may, notwithstanding the provisions of Art. 286(2), continue to be levied until 31-3-1951. Except for these special dispensations the restrictions laid down by Art. 286(1) and (2) prevail and the true scope and extent of these restrictions would have to be culled out of the terms in which these provisions are couched.

(63) These provisions came to be considered by this Court in two cases, (1) AIR 1953 SC 252 (B) and (2) AIR 1953 SC 333 (U). The first of these cases was concerned with the constitutionality of the Bombay Sales Tax Act 24 of 1952. The High Court of Bombay had declared the Bombay Sales Tax Act, 1952 'ultra vires' the State Legislature and had issued a writ in the nature of 'mandamus' against the State of Bombay and the Collector of Sales Tax, Bombay, directing them to forbear and desist from enforcing the provisions of the said Act against the respondents. The main ground of attack in the High Court had been that the Act purported to tax sales and purchases of goods regardless of restrictions imposed on the State Legislative power by Art. 286 of the Constitution and in that connection the provisions of Art. 286(1) and (2) came to be considered by this Court.

The majority judgment of this Court delivered by Patanjali Sastri C. J. with which Mukherjea J. and Ghulam Hasan J. concurred held that Art. 286(1)(a) of the Constitution read with the explanation thereto and construed in the light of Arts. 301 and 304 prohibits the taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein. The latter State is left free to tax such sales or purchases, and it derives this power not by virtue of Art. 286(1) but under Art. 246(3) read with Entry 54 of List II.

The majority judgment differed from the view which was taken by me that the Explanation does not deprive the State in which the property in the goods passed of this taxing power and that consequently both the State in which the property in the goods passes and the State in which the goods are delivered for consumption have the power to tax and characterised it as not correct. The majority judgment also held that cl. 2 of Art. 286 does not affect the power of the State in which the delivery of goods is made to tax inter-State sales or purchases of the kind mentioned in the Explanation to clause (1).

The effect of the Explanation is that such transactions are saved from the ban imposed by Art. 286(2). Bose J. and myself agreed that Art. 286(2) could not be construed in the light of Art. 304(1) as the two articles dealt with different matters. Bose J. however held that the basic idea underlying Art. 286 is to prohibit taxation in the case of inter-State trade and commerce until the ban under cl. (2) of the said article is lifted by Parliament and always in the case of imports and exports. When the ban is lifted, the Explanation to clause (1) of Art. 286 comes into play to determine the situs of the sale.

This Explanation does not govern cl. (2) of Art. 286 and as it can only apply to transactions which in truth and in fact take place in the course of inter-State trade and commerce, there is no need to call it in aid until the ban is removed. The majority judgment as well as Bose J. recognised that the provisions of Art. 286(1) and (2) had been enacted in order to prevent multiple taxation which used to be levied by the States before the commencement of the Constitution having resort to the nexus theory.

They however did not discard that theory altogether and were of the opinion that it was sufficient to invest the State Legislature with jurisdiction to impose a tax on sale or purchase of goods, if any of the essential ingredients of sale had taken place within its territory. They did not accept the transfer of ownership in the goods or the passing of property therein as the sole criterion determining the situs of the sale and thus investing the State within whose territories the sale had thus taken place as the only State entitled to impose the tax on sale or purchase of goods.

I however held that under the general law relating to sale of goods a sale must be regarded as having taken place in the State in which the property in the goods sold has passed to the purchaser, and that State is entitled to tax the sale or purchase as having taken place inside the State. The Explanation to Art. 286 (1) does not take away the right which the State in which the property in the goods passed has to tax the sale or purchase but only deems such purchase or sale, by a legal fiction, to have taken place in the State in which the delivery of the goods has been made for consumption therein so as to enable the latter State 'also', to tax the sale or purchase in question.

The Explanation only lifts the ban imposed by cl. (1)(a) on taxation of sales or purchases which take place outside the State, to the extent of the transactions mentioned in the Explanation to enable the delivery State also to tax them. I also held that the general provision enacted in Art. 286(2) against the imposition of tax on the sale or purchase of goods in the course of inter-State trade or commerce should give way to the special provision which is enacted in the Explanation to Art. 286(1)(a) enabling the delivery State to tax such sale or purchase in the limited class of cases covered by the Explanation, the transactions covered by the Explanation being thus lifted out of the category of transactions in the course of inter-State trade or commerce and assimilated to transactions of sale or purchase which take place inside the State and thus invested with the character of an intra-State sale or purchase so far as the delivery State is concerned.

There was thus a divergence between the learned Judges as regards the true scope and effect of the Explanation to Art. 286(1)(a) read with Art. 286(2) and even though the same conclusion was reached by the majority Judges and myself we reached the same on different grounds. The interpretation put on Art. 286 (1)(a) read with the Explanation thereto therefore was that the delivery State is left free to tax such sales or purchases as fall within the terms of the Explanation and Art. 286(2) does not affect the power of such a State to tax inter-State trade or commerce of the kind mentioned in the Explanation. The Explanation saves such transactions from the ban imposed by Art. 286(2).

(64) It may be noted that though there was a consensus of opinion that Art. 286(1) was designed to avoid the multiple taxation of a sale or purchase by various States having resort to the nexus theory there was divergence of opinion as regards the real purpose of the Explanation as also the construction of the 'non-obstante' clause and the true concept of consumption as embodied therein. According to the majority view the Explanation explained what is an outside sale by defining what is an inside sale. Bose J. was of the opinion that the purpose of the Explanation is to explain what is not outside the State and therefore what is inside.

I was of the view that what is otherwise a sale or purchase which takes place outside the State is deemed to have taken place inside

the delivery State and the only purpose of the Explanation is to introduce a legal fiction whereby the delivery State is also entitled to tax the transaction of sale or purchase along with the State in which the transfer of ownership has taken place or the property in the goods has passed. The 'non-obstante' clause also was differently interpreted. I took the view that the 'non-obstante' clause is incorporated in the Explanation to state what according to the Constitution makers is the basic idea of fixing the situs or the location of the sale or purchase in the place where the transfer of ownership takes place or the property in the goods passes and to indicate that notwithstanding that fact a sale or purchase which falls within the category mentioned in the Explanation is nevertheless to be deemed to have taken place inside the delivery State.

The majority judgment stated that the 'non-obstante' clause is inserted in the Explanation simply with a view to make it clear beyond all possible doubt that it is immaterial where the property in the goods passes as it might otherwise be regarded as indicative of the place of sale. Bose J. stated that the object of the Explanation is to fix the location of a sale or purchase by means of a fiction, but he disagreed with the view expressed by me that the 'non-obstante' clause enunciates the general law on this point. He stated that there was no general law which fixed the situs of a sale, not even the Sale of Goods Act, that what the general law does is to determine the place where the property passes in the absence of a special agreement, but the place where the property passes is not necessarily the place where the sale takes place, nor has that ever been regarded as the determining factor.

As regards the concept of consumption the majority were of the view that it should be understood as having reference not merely to the individual importer or purchaser but as contemplating distribution eventually to consumers in general within the State. Bose J. construed that word to mean the usual use made of an article for the purposes of trade and commerce. I adopted the Dictionary meaning of the term and held that the Explanation covers only those cases where as a direct result of the sale or purchase goods are delivered for consumption in the delivery State by the consumer and it is only that limited class of transactions which are covered by the Explanation and which are liable to tax by the delivery State.

I did not accept the contention that the words "for the purpose of consumption" must be accepted in a comprehensive sense as having reference to immediate as well as ultimate consumption within the State and excluding only resales out of the State.

(65) In regard to Art. 286 (2) all the Judges were agreed that transactions of sale or purchase in the course of inter-State trade or commerce are within the restriction and no State can tax such transactions, except in the two excepted cases, viz., (1) except in so far as Parliament may by law otherwise provide and (2) provided the President may by order direct that that any tax on sale or purchase of goods which was being levied by the Government of any State immediately before the commencement of the Constitution shall continue to be levied until 31-3-1951. The Explanation to Art. 286 (1) (a) though it is specifically stated to be for the purposes of sub-cl. (a) was construed by me as an exception or proviso to Art. 286 (2), thus enabling the delivery State to tax the transactions of sale or purchase taking place in the course of inter-State trade or commerce. The majority Judges differed from this view and held that the explanation converts the inter-State transaction into an intra-State one and therefore there is no scope at all for the operation of Art. 286 (2) in cases covered by the Explanation. Bose J., was of the view that the Art. 286 (2) bans the delivery State also from taxing such transactions, because if the transactions were in the course of inter-State trade or commerce the Explanation merely shifts the point from A to B but this shifting is of no consequence at all, because both the points are caught in the vortex of inter-State trade and commerce.

It is only when the Parliament otherwise provides or the President gives the directions within the meaning of the proviso that this ban is lifted and the Explanation is there to settle a matter of considerable controversy regarding the situs of a sale. The argument that on this construction being put on the Explanation to Art. 286 (1) and on Art. 286 (2) the Explanation would become nugatory though accepted by me was rejected by Bose J., by pointing out that once the Parliament by law otherwise provided or the President by order gave the direction within the meaning of the proviso the Explanation would come into operation and would determine the situs of the sale thus enabling the appropriate State to impose a tax on such transaction of sale or purchase.

(66) The second case concerned itself with the construction of Art. 286 (1) (b) in connection with the Sales Tax levied by the State of Travancore-Cochin upon certain dealers in cashew nuts within its territory under the provisions of the Travancore-Cochin General Sales Tax Act 1124 M. E. (Act No. 18 of 1124 M. E.) and the question for the consideration of the Court was whether

certain sales and purchases could be said to be in the course of the import of the goods into or the export of the goods out of the territory of India. The High Court had put a very wide construction on the words of Art. 286 (1) (b) and held that the clause is not restricted to the point of time at which goods are imported into or exported from India and the series of transactions which necessarily precede export or succeed import of goods will come within the purview of this clause.

There was a divergence of opinion between Patanjali Sastri C. J., Mukherjea J., Bose J. and Ghulam Hasan J. on the one side and S. R. Das J., on the other so far as the construction of the words "in the course of" was concerned. But apart from this construction of Art. 286 (1) (b) S. R. Das J., who was not a party to the earlier decision hereinbefore referred to put on record his views on the construction of Art. 286 (1) (a), the Explanation thereto and Art. 286 (2) expressing his disagreement with the interpretation which the majority judgment in that case had put up on the same.

He agreed that the Provincial Legislatures purporting to act under Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, had enacted the Sales Tax Acts imposing tax on sales or purchases of goods on the basis of one or more of the ingredients of sale having some connection with the Province and that this practice had resulted in the imposition of multiple taxes on a single transaction of sale or purchase thereby raising the price of the commodity concerned to the serious detriment to the consumer, that this evil had to be curbed and that is what has been done by Cl. (1) (a) of Art. 286.

He however was of the opinion that in imposing the ban that no law of a State shall impose or authorise the imposition of a tax on the sale or purchase where such sale or purchase takes place outside the State, the Constitution proceeds on the footing that a sale or purchase has a location or situs. He further held that the 'non-obstante' clause in the Explanation also clearly implies that the framers of the Constitution adopted the view that a sale or purchase has a situs and further that it ordinarily takes place at the place where the property in the goods passes.

In effect, therefore, the Constitution, by this Explanation to Cl. (1) (a), acknowledges that under the general law the sale or purchase of the kind therein mentioned may not really take place in the delivery State, but nevertheless requires it to be treated as if it did. That is to say, the Explanation creates a legal fiction. So far he agreed with me, but he differed from me in holding that the only effect of this assignment of a fictional location to a particular kind of sale or purchase in a particular State is to attract the ban of clause (1) (a) and to take away the taxing power of all other states in relation to such a sale or purchase even though the other ingredients which go towards the making up of a sale or purchase are to be found within these States or even if under the general law the property in the goods passes in any of those States.

The purpose of the Explanation ends there and cannot be stretched or extended beyond that purpose. He therefore held that the effect of Cl. (1) (a) read in the light of the Explanation is not to permit both States, viz., the State where the property passes under the general law as well as the State in which, by force of the Explanation, the sale or purchase is deemed to take place, to tax such sale or purchase, because in that event it will stultify the very purpose of that clause and it will fail to prevent the imposition of multiple taxes which it is obviously designed to prevent.

In his opinion Cl. (1) (a) in terms only takes away the taxing power of all States with respect to a sale or purchase which, by reason of the fiction introduced by the Explanation, is to be deemed to take place outside their respective territories and the purpose of the Explanation is only to explain the scope of Cl. (1) (a). The Explanation is neither an exception nor a proviso. It is not its purpose nor does it purport, substantively and 'proprio vigore', to confer any power on any State, not even on the delivery State, to impose any tax. Whether the delivery State can tax the sale or purchase of the kind mentioned in the Explanation will depend on other provisions of the Constitution. Neither Cl. (1) (a) nor the Explanation has any bearing on that question.

(67) So far as the purpose and design of Cl. (2) are concerned he was of the opinion that Cl. (2) places yet another ban on the taxing power of the State under Entry 54 read with Art. 246 (3), in addition to the ban imposed by Cl. (1) (a). A sale or purchase contemplated by the Explanation to Cl. (1) (a) undoubtedly partakes of the nature of a sale or purchase made in the course of inter-State trade and, therefore, no State, whether it is the State in which the property in the goods passes under the general law or the State where the goods are delivered as mentioned in the Explanation, can impose a tax on such sale or purchase, unless and until Parliament lifts this ban.

He differed from the view taken by me that the Explanation to Art. 286 (1) (a) must be regarded not only as having authorised the delivery State to impose the tax on the sale or

purchase covered by the Explanation, but having also exempted it from the ban imposed by Cl. (2). He also differed from the majority view that what was an inter-State transaction within the ban of Art. 286 (2) is converted into an intra-State or local or domestic transaction by virtue of the Explanation to Art. 286 (1) (a).

He saw no warrant for the argument that the fiction embodied in the Explanation for this definitely expressed purpose, can be legitimately used for the entirely foreign purpose of destroying the inter-State character of the transaction and converting it into a intra-State sale or purchase for all purposes. Such metamorphosis is completely beyond the purpose and purview of Cl. (1) (a) and the Explanation thereto.

(68) After expressing himself as above, he made the following observations which are very apposite to the appeal before us:

"To accede to this argument will mean that the Sales Tax Officer of the delivery State will have jurisdiction to call upon dealers outside that State to submit returns of their turnover in respect of goods delivered by them to dealers in that State under transactions of sale made by them with dealers within that State. Thus a dealer in, say, Pepsu who delivers goods to a dealer in, say, Travancore-Cochin will become subject to the jurisdiction of the last mentioned State and will have to file returns of their turnover and support the same by producing their books of account there.

I cannot imagine that our Constitution makers intended to produce this anomalous result. On the contrary, it appears to me that they enacted Cls. (1) (a) and (2) for the very purpose of preventing this anomaly. I repeat that it is not permissible, on principle or on authority, to extend the fiction of the Explanation beyond its immediate and avowed purpose which I have explained above. In my judgment, until Parliament otherwise provides, all sales or purchases which take place in the course of inter-State trade or commerce are, by Cl. (2) of Art. 286, made immune from taxation by the law of any State, irrespective of the place where the sales or purchases may take place, either under the general law or by virtue of the fiction introduced by the Explanation to Cl. (1) (a).

If a particular inter-State sale or purchase takes place outside a State, either under the general law or by virtue of the fiction created by the Explanation, it is exempted from taxation by the law of that State both under Cl. (1) (a) and Cl. (2). If such inter-State sale or purchase takes place within a particular State, either under the general law or by reason of the Explanation, it is still exempt from taxation even by the law of that State under Cl. (2), just as a sale or purchase which takes place within a State, either under the general law or by reason of the Explanation, cannot be taxed by the law of that State, if such sale or purchase takes place in the course of import or export within the meaning of Cl. (1) (b)."

It may be observed that the contentions urged before us by the Appellant are in conformity with the above observations of S. R. Das J.

(69) Normally speaking the construction put by the majority judgment on the Art. 286 (1), the Explanation thereto and Art. 286 (2) of the Constitution in the Bombay Sales Tax appeal would be the law binding on all parties and in the judgment just referred to in the Travancore-Cochin Sales Tax Appeal S. R. Das J., rightly expressed that decision to be binding on him so long as it stands. The Appellant has however sought to urge before us that that decision was erroneous and has attempted to persuade us to reconsider the same and put a construction on Art. 286 (1) (a), the Explanation thereto and Art. 286 (2) which is different from that adopted by the majority Judges in the Bombay Sales Tax Appeal (B).

(70) The question therefore arises whether we are entitled to reconsider that decision.

(71) The House of Lords in England has always considered itself bound by its previous decisions. These decisions, as distinguished from the opinions which are delivered by the Judicial Committee of the Privy Council as advice to the Crown, are pronounced in the form of judgments and are binding on the House as precedents. The question whether the House had the power to reconsider the previous decisions of its own and if it thought the decisions wrong to overrule or depart from them in subsequent cases was considered in '1898 AC 375 (H)'. Earl of Halsbury, L. C. who delivered the judgment of the House observed at page 379:

"A decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was 'res integra' & could be reargued, & so the House be asked to reverse its own decision. That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries, and I am therefore of opinion that in this case it is not competent for us to rehear and for counsel to reargue a question which has been recently decided."

The reason of the rule was thus stated at page 380:—

"Of course I do not deny that cases of individual hardship may arise, and there may

be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience — the disastrous inconvenience — of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal? My Lords, "interest rei publicae" that there should be 'finis litium" at some time, and there could be no "finis litium" if it were possible to suggest in each case that it might be reargued, because it is "not an ordinary case", whatever they may mean".

and the conclusion was thus recorded at page 381:—

"Under these circumstances it appears to me that your Lordships would do well to act upon that which has been universally assumed in the profession, so far as I know, to be the principle, namely, that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House".

(72) The Judicial Committee of the Privy Council on the other hand has held that it is free to differ from its own decisions or from those of the House of Lords. The power of the Privy Council to reconsider its own decisions was discussed in — 'AIR 1929 PC 84 (Q)'. In that case an earlier decision of the Board in — 'Wigg v. Attorney-General of the Irish Free State',AIR 1928 PC 239 (Z4), was attempted to be reviewed and after discussing the case law on the point the Board came to the conclusion that the Privy Council is not bound in law and without examination to follow the decision in a prior appeal whether they considered it to be right or wrong although the Privy Council would hesitate long before disturbing a solemn decision by a previous Board, which raised an identical or even a similar issue for determination.

While laying down this principle the Board discussed the earlier cases and in particular the case of — 'Ridsdale v. Clifton', 1877-2 PD 276 (Z5) which was followed in—'Tooth v. Power', 1891 AC 284 (Z6) and — 'Read v. Bishop of Lincoln', 1892 AC 644 (Z7) and the proposition was thus laid down in the last mentioned case:—

"In the present case their Lordships cannot but adopt the view expressed in — '1877-2 PD 276 (Z5) as to the effect of previous decisions. Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law".

The same principle was reiterated by the Privy Council in — 'AIR 1946 PC 88 (R)'. The Board was there concerned with the consideration of a constitutional question. An earlier decision of the Board in — 'Russell v. Reg', 1882-7 AC 829 (Z8) had upheld the validity of the impugned statute. That decision had stood unreversed for 63 years and had moreover received express approval of the Board in subsequent cases between 1883 and 1937. It was contended that the case had been wrongly decided and ought to be overruled and their Lordships repelled that contention:

"Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by governments and subjects. In the present case the decision now sought to be overruled has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisoments for breaches of the Act have been imposed and suffered. Time and again the occasion has arisen when the Board could have overruled the decision had it thought it wrong. Accordingly, in the opinion of their Lordships, the decision must be regarded as firmly embedded in the constitutional law of Canada and it is impossible now to depart from it".

(73) It is therefore settled law so far as England is concerned that their Lordships of the Privy Council do not consider themselves bound in law and without examination to follow their decision in a prior appeal whether they consider it to be right or wrong but feel themselves bound to examine the reasons upon which the decisions rest and to give effect to their own view of the law. We here are the highest Court of the land and would derive considerable assistance from the practice of the Privy Council set out above.

(74) The High Court of Australia is the highest Court of Appeal in the Commonwealth and concerns itself 'inter alia' with deciding constitutional questions. The question whether it is bound by its previous decisions came up for consideration in — '(1914) 18 CLR 54 (J)' and the High Court held that it was not bound by its previous decision but would only review a previous decision when that decision was manifestly wrong. Griffith, C. J. in this con-

nection made the following observations at page 58:—

"In my opinion it is impossible to maintain as an abstract proposition that the Court is either legally or technically bound by previous decisions. Indeed, it may in a proper case be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is manifestly wrong ..... Otherwise there would be grave danger of a want of continuity in the interpretation of the law".

Barton, J. observed at page 69:—

"In conclusion, I would say that I have never thought that it was not open to this Court to review its previous decisions upon good cause. The question is not whether the Court can do so, but whether it will, having due regard to the need for continuity and consistency in judicial decisions. Changes in the number of appointed Justices can, I take it, never of themselves furnish a reason for review. That the prior decision was that of little more than half their number might be urged with greater fairness, but it cannot be urged against an earlier case ..... But the Court can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest".

Powers, J. at page 86 referred to an earlier decision given by him in the case of — 'The Australian Agricultural Co. v. Federated Engine-Drivers and Firemen's Association of Australasia', (1913) 17 CLR 261 at page 292 (Z9):—

"I am at all times prepared to consider the review of any decision of this Court, by a Full Bench called to consider that question, and to reverse any decision if it is shown to be clearly wrong, subject to the well known considerations to be applied to the particular case in question at the time, according to the well known judicial policy of British, Australian and American Courts, and I think of all Courts of Appeal in English-speaking communities" — Except the House of Lords ..... "I decline even to consider a question of reversing a decision of this Court casually, or even seriously, raised by counsel, not clearly urgent, and not raised before as full a bench as is available. If we do not show some respect to our own Court's decisions, no counsel will feel safe in advising the public, and it will create uncertainty and confusion" ...."Under those circumstances I think it would have to be shown that the decision was clearly wrong, and, as it has been followed by this Court in other cases, that it would be in the interests of the public to reverse it".

This question came for consideration again by the High Court of Australia in '1920-28 CLR 129 (K)', and the majority judgment stated at p. 142:

"It is therefore, in the circumstances, the manifest duty of this Court to turn its earnest attention to the provisions of the Constitution itself. That instrument is the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament, and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed. In doing this, we follow, not merely previous instances in this Court and other Courts in Australia, but also the precedent of the Privy Council in '1892 AC 644 (Z7)', where the Lord Chancellor, speaking for the judicial committee in relation to reviewing its own prior decisions, said: "Whilst fully sensible of the weight to be attached to such decisions, their Lordships are at the same time bound to examine the reasons upon which the decisions rest, and to give effect to their own view of the law".

The ground upon which the Privy Council came to that conclusion we refer to, but need not repeat, adding, however, that as the Commonwealth and State Parliaments and Executives are themselves bound by the declarations of this Court as to their powers 'inter se' our responsibility is so much the greater to give the true effect to the relevant constitutional provisions. In doing this, to use the language of Lord Macnaughten in — 'Vacher & Sons Ltd. v. London Society of Compositors', 1913 AC 107 at p. 118 (Z10), "a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction." Higgins J., at page 160 added:

"But the decision is now directly impugned by the claimant; and it is our duty to reconsider the subject, and to obey the constitution and the Act rather than any decision of this Court, if the decision be shown to have been mistaken".

The High Court of Australia has therefore considered itself free to review its own decisions just as much as the Judicial committee of the Privy Council, examine the reasons upon which the decisions rest and to give effect to its own views of the law, in other words to reconsider the subject and to obey the Constitution and the Act rather than any decision of the Court if the decision be shown to have been mistaken.

(75) Our Constitution has drawn freely 'inter alia' upon the Constitution of the United States and it would be helpful to consider what is the position in the United States in regard to the re-consideration of its previous decisions by the Supreme Court. There have been numerous decisions of the Supreme Court in which the Court has departed from the doctrine of 'stare decisis' and has either refused to follow or overruled its previous decisions.

(76) In '1909-218 US 205 (N)', Mr. Justice Lurton observed:

"The rule of 'stare decisis', though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which again is called upon to consider a question once decided".

(77) Mr. Justice Brandeis while delivering his dissenting opinion in '1924-264 US 219 (L)', thus expressed himself with regard to the propriety upon the part of the Supreme Court of departing from its earlier doctrines if it has come to consider those doctrines as erroneous:

"The doctrine of 'stare decisis' should not deter us from overruling that case and those which follow it. The decisions are recent ones. They have not been acquiesced in. They have not created a rule of property around which vested interests have clustered. They affect solely matters of a transitory nature. On the other hand, they affect seriously the lives of men, women, and children, and the general welfare. 'Stare decisis' is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the court has disregarded its admonition are many".

(78) The same learned Judge in a dissenting opinion in '(1931) 285 US 393 (M)', reiterated the same position in the manner following:

" 'Stare decisis' is not, like the rule of 'res judicata', a universal, inexorable command". After quoting the passage from the judgment of Mr. Justice Lurton in '(1909) 218 US 205 (N)', above cited the learned Judge proceeded:

" 'Stare decisis' is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right ..... This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function..... Recently, it overruled several leading cases, when it concluded that the States should not have been permitted to exercise powers of taxation which it had theretofore repeatedly sanctioned. In cases involving the Federal Constitution the position of this Court is unlike of the highest court of England, where the policy of 'stare decisis' was formulated and is strictly applied to all classes of cases. Parliament is free to correct any judicial error; and the remedy may be promptly invoked".

It will be instructive at this juncture to note the following passages to be found in foot-note 3 at p. 825 in the report of '(1931) 76 Law Ed 815 (M)':

"Compare Taney Ch. J., in 'Passenger Cases', — 'George Smith v. William Turner', (1867) 7 How 283 at p. 470 (Z11): "After such opinions judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this Court. I do not, however object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported".

(79) Compare Field J., in — 'Barden v. Northern P. R. Co.', (1893) 154 US 288 at p. 322 (Z12):

"It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience".

(80) In '1939-306 US 466 at p. 491 (P)', Mr. Justice Frankfurter stated:

"But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it".

(81) The same principle was reiterated in — 'Smith v. Allwright', (1943) 321 US 649 (Z13):

"In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day".

and in — 'United States of America v. South-Eastern Underwriters Association', (1943) 322 US 533 (Z14), in the dissenting judgment of Stone C. J., at p. 579:

"This Court has never committed itself to any rule or policy that it will not "bow to the lessons of experience and the force of better reasoning" by overruling a mistaken precedent ..... This is especially the case when the meaning of the Constitution is at issue and a mistaken construction is one which cannot be corrected by legislative action. To give blind adherence to a rule or policy that no decision of this Court is to be overruled would be itself to overrule many decisions of the Court which do not accept that view.

But the rule of 'stare decisis' embodies a wise policy because it is often more important that a rule of law be settled than that it be settled right. This is especially so where as here, Congress is not without regulatory power ..... The question then is not whether an earlier decision should ever be overruled, but whether a particular decision ought to be. And before overruling a precedent in any case it is the duty of the Court to make certain that more harm will not be done in rejecting than in retaining a rule of even dubious validity."

(82) The position has been thus summarised by Willoughby on the Constitution of the United States — Vol. I — Second Edition — at p. 74:

"There are indeed good reasons why the doctrine of 'stare decisis' should not be so rigidly applied to the constitutional as to other laws. In cases of purely private import, the chief desideratum is that the law remain certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, except in the clearest cases of error, depart from the doctrine of 'stare decisis'. When, however, public interests are involved, and especially when the question is one of constitutional construction, the matter is otherwise. An error in the construction of a statute may easily be corrected by a legislative act, but a Constitution and particularly the Federal Constitution, may be changed only with great difficulty. Hence an error in its interpretation may for all practical purposes be corrected only by the court's repudiating or modifying its former decision".

(83) These then are the principles which should guide us in determining whether we should reconsider the earlier decisions of this Court. We are here not merely concerned with legislative enactments which it would be within the competence of either the Union Legislature or the State Legislatures to enact if our earlier decisions were erroneous. We are concerned with the construction of the provisions of the Constitution which it will be almost impossible to amend. The House of Lords considered itself bound by its previous decisions, because it felt that the Act of Parliament could set right an erroneous decision of the House by enacting appropriate legislation.

But the High Court of Australia as well as the Supreme Court of the United States felt themselves free to reconsider their earlier decisions because of the practical impossibility of correcting the erroneous decisions through legislative action. They considered it their bounden duty to construe the constitutional provisions and be guided by the provisions of the Constitution itself and not by what had been their earlier decisions on the questions of its construction. The only safeguard which they put on the exercise of such powers of reconsideration was that the earlier decision should be manifestly wrong or erroneous.

We here also are concerned with the construction of the provisions of the Constitution which cannot be amended so easily and if we come to the conclusion that the earlier decision was manifestly wrong or erroneous and that public interest demanded that the same should be reconsidered we should not have the slightest hesitation in doing so. We therefore approach the consideration of the earlier decision of this Court in the Bombay Sales Tax Appeal bearing in mind the principles above enunciated.

(84) It will be necessary at the outset to take stock of the situation as it obtained before the enactment of Art. 286 of the Constitution. The Government of India Act, 1935, contained provisions in regard to the distribution of legislative powers between the Dominion and the Porvincial Legislatures in Ss. 99 and 100. The Dominion Legislature was competent to make laws including laws having extra territorial operation for the whole or any part of the Dominion and the Provincial Legislatures were competent to make laws for the Province or for any part thereof.

The legislative heads in respect of which the laws could be made by the respective Legislatures were enumerated in the lists of the Seventh Schedule to the Act and the demarcation between the powers of the Dominion Legislature and the Provincial Legislatures in that behalf was to be found in S. 100. Entry 48 in List II of the said Schedule gave the power to the Provincial Legislatures in respect of "taxes on the sale of goods and on advertisements".

Even though the entry mentioned taxes on sale of goods that head was construed to mean in reality a power to tax the transaction and the power to tax the transaction carried with it the power to tax either party thereto.

The expression "taxes on sale" was therefore construed to include also a tax on purchases of goods, as the transaction resulted in change of ownership from one person to another and was from its very nature a bilateral transaction with a seller on the one hand and the purchaser on the other. (Vide — 'Syed Mahomed & Co. v. The State of Madras', AIR 1953 Mad 105 (Z15). The same distribution of legislative powers obtained when the Constitution came to be enacted and Art. 245 provided that Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

Exclusive power to make laws with respect to the legislative heads enumerated in the Union List (List I) and the State List (List II) of the Seventh Schedule to the Constitution was given to Parliament and the State Legislatures respectively by Art. 246. Entry 54 of the State List gave the exclusive power to the State Legislatures with respect to taxes on the sale or purchase of goods other than newspapers. What was implicit in the phraseology of Entry 48 of List II of the Seventh Schedule to the Government of India Act was thus made explicit by the phraseology adopted in Entry 54 of the State List in the Seventh Schedule to the Constitution:

(85) 'Prima facie laws enacted by State Legislatures would have operation within the territories of the States. Primarily legislation of a country is territorial & the general rule is "extra territorium jus dicenti impune non paretur". The laws of a nation apply to all its subjects & to all things & acts within its territories. (See — 'Maxwell on the Interpretation of Statutes', — 10th Edn. page 144). Craies' on Statute Law—5th Edn. at p. 174 contains the following citation from the speech of Lord Cranworth in — 'Jeffreys v. Boosey', (1854) 4 HLC 815 at p. 955 (Z16):

"'Prima facie' the Legislature of this country must be taken to make laws for its own subjects exclusively":

The same principle has been applied also to sales tax and it is stated in American Jurisprudence—Vol. 47, p. 202 para. 5 under the caption "Territorial Jurisdiction" that:

"The general rule that a State may not tax persons, property or interests which are not within its territorial jurisdiction is applicable to sales taxes".

(86) It would therefore appear that when the State Legislatures enacted laws in respect of taxes on sales or purchases of goods they would only have operation within the territories of the States and the sales or purchases of goods even though they are not specified in the relative entry to be "within the territories" of the States would 'prima facie' be such as take place within the respective territories of the States.

(87) This power to tax the sales or purchases of goods would again have to be construed with reference to the connotation of the term "sale" as it was understood in the legislative practice of the country at the time when the power was conferred. As was observed by their Lordships of the Privy Council in — 'Croft v. Dunphy', AIR 1933 PC 16 at p. 19 (Z17):

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

(88) The expression "Sale of goods" in Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, came to be construed by this Court in — 'Sales Tax Officer v. Budh Prakash Jai Prakash', AIR 1954 SC 459 (Z18), in relation to an attempt by the State of Uttar Pradesh to tax forward contracts of sale and this Court held:

"There having existed at the time of the enactment of the Government of India Act, 1935, a well-defined and well-established distinction between a sale and an agreement to sell it would be proper to interpret the expression 'sale of goods' in Entry 48 in the sense in which it was used in legislation both in England and India and to hold that it authorises the imposition of a Tax only when there is a completed sale involving transfer of title".

The expression "sale of goods" was construed in the light of the definition thereof to be found in S. 4 of the Indian Sale of Goods Act (Act III of 1930) as also the corresponding provision of the English Sale of Goods Act and the relevant passage from Halsbury's Laws of England, Vol. 15, Para 13 quoted therein. S. 4 of the Indian Sale of Goods Act runs as follows:

"(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

....

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be transferred."

(89) The corresponding provision in S. 1 of the English Sale of Goods Act is as follows:

"(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part-owner and another.

....

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

(90) This being the legislative practice in India as well as in England at the time when the power to tax sales or purchases of goods was conferred on the State Legislatures the scope of that power would have been ordinarily determined by the definition of the Sale of Goods to be found in these respective Sales of Goods Acts and the State Legislatures would have had the power to tax sales or purchases of goods in which the property in the goods passed within the respective territories of the States.

This was not a power to tax a seller or a purchaser in personam. It was a power to tax the sale or purchase of goods which took place within the territories of the State and was to be exercised in those cases where the property in the goods which were the subject matter of the sale or purchase passed within the territories of the State.

(91) This position however was not acceptable to the various States which wanted to enlarge the scope of their power to tax sales or purchases of goods. There was therefore an attempt made to analyse the concept of sale into its various ingredients and to fasten upon any one of the ingredients as conferring upon them the power to tax the sale or purchase of goods by having resort to the theory of territorial connection or nexus. As was observed by Bose J., in — 'State of Bombay v. United Motors (India) Ltd.', (B), at p. 264:

"The difficulty is apparent when one begins to split a sale into its component parts and analyse them. When this is done, a sale is found to consist of a number of ingredients which can be said to be essential in the sense that if any one of them is missing there is no sale. The following are some of them: (1) the existence of goods which form the subject-matter of the sale, (2) the bargain or contract which, when executed, will result in the passing of the property in the goods for a price, (3) the payment, or promise of payment, of a price, (4) the passing of the title".

Having analysed the concept of the sale thus into its essential ingredients the only essential condition which was considered necessary to be satisfied was the completion of the transaction of sale wheresoever it may take place and the taxable event was taken to be any one of these essential ingredients provided it took place within the territories of the State. Reliance was placed for this purpose on the decision of the Federal Court in — 'In re Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938', AIR 1939 FC 1 at pp. 26-27 (Z19), where Their Lordships observed that:

"Tax on sale of goods must necessarily be a tax imposed at the time of the sale of goods and must exclude other forms of transfer like mortgages, leases, etc."

Similar observations were also to be found in the — 'Province of Madras v. Boddu Paidanna & Sons', AIR 1942 FC 33 at p. 35 (Z20), where it was stated that a tax on the sale of goods is a tax levied on the occasion of the sale of goods and the liability to tax arises on the occasion of the sale. The sale was therefore taken to be the concrete event which gave rise to the power of the state to tax the sale of goods but was taken as not necessarily taking place within the territories of the taxing State, the only thing considered essential for the purpose being the territorial connection or nexus between the taxing State and one or more of the necessary ingredients of sale analysed as above.

The territorial connection or nexus theory was sought to be supported by reference to certain decisions of the High Court of Australia, e. g., — 'Wanganui-Rangitikey Electric Power Board v. Australian Mutual Provident Society', (1934) 50 CLR 581 at p. 600 (Z21), where Dixon J., observed:

"So long as the statute selected some fact or circumstance which provided some relation or connection with New South Wales, and adopted this as the ground of its interference, the validity of an enactment reducing interest would not be open to challenge".

and the dissenting judgment of Rich J., in — 'Broken Hill South Ltd. v. Commissioner of Taxation (N. S. W.)', (1937) 56 CLR 331 at p. 361 (Z22), which stated that:

"I do not deny that once any connection with New South Wales appears the legislature of that State may make that connection the occasion or subject of the imposition of a liability. But the connection with New South Wales must be a real one and the liability

sought to be imposed must be pertinent to that connection".

These observations of the learned Judges of the High Court of Australia were referred to with approval by our Federal Court in 'AIR 1947 PC 78 (Z3)'. It was an income-tax case and the dispute related to the claim of the Indian Government to levy income-tax and super tax on the dividends paid to the assessee company (which was a joint stock company incorporated under the English Companies Act having its registered offices in the Isle of Man and its main offices in England) by nine sterling companies, the bulk of whose shares were held by the assessee company. These sterling companies were registered under the English Companies Act and were controlled in London where the Boards of Directors sat, the share registers were situate and dividends were declared.

They however carried on the business of manufacturing and selling tobacco and cigarettes in India and the business in India where all profits were made was managed by the local boards which were constituted by the Boards in London. The financial policies of these companies were controlled by the London Boards and in all important matters of business the London Boards were consulted and all the general meetings of the Companies were held in England. The dividends of these Companies were also declared by them in England and paid by them in England to the assessee company in England.

It was however held that the source of the dividends paid to the assessee company by the sterling companies was British Indian and when the attempt was to tax income and not the corpus and the question to be considered was the 'source' of that income it was legitimate to take into account the place where the business from which the income was derived was in fact carried on and not to treat the situs of the shares in the eyes of the law as concluding the matter. The Court was therefore of the opinion that the source of the dividends paid to the assessee company by the sterling companies was British Indian and that in making them liable to income-tax on that basis the Indian Legislature was not giving its law any extra-territorial operation.

Spens C. J., who delivered the judgment of the Court further quoted with approval the following passage from the judgment of Evatt J., in — 'Trustees, Executors & Agency Co. Ltd. v. Federal Commissioner of Taxation', 1933-49 CLR 220 (Z24) at p. 236:

"The Constitution requires that it must be possible to predicate of every valid law that it is for the peace, order and good government of the Dominion with respect to a granted subject, e. g., customs, taxation, external affairs. In such cases, the presence of non-territorial elements in the challenged law has to be considered upon a slightly different footing and those affirming its validity have to show not only that the Dominion has some real concern or interest in the matter, thing or circumstance dealt with by the legislation, but that the concern or interest is of such a nature that the challenged law is truly one with respect to an enumerated subject-matter".

Two more decisions of the Federal Court reiterating the same principle may be noted in this context: 'AIR 1948 PC 118 (Y)', and — 'A. H. Wadia v. Commissioner of Income-tax, Bombay', AIR 1949 FC 18 (Z25). In the former case the Court held that where the Imperial Parliament has conferred a power to legislate on a particular topic it is permissible and important in determining the scope and meaning of the power to have regard to what is ordinarily treated as embraced within that topic in the legislative practice of the United Kingdom.

The general conception as to the scope of the legislative practice in the United Kingdom with regard to income-tax is that given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him, income-tax may properly extend to that person in respect of his foreign income. That general conception, both on a consideration of the British legislation and as a matter of construction of the Government of India Act, 1935, finds a place in the phrase "taxes on income" as used in that Act and the principle of sufficient territorial connection is implicit in the power conferred by the Act of 1935.

The derivation from British India of the major portion of its income for a year gives to a company as respects that year a territorial connection sufficient to justify the company being treated as at home in British India for all purposes relating to taxation on its income for that year from whatever source it may be derived, and if it is so at home in British India it is a person properly subject to the jurisdiction of the Central Indian legislature. In the latter case the Court held that a law imposing a tax cannot be impugned on the ground that it is extra-territorial if there is a connection between the person who is subjected to the tax and the country which imposes that tax.

The connection must however be a real one and the liability sought to be imposed must be pertinent to that connection; but, if these conditions are satisfied it is of no importance on the question of validity that the liability imposed is, or may be, disproportionate to the territorial connection. Kania C. J. also observed at p. 25 :

"As mentioned above, the aspect of it

affecting persons who are beyond the jurisdiction of the municipal courts cannot be considered sufficient for the Court to hold it 'ultra vires'. The municipal courts are bound to enforce the law. Whether after obtaining the opinion or decree the same is enforceable against the other side or not, is not a matter for the Court's consideration. The Court has only to see that the legislation is within the ambit of the powers of the Legislature."

(92) Having resort therefore to the territorial connection or the nexus theory enunciated in the cases above noted and analysing the concept of sale into its necessary ingredients as above the various State Legislatures enacted laws in respect of taxes on sales or purchases of goods spreading their net as wide as they could having regard to the situation obtaining in their respective territories. A transaction of sale or purchase of goods thus came to be taxed by more States than one even though really there was only one transaction of sale or purchase of goods as between the seller and the purchaser.

The consumer was the last person who ever counted in the scramble for taxes on sales or purchases of goods and even the free flow of inter-State trade and commerce was affected. The state of affairs was thus graphically described by Patanjali Sastri C. J. in his judgment in 'Bombay Sales Tax Appeal (B)', at pp. 256-257 :

"In exercise of the legislative power conferred upon them in substantially similar terms by the Government of India Act, 1935, the Provincial Legislatures enacted sales-tax laws for their respective Provinces, acting on the principle of territorial nexus referred to above; that is to say, they picked out one or more of the ingredients constituting a sale and made them the basis of their sales-tax legislation. Assam and Bengal made among other things the actual existence of the goods in the Province at the time of the contract of sale the test of taxability. In Bihar the production or manufacture of the goods in the Province was made an additional ground.

A net of the widest range perhaps was laid in Central Provinces and Berar where it was sufficient if the goods were actually 'found' in the Province at any time after the contract of sale or purchase in respect thereof was made. Whether the territorial nexus put forward as the basis of the taxing power in each case would be sustained as sufficient was a matter of doubt not having been tested in a court of law. And such claims to taxing power led to multiple taxation of the same transaction by different Provinces and cumulation of the burden falling ultimately on the consuming public. This situation posed to the Constitution makers the problem of restricting the taxing power on sales or purchases involving inter-State elements, and alleviating the tax burden on the consumer."

(93) Apart from the States resorting to the territorial connection or nexus theory in the manner aforesaid the Courts also appeared to lend their support to the theory and the High Court of Madras in particular in two decisions, — 'Poppatlal Shah v. State of Madras', AIR 1953 Mad 91 (Z26) and AIR 1953 Mad 116 (Z1), gave its imprimatur to this theory. In the former case the expression "sale of goods" was understood in its popular sense as distinct from its legal sense and it was held that the sales tax could be levied if the transaction substantially took place within the State notwithstanding that the property did not pass within the State.

In the latter case it was held that the power of the State to impose taxes was not conditioned on the subject-matter being wholly within its jurisdiction and the exercise of the power was valid if there was sufficient territorial connection with reference to the subject-matter. After discussing the American case law on the subject the Court came to the conclusion that in respect of inter-State sales the State in which the contract was concluded was the only State which had the power to impose a tax. This Court also in the majority judgment in the 'Bombay Sales Tax Appeal (B)' while summarising the position as it obtained before the enactment of the Constitution incidentally expressed its opinion in this behalf at p. 256 as under:

"As pointed out by the Privy Council in the 'Wallace Brothers case (Y)' in dealing with the competency of the Indian Legislature to impose tax on the income arising abroad to a non-resident foreign company, the constitutional validity of the relevant statutory provisions did not turn on the possession by the legislature of extra-territorial powers but on the existence of a sufficient territorial connection between the taxing State and what it seeks to tax.

In the case of sales-tax it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. Broadly speaking local activities of buying or selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately resulted in a concluded sale or purchase to be taxed."

In another case decided immediately thereafter — 'Poppatlal Shah v. State of Madras', AIR 1953 SC 274 (Z27 & 28) this Court un-

derstood this expression of opinion in the majority judgment as laying down the principle of territorial connection or nexus:

"It admits of no dispute that a Provincial Legislature could not pass a taxation statute which would be binding on any other part of India outside the limits of the Province, but it would be quite competent to enact a legislation imposing taxes on transactions concluded outside the Province, provided that there was sufficient and a real territorial nexus between such transactions and the taxing Province. This principle, which is based upon the decision of the Judicial Committee in 'Wallace Brothers & Co. v. Commr. of Income-tax, Bombay (Y)', has been held by this court to be applicable to sale tax legislation, in its recent decision in the 'Bombay Sales Tax Act case (B)' and its propriety is beyond question.

As a matter of fact, the legislative practice in regard to sale tax laws adopted by the Provincial Legislatures prior to the coming into force of the Constitution has been to authorise imposition of taxes on sales and purchases which were related in some manner with the taxing Province by reason of some of the ingredients of the transaction having taken place within the Province or by reason of the production or location of goods within it at the time when the transaction took place."

(94) It may be observed that in the 'Bombay Sales Tax Appeal (B)' the question of the territorial connection or nexus was not directly in dispute and in AIR 1953 SC 274 (Z27 & 28) referred to above it was taken as decided by this Court in the 'Bombay Sales Tax Appeal (B)' that the theory of territorial connection or nexus was applicable to sales tax legislation. It is a moot point whether this theory of territorial connection or nexus which has been mainly applied in income-tax cases is also applicable to sales tax legislation, the spheres of an income-tax legislation and sales tax legislation being quite distinct. Whereas in the case of income-tax legislation the tax is levied either on a person who is within the territory by exercising jurisdiction over him in personam or upon income which has accrued or arisen to him or is deemed to have accrued or arisen to him or has been derived by him from sources within the territory and it is therefore germane to enquire whether any part of such income has accrued or arisen or has been derived from a source within the territory, in the case of sales-tax legislation it is the sale or purchase of goods which is the subject-matter of taxation and it cannot be predicated that the sale or purchase takes place at one or more places where the necessary ingredients of sale happen to be located.

The theory of territorial connection or 'nexus' was not put to the test at any time prior to the enactment of the Constitution and it is not necessary also for us to give a definite pronouncement on the subject. Suffice it to say that there was this evil which was rampant in the pre-Constitution period by reason of the various States fastening upon one or more ingredients of the sale and arrogating to themselves the power to tax sales or purchases of goods by reason of the territorial connection or 'nexus' which they claimed to have with one or more of the ingredients of the sale provided however that a sale or purchase ultimately did take place either within their territories or anywhere else. It was this evil amongst others which was sought to be remedied by the Constitution-makers when they came to enact Art. 286 of the Constitution.

(95) The Constitution-makers enacted several provisions in Part XIII relating to trade, commerce and intercourse within the territory of India with an eye towards India as an economic unit and enacted in Art. 301 that trade, commerce and intercourse throughout the territory of India shall be free and by Art. 302 they empowered the Parliament to impose such restrictions on the freedom of trade, commerce and intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Broad based on this conception of freedom of trade, commerce and intercourse throughout the territory of India and also with a view 'inter alia' to relieve the consumer of the burden of multiple taxation which he was subjected to by the various State Legislatures by having resort to the territorial connection or 'nexus' theory as aforesaid the Constitution-makers in Art. 286 enacted restrictions on the power of the State Legislatures in regard to the imposition of tax on the sale or purchase of goods and these restrictions were fourfold:

(1) State Legislatures were restrained from imposing a tax on the sale or purchase of goods where such sale or purchase took place outside the State;

(2) The State Legislatures were restrained from imposing a tax on the sale or purchase of goods where such sale or purchase took place in the course of the import of the goods into or export of the goods out of the territory of India;

(3) The State Legislatures were restrained from imposing a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce except in so far as the Parliament might by law otherwise provide;

and (4) The State Legislatures were restrained from imposing a tax on the sale or purchase of any such goods as had been de-

clared by Parliament by law as essential for the life of the community unless such law had been reserved for the consideration of the President and had received his assent.

These were the four restrictions which were put upon the powers of the State Legislatures to impose a tax on the sales or purchases of goods and were imposed with different objectives in view.

(96) The first restriction was devised to achieve the objective of relieving the consumer of the burden of multiple taxation and put it out of the power of a State to tax the sale or purchase of goods where such sale or purchase took place outside the State. The Sale of Goods Act contained several provisions which determined when a sale or purchase took place or in other words when the property in the goods sold passed from the seller to the purchaser. But it was silent in regard to the place where the sale or purchase took place. There was no rule of law enacted therein which determined the situs or location of such sale or purchase and resort was therefore had to the general law of the land for the purpose. The territorial connection or nexus theory had an eye over the various ingredients of a sale or purchase and if anyone or more of these ingredients fixed the situs or the location of the sale it would mean that a sale had more situses or locations than one. This state of affairs could not be allowed to continue any further having regard to the interests of the consumer and it was therefore thought necessary, when the State Legislatures were restrained from imposing a tax on sale or purchase of goods where such sale or purchase took place outside the State, also to determine when such sale or purchase could be said to take place outside the State.

It was for this purpose that the Explanation to Art. 286(1)(a) was enacted and it was enacted for the express purpose therein mentioned, viz., "for the purposes of sub-cl. (a)." The Explanation was thus enacted for the express purpose of determining what sales or purchases could be said to have taken place outside the State and the basic idea which was adopted therein was that under the general law relating to Sale of Goods property in the goods would by reason of such sale or purchase pass in a particular State which would therefore be the situs or location of such sale or purchase. But notwithstanding that fact the sale or purchase was deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purposes of consumption in that State.

The anti-thesis appears to have been between the State in which the property in the goods has by reason of such sale or purchase passed and the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State and in the competition between these two States the Explanation provided that the sale or purchase in those circumstances shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption therein.

This Explanation was interpreted in various ways, one view being that it defined an outside sale and went no further and that the situs of the sale was determined for the limited purpose of telling the State what it could not tax by telling it that in the cases covered by the Explanation in spite of the property in the goods having passed within its territories it was an outside sale 'qua' that State. The other view was that besides fixing the situs of sale in this manner it also defined what was a sale or purchase which shall be deemed to have taken place in the delivery State and thus fulfilled a double function of investing only the delivery State with the power to tax such sale or purchase to the exclusion of all other States 'qua' whom the sale or purchase was deemed to be an outside sale.

The third view was that the Explanation was concerned with fixing the situs of sale in respect of the delivery State only and did not affect the power of the State in which the property in the goods had passed to tax such sale or purchase which it enjoyed by reason of the fact that the property in the goods had passed within its territories. A fourth possible view was that the only State which could not tax such sale or purchase on the ground that the sale was outside the State was the State in which the property in the goods had passed leaving open to the other States to tax such sales or purchases by having resort to the power which they possessed under Art. 246(3) and Entry 54 of List II, Sch. 7 to the Constitution.

Whatever be the correct view to take of this Explanation one fact remained that Art. 286 (1) (a) and the Explanation thereto were enacted with the one and only motive to relieve the consumer of the burden of multiple taxation to which he was subjected by having resort to the territorial connection or nexus theory and to replace the nexus theory by what may be described as the situs theory fixing the situs or the location of the sale or purchase and putting a restriction on the taxing power of the States 'qua' which it could be predicated that such sale or purchase took place outside the State, thus leaving only one State in which the goods have been actually delivered as a direct result of such sale or pur-

chase for the purpose of consumption therein free to tax the sale or purchase having resort to the powers vested in the State Legislature by Art. 246(3) and Entry 54 of List II, Sch. 7 to the Constitution.

(97) If therefore the situs or location of the sale was laid down as the criterion of the taxing power of the State the 'non-obstante' clause contained in the Explanation gave the clue as to what was in mind of the Constitution-makers when they substituted the situs theory in place of the nexus theory which theretofore prevailed. They took cognisance of the general law relating to the sale of goods under which the property in the goods passed by reason of such sale or purchase. The conception of the transfer of ownership of the goods by the seller to the purchaser was thus accepted by them as determining the situs or location of the sale or purchase and this conception had its roots in the relevant provisions of the Sale of Goods Acts both in India and in England and in spite of the fact that those provisions did not in terms say where the sale took place or the transfer of ownership came about or the property in the goods passed by reason of such sale or purchase, the general law relating to sale of goods was taken in the Explanation to fix the situs or location of such sale or purchase within the territories of a particular State and that event could only take place in one State and not in more States than one.

There could be only one situs or location of the sale or purchase and if that were so the State in whose territories such sale or purchase took place or in which the property in the goods passed by reason of such sale or purchase was the State which could claim the power to tax such sale or purchase by reason of its having taken place within its territory. It would therefore appear that the Constitution-makers had in enacting the Explanation the one and only motive of negativing the territorial connection or nexus theory and replacing it by the situs theory and fixing the situs or location of the sale or purchase within the State in which the property in the goods passed by reason of such sale or purchase.

While doing so they also created a legal fiction whereby in the competition between what may be called the title State and the delivery State the delivery State was given the power to impose a tax on sale or purchase of goods where the goods had actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State. If the object to be achieved was the relief of the consumer from the burden of multiple taxation that object could only be achieved by subjecting him to taxation at the instance of one State only and not by more States than one and to that extent the view that both the title State and the delivery State would be entitled to impose the tax on the sale or purchase falling within the Explanation was clearly erroneous, the only State which would be in a position to tax the sale or purchase in question being the State in which the goods had been actually delivered as a direct result of such sale or purchase for the purpose of consumption therein.

(98) The second restriction on the taxing power of the State Legislatures was devised to safeguard the import and export trade of the country and embraced transactions of sale or purchase of goods where such sales or purchases took place in the course of the import of the goods into or export of the goods out of the territory of India, vide Art. 286(1)(b). It is significant to observe that the Explanation to Art. 286(1)(a) was definitely put for the purposes of sub-cl. (a) and it had therefore no application to the cases which were covered by Art. 286(1)(b).

This concept was quite distinct from the concept which was dealt with in Art. 286(1)(a). The sales or purchases were looked at from different view-points and the particular aspect which was dealt with in Art. 286(1)(b) was the import-export aspect of the transactions of sales or purchases. That aspect was separately dealt with even though for the sake of economy of words the provisions in regard thereto were incorporated in Art. 286(1). They had nothing in common with the provision contained in Art. 286(1)(a).

(99) The third restriction was devised to protect inter-State trade or commerce and covered transactions of sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce except in so far as Parliament might by law otherwise provide. This was still another view-point and this restriction was put with a view to safeguard the freedom of trade, commerce and intercourse throughout the territory of India. The imposition of this restriction meant that the States would be deprived of a large part of their income which they used to derive from taxing sales or purchases falling within this category before the commencement of the Constitution.

A proviso was therefore enacted that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of the Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of Art. 286(2), continue to be levied until 31-3-1951.

This proviso enabled the State Governments to levy the taxes which they used to levy

before the commencement of the Constitution up to the 31-3-1951 within which period they were expected to adjust their economies and replenish their treasuries by having resort to their legitimate powers of taxation. By 31-3-1951 the States could also make representations to the Centre and induce the Parliament to otherwise provide by appropriate legislation within the meaning of Art. 286(2) and authorise them to impose taxes on the sale or purchase of any goods where such sales or purchases took place in the course of inter-State trade or commerce. But until that ban was lifted by appropriate legislation by the Parliament the ban imposed under Art. 286(2) was absolute and no transaction of sale or purchase of goods where such sale or purchase took place in the course of inter-State trade or commerce could ever be made the subject-matter of taxation at the instance of a State Legislature.

The Explanation to Article 286 (1) (a) being expressly for the purpose of sub-cl. (a), i. e., for the purpose of determining what transaction of sale or purchase was outside the State or inside the State as above stated could not be read into Article 286(2) nor could it be read as an exception or proviso to Article 286 (2). Reading it as such exception or proviso would be contrary to the express terms of the Explanation and would also stultify the purpose of the enactment of Article 286 (2) thus taking a large slice out of the transactions falling within that category.

The rule as to the exclusion of the general provision by a special provision would also not apply for the simple reason that the object of Article 286 (1) (a) and the Explanation thereto is quite distinct from the object of Article 286 (2) and the objects being quite different these provisions do not cover the same subject-matter and therefore there would be no occasion for the application of that rule of construction. To this extent the view taken by me in the — 'Bombay Sales Tax Appeal (B)', that the Explanation to Article 286 (1) (a) was an exception or proviso to Article 286 (2) was clearly erroneous.

(100) The last restriction on the taxing powers of the State Legislatures was devised to maintain the supply of essential commodities and related to the imposition of a tax on the sale or purchase of any goods as have been declared by Parliament by law to be essential for the life of the community unless such law has been reserved for the consideration of the President and has received his assent. This restriction also though of another nature was a restriction put on the power of the State Legislatures to tax such transactions of sale or purchase and was absolute in terms having nothing whatever to do with the restrictions put in the earlier clauses of Article 286. These transactions comprised a distinct category by themselves and were not affected by the restrictions put in the earlier clauses of the Article.

It may be noted that the transactions covered by Article 286 (1) (a), Article 286 (2) and Article 286 (3) though looked at from different view-points may overlap. A transaction which is covered by Article 286 (1) (a) may also be covered by Article 286 (2) and both these sets of transactions may be covered by Art. 286 (3). Such overlapping would not necessarily mean that the provisions of one particular clause have to be read as fastening upon the transactions falling within the category comprised therein and treating them as lifted out of the ban sought to be imposed by the other clauses of the Article. Each ban has got to be effective and imposed on the transactions falling within its ambit and even though the transaction may be saved out of the ban imposed in one particular clause it may just as well fall within the ban imposed in another clause and thus be excluded from the taxing power of the State Legislatures.

It cannot therefore be urged that the Explanation to Article 286 (1) (a) lifts the transaction out of the ban imposed by Article 286 (2) or by Article 286 (3) and leaves such transaction of sale or purchase as is covered by the Explanation free to be taxed by the delivery State in spite of the same being of an inter-State character or being in regard to goods declared by Parliament by law to be essential for the life of the community.

(101) The whole scheme of Article 286 is that four different restrictions are put on the taxing power of the State Legislatures in regard to the sales or purchases of goods and each one of these restrictions has got to be considered separately by itself and it is only those transactions of sale or purchase which do not fall within any of those categories that can be taxed by the State Legislatures by having resort to their powers under Art. 246 (3) and Entry 54 of List II, Sch. 7 to the Constitution.

(102) The learned Government Advocate for Bihar however urged five distinct reasons why Article 286 (2) cannot apply to the transactions of sale or purchase covered by Article 286 (1) (a) and the Explanation thereto and they were:—

(1) The class of sales falling under Article 286 (1) (a) form a special class of inter-State sales which on general principles ought not to be affected by the general provisions of Article 286 (2);

(2) If Article 286 (2) applies to the class of sales covered by Article 286 (1) (a) and the Explanation thereto it would result in discrimination against local trade in favour of inter-

State trade and it will be inconsistent with the provisions of Part XIII of the Constitution;

(3) The purpose of Article 286 being to eliminate multiple taxation and Article 286 (1) (a) having already achieved that purpose with regard to the class of sales falling within it it was no longer necessary for that purpose to apply Article 286 (2) to that class of sales;

(4) The Constitution itself has divided inter-State sales into two categories and in relation to one class it has itself provided which State will tax and under what conditions and in relation to the other class the Constitution itself has imposed a ban in general terms and granted Parliament power in general terms again to relax that ban as and when Parliament thinks fit;

and (5) By a legal fiction, the inter-State sale is converted into an intra-State sale.

We shall deal with these reasons seriatim.

(103) As to reason (1): it was submitted that the transactions of sale covered by Art. 286 (1)(a) and the Explanation thereto and the transactions of sale covered by Article 286 (2) were of the same category and both these provisions dealt with the same topic. That being so, Article 286 (2) contained a general provision whereas Art. 286 (1) (a) and the Explanation thereto contained a special provision having reference to the transactions of sale or purchase falling within that category, with the result that the rule of harmonious construction applied and the special provision was to be read as an exception to the general provision. This argument found favour with the High Court below as well as myself in the — 'Bombay Sales Tax Appeal (B)'. This rule of harmonious construction no doubt would apply if the topics covered by both these provisions were the same, and the subject-matters dealt with in both these provisions were identical.

There is this difference however between the two provisions, viz., that the transactions covered by both do not fall within the same category and a transaction of sale which is looked at from the point of view of its being an outside or an inside sale may just as well be a sale in the course of inter-State trade or commerce. In Article 286 (1) (a) the transaction is looked at from the point of view of its situs or location and in Article 286 (2) it is looked at from the point of view of its being in the course of inter-State trade or commerce and the two approaches are quite distinct one from the other.

That being so it cannot be said that the topics which are dealt with by both these provisions are the same or that the subject-matters thereof are identical. The ban which is imposed by Article 286 (1) (a) and the rule of harmonious construction and the exception of the special provisions from the general one as indicated above would have no application in the matter of the construction of both these provisions.

(104) As to reason (2): there is no question of discrimination against local trade in favour of inter-State trade if Article 286 (2) applied to the class of sales covered by Article 286 (1) (a) and the Explanation thereto. The local trade would certainly be liable to the levy of intra-State sales tax which could be avoided if a transaction takes place in the course of inter-State trade or commerce. For the working of the Union as an economic unit and for the free flow of trade, commerce and intercourse throughout the territory of India it is necessary that no fetter should be placed on the course of inter-State trade or commerce.

The consumers within a State who would resort to transactions of purchase across the border with a view to avoid the payment of the intra-State sales tax would be comparatively few and could in conceivable cases be caught within the net by imposing a tax on goods of a non-discriminatory nature within the meaning of Article 304 (a). This reason is therefore no deterrent to our holding that the ban under Article 286 (2) is absolute and unaffected by Article 286 (1) (a) and the Explanation thereto.

(105) As to reason (3): it postulates that the only purpose of the enactment of Article 286 (1) (a) and the Explanation thereto is to eliminate multiple taxation. If that was the only purpose of the Article it might conceivably be argued that once that purpose is achieved in regard to the particular set of transactions which are covered by Article 286 (1) (a) and the Explanation thereto there is no further need of putting any ban under Article 286 (2). As has been already observed before, the purposes of the enactment of Article 286 were manifold and they were achieved by enacting the four distinct provisions in the manner indicated above and the restrictions which were put on the powers of the State Legislatures to tax transactions of sale or purchase were mutually exclusive even though the transactions might so far as their nature and character be concerned overlap in certain events.

Even though therefore a transaction fell within the ban of Article 286 (1) (a) it could nonetheless be subjected to the ban which was imposed by Article 286 (2) and it could be taxed only if it survived this scrutiny also, which could be done if the Parliament by law otherwise provided as set out in Article 286 (2).

(106) As to reason (4): it assumes that the Constitution itself has divided transactions of sale or purchase in the course of inter-State trade and commerce into two distinct catego-

ries, one falling within Article 286 (1) (a) and the Explanation thereto and the other falling within Article 286 (2). There is no warrant for holding that transactions in the course of inter-State trade or commerce are divided into such distinct categories for the purpose of the imposition of the ban. The transaction of sale or purchase would be one but it is subject to the imposition of distinct bans having regard to the view-point from which it is being looked at.

If it is looked at from the view-point of its being an outside or an inside sale it may be caught within the ban of Article 286 (1) (a). If it is looked at from the view-point of its being a transaction in the course of inter-State trade or commerce it may be caught within the ban imposed by Article 286 (2). These bans are mutually exclusive and may have to be applied to the same transaction of sale or purchase, one ban not necessarily excluding the other.

(107) As to reason (5): the argument totally ignores the purpose and efficacy of a legal fiction. A legal fiction pre-supposes the correctness of the state of facts on which it is based and all the consequences which flow from that state of facts have got to be worked out to their logical extent. But due regard must be had in this behalf to the purpose for which the legal fiction has been created. If the purpose of this legal fiction contained in the Explanation to Article 286 (1) (a) is solely for the purpose of sub-clause (a) as expressly stated it would not be legitimate to travel beyond the scope of that purpose and read into the provision any other purpose howsoever attractive it may be.

The legal fiction which was created here was only for the purpose of determining whether a particular sale was an outside sale or one which could be deemed to have taken place inside the State and that was the only scope of the provision. It would be an illegitimate extension of the purpose of the legal fiction to say that it was also created for the purpose of converting the inter-State character of the transaction into an intra-State one. This type of conversion could not have been in the contemplation of the Constitution-makers and is contrary to the express purpose for which the legal fiction was created as set out in the Explanation to Art. 286 (1) (a).

(108) All these reasons therefore taken individually or collectively are not sufficient to negative the position that the transactions covered by Art. 286 (1)(a) & the Explanation thereto are not excluded from the operation of Article 286 (2) and that the ban under Article 286 (2) also applies to the same.

(109) It was also urged that this construction put upon Article 286 (1) (a) and the Explanation thereto and Article 286 (2) would render the Explanation nugatory and that the Constitution-makers at the very commencement of the Constitution would not have given the power by one hand and taken it away by the other and that therefore the Explanation to Article 286 (1) (a) should be read as an exception or a proviso to Article 286 (2). This argument no doubt found favour with me in the — 'Bombay Sales Tax Appeal (B)', and also with the High Court below. If due regard however is had to the purpose of the enactment of Article 286 as a whole and also to the various considerations which have been set out herein above it is clear that this argument is untenable.

The transactions of sale and purchase covered by the Explanation to Article 286 (1) (a) are not necessarily co-extensive or conterminous with the transactions of sale or purchase covered by Article 286 (2). There are transactions which would be covered by the Explanation to Art. 286 (1) (a) without their being transactions of sale or purchase in the course of inter-State trade or commerce and which therefore would without anything more be covered by the Explanation and would be the subject-matter of taxation by the delivery State by the appropriate exercise of its power of taxation.

There is also a further fact to be noted & it is that even though the transactions covered by both these provisions may be conceivably co-extensive or conterminous with each other, the Explanation to Article 286 (1) (a) would come into operation the moment the ban of Art. 286 (2) was lifted by an otherwise provision enacted by Parliament and it was certainly lifted up to 31-3-1951 by the President directing the continuance of the operation of the sales tax laws which previously existed in the various States. It could not therefore be stated that the construction put upon Article 286 (1) (a) and the Explanation thereto and Article 286 (2) as above would render the Explanation nugatory.

If the States thought that the operation of the ban under Article 286 (2) prevented them from taxing transactions of sale or purchase which take place in the course of inter-State trade and commerce and which are also covered by the Explanation to Article 286 (1) (a) it was open to them to adopt proper measures for lifting the ban under Article 286 (2) and making themselves free to tax the transactions of sale or purchase covered by the Explanation. Parliament would in that event consider the proposals made by the respective States in their proper perspective having regard to the provisions of the Constitution in regard to the freedom of trade, commerce and intercourse throughout the territory of India, the

convenience or inconvenience of the public and the needs of the respective States and lift the ban in the manner and to the extent it thought fit.

(110) The majority judgment in the — 'Bombay Sales Tax Appeal (B)', has been construed by the various States as giving them an authority to impose a tax on the transactions of sale or purchase covered by the Explanation to Article 286 (1) (a) and authorising them to impose such tax on the seller even though he may be residing outside their territories. The non-resident businessmen therefore who entered into transactions of sales of goods where as a direct result of such sales the goods are actually delivered for the purpose of consumption in a particular State have been sought to be subjected to the levy of sales tax at the instance of these States with great inconvenience and harassment to themselves, and the warrant for their action in this behalf is stated by these States to be the majority judgment of this Court.

The various States however in the scramble for taxes have been oblivious to the fact that a transaction of sale or purchase is not a unilateral transaction but a bilateral one and when it is looked at from the point of view of a sale or purchase it is one transaction which has two facts. From the point of view of a seller it is a sale transaction and from the point of view of a purchaser it is a purchase transaction. When therefore the transaction is one on which a tax on sale or purchase can be levied it does not necessarily mean that only a sales tax can be levied & not a purchase tax.

The inside dealer may therefore be taxed on his purchases or if he sells in retail to actual consumers in the State he may be taxed on the sales. If the inside dealer is himself the consumer then there will be no difficulty in assessing him for his books will show how much he has imported from other States and how much he has consumed. In any case, the convenience or inconvenience of collecting a sales tax or a purchase tax is not a relevant consideration when one is considering the validity or otherwise of such a tax, as was observed by Kania C. J., in the case of — 'A. H. Wadia v. Commissioner of Income-tax, Bombay', (Z25), at pp. 25-26.

In the very judgment of the majority in the 'Bombay Sales Tax Appeal (B)', there is a passage at p. 258 which indicates that all buyers within the delivery State except those buying for re-export out of the State would be within the scope of the Explanation and liable to be taxed by the State on such transactions, and it would be an unwarranted assumption on the part of anyone who read that judgment to say that the delivery State was entitled to levy a tax on the sale or purchase of goods falling within the Explanation to Art. 286 (1) (a) on the seller alone.

The seller would be outside the territories of the taxing State and would primarily not be liable to the jurisdiction of the Sales Tax Act enacted by the taxing State. It would be by adopting the theory of the territorial connection or nexus as it was being done prior to the enactment of the Constitution that the taxing State would seek to reach the non-resident businessmen outside its territories and if regard be had to the fact that the taxation is either in personam or in relation to the transaction of sale or purchase which takes place within its territory there is no warrant at all for taxing the outside businessmen on the transactions of sale or purchase covered by the Explanation to Art. 286 (1) (a).

All the provisions contained in the Bihar Sales Tax Act with regard to the registration of the outside dealer, the maintenance of the books of account, submission of returns by him to the Sales Tax authorities of the State of Bihar, the production and inspection of books of account before the Sales Tax authorities, the search of the premises of the outside dealer by them and the imposition of penalties on him by reason of his non-compliance with the various provisions contained in the Act amongst others are unwarranted and illegitimate exercise of the powers incidental to the power of taxing sales or purchases conferred upon the State of Bihar by Art. 246 (3) and the Entry 54 in List II, Sch. 7 to the Constitution and do not affect non-resident businessmen who are outside the territories of the State of Bihar.

(111) The majority judgment in the 'Bombay Sales Tax Appeal (B)', did not say that the delivery State was entitled to tax the sellers in the transactions of sale or purchase covered by the Explanation to Art. 286 (1) (a). The question whether the seller or the purchaser would be subject to the levy of a tax on the transaction of sale or purchase at the instance of the delivery State was not before the Court and the observations contained in the majority judgment were made with reference to a pure question of the interpretation of Art. 286 (1) (a) and the Explanation thereto. As a matter of fact the passage above-quoted from the judgment (B) at p. 258 would go to show that they contemplated the purchasers being amenable to tax at the instance of the delivery State in the case of transactions covered by the Explanation to Art. 286 (1) (a).

Even though it is not strictly relevant to consider the consequences of a particular position in law when construing a statutory provision it is nonetheless necessary to visualise those consequences when one tries to probe into the mind of the legislators and see whe-

ther they could have ever contemplated such consequences. If the construction sought to be put upon the Explanation to Art. 286 (1) (a) and the majority judgment in relation thereto by the State Legislatures were accepted, all outside dealers wheresoever they may be located or residing or carrying on their business all over the Union would be amenable to the levy of sales tax at the instance of the delivery State and one dealer in a particular State who had a very large business and was entering into transactions of sale with consumers in outside States all over the Union would be amenable to the jurisdiction of several States in the matter of his transactions of sale of his goods.

There are as many as 21 Sales Tax Acts to be found in the Manual of Sales Tax Acts and if a dealer in one State was going to be held amenable to the levy of sales tax at the instance of all the other States it would mean that he would have to ascertain from the purchaser in each of the transactions of sale which he enters into the State to which the purchaser belongs, whether the purchaser is purchasing the goods for the purpose of consumption within that State, to get himself registered as a dealer in that State, to maintain his books of account with a view to produce them and subject them to inspection by the Sales Tax authorities in that State, to submit returns of the sales tax recovered by him from the purchasers in that State before the Sales Tax authorities of that State & make himself liable for the non-observance of the various requirements of the Sales Tax Act enacted by that State.

The task of fulfilling the requirements 'qua' one State would be formidable enough. But when one visualises that the dealer who enters into such transactions of sale with the various customers may be subjected to this process at the instance of each and every State within whose territory the purchaser may happen to be importing the goods as a direct result of such sale for actual consumption within the territories of that State, one can easily understand what untold harassment and inconvenience the dealer would have to suffer from. It will be easy to understand that if those were the circumstances attendant upon his business the dealer may as well close down his business rather than submit to all this harassment at the hands of the various States.

The free flow of trade, commerce and intercourse throughout the territory of India will be thoroughly choked up and we are quite sure that neither the Constitution-makers nor the majority judgment in the 'Bombay Sales Tax Appeal (B)', would ever have contemplated these consequences. It is legitimate therefore to hold that no such thing could ever have been contemplated by them and nothing would have been farthest from their minds than such a position. The seller in such cases would certainly not be amenable to the levy of a sales tax at the instance of the delivery State and no law passed by the delivery State in regard to a levy of sales tax would have any operation against the non-resident businessman who enters into a transaction of sale where as a direct result of such sale the goods are actually delivered for consumption within the taxing State.

(112) If however the majority judgment be construed to have said that the seller could be subjected to the levy of a sales tax at the instance of the delivery State in the case of transactions covered by the Explanation to Art. 286 (1) (a) I am of the opinion that it was clearly erroneous and public interests demand that the same should be reversed.

(113) After further and fuller consideration of the matter in the light of the very elaborate arguments which have been addressed before us by the learned Counsel for the Appellants and the Respondents and also the Interveners, I feel that the conclusion reached in the 'Bombay Sales Tax Appeal (B)', needs to be revised and I am of the opinion that Art. 286 (2) puts an absolute restriction on the taxing power of the States where transactions of sale or purchase take place in the course of inter-State trade or commerce unless and until the ban is lifted by Parliament within the terms thereof and until such ban is lifted no delivery State within the meaning of the Explanation to Art. 286 (1) (a) much less the other States are in a position to impose a tax on transactions of sale or purchase covered by the Explanation.

(114) The appeal should therefore be allowed and a direction should issue against the State of Bihar to refrain from taxing the sales or purchases of goods which take place in the course of inter-State trade or commerce even though the goods as a direct result of such sale or purchase are actually delivered in Bihar for consumption in that State until Parliament otherwise provides within the meaning of that expression in Art. 286 (2). The Appellant should get its costs throughout from the State of Bihar, the rest of the parties appearing before us to bear and pay their respective costs of this appeal.

JAGANNADHADAS J.:

(115) The first, and to my mind, the most important, point that requires careful consideration in this case is whether, and if so within what limits, this Court will observe the rule as to the binding character of a judicial precedent with reference to its own prior decisions. Admittedly the question that has been raised in this case as to the construction of Art. 286 of the Constitution is one that is directly covered

by a recent decision of this Court in 'AIR 1953 SC 252 (B)'. The rule as to the binding character of judicial precedents is one which is normally accepted by all the courts which function on the pattern of the British Judicial system. This rule, in its very strict form, is observed by the English Courts, (Vide '1944 KB 718 (F)', and — 'Williams v. Glasbrook Brothers Ltd', 1947-2 All ER 884 (Z29). The House of Lords has ruled, after careful consideration, in its judgment in the case in '1898 AC 375 (H)', that the House is bound to follow its own previous decisions and will not allow any question settled thereby to be reopened and argued again, nor can the House be asked to reverse its own prior decision.

Such reversal, if needed, is one that has to be brought about by parliamentary legislation. The Judicial Committee of the Privy Council has, however, not adopted this extremely rigorous view but has felt itself free, in appropriate cases, to reconsider its prior decisions. (Vide 'AIR 1929 PC 84 (Q)'. The same is the case with the Supreme Court of the United States of America. (See Willoughby on the Constitution of the United States, Vol. I, p. 74). Our, Constitution which has made detailed provision about various matters relating to the Supreme Court including a matter relating to its practice, such as, whether there can be a dissenting judgment (see Art. 145 (5)) has not, in terms made any provision in this behalf. Art. 141, no doubt, provides that "the law declared by the Supreme Court shall be binding on all Courts within the territory of India". It has been urged before us that the phrase "all Courts" is comprehensive enough to include the Supreme Court.

It is pointed out, that since every decision declares the law, a later decision declaring the law in a contrary sense, would in effect, be the exercise of legislative function which must be taken to have been impliedly prohibited. While these arguments are not without force, it is reasonably clear, in the context of Art. 141, that the phrase "all Courts" must refer to Courts other than the Supreme Court. In the absence, therefore, of any clear provision in the Constitution and in view of the fact that this Court has historically succeeded to the pre-existing Federal Court and the Judicial Committee of the Privy Council, we cannot deny to this Court, the competence to reconsider its prior decisions.

(116) But, it does not follow that such power can be exercised without restriction or limitation or that a prior decision can be reversed on the ground that, on later consideration, the Court disagrees with the prior decision and thinks it erroneous. The necessity for certainty and continuity in the declaration of law by the highest courts in the country is recognised on all hands. That necessity is all the greater, and not the less, by reason of the Constitution itself having formally provided that the decisions of this Court are declaratory of the law. The rule as to the binding character of a judicial precedent is based on a juristic principle of universal application. The reason for its adoption is "the disastrous inconvenience of subjecting each question decided by a previous judgment to reargument, thereby rendering the dealings of mankind doubtful by different decisions; so that in truth & in fact there would be no real final Court of appeal" (See '1898 AC 375 (H)', at p. 380). It is, therefore, necessary to consider within what limits the competency of this Court to reconsider its prior decisions may well be exercised. For this purpose the actual practice of other comparable Courts as affording guidance requires close examination.

(117) The practice of the Supreme Court of America is indicated in the following passage from 'Willoughby on the Constitution' of the United States of America, Vol. I, P. 74:

"In cases of purely private import, the Chief desideratum is that the law remain certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, except in the clearest cases of error, depart from the doctrine of 'stare decisis'. When, however, public interests are involved, and especially when the question is one of constitutional construction, the matter is otherwise. An error in the construction of a statute may easily be corrected by a legislative act, but a Constitution and particularly the Federal Constitution, may be changed only with great difficulty. Hence an error in its interpretation may for all practical purposes be corrected only by the Court's repudiating or modifying its former decision". It would appear, therefore, that the power of reconsideration of a prior decision is somewhat freely exercised by the Supreme Court of America in Constitutional cases. The reason for such free exercise, or to the same extent, does not exist under our Constitution. To appreciate this, it is necessary to compare the provisions in the two Constitutions for amendment of the Constitution. The machinery for amendment of the Constitution of the United States is provided in Art. V thereof and is as follows:

"The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by con-

ventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress".

Under Art. 368 of our Constitution, the normal procedure provided for amendment, except in respect of specified matters to be presently enumerated, is as follows:

"An amendment of this Constitution may be initiated by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill".

In respect, however, of a limited number of matters specified in the Constitution, an additional step is required, namely, that "before the Bill making provision for such amendment is presented to the President for assent, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States Specified in Parts A, B, Sch. 1 by resolutions to that effect passed by those Legislatures". Now the special matters where amendment is conditional on this additional requirement relate to the election of President (Arts. 54 & 55), extent of the executive power of the Union (Art. 73), extent of the executive power of a State (Art. 162), provisions relating to the Union Judiciary (Supreme Court) (Chap. IV of Part V), and to the High Courts of the various States, in Parts A and B (Chap. V of Part VI) and in Part C (Art. 241), and the relations between the Union and the States (Chap. I of Part XI), as also the distribution of the legislative powers and the various lists in the Seventh Schedule, the representation of the States in Parliament, and the provision in the Constitution relating to the machinery for amendment of the Constitution.

Thus, it will be seen, excepting in respect of a few basic matters—of which it may be noticed Art. 286 is 'not' one—the normal machinery for the procedure of amendment is the same as that for the passing of any statute by Parliament except that a specified majority in each of the Houses is essential, the securing of which would be difficult or easy according to the strength of the Government at the time in each of the Houses .The requirement of special majority as a condition for the passing of legislation in respect of certain specified items of business is not altogether an unknown feature.

However that may be, it is quite clear that while the amendment of the Constitution does not depend upon the ordinary majority rule under which Parliament conducts its business, the machinery therefore is by invoking the very same Parliament and not anything so difficult, cumbrous and dilatory as that envisaged in Art. V of the American Constitution. Even as regards the few specified matters for which an additional requirement of ratification by State Legislatures is provided for, our machinery for amendment is clearly much easier and less cumbersome.

It does not appear to me, therefore, right to rely upon the American practice as a safe guide to determine our practice on the question as to the binding character of a judicial precedent. Neither, are we bound to adopt the very rigid rule which the House of Lords has formulated for its own practice. The problem of interpreting a written Constitution does not generally arise before it.

(118) The only other comparable Courts whose practice has been brought to our notice, through citation of cases, are the Judicial Committee of the Privy Council and the High Court of Australia. As this is the first case in this Court where in this question arises, it is desirable to consider that practice carefully for our guidance, though it is not necessary to lay down any absolutely rigid or inelastic formula. It is worthwhile at this stage to notice what, according to the Constitution of Australia, is the machinery for the alteration of their Constitution.

This is to be gathered from S. 128 of the Commonwealth Act of 1900 which—broadly speaking—shows that what is required there is an absolute majority in each of the Houses & the approval of each State to be obtained by a referendum to the electors of each State. This is definitely much more difficult, cumbersome and dilatory than what obtains in our Constitution. Therefore, there can be no reason for our adopting a less rigid standard than that adopted by the High Court of Commonwealth of Australia, nor is there any reason for our adopting a standard less rigid than that of the Judicial Committee of the Privy Council, who while feeling themselves free not to follow the very strict rule of the of the House of Lords, were under no constitutional limitations in this behalf.

(119) The practice of the Judicial Committee as to the limits within which they generally exercise the freedom to reconsider their prior decisions can be gathered from the cases in — 'In re Transferred Civil Servants (Ireland) Compensation (Q)'; 'Attorney General for Ontario v. Canada Temperance Federation', AIR 1946 PC 88 (Z30); & 'AIR 1949 PC 117 (S)'. The matter was discussed elaborately and various prior decisions of the Privy Council were considered and the conclusion was sum-

med up as follows in — 'In re Transferred Civil Servants (Ireland) Compensation (Q)':

"There is no inherent incompetency in ordering rehearing of a case already decided by the Board, even when a question of a right of property is involved but such an indulgence will be granted 'in very exceptional circumstances only. It is of the nature of an extraordinarium remedium".

After the above formulation of their practice, the Privy Council in this case permitted itself to reconsider the previous decision in 'AIR 1928 PC 239 (Z4)', on two grounds. (1) The case came up before them on a reference under S. 4, Judicial Committee Act of 1933, and that reference would have been futile of it did not necessarily involve such reconsideration. (2) The reference itself was granted on account of an alleged material mistake of fact, into which the previous Board of the Judicial Committee had fallen. On such reconsideration the previous decision was affirmed. In 'AIR 1946 PC 88 (Z30)', the Judicial Committee expressed itself as follows at pp. 90-91:

"The appellants' first contention is that '1882-7 AC 829 (Z8)', was wrongly decided and ought to be overruled. Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. 'But on constitutional questions it must be seldom indeed' that the Board would depart from a previous decision which it may be assumed will have been acted on both by Governments and subjects".

In this case the Privy Council was invited to reconsider the correctness of the law laid down by them in — 'Russell v. The Queen', (Z8), but they declined to do so on two grounds, viz., (1) on constitutional questions the Board Seldom departs from its previous decisions, and (2) the prior decision stood unchallenged for over 60 years.

In — 'Phanindra Chandra Neogy v. The King', (S), the Privy Council stated that it is only "in the most exceptional cases" that they would tender advice to His Majesty inconsistent with a previous decision and reaffirmed the decision in 'AIR 1948 PC 128 (T)'.

(120) Three cases of the High Court of Australia out of those brought to our notice are instructive. In '(1914) 18 CLR 54 (J)', the position was expressed in the following terms. Griffith C. J., observed as follows:

"In my opinion it is impossible to maintain as an abstract proposition that the Court is either legally or techinically bound by previous decisions. Indeed, it may, in a proper case, be its duty to disregard them. But the rule should be applied with great caution, and only when the previous decision is 'manifestly wrong', as, for instance, if it proceeded upon the mistaken assumption of the continuance of a repealed or expired statute, or is contrary to a decision of another Court which this Court is bound to follow; 'not', I think upon a mere suggestion that some or all of the members of the later Court might arrive at a different conclusion if the matter were 'res integra'. Otherwise there would be grave danger of want of continuity in the interpretation of the law."

Barton J., observed as follows:

"I have never thought that it was not open to this Court to review its previous decisions upon good cause. The question is not whether the Court can do so, but whether it will, having due regard to the need for continuity and consistency in judicial decisions. Changes in the number of appointed Justices can, I take it, never of themselves furnish a reason for review. ..... But the Court can always listen to argument as to whether it ought to review a particular decision, and 'the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest' ".

Having so laid down the rule of practice for their Court, the learned Judges, on account of the special circumstances in that case, unanimously agreed to reconsider the prior decision and on such reconsideration affirmed it. In so reaffirming the prior decision, one of the learned Judges, Powers J., stated his grounds to the following effect:

"In '11 CLR 1 (J1)', the Court consisted of all the Justices of this Court who could sit on the application. The case was very fully argued. Both parties and two of the States were represented by counsel. The judgments were considered judgments delivered more than two weeks after the preliminary objection was taken. ..... Under the circumstances I have no hesitation in following the judgment".

The same learned Judge at another portion of his judgment stated as follows:

"If we do not show some respect to our own Court's decisions, no counsel will feel safe in advising the public, and it will create uncertainty and confusion".

The principles so laid down have been reiterated in a recent case of the High Court of Australia in — 'Perpetual Executors & Trustees Association of Australia Ltd. v. Federal Commissioner of Taxation', (1949) 77 CLR 493 (Z31), in the following terms:

"The Court is not bound by its previous decisions so as absolutely to preclude reconsideration of a principle approved and applied,

in a prior case, but, as was stated in — 'Cain v. Malone', (1940) 66 CLR 10 (Z32), the exceptions to the rule are exceptions which should be allowed only with great caution and in clear cases."

Then the above quotation from the judgment of Barton J. in the 'Tramways Case (J)' was repeated and the principle indicated therein was reaffirmed. In this case the Court was asked to overrule their prior decision in — 'Trustees Executors and Agency Co. Ltd. v. Federal Commissioner of Taxation', (1945) 69 CLR 270 (Z33). The learned Judges declined to reconsider it with the following observations:

"The decisions of a superior Court have a double aspect. They determine the controversy between the parties, and in deciding the case they may include a statement of principle which it is the duty of that Court and of all subordinate courts to apply in cases to which that principle is relevant. Continuity and coherence in the law demand that, particularly in this Court, which is the highest court of appeal in Australia, the principle of 'stare decisis' should be applied, save in very exceptional cases."

The criterion, viz., that of manifest error 'plus' injury to public interest by maintenance of previous decision laid down in the above cases as being the ground on which a reconsideration can be granted was reiterated by Williams J. in his judgment in — 'Attorney-General for N. S. W. v. Perpetual Trustee Co. Ltd.', 85 CLR 237 (Z34). In this case the High Court was asked to reconsider the correctness of the majority decision in a prior case, viz., that in — 'Commonwealth v. Quince', (1944) 68 CLR 227 (Z35). On reconsideration the Judges by a majority affirmed the prior decision. One of the learned Judges, Dixon J. considered the matter on its merits elaborately and came to the conclusion that if the matter were to be considered afresh he should prefer a view contrary to that which had been expressed in the prior decision but concurred with the majority view with the following observations:

"There appears to me to be no ground for reconsidering the decision in 1944-68 CLR 227 (Z35) unless it be a sufficient ground simply that the opposite conclusion is to be preferred. It is evident that the decision was reached only after a very full examination of the question. It cannot be said that any compelling consideration or important authority was overlooked or that the decision conflicts with well established principle or fails to go with a definite stream of authority. It is a recent and well considered decision upon what is evidently a highly disputable question.

.....

I do not think that we should reconsider the correctness of that decision. The proper course judicially is to follow and apply that decision."

This is a strong case of the year 1951-1952 indicating the most recent practice of that Court, and the above passage aptly summarises almost the very considerations applicable to the present case.

(121) A consideration of these cases shows that while the highest courts other than the House of Lords have reserved to themselves theoretically the competency to reconsider the correctness of a prior decision, they have also carefully confined the actual exercise of that power within very narrow limits. In a number of cases in which they did permit themselves to reconsider, they have ultimately declined to overrule the prior decision notwithstanding that another view might well have been taken.

The only instances brought to our notice where, on a reconsideration, a previous decision was not followed, are two. One is (1920) 28 CLR 129 (K). That was a case where the question which arose was a very important one as to the power of State Legislature to encroach on the field of the Commonwealth Legislature by virtue of a rule of construction laid down in an earlier case, viz., — 'Railway Servants' case', 4 CLR 488 (Z36). The learned Judges were of the opinion that that was a question of far reaching public importance and 'that the prior decision being manifestly wrong and opposed to the rules of construction laid down by the Privy Council in a number of cases', should be reconsidered and overruled.

It would be seen that in this case the Court acted upon the limitations which they have laid down in the course of their decisions, that reconsideration and overruling of a prior decision is to be confined to cases where the prior decision 'is manifestly wrong and' its maintenance is productive of great public mischief. The second is the case in — 'G. Nkambule v. The King', 1950 AC 379 (Z37), where the Privy Council declined to follow its prior decision in — 'Tumahole Bereng v. R.', 1949 AC 253 (Z38). In this case, the Privy Council, while it reaffirmed the proposition that a prior decision upon a given set of facts ought not to be reopened without the greatest hesitation, explained why they, in fact, differed from the previous one in the following passage:

"From a perusal of the judgment in 'Tumahole's case', (Z38), it is apparent that the history of the adoption & promulgation of the various statutes and proclamations dealing with the effect of the evidence of accomplices in South Africa was only partially put before the Board, and much material which has now been ascertained was not presented to their

Lordships on that occasion. The present case, therefore, is one in which fresh facts have been adduced which were not under consideration when Tumahole's case (Z38) was decided, and accordingly it is one in which, in their Lordships' view, they are justified in reconsidering the foundations on which that case was determined".

This was a case where the question arose as to the applicability of the English rule of law relating to accomplice evidence as laid down in — 'Rex v. Baskerville', 1916-2 KB 658 (Z39), viz., that a particular portion of the rule which lays down that the evidence of one accomplice cannot be corroborated by that of another. What was under consideration of the Privy Council was whether a prior decision of the Judicial Committee, construing a particular section of the relevant statute applicable in that case in consonance with the above rule, was correct. It will be noticed that the overruling of the prior decision in this case was based on the fact that important and relevant material was not placed before the Judical Committee in the earlier case. These cases emphasis under what exceptional circumstances a prior decision or the highest and final court in a country is treated as not binding on itself.

(122) Now what are the grounds in the present case to justify a reconsideration of the prior decision. At this stage, I cannot help noticing that the argument before us — as it appears to me — has taken a somewhat unusual course. I should have thought that when the decision in a case so recent as that in the 'United Motors case (B)' given after full consideration, is sought to be challenged, the first question to have been considered was whether or not there were circumstances to justify a reconsideration. It is only after the Court came at least to a prima facie conclusion on that preliminary matter that a reargument on the merits of that decision should have been permitted.

What has happened, however, is that the correctness or the prior decision was straightaway canvassed before us and the question as to the competency or the desirability of such reconsideration occupied a later and subordinate part in the arguments. I must confess to the feeling that this all important question has accordingly suffered for want of due consideration thereof at the stage of arguments before us.

(123) Now, let us see what are the facts relating to the prior decision. The decision was given on 30-3-1953. The case itself was heard for 12 working days, i.e., from the 9th February to the 25th February, 1953. The Union of India and as many as eight States were permitted to intervene and their arguments were also heard. A perusal of the judgments then given shows that every possible aspect had been fully presented and considered.

The decision was that of a majority as against that of one dissenting Judge. One of the learned Judges in the majority, though concurring on the main point, was prepared to go further on one point than what the majority held (though, as appears now, he is prepared to go back on his concurrence).

It is true that in a later decision in 'AIR 1953 SC 333 (U)', another Judge of this Court expressed a view in disagreement with the view of the majority in this case. But that was a decision given on 8-5-1953, more than a month after the judgment in the prior case had been delivered and had become binding. The question that directly arose for consideration in the later case was not the one that had come in for consideration in the earlier case. However this may be, it may also be noticed that in a later decision of this Court in 'AIR 1954 SC 403 (C), the law as laid down in the earlier decision in the — 'United Motors case (B)', was reiterated and it was stated that the correctness of the view could no longer be questioned. (see page 273).

In view of the above facts, it appears to me 'prima facie', that there was no reason for reconsideration except the fact that a different view had been taken by two of the learned Judges of this Court and except the chance of a differently constituted majority emerging on rehearing.

(124) This, however, is sought to be justified on various grounds. It is said that the prior decision does not merely determine the rights of the two contending parties to that case but has far reaching effects on the rights of the consuming public and that it involves the adjudication of the taxing power of the States as against the consuming public in general. It is, therefore, said that, if that decision is erroneous, it is our duty not to perpetuate the error. It appears to me, with respect, that this is begging the question.

There is no absolute standard by which the erroneous character of a previous decision can be ascertained. What a previous decision has determined, must be presumed to be right unless it can be pronounced to be perverse or manifestly wrong. It is, therefore, a strong thing to characterise a previous decision as erroneous where, even on reconsideration, no unanimity is reached and the previous view is supported by a substantial minority. Nor can the mere fact of one of the prior learned Judges having gone back on his views be any criterion to determine which out of his two views is erroneous.

As regards the suggestion of tax burden on the consuming public, it is relevant to notice that the burden, if any, which arises

under the prior decision can only be by legislative action of the very State in which the consuming public are residents. The removal of the burden, if called for, is a matter which, under the Constitution, can be brought about by democratic process which is available to the consuming public, through its representatives in the State Legislature. It appears to me that that is not a matter for our consideration.

I may be permitted to add that in the course of the arguments there has been no serious grievance made about the alleged burden on the consuming public. But there has been a good deal of emphasis on the harassment to the business community, i. e., to the out-of-State dealers, from whom the tax is primarily collected and passed on, under the law, to the consumer. We are not, however, concerned with any question arising from such alleged hardship.

The hardship such as it is, is one that may have to be obviated by the adoption of a common and agreed machinery by all the States for the assessment (as distinguished from levy) and collection of the tax from out-of-State dealers, or if necessary, by the passing of the requisite legislation enabling this to be done. But that hardship, if any, can afford no reason for reversing the prior decision which, as will be shown later, has construed Art. 286 consistently with the entire scheme of the Constitution.

That decision enables the consuming State to derive an elastic source of revenue from its own residents to make it available for the expanding needs of the State in the discharge of the responsibilities allotted to it under the Constitution. It is not for this Court now to choose between the alleged hardship of the business community and the interests of the consuming State and treat the former as a ground for reconsideration.

(125) It is next suggested that there is some vagueness, if not inconsistency, in the prior majority judgment which justifies reconsideration. It is said, with reference to a particular passage quoted from the judgment, that it is only buyers falling within the Explanation who were contemplated as liable and not the out-of-State dealers, but that the whole trend of the rest of the judgment and the actual decision runs counter to this. With very great respect, it is hardly fair to read the decision as being in any way vague or inconsistent with itself by extracting one single passage.

The passage relied on is at page 258 and appears, in the context where the question was being considered, as to whether the phrase "actual delivery for consumption" has reference to "delivery to the actual consumer-purchaser" or delivery also to "a purchaser for eventual distribution to the consumers in the State". The view indicated in the extracted passage was that delivery to 'a purchaser' for eventual distribution to the consumer in the State was also "actual delivery for consumption" and hence the designation of purchaser as liable to tax in that passage.

That the extracted passage was not meant to indicate that only such purchaser was taxable and not the seller is quite clear from the various passages in the immediately succeeding paragraph at pp. 258 and 259 where "taxation of sales or purchases involving inter-State elements by the State in which the goods are delivered for consumption in the sense explained above" is repeatedly referred to. All that can, if at all, be said is that the decision has not, in terms, indicated the choice between the seller or the purchaser as regards taxability but has indicated either of them as taxable.

(126) It has next been said that the impugned decision is a recent one and that "judicial opinion was divided, if not evenly balanced". It is no doubt true that the prior decision is only two years old. But that is not by itself a ground for reconsideration. On the other hand, I should have thought that the very fact of its being recent should militate against reconsideration. The real test to my mind, as indicated by Dixon J., in — 'Attorney-General for N. S. W. v. Perpetual Trustee Co. Ltd.', (Z34), is whether it was a fully considered judgment and whether any fresh material has been brought to the notice of the Court. In considering the question whether a decision is open to reconsideration on account of its being recent, it is of importance to observe that our decisions become declarations of law under Art. 141 and must be treated normally as final from the very moment they are pronounced. The finality of the decisions of this Court, which is the court of last resort, will be greatly weakened and much mischief done if we treat our own judgments, even though recent, as open to reconsideration.

(127) It has next been suggested that rectification of the error, if any, in the view taken by the previous decision, is difficult and that this could be brought about only by the amendment of the legislative lists necessitating the consent of the requisite number of States. With respect, I am unable to appreciate this. The points of difference in the two opposing views ultimately boil down to this. (1) Does the Explanation to Art. 286 (1) (a) taken with the relevant legislative entry enable the consuming State to tax fictional inside sales? (2) If so, does Art. 286 (2) override this taxing power?

If the right construction of Art. 286 (2) is 'not' what has been accepted by the majority in the prior decision, what all was required to correct that error would be to amend Art. 286 (2) so as to make it clear that it overrides Art. 286 (1) (a) taken with the Explanation by the insertion therein of some appropriate phrase like "notwithstanding Explanation to Art. 286 (1) (a)". The responsibility for any such amendment, if called for, should be left to the Parliament who, as recent experience has shown, is quite capable of bringing about constitutional amendments when it felt the clear necessity for it.

(128) The proper course for this Court, therefore, is to adopt the attitude of Dixon J., in the case in — 'Attorney-General for N. S. W. v. Perpetual Trustee Co. Ltd., (Z34), wherein notwithstanding that he came to a contrary conclusion, he declined to disturb the prior decision. The case for not disturbing the prior decision is all the stronger, where, as happens in the present case, no unanimous opinion could be reached in favour of overruling the prior decision.

(129) Notwithstanding my opinion that there is no ground for reconsideration of the prior decision of this Court in the 'United Motors case (B)', I propose, out of respect for my learned brothers, who are prepared to take the opposite view, to give my reasons why, on a fresh consideration of the question involved, I am clearly in agreement with the decision of the majority in the said case. Having had the benefit of reading the judgments of my learned brothers, S. R. Das and Venkatarama Aiyar JJ., I propose to confine myself mainly to the consideration of the construction of Art. 286.

(130) There can be no doubt that Art. 286 taken as a whole has to be read in the context of the power vested in the States for levying taxes on the sales or purchases of goods (other than newspapers) under Entry 54 of List II of Sch. 7 taken with Art. 246 (3). Entry 54 does not, in terms, say that the sales or purchases of goods contemplated thereby as taxable are to be sales or purchases "within the State". In this respect it is in contrast with Entry 26 which vests in the State the power to legislate in respect of trade and commerce "within the State". The apparently wide language of Entry 54 is in recognition of the theory that in substance a tax on sale or purchase of goods is a tax on the goods with reference to the event of sale or purchase thereof. (See the 'United Motors case (B)').

Article 286 appears in Part XII of the Constitution relating to finance, property, contracts and suits and is in Chap. I thereof relating to finance. This is mainly concerned with the problem of allocation of finances between the Centre and the States in order to enable each to carry on the respective governmental functions allotted to it under the Constitution. Keeping this context in view as also the avowed purpose of the Article as indicated by the marginal note, it may be taken that Art. 286 was intended to indicate clearly the ambit of the taxing power of the State on sales or purchases of goods and to limit it to a demarcated field. To determine the exact scope of this ambit and of the limitations, it is relevant to consider what was the sales-tax law in operation just 'prior' to the new Constitution.

(131) A careful & thorough examination of the Provincial Sales-tax Acts at the time discloses the following. There were sales tax laws in operation in all the then nine Provinces, which subsequently became Part A States under the Constitution, as also in one Native State of Mysore. The pattern of the sales-tax laws in every one of the ten units had the following common features (with minor additions and variations). Under the charging section in each of these Acts, tax was levied as against a "dealer" whose turnover of sales (or purchases) exceeded a particular amount. A "dealer" was defined as a person carrying on the business of selling or supplying goods 'in the Province'.

"Sale" was defined as meaning transfer of property in goods in the course of trade for valuable consideration. In addition, each one of these Sales-tax Acts had an Explanation to the definition of the word "sale" to the effect that, notwithstanding anything to the contrary in the Indian Sale of Goods Act, a sale or purchase of goods "which were actually in the Province" at the time when the contract of sale or purchase is made, 'shall be deemed' to have taken place in the Province, wherever the contract for sale or purchase may have been made.

This was, broadly speaking, the common pattern of every one of the sales-tax laws just prior to the Constitution, subject to some further additions to the definition of sale by a few of the States, which will be presently noticed. This pattern indicates, that apart from the purely internal sales — in respect of which the power of taxation by the States was undoubted—the States claimed the power to tax 'sales with an outside element' in the following two cases: (1) Where the transfer of ownership in the goods was within the State (assumed to be so) according to the Indian Sale of Goods Act. (2) Where the goods which are the subject matter of the sale are actually in the Province at the time when the contract of sale is made, i. e., at the crucial moment of transfer of ownership.

If I may express this in another way, these sales-tax Acts purported to tax sales as being within the State, with reference to (1) 'situs' (as assumed) under the Sale of Goods Act, and (2) 'situs' (as probably assumed to be) under the general law. It is possible that this general law was so assumed with reference to the dictum of Lord Loreburn in — 'Badische Anilin Und Soda Fabrik v. Hickson', 1906 AC 419 (Z40), which suggests that the 'situs' of the goods at the time of appropriation of the goods to a particular sale is the 'situs' of the sale.

Whether the underlying assumptions as regards both these criteria were right or wrong is not material at this stage. While this was the general pattern, four of the States claimed the taxing power with reference to some additional criteria. Madras and Mysore had an additional Explanation as follows:

"In case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in the Province at any time, after the contract of sale or purchase in respect thereof was made, the sale or purchase shall be deemed to have taken place in the Province, wherever the contract of sale or purchase might have been made, notwithstanding anything to the contrary in the Indian Sale of Goods Act".

Bihar and United Provinces had the following additional Explanation. (Taken from the U. P. Act).

"Notwithstanding anything in the Indian Sale of Goods Act, the sale of any goods which are produced or manufactured in the Province 'by the producer or manufacturer thereof, shall, wherever the delivery or contract of sale is made, be deemed for the purposes of the Act to have taken place in the Province".

Both these additions refer to future goods. Madras and Mysore apparently treated such future goods as having been appropriated to the sale the moment they were "actually produced in the Province". The Bihar and U. P. addition was more or less the same and is limited to the case of sale 'by the very manufacturer or producer. The above additions are in effect the same as category No. 2 of the general pattern as applied to future goods. The underlying assumption appears to be that future goods which are contracted to be sold get appropriated thereto on their coming into existence and that thus a taxable sale emerges. Besides the above mentioned variations from the general pattern, Bihar and Uttar Pradesh had further additions to the definition of sale relating to forward contracts which virtually amounted to treating "agreement to sell" itself as being the taxable event.

This, it may be seen, had nothing to do with the nexus theory of taxation of sales and has been pronounced invalid by this Court in 'AIR 1954 SC 459 (Z18)'. From the above broad summary it will be seen that the Provinces were deriving sales-tax revenues not only in respect of purely internal sales, but also in respect of sales with an outside element. But in the generality of such sales, the tax was leviable at either or both of the above mentioned two points, i. e., (1) transfer of ownership within the State, (2) actual existence of goods within the State at the moment of such transfer. The ultimate consumer in respect of such sales would normally be not a person within the taxing State. Hence having regard to the structure of the sales-tax and the universally accepted machinery therefor which brings about the passing on, of the incidence thereof, to the ultimate consumer, this must have been felt to be inequitable.

It appears to me that in the adjustments called for on the passing of the Constitution it was this feature of the pre-existing sales-tax law which called for being remedied by the imposition of a ban on taxation of sales with an outside element. But that very consideration would equally indicate the permissibility of taxing an outside sale where the ultimate burden of it could be passed on to the resident of the very taxing State. This could be done by making the consuming State the taxing State. This, in my opinion, was the background with reference to which Art. 286 was incorporated in the Constitution.

(132) The Constitution wanted to put a ban on taxation of sales with an outside element on account of the inequity of making the residents of other States contribute towards the resources of the selling State. But in doing so it could not have intended to confine the resources of the State under this head to the comparatively small field of purely internal sales. Having regard to the expanding needs of a social-welfare State and the limited taxing powers allocated to it, the Constitution could not have meant to limit an elastic source of taxation payable by its own consumers to the very small field of purely internal sales.

It, therefore, selected and took out one category of sale with an outside element from the field of restriction, by adopting the device of a fictional inside sale and left that category taxable so that the incidence thereof may be the same as that of a purely internal sale.

This, to my mind, is the reason for the positive approach in the Explanation by a deeming provision as to an inside sale. It is on account of this common feature, as to the incidence of taxation, that the fictional inside sale indicated in the Explanation was assi-

milated to a purely internal or intra-State sale. It appears to me not very reasonable to assume that the Explanation to Art. 286 (1) (a) was required in order merely to determine what an outside sale is. If the Constitution intended nothing more than to ban taxation on outside sales, it might well have contented itself with declaring such a ban.

I do not think that the Courts would then have found any serious difficulty in construing "outside sale" to mean, a sale with a substantial outside element, or in the alternative, as a sale in which the ownership has passed outside the State in the assumed sense of the Sale of Goods Act. It was quite unnecessary and indeed out of the way to define an outside sale as the implied negative of a fictional inside sale. Nor can the purpose of the Explanation be readily assumed to be to obviate the supposed chaotic condition arising out of the adoption of the nexus theory in the Sales-tax Acts.

This could have been sufficiently and effectively provided for—as infact it was done —by the ban imposed under Art. 286(2). It has been suggested that the Explanation covers some outside sales which do not fall within Art. 286 (2) and that therefore the Explanation was necessary. But the possibility of a few ingenuously illustrated cases — like the Gurgaon-Delhi illustration put forward in the course of arguments — as falling outside the ambit of Art. 286 (2) and within the scope of Art. 286 (1) (a) taken with the Explanation, would not have been any adequate reason for the Constitution involving itself in two such provisions, mostly overlapping in effect. It appears to me, therefore, that the reasons for having these two provisions were distinct and different. Article 286 (1) (a) with the Explanation was meant to prevent taxation whose ultimate incidence would fall on residents of outside States.

Article 286 (2) was meant to prevent the taxing structure of the States being availed so as unduly to hamper the freedom of inter-State trade and commerce which, for the first time, the Constitution declared by Art. 301. In this context it also became necessary to provide that the foreign trade of the country should not be affected at all by the sales-tax structure of the States, while at the same time indicating that the internal trade could be permitted to bear a limited burden of taxation. It is in reconciliation of these various ideas that Art. 286 (1) and (2) were drafted.

(133) Judged in this light the following is the only reasonable construction of Art. 286 (1) (a) taken with the Explanation. This provision, while intended to prohibit taxation by States on outside sales was also meant to demarcate the boundary between inside sales and outside sales and to assimilate one particular category of outside sales into the filed of inside sales and to make it available for taxation by the consuming State. The underlying aim of this demarcation was to obviate the inequity of one State levying a tax whose ultimate incidence was on the residents of another State but to provide instead an elastic source of taxation which in its effect was to be against its own residents.

The field of export trade is completely marked off as not being available for the operation of sales-tax by Art. 286 (1) (b). Then the ban on sales in the course of inter-State trade and commerce is declared. This ban, which was for a totally different purpose cannot be so construed as to nullify the positive results intended and brought about by Art. 286 (1) (a) read with the Explanation. To such a situation the principle of harmonious construction would apply as enunciated by Lord Herschell in — 'John Carter Colquhoun v. Henry Brooks', 1889-14 AC 493 (Z41), at p. 506 in the following terms:

"It is beyond dispute that we are entitled and indeed bound when construing the terms of any provisions found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act".

If, as my learned brother, Venkatarama Aiyar J., is inclined to think, a sale cannot be said to have occurred in the course of inter-State trade and commerce if the sale 'follows' the completion of the inter-State transportation of goods, as for instance, would be the case when a hawking pedlar brings goods across a State boundary and vends it from door to door in another State, then clearly the fiction which brings about the notional inside sale would by itself be sufficient to take such a sale out of the category "of the course of inter-State trade and commerce". Because, in such a situation, while the transportation of goods across State boundaries remains as a fact, the sale itself is deemed to be inside the consuming State, the very purpose of the fiction being to shift the 'situs' of the sale for the purpose of taxability.

It is, I think, in this sense that in the earlier decision, the learned then Chief Justice laid down that by virtue of the Explanation this particular category of inter-State sale became an intra-State sale, of course, not for all purposes, but for the limited purposes for which the Explanation was inserted, viz., the purpose of demarcating the taxable field from the non-taxable field. Looked at either on the ground of harmonious construction or on the

ground that the notional inside sale brought about by the Explanation ceased, by that very fiction, to be part of the course of inter-State trade and commerce 'for taxation purposes', the only proper construction of Art. 286(2) would be that it cannot override Art. 286(1)(a) taken with the Explanation.

Having indicated the broad lines on which I have, on independent consideration of the construction of Arts. 286 (1) and (2), arrived at the same construction as that adopted in the 'United Motors case (B)', it is unnecessary for me to deal with all the various aspects raised before us in the course of the arguments, except to express my general agreement with a good deal of the reasoning of my learned brother, Venkatarama Aiyar J., on this part of the case. It is, however, necessary to refer to a few matters referred to in the contrary view.

(134) The contrary opinion adopted by my learned brothers is based almost entirely on the view that Art. 286 is inspired by the anxiety of the Constitution to prevent the mischief of multiple taxation, which arose from the operation of the pre-existing sales-tax laws. It is said that this result was achieved by covering all loopholes from various angles Arts. 286(1)(a), 286(1)(b), 286(2) and 286 (3) being said to be the four plugging points. With respect, I can only think that this is the outcome of an overdrawn picture as to the chaos said to have been created by the earlier pre-Constitution sales-tax laws.

As already pointed out, the common feature of all the previous ten sales-tax Acts, was to bring about limited multiple taxation in respect of outside sales at two points, viz., (1) transfer of ownership within the taxing State, & (2) the actual presence of goods in the taxing State at the point of time when the transfer of ownership takes place in another State.

It must be mentioned that 'none' of the sales-tax Acts took the 'mere' presence of goods in the State as enabling it to levy the tax. What was taken as enabling taxation was the existence of goods within the State at the crucial point of time, viz., the point at which the ownership became transferred wherever it may be. Once this is appreciated, it is difficult to agree with the assumption that under the pre-existing law, the taxation might get multiplied in the course of the transit of goods under sale through a number of States, if the goods happened 'to remain' in the successive States for some time.

In none except one of the States would the goods be in actual existence at the single crucial point of time of transfer of ownership. Hence, I am clear in my mind that the previous legislation would not have normally involved taxation of the same sale with an outside element, at more than two points. (Whether even this would not get limited by the fact that a "dealer" is defined in all the then Acts as "within the Province" would be a matter for consideration).

Four of the then provincial units had, as already stated, an additional criterion for taxation. But, so far as Madras and Mysore were concerned that criterion which relates to future goods cannot be cumulative with criterion two. So far as U. P. and Bihar are concerned which authorised the manufacturing State as such to levy the tax, it appears to me that if it is borne in mind that this is limited to the sale 'by the very manufacturer', this was also not likely to operate as a cumulative point.

Even otherwise these additional criteria might, if at all, have given rise to taxation at a third point, when the sale transaction had to be put through via these particular States. But even so there is no justification for the impression of chaotic conditions resulting therefrom which has been assumed. There is no evidence before us that prior to the Constitution there was 'in fact' multiple taxation of seales in operation, at any rate at more than the two points as explained by me above.

Hence in the light of the detailed scrutiny of the provisions in the various sales-tax Acts which were in force prior to the Constitution, I cannot help feeling that the mischief of multiple taxation which might if at all have existed in a limited measure as pointed out above, has been over-stated. No doubt, the future prevention of such multiple taxation by invoking the nexus theory recognised by the Privy Council in AIR 1948 PC 118 (Y), may well be one of the 'results' of Art. 286.

But I am unable to think that the main purpose underlying each and every one of the provisions of Art. 286 was to prevent the continuance of pre-existing chaotic conditions of multiple taxation by virtue of the nexus theory. I cannot help feeling that a wholly wrong impression of the pre-existing state of law in this respect has been created by overlooking that the existence of goods in a particular State has been taken as a taxing point 'only if' that existence was at the crucial moment of transfer of ownership. (A statement showing the definition of "sale" under each of the sales-tax Acts in operation just prior to the Constitution is appended — as Appendix I — for reference.)

(135) On the construction of Art. 286, reference has also been made in the dissenting view to sub-Art. 3 of Art. 286 which runs as follows :

"No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the commu-

nity shall have effect unless it has been reserved for the consideration of the President and has received his assent."

With great respect, I am unable to see its bearing on the question at issue. It is a totally different kind of restriction from what sub-Arts. (1) and (2) bring about. While sub-Arts. (1) and (2) impose certain bans on taxation what sub-Art. (3) does is 'not' to impose a ban at all but to impose a fetter in respect of taxation on sales of essential goods declared as such by the Parliament by requiring that before such a taxation-law can have any effect, it should be reserved for the consideration of the President and receive his assent. In this respect it is in line with what would happen if any other State legislation passed by that Legislature is presented to the Governor for his assent 'and' he reserves the same for the consideration of the President.

The only difference is that while in the latter the reservation for the President is optional, in the case of such essential goods the reservation is compulsory. Subject to this, even essential goods continue to be, in theory and by Constitution, taxable (by the States themselves) in respect of sales thereof. I am, therefore, unble to see the bearing of this provision on the construction of the other two provisions which bring about a total or contingent ban of taxation in respect of the sales to which they have reference.

(136) There is one other matter which has been stressed or implied in the dissenting view and it is this. The assumption is that even a single point tax on a sale arising in the course of inter-State trade would be a burden on the freedom of inter-State trade and commerce guaranteed under the Constitution by Art. 301 which runs as follows :

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

Now it is not disputed that a tax on a purely internal sale which occurs as a result of the transportation of goods from a manufacturing centre within the State to a purchasing market within the same State is clearly permissible and not hit by anything in the Constitution. If a sale in that kind of trade can bear the tax and is not a burden on the freedom of trade, it is difficult to see why a single point tax on the same kind of sale where a State boundary intervenes between the manufacturing centre and the consuming centre need be treated as a burden, especially where that tax is ultimately to come out of the residents of the very State by which such sale is taxable.

Freedom of trade and commerce applies as much within a State as outside it. It appears to me again, with great respect, that there is no warrant for treating such a tax as in any way contrary either to the letter or the spirit of the freedom of trade, commerce and intercourse provided under Art. 301.

(137) For all the above reasons, I am quite clear in my mind that the view taken in the prior decision, viz., that the consuming State has the present power to tax a fictional inside sale which falls within the scope of the Explanation and that the said power is not affected by Art. 286(2) and that Art. 286(2) cannot be construed as overriding Art. 286 (1)(a) read with the Explanation, is correct and that there is no reason to depart from that decision.

(138) The real difficulty, if any, that arises from this view is as regards what has been called the extra-territorial operation of the tax which such a view may involve. In the conclusion reached by my learned brothers who are prepared to uphold the dissenting view taken in the prior decision that question does not arise for consideration and has been left untouched.

I do not, therefore, feel called upon to go into it or to commit myself to any particular view on this somewhat difficult question. I am doubtful whether, as between the component States of a Union of the kind, which India is under the Constitution, there can be any question of extra-territoriality in the sense of the doctrine that one nation does not act in aid of the revenue laws of another (and foreign) nation.

It is true that a defined geographical part of India constitutes the territory of each unit called the State and that the governance of that unit is committed to that State. But it appears to me that on that account, the territory of one State is not a foreign territory in respect of another State, when freedom of movement and a number of other common fundamental rights are guaranteed.

On the other hand, I think it permissible to suggest that where the various States owe their existence to the same Constitution and are subject to its common operation, any taxing power vested in an individual State must carry with it the incidental implication of enforeability, if need be, in any other State within the Union when the very nature of that tax, as contemplated by the Constitution involves it.

In this context Art. 261(1) which enjoins that full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State, may well be relied upon to justify such a view. I am aware that this has been generally taken as applicable to judicial and legislative proceedings.

But the language of the Article is capable of wider application. I do not, however, wish

to go into the matter further because even if in the course of the administration of sales-tax, of the kind permissible, in the view of Art. 286 which the prior decision has accepted, there emerges the element of extra-territorial operation of such a tax, that by itself can be no reason for negativing the construction of Arts. 286(1) and (2) above indicated. In this context it is necessary to bear in mind the following clear dictum of the Privy Council in — 'British Columbia Electric Railway Co., Ltd. v. The King', 1946 AC 527 at p. 542 (Z42).

"A legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account, and the courts of its country must enforce the law with the machinery available to them."

The question, therefore, of extra-territoriality is not germane for construction of Art. 286.

(139) At the present stage we are not concerned with the enforcement of the levy of the assessed tax but with the assessment of the tax. All that we are concerned with is the validity of the steps so far taken by the assessment authorities and particularly of the notice dated 29-5-1952, which intimates that on non-compliance before 14-6-1952, proceedings for assessment on the basis of "best judgment" will be made.

That step, to my mind, is perfectly valid as appears from the following. In — 'Whitney v. Commissioners of Inland Revenue', 1926 AC 37 (Z43), the House of Lords by a majority held that where a tax was leviable on a non- resident, a requisition served upon him by post to file a return and to produce accounts was valid so as to entitle the taxing authority to make an assessment on the basis of best judgment on non-compliance with the requisition. The following passage from Lord Wrenbury's speech at page 56 is instructive :

"There is a second question in the case — namely, whether the appellant has been duly brought within the machinery for assessment provided by the Act. This turns upon S. 7. There was sent to the appellant by post addressed to him in the United States a notice under S. 7, sub-s. 2, requiring him to make a return.

It is contended that there was no right to post him such a notice so addressed. The case, it is contended, is similar to the case of service of a writ out of the jurisdiction. I do not agree. It is similar rather to the service of a notice of dishonour of a bill or of a notice to quit or of a notice requiring payment of calls upon shares as a preliminary to forfeiture in default of payment.

It is not a step in judicial proceeding but a step which will create inter partes a state of things in which judicial proceedings can subsequently be taken in default of compliance."

(140) It may be that some or all of the provisions in the Bihar Act which contemplate enforcement out of State or create penalties for non-compliance out of State may require closer examination when the validity thereof is directly challenged. It may also be that the harassment consequent on such outside operation may require to be remedied either by agreed co-ordination between the States or by appropriate legislation, if need be. These, however, are not relevant considerations for us on the question we have now to deal with.

(141) I am accordingly clear in my opinion that this appeal should be dismissed with costs.

APPENDIX—I.

STATEMENT SHOWING THE DEFINITION OF "SALE" UNDER EACH OF THE SALES-TAX ACTS IN OPERATION JUST PRIOR TO THE COMMENCEMENT OF THE CONSTITUTION.

(Vide Page 721, Para 134)

MADRAS SALES-TAX ACT, 1939.

"Sale" (with all its grammatical variations and cognate expressions) means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, (and includes also a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge;)

(Explanation 1: A transfer of goods on the hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale.)

Explanation 2: Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this Province, wherever the contract of sale or purchase might have been made—

(a) if the goods were actually in this Province at the time when the contract of sale or purchase in respect thereof was made, or

(b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this Province at any time after the contract of sale or purchase in respect thereof was made.

BENGAL FINANCE (SALES-TAX) ACT, 1941.

"Sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration..... .

* *

Explanation 2: Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in West Bengal at the time when the contract of sale (as defined in that Act) in respect thereof is made, shall, wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in West Bengal.

BOMBAY SALES-TAX ACT, 1946.

"Sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration..... .

* *

Explanation 2 : Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in the Province of Bombay at the time when the contract for sale (as defined in that Act) is made in respect thereof, shall, wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in the Province of Bombay.

ASSAM SALES-TAX ACT, 1947.

"Sale" means any transfer of property in goods by any person for cash or deferred payment or other valuable consideration..... .

* *

Explanation : Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in the Province at the time when the contract of sale (as defined in that Act) in respect thereof is made, shall, irrespective of the place where the said contract is made, be deemed for the purposes of this Act to have taken place in the Province.

BIHAR SALES-TAX ACT, 1947.

"Sale" means * * any transfer of property in goods for cash or deferred payment or other valuable consideration..... .

* *

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods—

(i) which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in S. 4 of that Act is made, or

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof,

shall, wherever the delivery of contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar;

Provided further that the sale of goods in respect of a forward contract, whether goods under such contract are actually delivered or not, shall be deemed to have taken place on the date orginally agreed upon for delivery.

CENTRAL PROVINCES AND BERAR SALES-TAX ACT, 1947.

"Sale" .....means any transfer of property in goods for cash or deferred payment or other valuable consideration.....

* *

Explanation 2: Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in the Central Provinces and Berar at the time when the contract of sale as defined in that Act in respect thereof is made, shall wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in the Central Provinces and Berar.

ORISSA SALES-TAX ACT, 1947.

"Sale" means ..... any transfer of property in goods for cash or deferred payment or other valuable consideration.....
.....

* *

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Orissa at the time when, in respect thereof, the contract of sale as defined in S. 4 of that Act is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in Orissa.

MYSORE SALES-TAX ACT, 1948.

"Sale" means ..... every transfer of the property in goods by one person to another in the course of trade or business for cash or deferred payment or other valuable consideration .....

* *

Explanation 2: Notwithstanding anything to the contrary in the Sale of Goods Act, 1932, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in Mysore, wherever the contract of sale might have been made:

(a) if the goods were actually in Mysore at the time when the contract of sale or purchase in respect thereof was made, or

(b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in

Mysore at any time after the contract of sale or purchase in respect thereof was made.

EAST PUNJAB GENERAL SALES-TAX ACT, 1948.

"Sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration.....

* *

Explanation 2: Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in East Punjab at the time when the contract of sale (as defined in that Act) in respect thereof is made, shall, wherever the said contract of sale is made, be deemed for the purposes of this Act to have taken place in East Punjab.

UNITED PROVINCES SALES-TAX ACT, 1948.

"Sale" means ..... any transfer of property in goods for cash or deferred payment or other valuable consideration.....

* *

Explanation II. Notwithstanding anything in the India Sale of Goods Act, 1930, or any other law for the time being in force, the sale of any goods—

(i) which are actually in the United Provinces at the time when in respect thereof, the contract of sale as defined in S. 4 of that Act is made, or

(ii) which are produced or manufactured in the United Provinces by the producer or manufacturer thereof, shall wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in the United Provinces.

Explanation III. Where goods under a forward contract are not actually delivered, the sale in respect of such contract shall be deemed to have been completed on the date originally agreed upon for delivery.

Note: The omitted portions in the definitions other than those in the Madras Act are to the same effect as those shown within brackets in the Madras definition.

VENKATARAMA AYYAR J.:

(142) The appellant is a Company registered under the Indian Companies Act carrying on business in the manufacture and sale of Sera, biological products and medicines. Its registered office is at No. 153, Dharamtalla Street, Calcutta, and its laboratory and factory are situated at Baranagar, 24 Paraganas, West Bengal. Respondent 1 is the State of Bihar, and respondents 2 and 3 are respectively the Secretary and the Assistant Secretary of Commercial Taxes. On 18-12-1951, respondent 2 issued a notice under S. 13 (5) of the Bihar Sales Tax Act, 1947 (Act 19 of 1947) (hereinafter referred to as the Act) calling upon the appellant to register itself as a dealer under the Act and to submit a return for assessment of sales tax. To this the appellant sent a reply on 8-1-1952 disputing its liability on various grounds, and after further correspondence between the parties which it is needless to set out, respondent 3 sent a notice on 29-5-1952 that if the appellant failed to comply with the notice dated 18-12-1951 by 14-6-1952, steps would be taken to assess tax on the basis of best judgment.

The appellant replied by filing the application out of which the present appeal arises, under Art. 226 of the Constitution for a writ of prohibition restraining the respondents from proceeding with the assessment. It was alleged in the petition that as the appellant had no place of business within the State of Bihar, the provisions of the Act under which it was sought to be taxed were 'ultra vires' as extra-territorial in operation, and that further those provisions were repugnant to Art. 286 (2) of the Constitution and were therefore void. The State of Bihar, which will hereafter be referred to as the respondent, resisted the application on the ground firstly, that it was not maintainable for the reason that the appellant had, under the provisions of the Act, a right of appeal against the assessment to the appropriate authorities, and secondly, that as the sales proposed to be taxed must be deemed to have taken place by reason of the Explanation to Art. 286 (1)(a) within Bihar, the provisions of the Act imposing tax on a non-resident seller were neither 'ultra vires' nor unconstitutional.

The learned Judges of the High Court upheld both these contentions and dismissed the application, and this appeal has been preferred against their judgment on a certificate granted under Art. 132(1) of the Constitution. In view of the importance of the issues involved, leave of the Court was sought by and granted to ten States, one commercial firm and one individual dealer. Nine out the ten States, namely Orissa, Pepsu, Punjab, Madhya Pradesh, Madras, Mysore, Rajasthan, Travancore-Cochin and Uttar Pradesh, have intervened and supported the respondents. One State, West Bengal, represented by the learned Attorney-General supported the appellant, and so did the Tata Iron and Steel Co., Ltd., and one M. K. Kuriakose.

(143) On the arguments addressed before us, the following points arise for determination:

1. Whether the application for a writ of prohibition is maintainable?

2. Whether the Explanation to Art. 286 (1) (a) confers authority on the State Legislatures to impose tax on sales falling within its purview?

3. Whether the sales covered by the Explanation to Art. 286 (1) (a) are subject to the prohibition contained in Art. 286 (2)?

4. Whether the Bihar Sales Tax Act, 1947 is invalid on the ground that it is extra-territorial in its operation, and 'ultra vires' the power of the State Legislature?

5. Whether the assessment proposed to be made on the appellant is not authorised by the Explanation to Art. 286 (1) (a)?

(144) 1. On the question of the maintainability of the application for a writ of prohibition, it was observed by the learned Judges that under S. 13 (5) of the impugned Act, the Commissioner was competent to decide whether the appellant was a person liable to pay tax under the Act, that even if he came to an erroneous conclusion on the merits, that did not affect his jurisdiction over the subject-matter, that the Act itself provided in Ss. 24 and 25 a complete and effective machinery by way of appeal and revision for correction of such errors, and that accordingly a writ of prohibition was not the proper remedy. If the learned Judges intended to lay down that a writ of prohibition should not issue because another remedy was open under the Act, that cannot be supported.

The existence of another remedy is a very material circumstance to be taken into account when the Court is called upon to issue a writ of 'certiorari', but wholly different considerations arise when the writ asked for is prohibition. Writ of prohibition is issued whenever a subordinate Court or Tribunal usurps jurisdiction which does not belong to it, and when that has been shown, the issue of the writ, though not of course, is of right and not discretionary. The point to be determined, therefore, is whether in taking proceedings under S. 13 (5) of the Act, respondents 2 and 3 acted without jurisdiction or in excess of it.

The contention of the appellant is that the Bihar Legislature had no competence to tax the sales in question, because they were effected in Bengal, and the appellant was not carrying on business within the State of Bihar. If this contention is well-founded, then S. 13(5) of the Act would be void & inoperative in its application as against the appellant, and the proceedings taken thereunder would in consequence be without jurisdiction. We are not here concerned with a statute whose 'vires' is not in question, and which confers jurisdiction on any authority to take proceedings if certain facts exist and the enquiry directed by the authority is as to whether those facts exist. The determination in such a case is incidental to the effective exercise by the authority of its undisputed jurisdiction and if, as a result of that enquiry, it came to an erroneous conclusion, there is no error of jurisdiction, and it might well be contended in that case that the remedy of the party aggrieved was to resort to the machinery provided in the statute itself by way of appeal or revision, and that a writ of prohibition would be misconceived.

But here, the contention of the appellant is that the statute itself is void in so far as it authorises the imposition of a tax on dealers who are not residents within the State or do not carry on business there, and that, in consequence, the proceedings taken under S. 13(5) of the Act should be restrained on the ground of want of jurisdiction. It is no answer to this contention that the appellant should seek redress through the channels provided in the Act therefor. Indeed, the contention that the Act is 'ultra vires' is not one which the Tribunals constituted under the Act, whether original, appellate, or revisional, could entertain, their duty being merely to administer the Act.

(145) It was argued by Mr. N. C. Chatterjee that if the tax was illegal, as contended by the appellant, then the proceedings taken for imposing the same would amount to unconstitutional interference with the fundamental right of the appellant to carry on business guranteed under Art. 19 (1) (g), and that the courts were bound to interfere under Art. 226. He relied on the decisions of this Court in 'AIR 1952 SC 115 (A)'; 'AIR 1953 SC 252 (B)' and 'AIR 1954 SC 403 (C)'.

That is undoubtedly the position in law, but as the appellant is a Company registered under the Indian Companies Act and the question whether a juristic person is a citizen for the purpose of Art. 19 (1) (g) is still an open one, I would prefer not to rest my decision on this ground. It is sufficient for the purpose of this appeal to hold that a writ of prohibition should issue, if the appellant establishes that the proceedings taken against it under S. 13 (5) of the Act are without jurisdiction. The contentions urged in support of that position must now be examined.

(146) 2. It is firstly argued that the Explanation to Art. 286 (1) (a) on which the validity of the impugned Act depends confers no authority on the State Legislature to impose a tax on sales falling within its purview. To appreciate the contentions advanced on either side, it must be mentioned that the Act as passed in 1947 contemplated the imposition of a tax on residents within the State. They might be natural persons, or they might be juristic persons carrying on business within the State. The business might be,

carried on in person or through agents. But if the persons who carried on the business of buying and selling did not reside within the State or carry on business there, then the Act did not authorise the imposition of tax on them. That was the effect of the definition of "dealer" as meaning "any person who carries on the business of selling or buying goods in Bihar".

Then came the Constitution, and the Explanation to Art. 286 (1) (a) enacted that sales shall be deemed to have taken place in that State in which the goods are delivered for consumption, notwithstanding that title to them passed in another State. The construction which the respondent puts on the Explanation is that it confers on the States 'proprio vigore', a power to tax sales when the conditions mentioned therein are satisfied. Agreeably to this view, the Bihar Finance Act, 1950 (Act 17 of 1950) substituted for the words "who carries on business of selling or buying goods in Bihar" the words "who sells or supplies any goods". The point to be noted is that the words "in Bihar" which occurred in the previous definition were omitted. In 1951 by the Adaptation of Laws Order, a new section, S. 33, was added, and that is as follows:

"33. (1) Notwithstanding anything contained in this Act,—

(a) a tax on the sale or purchase of goods shall not be imposed under this Act—

(i) where such sale or purchase takes place outside the State of Bihar; or

(ii) where such sale or purchase takes place in the course of import of the goods into, or export of the goods out of, the territory of India;

(b) a tax on the sale or purchase of any goods shall not, after the 31st day of March 1951, be imposed where such sale or purchase takes place in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide.

(2) The Explanation to Cl. (1) of Art. 286 of the Constitution shall apply for the interpretation of sub-cl. (i) of Cl. (a) of sub-s. (1)".

The contention of the respondent is that the appellant has become liable to be taxed under these provisions. The appellant replies that Art. 286 (1) (a) is restrictive in its scope, that it merely takes away a power to tax which the State might otherwise possess, but that it does not positively confer on a State a power to tax where it did not previously exist, and that on its true construction, it would operate to divest Bengal of its power to tax but not to vest it in Bihar. To decide which of these two contentions is the correct one, it is necessary to examine what the law was prior to the enactment of Art. 286 (1) (a) and the Explanation, what the defect was which was disclosed in the working of that law, and how it was proposed to remedy it.

(147) Under the Government of India Act, 1935, the power to enact a law imposing tax on sale of goods was conferred on the Provincial Legislature by Entry 48 in List II. Under Ss. 99 (1) and 100 (3) that law must be for the Province, and as interpreted in 'AIR 1948 PC 118 (Y)', that meant that there should be sufficient territorial connection between the person proposed to be taxed and the State seeking to tax with reference to the subject-matter of the taxation. Dealing with this aspect of the matter, Patanjali Sastri C. J., observed in 'AIR 1953 SC 252 (B)', as follows:

"The expression 'for such State, or any part thereof' cannot, in our view, be taken to import into Entry 54 the restriction that the sale or purchase referred to must take place within the territory of that State. All that it means is that the laws which a State is empowered to make must be for the purposes of that State .....

In the case of sales-tax it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. Broadly speaking, local activities of buying and selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately resulted in a concluded sale or purchase to be taxed".

This statement of the law was again adopted by this Court in 'AIR 1953 SC 274 (Z27 & Z28)'. Vide the observations of Mukherjea J., (as he then was) at p. 276. In this view, a law of the State imposing a tax on sales must, to be valid, fulfil two conditions. Firstly, there must be a completed sale involving the transfer of title in the goods to the purchaser. It is only then that the power to tax arises. That was held by this Court in 'AIR 1954 SC 459 (Z18)'. Secondly, there must be sufficient territorial nexus between the transaction and the State which seeks to tax it. This condition undoubtedly introduced an element of uncertainty and vagueness in the law with the result that the power to tax which was linked up with it, had indefiniteness which could lend itself to abuse. How expansive was the area open to the State Legislature to impose a tax on the basis of the nexus theory is forcibly brought out by Bose J., in the following observations in 'AIR 1953 SC 252 (B)', at p. 264:

"The difficulty is apparent when one begins to split a sale into its component parts and analyse them. When this is done, a sale

is found to consist of a number of ingredients which can be said to be essential in the sense that if any one of them is missing there is no sale. The following are some of them: (1) the existence of goods which form the subject-matter of the sale, (2) the bargain or contract which, when executed, will result in the passing of the property in the goods for a price, (3) the payment, or promise of payment, of a price, (4) the passing of the title. When all take place in one State, there is no difficulty. The situs of the sale is the place in which all the ingredients are brought into being. But when one or more ingredients take place in different States, what criterion is one to employ? It is impossible to say that any of these ingredients is more essential than any other because the result is always the same the moment you take one away. There is then no sale".

Many were the problems which this state of the law created both for the State and for the consumers. Whether the fact on which a State law seeks to tax is sufficient nexus must, except in some obvious cases, be open to debate, and until a Court pronounces on it, there must be a cloud of uncertainty hanging over the validity of the enactment. More than that, when the several elements which go to make up a sale are distributed over different States it might happen that the same transaction might be subjected to tax by more States than one and the burden thereof must ultimately fall on the consumers. It was this, the possibility of multiple taxation that was the most serious defect in the law as it stood prior to the Constitution, and it was to remedy this that a new provision, Art. 286 (1)(a) with its Explanation was enacted. It is as follows:

"286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State.

Explanation.— For the purposes of sub-cl. (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State".

It will be convenient hereafter to refer to the State in which title to the goods passes as the selling State, and the State in which goods are delivered for consumption as the delivery State.

(148) Now, we may examine how this provision is designed to put an end to multiple taxation. The scheme of the enactment is to fix, what had not been done under the Government of India Act, 1935, the 'situs' of the sale, and for that purpose, to classify it into two categories, sale inside the State and sale outside the State. On what principle the 'situs' was fixed will presently be considered. But when once that is done, the problem is solved. If a sale is inside a State, the power of that State to tax it under Entry 54 remains unaffected. But if the sale is outside a State, Art. 286 (1) (a) prohibits that State from taxing it. This process must have the effect of eliminating multiple taxation, because a sale must be either inside or outside a State, and if it is inside one State it must be outside all other States.

In this respect, Art. 286 (1) (a) effected a fundamental alteration in the law under Entry 48 in List II and S. 100 (3), Government of India Act, 1935, as construed by the Courts. Whereas under these provisions a State could tax irrespective of where a sale took place, provided there was sufficient territorial nexus, under Art. 286 (1) (a) that power can be exercised only when it takes place inside the State, mere nexi being insufficient to support such a power. The theory of nexus as a source of jurisdiction to tax was thus abandoned, and the power to tax was annexed to the 'situs' of the sale to be exercised by the State wherein it is fixed and as a given sale can take place only in one State and in no other, it must follow that the power of taxing that sale is capable of exercise only by one State and not others.

(149) The foundation on which this scheme rests is the location of a sale in a particular State. But how is this to be done? When all the essential elements of a sale take place within one State, the question presents no difficulty. But what, if they are distributed over several States? It is to deal with this situation that the Explanation has been enacted. Its purpose is to fix the 'situs' of a sale when it is of an inter-State character, and it does that by providing that it shall be deemed to have taken place in that State in which the goods are delivered for consumption. What the significance of the words "for consumption" is, will be considered in due course.

But that apart, it is delivery of the goods that has been adopted by the Constitution as the determining factor in fixing the 'situs' of the sale, not the agreement to sell, nor the passing of title to the goods, nor other ingredients of sale, and there is good reason for this. Where an agreement to sell is concluded by correspondence as generally it must be when the transaction is of an inter-State character, difficult questions might crop up as to where the agreement was concluded. Likewise, the conception as to passing of property in the

goods is largely juristic & not seldom obscured by legal subtleties & refinements, & it is conceivable that there might be conflict among the State as to in which of them the title has passed.

But delivery is a matter of fact, about which there ought to be no dispute, and it is consistent with the purpose of Art. 286 (1) (a) that the Explanation should have chosen delivery as the determining element in the transaction of sale. Now, the question to be decided is whether in the light of the above discussion, the contention of the appellant that the Explanation operates only to deprive the selling State of its power to tax the sale, and that it confers no authority on the delivery State to impose a tax can be accepted.

An obvious objection to this view might at once be stated. If the Explanation has no application to any but the selling State, it must follow that all the other States including the delivery State will have power to impose a tax under Entry 54 uncontrolled by the Explanation, and that will bring into play the nexus theory with its attendant evil of multiple taxation. On this contention, therefore, Art. 286 (1) (a) must be held to have failed to achieve what it set about to do. A construction which leads to such a conclusion cannot be accepted unless there are cogent reasons therefor. What are those reasons?

It is urged that Art. 286 (1) (a) does not, in terms, purport to confer a power on the State to impose a tax on sale, that, on the other hand, it assumes the pre-existence of such a power in the State, and then proceeds to restrict it, that the substantive provisions which confer power to tax are Entry 54 in List II and Art. 246 (3), that when a State has no power to tax under those provisions, then Art. 286 (1) (a) could have no application as there could be no question of restricting what does not exist, and that it could not, therefore, operate to confer on it such a power.

In support of this position, reliance is placed on the form of Art. 286(1)(a) that no law of a State shall impose a tax on outside sale. This prescription, it is argued, is merely negative and destructive and not positive and creative in its content.

(150) But this contention does not give sufficient effect to the Explanation which is in substance and form positive, and it also fails to take adequately into consideration the purpose of the enactment. The object of Art. 286 (1)(a)— and there is no dispute about it—is to avoid multiple taxation and that, as already stated, was sought to be achieved by fixing the 'situs' of sale in one State in accordance with the Explanation. The scheme of the enactment must, by its very nature, have both a positive and a negative aspect. In so far as it lays down which of the several States could tax—and it does that in the Explanation—it is positive in its aspect, and in so far as it prohibits the other States from imposing tax—and it does this in the body of Art. 286-(1)(a) —it is negative in its aspect.

The body of Art. 286(1)(a) & the Explanation together form parts of a single enactment charged with a single purpose and to refer to it either as negative or positive in character can only be a partial and not an accurate statement of the true position. It is no doubt true that Art. 286 (1) (a) assumes that there is in the State a power to tax 'aliunde', and then proceeds to restrict it. But it is not inconsistent with this to construe the Explanation as positive in character. The problem of multiple taxation, which it is the object of the enactment to avoid, is possible only when the sale is of an inter-State character, and when the Explanation enacts that in such cases the sale shall be deemed to have taken place in the delivery State, that is at once a recognition and a declaration by the Constitution that delivery is sufficient nexus on which the State can tax the sale under Entry 54.

The object of this declaration was to remove the question from the arena of controversy and settle it once and for all. It is thus a positive enactment and not the less so, because it is declaratory in character and it is also restrictive in that it takes away by necessary implication the power of taxation on the basis of other nexi which other States would have had under Entry 54. No purpose would be served by entering into a subtle disputation as to whether the Explanation conferred a new and substantive power, or whether it affirmed an existing power. In either case, the power of the delivery State to tax could not be challenged.

(151) Looking at the form of the Explanation, it is emphatically positive in that it declares that the sale shall be deemed to have taken place in the delivery State, and that is all the more significant in view of the fact that the body of Art. 286 (1) (a) to which it is appended is negative in form. The changeover from the negative of the body of Art. 286 (1) (a) to the positive of the Explanation is highly significant, and the appellant has been unable to suggest any reason for this, except inadvertence and slovenliness on the part of the draftsman.

(152) The marginal note to Art. 286 was also referred to as showing that the Explanation was merely restrictive in character. In — 'Thakurain Balraj Kunwar v. Rae Jagat Pal Singh', 31 Ind App 132 at pp. 142, 143 (PC) (Z44), Lord Macnaghten observed:

"It is well settled that marginal notes to the sections of an Act of Parliament cannot

be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament".

The reason on which this rule rests was thus stated by Baggallay L. J., in — 'Attorney-General v. G. E. Ry', (1879) 11 Ch D 449 at p. 461 (Z45):

"I never knew an amendment set down or discussed upon marginal notes to a clause. The House of Commons has nothing to do with a marginal note."

Vide also the observations of Lord Hanworth, M. R., in — 'Nixon v. Attorney-General 1930-1 Ch 566 at p. 593 (Z46). This reasoning applies with equal force to marginal notes in Indian statutes. In my opinion, the marginal note to Art. 286(1)(a) cannot be referred to for construing the Explanation. It is clearly inadmissible for cutting down the plain meaning of the words of the Constitution. Vide — 'Commissioner of Income-tax, Bombay v. Ahmedbhai Umarbhai & Co.', AIR 1950 SC 134 at p. 141 (Z47).

(153) Two other views as to the scope of the Explanation which were discussed by the learned Attorney-General in the course of his argument must now be noticed. One is that the Explanation does not deprive the selling State of its power to tax under Entry 54 but confers additional power of taxation on the delivery State. And the other is that the Explanation merely settles the competing claims of the selling and of the delivery State, and leaves untouched the power of the other States to tax on the basis of the nexus theory. Neither of these views has been pressed by any of the parties before us, and both of them are open to the objection that they would result in multiple taxation, which it was the purpose of the Explanation to avoid, and must in consequence be rejected. In the result, whether regard is had to the object of the enactment or its language, the Explanation must be held to authorise the imposition of tax by the delivery State.

(154) 3. It is next contended by the appellant that the sales covered by the Explanation to Art. 286(1)(a) are within the prohibition contained in Art. 286(2) and that in consequence the charge sought to be imposed on such sales by the impugned Act is illegal and void. That raises the question as to what the scope of the Explanation to Art. 286(1)(a) is, and whether it is controlled by Art. 286 (2). The Explanation declaring as it does that the 'situs' of a sale for purposes of taxation is the delivery and not the selling State can apply, by its very terms, only to sales of an inter-State character, and that is the basis on which the argument of both the parties to the appeal has proceeded. Article 286(2) prohibits the imposition of tax on sales in the course of inter-State trade. Thus, the field on which the Explanation operates falls within the area covered by Art. 286(2), and there is apparently a conflict between them. Now the question is how the power of a State to tax on the basis of the Explanation is affected by the impact of Art. 286(2), and on that, three views have been put forward :

(a) The Explanation fixes the 'situs' of the sale in the delivery State. It becomes thereby a sale inside that State and outside all other States. It accordingly ceases to be a sale in the course of inter-State trade and becomes an intra-State sale and is, therefore, outside the purview of Art. 286(2); and the power of the delivery State to tax under the Explanation remains unaffected. That was the view taken by the majority of the learned Judges in AIR 1953 SC 252 (B), and according to it, there is no conflict between the Explanation and Art. 286(2).

(b) The sales to which the Explanation applies are in the course of inter-State trade, and fall within the coverage of Art. 286(2), and there is thus a conflict between the two provisions, but the Explanation deals with a special topic, and therefore prevails against Art. 286(2) on the principle of 'generalia specialibus non derogant', and the power to tax thereunder is unaffected. That was the view taken by Bhagwati, J. in AIR 1953 SC 252 (B).

(c) The sales to which the Explanation applies are in the course of inter-State trade, and are hit by Art. 286(2) and unless Parliament lifts the ban as provided therein, no tax can be levied on them. According to this view, the two provisions are irreconcilably in conflict, and Art. 286(2) must prevail as against the Explanation unless its operation is superseded by Parliamentary legislation. This was the view taken by Bose, J. in AIR 1953 SC 252 (B), and by Das, J. in AIR 1953 SC 333 (U). The points for determination are thus whether there is conflict between the Explanation to Art. 286(1)(a) and Art. 286(2), and if so, which of them is to prevail. To decide this, it is necessary to examine first what the position was under the Government of India Act, 1935, and next how it has been affected by the provisions of the Constitution.

(155) Under the Government of India Act, 1935, the Provinces had under Entry 48 in List II the exclusive power to make laws in respect of taxes on sale of goods, and under Entry 27, in respect of trade and commerce within its territory. There was no entry relating to trade and commerce

among the Provinces though several topics relating to inter-State trade and commerce were specifically enumerated in List I. Nor was there any provision for regulating inter-State commerce though under S. 297 some restrictions were placed on the powers of the Provincial Legislature with reference thereto.

The conception of a commerce clause, as we now have it, was unknown to the Government of India Act, 1935. It came in for the first time as part of the Constitution. To understand its true scope, it would be legitimate and indeed necessary to examine its bearings and incidents in other systems of law. The American Constitution is the oldest written Federal Constitution in the world, and the problems it had to deal with were what many Federal Governments have had since to face. The commerce clause is one of its notable provisions, and it was before the framers of the British North America Act, 1867 and of the Commonwealth Act of Australia, 1900. Our Constitution also has largely been influenced by it, and it would be useful to examine it to see what light it throws on the present controversy.

(156) In America the authority of the Congress to enact laws on the matters delegated to it under the Constitution is supreme. In respect of all other matters, the States possess plenary powers of legislation subject to the inhibitions contained in the Constitution. It is in exercise of these powers that the States enact laws regulating sales and imposing tax on them. Under S. 8 of Art. 1 of the Constitution, the power "to regulate commerce among the States" is vested in the Congress. Thus, while intra-State commerce is within the exclusive jurisdiction of the State, inter-State commerce is within the exclusive jurisdiction of the Congress.

A question which came up frequently for decision before the Courts was whether the States had the power to enact laws with reference to goods which had come into a State in the course of inter-State trade, and it was settled on the highest authority that if the sale was for the purposes of consumption within the State it became domestic in its character, and fell within the power of the State to regulate and to tax, but that if it was for purposes other than consumption such as re-sale, then that was in the course of inter-State commerce, and Congress alone had the jurisdiction to legislate in respect of it.

In — 'Pennsylvania Gas Co. v. Public Service Commission', (1919) 252 US 23 (Z48), the question was as to the validity of a statute of New York regulating the rates which could be charged for sale of natural gas for consumption within the State. The gas was transported into the State by pipe lines from outside, and it was accordingly held that the regulation was in respect of inter-State trade and commerce, and was therefore "subject to applicable Constitutional limitations" but that the State law was valid because

"the thing which the State Commission has undertaken to regulate, while part of inter-State transmission, is 'local in its nature', and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the State of New York".

In — 'Missouri ex rel. Barrett v. Kansas Natural Gas Co.', (1923) 265 US 298 (Z49), the facts were similar except that the sales were not for consumption within the State but for resale. It was held that those sales continued to retain the character of inter-State trade, and fell within the commerce clause. Vide also — 'Public Utilities Commission v. Attleboro Steam & Electric Co.', (1926) 273 US 83 (Z50).

The principle underlying these decisions would appear to be that goods which are transported in inter-State trade must necessarily come to the end of their journey when they are consumed, and that, therefore, sales for consumption take them out of the course of inter-State trade. But if the goods are sold for resale, they are still moving in inter-State journey and therefore the commerce clause applies.

In 1938 the Congress enacted a legislation with reference to sales in the course of inter-State trade for purposes of resale. Examining the question whether the States had thereafter the power to enact a law regulating sales which take place in the course of inter-State trade but for local consumption, the Supreme Court held in — 'Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana', (1947) 332 US 507 (Z51), that they had, and observed :

"Prior to that time (1938) this Court in a series of decisions had dealt with various situations arising from State efforts to regulate the sale of imported natural gas. The story has been adequately told and we do not stop to review it again or attempt reconciliation of all the decisions or their groundings. Suffice it to say that by 1938 the Court had delineated broadly between the area of permissible state control and that in which the states could not intrude. The former included interstate direct sales to local consumers, the latter, service interstate to local distributing companies, for resale."

It further held that the Congress legislation was itself a recognition of the distinction established by the decisions "between sales for resale and direct sale for consumption". This decision was followed quite recently in — 'Panhandle Eastern Pipe Line Co. v. Michigan

Public Service Commission', (1951) 341 US 329 (Z52). Four propositions might accordingly be taken as well-settled in American law:

(i) The States have plenary and exclusive power of legislation in respect of intra-State sales.'

(ii) Regulation of inter-State commerce is a topic within the exclusive jurisdiction of the Congress.

(iii) Sales which take place in the course of inter-State trade are local in character and within the jurisdiction of the State, if they are for consumption within the State.

(iv) Where such sales are for other purposes than consumption such as resale, they retain their character as sales in the course of inter-State trade and are within the exclusive jurisdiction of the Congress.

(157) The provisions of the Indian Constitution bearing on this subject may now be referred to :

(a) The States have exclusive jurisdiction under Entry 54 to impose sales tax and under Entry 26 to regulate trade and commerce within the State. Legislative powers in respect of these matters were conferred on the Provinces by the Government of India Act, 1935, and these powers have been continued in the States by the Constitution.

(b) Article 301 enacts that trade and commerce within the territory of India shall be free, and under Entry 42 in List I, the power to legislate on inter-State trade and commerce is vested exclusively in the Union. There was nothing corresponding to these provisions in the Government of India Act, 1935.

(c) Under the Explanation to Art. 286(1)(a), a sale is deemed to take place within the State in which the goods are delivered for consumption. This again is a new provision introduced in the Constitution.

(d) No law of a State can impose a tax on a sale which takes place in the course of inter-State trade. That is Art. 286(2) which is also a new provision.

(158) Reading side by side the law on the subject both in America and under the Indian Constitution, it is difficult to avoid the conclusion that the Explanation to Art. 286(1)(a) and Art. 286(2) have been inspired by the American law on the subject, and that their spheres of operation correspond respectively to the jurisdiction of the State and of the Congress in America as delineated in (1923) 265 US 298 (Z49) and (1947) 332 US 507 (Z51).

(159) I shall now pass on to consider which of the three views which have been placed before us as to the effect of Art. 286(2) on the Explanation to Art. 286(1)(a) deserves to be accepted. The first view is that the sales falling within the Explanation are intra-State in character, and are therefore outside the area covered by Art. 286(2).

This derives considerable support from the language of the enactment. The scheme of Art. 286(1)(a) is, as already stated, that it fixes the 'situs' of the sales with a view to avoid multiple taxation, and for that purpose it divides them into two categories — inside sales and outside sales — and enacts that a State cannot tax an outside sale. When in the same context the Explanation declares that a sale in the course of inter-State trade—that this is its scope is common ground—must be deemed to have taken place in the State in which the goods are delivered for consumption, its purpose is clearly to take it out of inter-State trade and stamp it with the character of an intra-State sale. Under Entry 26 in List II, it is the State that has jurisdiction in respect of "trade and commerce within the State", and reading that with the language of the Explanation that the sales covered by it are deemed to take place 'in the State', the inference is irresistible that the intention of the Constitution-makers was to bring those sales within the exclusive jurisdiction of the State for purposes of taxation under Entry 54.

The result is that with reference to sales for local consumption made in the course of inter-State trade, the law under the Constitution is exactly what it is in America and indeed, the similarity is too striking to be merely accidental. The position may thus be summed up : Art. 286(2) applies to sales in the course of inter-State trade. The sales which fall within the Explanation are intra-State sales. The grounds covered by the two provisions are distinct and separate. Each has operation within its own sphere, and there is no conflict between them.

(160) The appellant resists this conclusion on several grounds, and they will now be considered. It was argued firstly that the conclusion that the Explanation and Art. 286(2) relate to two different subjects and that they operate on different fields could be reached only by importing the Explanation into Art. 286(2), and that could not be done because it is in terms stated to be "for the purposes of sub-cl. (a)" and also because such a course could not be supported on any recognised rule of interpretation. Now, what is the significance of the words "for the purposes of sub-cl. (a)" occurring in the Explanation? In the context, its purpose is only to exclude its application to Art. 286(1)(b). Article 286(1) deals with two matters, sales outside the State and sales in the course of export and import. The former is dealt with in sub-cl. (a) and the latter in sub-cl. (b). If the Legislature intended that the Explanation should apply to the former and not to the latter, the most natural and obvious

mode of expressing that intention would be to enact, as it has, that it is "for the purposes of sub-cl. (a)". This problem would not have arisen if the two matters had been dealt with in two different clauses as logically they might have been. If that had been done, the Article simplifying it, would run as follows :

"286. (1) No law of a State shall impose a tax on a sale, where it takes place outside that State.

Explanation: A sale shall be deemed to have taken place within that State where the goods are delivered for consumption as a direct result of the sale.

* *

286. (4) No law of a State shall impose a tax on a sale in the course of export or import."

Article 286(1) as drafted above, relegating sub-cl. (b) to a separate clause and omitting the words "for the purposes of sub-cl. (a)" in the Explanation would convey precisely the import of Art. 286(1)(a) as it now stands with sub-cl. (b) and with the words "for the purposes of sub-cl. (a)". That would clearly show that the force of the words "for the purposes of sub-cl. (a)" becomes spent when Art. 286 (1)(b) is excluded from the operation of the Explanation.

(161) But then, it is contended that whatever the form in which the Explanation may be couched, it could not be extended beyond Art. 286(1)(a) and projected into Art. 286(2), and that unless that was done, it was not possible to hold that the sales falling within the Explanation are taken out of the purview of Art. 286(2). In my opinion, this argument proceeds on a misconception of the real reasoning on which the conclusion that the Explanation and Art. 286 (2) relate to two different subjects is based.

In view of the insistence with which this contention was pressed by the appellant, it seems desirable to examine the position in some detail. To start with, the two relevant provisions to be considered are Article 286(1) (a) with the Explanation and Article 286 (2). Omitting what is not material, they would run as follows:

286. (1) "No law of a State shall impose a tax on a sale, where it takes place outside that State.

Explanation: A sale in the course of inter-State trade is inside that State in which goods are actually delivered for consumption.

(2). No law of a State shall impose tax on a sale in the course of inter-State trade".

The argument of the appellant that Art. 286(2) is comprehensive and includes all sales in the course of inter-State trade and that therefore the sales covered by the Explanation fall within its purview, takes into account only Article 286 (2) and the Explanation, and it would have been unassailable if the question had to be decided on a construction only of these two provisions. But that, however, is not the position. An explanation appended to a section or clause gets incorporated into it, and becomes an integral part of it, and has no independent existence apart from it. There is, in the eye of law, only one enactment, of which both the section and the Explanation are two inseparable parts. "They move in a body if they move at all".

When, therefore, the question is whether sales falling within the Eplanation are comprised within Article 286 (2), what has to be construed is that Article in relation to, not merely the Explanation taken in isolation but to Article 286 (1) (a) read with the Explanation. If the matter is thus considered, the resultant position might thus be stated. Article 286 (1) (a) confers on States power to tax sales inside their territory. Article 286 (2) prohibits them from taxing sales in the course of inter-State trade.

Explanation to Article 286 (1) (a) enacts that sales in the course of inter-State trade in which goods are delivered for consumption in a State shall be deemed to have taken place inside that State. The combined effect of all these provisions is that States can tax sales in the course of inter-State trade if they fall within the Explanation. This conclusion is reached, it will be seen, not by reading the Explanation into Article 286 (2) as a sort of exception but giving to all the provisions the status of independent enactments and determining what, on a construction of the language, their respective spheres of operation are.

(162) In this view, the argument that if the Explanation could be read into Article 286 (2) it might as well be read into Article 286 (1) (b) and Article 286 (3) does not call for consideration. As the question is one of determining on a reading of the entire Article the precise operation of the several parts thereof, there can be no objection to examining the scope of Article 286 (1) including the Explanation in relation to Article 286 (1) (b) and Article 286 (3). Article 286 (1) (a) relates to sales inside a State, and Article 286 (1) (b) to sales in the course of export from or import into the country, and there could not be any interaction between them, and that is made abundantly clear by the words "for the purposes of sub-clause (a)" in the Explanation.

Likewise, reading Article 286 (1) (a) including the Explanation along with Article 286 (3), the result is that the power to tax which the State otherwise possesses has to be exercised subject to the conditions mentioned in the latter, when there is a Parliamentary

declaration thereunder. The impact of Article 286 (3) is, it should be noted, not confined to the Explanation but extends to the whole of Article 286 (1) (a). It operates not only on the inter-State sales falling within the Explanation but also on sales which are indisputably intra-State, and it controls both of them on the principle of 'generalia specialibus non derogant'.

(163) It is next contended that the sales to which the Explanation applies, takes place as a fact in the course of inter-State trade, and that the Explanation could not be construed as altering that fact, and that its true scope was merely to shift the 'situs' of the sale from the selling to the delivery State. Conceiving inter-State trade as a stream flowing from point A in the selling State to a point B in the delivery State, it was argued that what the Explanation did was to shift the 'situs' of the sale from point A to point B, that the stream was still there despite the shifting and that the sale therefore did not cease to be in the course of inter-State trade.

With respect, the fallacy in this argument lies in thinking that after the shifting of the 'situs' from point A to B, the sale could be regarded as one in the course of inter-State trade. A sale could be said to be in the course of inter-State trade only if two conditions concur: (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State trade. Thus, if X, a merchant in State A goes to State B, purchases goods there and transports them into A, there is undoubtedly a movement of goods in inter-State commerce. But that is not under any contract of sale. X might be entitled under Article 301 to certain rights in the matter of transportation.

But Article 286 (2) has no application, as there is no sale in the course of inter-State trade or commerce. In the same illustration, if X after transporting the goods into State A sells them, then also there is no sale in the course of inter-State trade. It is true that there is a sale, and there is also a movement of goods from one State to another. But that movement has not been under the sale, there having been no sale at the time of transportation. In — 'Rottschaefer on Constitutional Law (1939 Edn.)', sale in the course of inter-State commerce is thus defined:

"The activities of buying and selling constitute inter-State commerce if the contracts therefor contemplate or necessarily involve the movement of goods in inter-State commerce".

The law is thus stated by — 'Gavit in "Commerce Clause" (1932 Edn.):—

"The dividing line between an interstate sale and intrastate sale is rather fine, although clear. If the goods are shipped into a State without a previous sale, any sale within the State in intra-State commerce. .... Thus if the sale succeeds the transportation in point of time, however close, the state may license it".

In — 'William T. Wagner v. City of Covington', (1919) 251 US 95 (Z53), it was held that local sales of goods brought into the State from outside for the very purpose of the sale were not parts of inter-State commerce. The following observations at p. 167 might be quoted:

"Of course the transportation of plaintiffs' goods across the state line is of itself interstate commerce; but it is not this that is taxed by the city of Covington, nor is such commerce a part of the business that is taxed, or anything more than a preparation for it. So far as the itinerant vending is concerned the goods might just as well have been manufactured within the State of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and this being so, they can claim no immunity from local regulation, whether the goods remain in original packages or not".

In the light of the above principles, what is the legal character of the sales effected by the appellant and sought to be taxed by the respondent? There is firstly the fact that the goods were actually delivered in Bihar, and secondly, there is the fiction enacted by the Explanation that the sale had taken place not in Bengal but in Bihar. If both sale and delivery are in Bihar, it is difficult to see how the sale can be said to be in the course of inter-State trade. The argument of the appellant that there was, in fact, a movement of goods from Bengal to Bihar and that stood unaffected by the fictional shifting of the 'situs' of the sale from Bengal to Bihar, overlooks that by this very shifting, the character and complexion of the sale become altered, because as the sale follows the transport of goods, it cannot, according to the principles already stated, be said to be in the course of inter-State trade.

It may be urged as against this conclusion that as the Explanation to Article 286 (1) (a) merely shifts the 'situs' of the sales, and leaves unaffected the agreements to sell which must in the present case be held to have been made at Calcutta when the appellant executed the orders received from the Bihar purchasers, the transport of goods from Bengal to Bihar was under the above contracts to sell, and that therefore the sales were in the course of inter-State trade.

Such a contention would be untenable, because the expression "contract of sale" in

this context has the same meaning as the words "contract of buying and selling" in the definition of inter-State commerce given by Rottschaefer in the passage already quoted, and they both refer to the bargain resulting in sale irrespective of whether it is in the stage of an agreement to sell, or whether it is a sale in which title to the goods has passed to the purchaser.

That is also the definition of 'contract of sale' in Section 5 (1), Indian Sale of Goods Act. As there can be only one final and concluded bargain in respect of any particular sale, and as that is fixed by the Explanation at Bihar, it follows that there could not be any bargain with reference thereto in Calcutta, and the movement of goods from Bengal to Bihar was not under any contract of sale. The position in law is exactly the same as if the goods had been sent by the seller from Bengal to Bihar on his own account and then sold there and delivered to the purchaser, in which case it would be indistinguishable from — '(1919) 251 US 95 (Z53)', and the sale would clearly be intra-State. This conclusion does not negative the factum of inter-State movement of goods, and does not prevent any rights being put forward on that footing under Art. 301. It only negatives the notion of a sale in the course of inter-State trade, and thus takes it out of the purview of Art. 286(2).

(164) It was argued that the Explanation merely enacted a legal fiction, and that it being a well-established rule of construction that legal fictions should be limited to the purpose for which they are enacted, it would be contrary to this rule to hold that the Explanation not merely shifted the 'situs' of the sale but also obliterated the course of inter-State commerce. But the conclusion that the sales covered by the Explanation cease to be in the course of inter-State trade is not the result of any extension of the fiction because, as already stated, the factum of inter-State transportation is not ignored. That is the legal consequence of the fictional shifting of the 'situs'. It will be useful in this connection to quote what Lord Asquith observed in dealing with a similar contention the — 1952 AC 109 at p. 132 (Z)'. "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs".

It is next contended that the view that sales in which goods are delivered for consumption within the State are not within Article 286 (2) would render that provision practically useless, because sales for purposes other than consumption such as for resale must be very few and negligible. Why should a seller for consumption, it is asked, get his goods from an intermediary and not directly from the manufacturer? But then, the Constitution has itself recognised in clear and unmistakable terms a distinction between sales in which goods are delivered for consumption and sales in which they are delivered for purposes other than consumption such as re-sale, and what purpose this distinction serves, the appellant has been unable to explain.

Besides, what are the materials on which we can brush it aside on the ground that it is not one of substance? One of the developments of modern big business is the agency system under which middlemen enter into contracts with manufacturers, stipulate for monopoly of the distribution rights within a specified area, guarantee a certain volume of business, and are granted liberal commission on the sales.

In such cases, retail sellers can get the goods only from the distributors, and even when there is no grant of monopoly, it is nothing unusual in business that large distributors are able to get the goods from the manufacturers on rates more favourable than retail sellers can obtain and that consequently, it is more economical for the latter to buy them from the distributors than from the manufacturers. And it is not without significance that the distinction between the two classes of sales has been recognised in commercially advanced America for now nearly a century and recognised for this very purpose; and how can such a distinction be characterised as unsubstantial?

(165) It was finally contended by the learned Attorney-General that if Article 286 (2) were to be construed as not comprehending sales falling within the Explanation, then there would be nothing on which it could operate. The argument was thus presented: Article 286 (1) (a) bars the selling State, in the present case Bengal, from taxing the sale because by reason of the Explanation, it becomes an outside sale, and if Article 286 (2) is to be construed as not barring the delivery State, in the instant case Bihar, from taking the sale, then there is no sale to which it can apply, and it will serve no purpose. The error in this argument lies in taking the illustration as exhausting the entire range of inter-State trade. But that is not correct. Inter-State commerce consists in a flow of goods not merely from one State to another but in its continuous flow

through several States, and Article 286 (2) is designed to protect such a flow without being burdened by State taxes.

Thus, if A in Bengal sells to B in Bihar, and if in his turn B sells the same goods to C in U. P. for local consumption, there will be inter-State commerce under Article 286 (2) and in the course thereof, there will be two sales. Taking first the sale from Bengal to Bihar, Bengal can tax it under Article 286 (1) (a) because the Explanation thereto is not applicable as the delivery to Bihar is not for local consumption. But Article 286 (2) would interpose a bar. Bihar cannot tax the sale under Article 286 (1) (a), because that is an outside sale, the Explanation being inapplicable. Coming next to the sale by Bihar to U. P., Bihar will be entitled to tax it under the body of Article 286 (1) (a) as the sale took place inside its limits. But it cannot do so as under the Explanation, it becomes an outside sale. But U. P. will be entitled to tax the sale under the Explanation as it was for consumption within that State. Thus, the effect of the combined operation of both Article 286 (2) and Article 286 (1) (a) read with the Explanation is that the only State which can tax the sale is the one in which the goods are sold for local consumption.

(166) These are the objections advanced by the appellant against the view that the sales covered by the Explanation are outside Article 286 (2), and they are not of sufficient weight to overthrow it.

(167) The consideration of this question will, however, be incomplete without an examination of the other two views that have been put forward as to the true meaning and scope of Article 286 (2). The second view — and that was taken by Bhagwati, J. in — 'AIR 1953 SC 252 (B)', — is that the sales covered by the Explanation are in the course of inter-State trade and they are, therefore, within the purview of Article 286 (2), but that as the latter is a general provision covering all sales in the course of inter-State trade, and the former deals only with a special class thereof, the maxim 'generalia specialibus non derogant' applies, and the Explanation prevails as against Article 286 (2). It will be noticed that this agrees with the first view in its conclusion but it differs from it on the reasoning by which it reaches it. According to the first view, sales in the course of inter-State trade contemplated by Article 286 (2) include only those under which goods are delivered for purposes other than local consumption; whereas according to the second, they include all sales including those in which goods are delivered for consumption within the State and those in which they are delivered for other purposes.

According to this view, therefore, there is conflict between the Explanation and Article 286 (2), and the solution for it is to be sought in the application of the rule of construction that general provisions do not derogate from the special. As between these two views, the first view is, for the reasons already given, to be preferred. But if the contention that Article 286 (2) applies both to sales in which goods are delivered for local consumption and those in which they are delivered for other purposes is correct, then it is difficult to see how the appellant can escape the conclusion reached by Bhagwati, J. in — 'AIR 1953 SC 252 (B)'. The appellant is plainly in the horns of a dilemma. Sales in which goods are delivered for local consumption fall either outside Article 286 (2) or inside it. If they fall outside Article 286 (2), then the appellant can claim no immunity from taxation under that provision. In case they fall inside Article 286 (2), then the Explanation must prevail as against it on the principle 'generalia specialibus non derogant', and the sales will be liable to be taxed.

To get out of this difficulty, the appellant contended that Article 286 (2) and the Explanation related to two different matters, and therefore the maxim in question had no application. The argument was that Article 286 imposed a number of restrictions on the power of the State to tax sale of goods from different angles, e. g., when they were outside the State, Article 286 (1) (a); in the course of export or import, Article 286 (1) (b); in the course of inter-State trade, Article 286 (2); and in relation to commodities declared essential by Parliamentary legislation under Article 286 (3); that the Explanation was enacted from the standpoint whether the sales were outside or inside and Article 286 (2) from the standpoint whether they were in the course of inter-State trade or intra-State trade, and that the purpose and the policy of the two provisions being different, their subject-matter must be held to be different and that therefore the maxim was inapplicable.

(168) I see no force in this contention. It is a cardinal rule of construction that when there are in a Statute two provisions which are in conflict with each other such that both of them cannot stand, they should, if possible, be so interpreted that effect can be given to both, and that a construction which renders either of them inoperative and useless should not be adopted except in the last resort. This is what is known as the rule of harmonious construction. One application of this rule is that when there is a law generally dealing with a subject and another dealing particularly with one of the topics comprised therein, the general law is to be construed as yielding to the special in respect of the matters comprised therein.

Now, the reason of the rule requires that it should apply whenever there is overlapping of the fields occupied by two conflicting enactments, and when that is shown, it would not be logical to exclude its application on the ground that the enactments have been made with a different purpose. It is the identity of the subject-matter of the conflicting provisions, not the identity of their purpose or angle of vision that is essential for the application of the maxim. No authority was cited for limiting it in the manner contended for by the appellant.

Now, it is the appellant's own contention that the sales covered by the Explanation are within the purview of Art. 286 (1) (a), and are therefore exempt from taxation thereunder, and that such taxation would be permissible only when the hold of Art. 286 (2) over the Explanation is removed by Parliamentary legislation under that sub-clause. That is to say, the subject-matter of the Explanation is within the coverage of Art. 286 (2), and that the two provisions are directly in conflict. It is difficult to see how consistently with this stand the appellant could resist the application of the maxim aforesaid. It is true that Bhagwati J., who took that view in 'AIR 1953 SC 252 (B)', has now retreated from that position. But with respect, there is irrefragable logic in his reasoning in that decision, and that commends itself to me.

(169) Then, there is the third view that the sales to which the Explanation applies are in the course of inter-State trade, and therefore fall within the purview of Art. 286 (2), and that in consequence, the power of the delivery State to tax those sales is incapable of exercise, as it is within the prohibition contained in that Article, and that when the Parliament enacts a law in terms of Art. 286 (2) lifting the ban thereunder, then and not until then could the Explanation have any operation. That was the view expressed by Bose J., in 'AIR 1953 SC 252 (B)', and by Das J., in 'AIR 1953 SC 333 (U)'. Briefly, according to this view Art. 286 (2) controls the Explanation. Can this be sustained on the language of the enactment?

The Explanation is not expressed to be subject to Art. 286 (2). Nor does the latter contain the words "notwithstanding anything contained in the Explanation to Art. 286 (1) (a)". These are simple and familiar expressions used by the legislature when it intends that a particular provision in the Statute should be subject to or override another. Nor is there anything in the language of the Explanation providing that its operation is not to be 'in praesenti' but contingent on Parliamentary legislation under Art. 286 (2). To construe, therefore, Art. 286 (2) as controlling the Explanation, we must import into the Statute words which are not there and thereby cut down the operation of the Explanation which on its terms is of equal authority and potency with Art. 286 (2).

(170) There being nothing express in the language of the enactment to lead to the conclusion that the Explanation is controlled by Art. 286 (2), it has to be seen whether that conclusion can be drawn on a construction of the relevant provisions of the Statute. The appellant argues that it can be, and relies firstly on the saving clause in Art. 286 (2), and secondly, on the proviso thereto as supporting it. The argument based on the saving clause may thus be stated: The contention that Art. 286(2) controls the Explanation would have resulted in rendering the latter wholly nugatory, if the words "except in so far as Parliament may by law otherwise provide" had not been there. But that result is avoided by the saving clause under which the Explanation can come into operation when there is Parliamentary legislation lifting the ban under Art. 286 (2).

The construction, it is argued, gives effect to the plain language of the Article and also to both the provisions. But when examined, it will be seen that far from giving effect to both the Explanation and Art. 286 (2), this construction results in destroying one or the other of them. The harmonious construction which the law favours is one which gives operation to both the provisions at the same time but in their respective spheres. But according to the appellant, if Art. 286 (2) is in force then the Explanation cannot operate, and if the Explanation is to operate, it can only be if the Parliament puts an end to Art. 286 (2) by legislation thereunder. This construction, far from reconciling the two provisions and giving operation to both of them, renders them uncompromisingly hostile, and makes their co-existence and co-operation impossible.

(171) It is also open to question whether the saving clause could be referred to for the purposes of determining the respective spheres of operation of the Explanation and the body of Art. 286 (2). The scope of a saving clause or an exception is that it operates within the area covered by the main provision on which it is engrafted. It cannot add to it though, when in force, it can detract from it. It would, therefore, be inadmissible for enlarging what would otherwise be the sphere in which Art. 286 (2) would operate. If the view that Art. 286 (2) controls the Explanation cannot be maintained on a construction of the body of Art. 286 (2) and the Explanation, it cannot properly be adopted on the strength of the saving clause annexed thereto.

(172) There was considerable discussion before us as to the nature and scope of the law

that could be enacted under Art. 286 (2). It must be confessed that the matter is not free from doubts and difficulties. But about one thing, there can be no dispute. The law to be enacted by Parliament cannot run counter to any of the provisions of the Constitution. Thus, it cannot itself impose a tax on sales, that being within the exclusive jurisdiction of the States under Entry 54 in List II. Nor can it confer a power to tax a sale in the course of inter-State commerce on any State of its own choice in contravention of the Explanation to Art. 286 (1) (a). Its operation can only be negative. It can lift the ban imposed by Art. 286 (2). It was suggested for the appellant that it can do that as regards particular commodities or with reference to particular States, and that further in so limiting the operation it could enact suitable provisions for an equitable adjustment of the interests of all the States.

But laws limited in their operation to specified commodities and States must in their very nature, be temporary legislation to be withdrawn and re-enacted from time to time suitable to the ever-changing conditions of inter-State trade and commerce. If that was the sort of legislation that the Constitution-makers had in mind, one would have expected that the authority contemplated by Art. 307 would have been empowered to deal not merely with the matters mentioned in Arts. 301 to 304 but also Art. 286 (2), and it is also not a little surprising that no legislation should have been enacted on those lines during all these years. In any event, it must be a profitless task to speculate on the scope and effect of a hypothetical legislation under Art. 286(2), and it would be unsafe to base any conclusion as to the true scope of the Explanation on the existence of a power in the Parliament to enact a law under Art. 286(2).

(173) The contention based on the proviso to Art. 286 (2) must now be considered. It was argued that while the proviso is to have operation notwithstanding anything contained in Art. 286 (2) it does not similarly override Art. 286 (1) (a) and that therefore when the President issued an order under that proviso, the Explanation would have operation, and that therefore it was not useless. To this contention, there are two answers: (1) An order issued by the President under the proviso can operate only to continue existing taxes. It cannot go further, and authorise the imposition of a tax even when the conditions mentioned in the Explanation are satisfied, if, in fact, it had not been previously collected. Therefore, the Explanation can have no practical effect on the operation of the proviso.

If, in fact, a delivery State had been levying a tax before the commencement of the Constitution, that would continue to be valid under the proviso, not by the operation of the Explanation but by reason of the fact that it had been levied before. Thus, the Explanation as such has no operation. (2) It should also be mentioned that prior to the Constitution no State was actually levying a tax on the basis of delivery and therefore the Explanation could have no practical effect even when the President made the order. The Constitution-makers presumably had before them the sales tax legislation of all the States, and it is a legitimate inference that they could not have thought of the Explanation as deriving any force or operation by reason of an order of the President under the proviso.

(174) Mr. Taikad Subrahmanya Iyer, counsel for M. K. Kuriakose, one of the interveners, arguing in support of the contention of the appellant that Art. 286 (2) is the controlling provision, suggested a third category of cases wherein the Explanation could operate apart from a law under the saving clause in Art. 286 (2) or the order of the President under the proviso thereto. His argument was this: Suppose that both the seller and the purchaser are in State 'A' and the goods are located in State 'B'. The instrument of sale is executed in State A, and pursuant thereto, the purchaser gets actual delivery of the goods in State B. Article 286 (2) has no application to the sale as there is no inter-State movement of goods thereunder. But for the Explanation, State A would have been entitled to tax the sale as it was inside that State. But the Explanation bars it, and confers on State B the right to tax it. This, it is contended, gives operation to the Explanation consistently with the view that it is controlled by Art. 286 (2).

The assumption underlying this argument is that the property in the goods passed in State A when the instrument of sale was executed, though the goods were then located in State B. But this is not correct. It is one thing to say that title to the goods passes at the time when the instrument of sale was executed and quite a different thing to state that it passes at the place where it is executed. Considering the matter with particular reference to the power of a State to impose tax, sale is a practical conception having relation to the right to enjoy and dispose of the goods, and it is a well-settled feature of all sales-tax legislation that the power to tax the sale is annexed to the place where the goods are located at the time of the contract. Under the general law also, the position is that title to the goods passes in the State in which the goods are situated at the time of the sale.

In 1906 AC 419 (Z40)', there was a contract of sale signed by both the parties in England with reference to goods situated in Swit-

zerland. The action was laid in England for breach of patent, and the point for decision was whether it was maintainable there. It would have been maintainable there if the sale was in England but not if it was in Switzerland. It was held by the House of Lords that the sale was not in England, and that the action did not lie. The position in law was thus stated by Lord Loreburn L. C., at p. 421:

"As I understood him, Mr. Cripps argued that the defendant had 'vended' these goods in England within the terms of the patent. He admitted that merely to make a contract of sale would not be 'vending' or, to use a word in sense equivalent and in use more familiar, selling. But he maintained that if the contract to sell was made in England, &, in pursuance of it goods were, by the consent of buyer and seller, appropriated to meet the contract, then the transaction became a sale completed in England, and that it did not signify whether the goods were at the time of such appropriation in England or abroad.

I cannot accept that view. A contract to sell unascertained goods is not a complete sale, but a promise to sell. There must be added to it some act which completes the sale, such as delivery or the appropriation of specific goods to the contract by the assent, express or implied, of both buyer and seller. Such appropriation will convert the executory agreement into a complete sale".

* *

In my opinion, if you must decide in what country an appropriation of goods by consent takes place, it takes place 'not where the consent is given, but where the goods are at the time situate' ".

In view of these observations it cannot be contended that the title to the goods passed in State A and that State B gets the right to tax by reason of the Explanation. State B gets the power to tax the sale not under the Explanation but under the general law. This contention, it should be noted, has reference to cases which 'ex hypothesi' are outside Art. 286 (2), and has only an indirect bearing on the question whether Art. 286 (2) controls the Explanation.

(175) It is necessary now to refer to the arguments addressed by both parties based on what were stated to be the broad principles underlying the Constitution and on considerations of hardship or inconvenience arising from one view or the other. It was argued for the appellant that the intention of the Constitution-makers as disclosed in Art. 301 was to encourage the free flow of trade and commerce within the Union unimpeded and unobstructed by State legislation, that Art. 286 (2) was enacted in furtherance of that policy, as taxation by the States might become so heavy as to become burdensome to inter-State commerce; that the normal situation envisaged by that Article was, therefore, that no tax should be levied on sales in the course of inter-State trade, power being reserved in Parliament to intervene in appropriate cases and that consistently with this policy, Art. 286 (2) should be construed as the controlling provision and the Explanation as an emergency reserve.

The reply of the respondent was that the intention of the Constitution as expressed in Art. 286 (1) (a) was to avoid multiple taxation of sales in the course of inter-State trade, and not to free them from any taxation, that the Constitution did contemplate the levy of one tax on every sale, and that the construction of the appellant, if accepted, must place local sales in a greatly disadvantageous situation as against sales in the course of inter-State trade, and that must result in driving out local trade and business across the borders of the State.

(176) The appellant is undoubtedly right in his contention that the Constitution intended trade and commerce within the Union to be free. But the question is whether that requires that there should be no tax at all at any stage even when the goods have come to the end of their journey as a result of sale. That clearly is not the law in America where inter-State commerce is highly developed and jealously protected. That the Constitution did contemplate one tax on a sale in the course of inter-State trade when it is for local consumption is clear from the Explanation. To argue that freedom from taxation under Art. 286 (2) is the normal condition, and that taxation under the Explanation is an exception is to beg the very question that we have got to decide. No other provisions of the Constitution have been cited as expressive of that intention. On the other hand, such indication as there is, tends in the opposite direction.

Article 304 (a) which is an exception to Art. 301 authorises the imposition of a tax on imported goods when similar goods locally manufactured are subject to a States tax provided that such imposition is not discriminatory. It is true, as contended by the learned Attorney-General, that under Art. 304 (a) the tax is levied on the goods whereas under Art. 286 (2) it is laid on the transaction of buying and selling. But on a question of policy, what difference would it make whether the tax is imposed on the transaction of sale or on the import of goods, as in either case it must fall on the consumers? That clearly is the reasoning of the majority of the learned Judges in 'AIR 1953 SC 252 at pp. 259-260 (B)', and

there has been no satisfactory answer to it by the appellant.

(177) On the other hand, Art. 304 (a) lends considerable support to the contention of the respondent that it could not have been the intention of the Constitution to place local sales in a worse position than sales in the course of inter-State commerce, which must be the result of holding that sales in the course of inter-State trade are immune from taxation under Art. 286 (2), while intra-State sales are liable to be taxed under Entry 54. What reason or justice can there be for making a local purchaser of goods pay a higher price therefor than what a purchaser of the same goods across the State line would have to pay? The only answer that was suggested was that the State might refrain from taxing even intra-State sales of those commodities which are the subject-matter of inter-State trade.

Seeing that inter-State trade is happily an expanding factor in national life, and that it tends to comprehend an increasing variety of goods, there will be left, if the suggestion of the appellant is to be followed, very few commodities which the State could tax, and Entry 54 might as well be effaced from out of the Constitution. There is, besides, the apprehension expressed by the respondent—and it cannot be brushed aside as fanciful—that if the contention put forward by the appellant is accepted, then it must inevitably result in local trade shifting on to adjacent States. If the scheme of the Constitution is, as I conceive it to be, to put both intra-State sales and sales in the course of inter-State trade on the same footing—and that is manifest on the language of Art. 301—it must follow that as the former are liable to be taxed under Entry 54, the latter should also be similarly liable to be taxed, and that is precisely what the Explanation provides for.

(178) It was next argued for the appellant that the view that under the Explanation delivery States would be entitled to tax all sales in the course of inter-State trade if goods are delivered for consumption there, would render sellers liable to be taxed in all the States in which their goods are sold, and that would subject them to a perplexing multitude of assessment proceedings in several States and that that must cause great inconvenience and hardship in business circles. Our attention was also invited to the provisions of the impugned Act relating to assessment and collection of tax, and it was contended that they must result in considerable harassment of the assessees. As against this, the respondent contended that the sellers had really no grievance in the matter as the tax would be ultimately paid by the consumers, and that, on the other hand, if the contention of the appellant were to be accepted, the States would have to lose a substantial portion of the revenue derived from sales tax and that must seriously affect their economy.

(179) It must be conceded that in the view that the Explanation authorises the imposition of tax on all sales in the course of inter-State trade falling within its purview, non-resident sellers will be liable to be taxed in every State in which the goods are sold for consumption, and that they must in consequence be exposed to multiple assessment proceedings in different jurisdictions and that that must cause inconvenience. But then, that is necessarily inherent in the Explanation whether it operates when the ban under Art. 286 (2) is lifted by Parliamentary legislation as contended for by the appellant, or even without such law, as the respondent maintains. That does not, therefore, appear to be very material in construing the scope of the Explanation.

The right which residents of one State have to trade freely in other States is one conferred by Article 301 and is a creature of the Constitution and when the same Constitution provides for taxation of sales in the course of inter-State trade by the Explanation to Art. 286 (1) (a), and the inconvenience complained of results from that provision and is incidental to its enforcement, it does not sound logical that the sellers should, while electing to take the benefit under Art. 301, disclaim their obligations under the Explanation.

(180) The point of substance against the appellant is that the sellers are not the persons really affected, as the incidence of taxation will ultimately fall on the consumers. The Explanation applies to goods delivered for consumption within the State, and the tax imposed on the sale of such goods is really a tax laid on the purchasers for consumption. It might happen that such purchasers are numerous and scattered all over the State, and that must be so when the goods sold are, as in the present case, medicines. The power to tax in such a case can be effectively exercised only through the seller. No administrative machinery can succeed in reaching the consumers when their name is legion, and as the seller is merely to pass on the tax to the consumer, he is, in fact, constituted collector of the tax on behalf of the State. This is the practice largely adopted in America in the collection of Use Tax, and its validity has been repeatedly affirmed. A recent decision on the question is that in — 'General Trading Co. v. State Tax Commission'. (1943) 332 US 335 (Z54). There, the State of Iowa imposed a Use Tax on a foreign Company in respect of goods distributed by it for consumption within the State. In upholding the tax, Frankfurter J., observed:

"To make the distributor the tax collector for the State is a familiar and sanctioned device. — 'Monamotor Oil Co. v. Johnson', (1933) 292 US 86: 78 Law Ed 1141 at pp. 1147, 1148 (Z55); — 'Felt & T. Mfg. Co. v. Gallagher', (1938) 306 US 62 (Z56).".

It was argued by the appellant that in the above case, the foreign Company was "a retailer maintaining a place of business" within the State. But as the tax in question was not a sale-tax but a use tax payable by the purchaser, it would be wholly irrelevant whether the distributor had a place of business within the State, and that indeed is what is stated in the judgment itself.

(181) Even looking at the matter from the practical standpoint, it is easy to exaggerate the inconvenience which the Explanation might cause. If sellers have trade and commerce all over the States, theirs must undoubtedly be a big business. That means that they would have, for the purpose of the business, adequate clerical establishment—accountants, correspondence clerks and so forth. Regular account books would be maintained showing the dispatch of goods to dealers and purchasers in other States. And thus, all the materials on which returns have to be made would be already there. The additional burden will consist in this that in posting the entries in the ledger accounts, separate folios will have to be opened for the several States.

This is no doubt additional work thrown on the sellers, but viewed in its true perspective, it is too unsubstantial to deny the States a substantive power to tax. It is said that there would be considerable harassment of the sellers under the provisions of the impugned Act. But why should there be? It must be presumed that sales-tax officers will do nothing unfair or oppressive, and the correspondence between the parties preceding the proceedings shows a just and sympathetic attitude on the part of the respondent. True, some of the provisions of the Act are of a stringent character. But they have terrors only for those who would evade and avoid tax, and persons like the appellant doing big business of an all-India character and maintaining regular and correct accounts have nothing to fear from them.

(182) Now, let us look at the other side of the picture. Prior to the Constitution, the States had the power to tax even sales in the course of inter-State trade and commerce, and it is stated that a substantial portion of their revenue was derived from this source. The Constitution enacted Art. 286 (1) (a) with a view to avoid multiple taxation of sales in the course of inter-State trade, and it is the contention of the respondent that the Explanation on its true interpretation provides for a single taxation of those sales, at the stage of consumption. If the contention of the appellant as to the scope of the Explanation and of Art. 286 (2) is accepted, this tax could not be levied after 31-3-1951, and the States would have lost a substantial source of revenue. What is the substitute that the Constitution has provided herefor? None. In the result, there must be, as argued by the respondent, a financial crisis in the affairs of the States.

The position, therefore, is that we have to choose between depriving the States of their power to impose a tax on which their very existence depends, and exposing the sellers having business outside their State to the inconvenience of multiple assessment proceedings. In that situation, can there be any doubt as to what our decision should be? Surely, the claim of the State should have precedence over that of individuals. It is very significant that all the States which have intervened have, with one exception, strongly supported the stand of the respondents. That exception is the State of West Bengal. The learned Attorney-General appearing for this State did not contend for any right in it to tax the sales. His argument was that neither West Bengal nor Bihar was entitled to tax by reason of Art. 286 (2). The intervention of West Bengal is, therefore, not for protecting its rights but for the vindication of the law, as it conceives it to be.

(183) It was suggested for the appellant that the solution to the problem lay in the Centre taking over the subject of tax on sales in the course of inter-State trade, provision being made for distribution of the receipts among the States under Art. 269 after making the necessary amendments to the Constitution. Our duty is to construe the provisions as they stand and not to discuss questions of policy which it is for the Legislature to decide; and if I examine the suggestion of the appellant, it is only for the purpose of finding out what light it throws on the present controversy, and how far it will be an improvement on the present position under the Constitution.

Under Entry 48 in List II of the Government of India Act, 1935, the States had the power to impose tax on sale of goods and advertisements. When dealing with this topic, the Constitution-makers took over advertisement of newspapers to the Union List, the residue being left to the States. Thus, the decision to entrust the power to tax sales to the States was deliberate, and there is good reason for it. Sales might take place either in the course of inter-State trade or be intra-State. There can be no question of the Centre taking over taxation of intra-State sales. To confer a power on the Centre to tax sales in the course of inter-State trade alone would be to dichoto-

mise the power to impose sales tax and distribute it between the States and the Centre. For such a course, there does not appear to be any precedent, anywhere, and the practical inconvenience attendant thereon is obvious. Moreover, let us assume that the Centre takes over the taxation of sales in the course of inter-State trade. What difference will it make in the present position? So far as sellers are concerned, they will have to submit one consolidated statement of all the sales outside their State instead of splitting them according to the States in which the sales are effected, and there will be a single assessment proceeding instead of as many as the States where the sales take palce. That would no doubt avoid much of inconvenience. But, so far as the burden of taxation on the sellers is concerned, the position would be exactly what it is now. And on what principle is the Centre to distribute the tax realisations among the States? It can only be on the basis of receipts from the several States. And there is justice in each State claiming what is realised from the consumers resident within its territory. That is precisely the scope of the consumption tax under the Explanation.

Thus, the suggestion of the appellant, if acted upon, will not relieve it from the liability to be taxed; it will only reduce the assessment proceedings from many to one. In other words, the relief will be with reference not to substantive rights, but to a matter of procedure. But the contention of the appellant that article 286 (2) controls the Explanation is directed not against the procedure in the assessment of tax, but against the very liability to be assessed to it, the 'argumentum ab inconvenienti' being availed of as a ground for denying it. The suggestion, therefore, that the taxation of sales in the course of inter-State trade should be left to the Centre lacks substance. Even with reference to the inconvenience that might result from the multiplicity of assessment proceedings it is one which is capable of being removed without disturbing the existing scheme of the Constitution, by Parliament enacting a law constituting an authority under Art. 307 and conferring on it power to receive from the sellers one consolidated statement of all their sales outside their State and determining the precise extent thereof effected in the several States & making that determination final for purposes of assessment by the States. That would, on the one hand, secure to the States the finance legitimately due to them under the Explanation, and at the same time, save the sellers from the harassment of multiplicity of proceedings. Such a law cannot be impugned as trespassing on the exclusive domain of the States to impose sales tax under Entry 54, as the authority to impose the tax would continue to be the States.

It is the law of the several States that will determine the conditions under which, and the rate at which, the tax will be chargeable. It is the machinery set up by the States that will make the assessment and collect the taxes, and these realisations will find their way into the coffers of the States. The effect of the Act would be only to enact a rule of evidence, on which the assessing authorities have to act. Such a law would not conflict with any of the provisions of the Constitution. It is scarcely necessary to add that this suggestion is only by way of answer to the one put forward by the appellant, and even if there are Constitutional difficulties in the way of acting on it, that would not affect the decision of this appeal, which must turn on the provisions of the Constitution as they stand.

(184) Having carefully considered the arguments addressed by the learned counsel appearing for the parties to the appeal and for the interveners, I am clearly of opinion that the sales falling within the Explanation are, by reason of the fiction enacted therein, intra-State sales, that accordingly they fall outside the ambit of Art. 286 (2) and are unaffected by the prohibition contained therein. In coming to this conclusion, I have considered the question afresh and on its own merits as if it were 'res integra'. But, in fact, it is concluded by the decision of this Court in 'AIR 1953 SC 252 (B)', to which reference has been made in the course of the discussion.

It is conceded that if this decision is to govern, then this point would have to be found against the appellant. But it is contended that it is erroneous and should not be followed. That raises the question whether this Court has the power to reconsider a previous judgment given by it on the identical issue. As the point arises for decision for the first time before this Court, and as our pronouncement thereon must be of the highest importance, we have heard arguments as to what the practice is in the highest judicial tribunals of other countries with reference to this matter.

(185) In '(1898) AC 375 (H)', it was held by the House of Lords that its decision on a question of law was conclusive and binding on the House in subsequent cases and that if it was erroneous, it could be set right only by an Act of Parliament. The practice before the Privy Council however has been different. In '(1877) 2 PD 276 (Z5)', Lord Cairns dealing with this question observed as follows:

"In the case of decisions of final Courts of appeal on questions of law affecting civil rights, especially rights of property, there are strong reasons for holding the decisions, as a general rule, to be final as to third parties. The

law as to rights of property in this country is to a great extent based upon and formed by such decisions. When once arrived at, these decisions become elements in the composition of the law, and the dealings of mankind are based upon a reliance on such decisions.

Even as to such decisions it would perhaps be difficult to say that they were, as to third parties, under all circumstances and in all cases absolutely final, but they certainly 'ought not to be reopened without the very greatest hesitation".

The case before the Board was one involving questions of ecclesiastical law, and it was held that in such cases their Lordships were free to examine for themselves the reason on which the prior decision rested and to decide on their own view of the matter. The authorities bearing on this question were reviewed by the Privy Council at some length in AIR 1929 PC 84 (Q), and the result was thus summed up:

"There is no inherent incompetency in ordering a rehearing of a case already decided by the Board, even when a question of a right of property is involved, but such an indulgence will be granted in very exceptional circumstances only. It is of the nature of an 'extraordinarium remedium."

This opinion was reiterated in AIR 1946 PC 88 (Z30), wherein Viscount Simon said :

"Their Lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. In ecclesiastical appeals, for instance, on more than one occasion, the Board has tendered advice contrary to that given in a previous case, which further historical research has shown to have been wrong. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have acted upon both by Governments and subjects."

Thus, the practice of the Privy Council has been to recognise a power to reconsider its previous decisions, but it is exercised only in exceptional circumstances. In (1914) 18 CLR 54 (J), the High Court of Australia has ruled that it has the power to examine the correctness of its previous decisions. The practice of the Supreme Court of America is that it has considered itself free to reconsider its previous decisions especially when they relate to questions of constitutional law. (Vide Willoughby on Constitutional Law, Vol. I, pages 74 and 75 and the cases cited there). The reason given for this view is that while errors of law not bearing on constitutional provisions could be corrected by ordinary process of legislation, an error on a question of constitutional law could be set right only by resort to the dilatory and cumbersome machinery of amending the Constitution. (Vide (1943) 321 US 649 (Z13)).

This reasoning will also be applicable to decisions involving interpretation of our Constitution. It was argued for the respondents that Article 141 gives the decisions of this Court the status of law, and that, therefore, if they are to be changed that could be only by process of legislation. Article 141 only enacts that the decisions of this Court are binding on all courts, and that does not stand in the way of this Court itself, reversing or modifying a previous decision, as when that is done, such decision would thereafter become itself the law under that Article. There is, therefore, good reason for holding that this Court has the power to reconsider, in appropriate cases, a previous decision given by it.

(186) The question then arises as to the principles on which and the limits within which this power should be exercised. It is of course not possible to enumerate them exhaustively, nor is it even desirable that they should be crystallised into rigid and inflexible rules. But one principle stands out prominently above the rest, and that is that in general, there should be finality in the decisions of the highest courts in the land, and that is for the benefit and protection of the public. In this connection, it is necessary to bear in mind that next to legislative enactments, it is decisions of Courts that form the most important source of law. It is on the faith of decisions that rights are acquired and obligations incurred, and States and subjects alike shape their course of action. It must greatly impair the value of the decisions of this Court, if the notion came to be entertained that there was nothing certain or final about them, which must be the consequence if the points decided therein came to be reconsidered on the merits every time they were raised.

It should be noted that though the Privy Council has repeatedly declared that it has the power to reconsider its decisions, in fact, no instance has been quoted in which it did actually reverse its previous decision except in ecclesiastical cases. If that is the correct position, then the power to reconsider is one which should be exercised very sparingly and only in exceptional circumstances, such as when a material provision of law had been overlooked, or where a fundamental assumption on which the decision is based turns out to be mistaken. In the present case, it is not suggested that in deciding the question of law as they did in AIR 1953 SC 252 (B), the learned Judges ignored any material provisions of law, or were under any misapprehension as to a matter fundamental to the decision. The arguments for the appellant before us, were in fact only a repetition of the very conten-

tions which were urged before the learned Judges and negatived by them. The question then resolves itself to this. Can we differ from a previous decision of this Court, because a view contrary to the one taken therein appears to be preferable? I would unhesitatingly answer it in the negative, not because the view previously taken must necessarily be infallible but because it is important in public interest that the law declared should be certain and final rather than that it should be declared in one sense or the other. That, I conceive, is the reason behind Article 141. There are questions of law on which it is not possible to avoid difference of opinion, and the present case is itself a signal example of it.

The object of Article 141 is that the decisions of this Court on these questions should settle the controversy, and that they should be followed as law by all the Courts, and if they are allowed to be reopened because a different view appears to be the better one, then the very purpose with which Article 141 has been enacted will be defeated, and the prospect will have been opened of litigants subjecting our decisions to a continuous process of attack before successive Benches in the hope that with changes in the personnel of the Court which time must inevitably bring, a different view might find acceptance.

I can imagine nothing more damaging to the prestige of this Court or to the value of its pronouncements. In (1914) 18 CLR 54 (J), it was observed that a question settled by a previous decision should not be allowed to be reopened "upon a mere suggestion that some or all of the Members of the later Court might arrive at a different conclusion if the matter was 'res integra'.

Otherwise, there would be grave danger of want of continuity in the interpretation of the law". (per Griffiths, C. J. at page 58). It is for this reason that Article 141 invests decisions of this Court with special authority, but the weight of that authority can only be what we ourselves give to it.

(187) It was suggested as a ground for reconsidering the correctness of the decision in AIR 1953 SC 252 (B), that it had caused great hardship to the business world. I have already held that there is not much of substance in this complaint. On the other hand, acting on the view that the Explanation confers on the delivery States power to tax the sales, several States amended their Sales Tax Acts in 1951 by inserting appropriate provisions and it is represented before us that for some years, taxes have been collected by the States on the basis of these provisions.

If we are now to hold that the view taken in AIR 1953 SC 252 (B), is erroneous, the consequences will be to render the amended provisions inoperative and the collections of taxes made thereunder illegal. The States will then be not merely powerless to tax sales falling within the Explanation in future, but will have actually to refund whatever they might have collected in the past.

I can see no end to the chaos, confusion and trouble that must ensue on such a decision—a situation that can be retrieved only by Parliament removing Art. 286(2) out of the scene with retrospective operation, and all this, to benefit not the consumers who are the persons really affected but the sellers who are only statutory middlemen for collection, some of whom are stated to have collected sales tax from purchasers outside their States.

I consider it wholly inexpedient that our power of reconsideration should be exercised for that end. This, of course, is apart from my conclusion that on a correct interpretation of the Explanation and Art. 286(2), the respondents have the power to tax. In the result, this point must be held against the appellant.

(188) 4. I shall now consider the question urged by the appellant that the Bihar Sales Tax Act is invalid on the ground that it is extra-territorial in operation and 'ultra vires' the powers of the State Legislature. The Constitutional provisions bearing on this question are Arts. 245(1) and 246(3) which are as follows :

"245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

246. (3) Subject to clauses (1) and (2), the Legislature of any State specified in Part A or Part B of the First Schedule has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List")".

The contention of the appellant is that the words "for the whole or any part of the State" in Art. 245(1) and "for such State or any part thereof with respect to any of the matters enumerated in List II" in Art. 246(3), impose a territorial limitation on the jurisdiction of the State Legislature; that under these provisions it can enact laws only for persons and properties within the State and that the provisions of the Act to the extent that they impose tax on sellers who are outside the State are 'ultra vires'.

It was also contended that the impugned provisions were extra-territorial in their operation, and were beyond the competence of the State Legislature. The questions thus raised are of great importance involving the determination of the nature and extent of the power

which a State has to make laws in respect of the matters enumerated in List II.

(189) It is necessary, to begin with, to define the precise meaning of the words "extra-territorial operation". A sovereign State has plenary jurisdiction to enact laws for its own territory. Such laws may be in respect of persons within the territory whether citizens or not, of property, immovable or movable, situated within the State; or of acts and events which occur within its borders. In Maxwell on Interpretation of Statutes (10th Edn. p. 144) the law is thus stated :

"Primarily, the legislation of a country is territorial. The general rule is, that 'extra territorium jus dicenti impune non paretur. The laws of a nation apply to all its subjects and to all things and 'acts' within its territories." In "Conflict of Laws—Restatement of the Law" by the American Law Institute, the position is thus summed up :

"47. A State has jurisdiction over a person:

(a) if he is within the territory of the State,

(b) if he is domiciled in the state although not present there,

(c) if he has consented or subjected himself to the exercise of jurisdiction over him either before or after the exercise of jurisdiction.

(48) An immovable thing is subject to the jurisdiction of the State within which it is.

(49) A chattel is subject to the jurisdiction of the state within which it is.

(56) A state has jurisdiction over all 'acts done or events occurring within the territory of the state', and over all failures to act in cases where there is a legal duty to act within the state."

The legislation in respect of the above matters is intra-territorial, notwithstanding that it might operate on persons residing outside the State. Thus, a law of a State taking over the management of lands of absentee-landlords must operate on owners who are residing abroad. But in strictness, this is not extra-territorial legislation but legislation in respect of lands within the State.

Likewise, a law with reference to act or events which occur within the State is not extra-territorial, though it might have to be enforced against a person who is residing outside the State. Such a law is one in respect of an act or event within the State. These laws, though intra-territorial, are often loosely described as extra-territorial in operation.

In this context the words "extra-territorial operation" connote laws in respect of properties or acts or events within a State but having impact or operation on persons outside the State.

(190) There is another sense in which these words are used. When a State enacts a law with reference to an act or event which takes place outside its territory, it is described as extra-territorial, and such legislation is recognised as valid by rules of International Law where it is directed against its own nationals and persons in its service.

Thus, in "Conflict of Laws—Restatement of Law" it is observed that "a nation has jurisdiction over its nationals although not present within the territorial limits of the nation". (page 78). In Corpus Juris Secundum, extra-territoriality is defined as "the act by which a State extends its jurisdiction beyond its own boundaries into the territory of another State", and it is added that "the almost self-evident proposition should perhaps also be noted in this connection that a sovereignty has power to make laws regulating the conduct of its subjects, while beyond the limits of its territorial jurisdiction". (Volume 15, pages 868-869).

"Extra-territorial Legislation", says Wheare, "simply means legislation which attaches significance for courts within the jurisdiction to 'facts and events occurring outside the jurisdiction' ". (Statute of Westminster and Dominion Status by Wheare, 4th Edition, page 167). A typical illustration of this class of legislation is furnished by S. 4, Penal Code, which enacts that

"the provisions of this Code apply also to any offence committed by—

1. any citizen of India in any place without and beyond India;

2. any person on any ship or aircraft registered in India wherever it may be.

Explanation : In this section the word 'offence' includes every act committed outside (India) which, if committed in (India) would be punishable under this Code.

Illustration : A (who is a citizen of India) commits a murder in Uganda. He can be tried and convicted of murder in any place in (India) in which he may be found."

In this connection, extra-territorial legislation means a law of a State with reference to its own citizens in respect of acts or events which take place outside the State. In discussing questions relating to extra-territorial operation, it is desirable that the two connotations of the words should be kept distinct and separate.

As the impugned Act purports to tax sales within its territory, its operation against persons who are residing outside but in respect of sales within the State is extra-territorial in the first sense, and it is the validity of the provisions of the Act in this sense that this appeal is concerned with.

(191) Now, the question is, can a State Legislature make laws with extra-territorial operation in the sense stated above? The ap-

pellant contends that it cannot, and calls in aid observations and decisions of the Privy Council with reference to the powers of a subordinate or colonial legislature to enact laws with extra-territorial operation.

In — 'Macleod v. Attorney-General for New South Wales', 1891-AC 455 (Z57), the point for decision was whether an Act of New South Wales conferred, on its true construction, jurisdiction on the Courts within the Colony to try an offence of bigamy committed presumably by its national in America. In construing it as intended to apply to crimes committed within the State, Lord Halsbury, L. C. observed that the jurisdiction of the colonies to enact laws was "confined within their own territories", and that "it would have been beyond the jurisdiction of the Colony" to enact a law in respect of a crime committed outside their territory.

These observations refer to extra-territorial operation in the second sense stated above, and have no application when the law of the State is in respect of an act or event taking place within its territories. In — 'Commercial Cable Co. v. Attorney-General of Newfoundland', 1912 AC 820 (Z58), the question was with reference to a law of Newfoundland imposing a tax on telephone companies in respect of cables landed or established in the Colony. In discussing the scope of these provisions, Lord Macnaghten observed at page 826 :

"While, of course, it was competent to impose taxation on cables within its territorial jurisdiction, it was not competent for the Government to lay a tax on cables outside its territorial jurisdiction."

These observations again have no bearing on the point now under consideration whether a law enacted in respect of an act or event occurring within the State is incompetent, if it seeks to operate on a person concerned in the act but residing outside the State. In — 'Nadan v. The King', 1926 AC 482 (Z59), the question was as to the validity of S. 1025 of the Criminal Code of the Dominion of Canada which enacted that "no appeal shall lie in criminal case to any authority in the United Kingdom by way of appeal or petition to His Majesty in Council".

It was held by Viscount Cave, L. C., that that section was repugnant to the Privy Council Acts of 1833 and 1844, and was therefore void under the Colonial Laws Validity Act, 1865, and that accordingly the appeal to the Privy Council was competent. He also observed that however widely the powers of the Dominion Parliament be construed, they were confined to action to be taken in the Dominion, and could not extend to annulling the prerogative right of the King in Council to grant special leave to appeal.

As the law in question was in respect of crimes committed within the State, these observations are capable of the construction which the appellant seems to put on them that such a law would be incompetent to the extent that it is to have operation outside the State. But it must be mentioned that the 'vires' of the action to be taken under the Act within the State itself was affirmed in unqualified terms, and that is what we are concerned with in this appeal.

The question, however, must now be taken to be settled by the decision in 'AIR 1933 PC 16 (Z17)'. There, the question related to the validity of Ss. 151 and 207 of the Customs Act of Canada under which the officers of the State were authorised to search ships within 12 miles of the coast, and seize dutiable goods found in them, the provisions being obviously intended to aid in the effective collection of customs.

There was no dispute that the legislation was within the competence of the Dominion Legislature, customs being one of the topics enumerated in S. 91, British North America Act, 1867, but the attack was on the validity of Ss. 151 and 207 on the ground that their operation was extra-territorial. Thus, the question raised is the very question which now arises for determination. In holding that the legislation was valid, Lord Macmillan observed as follows:

"Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good Government of Canada or as being one of the specific subjects enumerated in S. 91, British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State".

The law as settled by this decision may thus be stated: Whether a subordinate Legislature has power to enact laws with extra-territorial operation will depend on the terms of the Constitution Act which creates it and subject to any limitations contained therein, it has in respect of the topics assigned to it powers of legislation as plenary as the Sovereign Legislature which constitutes it.

(192) It was argued by Mr. N. C. Chatterjee that subsequent to the decision in 'AIR 1933 PC 16 (Z17)', the Privy Council had again to consider in — 'British Coal Corporation v. The King', AIR 1935 PC 158 at p. 161 (Z60), the validity of a Canadian law which had extra-territorial operation, and therein the grounds of the decision in '1926 AC 482 (Z59)',

were stated at page 161 with apparent approval, and that though the legislation was held to be valid, it was because of the Statute of Westminster, 1931, and that in the absence of a similar statute for India, the Legislature of this country had only the limited powers recognised in '1926 AC 482 (Z59)', and that extra-territorial legislation was incompetent.

But there is nothing in the observations in 'AIR 1935 PC 158 (Z60)', relied on by the appellant, to support the contention that the view expressed in 1926 AC 482 (Z59), was adopted in preference to that taken in AIR 1933 PC 16 (Z17); in fact, there was no decision at all on this point. Nor does the fact that the Statute of Westminster has conferred an express power on the Colonial Legislature to enact laws with extra-territorial operation affect the weight to be attached to the conclusions come to in 'AIR 1933 PC 16 (Z17)', because they were reached, not with reference to the Statute of Westminster about the applicability of which retrospectively to the case before the Board there was controversy, but on general principles, and what is more to the present case, it was the law as declared in 'AIR 1933 PC 16 (Z17)', that was before the framers of the Constitution when they enacted Ss. 99 and 100 of the Government of India Act, 1935.

(193) Turning now to the Constitutional provisions under the Indian law, this topic is dealt with in Ss. 99 (1) and 100 (3) of the Government of India Act. To understand the precise scope of these provisions, it is necessary to examine the position under the previous Constitution Acts. Section 43 of the Charter Act, 1833 (3 and 4 Will. IV, Chap. 85) conferred power on the Governor-General in Council "to make laws and regulations for all persons ..... and for all Courts and for all places and things whatsoever 'within and throughout the whole and every part of the said territory' ".

In the Government of India Act, 1915 (5 and 6 Geo. V, Ch. 61) the corresponding provision was S. 65 (1) (a) which enacted that the Indian Legislatures have the "power to make laws for all persons, for all Courts and for all places and things within the British India". Under these provisions, it cannot be doubted that the Indian Legislatures would have had no jurisdiction to enact laws operating on persons who were not within the State, as that would be plainly opposed to the limitation that they should be "for persons within the territory".

Both S. 43 of the Charter Act, 1833 and S. 65 (1) (a) of the Government of India Act, 1915 are based on the theory which was then widely held that a subordinate Legislature had no competence to enact laws with extra-territorial operation. Then came the Government of India Act, 1935. Sections 99 (1) and 100 (3) which are relevant provisions are as follows:

"99. (1) Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof.

100. (3) Subject to the two preceding subsections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List")".

The language of these sections marks, it will be noticed, a wide departure from that of S. 43 of the Charter Act and S. 65 (1) (a) of the Government of India Act, 1915. The limitation that the legislation should be for persons or things within the territory has been removed. Instead, it is enacted that it could be "for the whole or part of British India in the case of Federal Legislature" and "for the Province or part thereof in the case of Provincial Legislature", and under S. 100 (3), the power is to make laws for a Province or a part thereof with respect to the matters enumerated in List II.

Under Ss. 99 (1) and 100, the legislative power of the Centre or the Province is determined by two conditions. It must be for the territory specified, and it must be in respect of the topics enumerated in the respective lists. If these conditions are satisfied, then the law is valid notwithstanding that it may have impact or operation outside the State.

The scope of the legislative power conferred by Ss. 99 (1) and 100 is precisely the same as that conferred on the Legislatures of Canada under Ss. 91 and 92 of the British North America Act. That was also a power conferred on the Dominion Parliament or the Provincial Legislature to make laws for the Dominion or the Province in respect of the matters mentioned in Ss. 91 and 92 respectively.

It is on the construction of these provisions that Lord Macmillan held in 'AIR 1933 PC 16 (Z17)', that the Dominion Legislature was competent to enact laws in respect of those matters even if they had extra-territorial operation. The framers of the Government of India Act, 1935, changed the language of S. 65 (1) (a), Government of India Act, 1915, and substituted words similar to those in Ss. 91 and 92, British North America Act, 1867.

It is a reasonable deduction to make that they intended to give effect to the law as declared in 'AIR 1933 PC 16 (Z17)'. A law which

satisfies the two conditions prescribed in Ss. 99 (1) and 100, therefore, must be held to be 'intra vires, even though it might have extra-territorial operation.

(194) The precise extent of the powers conferred by Ss. 99 (1) and 100 has also been the subject of considerable judicial consideration. In 'AIR 1944 FC 51 (Z23)', the question was as to the liability of a Company which was incorporated under the English Companies Act having its main office in England and no place of business in India to be assessed to income-tax under the provisions of the Indian Income-tax Act. The Company held the bulk of shares in nine Companies which were also registered in England and controlled from there, and carried on business in British India and earned profits. Dividends in respect of these profits were declared in London & paid to the assessee in London. The Explanation to S. 4 (i) (c) of the Indian Income-tax Act enacts that a dividend paid outside British India shall be deemed to be income accruing in or arising in British India to the extent to which it has been paid out of profits subjected to tax in British India. The income-tax authorities claimed that the dividends received by the assessee-Company were liable to be taxed under this provision. The Company resisted the claim 'inter alia' on the ground that as it was not resident in British India and did not carry on business there, the Indian Legislature had no competence to impose a tax on it, and that the provisions of the Act were 'ultra vires' as extra-territorial in their operation.

This contention succeeded before the High Court of Calcutta, the Chief Justice observing that the impugned provision amounted to the "Legislature of British India without specific or apparent authority stretching out its legislative arm and physical hand beyond British India into other countries in an attempt to tax persons and property there not subject to its laws"; and Mitter J., characterising it as a "piece of extra-territorial legislation not by a superior or Dominion Legislature but by a subordinate Legislature". On appeal, this decision was reversed by the Federal Court. Spens C. J., who delivered the judgment of the Court held firstly that as the source of the income which was subjected to tax was Indian, it was competent for the Indian Legislature to impose a tax thereon, and 'no question of extra-territorial operation arose'. That is to say, Entry 54 in List I gave power to the Indian Legislature to tax income which arises from British India, even though the person to be taxed was not resident within British India. He also held that even if an element of extra-territoriality was involved, the legislation was not bad on that account, because S. 99 (1) and S. 100, Government of India Act, 1935 were intended to embody the law as declared in 'AIR 1933 PC 16 (Z17)', and to confer on the Indian Legislature plenary powers of legislation in respect of matters mentioned in the lists, departing in this respect from the position under S. 65 (1) (a) of the Government of India Act, 1915.

(195) In 'Wallace Brothers & Co. Ltd. v. Commissioner of Income-tax, Bombay', AIR 1945 FC 9 (Z61), the appellant was a Company registered in England and controlled from there. It held a 14/32 share in a firm called Messrs. Wallace & Co., which was carrying on business in Bombay. The appellant was sought to be taxed not merely on its income as partner of the Bombay firm about which there was no dispute but also on the income of over seven lakhs of rupees which had arisen and had accrued to it abroad. The appellant resisted the claim on the ground that the provisions of the Indian Act were 'ultra vires' as their operation was extra-territorial, inasmuch as they sought to tax income of a non-resident received abroad. The Federal Court rejected this contention. It held that if the person proposed to be taxed had sufficient business connection with British India, that would confer a jurisdiction on the Indian Legislature to tax him, & that what heads of income in his hands should be taxed was a matter of policy which was within the province of the Legislature to decide. It also held that the provisions of the Act were "not in their operation extra-territorial in the strict legal sense". There was an appeal against this judgment to the Privy Council, i. e., 'AIR 1948 PC 118 (Y)'.

Affirming the judgment of the Federal Court, Lord Uthwatt observed that the fact that the appellant "was a member of the partnership carrying on business in British India" was irrelevant in considering whether the legislation was 'intra vires'; that it was to be assumed that there was "no connection between the Companies and British India except the derivation from British India of the larger part of their income", and that the validity of the legislation should be determined on that basis. He then observed:

"There is no rule of law that the territorial limits of subordinate legislature define the possible scope of its legislative enactments or mark the field open to its vision. The ambit of the powers possessed by a subordinate legislature depends upon the proper construction of the statute conferring those powers. No doubt the enabling statute has to be read against the background that only a defined territory has been committed to the charge of the legislature. Concern by a subordinate Legislature with affairs or persons

outside its own territory may therefore suggest a query whether the Legislature is in truth minding its own business. It does not compel the conclusion that it is not. The enabling statute has to be fairly construed". He then referred to S. 99 (1) and S. 100, Government of India Act under which the Indian Legislature had power to enact laws for the whole or part of British India with respect to tax on incomes, and concluded:

"The resulting general conception as to the scope of income-tax is that given a sufficient territorial connection between the person sought to be charged and the country seeking to tax him income-tax may properly extend to that person in respect of his foreign income... .....The principle — sufficient territorial connection—not the rule giving effect to that principle—residence—is implicit in the power conferred by the Government of India Act, 1935. The result is that the validity of the legislation in question depends on the sufficiency for the purpose for which it is used of the territorial connection set forth in the impugned portion of the statutory test".

It is the contention of the respondent that the present question is concluded by this decision. In 'AIR 1949 FC 18 (Z25)', the question related to the liability of the Gwalior Durbar to be assessed to income-tax in respect of interest received at Gwalior. There was a Company called the Providence Investment Co. Ltd., carrying on business in Bombay. The shares of the Company were all held by the Durbar or by its nominees. It was financed by the Durbar, the transaction taking the form of loan advanced at Gwalior. On these facts, the Income-tax Officer assessed the Agent of the Durbar to tax on the interest received at Gwalior. The validity of this assessment was disputed on the ground that the statutory provisions under which it was made were extra-territorial in their operation and therefore 'ultra vires'. It was held by all the learned Judges following the decisions in 'AIR 1944 FC 51 (Z23)'; and 'AIR 1948 PC 118 (Y)', that the assessee would be liable to tax if there was sufficient business connection between him and British India, and that, in that event, the provisions would not be bad on the ground of extra-territorial operation. There was, however, a difference of opinion among the learned Judges as to whether, on the facts, sufficient territorial connection had been established, the majority holding that it had been, while two learned Judges thought otherwise. That, however, is not material to the present discussion.

(196) These authorities establish that under S. 99 (1) and S. 100, Government of India Act, a law enacted by the Indian Legislature in respect of the matters enumerated in the appropriate lists would be valid provided it is for the territory entrusted to their charge; that whether it was so or not would depend on whether there was sufficient territorial connection between the person who is sought to be charged or proceeded against under the law and the country which enacts the law; and that when such connection exists, the law is not strictly speaking extra-territorial, and it is not 'ultra vires' on the ground that the person is not residing within the State which enacts the law.

(197) Then, we come to the Constitution. Articles 245 (1) and 246 which deal with this subject reproduce Ss. 99 (1) and 100 with only alterations of a formal character. They confer on the Parliament and the State Legislatures power to enact laws in respect of the topics mentioned in the respective lists to be exercised for the territory over which they have jurisdiction. It is a well-settled rule of construction that when a statute is repealed and re-enacted and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them under the repealed Act, because the legislature is presumed to be acquainted with the construction which the Courts have put upon the words, and when they repeat the same words, they must be taken to have accepted the interpretation put on them by the Court as correctly reflecting the legislative mind. On a construction of Arts. 245 (1) and 246, therefore, it will be difficult to come to any other conclusion than that a sales tax legislation of a State which is otherwise valid is not 'ultra vires' on the ground that the person proposed to be taxed is not resident within the territorial limits of the State.

(198) Three other contentions urged in opposition to this conclusion must now be considered:

1. It is only the Central or Federal Legislature that has the power to enact laws with extra-territorial operation, and that the Legislatures of the States forming units of a Federal Union do not possess such power.

2. Under Art. 245 (2) there is a prohibition against States enacting laws with extra-territorial operation.

3. Some of the provisions of the Act forming the machinery sections for the assessment and collection of taxes are, in any event, unauthorised and the whole Act is void on the ground that the valid provisions thereof cannot be separated from the invalid ones.

(199) On the first question, it is argued by the learned Attorney-General that the decision in 'AIR 1933 PC 16 (Z17)', had reference to a law enacted by the Legislature of Dominion of Canada and not any of the Provinces,

and that the decisions in 'AIR 1944 FC 51 (Z23)', 'AIR 1948 PC 118 (Y)', and 'AIR 1949 FC 18 (Z25)', related to the Indian Income-tax Act which was enacted by the Central Legislature, and that to apply the doctrine laid down in those cases to laws passed by the States would be to extend its operation beyond recognised limits, and that there was no warrant for it in the Constitution.

On principle, it is difficult to see why a law enacted by the State in respect of the matters assigned exclusively to its jurisdiction should stand on a different footing from a law passed by Parliament on a matter within its jurisdiction. Both the Legislatures derive their authority from the same source, whether it be the Government of India Act, 1935, or the Constitution of India. Under these Statutes, the State is not subordinate to the Centre, its authority being supreme in respect of the matters entrusted to it. Under the Government of India Act, 1935, when the British Government decided to change what was a unitary into a Federal Government, the process adopted for that purpose was that the Parliament resumed all the powers that had been granted under the previous Constitution Act and redistributed them between the Centre and the Province. The terms on which the redistribution was made were identical both for the Centre and the Province, their authority under Ss. 99 (1) and 100 being to enact laws in respect of the matters mentioned in the appropriate lists and for their respective territory. The extent of this authority must therefore, be the same both in the case of the Centre and the State, each being sovereign within its own sphere.

The principle laid down in 'AIR 1933 PC 16 (Z17)', that a subordinate Legislature has plenary powers in respect of the topics assigned to it will apply as much to the State with reference to the matters enumerated in List II as to the Centre with reference to the topics mentioned in Lists I and III. In — 'Hodge v. The Queen', (1883) 9 AC 117 (Z62), which is one of the cases on which the decision in 'AIR 1933 PC 16 (Z17), was based, the law under challenge was that of the Province of Ontario in Canada in respect of a topic enumerated in S. 92, British-North America Act of 1867. The question whether States as distinct from the Commonwealth have competence to enact laws with extra-territorial operation has also been considered in some of the decisions of the Australian High Court. In — 'Broken Hill South Ltd. v. Commissioner of Taxation', (1937) 56 CLR 337 (Z63), Evatt J., in discussing this question observed as follows at p. 378:

"Some of the cases also illustrate the fact, occasionally overlooked, that, constitutionally speaking, the status of the States of Australia is equal to, or co-ordinate with, that of the Commonwealth itself. Sovereignty is not attributable to one authority more than to the others; it is divided between them in accordance with the demarcation of functions set out in the Commonwealth Constitution. Within the limits so prescribed, the legislative authority of the States is of precisely equivalent quality and potency to that of the Commonwealth, the authority of which is, in Ss. 51 and 52 of the Commonwealth Constitution, limited by reference to subject-matter.

In short, the Commonwealth Parliament may legislate for 'the peace, order and good government of the Commonwealth with respect to' a large number of subject matters. Similarily, the State of New South Wales may legislate for the 'peace, welfare and good government' of New South Wales. In relation to such a subject-matter as that of taxation, and subject, of course, to any overriding provision of the Commonwealth Constitution, it is quite impossible to deny to the States in relation to their geographical area constitutional powers precisely analogous to those possessed by the Commonwealth Parliament in relation to its geographical area. The legislation of the States cannot be deemed 'ultra vires' merely because of territorial reasons, unless analogous legislation of the Commonwealth Parliament would similarly be deemed unconstitutional and void".

These observations are very apposite to the present controversy. The conclusion is inescapable that the powers of the Union and the State under Ss. 99 (1) and 100, Government of India Act, as also under Arts. 245 (1) and 246 in respect of the matters mentioned in their respective lists have the same content and quality, and that if legislation with extra-territorial operation is within the competence of the Union, it is equally within the competence of the State.

(200) Coming now to the second contention, the argument of the appellant is that in enacting that "no law of Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation", Art. 245 (2) prohibits by implication the enactment of such laws by the States. This contention is unsound. The words "extra-territorial operation" are used, as already stated, in two different senses as connoting firstly, laws in respect of acts or events which take place inside the State but have operation outside, and secondly, laws with reference to the nationals of a State in respect of their acts outside; that in its former sense, the laws are strictly speaking intra-territorial though loosely termed 'extra-territorial', and that under Art. 245 (1) it is within the competence of the Parliament &

of the State Legislatures to enact laws with extra territorial operation in that sense. The words "laws with extra-territorial operation" in Article 245 (2) must be understood in their second and strict sense as having reference to the laws of a State for their nationals in respect of acts done outside the State. Otherwise, the provision would be redundant as regards legislation by Parliament and inconsistent as regards laws enacted by States.

This conclusion is placed beyond doubt when regard is had to the history of legislation on this topic. S. 43 of the Charter Act, 1833 while restricting the scope of legislative authority to persons and things within the State thus denying the power to enact laws with extra-territorial operations in the first sense, conferred a power to make laws "for all servants of the Company within the Dominion of Princes and States in alliance with the said Company". This was a power to enact extra-territorial legislation in the second sense for servants of the Company. S. 65 (1), Government of India Act, 1915 followed the same pattern, and while limiting under sub-cl. (a) the power of Indian Legislatures to enact laws for persons and things within British India conferred jurisdiction to enact laws with extra-territorial operation in the second sense by sub-cls. (b), (c), (d) and (e) which are as follows:

"65. (1) The (Indian Legislature) has power to make laws—

(b) for all subjects of His Majesty and servants of the Crown within other parts of India; and

(c) for all native Indian subjects of His Majesty, without and beyond as well as within British India; and

(d) for the government of officers, soldiers, (airmen) and followers in His Majesty's Indian forces, wherever they are serving, in so far as they are not subject to the Army Act (or the Air Force Act); and

(e) for all persons employed or serving in or belonging to the Royal Indian Marine Service".

This topic was again dealt with in S. 99(2), Government of India Act, 1935, which runs as follows:

"99. (2) Without prejudice to the generality of the powers conferred, by the preceding sub-section, no Federal law shall, on the ground that it would have extra-territorial operation, be deemed to be invalid in so far as it applies—

(a) to British subjects and servants of the Crown in any part of India; or

(b) to British subjects who are domiciled in any part of India wherever they may be; or

(c) to, or to persons on, ships or aircraft registered in British India or any Federal States wherever they may be; or

(d) in the case of a law with respect to a matter accepted in the Instrument of Accession of a Federated State as a matter with respect to which the Federal Legislature may make laws for that State, to subjects of that State wherever they may be; or

(e) in the case of law for the regulation or discipline of any naval, military, or air force raised in British India, to members of, and persons attached to, employed with or following, that force, wherever they may be".

In AIR 1944 FC 51 (Z23), the question was raised whether these provisions were restrictive of the power of the Indian Legislature to enact laws with extra-territorial operation in respect of matters other than those enumerated in S. 99(2). Spens C. J. held that as the impugned provisions were within the ambit of legislative power under Ss. 99(1) and 100, Government of India Act, 1935, they were not extra-territorial in operation and that even if they were, the words "without prejudice to the generality of the powers conferred by the preceding sub-section" occurring in S. 99(2) posited the existence of a power 'aliunde', and that the enumeration of the specified topics in that sub-clause was by way of abundant caution.

On 14-8-1947, acting under S. 9, Indian Independence Act the Governor-General issued an Adaptation Order, and therein, for the words "for the whole or any part of British India or for any Federated State" were substituted the words "including laws having extra-territorial operation for the whole or any part of the Dominion"; and sub-s. (2) was omitted.

When the Constitution was enacted, the words "including laws having extra-territorial operation for the whole or any part of the Dominion" were omitted, and in their place, Art. 245(2) was enacted. Thus, Art. 245(2) is a successor to S. 65(1), sub-cls. (b), (c), (d) and (e), Government of India Act, 1915 and S. 99 (2), Government of India Act, 1935, and its scope is extra-territorial legislation in the second sense. As we are concerned in this appeal with extra-territorial operation in its first sense, Art. 245(2) has on application, & the attack on the impugned Act on the ground that it is barred by Art. 245 (2) must fail.

(201) The third contention has reference to the machinery sections of the Act relating to the assessment and collection of taxes. The argument was that even if the Bihar Legislature had the competence to enact under Entry 54 a taxation law against non-residents, it had no power to enforce it outside its own territorial limits, and some of the provisions were bad on this ground, such as S. 17 which authorised search of premises and seizure of ac-

counts, and S. 26 which made it an offence to obstruct such search or seizure. But we are not called upon in these proceedings to pronounce on the validity of these provisions. The respondent issued notice under S. 13(5) of the Act calling upon the appellant to send his returns and proposing in case of default to make assessment on the basis of best judgment.

It was at this stage that the appellant rushed to the Court, and moved for a writ of prohibition to restrain the proceedings on the ground of want of jurisdiction. That is the one and the only question that now falls to be determined. Even if some of the machinery sections are bad—it is a question to be decided when it arises whether they can be justified on the ground that they are ancillary or incidental to the substantive provisions, as to which see — 'Attorney-General for Canada v. Cain', 1906 AC 542 (Z64) and AIR 1933 PC 16 (Z17)—that would not affect the power of the State to impose a tax, and it will therefore be foreign to the scope of this appeal to enter into a discussion of their validity.

(202) It was urged by the learned Attorney-General that if the machinery sections were bad on the ground that they were extra-territorial in their operation, and if the power to tax was so mixed up with them as to be inseparable from them, then, when they fall it must also fall. A power to tax is a matter of substantive law; whereas the machinery sections providing for the execution of that power such as, assessment, and collection of tax, pertain to the domain of adjectival law, and the two are distinct and separable. It is elementary law that the power to tax does not depend on the ability to realise it. In 1946 AC 527 (Z42) Viscount Simon observed:

"A legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account, and the courts of its country must enforce the law with the machinery available to them".

Without expressing any opinion, therefore, on the validity of the machinery sections, I must hold that the impugned Act in so far as it authorises the imposition of tax on sales falling within the Explanation to Art. 286(1)(a) is neither 'ultra-vires' the powers of the State Legislature nor bad on the ground that it is extra-territorial in its operation.

(203) 5. Then there remains the contention of the appellant that even assuming that the States could, under the Explanation, enact a law imposing a tax on a non-resident and that such law would not be hit by Art. 286(2), the impugned Act must even then be held to be bad for the reason that it was not authorised by the terms of the Explanation. Two grounds were urged in support of this contention: (1) that under the Explanation truly construed, a seller could be taxed only if he is within the State, and (2) that the goods were actually delivered not in Bihar but in Bengal and that therefore the Explanation did not apply. The argument in support of the first ground was that as the Explanation enacts that the sale or purchase—not merely the sale—must be deemed to have taken place in the delivery State, it must be construed in the light of the presumption that the laws of a State are intended to operate on persons or things within its territory, and so construed, it should be held to authorise the levy of a tax on the seller only if he was within the State or on the purchaser who must be within the territory.

The assumption on which this argument rests is that States have jurisdiction only over persons and property within their territory; but this, as already shown, is not correct. A State has jurisdiction to enact laws in respect of acts and events which occur within its territory, and if a sale takes place within the State as under the Explanation it does by a legal fiction, then its jurisdiction to enact a law imposing a tax thereon is complete, and no question of its overstepping its territorial limits arises. It should also be noted that the scope of the presumption that the laws of a State are not intended to operate outside its territory is, as stated by Maxwell, that "Parliament does not design its Statutes to operate on its subjects beyond the territorial limits of the United Kingdom" (Maxwell's Interpretation of Statutes, 10th Edn., p. 145). That has reference to extra-territorial operation in the second sense. There is no presumption that the laws of a State made with reference to acts and events occurring within its borders are not intended to have operation outside its territory.

(204) Moreover, a tax on sale of goods is, as observed in AIR 1942 FC 33 (Z20) "a tax levied on the occasion of the sale of goods" and the liability to tax arises "on the occasion of a sale". In AIR 1953 SC 252 (B), it was stated that the sales tax was a tax imposed "on the occasion of the sale as a taxable event". It is thus, in essence, a tax levied on the act of buying and selling. Sale is the result of a contract, and is bilateral in character. There can be seller only in relation to a purchaser and 'vice versa'. It, therefore, follows that the power to impose a tax on sale imports a power to tax either the seller or the purchaser.

(205) In — 'Syed Mohammad and Co. v. State of Andhra', AIR 1954 SC 314 (Z65) the question was raised for decision whether Entry 48 in the Provincial List of the Government of India Act, 1935 "tax on sale of goods" included a power to impose a tax on the pur-

chaser. It was held that it did, and it was observed that when Entry 54 in List II, Sch. 7 of the Constitution substituted for the words "tax on sales" occurring in Entry 48 the words "tax on sale or purchase", it did not thereby enlarge the powers previously conferred by Entry 48 but "merely expressed in clearer language what was implicit in that corresponding entry". When Art. 286(1)(a) and the Explanation refer to a sale or purchase, they merely conform to the terms of Entry 54, and these words cannot therefore be construed as splitting up the power to tax sales into two parts, one available against the purchaser at all times, as in the very nature of it he must be within the State, and the other against a seller if he is within jurisdiction. The power is one and indivisible to be exercised when the conditions mentioned in the Explanation are satisfied against either a seller or buyer as the Legislature might determine.

(206) The language of the Explanation, it should be marked, does not impose any limitation or condition on the exercise of this power. It is general and unqualified, and will comprehend all cases in which goods are delivered for consumption in the taxing State irrespective of whether the seller is within the State or not. To hold that the tax could be imposed on a seller only if he is within the State would be to add words to the Explanation which are not there, and for this, there is no justification. On the other hand, there are good reasons why the power should have been vested in the legislature to determine whether it will tax the seller or the buyer. The tax imposed under the Explanation really falls on the consumer-purchaser.

While it is possible that with reference to certain classes of goods the tax can effectively be imposed on the purchaser, it must happen that with reference to other kinds of goods as, for example, medicines in the present appeal, it cannot be so done, and, as already pointed out, it is a "familiar and sanctioned device" to make the seller the agent of the State for collection of taxes. In leaving it to the States to determine whether they will tax the seller or the buyer, the Explanation has merely given recognition to a familiar principle of taxation laws sanctioned by usage and upheld by authority. This objection must accordingly be overruled.

(207) It was then contended that the sales proposed to be taxed did not take place in Bihar as the goods were actually delivered as contemplated by the Explanation not there but in Bengal. The argument is that the words "actual delivery" in the Explanation are used in contrast to constructive or symbolic delivery as meaning physical delivery of goods, that under S. 39(1), Sale of Goods Act, 1930 (Act 3 of 1930) the common carrier is the agent of the purchaser, and that therefore delivery of the goods to the railway authorities in Bengal was actual delivery thereof to the purchaser in Bengal. Section 39(1) is as follows:

"Where in pursuance of a contract of sale, the seller is athorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody is 'prima facie' deemed to be a delivery of the goods to the buyer".

It is difficult to see what there is in this section to support the contention that delivery to a common carrier is actual delivery to the purchaser. The section does not say so. On the other hand, it proceeds on the assumption that there was, in fact, no delivery to the purchaser, actual or otherwise, a thing being deemed to be something only, when as a fact it is not that, and then enacts on that basis a fiction that delivery to a common carrier shall be deemed 'prima facie' to be delivery to the buyer. What is the purpose of this fiction? It is, as will be clear from S. 39(2), to fix on whom the loss is to fall in case the goods are lost or damaged in course of transit. But where no such question arises, the fiction has to be ignored, and the matter will have to be decided on the factual basis whether the goods were actually delivered.

(208) A reference to S. 51(1), Sale of Goods Act is very instructive. It runs as follows:

"Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee".

In this clause, the word "delivery" is used to denote both the delivery of goods by the seller to the common carrier and the delivery to the purchaser by the common carrier. They cannot both be actual deliveries, as goods sold under a sale can actually be delivered only once. If the delivery of the goods to the common carrier was actual delivery, then what is the nature of delivery when the purchaser took possession of the goods from the common carrier? It is also physical delivery of the goods, and is therefore actual delivery on the appellant's own definition.

(209) The fact is that while for some purposes delivery to the common carrier is treated as delivery to the purchaser, there is delivery in fact and in its popular sense, only when the purchaser obtains possession of the goods and it is this that is connoted by the words "actual delivery". When S. 51(1) refers to delivery to buyer or his agent, it refers to actual delivery,

and delivery to common carrier is regarded as constructive, having regard to S. 39(1). The section, it will be noticed, proceeds on the footing that a common carrier is not the agent of the buyer with reference to actual delivery. He is the agent of the purchaser for transmission of the goods to him.

(210) This position was well-established in the common law of England, and was thus stated by Parke, B., in — 'James v. Griffin', (1837) 2 M and W 623: 150 ER 906 at p. 910 (Z66) in the following terms:

"The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a 'constructive delivery to the vendee'; but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods before they 'are actually delivered to the vendee', or some one whom he means to be his agent, to take possession of and keep the goods for him, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession.....The actual delivery to the vendee or his agent, which puts an end to the transitus or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods: (Scott v. Pettit, (1803) 3 Box and P 469 (Z67); Rowe v. Pickford, (1817) 8 Taunt 83 (Z68)); or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself: — 'Dixon v. Baldwen', (1804) 5 East 175 (Z69); or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination".

In 'In Re Cock, Ex parte Rosevar China Clay Co.', (1879) 11 Ch D 560 (Z70), James L. J., said:

"The authorities show that the vendor has a right to stop in 'transitu', until the goods have 'actually' got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent".

In the same case, the position was stated even more fully by Brett L. J., in the following terms:

"As soon as the clay was appropriated by the vendors to this contract and was placed on board the ship, the property in it passed to the purchaser and at the same time as between the vendor and the purchaser, there was a delivery of the claim to the latter. But it was 'a constructive not actual' delivery".

The same learned Judge again observed in — 'Kendal v. Marshall', (1883) 11 QBD 356 at p. 364 (Z71), as follows:

"Where the goods have been appropriated by the vendor, and have been delivered by him to a carrier to be transmitted to the vendee, a 'constructive possession exists in the vendee'". The law as declared in the above decisions was embodied in S. 32 (1), English Sale of Goods Act, which has been reproduced in S. 51 (1), Indian Sale of Goods Act. Vide also — 'Benjamin on Sales, Eighth Edn., p. 889 where the possession of the carrier on behalf of the buyer is stated to be "constructive though not yet actual possession". It must accordingly be held that the expression "actual delivery" in the Explanation to Art. 286 (1) (a) means delivery of the goods to the purchaser or his agent, and delivery to the common carrier is not actual delivery, and that, in this case, the goods were actually delivered not in Bengal when they were delivered to the common carrier but in Bihar when they were delivered to the purchaser. This contention of the appellant must also be rejected.

(211) In the result, the appeal should, in my judgment, be rejected with costs.

SINHA J.:

(212) I have had the advantage of perusing the judgments prepared by my brothers, S. R. Das, N. H. Bhagwati, B. Jagannadhadas and T. L. Venkatarama Aiyar. After a careful and anxious consideration of the two viewpoints contained in the judgments respectively of my brother S. R. Das holding that the previous decision of this court in 'AIR 1953 SC 252 (B)', should be overruled, and of my brother T. L. Venkatarama Aiyar that it should be followed, I have come to the conclusion that the latter view is more acceptable.

(213) We are all agreed that the present case is governed by the previous decision of this Court just referred to and that if that case lays down the correct rule of law, this appeal should be dismissed. We are also agreed that the language of Art. 286 of the Constitution on which the case depends is not felicitous and free from vagueness, with the result that the interpretation of that article is not free from doubt and difficulty. The very fact that in the case referred to, as also in the later decision of this Court reported in 'AIR 1953 SC 333 (U)', involving the construction of Art. 286, the Court was divided in its opinion shows that the interpretation of the articles in question is by no means easy.

The fact that the Court is sharply divided in the present case also emphasizes the difficulty. The question we have to determine at the outset is whether or not we should follow the previous decision of this Court in 'AIR 1953 SC 252 (B)'. We are all agreed that in a proper case it is permissible for this Court to go back upon its previous decision; but we are again divided as to whether this is a fit occasion for reviewing its previous decision. For the reasons given by my brothers, Jagan-

nadhadas and Venkatarama Aiyar, I would agree with them in holding that sufficient grounds have not been made out for overruling that decision which had been taken after hearing all the parties interested in the result of the case. Not only the parties directly concerned with the case but a number of States by way of interveners as in the present case were also heard. After giving a very full hearing the Court gave its judgment which is a very elaborate one, — the report of the case running into 60 pages in print.

It is true that much can be said for the opposite view as adumbrated in the judgment of my brother S. R. Das; but, in my opinion, simply because another view may be taken of the points in controversy is not a sufficient justification for our reviewing the previous judgment of this Court. It has not been suggested that any relevant provisions of the Indian Constitution or any other provision of law had been overlooked by this Court when it pronounced its previous ruling; nor has it been suggested that this Court on the previous occasion proceeded on erroneous suppositions. Under the Constitution and even otherwise this Court is naturally looked upon by the country as the custodian of law and the Constitution, and if this Court were to review its previous decisions simply on the ground that another view is possible, the litigant public may be encouraged to think that it is always worthwhile taking a chance with the highest court in the land.

Definiteness and certainty of the legal position are essential conditions for the growth of the rule of law. In my opinion, therefore, this Court should review its previous decisions only in exceptional circumstances as is the practice of the Judicial Committee of the Privy Council in the cases referred to by my brothers Jagannadha Das and Venkatarama Aiyar. If this Court has taken a view of the relevant provisions of the Constitution which does not commend itself to the acceptance of the Legislature, the latter can make necessary amendments, as has been done in the recent past.

(214) Coming to the merits of the case in hand, we are all agreed that the Explanation to Art. 286 (1) (a) of the Constitution has created a legal fiction as a result of which a transaction of sale or a purchase partaking of an inter-State character has been treated as a domestic transaction. The fiction has localized sales or purchases contemplated by the Explanation, by converting such transactions as would otherwise have been inter-State sales or purchases into sales or purchases inside one State in a sense in which it is placed in a class distinct and separate from what is referred to as sales or purchases "outside the State" in the main body of Art. 286 (1) (a) which prohibits imposition of tax by any State. There is a general agreement amongst us, I take it, that the main purpose of creating the fiction is to prevent multiple taxation of the same transaction, but, it may be added, not altogether to stop the taxation of such transactions.

We are also agreed that full effect must be given to the legal fiction on the supposition that the putative state of affairs is the real one. While thus agreeing on the general principle bearing on the question of the purpose and scope of a legal fiction, we are again divided on the question of how far the legal fiction should be carried in its actual application. For the reasons given by my brother Venkatarama Aiyar, I agree with him that the fiction created by the Explanation brings such a sale within the taxing power of the State within which such a sale is said to have taken place. Such a result is brought about not by holding that the Explanation has conferred positively the power on the relevant State to impose sales tax, but by holding that such an inside sale is beyond the scope of the prohibition contained in the main body of Art. 286 (1) (a) which interdicts the imposition of a tax on a sale "outside the State".

The explanation has got to be read as an integral part of Art. 286 (1) (a) and thus read, it means negatively that a sale or purchase outside a State cannot be taxed; and by necessary implication, that a sale or purchase inside a State may be taxed by that State as falling outside the mischief of the prohibition directed against the imposition of a tax on a sale or purchase of goods outside a State; in other words, as soon as a sale or purchase of goods is declared to be outside the pale of the prohibition contained in Art. 286 (1) (a), the State's power of imposing a tax contained in Art. 246 read with item 54 of List II, Sch. 7 comes into operation. I do not find myself in agreement with the view propounded by my brother S. R. Das chiefly because that view goes beyond the purpose of the creation of the fiction which admittedly was to prevent multiple taxation. The view as propounded by him besides preventing multiple taxation goes to the length of prohibiting any imposition of sales tax by any State. Such, in my opinion, was not the intention of the Constitution. Whereas the imposition of multiple sales tax on transactions of sale or purchase may be an obstacle to the free flow of inland trade and commerce, the imposition of sales tax by a single State in which the sale is deemed to have taken place by virtue of the Explanation cannot be predicated as having such an effect.

The view propounded by my learned Venkatarama Aiyar is thus not inconsistent with the avowed purpose of the Constitution, as expressed in Art. 301, which provides that

trade, commerce and intercourse shall be free throughout the territory of India. In my opinion, the view propounded by my learned brother S. R. Das about the actual application of the legal fiction stops short of giving full effect to that fiction. Allied with this question is the controversy as to whether Cl. (2) of Art. 286 is subject to Art. 286 (1) (a) read with the Explanation or 'vice versa'. In my opinion, for the reasons given by my learned brother Venkatarama Aiyar the better view is that Cl. (2) of Art. 286 of the Constitution is subject to Art. 286 (1) (a) read with the Explanation. On the whole, therefore, I would agree with the view that the previous decision of this Court in 'AIR 1953 SC 252 (B)', should continue to hold good and govern the present controversy also. In that view of the matter I would dismiss this appeal with costs.

BY THE COURT

(215) The appeal is allowed and an order shall be issued directing that, until Parliament by law provides otherwise, the State of Bihar do forbear and abstain from imposing Sales Tax on out-of-State dealers in respect of sales or purchases that have taken place in the course of inter-State Trade or commerce even though the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar. The State must pay the costs of the appellant in this Court and in the Court below. The interveners must bear and pay their own costs.

D.H.Z. Appeal allowed.

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*(S) AIR 1955 S. C. 756 (V 42, C. 102 Nov.)
(From: Election Tribunal, Shimoga)*

15th September, 1955.

S. R. DAS AG. C. J. AND VENKATARAMA AYYAR, J.

T. Nagappa, Appellant v. T. C. Basappa and others, Respondents.

Civil Appeal No. 18-A of 1955.

(a) Constitution of India, Art. 136 — Findings of fact recorded by Election Tribunal — Interference — (Representation of the People Act (1951), Ss. 123 (6) and 124 (4)).

Ordinarily the Supreme Court will not, in special appeal under Article 136, review findings of fact recorded by an Election Tribunal if there is evidence on which they could be reached. Hence where the Election Tribunal has held that certain candidate has committed corrupt practices mentioned in S. 123 (6) and (8) and S. 124 (4) of the Representation of the People Act and there is evidence to support these findings, the Supreme Court in appeal under Art. 136 will decline to interfere with them. (Para 4)

Anno: AIR Com., Const. of India, Art. 136, N. 12.

(b) Representation of the People Act (1951), S. 101 (b) — Votes obtained by returned candidate by corrupt practices struck out — Power of Election Tribunal to declare defeated candidate duly elected.

In an election to the Legislative Assembly A obtained 8093 votes as against 8059 obtained by B. A was therefore declared duly elected. B filed a petition for setting aside the election on the ground that A had committed corrupt and illegal practices. The Election Tribunal found that in all 60 votes were recorded by the electors who were transported by one J in a service bus with the connivance of A and of them at least 47 were recorded for A.

These voters would not have gone to the polling booth from their villages but for the facilities furnished by J. Even if all these votes were recorded in favour of the defeated candidate other than B, the lead of B would have remained unaffected.

Held that the Election Tribunal after striking out 47 votes obtained by A by corrupt practices could declare B duly elected: AIR 1954 SC 686. Distinguished. (Paras 5 and 6)

(c) Representation of the People Act (1951), S. 99 — Proviso — Notice.

No fresh notice under the proviso to S. 99 need be given to a party to the election petition in respect of the very charges which are the subject-matter of enquiry therein and as to which he already had notice. Civil Appeal No. 21 of 1955 (SC) Foll. (Para 7)

(d) Representation of the People Act (1951), S. 99, Proviso — Applicability.

In making recommendations with reference to the disqualifications mentioned in Ss. 141 to 143 of the Representation of the People Act the Tribunal exercises an advisory jurisdiction and the proviso to S. 99 has no application to it. Civil Appeal No. 21 of 1955 (SC) Foll. (Para 7)

CASES REFERRED: Paras

(A) (V41) AIR 1954 SC 440: 1955 SCR 250 (SC) 2, 6

(B) (V41) AIR 1954 SC 686: 1955 SCR 608 (SC) 6

(C) ('55) Civil Appeal No. 21 of 1955 (SC) 7

Mr. N. C. Chatterjee, Senior Advocate, (Mr. R. Ganapathy Iyer, Advocate, with him), for Appellant; Mr. C. K. Daphtary, Solicitor-General (Messrs. S. K. Venkataranga Ayyangar and B. R. L. Iyengar, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by VENKATARAMA AYYAR J.:

The appellant was one of several candidates who stood for election to the Legislative Assembly of the State of Mysore from the Tarikera Constituency. At the polling which took place on 4-1-1952 he obtained 8093 votes as against 8059 got by the first respondent, the others getting much less, & was duly declared elected. The first respondent then filed a petition for setting aside the election on the ground that the appellant had committed corrupt and illegal practices, and also prayed that he might himself be declared duly elected.

By its order dated 15-1-1953, the Election Tribunal, Shimoga held that three of the corrupt practices set out in the petition had been proved, viz., (1) that one Ahmed Jan had with the connivance of the appellant transported voters to the polling booth in a service bus,

*See Shimoga Election case No. 1 of 1952-1953, dated 15-1-1953.