CHAPTER II

CONFLICTS BETWEEN THE EXCLUSIVE FIELDS

CREATION, ARRANGEMENT AND RECONCILIATION OF THE FIELDS

Creation of exclusive fields

2.1 The Constitution creates an exclusive field of legislation for the Union Parliament and an exclusive field for the Legislature of each State. Fields are created by enumeration of topics or heads of legislation. The Union List (List I in the Seventh Schedule) contains 97 entries belonging to the exclusive Union field. The exclusive field of State Legislature is comprised of 66 entries mentioned in List II in the Seventh Schedule. In addition, there are 47 entries in the Concurrent List in respect of which both the Union Parliament and the State Legislatures are competent to legislate. Article 245 of the Constitution confers territorial competence on the Legislatures. The Union Parliament may make laws for the whole or any part of the territory of India. The Legislature of a State may make laws for the whole or any part of the State. The Union Parliament may also make laws which are extra-territorial in operation.

1 Under article 246 the exclusive fields of legislation are

1. 246 (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(contd.....34).
given to the respective legislatures, that is, to the Union Parliament with regard to items in the Union List, and State Legislatures with regard to the items in the State List.

2.2 In addition to article 246, there are provisions which create exclusive fields in favour of the Union. Thus article 252 of the Constitution empowers the Parliament to legislate exclusively on the topics of legislation mentioned in the State List when so authorised by resolutions passed in

(f.n. 1 contd.)

(3) Subject to clauses (1) and (2), the Legislature of any State 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").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List.

2. 252 (1) If it appears to the Legislature of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State.

(2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.
the House or Houses of Legislature of the State concerned.

An exclusive field in favour of the Union is also created by article 253. According to this article for implementing any treaty, agreement or convention with another country or for the implementation of a decision made at an international conference, association or other body, the Union Parliament has exclusive legislative competence even though it would necessitate legislation with regard to matters in the exclusive State field.

Overlapping of fields

2.3 Although an attempt has been made in the Constitution to demarcate the fields as exclusive, it has not been possible in practice to allocate legislative competence in such a way as to prevent overlapping. There are three main ways in which the overlapping may occur.

3. See the Prize Competition Act 1955 and sections 5(2) and 5A of the Estate Duty Act, 1953. For other instances see the North Eastern Hill University Act 1973 (24 of 1973) enacted by the Union Parliament in pursuance of resolution under article 252(1) passed by the Legislatures of the States of Meghalaya and Nagaland, and the Urban Land (Ceiling and Regulation) Act, 1976 based on resolution passed by the Legislatures of the States of Andhra Pradesh, Gujarat, Haryana, Himachal Pradesh, Karnataka, Maharashtra, Orissa, Punjab, Tripura, Uttar Pradesh and West Bengal.

4. 253. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.
Firstly, a subject of legislation of wide scope may be divided between the Union and the State fields; and it would be impossible to prevent overlapping by a clean-out division. Thus the legislative power with regard to trade and commerce is divided amongst three fields. Trade and commerce with foreign countries, import and export across custom frontiers and definition of custom frontiers are given to the Union Parliament. Inter-State trade and commerce is also allocated to the exclusive Union field. Trade and commerce within the State is given to the State Legislature and is placed in the exclusive State field. However, trade and commerce in the products of controlled industries, food-stuffs and certain other articles is allotted to the concurrent field. In view of such a division, the scope of trade and commerce power given to each field has to be determined by the courts.

2.4 Secondly, in certain cases exclusive field given to the States is described as comprised of matters not specified in List I. Entry 13 of List II speaks of "...and other means of communication not specified in List I" whereas the Union List specifies railways, highways declared by or under law made by Parliament to be national highways, and shipping and

5. Entry 41 of List I of Schedule 7.
navigation on inland waterways declared by law to be national highways. Entry 32 of List II refers to incorporation, regulation and winding up of corporations other than those specified in List I whereas entries 43 and 44 of List I refer respectively to the incorporation, regulation and winding up of trading corporations including banking, insurance and financial corporations but not including co-operative societies, and the incorporation, regulation and winding up of corporation, whether trading or not with objects not confined to one State but not including universities. Entry 63 of List II refers to rates of stamp duty in respect of documents other than those specified in the provisions of List I, and entry 91 of List I refers to rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

2.5 Thirdly, in several cases, the exclusive field in favour of the States is made subject to an exclusive field, carved out of it and reserved in favour of the Union. In some of these cases, the scope of the Union field is made to depend on a declaration given by Parliament. Obviously this device is adopted to promote uniform regulation under Parliamentary enactment of matters which would in national interest demand such treatment. This would give flexibility to the division
though it savours of centralisation. Education including universities, though given to the exclusive sphere of State legislation, is made subject to the following entries of the Union List:

63- The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

64- Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

65- Union agencies and institutions for-
   (a) professional, vocational or technical training, including the training of police officers; or
   (b) the promotion of special studies or research; or
   (c) scientific or technical assistance in the investigation or detection of crime.

66- Co-ordination and determination of standards in institutions for higher education or research and technical institutions.

Education is also made subject to the following entry in the Concurrent List:

"25. Vocational and technical training of labour".

2.6 Regulation of mines and mineral development in entry 23 of List II is made subject to entry 54 of the Union List.

According to entry 54 regulation of mines and mineral development to the extent to which such regulation and development
under the control of Union is declared by Parliament by law to be expedient in the public interest is an exclusive Union field. Similarly "industries" given to State field under entry 24 of List II is made subject to entry 7- industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war, and entry 52- industries the control of which by the Union is declared by Parliament by law be expedient in the public interest of List I.

2.7 In all these cases where an exclusive State field is made subject to an exclusive Union field or part of the exclusive State field may be transferred to exclusive Union field by a declaration of Parliament by law or by the Government under such a law, an overlapping of the fields is inevitable and the process of distribution of powers has really to be completed by the courts. The Supreme Court has held that in such cases the State field is pro tanto reduced which would take away the legislative competence of the State.

Hierarchical arrangement of jurisdiction

2.8 The three legislative fields are arranged hierarchically. The exclusive Union field has precedence over the concurrent and exclusive State fields. This is achieved in two ways. The concurrent and State fields are made subject to Union field.

12. For further examples the following entries may be consulted. Entries 17 of List I and 56 of List II, entries 22 of List II and 34 of List I and entries 33 of List II and 60 of List I and entry 54 of List II and entry 92A of List I.


14. Sub-articles (2) and (3) of Article 246.
It is provided that exclusive Union field is given to the Union Parliament "notwithstanding anything" in the concurrent and State fields. The concurrent field in its turn will override the State field but, as has been pointed out, it is subject to Union field. And the exclusive State field is subject to both the Union and the concurrent fields. The implication of this type of arrangement of the jurisdictions is that, in case of a conflict, a Union law in the exclusive field will prevail over a law in the concurrent or State fields, and a law in the concurrent field will prevail over a State law in the State field.

Reconciliation of conflict

2.9 In order to resolve conflicts of legislation between the exclusive fields, the first step is the proper ascertain­ment of the field and, the second one, the characterisation of the legislation to know to what field the law relates.

Ascertainment of the field

2.10 It has been held that the entries in the Lists are only legislative heads or fields of legislation. They demarcate the area over which the appropriate legislature has competence. The widest amplitude should be given to the language of the entries. If, on an interpretation of the true scope of the entry, the

15. Article 246(1).
16. Article 246(2).
17. Article 246(1) is comparable to the supremacy clauses in the U.S.A. Constitution (Art. VI) and the Australian Constitution (covering clause 5).
conflict or ambiguity, could be removed the problem is simple. Thus in Diamond Sugar Mills v. State of U.P. the scope of "local area" in entry 52 of List II ("52- Taxes on the entry of goods into a local area for consumption, use or sale therein") had to be determined. The U.P. Government had imposed a tax on the entry of sugarcane into sugar factories. Interpreting the term "local area", it was held that a factory premise could not be treated as "local area" which meant an area administered by a local authority.

2.11 In State of Madras v. Cannon Dunkerley & Co. Limited the scope of "sale of goods" in entry 48 ("48- Taxes on the sale of the goods and on advertisement") of List II of the Seventh Schedule to the Government of India Act 1935, had to be considered. The proposal in the Madras General Sales Tax (Amendment) Act, 1947 to levy sales tax on the materials used in the execution of a works contract, treating the use of materials as a sale of goods by the contractor, was challenged as ultra vires the power of the Provincial Legislature. It was held that agreement to sell movables for a price and the passing of property pursuant to that agreement were essential ingredients of 'sale of goods' in entry 48. In a works contract, which was an entire and indivisible one, there was no sale of goods as such. The result was that the Provincial Legislature had no power to levy sales tax on the price of the materials used in a works contract.

Thus the proper delimitation of the fields by itself may very often solve an apparent problem of conflict.

Reconciliation of overlapping entries

2.12 As has been noted above, in allocating subjects of legislation, clean-cut, water-tight divisions are not possible and hence overlapping is bound to occur. In such cases a reconciliation between the entries must be effected having recourse to the other entries in the Lists and the context and the scheme of the Act. For example, in In re C.P. Motor Spirit Act the question was whether the C.P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, which levied from every retail dealer a tax on the sale of motor spirits and lubricants at the rate of 5% on the value of such sales, was ultra vires the Provincial Legislature. Entry 48 of List II, "Taxes on the sale of goods and on advertisement", seemed to allow the Provincial Legislature to pass the law. At the same time, the terms 'duties of excise' in entry 45 of the Federal List, "Duties of Excise on tobacco and other goods manufactured or produced in India....", could include at least a tax on the first sale of an article after its manufacture or production. So if each legislative power was given its widest meaning, there was a common territory shared between them and an overlapping of the jurisdictions was the inevitable result.

Gwyer C.J. quoted the following passage from Citizens Insurance Company v. Parsons:

22. (1882) 7 A.C. 96.
"It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together and the language of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and to give effect to all of them."\(^23\)

In order to give effect to the Provincial power and establish harmony between the entries it was held that "duties of excise" should be read in a restricted sense. The Central Legislature would have power to impose duties on excisable articles before they became part of the general stock of the Province, i.e., at the stage of manufacture or production, and a Provincial Legislature would have exclusive power to impose a tax on sales thereafter.\(^24\) It was pointed out that in reaching this result Parliament should be presumed to know the Indian legislative practice of levying excise duty only at the stage of manufacture or production. Suleiman J. held that a tax on retail sales to consumers would not in substance be an excise duty. Jaykar J. in his concurring judgment observed:

"Item 45 (List I) may be said to contain a special power to levy an excise duty at all stages. As an exception to this, a portion of the power is cut out and allocated to the Province under item 48 (List II). It operates as an exception to the general power conferred by item 45".\(^25\)

\(^{23}\) A.I.R. 1939 F.C. 1 at p.5.
\(^{24}\) Ibid, at p.11.
\(^{25}\) Ibid, at p.40-41.
Thus reading a general power in a restricted sense in favour of a special power is a method of achieving harmony to avoid conflict of entries. This is only an instance of the principle of harmonious construction by the application of the maxim "generalia specialibus non derogant".

2.13 In Governor-General in Council v. Province of Madras the Governor-General in an original suit before the Federal Court contended that Madras General Sales Tax Act, 1939 (Act IX of 1939), in so far as it imposed a sales tax on the first sale of goods manufactured or produced in India, had contravened the exclusive field "duties of excise" given by entry No.45. The suggestion to read entry 48 of the Provincial List, "Taxes on the sale of goods", subject to entry 45 of List I in view of section 100 of the Government of India Act, 1935 did not prevail in the Federal Court. On appeal to the Privy Council, speaking for the Board, Lord Simonds approved of the decision of the Federal Court in Province of Madras v. Boddu Paidanna & Sons and held that a duty of excise was primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. A sales tax was levied on the vendor in respect of sales. Though they might seem to overlap, they were distinct in law. By giving a less wide meaning to the entry in the Federal List a reconciliation was possible. So the contention of the Governor-General failed and the validity of the Madras Act was upheld by the Privy Council.

2.14 The principle of reconciliation of the entries by reading the entries in a restricted sense in the light of other entries may be further noticed with regard to the interpretation of entry No. 24 "Industry" in the State List. In Tika Ramji v. State of U.P. Bhagawati J. speaking for the Supreme Court observed that industry in the wide sense of the term would be capable of comprising three different aspects: (1) raw materials which were an integral part of the industrial process, (2) the process of manufacture or production and (3) the distribution of the products of the industry. The raw materials would be goods which would be comprised in entry 27, "Production, supply and distribution of goods subject to the provisions of entry 33 of List III" of the State List. The process of manufacture or production would be comprised in State List entry 24, "Industries subject to the provisions of entries 7 and 52 of List I" except where the industry was a controlled industry when it would fall within the Union List entry 52 "Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest". The products of the industry would also be comprised in the State List entry 27 except where they were the products of a controlled industry which would fall within the Concurrent List entry 33. Thus by

29 Entry 33: Trade and commerce in, and the production, supply and distribution of-
(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;
(b) foodstuffs, including edible oilseeds and oils;
(c) cattle fodder, including oilcakes and other concentrates;
(d) raw cotton, whether ginned or unginned, and cotton seed &
(e) raw jute.
confining the meaning of the term 'industry' to the process of manufacture or production and leaving the raw materials and the products of industry to other entries a reconciliation has been effected.

2.15 The term 'industry' widely interpreted would include "gas and gas-works" specifically provided for in entry 25 of List II. Hence in Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal Subba Rao J. held that gas and gas-works would be excluded from the term industry in entry 24 of List II. Since 'industry' had the same meaning in entries 24 of List II and 52 of List I, the declaration in the Industries (Development and Regulation) Act, 1951 did not effect a transfer to the Union's sphere of the gas industry for regulation and development under the Union.

Reconciliation of the fields when a part of the exclusive State sphere is transferred to the Union

2.16 As has been noticed earlier, a part of the exclusive State field may be transferred to the exclusive Union field as a result of resolutions passed by the State Legislatures under article 252, by the exercise of treaty making power under article 253, the subjection of entries in the State List to related entries in the Union List, or by declaration by Parliament that it was expedient in public interest that the matter is regulated by the Union law. It has been held that in all such cases there is a deprivation of the exclusive

field of the State in favour of the Union, and any legislation of the State in the field so transferred would thereafter become invalid even if the Union did not exercise its powers and pass any legislation to regulate the matter. The status of State law in the transferred field has been described by M. Rajagopala Ayyanger J. in *State of Orissa v. M.A. Tulloch* to be one of virtual repeal by supersedure by the Parliamentary enactment. The effect of transfer of State field to the Union field in pursuance of resolution under article 252 has been described as one of 'surrendering' the field. Once the field is transferred, any existing State law would be impliedly repealed as in the case of transfer of State field by a declaration by Parliament.

2.17 There seems to be a confusion regarding the principle that should be invoked to settle conflicts in the transferred field. This has arisen because of the use by the courts of language appropriate in the resolution of conflicts in the concurrent field to cases of the type under discussion. These are considered later on while discussing conflicts in the concurrent field.


33. Ibid. at p. 1293.


35. *Infra*, Chapter IX.
Incidental Power

Entries to be interpreted to include ancillary powers

2.18 The entries in the Lists, being fields for the operation of legislative powers for the governance of the country, should be construed liberally. A grant of power necessarily implies that it carries along with it the power to do all that is necessary to realise that power. Though the Government of India Act, 1935 and the Constitution of India, 1950 do not contain any reference to the incidental or ancillary power, as in the case of the American Constitution, such power has been conceded to the legislatures by the interpretation of the courts. Gwyer C.J. of the Federal Court of India observed: "none of the items in the list is to be read in a narrow or restricted sense, ... each general word should be allowed to extend to all ancillary or subsidiary matters which can fairly or reasonably be said to be comprehended in it".

Mortgage of land was held to be included as an incidental and ancillary subject in the legislative head of land in entry 21 of the Provincial Legislative List in the Government of India Act, 1935. The corresponding entry in the

36. United Provinces v. Atiga Begum, A.I.R. 1941 F.C. 16 at p.25. In this case legislative validation of illegal executive orders remitting rent though not specifically mentioned in any of the Lists was held to be subsidiary or ancillary to the power of legislating on the particular subject (In this case, entry 21- Land etc. of List II) in respect of which the executive orders might have been issued.

Constitution, entry 18 of List II in the Seventh Schedule, has been held to comprehend legislation for agrarian reform and town planning. In *Indu Bhosan v. Rama Sunder*, it was argued that the words 'regulation of house accommodation' in cantonment areas provided for in entry 3 of the Union List should be confined to legislation for the allotment of house accommodation. Rejecting this argument it was held that the power to regulate was a power to direct and control and "will include within it all aspects as to who is to make the constructions, under what condition the construction can be altered, who is to occupy the accommodation and for how long, on what terms it is to be occupied, when and under what circumstances the occupant is to cease to occupy it, and the manner in which the accommodation is to be utilised".

Specifically enumerated power cannot be treated as incidental power

2.19 The detailed enumeration of subjects in the three Lists may sometimes affect the treating of a particular subject as incidental to another subject. Thus the taxing powers of the Union and the States having been specifically enumerated in the Union and State Lists respectively, a taxing power


41. Ibid, at p.232.
cannot be allowed as an incidental power of another legislative power though in the absence of a specific enumeration, it could have been so conceded. When the State Legislatures surrendered to the Union Parliament under article 252 of the Constitution, the power of legislating with respect to betting and gambling, the power to tax on betting and gambling given to the States under entry 62 of List II did not pass to the Union, though in the absence of a specific entry it would have been held to have passed as ancillary power.

2.20 If a matter cannot be fairly and reasonably be said to be comprehended in the given topic of legislation it will not be allowed as an incidental one. Bhagawati J. held that the requisition of immovable property could not be allowed as an incidental power to compulsorily acquire land (in entry 9 of List II) nor to rights in or over land included in entry 21 of List II nor to transfer of property within entry 8 of List III in the Government of India Act, 1935.

2.21 In State of Bihar v. Kameswar Singh the Attorney General had raised a contention that the Bihar Land Reforms Act, 1950 was a legislation with respect to land under entry 18

43. Entry 34 of List II.
of the State List, and a legislation under that entry should include all ancillary matters including acquisition of land. This contention was repelled by the court. Das J. observed:

"There is no doubt that 'land' in Entry 18 in List II, has been construed in a very wide way but if 'land' or land tenure in that entry is held to cover acquisition of land also, then Entry 36 of List II will have to be held as wholly redundant, so far as acquisition of land is concerned...to give a meaning and content to each of the two legislative heads under Entry 18 and Entry 36 in List II, the former should be read as a legislative category or head comprising land and land tenure and all matters connected therewith other than acquisition of land which should be read as covered by Entry 36 in List II".47

Limits of incidental power

2.22 The rule that an entry conferring legislative power should be interpreted broadly to include all ancillary and incidental matters cannot be stretched to any extent. In R.C. Cooper v. Union of India (The Bank Nationalisation Case) it was argued that the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 affected also the non-banking business (miscellaneous services, strictly not within banking, but customerily performed by banks to attract business) of the acquired banks. The non-banking business


was outside the scope of entry 45 Banking in the Union List, and of matters incidental thereto, and hence beyond the legislative competence of the Parliament. Accepting this argument Shah J. in his majority judgment observed as follows:

"To include within the connotation of the expression "Banking" in Entry 45 of List I, power to legislate in respect of all commercial activities which a banker by the custom of bankers or authority of law engages in, would result in rewriting the Constitution. Investment of power to legislate on a designated topic covers all matters incidental to the topic. A legislative entry being expressed in a broad designation indicating the contour of plenary power must receive a meaning conducive to the widest amplitude, subject however to limitations inherent in the federal scheme which distributes legislative power between the Union and the constituent units. But the field of banking cannot be extended to include trading activities which not being incidental to banking encroach upon the substance of the entry "trade and commerce" in List II".

2.23 The limits of the doctrine of incidental power is illustrated also by certain Sales Tax cases. Section 11(2) of the Hyderabad General Sales Tax Act, 1950, (14 of 1950), had provided that, despite judicial verdicts, every person who had

49. Others joining him in the majority judgment were S.M. Sikri, J.N. Shelat, V. Bhargava, G.K. Mitter, C.A. Vaidialingam, K.S. Hegde, A.N. Grover, P. Jaganmohan Reddy and I.D. Dua, JJ. A.N. Ray J. (as he then was) held in his dissenting judgment that the non-banking business also would come within the scope of entry 45 Banking.

50. Ibid, at p.390. This interpretation of "Banking" did not contribute to the invalidating of the Act as it was held that there was no evidence to show that the banks in question were carrying on non-banking business before the date of acquisition.
collected tax otherwise than in accordance with the Act should pay it over to Government and that, in case of default, the recovery should be effected as though it were arrears of land revenue. Declining to allow this as part of the incidental and ancillary power to levy sales tax, Wanchoo J. pointed out that the incidental and ancillary powers had to be exercised in aid of the main topic of legislation which in the case on hand was levying of sales tax. All powers necessary for levy and collection of the tax concerned, and for the prevention of evasion of tax were comprised in the legislative entry as ancillary or incidental powers. But it could not be stretched to the extent of claiming an amount not exigible as tax under the law as though it were a tax.

2.24 Section 42(3) of the Madras General Sales Tax Act, 1959 had authorised the Check Post Officer to seize and confiscate goods under transport not covered by a bill of sale or delivery note. Refusing to treat this as part of the ancillary power, J.C. Shah J. pointed out that such power could not be said to be fairly and reasonably comprehended as ancillary to the power to levy a sales tax. Even an innocent person carrying his own goods as personal baggage from one

51. R. Abdul Quader & Co. v. Sales Tax Officer, Hyderabad, A.I.R. 1964 S.C. 922 at 924. See also Kantilal Babulal & Bros. v. H.C. Patel, A.I.R. 1968 S.C. 445 (S.12A (4)) of the Bombay Sales Tax Act, 1946 under which amounts illegally collected by the dealers on certain inter-State sales were claimed by the Government as incidental to the power to levy sales tax was invalid), and Asoka Marketing Limited v. State of Bihar, A.I.R. 1971 S.C. 946 where the Supreme Court held that a provision in the Bihar Sales Tax Act, 1959, claiming erroneously collected amount as incidental to the power to levy sales tax, was invalid.
State to another could come under the confiscation rule for failure to produce a bill of sale or delivery note.

2.25 The important scope of the doctrine of ancillary powers in connection with the doctrines of pith and substance, of incidental encroachment, and of unoccupied field, is considered later.

CHARACTERISATION OF LEGISLATION

Doctrine of pith and substance

2.26 The first step in the resolution of conflicts in the exclusive spheres of legislation is, as stated above, the determination of the scope of the fields created by the entries and, in cases of overlapping, the reconciliation of the fields by harmonious interpretation. It is possible that, even after the scope of the fields has thus been fixed, there could still arise conflicts because in actual legislation it will be impossible to confine the legislative provisions to any one exclusive field. Very often, in order to bring out a workable legislative scheme in a federal polity, many provisions which would appear to relate to matters in the exclusive fields given to another legislature may be necessary. In such instances, if the supremacy of the Federal jurisdiction granted by article 246 of the Constitution is literally adopted it would result in a large-scale curtailment of the State fields. Such

an approach would be contrary to the federal spirit of the Constitution. The power to legislate has been given as the power to legislate "with respect to" the topic concerned. So in the case of a legislation appearing to touch also the forbidden field it would be necessary to find out "with respect to" what field the legislation in question has been made. In a sense the legislation is "with respect to" a matter enumerated in a List if in its essential character it is in regard to a matter enumerated in that List. It is immaterial if its incidental or ancillary provisions touch the exclusive field allotted to the other legislature. This is called the doctrine of pith and substance and the doctrine of incidental encroachment.

2.27 In Subramanyen v. Muttuswami the Federal Court had to consider, on appeal from Madras, the validity of the Madras Agriculturists Relief Act, 1938, (Act 4 of 1938), which had scaled down the debts payable by agriculturists. A creditor who had advanced money to an agriculturist on a promissory note contended that the Act was invalid to the extent it affected debts on promissory notes as legislation with respect to promissory notes belonged under entry 28 of List I to the exclusive competence of the Federal Legislature. Gwyer C.J. though he decided the case on the basis that there was no

53. In Canada these are called the aspect doctrine and the doctrine of trenching. See Bora Laskin, Canadian Constitutional Law, 3rd Edn., (1969), Ch.III, pp.85-144.
54. A.I.R. 1941 F.C. 47.
encroachment into the federal sphere as the debts evidenced by
the promissory notes in question had passed to amounts due on
decrees which could be dealt with by the Provincial Legislature
under its exclusive or concurrent powers made the following
observations:

"It must inevitably happen from time to time that
legislation, though purporting to deal with a subject
in one list, touches also on a subject in another list,
and the different provisions of the enactment may be so
closely intertwined that blind adherence to a strictly
verbal interpretation would result in a large number of
statutes being declared invalid because the Legislature
enacting them may appear to have legislated in a
forbidden sphere. Hence the rule which has been evolved
by the Judicial Committee whereby the impugned statute
is examined to ascertain its "pith and substance", or
its "true nature and character" for the purpose of
determining whether it is legislation with respect to
matters in this list or in that".55

The accidental circumstance of having used negotia-
ble instruments or promissory notes in most cases for evidencing
the debts in question could not make the Act in question one
with respect to negotiable instruments or promissory notes.

2.28 In Prafullakumar v. Bank of Commerce, Khulna
Lord Porter, delivering the opinion of the Privy Council,
approved of the above dictum as correctly laying down the

55. Ibid, at p.51.
57. Other members on the Board being Lords Wright and Uthwatt,
   Sir Madhevan Nair and Sir John Beaumont.
grounds on which the rule of pith and substance was founded. It was also held that the rule was applicable in the interpretation of the Government of India Act as it applied to the Canadian Constitution. This principle has been adopted and followed in a large number of subsequent cases.

Pith and substance and the non-obstante clauses

2.29 The rule of pith and substance with its implication that incidental encroachment was permissible had some difficulty of being accepted initially. In view of the subjection of the Provincial field to the federal and concurrent fields and the use of the non-obstante clause in establishing the federal supremacy, it was thought that the doctrine of pith and substance and the allied principles of interpretation followed in Canada were not applicable in India. In Sadanand Jha v. Aman Khan, a Full Bench of the Patna High Court held that section 11 of the Bihar Money Lenders Act, 1938, (Act 3 of 1938), was void to the extent it affected though incidentally


60. Wort, Dhavle and Manchar Lall, JJ.
the provisions of existing Indian law, namely, section 2 of Usury Laws Repeal Act, 1855. Dhavle J. expressly stated that the principle of pith and substance, applied by the Privy Council in *Gallagher v. Lynn*, would not apply to the Government of India Act.

2.30 In the same strain, in his dissenting judgment in *Subramanyan v. Muttuswami*, Suleiman J. of the Federal Court held that the Madras Debt Relief Act, 1938 though in pith and substance related only to topics in the Provincial List could not be saved in so far as it conflicted with existing Indian law, viz., Negotiable Instruments Act. He held that the Canadian doctrines should be imported wholesale and not piece-meal. If the interpretation of "with respect to" led to the Canadian doctrines of pith and substance and incidental encroachment, there was no reason to stop at that and not to come to the next doctrine of occupied field. Since the Negotiable Instruments Act was there as existing Indian law, the Madras Act would not be held valid though only incidentally trenching the field occupied by the existing Indian law.

61. (1937) A.C. 863.
62. Section 11 held invalid was re-enacted as section 7 of the Bihar Money Lenders (Regulation of Transactions) Act, 1939, (Act 7 of 1939), passed in accordance with section 107 of the Government of India Act, 1935, that is with the assent of the Governor-General. The validity of the re-enacted provision and the lower court judgment based thereon were upheld in *Jagdish Jha v. Aman Khan*, A.I.R. 1940 F.C. 3.
63. A.I.R. 1941 F.C. 47.
2.31 If the doctrine of pith and substance was not applied in interpreting the Government of India Act, 1935, it would have meant that the federal supremacy had to be literally followed ignoring the spirit of provincial autonomy envisaged in the federal set up. The States would have found it practically impossible to embark upon legislation even on matters constitutionally committed to their charge without attracting invalidity on account of incidental trespass into the exclusive federal domain. So in order to give reasonable scope to provincial autonomy it was only proper that a literal and rigid stand was not accepted.

2.32 The acceptance of the doctrine of pith and substance has therefore the effect of softening down the rigours of the non-obstante clause, and of saving much State legislation from attack for want of competence which a literal application of the clause would have denied to the State Legislatures.

Scope of the doctrine

2.33 The doctrine of pith and substance is a doctrine capable of application to determine the vires of a legislative act when there are limitations on the legislative power. Such limitations may arise from division of powers or from other limitations envisaged in the Constitution such as fundamental rights or freedom of trade and commerce. In all such situations a literal adherence to the limitation might frustrate the grant of power by an undue insistence that the legislation in all its details and aspects should be within the prescribed limits. If the legislation is in its essential
features within the scope of the power granted, and exceeds
the limit only in respect of unimportant and incidental matters,
the validity of the legislation may be upheld. Thus the Bombay
Lotteries and Prizes Competition (Control and Tax) Act, 1948
was challenged as interfering with the freedom of trade and
commerce. It was held that in pith and substance, the Act
related to betting and gambling and not to trade and commerce
to attract justification on the yard-stick of reasonableness
and public interest laid down in articles 19(6) and 304 of the
Constitution.

2.34 The main ground of challenge to the validity of the
Constitution Seventeenth Amendment Act, which further abridged
the fundamental right to property, was that it curtailed the
powers of the High Court under article 226 which, under the
proviso to clause (b) of article 368, could have been passed
only with the concurrence of not less than half the number of
States as specified therein. Applying the doctrine, the Supreme
Court held that the pith and substance of Seventeenth Amendment
Act was to amend the fundamental right which could be done
without the concurrence of the States and the effect on the
jurisdiction of the High Courts was only incidental and in-
direct. In the present discussion we are concerned only with
the application of the doctrine for the resolution of conflicts
between the entries in the lists.

699.
2.35 In view of the hierarchical arrangements of the legislative jurisdictions this doctrine is applicable to the resolution of conflicts between entries in the exclusive Union field and the concurrent field, the concurrent field and the exclusive State field, and the exclusive Union field and the State field.

Nature and criteria of the connection

2.36 Since the power of legislation is conferred "with respect to" the various subject matters indicated, there arises a question as to the extent of connection that must be established before a law may be held to be "with respect to" that matter. While it is clear that a remote or fanciful connection is not enough, difficulties are bound to arise when the doctrine is applied in practice. Latham C.J. observed in Bank of New South Wales v. The Commonwealth:

"A power to make laws 'with respect to' a subject-matter is a power to make laws which in reality and substance are laws upon the subject-matter. It is not enough that a law should refer to the subject-matter or apply to the subject-matter: for example, income-tax laws apply to clergymen and to hotel-keeping as members of the public; but no one would describe an income-tax law as being, for that reason, a law with respect to clergymen or hotel-keepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks or banking".67

66. (1948) 76 C.L.R. 1 at p. 186.
67. As quoted with approval by M. Hidayatullah J. (as he then was) in State of Rajasthan v. G. Chawla, A.I.R. 1959 S.C. 544.
While no single criterion may be forthcoming to establish the connection required by the pith and substance doctrine judicial dicta and practice afford some guidance. Suleiman J. has said that looking at the legislation as a whole it must substantially be with respect to matters in the list.

"View of the act as a whole" and "end and purpose of the legislation" have been relied upon by the Supreme Court in State of Rajasthan v. G. Chawla.

2.37 Seeking the pith and substance of the legislation gives scope for purposive interpretation of the statute in question. This also means that the judges have sufficient latitude to introduce their value preferences into the doctrinal mould. This is well illustrated by the Northern Ireland Case Gallegher v. Lynn. The Parliament of Northern Ireland had no power to make laws "in respect of trade with any place out of that part of Ireland within their jurisdiction, except so far as trade may be affected by the exercise of powers of taxation given to the said Parliament or by regulation made for the sole purpose of preventing contagious diseases....". The Milk Products Act, 1934 made it an offence to sell milk for human consumption in Northern Ireland without a licence. The effect of this was to disable non-Northern Ireland producers.

70. (1937) A.C. 863.
from lawfully selling milk in Northern Ireland market and to affect external trade. If the Act was construed as in respect of external trade it was beyond the competence of the Northern Ireland Parliament. The Privy Council held the Act valid since in pith and substance it was a law relating to public health and it affected external trade only incidentally. It has however been claimed that the primary purpose of the Northern Ireland Act was not the protection of public health but the protection of domestic producers of milk. It is also interesting to compare this decision of the Privy Council with an American decision where on almost similar facts the court held that the legislation was primarily concerned with the local protection of trade and commerce and not with public health.

APPLICATION OF NON-OBSTANTE CLAUSE

2.38 After the legislation has been characterised and allocated to the proper field what remains would only be the problem of incidental encroachment. If the incidentally encroaching legislation is not met with inconsistent legislation in the encroaching field there will be no problem. Sometimes, legislation in pith and substance in the State field but encroaching incidentally into the Union field may come into conflict with legislation in pith and substance in the Union field whether incidentally encroaching into States

72. Dean Milk Co. v. City of Madison, 340 U.S. 349; (1951) 95 L.Ed. 329.
sphere or not. In such situations, if the two provisions cannot be given effect to, the conflict is resolved by invoking the non-obstante clause according to which the Union field will prevail over the State field.

2.39 Sometimes, it has been argued that an incidental encroachment into the Union field is permissible only if the field is unoccupied. On this basis Sulaiman J. held that sections 8 and 9 of the Madras Agriculturists Relief Act, 1938, which incidentally encroached into the exclusive federal field occupied by existing Indian law relating to promissory notes, to be void. It is submitted that there is no need to drag in the doctrine of occupied field to resolve conflicts of this type. The hierarchical arrangement of the jurisdictions and the use of the non-obstante clause are conclusive against the application of the doctrine of occupied field to resolve conflicts of the above mentioned type.

2.40 In Sudhir Chandra Nawn v. Wealth Tax Officer, Calcutta, where the validity of the Wealth Tax Act, 1957 was in issue, a conflict was alleged to exist between entry 86 of List I and entry 49 of List II. Shah J. held that if there was such

74. This doctrine of occupied field, considered more fully while discussing conflicts in the concurrent field, is properly applicable only to conflicts in the concurrent field.
76. 86— Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.
77. 49— Taxes on lands and buildings.
a conflict which was not capable of reconciliation, the power of Parliament to legislate in respect of a matter which was exclusively entrusted to it must supersede pro tanto the exercise of power of the State Legislature.

2.41 In Indubhushan v. Rama Sundari it was argued that the power of regulating house accommodation (including the control of rents) in cantonment areas, referred to in entry 3 of List I, should narrowly be construed as applicable to accommodation required for military purposes only, as otherwise, it would attract the general power of legislating in respect of landlord-tenant relationship under entry 18 of List II or entries 6 and 7 of List III. Rejecting this Bhargava J. made the following observation which shows the effect of the primacy given to the exclusive Union field by the non-obstante clause:

80. 3- Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.
81. 18- Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.
82. 6- Transfer of property other than agricultural land; registration of deeds and documents.
83. 7- Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.
"Article 246 of the Constitution confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List I, notwithstanding the concurrent power of Parliament and the State Legislature, or the exclusive power of the State Legislature in Lists III and II respectively. The general power of legislating in respect of relationship between landlord and tenant exercisable by a State Legislature either under Entry 18 of List II or Entries 6 and 7 of List III is subject to the overriding power of Parliament in respect of matters in List I, so that the effect of Entry 3 of List I is that, on the subject of relationship between landlord and tenant insofar as it arises in respect of house accommodation situated in cantonment areas, Parliament alone can legislate and not the State Legislatures".84

2.42 The non-obstante clause should however not be invoked in the beginning. As Gwyer C.J. said, effort should always be made to reconcile the conflicting jurisdictions by having recourse to the context and scheme of the Act and by reading entries together and by interpreting, and where necessary, modifying, the language of the one by that of the other. "If indeed such a reconciliation is proved impossible, then, and only then, will the non-obstante clause operate and the federal power prevail for the clause ought to be regarded as the last resource, witness to the imperfections of human expression and the fallibility of legal draftsmanship". 