

(1951) 04 BOM CK 0015
In the Bombay High Court

Sheoshankar

APPELLANT

Vs

State Govt. of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 18-04-1951

Acts Referred:

Central Provinces & Berar Prohibition Act, 1938 — Section 1, 1(3), 1A, 6, 6(1), 6(3), 6(1)(i), 6(1)(a), 8, 8A, 28, 29, 29(2), 30, 31, 32, 32(a), 32(b), 32(c), 32(d), 32(e), 32(f), 33, 34, 35, 36, 37, 47, 52, 68, 68(2)(f), 68(2)(i)
Trading With The Enemy Act, 1914 — Section 2(2)(b)
Judiciary Act, 1903 — Section 30, 45, 92
Bombay Prohibition Act, 1949 — Section 29(2)
Specific Relief Act, 1963 — Section 45, 47
Government of India Act, 1858 — Section 1(3)(i), 1(2), 100, 100(3), 137, 224(2), 297, 297(1)(a)
Preventive Detention Act, 1950 — Section 14
Central Provinces & Berar Foreign Liquor Rules, 1938 — Rule 7, 7A, 8, 8A 10, 18
Code Of Civil Procedure, 1908 — Rule Order 25 Rule 5
Constitution Of India, 1950 — Article 13(1), 14, 19, 19(a), 19(d), 19(e), 19(f), 19(g), 19(1)(a), 19(1)(f), 19(1)(e), 23(3), 32, 32(1), 32(2), 32(3), 33, 34, 35, 37, 47, 131, 132, 132(1), 133, 134, 135, 136, 137, 138, 139, 205, 225, 226, 227, 227(1), 228, 245, 246, 247, 301, 303, 305, 372(1), 395

Citation : (1951) CriLJ 1140

Hon'ble Judges : Mudholkar, J;Mangalmurti, J;Hidayatullah, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Hidayatullah, J.—This is an application purporting to be under Article 226 of the Constitution for the following reliefs:

(i) A writ of Mandamus directing the respondents not to enforce against the petitioner the Central Provinces & Berar Prohibition Act VII (7) of 1938 or all such sections of the same as may be found inconsistent with the Constitution:

(ii) a writ of Mandamus directing the respondents to withdraw & cancel all such notifications rules & orders made by the respondents in exercise of the powers conferred on them by the provisions of the said Act as may be found inconsistent

with the Constitution:

(iii) all the costs of the petition, &

(iv) Any other relief that this Honourable Court may deem proper to grant.

2. The petitioner states that he is a permanent resident of Nagpur and is earning Rs. 100 per month & has been accustomed for a number of years to take alcoholic drinks, generally country liquor, at an average of 4 ounces per day.

3. Since the enforcement of the Central Provinces & Berar Prohibition Act, 1938 (Act VII (7) of 1938), in the Nagpur District by Notification No. 652-800-VIII, dated 5-8-1946 the petitioner had to stop consumption of country liquor altogether inasmuch as a permit for bottled foreign liquor in forms F. L. XII & XII-A alone is available under Rules 7 & 7-A, Central Provinces & Berar Foreign Liquor Rules, 1938, issued by the Govt. under Sections 30, 32, 33 & 68(2)(f) & (i) of the said Act & under Notification No. 1271-1095-VIII dated 2-1-1938. Even this permit is subject to the condition that the licensing authority should be satisfied that the social & economic status of the petitioner warrant the grant of a permit & that the petitioner is not likely to abuse it.

4. The petitioner complains that he is prohibited by law from importing any country liquor & that he is eligible to import only foreign liquor from overseas or Indian made foreign liquor if a permit in form F. L. XII or P. L. XIII under Rules 18 & 10 respectively of the Central Provinces & Berar Foreign Liquor Rules, 1938, is granted to him.

5. The petitioner complains that neither he nor any licensed dealer in the Nagpur district can manufacture, store, or sell country liquor, inasmuch as no permit for the purpose can be granted under the Act or the Rules made thereunder.

6. The petitioner states that as a result, the petitioner is forced to apply for a permit for importing, purchasing or consuming foreign liquor only, whereas a citizen of Jabalpur or Gondia is free to purchase, hold, dispose of property in the shape of country liquor without any restrictions.

7. The petitioner submits that he is unable to apply for such a permit because (a) he is poor, & (b) he is afraid that the licensing authority might refuse him a permit on the ground that his social & economic status does not satisfy the authority. He contends that the consumption of liquor in moderation is in no way injurious to the health of the petitioner, that on the other hand deprivation of liquor to him has seriously affected his health, requiring constant treatment, that he has been unable to concentrate on his work, & that he is suffering in his income as a result.

8. The petitioner contends that he was previously working as an excise contractor, which is his hereditary occupation, but that since the imposition of prohibition in the Nagpur district on 5-8-1946, the petitioner is denied the right to engage in his family trade in the Nagpur district, though the citizens of the

Bhandara district are free to engage themselves freely in the same trade.

9. The petitioner contends that the Prohibition Act VII (7) of 1938 as a whole together with its permit system & all the notifications & rules, is void, because it takes away, or at any rate abridges, the Fundamental Rights guaranteed by Article 19, Sub-clauses (d), (e), (f) & (g) of the Constitution, & also because it denies equality before law of citizens, guaranteed under Article 14 of the Constitution & creates inequality between the citizens of one local area & those of another in the State of Madhya Pradesh.

10. The petitioner further contends that the Prohibition Act in so far as it prohibits the manufacture & sale of country liquor in prohibited areas & allows the sale of Indian-made foreign liquor, is void under Article 303 of the Constitution inasmuch as it gives to the brewery industry in other States a preference over the same industry in this state.

11. The petitioner contends that although Section 6 (3) of the Act, which exempts any person of non-Asiatic domicile or any member of the Defence Forces from any restraint in the matter of possession or consumption of any liquor, has now been repealed by the Central Provinces & Berar Prohibition (Second Amendment) Act, 1947, the Proviso to Rules 7 & 7 A of the Central Provinces & Berar Foreign Liquor Rules, 1938, make a discrimination against the petitioner in allowing free permits to consume liquor, to persons of such domicile. He challenges this discrimination as being repugnant to Article 14 of the Constitution.

12. The petition further contends that there is discrimination between a member of the Defence Forces of the country & other citizens, inasmuch as, under P. L. IV the former can have any quantity of the alcoholic beverage, without a permit from a military canteen &, this is repugnant to Article 14 of the Constitution.

13. The petitioner further contends, that the inhibition of advertisements & propoganda in favour of alcoholic drinks, by Section 8-"A" of the Act, offends against Article 19 (1)(a) & 303 of the Constitution inasmuch as it prevents him from expressing his opinion freely & restricts his right to convert others to his own view point & places the newspaper industry in Bengal & other States at an advantage over the newspapers of Madhya Pradesh.

14. The petitioner challenges the validity of Sections 28 & 37 of the Act on the ground that they empower a Deputy Commissioner in his discretion to compound an offence u/s 76 of the Act on payment of Rs. 500, thus denying equality before law to all the citizens. For the same reasons the petitioner also challenges Section 52 of the Act, which empowers the Deputy Commissioner or the Prohibition Officer to stop proceedings under the Act without reference to the Magistrate trying the case,

15. The petitioner challenges Section 29 of the Act, inasmuch as it amounts to a delegation of the legislative powers to the Govt.

16. The petitioner challenges Section 47 because, he avers, it offends against Article 23(3) of the Constitution.

17. The Act & the notifications which prohibit a citizen from acquiring, holding, or disposing of non-beverage, medicinal, & toilet preparations are challenged by the petitioner as being "ultra vires* of Article 19 (1)(f) of the Constitution.

18. The petitioner further challenges the Sweet Toddy (Nira) Rules, 1939, & the Mahuwa Rules, 1939, issued under Sections 33 & 68 of the Act as offending against Article 14 being applicable not at the whole State but to certain areas including the district of Nagpur.

19. The petitioner, therefore, asks not only for the reliefs above-mentioned but also for a declaration that the entire Prohibition Act & all the Rules, Notifications, & Orders are void & of no effect. He filed an affidavit in support of his petition.

20. The State Govt. in their Return filed in answer to the Rule issued by this Court admitted certain facts relating to the petitioner but denied others. They admitted the effect of the Prohibition Act as detailed by the petitioner, but denied that any of the provisions challenged by the petitioner militates against Article 14, 19, or 303 of the Constitution. They stated that the petitioner had no right to challenge the Act in the manner done by him & the petition itself was untenable under Article 226 of the Constitution.

21. The matter came up for hearing before a Division Bench of Mangalmurti & Mudholkar JJ., but on their recommendation the learned Chief Justice has been pleased to constitute a Full Bench consisting of the same learned Judges & myself.

22. At the hearing the petitioner was represented by Shri R. V. S. Mani & the opposite party by Shri T. P. Naik, Additional Govt. Pleader. Shri Naik raised three preliminary objections. His first contention was that this Court had no jurisdiction to entertain a petition for a writ of mandamus except in the exercise of its general jurisdiction since there is no original jurisdiction beyond what is laid down in the Letters Patent of this Court According to the learned Additional Govt. Pleader, a distinction must be made between powers, authority, & jurisdiction, & though the Constitution has vested certain powers in High Courts their jurisdiction as heretofore has been preserved & the powers can only be used by them in the exercise of their ordinary jurisdiction but not beyond. His second objection was to the form of the petition & the "locus standi" of the petitioner inasmuch as he had never applied for & permit or been refused one, & had never been prosecuted for the infringement of any of the provisions of the Act. His third contention was that the petition for mandamus was not only premature but misconceived because no specific legal duty has been challenged.

23. We heard the preliminary objections in detail but went on to hear the entire case as it was inconvenient to decide the matter of jurisdiction without having before us the entire case of the applicant & the specific grievance or grievances

which had given rise to the petition.

24. Before dealing with the arguments on the preliminary objection as well the merits of the case, it is necessary to examine, in brief, the Central Provinces & Berar Prohibition Act, 1938 (VII (7) of 1938) -- hereinafter called "the Act" -- to see how it is constructed. It is also necessary to find out the provisions therein & the rules which are challenged.

25. The Act was passed to introduce & extend the prohibition of the manufacture, sale, & consumption of liquor in the Central Provinces & Berar. The preamble of the Act states the underlying policy of the enactment in these terms:

Whereas it is expedient, as early as possible, to bring about the prohibition, except for sacramental, medicinal, scientific, industrial & such like purpose, of the production, manufacture, possession, export, import, transport, purchase, sale & consumption of liquor in the Central Provinces & Berar, etc.

Though the Act is extended to the whole of the Central Provinces & Berar, it is to come into force only in certain districts from 1-4-1938 & the Provincial Govt, is given the power to extend it to other areas from time to time by notifications as also to withdraw it from areas to which it is extended. There is appended a schedule of those laws which were to stand repealed as a consequence of the application of the Act to any local area. The administration of the Act is placed in the hands of a Prohibition Commissioner, though there is also a provision for the appointment of prohibition officers & for the delegation of his powers by the Prohibition Commissioner to the Deputy Commissioner.

26. u/s 5 Anti-drink Committees are to be set up. Chap. III deals with penalties, "inter alia" for import, export, transport, possession, manufacture (including tapping, drawing & distilling) of liquor & for possession or use of distilling apparatus. Penalties are also to be imposed for consumption, purchase & bottling of liquor, & for being found in a state of drunkenness. Section 8 makes punishable a mere agreement without an overt act, of two or more persons to commit, cause to be committed any offence, or to evade or nullify the provisions of the Act. Section 8 A provides for punishment in regard to advertisements relating to liquor & the remaining chapter deals with punishments of varying degrees, confiscation, & with compounding of certain offences.

27. Section 29 empowers the notification of exemptions. Section 30 empowers the grant of licences for "bona fide" medicinal & other purposes; Section 31 empowers the grant of licences for tapping sweet todds -- (called Nira); Section 32 empowers making of rules by the Provincial Govt. empowering the Prohibition Commissioner or any officer empowered by him to grant permits authorising grant of licences; Section 33 provides for fees; Section 34 for execution of agreements with or without security; Section 35 enables the authority granting the licence also to suspend or cancel it; Section 36 provides for punishment for misconduct by licensees, & Section 37 provides for compounding of offences committed by licence & permit-holders.

28. Chap. V provides for powers, duties & procedure of Officers etc. Chap. VI for Rules & Notifications, & Chap. VII for bar of legal proceedings against the Crown, police, & prohibition officers.

29. Of these, Sections 1 (3), 1 A, 6, 8A, 29, 30, 31, 32 & 37 were particularly challenged. Of the notifications those called in question were the following:

No. 934-863-VII dated 14-9-1940: reducing duty for troops receiving supplies through military canteens. This is challenged as amounting to discriminations:

No. 728-483-VIII dated 21-6-1938: exempting "bona fide" railway travellers in respect of certain qualities of liquor. This is also challenged as amounting to discrimination:

No. 1452-VIII dated 9-12-1947: granting certain exemption to military messes & canteens belonging to the Naval, Military, & Air Forces. This is also challenged as being discriminatory:

No. 1457-1861-VIII dated 11-12-1947: notifying the rules regulating the import, export or transport of country spirit, in transit from one part of India to another through Central Provinces & Berar. This is challenged as interfering with inter-State trade:

No. 1271-1095-VIII dated 2-11-1938: notifying the Central Provinces & Berar Foreign Liquor Rules, 1938. Of these Rules 7, 7 A, 8 & 8 A (which will be notified later) are particularly challenged as also certain licences & permits connected with them, on the ground of discrimination:

No. 687-327-VIII dated 17-6-1939: notifying the Sweet Toddy (Nira) Rules 1939.

No. 111-1524-VIII dated 25-1-1939: notifying the Mahua Rules, 1939.

The Toddy & Mahua Rules are challenged on the ground of discrimination.

29A The main grounds of attack are that they negative fundamental rights, make discrimination between one place & another, between persons & persons, foreign liquor & country liquor, & affect inter-state trade & commerce. In particular Article 19, Clauses (a), (d), (e), (f) & (g) were invoked.

30. I shall first take up the preliminary objection of the learned Additional Govt. Pleader for consideration. The objection here is threefold. The first objection is that this Court is not possessed of original civil jurisdiction & hence such a petition cannot be entertained till Parliament passes the kind of legislation contemplated by Article 32 (3) of the Constitution. The second objection is that even if a petition by way of original motion can be entertained the petitioner has not shown what injury he has suffered, or what act or omission there is in respect of which he seeks a writ, direction or order. Lastly, it is contended that the petitioner seeks merely a declaratory opinion from this Court on the validity of the Prohibition Act & the rules & notifications made thereunder. I shall deal with these objections in the same order.

31. The powers & jurisdiction of this Court are created by the Constitution, the Letters Patent, & other statutes. Article 226 of the Constitution, which gives the power to issue writs etc. provides:

(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Govt., within those territories directions, orders or writs, including writs in the nature of "habeas corpus, mandamus, prohibition, "quo warrants & certiorari, or any of them, for the enforcement of any of the rights conferred by Part in & for any other purpose. (2) The power conferred on a High Court by Clause (1) shall not be in derogation of the power conferred on the Supreme Court by Clause (2) of Article 32.

32. Reference is made in this connection to Articles 225 & 32, & it is stated that the jurisdiction of the High Courts is to remain unaltered except as stated in the proviso to the former article. It is then pointed out that the right to move the Supreme Court for the enforcement of Fundamental Rights is guaranteed by Article 32 (first clause), & the Supreme Court has been granted the power to issue writs, directions or orders (including writs in the nature of "habeas corpus" etc.) for the enforcement of any of the rights conferred by Part III (second clause). It is argued that there is no such guarantee in Article 226 which is also not placed in Part III & further that Clause 3 of Article 32 states that

Without prejudice to the powers conferred on the Supreme Court by Clauses (1) & (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).

33. It is contended that any exercise of such powers by the High Court must await legislation by Parliament in this behalf. This argument is clearly untenable.

34. The opening words of Article 226 "Notwithstanding anything in Article 32" read with the second clause of that article that

the power conferred on a High Court by Clause (1) shall not be in derogation of the power conferred on the Supreme Court by Clause (2) of Article 32.

show that the High Court's powers are not postponed & that the High Courts are excepted from the operation of the third clause of Article 32.

35. There is no force in the contention that we must make a distinction between "jurisdiction" & "power" & that Article 226 is merely enabling & provides an additional arm to the High Courts to be used in the exercise of their established jurisdictions. I am aware that opinion in India is not uniform on this point. The Madhya Bharat High Court in spite of a Pull Bench decision is really equally divided, & in the negation of such jurisdiction, is supported by the East Punjab High Court, while the Madras & Patna High Courts, expressly, & Bombay & Allahabad by implication, have recognized such jurisdiction. This Court has also

exercised jurisdiction under Article 226 on previous occasions.

36. Shri T. P. Naik quoted to us the observations of Patanjali Sastri, J. in *Romesh Thappar Vs. The State of Madras*, , in support of his contentions. His Lordship observed as follows:

We are of opinion that neither the instances mentioned by the learned Advocate General nor the American decisions referred to by him are really analogous to the remedy afforded by Article 32 of the Indian Constitution. That Article does not merely confer power on this Court, as Article 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred fly Part III, or for any other purpose, as part of its general jurisdiction. In that case it would have been more appropriately placed among Articles 131 to 139 which define that jurisdiction. Article 32 provides a "guaranteed" remedy for the enforcement of those rights, & this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector & guarantor of fundamental rights, & it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights. No similar provision is to be found in the Constitution of the United States & we do not consider that the American decisions are in point.

37. Before discussing this observation, which really goes against Shri Naik's contention, I propose to state my own view. When power is unconditionally granted by the people to certain legislative & other bodies, in a solemn constitution, :he power is to be used "eo instanti", unless otherwise provided, for the purpose for which it is granted. Every grant of power carries with it a jurisdiction to exercise that power."

As pointed out by Willis in his *Constitutional Law* (1936), page 683:

Questions of jurisdiction arise with reference to the agencies of the sovereign people. The question, therefore, simply is whether or not the sovereign people, as a principal, have given their agents power, either directly in the Constitution or indirectly through Congress & the Supreme Court. If they have given an agent power, that agent has jurisdiction. If the people have given the federal Govt. power, the federal Govt. has jurisdiction. If the people have given the states power, the states have jurisdiction. If the people have given a tax power to the federal Govt., or to the states, or to both, the Govts. to which that power has been given have tax jurisdiction as the case may be. In these cases the people have spoken...

38. It is true that the learned author goes on to say:

Where the jurisdiction has not been fixed by the terms of the power granted, expressly or impliedly, or by constitutional limitations, the common law bases of jurisdiction are implied. (ibid)

39. The latter observation cannot be invoked here because no limits are fixed by the Indian Constitution. Article 225, which is said to limit jurisdiction, is to the

following effect:.

Subject to the provisions of this Constitution & to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, & the law administered in, any existing High Court, & the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court & to regulate the sittings of the Court & of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

"Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction.

40. All that this article does is to preserve the original & appellate jurisdictions such as they were on the date of the inauguration of the Constitution. Article 226 must be read as an enlargement of that jurisdiction, & such an enlargement cannot be shut out either expressly or by implication, regard being had to the qualification "subject to the provisions of this Constitution" by which Article 225 is prefaced.

41. The observations of Patanjali Sastri J., if I may say so with profound respect, do not indicate anything to the contrary. His Lordship was merely pointing out that while the High Court issues writs etc. as "part of its general jurisdiction" the Supreme Court is invested with a "guaranteed" remedy for the enforcement of fundamental rights. The matter is not one of the general jurisdiction of the Supreme Court but of a special & guaranteed constitutional jurisdiction to be exercised whenever Part III of the Constitution is infringed. This has nothing to do with the distinction between "power" & "jurisdiction" which has found favour with the East Punjab & the Madhya Bharat High Courts. I do not think that the fact that Article 226 is sandwiched between Articles 225 & 227 has much relevance. The collocation of articles in the Constitution is not decisive, though it has some relevance in the matter of amendment thereof, in any event the position of Article 226 has not the same quality as the placing of Article 32 in the chapter on fundamental rights. I, therefore, hold that the High Court is invested with a jurisdiction as well as a power to issue writs, directions or orders as laid down in Article 226 in appropriate cases. In what classes of cases such jurisdiction should be exercised will be considered at a later stage.

42. I shall concern myself at this stage only with the question whether an application for the examination at large of statutes with a view to considering their constitutionality can be entertained, The provisions of Article 226 are new, & it is, therefore, necessary to point out the limits of the remedy conferred by that article.

43. It is true that Article 226 gives the power not only for the enforcement of fundamental rights but also for "any other purpose". The words "any other purpose" are of very wide significance, but it cannot be postulated that the High Courts were given unlimited power to do anything by their writs, orders or directions, some limitations must be placed by the High Court on its own powers. In the Bombay Prohibition case, *Fram Nusservanji Balsara Vs. State of Bombay and Another*, (Chagla C.J.) & in "*Indian Sugar Mills Ltd. v. Secretary to Govt. of U.P.*" 1950 ACJ 767, the same opinion was expressed.

44. While I do not pretend to lay down principles for all cases, I am quite clear that a petition for the examination of the constitutionality of an Act does not lie even under the wide powers conferred by Article 226. There is no need to go into the question whether original jurisdiction is conferred by Article 226. Even in those countries where original jurisdiction is possessed judgments are at rendered unless the petitioner can show some injury or some imminent injury to himself as a cause of action. But in no country is the constitutionality of a statute examined on a mere petition to a superior Court. In other words, advisory opinions or declaratory judgments on the constitutionality of legislation cannot be given apart from some concrete injury or controversy.

45. In England questions about the constitutionality of statutes can hardly arise, but the validity of Rules & Regulations & actions under statutes is frequently tested. There are only two modes of procedure. One is the petition of right, & the other an action against the Attorney-General as representing the Crown. In "*Dyson v. Attorney-General*" (1911) 1KB 410, an action was brought against the Attorney-General to test the validity of the notices issued by the Commissioners of Inland Revenue under the Finance (1909-1910) Act, 1910, & commonly known as Form IV. The main question argued was whether the Attorney-General could properly be made a deft, to an action of this nature. It was held by the Court of Appeal that the Attorney-General could be sued. Cozens-Hardy M. R. said at p. 415:

It has been settled for centuries that in the Court of Chancery the Attorney-General might in some cases be sued as a deft, as representing the Crown, & that in such a suit relief could be given against the Crown. "*Pawlett v. Attorney-General*" (1667) Hardress" Rep 465, is a very early authority on this point. "*Laragoity v. Attorney-General*" (1816) 2 Pri 172, is a case where this matter was a good deal discussed. In "*Deare v. Attorney-General*" (1835) 1 Y & C Ex 197, the Attorney-General demurred to such a bill. Lord Abinger (ibid at p. 208), said: "I apprehend that the Crown always appears by the Attorney-General in a Court of justice, especially in a Court of Equity, where the interest of the Crown is threatened. Therefore a practice has arisen of filing a bill against the Attorney-General or of making him a party to a bill, where the interest of the Crown is concerned", & the demurrer was overruled. But it is said that these authorities have no application except in cases in which the Crown rights are only incidentally concerned, & that where the rights of the Crown are the immediate &

sole object of the suit the application must be by petition of right; see Mitford on Pleading, P. 30. I do not think the distinction thus suggested is supported by authority, nor do I think the distinction would avail the Attorney-General in the present case.

It was further held in the same case that a declaratory decree could be granted in such an action. Farewell L. J.'s observations are instructive. The learned Lord Justice observed:

The next argument on the Attorney-General's behalf was "ab inconvenienti"; it was said that if an action of this sort would lie there would be innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers. But the Court is not bound to make declaratory orders & would refuse to do so unless in proper cases, & would punish with costs persons who might bring unnecessary actions: there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy & easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against "the exercise of statutory powers by Govt. departments & Govt. officials, having regard to their growing tendency to claim the right to act without regard to legal principles & without appeal to any Court.

46. The rule in "Dyson's case" is used in Australia & Canada to obtain declarations about the constitutionality of statutes. In "Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth" 15 CLR 182, an action was brought by the Company against the Attorney-General of the Commonwealth & members of a Royal Commission appointed under the Royal Commission Act, 1902-1912 to inquire into the sugar industry in the Commonwealth. The pltf.-Company claimed a declaration that that Act as it stood was invalid & an injunction against the Commission, Dyson's case was invoked in this connexion. Griffith, C.J. observed as follows:

In my opinion the jurisdiction of the Court both to make a declaration of right & to grant an injunction is clearly established in any1 of the following cases: (1) if the Act itself under which the alleged power is claimed is wholly invalid; (2) if the Govt. instrumentality is attempting to exert under cover of a valid Act powers which are not capable of being conferred on it by the Commonwealth Parliament; or (3) If it is attempting to exert under cover of the instrument creating it, powers which that instrument does not confer. I think it immaterial whether the instrument under which the power is asserted is an Act of Parliament, or letters patent purporting to be issued under an Act of Parliament, or letters patent validly so issued. As to the declaration, "Dyson's case" 1911 1 K B 410, is conclusive. As to the injunction against the depts. other than the Attorney-General the case of "Nireaha Tamak v. Baker" 1901 AC 561 , is equally conclusive.

47. In "Welsbach Light Co. of Australasia Ltd. v. Commonwealth of Australia" 22

CLR 268, an action was brought in the High Court against the Commonwealth & the Attorney-General for the Commonwealth for a declaration that the Trading with the Enemy Act, 1914, Section 2 (2)(b), was "ultra vires" the Parliament of the Commonwealth, a declaration that the Proclamation of His Excellency the Governor-General dated 7-7-1915 was unlawful as also a notice issued under the Act, & for an injunction. Though the demurrer was sustained, Isaacs, J. observed as follows at page 283:

The Crown in this case does not deny the propriety of the claim as a mere matter of procedure, but denies, &, in my opinion, successfully denies, that the law supports it. That is a very proper attitude, for otherwise the Crown would be substantially setting up a claim to what Farewell, L.J. called "a superiority to the law which was denied by the Court to the King himself in Stuart times" ("Dyson v. Attorney-General" 1911 1 KB 410). Apart from the justice of the position so taken up by the Crown, having reference not merely to the Company but to all Australian citizens who desired without incurring possible penalties or acting unpatriotically, to know their position in regard to the matter, it seems to me that, after the exposition of the corresponding English rule by Lord Davey in "Barraclough v. Brown" 1897 A C 615 , & by the Privy Council regarding this very rule in the "Attorney-General for the Commonwealth v. Colonial Sugar Refining Co." (1914) AC 237 , where they adopted the reason given by the learned Chief Justice, any contention to the contrary would have been unsustainable. But I hold that the pl'tfs. wholly fail on the merits for the reasons I have given, & therefore the demurrer should be allowed, & judgment entered for the defts.

48. In "Luna Park Ltd. v. The Commonwealth" 32 CLR 596, the attack was against the Entertainments Tax Assessment Act, 1916. The action was brought before the Act was enforced. The authority of "Commonwealth v. Queensland" (1920) 29 CLR 1, was cited to show that proceedings as to the validity of a statute can be entertained even though there was no statement of facts beyond a mere apprehension that the statute would be enforced.

49. The High Court of Australia did not accept the contention. Knox C.J. observed as follows:

In this case I do not think it is necessary to consider whether the Court has jurisdiction to make a declaration, for even if it had, I do not think the case is one in which the application for a declaration should be entertained. The state of facts on which the claim is based is purely hypothetical" "If the company elects to carry on its business in a certain way, will it be liable to pay a certain tax?" "It has always been the rule that the Court does not answer questions based on a hypothetical state of facts. If authority were needed for that, it will be found in the case of "Glasgow Navigation Co. v. Iron Ore Co." (1910) A C 293 , where Lord Loreburn L. C. stated that it was not the function of a Court of law to advise parties as to what would be their rights under a hypothetical state of facts. If this declaration were made, it would have no binding effect in the true sense at all. It would be no more than an abstract opinion in the nature of advice that, if the

company did certain things it would or would not become liable to pay a certain tax. None of the cases we have been referred to, I think, goes as far as that, & in my opinion the questions should not be answered.

Higgins J. added the following judgment:

In concurring with the judgment of the Court I wish to add a few words; because in the previous cases on which Mr. Latham & Mr. Dixon rely I had the misfortune to differ from the majority of the Court. In the "Mc Arther case" (1920) 28 CLR 530, & in the case of "Commonwealth v. Queensland" (1920) 29 C LR 1, my personal opinion was, as stated in the reports, that the action did not lie. But I am bound by the decision of the majority, & I loyally accept it. However, I am glad to find that in this case a limit is being put upon this class of actions.

50. What I have said so far is also borne out by the observations of Williams J. in "Attorney-General (Vict.) v. The Commonwealth" 71 CLR 237, where the learned Judge observes:

But counsel for the depts., after pointing out that the Parliament of the State of Victoria has not yet legislated in the field alleged to have been invaded by the Pharmaceutical Benefits Act, contended that, as there was no existing conflict between State & Commonwealth Legislation the declaration claimed involved a mere abstract question of law, so that there was no "matter" within the meaning of Section 75 of the Constitution, it was, of course, held in "In re Judiciary Act" (1921) 29 CLR 257, that there is no "matter" within the meaning of this section unless there is some immediate right, duty, or liability to be established by the determination of the Court. But, as I have said in two recent cases, "Whitney v. Vegetable Seeds Committee, (Unreported)" & "French v. Mc Carthy", (Unreported), I do not understand this statement to mean that the jurisdiction of this Court under Order IV of the Rules of Court to make declarations in cases where it has original jurisdiction is less than the corresponding jurisdiction of the English Courts under Order XXV, Rule 5. In those cases the opinion was expressed that the words in Order IV "in an action properly brought" mean in an action in which the Court has original jurisdiction. The present action, in my opinion, raises more than abstract questions. The Act has not yet been proclaimed, but we were informed by counsel for the depts. that it will be proclaimed at the beginning of next year, & that in the mean time the necessary preliminary steps are being taken so that it may then be brought into effective operation. The question will therefore arise in the immediate future whether the public in each of the states are entitled to the benefits & subject to the obligations imposed by the Act. The cause of action relied upon is not founded upon any conflict between State & Federal legislation, but upon the right, in some instances of the individual, & in other instances of the public or a section of the public, to restrain a public body clothed with statutory powers exceeding those powers. The cause of action was discussed & explained by O'Connor J. in the "Union Label case" 1908 6 CLR 469 & by my brothers Rich and Dixon in "Tasmania v. Victoria" 1935 CLR 157. In England no question can arise as to the

validity or invalidity of an Act of the Imperial Parliament, but such questions can arise with respect to regulations or executive acts purported to be made or done under the authority of Imperial Acts, & in England a claim for a declaration that such regulations or executive acts are beyond power would clearly constitute a cause of action. Instances where individuals who could claim some special interest in themselves have litigated such causes of action are illustrated by such cases as "Dyson v. Attorney-General" 1911 1 KB 410; "Burghes v. Attorney-General" 1912 1 Ch 173; "Wigg v. Attorney-General for the Irish Free State 1927 A C 674, "Yoxford & Darsham Farmers" Association Ltd. v. Llewellyn" (1945) 173 LT 103; while instances where it would be necessary to join the Attorney-General are discussed by Viscount Maugham in "Moscrop's case" 1942 AC 332. As the Chief Justice has said in "Toowoomba Foundry Pty., Ltd. v. The Commonwealth" 1945 Arb L R 282 , "it is now...too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid".

51. The above, however, must be read in the light of powers conferred on the High Court in Australia by Sections 75 & 76 of the Constitution & Section 30 of the Judiciary Act, 1903. The original Jurisdiction of the High Court in Australia is much larger than that of this Court. In spite of these provisions it was held by the High Court that there is no power to consider abstract questions of law involving the interpretation of the Constitution: See "In re Judiciary & Navigation Acts" (1921) 29 CLR 257 & "Bruce v. The Commonwealth Trade Marks Label Association" 4 CLR 1569.

52. The position in Canada is the same, though the bases for the decision are different. All this goes to show that it is possible in England, Australia, & Canada to bring an action against the Attorney-General for a declaration that a particular statute or action under it is "ultra vires" or unconstitutional. This, however, depends on the fundamental fact that the declaration must not be sought on a hypothetical state of facts & at the cause of action must disclose a real injury already occasioned or about to be occasioned to the plaintiff.

53. Many cases from American Courts were cited at the Bar in support of the contention that we should enter into an examination of the constitutionality of the Act. It is, therefore, necessary to say a few words about American practice. Under Article III of the American Constitution the Judicial power of the United States is vested in one Supreme Court & in such inferior Courts as the Congress may from time to time ordain & establish. The judicial power extends to all cases in law & equity arising under the Constitution, the laws of the United States... (and) to controversies to which the United States is a party. The original jurisdiction of the Supreme Court includes cases in which a State is a party.

54. In respect of declaratory judgments the matter is governed by the Federal Declaratory Judgments Act, which provides:

In cases of actual controversy except with respect to Federal taxes the Courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights & other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, & such declaration shall have the force & effect of a final judgment or decree & be reviewable as such.

55. In spite of the very wide powers the Supreme Court has given a very restricted meaning to the words "case", "controversy", & "actual controversy". Frankfurter & Hart writing in (1935) 49 H L. R 68, summarize the position in these words:

The presence of an actual controversy is the condition precedent of the Court's power to act; it does not of itself, however, assure the appropriateness of its acting...plainly enough, narrow concrete issues are more wisely decided than broad conjectural ones. No tenuous chain of interest should suffice to call into question aspects of a considered legislative policy not of immediate & demonstrable concern to the party invoking the Court's judgment." (Quoted in Frankfurter & Shulman: cases on Federal Jurisdiction & Procedure (1937) p. 93.)

56. The awkward dilemma of subjects having to choose between complying with the law, to their unnecessary detriment if the law be unconstitutional, & violating it at their own peril if it should prove to be constitutional, has not induced the Supreme Court to examine at large the constitutionality of Acts of legislature. The American Courts always insist that there must be a "case" or "actual controversy" before them.

57. Opinions have been expressed on several occasions that the Declaratory Judgments Act should be taken to cover those cases in which adjudication is necessary before actual violations of rights. Prof. Borchard, who had a lot to do with the adoption of the Declaratory Judgments Act, has also given expression to this opinion in "his book on Declaratory Judgments. Sometimes, resort is taken to the device of making an allegation that the Attorney-General has threatened action, & a suit or petition is founded on this fictitious threat as a cause of action, reminding us of the fictitious suits under Roman Law. Sometimes this plea is accepted as sufficient, but all such cases are for an injunctive relief. Examples of such injunctive relief on the basis of potential law can be found in "Euclid v. Ambler Realty Co." (1925) 272 U S 365 & "Pierce V. Society of Sisters" (1925) 268 US 510. But this principle has not been extended to pure declaratory reliefs.

58. As pointed out by Laurence M. Hyde (Commissioner Missouri Supreme Court) in an article on Declaratory Judgments in the Washington University (1941) 26 L Q 4:

One thing is certainly now settled, & that is that a declaratory judgment is neither an advisory opinion nor a decision of a moot question, because it must involve a real controversy in which the result would be "res judicata" between the parties.As recently pointed out in the United States Supreme Court

Frankfurter J. in "Coleman v. Miller" (1939) 307 US 433 , it is not the exercise of judicial power "to write legal essays or to give advisory legal opinions," that properly "a Judge never gives a decision until the facts necessary for that decision have arisen"; & that Courts should not do so because "the imagination of Judges, like that of other persons, is limited, & they are not able to put before their minds all the complex circumstances which they ought to have in their minds when giving a decision".

59. The United States Federal Courts as well as the Supreme Court, therefore, in spite of the power to declare any law -- national or state -- invalid as a violation of the Constitution, impose on themselves some limitations. Gersternburg points out that out of 40,000 cases approximately, decided by the Supreme Court in 147 years of its existence, only 76 decisions involved the invalidation of federal statutes or parts thereof. The position of state laws under the "due process" & "equality clauses" is however different.

60. The learned author (American Constitutional Law, 1937, pages 84, 86) summarizes these self-imposed limitations thus:

Acceptance of the exercise of the power by the Courts is in part attributable to the caution with which these have wielded it. The following rules have been laid down to govern the exercise of the power:

1. Questions as to constitutionality will not be passed upon unless they are essential to the decision in the case.
2. One who relies on the invalidity of a statute has the burden of proving its unconstitutionality. If the burden is not sustained the Court will presume that the statute is constitutional. "This rule applies especially where the issue is the reasonableness of the enactment in the light of existing conditions.
3. The unconstitutional character of the legislation must be clear regardless of the interpretation put upon it. Hence, where alternative constructions are possible, the law must be so construed as to preserve its validity.
4. The power cannot be extended to permit the Court to pass upon the question of the expediency or wisdom of particular legislation.
5. The motives of the legislature in passing particular statutes cannot be made the subject of judicial examination.
6. The power may be exercised only in actual litigation since under Article II of the Constitution the judicial power extends only to "cases" & "controversies". This means that there must be a real controversy between parties having opposing interests, & that one who contests the validity of a statute must show that substantial interests of his own will be adversely affected by its enforcement. The federal courts will not decide moot cases (i.e. they will not decide what the law would be on a hypothetical state of facts) nor will they render advisory opinions in cases where an abstract determination of the

constitutionality of a statute is sought.

Only in one case "Nashville v. Wallace," (1933) 233 US 249, a declaratory judgment was given on the assumption, regardless of form that an "actual" & "justiciable" controversy existed.

61. I have no hesitation in adopting these limitations, & in my opinion, regardless of the question whether this Court possesses original jurisdiction, such limitations must control our judgments under Article 226 of our Constitution.

62. Judged from this test the application involves little but a declaratory opinion upon all the sections of the Act & the rules & notifications thereunder. The petitioner contends that such applications have been entertained before, & he relied upon *Fram Nusservanji Balsara Vs. State of Bombay and Another*, to show that the application is competent. The petitioner before us urges that there is no point in making an application for a permit regarding "toddy" as that beverage is completely banned under the Act, that for a permit for foreign liquor he has not the means to pay the requisite fee, & that he is also afraid his social status etc. might not be found sufficient to pass the test laid down in the rules. He, therefore, contends that he is a person injured by the Act.

63. Now in the Bombay case the learned Chief Justice felt some difficulty about entertaining the petition. As observed by the learned Chief justice:

The Advocate General did at the very outset raise a preliminary point that the petition was not maintainable & the petitioner was not entitled to any relief. But he did not insist on arguing that preliminary point "in limine" & inviting our decision on it. He stated that Govt. did not wish to avail itself of any technical defence, on the other hand, Govt. was most anxious to know the views of this Court on the various provisions of the law so that it should be guided in the enforcement of the prohibition law & should not do anything which in the opinion of this Court was illegal? We appreciate the very fair stand taken by Govt. & it is because of this that we have dealt with the various provisions of the prohibition law before we come to the question of the relief to which the petitioner is entitled....The Advocate General has argued that the petitioner is not entitled to any relief because he never made a specific demand of these rights against the Govt. to comply with any of his demand & therefore strictly there was no denial of his rights by Govt. at the date the petition was filed, To maintain in application u/s 45, Specific Relief Act. a demand of justice & its denial is essential before an order can be made under that section. It is true that the orders that the petitioner is now seeking are not confined to Section 45 but fall under Article 226 of the Constitution. But even so we have to consider whether It is open to a petitioner under Article 226, without making a specific demand of his right & without giving an opportunity to the Govt. to comply with that right, to file a petition. It was pointed out in *Emperor Vs. Jeshingbhai Ishwarlal*, that the Court should of its own motion put limitations upon the wide powers conferred upon it under Article 226.

64. The Full Bench, in view of the arguments which had already taken place & in view of the desire of the State Govt. that the legality of the provisions challenged should be authoritatively examined, gave judgment. There are indications that, had the matter been objected to at an early stage & pressed unconditionally, the learned Judges might have reached a different conclusion. However, we are not concerned with a possible result, &, in view of the special circumstances present in that case, I cannot treat it as a precedent.

65. The petitioner has filed the petition for a mere declaratory opinion. He has done no act under the Act, nor has any action been taken under the Act to his detriment. He has not even made a demand for a permit, & thus there is no demand & refusal. The Prohibition Act has not been enforced against him as such. His only complaint is that as a result of the impugned Act he cannot do many things which he has in his mind. Mandamus cannot issue unless there is a demand & a refusal or some act or omission is to be ordered. It is not to be expected that this Court will sit down to examine the constitutionality of all the sections of the Act & the rules & notifications with a view to finding out what is constitutional or what is not.

66. Strictly speaking the application ought to be dismissed on this short ground. However, as the matter has been argued at great length & a Full Bench as been constituted to consider the legality of the Act, I feel that I should express some opinion on at least those portions of the impugned legislation which in my opinion need consideration in the light of the present Constitution. I follow, in doing this, the precedent of Griffith C.J. in "Australian Sugar Producers" Association Ltd. v. Australian Workers" Union 23 CLR 58, where the learned Chief Justice observed: as follows:

It is at any rate consonant with the practice of the Judicial Committee & of British Courts of Justice in general not to refrain from expressing an extra-judicial opinion In a case in which a formal error in procedure may prevent them from giving a formal judgment, but in which such an expression of opinion may avert a great public calamity. In my opinion, it would be a lamentable thing indeed if a Court should under such circumstances hold itself bound by any legal technicality to allow by its reticence the destruction of a great industry & great Imperial asset. In such a case legal technicalities have, to my mind, the same weight as rules of professional etiquette should have to the mind of a physician irregularly summoned to the bedside of an apparently dying man. For these reasons I not only feel at liberty but think that it is my imperative duty to express an opinion upon the merits of the case, & I venture to hope that some at least of my brothers on the bench will do likewise.

67. Before embarking upon the task of giving an opinion, I wish to indicate what are the exact points which I will take up for consideration. I shall confine my examination to the following points:

(a) Is the Prohibition Act rendered void being an unreasonable restraint upon the

freedom of the citizens of India?

(b) Was the Prohibition Act an unconstitutional measure under the Govt of India Act, 1935?

(c) Is Section 29(2) of the Act, read with Rules 7 & 7-"A" of the Central Provinces & Berar Foreign Liquor Rules, affected by Article 14 of the Constitution inasmuch as there is a likelihood of unequal treatment of the citizens of India? While dealing with these matters I shall put forth the arguments of the petitioner as the occasion arises. On the rest of the case of the petitioner I do not intend pronouncing any opinion & must reserve my judgment for such cases in which the questions can be properly examined.

68. I have shown above that the petitioner objects to the entire prohibition policy & all the measures by which that policy is implemented. In so far as the policy underlying the Act is concerned it is no part of the duties of this Court to pronounce upon it unless it can be brought within any of the exceptions provided in the Constitution. What we are mainly concerned with is whether the Act, Rules, etc., in whole or in any part, are unconstitutional. If we were to substitute we would be usurping the functions of the latter. Judges are not in a position to know the effects of drinking upon the health of the nation & must not substitute their own judgment for that of the legislature on what is good for the people & what is not.

69. It is to be remembered that one of the directive principles in Article 47 is to the effect that:

the State shall endeavour to bring about prohibition of the consumption for medicinal purposes of intoxicating drinks & of drugs which are injurious to health,

It must also be borne in mind that under Article 37, though this principle is not enforceable by any Court, the principle itself is fundamental in the governance of the country, & it is the duty of the State to apply this principle in making laws. It would appear that the matter is not one of moral persuasion merely. I am not concerned with the policy underlying the law. For that the petitioner must "resort to the polls & not to the Court". All that I am concerned with is whether the petitioner is injured by any act or omission under the impugned Act etc., & whether he can in a proceeding such as this challenge the constitutionality of the impugned Act & the rules & notifications thereunder.

70. The specific injury which the petitioner claims has been occasioned to him is that "toddy" which according to him is a refreshing beverage, has been completely banned, & this amounts to a violation of his fundamental rights.

71. He says there is discrimination between the place & another, one kind of intoxicating liquor & another, & between persons & persons & this is against the letter & spirit of Article 14 of the Constitution. He complains of deprivation of freedom of speech, & of his inability to get country liquor from other States, & says that the Act thus offends against Sub-clause (e) of Article 19(1) & against

Part XIII of the Constitution.

72. The last argument can be disposed of easily. Articles 301 & 303, on which reliance is placed, are subject to Article 305, which provides:

Nothing in Articles 301 & 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise provide." It is clear that unless the Prohibition Act etc, were unconstitutional measures under the Govt. of India Act, 1935, Article 305 saves them from the operation of Articles 301 & 303.

73. Similarly, Sub-clause (e) of Article 19(1) is subject to an exception, which is to the following effect:

Nothing in Sub-clauses (d), (e) & (f) of the said clause shall affect the" operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights "conferred by the said Sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

74. As regards reasonableness of the measure many cases of the Supreme Court of America illustrative of the exercise of "Police Power" by the States were cited before us to show under what circumstances legislation by the States was considered unreasonable & was declared void. The other side cited cases to the contrary. I do not consider it profitable to discuss those cases for the reasons which I give below.

75. Among the governmental functions it is usual in America to include a power to regulate the life & habits "of people in the interests of public safety, health or morals. This power is known, for want of a better designation, as "police power". Legislation in the exercise of "police power" is subject to "judicial review" under the twin "due process" & "equality" clauses of the 14th Amendment to find out whether the law curtailing rights to liberty & property is within such power.

76. The phrase "police power" itself has no precise definition, though several have been attempted. Prof. Thomas Reed Powell of Columbia University described it in these words:

The only safe answer is that the "police power" is the name given to the functions of Govt. not otherwise named. Learned American writers have called it "a fiction", "the dark continent of our jurisprudence", "the convenient repository for which our juristic classification can find no other "place," the indefinite supremacy of the State, "the power to govern". Such remarks are helpful to readers already familiar with the toil & turmoil, which controversies over the police power have engendered. They may solace those, who have sought in vain to evolve some definition more precise. But they do not chart the way for explorers, to whom the police power is still an unknown land". 1919 jCL 160.

77. In America such a power is deduced from the residuary legislative powers vested in the States, & the exercise of "police powers" is correlated to health,

safety, morals, & welfare of the public. The notion of "federal police powers" is of recent growth & has sprung up after the first world War, the power being exercised under the garb of "necessary & proper" legislation ancillary to the enumerated powers.

78. Dealing with "police power" Holmes J. observed that:

It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong & preponderant opinion, to be greatly & immediately necessary to the public welfare. Legislation, however, is valid only if it can be correlated to public morals, safety or health. When it is not so related, it ceases to be good law as it lacks "due process".

79. Thus, in so far as State Legislation of this kind is concerned the fight is between the "due process" & "equality" clauses on the one hand, & "police power" on the other. The "due process" clause overlaps the "equality" clause & goes beyond it. The Fourteenth Amendment, which had as one of its primary purposes the elevation of Negroes & their protection from State discrimination contains the following provision:

nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

80. Taking up "due process" first it is to be noticed that the term has no definition. The Supreme Court in one of its early decisions "Munn v. Illinois" (1876) 94 US 113, declared that it would ascertain:

the intent & application of such, an important phrase in the Federal Constitution by the general policy of judicial exclusion & inclusion as the cases presented for decision shall require.

81. As already stated above, any law which is restrictive of freedom etc. is either justified as "police power" or is declared bad as offending the "due process" clause. Vague criteria are deducible, but mostly the policy of "judicial exclusion or inclusion" is followed. An unending confusion has thus resulted, & it is difficult to say, in essence, "whether, when statutes fail to be regarded as within "police power," they lack "due process" or they lack "due process because they are not truly within "police power". So far as I am aware, nobody has attempted to solve this riddle.

82. In England Parliament is so transcendently supreme that it can make any law, & questions akin to "due process" can hardly arise. Thus, if Parliament made a law that all persons working in collieries shall travel free on buses & trains, it shall have to be given effect to, irrespective of any question of "due process" or "inequality". In America, on the other hand, when a State made a law that the upper berths of sleeping cars should not be lowered when unsold, the Supreme Court held the law to be benevolent but unconstitutional because it gave to the "purchaser of the lower Berth the luxury of more air space than he had paid for."

83. The exercise of the functions of "judicial review" of State Legislation, which began with "Marbury v. Madison," 1 Cra 137, was but the logical result of the Constitution. Hamilton, Federalist No. 78, said agreeing with Montesquieu that:

there is no liberty, if the power of judging be not separated from the legislative & executive powers.

The above Federalist was an answer to Brutus No. XI, in which the power of "judicial review" was belittled. Hamilton gives a classic analysis of the functions of the judiciary in relation to legislation. His statement is long & would not bear quotation here. According to him the Constitution is "law" & "fundamental law", & there is identity between law (including the Constitution) & the "judicial version" thereof. The interpretation of law being the peculiar province of Judges, according to him, it is "natural to suppose that the Courts were designed to be in an intermediate body between the people & the legislature, in order to keep the latter within the limits of "their" assigned authority".

84. All this has proved true in America in practice. Though the Constitution should speak for itself, it is the Court's version of the Constitution which has value in judicial review,

85. Though Hamilton & others warned that Courts must exercise JUDGMENT & not WILL, otherwise they would be substituting their "leisure for that of the legislative body, it is easy to see that judicial review has sometimes not adhered to this & decisions on the policy underlying a particular law have resulted.

86. Any attempt to evolve a single test must obviously fail. The amount of literature on "due process" & "police power" is colossal & the conflict in the decisions bewildering. Dr. Corwin has trenchantly pointed out that while professor Willoughby in the first edition of his classic book discussed the entire subject of "due process" & "equality" in one chapter of 18 pages he had to treat the same, 19 years later, in 15 chapters of 276 pages! As the learned author says:

From these two buds of the original constitutional tree have sprung, and largely within the last fifty years, a whole forest of constitutional law & doctrine." 1938 Court over Constitution 95.

87. And much water has flowed under the bridges in more recent years] The need for national security during the last two world wars gave preponderance to "police power" at the expense of due process & equal protection, while the return to peace put back police power in the shade.

88. Judicial review is thus not merely a matter of theory but in practice an institution of Govt. It is usual to call the Supreme Court as the substitute for the British House of Lords 1 This judicial review has no affinity to the utterance of the Privy Council on colonial legislation. There, either the power is found to exist or not to exist, but once found all ancillary powers are also conceded.

89. A brief analysis of the course of judicial decisions would disclose the mutability of judicial opinion from time to time. As pointed out by Wills in his Constitutional law (1936), page 651, note:

Kent thought due process meant judicial process. Soon it meant the standing law; that is, law under which property had been acquired. Then it meant with Cooley, state constitutional law. Now it has come to mean the approval of the Supreme Court.

I shall illustrate my meaning by referring to but a few of such cases. I leave but of account the earlier cases like the "License Cases" (1847) 5 How 504, where Chief Justice Taney attempted a definition of "police power", or "Brown v. Maryland". (1872) 12 Whe 419, where Marshall C.J. invoked police powers.

90. I begin with "Munn v. Illinois (1876) 94 US 113, in which a statute fixing maximum charges for the storage of grain in warehouses was upheld, it being laid down that "for protection against abuses by legislature, the people must resort to the polls, not the Courts." Fourteen, years later, a different note was struck in Chicago in "Milwaukee and St Paul R.R. v. Minnesota" (1890) 134 US 418, & the last cited case was overruled. The different result was because protection of invested capital was needed at the hands of the Court. The dissent of Bradley J. (concurred in by Lamar & Gray JJ.) is worth noting:

I cannot agree to the decision of the Court in this case. It practically overrules "Munn v. Illinois (1876) 94 US 113 and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation & settlement of the fares of railroads & other public accommodations is a legislative prerogative, & not a judicial question.

In this case the legislature appointed a commissioner to fix the rates chargeable by the railroads. The railways complained that the rates were too low, hence confiscatory & unconstitutional. This was upheld. In this case due process shifted from process or procedure to the field of substantive law.

91 In "Mugler v. Kansas" (1887) 123 US 623, Mr. Justice Harlan laid down the principle that:

it is not for the Courts, upon their views as to what is best, & safest for the community to disregard the Legislative determination of the question.

Yet in "Lochner v. State of New York (1905) 198 U. S45 the Supreme Court, by a five to four majority, decided that an act fixing an ten-hour days in bakeries was "an unnecessary", "unreasonable", "arbitrary", "illegal", & "meddlesome", interference with the rights of the individual." Justice Packham said:

It must, of course, be conceded, that there is a limit to the valid exercise of the police power ...Otherwise the Fourteenth Amendment would have no efficacy & the legislature of the Staia would have unbounded power, & it would be enough to say that any piece of legislation was enacted to conserve the morals, the

health or the safety of the people; which legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext -- become another & delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint.

92. The strong minority view was led by Holmes J. & contained a trenchant criticism. He said:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further & long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.

93. "Lochner's case" was not long lived. Another Oregon Statute which fixed a ten hour (day for women working in Laundries & factories was upheld: "Muller v. Oregon" (1908) 208 U S 412 & in "Bunting v. Oregon" (1917) 243 US 426; an Act similar to that in Lochner's case was upheld. In spite of "Muller's case" in "Adkins v. Children's Hospital" (1923) 261 US 525, a law passed to fix minimum wages for women & children was declared unconstitutional.

94. These are but samples of the conflicting decisions of which scores & scores can be cited. Since little principle is involved one can only say that they really rest on "judicial exclusion & inclusion".

95. Now, is this a happy precedent to invoke in this country? I would emphatically answer, No. The framers of our constitution sedulously avoided the phrase "due process" & put instead "authority of law", "according to procedure established by law". The constitution does not also leave it to the Court what is within "police power" & what is not. Wherever rights are guaranteed "there is also an indication of the limits of the guarantee and the qualifications to which it is "subject. By avoiding the term "due process" & by prescribing action "according to law", the inquiry has been limited to the content of the power of the legislature except where the constitution itself says that the reasonableness of the restriction is the test.

96. With a constitution so explicit we cannot borrow light from America to interpret our Constitution. It is time that lawyers began reading the Indian Constitution with the same care as they do the American Constitution. The decisions might have been helpful if the social structure of the two countries was the same & if the allowances and limitations imposed by the two constitutions were alike. In my judgment we cannot do better than adopt the line taken by the High Court of Australia in spite of the great similarity in the constitutions of the two countries. In the "Amalgamated Society of Engineers v. The Adelaide Steamship Company Ltd." 28 C L R 129, Knox C.J. (Issacs, Rich & Starke JJ. concurring) observed as follows at p. 146:

But we conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own constitution. While in secondary & subsidiary matters they may, & sometimes do afford considerable light & assistance, they cannot, for reasons we are about to state, be recognized as standards whereby to measure the respective rights of the Commonwealth & states under the Australian Constitution.

Higgins J. in a separate judgment added the following at p. 168:

Whatever opinion we may hold as to the sufficiency of this reasoning, as applied to the United States Constitution, is really immaterial; for we have to construe the Australian Constitution

97. Again in "Roughley v. New South Wales"; Ex parte Beavis 42 C L R 162 Higgins J. after discussing certain cases on "police power" observed as follows:

Moreover, in Australia we have to apply a specific provision of the constitution (Section 92), not to apply the subtle refinements of the doctrine as to "police power."

I would also respectfully draw attention to the last sentence of the quotation from Patanjali Sastri's Judgment in Para 36 above, which gives a similar caution.

98. American precedents of judicial review of State legislation, to which I have referred, cannot in my opinion be sufficient authority for me to embark upon a wholesale examination of the Prohibition Act together with the rules etc., to find out if any of those provisions is unreasonable & offends against the Constitution. It is not enough for a petitioner to assert that a particular law is unreasonable or that it is unconstitutional. There must be something more concrete than that.

99. In so far as prohibition is concerned, there can be no doubt that a vast proportion of the population of this country does believe that drinking is an evil & that a policy of prohibition should be adopted. Whether they are right or wrong is immaterial. To prove that such views are held it is enough to cite the solemn declaration of the people in the Constitution itself. Whether the police itself should be put into practice, as also the extant nature of the restrictions required to implement that policy, is a matter for legislative determination. Whether "toddy" is good or bad, better or worse than foreign liquor is not for the Courts to determine. It is for the legislature as representing the opinion in the country to decide.

100. But that apart, even the constitutionality of the legislation can be challenged by a petitioner only if he can show injury to himself. When country liquor is banned for all, there can be no individual injury, there can be no injury when uniform laws are made, affecting all alike, provided constitutional power to make the laws can be found. Injury may, however, exist if everyone does not receive equal treatment."

101. I shall now examine the validity of the Act under the old constitution. This is necessary because if the law was valid when it was passed it will be continued by operation of Article 372(1) of the Constitution unless the law is found to be repugnant to Part III of the Constitution.

102. Under the Govt. of India Act, 1935, the powers of the provincial legislature extended to the enacting of laws in respect of "intoxicating liquors" by item No. 31 in the second list. That item read as follows:

Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase & sale of intoxicating liquors, opium & other narcotic drugs, but subject, as respects poisons & dangerous drugs, to the provisions of List III.

The words "that is to say" were expounded by the Federal Court in three cases, viz. "The United Provinces v. Atiqah Begum" 1940 PCR 110, "Bhola Prasad v. Emperor" 1942 PC R 17, & "Manikkasundara Bhattar v. R. S. Nayudu" 1946 PCR 67. In "Bhola Prasad v. Emperor" 1942 PCR 17, it was observed that a power to legislate with respect to intoxicating liquors could not well be expressed in wider terms.

103. The rules for determining whether particular law is within the powers of the legislature were settled as far back as 1878 in "Queen v. Burah" (1878) 3 AC 889. Their Lordships in that case observed as follows:

The established Courts of justice, when a question arises whether the prescribed limits have been exceeded must of necessity determine that question; & the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers are created, & by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, & if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of justice to inquire further, or to enlarge constructively those conditions & restrictions.

104. Again in "Attorney-General for Ontario v. Attorney-General for Canada" (1912) AC 571, it was observed at page 83:

In the interpretation of a completely self-governing constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs & what it forbids.

105. In view of the wide meaning which one must attribute to the term "intoxicating liquors" it must be taken that the entire subject of the control, including the prohibition of its use, could be legislated upon by the provincial legislature. The provincial legislature must be taken to be possessed of such plenary powers of legislation on this topic as the Imperial Parliament itself. Not only could the subject of liquor as such be comprehended within the scope of the

legislation, but all such commodities as were alcoholic & would be intoxicating, if consumed, could be regulated. The regulation in respect of liquors, other than consumable liquors, could not, however, exceed the legitimate purpose of assuring that non beverages would not be consumed to produce intoxication but would be used in a legitimate manner. As observed by Taft C.J.:

The power of the Federal Govt., granted by the 18th Amendment, to enforce the prohibition of the manufacture, sale, & transportation of intoxicating liquor, carries with it power to enact any legislative measures reasonably adapted to promote the purpose. The denaturing in order to render the making & sale of industrial alcohol compatible with the enforcement of prohibition of alcohol for beverage purposes is not always effective. The ignorance of some, the craving & the hardihood of others, & the fraud & cupidity of still others, often tend to defeat its object. It helps the main purpose of the amendment, therefore, to hedge about the making & disposition of the denatured article every reasonable precaution & penalty to prevent the proper industrial use of it from being perverted to drinking it. The conclusion is fully supported by the decisions of this Court in "Jacob Ruppert v. Caffey" (1920) 251 US 264 : 64 L Ed 260 & National Prohibition Cases ("Rhode Island v Palmer" (1920) 253 US 350: 64 L Ed 946). See also "Huth v. United States" 295 Fed 35 , "Selzman v. V. S." (1924) 268 US 466.

106. It was urged that the Act in many of its parts conflicts with item 19 of list I
Import & export across customs frontiers as denned by the Federal Govt.
& item No. 44 of that list

Duties of customs, including export duties.

107 To determine whether the Prohibition Act was invalid because of any repugnancy to these two items we must examine the pith & substance, that is to say, "the scope & effect of the measure". Subjects in one list sometimes overlap subjects in another list. Where they do this it is necessary to see what is the scope & effect of the measure. If the enactment is substantially covered by the entry in the list which gives power, then the legislation is not bad if it incidentally touches upon another field in a different list.

108 The law on this subject was exhaustively stated by me & Bose C.J. (as he then was) in "Om Prakash v. Emperor" ILR (1947) Nag 579. That case was followed in "Jnan Prosanna v. Province of West Bengal" 53 CWN 27 & "Venkata-raman v. Commissioner of Police, Madras" AIR 1949 Mad 605. The same view was reiterated by Sen & Mudholkar JJ. in "Balmukund v. Maniram" ILR (1949) Nag 829. These views have been approved by the Supreme Court in State of Bombay Vs. Narothamdas Jethabai and Another, .

109. The law cannot therefore be challenged on the ground that it touches items Nos. 19 & 44 in the first list, unless the scope & effect of the Act is not under item No. 31 in the second list but substantially under the two items invoked.

110. It is not necessary to examine in detail the pith & substance of the Prohibition Act & the Rules. A close examination of the provisions will show that the entire subject is related to intoxicating liquors & the effect of items Nos. 19 & 44 of the first list is merely incidental. In my judgment the validity of the law cannot be impugned on that ground.

111. No other argument was advanced to show that the Prohibition Act etc. was invalid for any other reason when the Govt. of India Act, 1935 was in force. Under Article 372 (1), which reads:

Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by the competent legislature or other competent authority." The Prohibition Act will be continued in force unaffected except in so far as its validity could be brought into question by reason of the "non obstante" clause in Article 13 (1). If the Prohibition Act could be shown to be opposed to the Provisions of Part III of the Constitution, then to the extent of the inconsistency it would be void.

112. The petitioner invokes Article 14 of the Constitution, which is to the following effect:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." He challenges the Prohibition Act & the Rules as being discriminatory on various grounds. The scope & operation of Article 14 was examined by the Supreme Court in Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, . It is not therefore necessary or profitable to consider the American cases in which the Fourteenth Amendment, which was served as a model for Article 14 of our Constitution, was considered. Mukherjea J. expounded Article 14 in the following words:

Art. 14 of the Constitution, it may be noted, corresponds to the equal protection clause in the Fourteenth Amendment of the American Constitution which declares that "no State shall deny to any person within its jurisdiction the equal protection of laws". We have been referred in course of the arguments on this point by the learned Counsel on both sides to quite a number of cases decided by the American Supreme Court. where questions turning upon the construction of the "equal protection" clause in the American Constitution came up for consideration. "A detailed examination of these reports is neither necessary nor profitable for our present purpose but we think we can cull a few general principles from some of the pronouncements of the American Judges which might appear to us to be consonant with reason & help us in determining the true meaning & scope of Article 14 of our Constitution

I may state here that so far as the violation of the equality clause in the Constitution is concerned, the petitioner, as a shareholder of the company, has as much right to complain as the company itself, for his complaint is that apart from

the discrimination made against the Company the impugned legislation has discriminated against him & the other share-holders of the Company as a group "vis-a-vis" the shareholders of all other companies governed by the Indian Companies Act who have not been treated in a similar way. As the discriminatory treatment has been in respect to the shareholders of this Company alone, any one of the shareholders, whose interests are thus vitally affected, has a right to complain & it is immaterial that there has been no discrimination "inter se" amongst the shareholders themselves.

It must be admitted that the guarantee against the denial of equal protection of laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances & conditions. As has been said by the Supreme Court of America "equal protection of laws is a pledge of the protection of equal laws". (See "Yick Wo v. Hopkins" (1886) 118 US 356, & this means "subjection to equal laws applying alike to all in the same situation". (Vide "Southern Railway Co. v. Greene" (1910) 216 US 400 . In other words, there should be no discrimination between one person & another if as regards the subject-matter of the legislation their position is the same. I am unable to accept the argument of Mr. Chari that a legislation relating to one individual or one family or one body corporate would "per se" violate the guarantee of the equal protection rule. There can certainly be a law applying to one person or to one group of persons & it cannot be held to be unconstitutional if it is not discriminatory in its character. (See Willis Constitutional Law, page 580). It would be bad law "if it arbitrarily selects one individual or a class of individuals, one corporation or a class of corporations & visits a penalty upon them, which is not imposed upon others guilty of like delinquency." (See "Gulf C. & S. P. R. Co. v. Ellis" (1897) 165 US 150). The legislature undoubtedly has a wide field of choice in determining & classifying the subject of its laws, & if the law deals alike with all of a certain class, it is normally not abnoxious to the charge of denial of equal protection; but the classification should never be arbitrary, it must always rest upon real & substantial distinction bearing a reasonable & just relation to the things in respect to which the classification is made; & classification made without any substantial basis would be regarded as invalid. (See "Southern Railway Co. v. Greene" (1910) 216 US 400).

113. To the same effect are the observations of Das, J. at page 65:

The only other ground on which the Ordinance & the Act have been challenged is that they infringe the fundamental rights guaranteed by Article 14 of the Constitution. "Equal protection of the laws", as observed by Day, J. in "Southern Railway Company v. Greane" (1910) 216 US 400, "means subjection to equal laws, applying alike to all in the same situation". The inhibition of the Article that the State shall not deny to any person equality before the law or the equal protection of the laws was designed to protect all persons against legislative discrimination amongst equals & to prevent any person or class of persons from

being singled out as a special subject for discriminating & hostile legislation. It does not, however, mean that every law must have universal application, for all persons are not, by nature, attainment or circumstances, in the same position. The varying needs of different classes of persons often require separate treatment & it is, therefore, established by judicial decisions that the equal protection clause of the Fourteenth Amendment of the American Constitution does not take away from the State the power to classify persons for legislative purposes. This classification may be on different basis. It may be geographical or according to objects or occupations or the like. If the law deals equally with all of a certain well-defined class it is not obnoxious & it is not open to the charge of a denial of equal protection on the ground that it has not application to other persons, for the class for whom the law has been made is different from other persons &, therefore, there is no discrimination amongst equals. It is plain that every classification is in some degree likely to produce some inequality, but mere production of inequality is not by itself enough. The inequality produced, in order to encounter the challenge of the Constitution, must be "actually & palpably unreasonable & arbitrary". Said Day J. in "Southern Railway Co. v. Greane" (1909) 216 US 400:

While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real & substantial distinction, bearing a reasonable & just relation to the things in respect to which such classification is imposed; & the classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.

Quite conceivable there may be a law relating to a single individual if it is made apparent that, on account of some special reasons applicable only to him & inapplicable to anyone else, that single individual is a class by himself. In "Middleton v. Texas Power & Light Co." (1919) 249 U S 152, it was pointed out that there was a strong presumption that a Legislature understood & correctly appreciated the needs of its own people, that its laws were directed to problems made manifest by experience & that the discriminations were based upon adequate grounds. It was also pointed out in that case that the burden was upon him who attacked a law for unconstitutionally. In "Lindsley v. Natural Carbonic Gas Co." (1910) 220 US 61, it was also said that one who assailed the classification made in a law must carry the burden of showing that it did not rest upon any reasonable basis but was essentially arbitrary. If there is a classification, the Court will not hold it invalid merely because the law might have been extended to other persons who in some respects might resemble the class for which" the law was made, for the Legislature is the best judge of the needs of the particular classes & to estimate the degree of evil so as to adjust its legislation according to the exigency found to exist. If, however, there is, on the face of the statute, no classification at all or none on the basis of any apparent difference specially peculiar to any particular individual or class & not applicable to any other person or class of persons & yet the law hits only the particular

individual or class it is nothing but an attempt to arbitrarily single out an individual or class for discriminating & hostile legislation. The presumption in favour of the Legislature cannot in such a case be legitimately stretched so as to throw the impossible onus on the complainant to prove affirmatively that there are other individuals or class of individuals who also possess the precise amount of the identical qualities which are attributed to him so as to form a class with him. As pointed out by Brewer J. in the "Gulf Colorado and Santa Fe" Railway v. W.H. Ellis" (1896) 165 US 150, while good faith & a knowledge of existing conditions on the part of a Legislature was to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed & unknown reason for subjecting certain individuals or corporations to hostile & discriminating legislation was to make the protecting clause a mere rope of sand, in no manner restraining State action.

114. Judged from these tests, which are adequate for our purposes, it would appear that Section 29 (2), Prohibition Act, & Rules 7 & 7 A of the Central Provinces & Berar Foreign Liquor Rules, 1938, are discriminatory. Section 29 (2) is to the following effect:

The Provincial Govt. may, by notification, either wholly or partially & subject to such conditions as it may think fit to impose, exempt any person or class of persons from all or any of the provisions of this Act, or of all or any of the rules made under this Act, either throughout the province or in any specified area, or for any specified period or occasion.

R. 7 reads:

A permit in Form P. L. XII for possession for private consumption of a specified number of units of bottled foreign liquor not exceeding two at any one time or six in the aggregate during a month may be granted to any person who applies for it in writing if the licensing authority is satisfied that the social & economic status & habits of the applicant warrant the grant of the concession & that he is not likely to abuse it. A fee of Rs. 100 per year or part of year shall be payable for each permit. A unit will be deemed to be either a quart bottle of spirit or liquor or three quart bottles of wines or vermouth or six quart bottles of malt liquor:

Provided that in the case of persons of non-Asiatic domicile & of members of His Majesty's regular Naval, Military or Air Forces, who are of non-Asiatic domicile a permit shall be granted by the Deputy Commissioner, free of charge, on an application made in this behalf in writing which in the case of members of His Majesty's regular Naval, Military or Air Forces, of non-Asiatic domicile shall be countersigned by the officer commanding -of the area concerned, or an officer not below the rank of Lt.-Col. deputed by him:

Provided further that in the case of members of His Majesty's regular Naval, Military or Air Forces, who are of Asiatic domicile, or a permit may be granted by the Deputy Commissioner, free of charge, on an application made in writing & countersigned by the officer commanding of the area concerned, or an officer not

below the rank of Lt. Col. deputed by him if he is satisfied that the health of such person shall be seriously & permanently affected if such a person is not permitted to use & consume such liquor.

Rule 7 A runs as follows:

A permit in Form F. L. XIIA for possession for private consumption of bottled foreign liquor not exceeding two units at any one time or six in the aggregate during a month may be granted by the prohibition Commissioner to any person who applied for it in writing if he is satisfied that the applicant has to travel frequently in the areas where the Act is in force, that his social, economic status & habits warrant the grant of the permit & that he is not likely to abuse it. A fee of Rs. 150 per year or part of a year shall be payable for each permit. A unit shall be deemed to be either a quart bottle of spirit or liquor or three quart bottles of wines or vermouth or six quart bottles of malt liquor:

Provided that in the case of persons of non-Asiatic domicile & of members of His Majesty's regular Naval, Military or Air Forces, who are of non-Asiatic domicile, a permit shall be granted by the Prohibition Commissioner, free of charge, on an application made in this behalf in writing which in the case of members of His Majesty's regular Naval, Military or Air Forces of non-Asiatic domicile shall be countersigned by the officer commanding of the area concerned, or an officer not below the rank of Lt.-Col. deputed by him: Provided further that in the case of members of His Majesty's regular Naval, Military or Air Forces, who are of Asiatic domicile, a permit may be granted by the Prohibition Commissioner, free of charge, on an application made in writing & countersigned by the officer commanding of the area concerned, or an officer not below the rank of Lt.-Col. deputed by him if he is satisfied that the health of such person shall be seriously & permanently affected if such person is not permitted to use & consume such liquor.

115. There is no reasonable or pre-determined basis for classification. There can be no distinction between any of the citizens of India on the ground of social & economic status. The Govt. of course, can make a regulation that on payment of a fee a licence will be granted to a person. The Govt. can also revoke the licence if the person abuses the privilege conferred, but it cannot leave to the arbitrary power of any officer the determination of the question whether any citizen is of the requisite social or economic status without saying what that social or economic status should be. There is no doubt, therefore, that these rules create an inequality in the application of the law, not warranted by Article 14 of the Constitution. Similarly, there is no warrant for giving a preferential treatment to members of the Naval, Military, or Air Forces, or to persons of non-Asiatic domicile who may be residing in the country. There must be absolute equality in the operation of the laws for all. I am therefore of opinion that the permit system envisaged by Section 29 (2) & Rr, 7 & 7 A of the Central Provinces & Berar Foreign Liquor Rules, 1938, creates an inequality.

116. I have considered whether there is any possibility of severing the objected portion from any portion which is unobjectionable. In my judgment the matter is not capable of being severed. The rules as they stand today & the section which authorizes Govt. to make exemptions in favour of any person or persons must stand or fall in toto. It is not possible for me to say whether the inequality should be removed by making a permit available for all or for none. I can only declare that by reason of the inequality which underlies Rules 7 & 7 A these rules & Section 29 (2), which enables the Provincial Govt. to enact such rules, are void under the present Constitution. All other alleged discriminations are not on matters which directly affect the present petitioner, & no declaration can therefore be obtained by him about their legality.

117. The result, therefore, is that I hold that the petitioner cannot challenge the policy underlying the Prohibition Act & the Rules etc. I would dismiss the petition because the petitioner has not made any demand for a permit up till now, & mandamus cannot issue as there is no demand & refusal. In passing, however, I have expressed my opinion that Section 29 (2) of the Prohibition Act & Rules 7 & 7 A of the Central Provinces & Berar Foreign Liquor Rules, 1938, are inconsistent with Article 14 of the Constitution & to that extent void.

118. With these observations I would dismiss the petition without costs.

119. I certify this case is a fit one for appeal to the Supreme Court under Article 132 (1) of the Constitution as involving a substantial question of law as to the interpretation of the Govt. of India Act, 1935, & the present Constitution.

Mangalmurti and Mudholkar, JJ.

120. This is a petition under Article 226 of the Constitution for the issue of a writ of mandamus to the opposite parties, the State Govt. of Madhya Pradesh, the Prohibition Commissioner, Nagpur, & the Deputy Commissioner, Nagpur, directing them not to enforce against the petitioner "the Central Provinces and Berar Prohibition Act, VII (7) of 1938 or all such sections of the same as may be found inconsistent with the Constitution". The petitioner further seeks the issue of a writ of mandamus directing the opposite parties to withdraw & cancel "all such notifications, rules & orders" made by them in exercise of the powers conferred by the Act as may be found inconsistent with the Constitution.

121. The petitioner, it may be mentioned, is a resident of Nagpur, engaged in private service & drawing a salary of Rs. 100/- per month. He states that he is accustomed for a number of years to take "alcoholic drinks, generally country liquor, at an average of 4 Oz. per day". His complaint is that subsequent to the application of the Prohibition Act to the Nagpur district he had to stop taking liquor altogether as he is only used to drinking country liquor & that under the rules he is not entitled even to obtain a permit for drinking country liquor because a permit entitles a person to drink foreign liquor & no other kind of liquor. The petitioner further points out that under the rules the licensing authority would issue permit to a person only if it is satisfied that his social &

economic status warrants the grant of a permit & that the person is not likely to abuse the permit if one is granted to him. The petitioner states that the fee for obtaining a permit is Rs. 100, that his financial circumstances make it prohibitive for him to apply for a permit and that he does not wish to take the risk of being refused a permit on the ground that his social & economic status does not warrant the grant of a permit to him.

122. The petitioner then goes on to challenge the various provisions of the Prohibition Act & says that not only those provisions but the whole Act has become void because it is repugnant either to the fundamental rights guaranteed by Article 19 of the Constitution or to the right of equality before law guaranteed by Article 14 of the Constitution or to the provisions relating to inter-state commerce contained in Article 303. He wants the withdrawal or cancellation of all notifications, rules & orders which are inconsistent with the Constitution.

123. The State Govt. while admitting the facts stated by the petitioner concerning himself, contest the petition on the grounds that it is not maintainable under Article 226 of the Constitution, that the petitioner is not entitled to a writ of mandamus without satisfying the Court that he had made a demand upon the State in respect of the reliefs which he now seeks & that the demand was refused, that a writ can never issue where the petitioner seeks merely a declaration, that the petition does not lie at the instance of a person whose legal rights have not been infringed & finally, that the whole of the Act & the rules framed & the notifications issued thereunder are valid.

124. An objection to the jurisdiction of the Court having been raised, it must be decided first. The argument advanced by Shri Naik, who appears for the State, is that Article 226 of the Constitution does not confer an original jurisdiction on the High Court to entertain an application of this kind. According to him, the powers conferred on the High Court by this Article are available only in the exercise of its ordinary jurisdiction, that is, the appellate & the revisional jurisdiction, & that such an application would be maintainable only after Parliament has taken action under Article 32 (3) of the Constitution & conferred jurisdiction upon this Court to entertain an original petition just as the Supreme Court is empowered by the Constitution itself to entertain a petition. The argument, if we may point out, is based upon the decision of the Madhya Bharat High Court reported in "Anant Bhaskar Lagu v. State" AIR 1950 M B 60.

125. In that case, Kaul C.J., with whom Shinde J, agreed, held that Article 226 only mentions some of the powers which, if law made by Parliament or other appropriate Legislature so provides, may be exercised by the High Courts under circumstances & conditions prescribed by such law but that so long as this is not done, the power conferred by this Article must remain ineffective except in so far as they" can be exercised under the existing law. Mehta J. who was the third Judge constituting the Pull Bench, dissented from this view & reiterated the view taken by him & Dixit J. in "Harendranath v. State of Madhya Bharat" AIR 1950 MB 46. In the latter case, the two judges expressed the view that the object of

the inclusion of Article 226 in the Constitution itself with regard to the powers of the High Courts is to secure that these powers shall not be in any way affected by any law made by Parliament or by the Legislature of a State. Upon this view, Dixit & Mehta JJ. regarded the original petition to the High Court as maintainable.

126. Kaul C.J. in his opinion in "Anant Bhaskar Lagu"s" case concedes that Article 226 read by itself does create an impression that it gives the High Court simultaneously with the Supreme Court jurisdiction to entertain petitions for enforcement of fundamental rights as a constitutional remedy even before any action is taken by Parliament under Article 32(3) but goes on to say that an analysis of the relevant portion of the Constitution & a consideration of Article 226 in its proper perspective dispels this impression. He points out that whereas Articles 32 to 35 form part of Part III of the Constitution which deals with fundamental rights & are classed under the heading "Right to Constitutional Remedies", Article 226 is to be found in Chap. V of Part VI which deals with the "High Courts in the States". According to him, Article 226 merely confers power on the High Court to issue certain writs in those cases where it has jurisdiction under Article 225 or Article 227 or Article 228 to exercise that power. This decision has been recently dissented from in W.N. Srinivasa Bhat and Another Vs. The State of Madras and Another, .

127. There is no doubt that the Constitution has made the Supreme Court the guardian of the fundamental rights guaranteed by it but it does not necessarily follow from this that the High Court has no jurisdiction concurrently with the Supreme Court to deal with a similar matter. In Romesh Thappar Vs. The State of Madras, a petition was made before the Supreme Court for the issue of a writ to the Govt. of Madras directing them to remove a ban imposed by them upon the entry within the State of Madras & circulation therein of a Journal called "Cross Roads". An objection was taken by the Advocate-General of Madras to the maintainability of the petition on the ground that the matter lay within the concurrent jurisdiction of the Supreme Court & the High Court of Madras & that the petitioner should have resorted in the first instance to the High Court under Article 226. If, indeed, the High Court had no jurisdiction to entertain the petition, the Supreme Court would have overruled the Advocate-General's objection on that ground alone. Instead, his Lordship Patanjali Sastri J., who delivered the judgment of the majority of the Judges of that Court, observed as follows:

That article (Art. 32) does not merely confer power on this Court, as Article 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III, or for any other purpose, as part of its general jurisdiction. In that case, it would have been more appropriately placed among Articles 131 to 139 which define that jurisdiction. Article 32 provides a "guaranteed" remedy for the enforcement of those rights & this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector & guarantor of fundamental rights, & it cannot, consistently with the

responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights.

The only distinction drawn by the Supreme Court between Article 32 & Article 226 is that whereas the former makes it obligatory upon the Supreme Court "to entertain applications seeking protection against infringement" of fundamental rights, the latter leaves it within the discretion of the High Court whether to entertain a petition or not. Thus, for instance, where another remedy is open, the High Court can refuse to entertain a petition while the Supreme Court cannot.

128. Shri Naik, however, contends that by the expression "general jurisdiction" what his Lordship Patanjali Sastri J. meant was such jurisdiction which the Court already possessed or which was expressly conferred by the other provisions of the Constitution. He further argued that just as there is a general presumption against an intention to oust or restrict the jurisdiction of superior Courts, there is a presumption against conferral of jurisdiction on a new tribunal & that a strong case has to be made out to show that jurisdiction has been conferred on the new tribunal.

129. It seems to us that by the expression "general jurisdiction" the Supreme Court did not mean merely such jurisdiction as is conferred on the High Court by Articles 225, 227 & 228 of the Constitution because if that were so, as we have already pointed out, the objection raised by the Advocate-General of Madras could have been met on that ground. Moreover, Article 225, which is subject to the other provisions of the Constitution, does not restrict the jurisdiction of the High Court but merely preserves its existing jurisdiction & Articles 227 & 228 confer some additional jurisdiction on it. Article 226 which finds place in between Article 225, on the one hand, & parts. 227 & 228, on the other hand, cannot reasonably be regarded as having nothing to do with jurisdiction. Article 226 clearly states that the territorial limits of the exercise of the powers conferred by it on the High Courts are those within which the High Court exercises jurisdiction.

130 The power to do a thing necessarily implies jurisdiction to do it, otherwise the conferral of such power is pointless. The learned counsel, however, argues that this power is exercisable only in the appellate & revisional jurisdiction of the High Court. There is nothing in Article 226 which warrants the limitation of the jurisdiction of the High Court to act only on the appellate or revisional side. Furthermore, if the power to issue a writ, direction etc., can be exercised only on the appellate or the revisional side, it seems difficult to appreciate how at all it could be so exercised because no law confers upon subordinate Courts the power to issue writs, orders etc. The scope of an appeal or of a revision application cannot obviously be enlarged so as to entitle a party to a relief in appeal or revision which could not have been claimed in the Court of the lowest grade. Again, the restriction of operation of Article 226 to the appellate & revisional jurisdiction of the High Court would deprive a citizen of the protection of the High Court even in the matter of fundamental rights where the infringement has been occasioned, say, by an executive act or by some form of oppression which falls

outside the cognizance of the ordinary Courts of the State or when a citizen seeks the enforcement of public duties. Section 45, Specific Relief Act, conferred some of the powers conferred by Article 226 on three of the High Courts exercisable within the limits of their original civil jurisdiction, & it would appear that Article 226 was intended to extend the jurisdiction of all the High courts & place them on a par with one another & also with the King's Bench Division of the Supreme Court of England.

131. The learned Counsel then says that if a wide interpretation is placed on Article 226, Articles 227 & 228 would be redundant. Though there may be a certain amount of overlapping between Article 226, on the one hand, & Articles 227 & 228, on the other, we are clear that each of the latter Articles confers power on the High Court in addition to that conferred by Article 226.

132. The main purpose of Article 227 appears to be to empower the High Court to call for returns from all Courts & tribunals, make general rules, prescribe forms for regulating the practice & proceedings of such courts, settle tables of fees & so on. Article 226 does not touch these or similar matters. It is in order to indicate the plenitude of the power conferred upon the High Court with respect to Courts & tribunals of every kind that the constitution conferred the power of superintendence on the High Court. It is true that the absence of a provision similar to that contained in Sub-section (2) of Section 224, Govt. of India Act of 1935 enables the High Court, under this Article, to exercise revisional jurisdiction with respect to the decisions given by all Courts & tribunals & that to this extent there is a certain amount of overlapping between Clause (1) of Article 227 & Article 226. That, however, is inevitable. Of course, the power of superintendence conferred upon a High Court is not as extensive as the power conferred upon it by Article 226. Thus, ordinarily it will be open to the High Court, in the exercise of the power of superintendence only to consider whether there is an error of jurisdiction in the decision of a Court or tribunal subject to its superintendence, whereas there is no limitation under Article 226.

133. Similarly, Article 228 covers a different field from that covered by Article 226. It lays down the procedure regarding transfer of cases pending in Courts subordinate to the High Court. This power is not to be found in Article 226. These reasons ought, we think, to suffice to show that even upon the interpretation we are giving to the provisions of Article 226, Articles 227 & 228 would not be rendered superfluous.

134. As regards the other argument of the learned counsel, which is to the effect that a provision conferring jurisdiction upon a Court must be strictly construed, all that we need say is that the three cases on which he relies, the "Attorney-General v. Sillem" (1864) 10 HLC 704, "Smith v. Brown" 1871 6 QB 729 and "Cousins v. Lombard Bank" (1876) 1 Fx D 404, only lay down that the question whether jurisdiction has been conferred even on a superior Court is a matter of construction of the law bearing on the point. But it does not follow from these cases that there is a presumption against conferral of jurisdiction on a superior

Court. The learned Counsel then referred to the heading of Section 1 in Chap. V of Maxwell's Interpretation of Statutes, which runs:

Presumptions against ousting established, & creating new jurisdiction.

& said that it supports his argument. In the cases there dealt with, jurisdiction was conferred on inferior tribunals with a view to oust established jurisdictions. Those cases are, therefore, distinguishable. Article 226 does not oust the jurisdiction of any existing Court but only enlarges the powers of an existing superior Court. Therefore, there is little scope for a presumption of the kind suggested by the learned counsel.

135. Then, again, it may be mentioned that though the general principles applicable for the construction of statutes apply also to the construction of a Constitution, there is one difference: that is, that a Constitution should be liberally construed & so interpreted as to carry out its general objects. As observed by Willis at page 94:

The Courts should endeavour to carry out the real purpose & intent of a provision. This intent must be embodied in the instrument itself. But if a provision is doubtful it may be examined in the light of its prior & contemporaneous history, words should be given their natural signification, & the instrument should be construed as a whole.

(Willis on Constitutional Law, p. 94). That is why the principle of the strict construction of a provision does not apply when what has to be construed is a provision of a Constitution, such as Article 226.

136. Another argument of the learned Counsel is that power, authority & jurisdiction must coexist before a tribunal can act or grant redress in a particular matter. In this connection, he refers to Lecture I, the Law of "Ultra Vires" in British India by Satya Ranjan Das. He particularly relies on the following observations:

Jurisdiction has been defined to be a power conferred by the State on a Magistrate or Judge to take cognisance of & determine questions according to law, & to carry his sentence into execution.

This quotation itself shows that power & authority are not different from jurisdiction. Wharton has defined "jurisdiction" thus in his Law Lexicon, Edn. 14, at p. 548:

legal authority; extent of power; declaration of the law. Jurisdiction may be limited either locally, as that of a county court, or personally, as where a court has a quorum, or as to amount, or as to the character of the questions to be determined.

The learned Counsel then urges that as there is no provision in Article 226 to enable this Court to carry out its orders, its jurisdiction is incomplete & so the power conferred by that Article is not exercisable. We may point out that Article

32 of the Constitution which, according to the learned Counsel gives jurisdiction to the Supreme Court to go into such questions, is also similarly worded & contains no provision for enforcing the orders of the Supreme Court. If the jurisdiction of the Supreme Court is not incomplete we are unable to see how the jurisdiction of the High Court is incomplete.

137. The learned counsel, however, argues that it is not till Parliament acts under Clause (3) of Article 32 that the power of the High Court to take cognizance of a matter comes into being. That clause reads thus:

Without prejudice to the powers conferred on the Supreme Court by Clauses (1) & (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).

No doubt, the words of that clause are wide enough to include a High Court, but it is equally pertinent to note that the powers conferred by Article 226 are "notwithstanding anything in Article 32" from which it would follow that the High Courts do not come within Clause (3) of that Article. What the Constituent Assembly had apparently in view while enacting that clause was Article 247 which empowers Parliament to provide for the establishment of additional Courts for the better administration of laws made by Parliament or of any existing law with respect to a matter enumerated in the Union List.

138. We may further point out that Clause (2) of Article 32 empowers the Supreme Court to issue directions etc. for the enforcement of any of the rights conferred by Part III of the Constitution i. e. Fundamental rights. Clause (3) refers to legislation which can confer power on a Court similar to that found by the Supreme Court under Clause (2) of that Article i.e. power in respect of the Fundamental Rights. If this argument of the learned Counsel is accepted then, the only power which Parliament could confer upon the High Court would be the power in respect of the Fundamental Rights whereas Article 226 embraces matters over & above the Fundamental Rights, as the words "and for any other purpose" occurring at the end of Clause (1) of Article 226 indicate. The power conferred on Parliament by Clause (3) of Article 32 does not extend to conference of jurisdiction on a Court for such a purpose & so it must be inferred that that clause has no reference to a High Court.

139. Furthermore, we may point out that the words in Clause 3 which, according to the learned counsel, are efficient for enabling Parliament to confer jurisdiction on the High Court are "may by law empower". But if we read Article 226 we find that this is precisely what the Constitution itself has done by using the words "shall have power."

140. Then, again, if Article 226 does not empower a High Court to exercise any power till Parliament or a State Legislature provides in that behalf, we fail to see the propriety of having this provision in the Constitution. It might, if such were the intention of the Constituent Assembly, as well have been left to Parliament or

the State Legislature to say whether & in what circumstances writs, orders, directions etc. could be issued by the High Court. For, there would have been little point in conferring upon a High Court a power which a Legislature could not take away or restrict & yet make its exercise dependent upon the will of the Legislature. To construe Article 226 in the way contended for by the learned Counsel would render that Article pointless & unnecessary. It is well known that effect has to be given to every provision of a statute & that construction must lean against rendering any provision a surplusage (see Craies on Statute Law, Edn. 4th pp. 99-101). This principle would apply with greater force to the provisions of a Constitution. We would, therefore, be loath to place an interpretation on Article 226 which would reduce it to the position of a useless appendix.

141. For all these reasons, we are of the opinion that this Court has original jurisdiction to entertain a petition under Article 226 of the Constitution. We may mention that, besides this High Court, at least two High Courts, which do not exercise ordinary jurisdiction have entertained applications under Article 226. We refer to the decisions in *Bagaram Tulouls Vs. The State of Bihar*, , and *Indian Sugar Mills Association Vs. Secy. to Government, Uttar Pradesh Labour Department and Others*, . Further, the Bombay High Court in *Emperor Vs. Jeshingbhai Ishwarlal*, , has held that it has power to issue a writ or order under this Article even in respect of a matter which arose within its appellate jurisdiction. The decision of the Supreme Court in *Romesh Thappar Vs. The State of Madras*, , to which we have already referred, lends support to this view.

142. Finally, we would advert to the argument of the learned Counsel based upon the decision in "*Marbury v. Madison*" 5 U S 137. In that case, one of the questions raised was whether the United States Supreme Court had original jurisdiction to entertain an application for the issue of a writ of mandamus. The Supreme Court held that it had no such jurisdiction. This decision is based upon the express provisions in the Federal Constitution restricting the jurisdiction of the Supreme Court to appeals except in regard to certain matters. The Constitution of India does not place any such restriction on the powers conferred on the High Court by Article 226. It may be mentioned that the district courts & the state Supreme Courts in the United States of America have a power to issue writs & thus, when a matter goes up to the United States Supreme Court, it can issue a writ. In India, the Courts subordinate to the High Court have no such power. The decision in "*Marbury's case*" 5 U. Section 137 thus affords little assistance to the learned counsel.

143. The next question is whether the applicant not having called upon the State Govt, or the appropriate authority to give a permit, without charging a fee of Rs. 100, to enable him to drink country liquor, & not having asked the State or other authority not to enforce the Prohibition Act against him, or in other words, not to interfere with the exercise by him of his rights, can maintain the petition. There is no doubt that ordinarily before a person petitions for a mandamus to enforce

the performance of a public duty -- or makes some other demand -- he must show that he had made such a demand from the appropriate authority & that the demand was refused or not met. This is, however, not an inflexible rule. So, when in the particular circumstances, such a demand could not have been met, the absence of a demand has been held to be immaterial: "Rex v. Hanley Revising Barrister" (1912) 3 KB 518. Again, as observed by Lord Denman C.J. & also by Littledale J. in "King v. Brecknock" (1835) 111 ER 395, all that is necessary is to show that the party complained of has distinctly determined not to do what is demanded. What the petitioner seeks here is, that the State Govt. & its subordinate agencies should not do that which is enjoined upon them by a law binding upon them till it is declared invalid & has also asked for the performance of that which is not permitted by law. Quite obviously, what he seeks is something which the State Govt. or its agencies cannot, as things stand, be expected to comply with. No doubt, the State Govt. & its agencies are not entitled to interfere with the exercise by the petitioner of such right as he possesses but when a statute stands in the way of the petitioner & bars the exercise of that right, it seems to me that he cannot reasonably expect the State Govt. or its agencies not to enforce that statute, even if it really infringes his rights. For, it would be placing too great a responsibility upon the State to treat a statute which was good law when it was passed, as void because of the operation of Article 13(1) of the Constitution. Though what has become void can be rightly treated as void by anyone without a declaration to that effect by a Court of law, it would, we think, not be safe for the State to take a decision to that effect unless the matter is clearly obvious. We would not say that the matter is obvious in the present case. In the circumstances, we are of opinion that, it was idle for the petitioner to make a demand upon them & that the absence of such a demand does not affect the tenability of this petition.

144. The next two points raised by Shri Naik are: that a writ can never issue when the petitioner merely seeks a declaration & that a petition does not lie at the instance of a person whose legal rights have not been infringed. They can conveniently be dealt with together because they cover more or less the same ground.

145. The Courts in the United States of America have held that judicial power does not extend to the decision of mere abstract questions. See "Ashwander v. Tennessee Valley Authority 297 U. S 268, "Liberty Warehouse Co. v. Grannis" 273 U. S 70 , "Fairchild v. Hughes" 254 U. S 626, & "Massachusetts v. Mellon" 262 U. S 447. We would refer in particular to the judgment of Brandeis J. in "Ashwander"s case". The learned Judge has formulated seven canons which, in his view, should guide the court. (We?) mention two of them as they have a direct bearing on the "joint adumbrated by the learned counsel. They are:

(1) The Court will not anticipate a question at constitutional law in advance of the necessity of deciding it"... it is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

(2) The Court will not pass upon the validity of a statute upon complaint of one who falls to show that he is injured by its operation.

Though these decisions turn upon the construction of certain provisions of the Federal Constitution, they lay down principles some of which have also been applied in England. We may also refer to the decision in *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, which proceeds on the same principles.

146. In "*the Queen v. Lewisham Union*" 1897 1 QB 498 it was held that the legal right to enforce the performance of a duty must be in the petitioner himself & that he must show that he can insist on such performance. Again, in "*Rex v. City of London Assessment Committee*" 1907 2 KB 764, when a person belonged to a class interested in the performance of a duty but there was no particular ground on which he could claim such performance, a writ was refused. There are also numerous decisions which lay down that the petition must be made bona fide & not with an ulterior motive or for the benefit of a third party. The principles underlying these decisions ought, in our judgment, to be applied to a case such as the present where this Court is asked to exercise its discretionary powers.

147. It would be evident that the only matter in which the petitioner is personally interested, is his right to drink country liquor, with or without permit, & as a necessary pre-requisite for the exercise of that right, to have that kind of liquor made available to him. He has characterised as discriminatory the provisions of one of the rules which preclude a person from obtaining a permit to consume intoxicating liquor unless he had a certain social & economic status & unless he pays Rs. 100/- as fees & then too restricting the permit-holder to the consumption of foreign liquor. No doubt, the petitioner belongs to a large class of persons who are as much affected by this provision as he himself is but as he asserts that by reason of the discrimination he feels injured he has a right to maintain the petition. But then his right to challenge the law is limited to such of its provisions (& of the rules etc. made thereunder) as affect him personally. The decision in *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, to which we have already referred, supports this view.

148. The petitioner has chosen to challenge a large number of provisions of the Act which do not affect him in addition to those that affect him. Beading the petition as a whole, we are inclined to think that the petitioner has challenged certain provisions of the Act in the interest of the liquor trade. He is not entitled to a decision on their validity. We would therefore confine our opinion to such of the impugned provisions as affect, or are likely to affect, the petitioner personally. Apart, however, from challenging different provisions, the petitioner has challenged the competence of the Legislature to enact the Prohibition Act. That matter must be dealt with before we consider the argument relating to the different provisions of the Act.

149. His counsel Shri Mani has urged several grounds in support of the contention that the Act is unconstitutional. The first of these grounds is that

Entry No. 8 in the State List does not confer a power on the State Legislature to enact a law prohibiting the "consumption" of intoxicating liquor or prohibiting its "export" or "import", that, for this reason, Clauses (i) & (a) of Sub-section (1) of Section 6 are invalid & that as the law centres round these provisions, it is "ultra vires" the legislature.

150. The Prohibition Act was passed in the year 1938 by the Central Provinces & Berar Legislative Assembly which derived its legislative power from Section 100(3), Govt. of India Act, 1935 & so its validity or that of any of its provisions will, for the purposes of this part of the argument, have to be determined by reference to the relevant provisions of the Govt. of India Act. Shri Mani, however, argues that all laws in force on 26-1-1950, when the Constitution of India came into force, continue to be in force thereafter only subject to the provisions of the Constitution & that therefore we must ascertain whether the particular provisions of the Prohibition Act fall within the ambit of the legislative power of the State Assembly. We are afraid we cannot accede to this contention.

151. The only provision in the Constitution which renders pre-existing law void is Article 13(1). it runs thus:

All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

It does not render a pre-existing law void because under the Constitution such a law would not fall within the legislative competence of a State Legislature. According to Shri Mani, Article 13(1) is not the only provision which is relevant for consideration here. He says that Article 372 is another provision which must be examined. Indeed, that Article is relevant for consideration but it actually repels his contention. We would reproduce the relevant provisions of the Article.

Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.

* * * * * Explanation I: The expression "law in force" in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution & not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

152. Reading these provisions together, it is clear that all law made, before the commencement of the Constitution, by a Legislature or a competent authority (& not previously repealed) will continue to be in force till its alteration, repeal or amendment by a competent Legislature etc. No doubt, this would be subject to the "other provisions of the Constitution". The Legislative Lists do not, as do the

provisions of Part III, for instance, have an overriding effect. Shri Mani, however, refers to Articles 245 & 246 & says that the State Legislature's competence to legislate is restricted by them. That is so but these provisions are clearly prospective in their operation & do not affect what was done before they came into force.

153. In this view, we shall proceed to examine the scope of the particular provision under the Govt. of India Act by virtue of which the Provincial Legislature purported to enact the law. Entry No. 31 in the Provincial List is that provision & runs thus:

Intoxicating liquors & narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase & sale of intoxicating liquors, opium & other narcotic drugs, but subject, as respects opium to the provisions of List I &, as respects poisons & dangerous drugs, to the provisions of List III." This entry was the subject of interpretation before the federal Court in "Bhola Prasad v. Emperor" AIR (29) 1942 PC 17. The argument advanced before that Court was that a certain provision of the Bihar & Orissa Excise Act, 1915, as amended by the Act of 1940, was invalid because it was in excess of the powers of the Legislature conferred by Entry No. 31. The particular provision was Section 47 of the Act which made it an offence for any person to import, export, transport, manufacture, possess or sell any excisable article in contravention of the Act or of any notification made thereunder. An argument similar to the one addressed before us was advanced before the Federal Court. Dealing with that argument, Gwyer C. 3, observed:

A power to legislate "with respect to intoxicating liquors" could not well be expressed in wider terms, & would, in our opinion, unless the meaning of the words used is restricted or controlled by the context or by other provisions in the Act, undoubtedly include the power to prohibit intoxicating liquors throughout the province or in any specified part of the province....But, it is said, the context does in fact require a more restricted meaning to be given to the general words at the beginning of Entry No. 31, inasmuch as "intoxicating liquors & narcotic drugs" is followed by the words "that is to say; the production, manufacture, possession, transport, purchase & sale of intoxicating liquors, opium & other narcotic drugs". In our opinion these words are explanatory or illustrative words, & not words either of amplification or limitation.

It is difficult to conceive of legislation with respect to intoxicating liquors & narcotic drugs which did not deal in some way or other with their production, manufacture, possession, transport, purchase or sale, & these words seem apt to cover the whole field of possible legislation on the subject.

This decision is binding on this Court & therefore it must be held that the absence of the words "consumption, export, or import" in Entry No. 31 did not detract from the powers of the Provincial Legislature to enable the particular provision. We may mention that this decision is in accord with the principles laid

down in the decision in AIR 1941 16 (Federal Court) and "Prafulla Kumar v. Bank of Commerce, Khulna" AIR 1947 PC 60.

154. The next argument is that the provision prohibiting the import into, or export from, the province of liquor trenches upon the power of the Central Legislature & is also in contravention of (Arts. 301 & 303 of the Constitution. Article 205 provides that nothing in Articles 301 & 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise provide. The President has not made any order on the subject. The provision of the Govt. of India Act which corresponded to Articles 301 & 303 is Section 297 & so it is with reference to this latter provision that the argument must be examined. Here, again, the point is covered by authority. A similar argument advanced before the Federal Court in "Bhola Prasad's case" was negated, Gwyer C.J. observing:

We confess that we have difficulty in appreciating this argument. Section 297(1) (a) enacts that no Provincial Legislature or Govt. shall by virtue of the entry in the Provincial Legislative List relating to trade & commerce within the Province, or the entry in the List relating to the production, supply & distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the province of goods of any class or description. It is plain beyond words that this provision only refers to legislation with respect to Entry No. 27 & Entry No. 29 in the Provincial Legislative List; it has no application to legislation with respect to anything in Entry No. 31. A provincial Legislature if it desires to pass a law prohibiting export from, or import into, the province, must therefore seek for legislative authority to do so in entries other than Entry No. 27 or Entry No. 29. If it can point to legislative powers for the purpose derived from any other entry in the Provincial Legislative List, then its legislation cannot be challenged u/s 297(1)(a). There is no substance at all in the appellant's argument on this point.

155. A decision of this Court, "Balmukund v. Maniram" ILR (1949) Nag 829, is also in point, There, it was held, following the decision of the Privy Council in "Prafulla Kumar v. Bank of Commerce, Khulna" AIR 1947 PC 60, that in determining the validity of a Provincial Act which purporting to deal with a subject in one list in Sch. VII, Govt. of India Act, 1935, touches also upon a subject in another list, the Court should ascertain the pith & substance of the true nature & character of the Act in order to ascertain whether it is a legislation with respect to matters in this list or that. The pith & substance of the instant statute is not regulation of inter-provincial (now inter-state) commerce but prohibition of the consumption etc. of intoxicating liquor within the province. Therefore, even if incidentally to the dominant purpose of the statute, & to give effect to that purpose, inter-provincial commerce is affected, the legislation does not transgress the limits of the powers possessed by the Provincial Legislature. This view is confirmed by what has been held in two recent decisions of the highest Courts in the land", "Lakhi Narayan Das v. Province of Bihar" AIR 1950

PC 59 and State of Bombay Vs. Narothisdas Jethabai and Another, .

156. Even assuming that the power conferred by Entry No. 31 in List II extends only to regulation, we may point out that this power, in certain circumstances, can extend to prohibition. As observed by their Lordships of the Privy Council in "Australia v. Bank of New South Wales" 1949 2 All ER 755.

Yet about this, as about every other proposition in this field, a reservation must be made, for their Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State of Commonwealth agency, or in some other body, be justified. Every case must be judged on its own facts & in its own setting of time & circumstances, & it may be that in regard to some economic activities & at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical & reasonable manner of regulation & that inter-State "trade commerce & intercourse" thus prohibited & thus monopolised remained absolutely free. Nor can one further aspect of prohibition be ignored. It was urged by the appellants that prohibitory measures must be permissible, for otherwise lunatics, infants & bankrupts could without restraint embark on inter-state trade & diseased cattle or noxious drugs could freely be taken across State frontiers. Their Lordships must therefore add what, but for this argument so strenuously urged, they would have thought it unnecessary to add, that regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens.

This decision thus lends support, if support were needed, to the view that the impugned provision was within the legislative competence of the provincial Assembly as it was incidental to the main purpose of the Act. The view taken in this case reiterates what was laid down in "Gallagher v. Lynn" (1937) 3 All ER 598, "Re. Natural products Marketing 1937 4 DLR 298 and, "Shannon v. Lower Mainland Dairy products Board" 1938 A C 708.

157. The next argument is that though the provision may have been valid when enacted, it has become void now by the operation of Article 13 of the Constitution. For, the argument proceeds, the provision deprives the petitioner of his rights to acquire property, guaranteed by Sub-clause (f) of Clause (1) of Article 19 & to carry on the liquor trade which he is entitled to carry on under Sub-clause (g) of that Article. The argument opens up a question of a fundamental character: the powers & duties of a State vis-a-vis a citizen.

158. It cannot be denied -- & indeed Shri Mani does not deny it - that the State is charged with the duty not only of protecting its citizens but also of promoting their welfare, happiness & prosperity. The discharge of this duty necessarily involves the assumption of authority, sometimes described in the United States as police power, to impose some kind of social control on the individual. The

legislative department of the State - that is, the State legislature - by enacting laws, can, within the ambit of its legislative competence, confer authority on the executive Govt. to do that which is necessary to secure the well being of the citizens of the State. This necessitates delimitation of personal liberty, & the question is when & how far can this be done?

159. It is beyond question that our Constitution as does the Constitution of the United States, protects certain forms of liberty. But it must be borne in mind that there is no such thing as absolute liberty; our Constitution does not recognise this. This is what Humeon J. & one of us observed in "Prasadrao v. Provincial Govt., C, P. & Berar" 1950 Nag 233. There is, indeed, good reason for not recognising absolute liberty.

If people were given complete & absolute liberty without any social control, the result would be ruin. Hence it was never the purpose of the Constitution to give any such protection. (Willis on Constitutional Law, p. 477).

On the other hand, excessive government control would lead to tyranny & so a compromise has to be struck. It is difficult to say at what point the compromise should be effected. According to Willis:

Perhaps no general test can be formulated which will determine in all cases when it would be better to permit personal liberty & when it would be better to have social control. It can be said, however, that no one should be allowed to do what all cannot be allowed to do if by so doing our social order would be ruined." The compromise so struck is embodied in law. As Willis puts it:

Law is a scheme of social control, as distinct from self-control; so that when we are concerned with law we are concerned only with the question of how much personal liberty is best & how much social control is best.

160. The principle that a man should be free in acts which affect him alone & that restraint of liberty is justifiable only in respect of acts which may do injury to others will, we think, not be questioned. Upon this principle, social control would be justified provided it is intended thereby to secure a social interest. Indeed, if personal liberty is to be preserved, a certain amount of social control is necessary. For to quote Willis again:

When Government exercises social control it of course delimits personal liberty, but if Govt. did not exercise its social control the chances are that the liberty of each would be destroyed by the actions of others in the exercise of their liberty so that social control which delimits individual personal liberty anomalously results in enlarging general personal liberty.

161. The power of the State to impose social control has been variously defined:

Chief Justice Shaw defined it as "the power rested in the legislature by the constitution to make, ordain, & establish all manner of wholesome & reasonable laws...either with penalties or without, not repugnant to the Constitution, as they

shall judge to be for the good & welfare of the commonwealth, & the subjects of the same." The United States Supreme Court has said that the "police power embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety." Judge Cooley said, The police of a state, In a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order & to prevent offences against the state, but also to establish for the inter course of citizens with citizens those rules of good manners & good neighbourhood which are calculated to prevent a conflict of rights, & to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." The writer has formulated the definition that the police power is the legal capacity of sovereignty, or one of its agents, to delimit personal liberty for the protection of other more important social interests by means which bear a substantial relation thereto. There are two main requirements for a proper exercise of the police power:

1. There must be a social interest to be protected which is more important than the social interest in personal liberty &
2. there must be, as a means for the accomplishment of this end, something which bears a substantial relation thereto.

162. The decision in "Queen v. Burah" 4 Cal 172 & allied cases has left no doubt about the scope of the powers possessed by the former legislatures in the provinces. As observed by their Lordships in "Burah's case".

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, & it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, & was intended to have, plenary powers of legislation, as large, & of the same nature, as those of Parliament itself." The powers of Colonial legislatures are also similarly extensive. As illustrations of the amplitude of this power we may refer to the decision in "British Coal Corporation v. The King" 1935 A C 500 where legislation having the effect of curtailing the King's prerogative was upheld. Again, in "Attorney-General for Canada v. Cain" 1906 AC 542 the power was held to warrant legislation permitting the deportation of aliens. Both these cases & also "Henrietta Muir Edwards v. Attorney-General for Canada" 1930 A C 124, emphasise that in interpreting a constituent or organic statute that construction most beneficial to the widest possible amplitude of the powers of the legislature created by it must be adopted. Upon these principles it must be held that the Govt. of India Act, 1935 conferred plenary powers of legislation on the provincial legislatures with regard to matters which were within their legislative competence. List II in Sch. 7 of the Act read with Section 100 deals with subjects which were exclusively within the provincial field. Numerous subjects included in that List, such as Public order, Police, Public health, Sanitation, Hospitals,

Education, Intoxicating liquors & narcotic drugs, Betting & Gambling & so on, fall within the provincial sphere. The nature & range of these subjects leaves it beyond doubt that the provincial legislatures possess one power, akin to the police power in the United States to promote by regulation the public health, the public moral & public safety. No doubt the power must be exercised for protecting a social interest. But once a proper social interest is discovered & the need for protecting it is felt by the legislature, it is, in our judgment, within the competence of the legislature to make any law & impose any restrictions upon personal liberty reasonably necessary for protecting the social interest & for ensuring the successful operation of the law enacted for that purpose.

163. There may be different opinions as regards the need or the method for tackling the problem. Thus, upon the question of the consumption of intoxicating liquor, some may say that only a few people indulge in drink, that the revenue derived from intoxicating liquor is considerable & that total prohibition is uncalled for as it occasions loss of income to the State which could well be utilised for nation building purposes. Some others may say, with equal force, that the advantage secured by placing a complete embargo on the consumption of intoxicating liquor so far outweighs other considerations that in the public interest there should be total prohibition. Yet others may say that the real solution lies in regulating the sale of intoxicating liquor & in controlling its consumption. But, then. It is for the legislature to choose from amongst these opinions the one that it regards as compelling. When it makes its choice, that choice becomes final & passes beyond any review by a Court of law. To hold otherwise would be, in effect, to substitute the judgment of the Court for the will of the people. Again, it is incontestible that intoxicating liquor is not an innocuous thing & is liable to be abused. It is therefore within the competence of the legislature to make appropriate laws concerning it. We may quote from "Lochner's case" (1905) 198 US 45 what, according to the Supreme Court, is the position of the States in this matter in the United States of America.

There are, however, certain powers, existing in the sovereignty of each state in the Unions somewhat vaguely termed police powers, the exact description & limitation of which have not been attempted by the Courts. Those powers, broadly stated, & without, at present, any attempt at a more specific limitation, relate to the safety, health, morals & general welfare of the public. Both property & liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, & with such conditions the 14th Amendment was not designed to interfere.

164. It is primarily for the legislature to lay down the policy in regard to a particular matter & say which is the social interest to be protected & by what means. Where a law enacted for the purpose of protecting that social interest is challenged, what the Court can enquire into is whether there is in fact a proper social interest & whether the law which is intended to protect it bears a substantial relation thereto. Where the Court is satisfied about both these

matters, it is not open to it to probe into further or to question the wisdom of the legislature in pursuing the policy of protecting it: "Lochner v. New York" (1905) 198 U S 45; "Purity Extract & T. Co. v. Lynch" 226 US 192 & "Palmer v. Massachusetts" 308 US 79 . In other words, what the Courts of law are entitled to ascertain is whether the law has any substantial relation to a proper purpose such as public welfare, health or security or whether it constitutes an arbitrary invasion on the liberty of the citizen under the guise of the police power of the State: "Lochner v. New York" (1905) 198 US 45 & "Purity Extract & T. Co. v. Lynch" 226 US 192. If the law does not constitute an arbitrary inroad on individual liberty, it has to be upheld howsoever drastic it may be.

165. Here, the legislature, by prohibiting trafficking in, & consumption & manufacture of, intoxicating liquor, except for certain limited purposes, has declared such activities as being inimical to the public interest. There is no denying the fact that the opinion is extensively held that intoxicating liquor taken as a beverage is injurious to health. Indeed, on the question of intoxicating drinks controversy has raged from times immemorial. As Willis points out: "There is historical evidence that the Hebrews, Babylonians, the Chinese wrestled" with the problem of drink long before the Christian Era. It is a matter of opinion that the real solution is not governmental action but educating the people by propaganda or some such means. But the problem exists & so there can be an honest opinion that it is necessary to enforce total prohibition by law. It was therefore open to the legislature to accept that opinion & enact the prohibition law.

166. Shri Mani, however, argues that the law infringes the rights conferred by Sub-clauses (f) & (g) of Clause (1) of Article 19 of the Constitution & is therefore void. According to him, it was open to the legislature only to place "restrictions" on the enjoyment of the rights guaranteed by these Sub-clauses & it could not completely deprive the people of those rights. That is, the State cannot prohibit a person from acquiring or possessing any property however noxious or dangerous nor can it prohibit the pursuit of any activity howsoever injurious it may be but can only regulate the acquisition or possession of the property or the pursuit of the activity. The Sub-clauses relied on read thus:

(f) to acquire, hold & dispose of property; & to practice any profession or to carry on any occupation, trade or business.

167. Undoubtedly, these Sub-clauses guarantee the right to acquire, hold & dispose of property & also to carry on any trade or business. It is also true that as a direct consequence of the Act no one (except when permitted under any provision of the Act) can manufacture, buy, sell or keep intoxicating liquor. The question is whether placing such disabilities on an individual is a violation of the constitutional guarantee.

168. In the United States, a similar question was agitated in several cases. One of the leading cases on the subject is "Mugler v. State of Kansas" (1887) 123 US

623, where the following principles were laid down:

1. Legislation by a State prohibiting the manufacture within its limits of intoxicating liquors, to be there sold or bartered for general use as a beverage does not necessarily infringe any right, privilege or immunity secured by the Constitution of United States.
2. It is for the legislative department to exert what are known as the police powers of the state & to determine what measures are appropriate or needful for the protection of the public morals, public health or public safety -- subject to the power of the Courts to adjudge whether any particular law is an invasion of rights secured by the Constitution.
3. Govt. does not interfere with nor impair anyone's constitutional rights of liberty or of property when it determines that the manufacture & sale of intoxicating liquor for general or individual use as a beverage, are or may become hurtful to society & constitute, therefore, a business in which no one may lawfully engage.
4. The 14th Amendment does not take from the States those powers of police which were reserved when the original constitution was adopted.
5. The Prohibition of property for being used for a purpose declared to be injurious to the health, morals or safety of the community, cannot in any just sense be deemed a taking or an appropriation of property for the public benefit. State cannot be prevented from providing for the discontinuance of any manufacture or traffic which is injurious to the public morals by any incidental inconvenience which individuals or corporations may suffer.

169. Another case which may be usefully referred to is "Purity Extract & T. Co. v. Lynch" 226 US 192. There, a statute of Mississippi which prohibited the sale of malt & liquor was challenged. Hughes, J., who delivered the judgment of the Court, observed: (201)

That the State, in the exercise of its police power, may prohibit the selling of liquor is undoubted...It is also well established that when a state exercises its recognised authority under rules to suppress what it is free to regard as public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective.

This case was decided before the making of the 18th Amendment to the Constitution of the United States. The prohibition enacted by the Mississippi State apparently interfered with the exercise of rights similar to those guaranteed by Sub-clauses (f) & (g) of Article 19 of our Constitution, yet the law was upheld.

170. In a more recent case, " Ziffrin, Inc. v. Beeves" 308 US 132, which arose after the repeal of the 18th Amendment the Court said:

Without doubt a State may absolutely prohibit the manufacture of intoxicants,

their transportation, sale, or possession, irrespective of when & where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions & exercise full police authority in respect of them.

171. Then there is also the well-known decision of the Privy Council in "Charles Russell v. The Queen" (1882) 7 AC 829, where their Lordships had to consider whether legislation in regard to intoxicating matters belongs to the class of subjects "Property & Civil Rights", Their Lordships observed:

Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects "Property & Civil Rights". It has in its legal aspect an obvious & close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things, as well as intoxicating liquors, can of course, be held as property, but a law placing restrictions on their sale, custody, or removal, on the ground that the free sale or use of them is dangerous to public safety, & making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property & its rights, but one relating to public order & safety. That is the primary matter dealt with, "& though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law". Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring & enacting certain uses of property, & certain acts in relation to property, to be criminal & wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property & the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety or morals, & which subject those who contravene them to criminal procedure & punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament "to make laws for the order and good Govt. of Canada, & have direct relation to criminal law. which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada.

172. The decision in this & in the "Bank of New South Wales case" 1949 2 All ER 755, cited earlier, also support the view that legislation of this kind is within the competence of the State Legislature. For, if, as held by their Lordships, in the Bank of New South Wales case, exclusion from passage across the frontier of a

State "creatures or things calculated to injure its citizens" is merely "regulation" of trade, the prohibition contained in the impugned Act must be regarded as merely restriction on the right to acquire property & carry on a trade. The reasonableness of the restrictions is, of course, a matter open to judicial scrutiny, as held in "Chintamanrao v. State of Madhya Pradesh" 1950 SC J 571, but that is another matter.

173. We may also usefully refer to a decision of the House of Lords in "Gallagher v. Lynn" 1937-3 All ER 598, in which the Milk & Milk Products Act (Northern Ireland), 1934 was challenged on the ground that it unduly interfered with the right of a citizen to follow a trade because it precluded a trader from selling milk except under & in accordance with this Act & such licence as may be required thereunder. Negating the contention Lord Atkin observed at page 601:

My Lords, the short answer to this is that this Milk Act is not a law "in respect of trade, but is a law for the peace, order & good Govt. of Northern Ireland "in respect of precautions taken to secure the health of the inhabitants of Northern Ireland, by protecting them from the dangers of an unregulated supply of milk.

thus recognising the power of the legislature to make the law despite the fact that it interferes with the pursuit of a trade.

174. What the Constitution safeguards is a right that what is regarded as property or what is regarded as an object of trade shall for ever be continued to be so regarded? The decisions we have referred to justify the conclusion that it does not. No one will dispute that an article which has been rendered unfit for human consumption must not be allowed to be sold or consumed & ought to be destroyed. A law requiring the destruction of such article or penalising its sale will unquestionably have to be upheld. Even Shri Mani concedes that prohibition of the consumption of cocaine & such like drugs is proper though he expresses a different opinion regarding intoxicating liquor. But it seems to us that the principle is the same. We would repeat that the legislature having come to the conclusion that the consumption of intoxicating liquor is not in the public interest its conclusion is not open to question before a Court of law. From this conclusion it follows that intoxicating liquor must be regarded as a noxious object, it therefore ceases to be a legitimate object of "property" or a legitimate object of commerce. What has been rendered contraband cannot be the object of "property". See "Miller v. Schoene" 276 US 272; "Clarke v. Haberle Crystal Springs Brewing Co." 280 US 384; "State Board v. Young's Market Co." 299 US 59 ; "Clason v. Indiana" 306 US 439; "Ziffrin Inc. v. Reeves" 308 US 132 & "Mugler v. State of Kansas" (1887) 120 US 623.

175. It cannot, therefore, be questioned that the general right to property or to carry on any activity is not unreasonably restricted merely because a particular commodity is excepted from its purview in the public interest. As we have already observed, liquor is not an innocuous article & regulation or prohibition of its consumption therefore, unquestionably falls within the competence of the

legislature. It may be that in the opinion of a Court the method adopted by the legislature is perhaps too drastic & that it would have been more appropriate to tackle the problem of drink by resorting to licensing hours & prescribing quantitative & qualitative limits. That would however be only a matter of opinion &, however strongly & honestly held, it cannot override the opinion of those who are empowered to legislate.

176. It is not quite relevant in this case to consider whether the law as enacted sufficiently safeguards the rights of those who are entitled to obtain & use intoxicating liquor for purposes which are outside the prohibitions indicated in the preamble to the Act. That is because the petitioner is not himself interested in these matters.

177. The next part of the argument is that the Act is invalid as it is discriminatory in three respects : it makes a difference between certain districts & local areas & others; it makes a difference between persons having a certain social position, non-Asiatics & members of the Armed Forces on the one hand & the rest of the people, on the other, & finally, it differentiates between foreign liquor & country liquor.

178. We may observe at the outset that if some provisions of a law are void & they are separable from the rest, the whole of the law cannot be declared invalid if the valid provisions can stand by themselves & sufficiently carry out the main purpose of that law. This is clear from the decisions of Sulaiman J. in AIR 1939 74 (Federal Court) & of the Privy Council in "Attorney-General for Alberta v. Attorney-General for Canada" 1947 AC 503 . The Supreme Court, acting upon this principle, has, in "A. K. Gopalan v. State of Madras" 1950 SC J 174, while declaring Section 14, Preventive Detention Act (IV (4) of 1950) as unconstitutional, upheld the rest of the Act. So, if the alleged discriminatory provision can be severed from the rest of the Act, the whole Act cannot be declared void, unless, after rejecting the invalid part, no sense could be made out of what remains or the surviving law is so far different from the one passed by the legislature that it cannot be reasonably said that the legislature would have enacted what survives without enacting what is void. Indeed, Article 13 (1) of the Constitution itself contemplates the severance of unconstitutional provisions of an existing law from those which are valid.

179. The complaint of territorial discrimination is founded upon the provisions of Section 1 (3) & Section 1 A of the Act. They read as follows:

(1)...

(3) It shall come into force:

(i) in the Saugor district, the Narsinghpur subdivision of the Hoshangabad district, the Akot taluq of the Akola district, & in the towns of Hinganghat in the Wardha district, & of Badnera in the Amraoti district, with effect from 1-4-1938; &

(ii) in any other local area in the province on such dates the Provincial Govt.

may, from time to time, by notification, appoint.

1 A. The Provincial Govt. may, by notification, declare that this Act shall cease to be in force in any area specified in Clause (i) of Sub-section (3) of Section 1 or part thereof from such date as may be specified in the notification.

It is said that the legislature, in the first instance, singled out certain tracts for the enforcement of the law & then empowered the Govt to enforce it in such other areas as it deems fit "from time to time". This is said to amount to territorial discrimination.

180. It must however be borne in mind that the law was enacted not for a part of the province (now the State) but for the whole of it. This is clear from Sub-section (2) of Section 1 which says that it shall extend to the "whole of the Central Provinces & Berar". A provision of this kind cannot be regarded as discriminatory but, as held in the "*Queen v. Burah*" 5 I A 178; "*Russell v. The Queen*" (1882) 7 AC 829 & "*Hodge v. The Queen*" (1883) 9 AC 117, it is only conditional legislation. Even in the United States of America, where the equal protection clause in the 14th Amendment to the Constitution prohibits discrimination, such a power as that conferred by the impugned provisions has been regarded as merely conditional legislation & valid. It is thus well settled that a legislature may delegate the power to determine the conditions or contingencies under which a statute shall be operative even though such conditions may be determined by the Govt.

181. Even though the law is well settled, we would quote the following passage from the judgment of O'Connor J. in "*Baxter v. Ah Way*" (1909) 8 CLR 626, because of the lucidity with which the learned Judge has dealt with the question of delegation of power by a legislature to another authority. He says:

It is fundamental principle of the Constitution that everything necessary to the exercise of a power is included in the grant of a power. Everything necessary to the effective exercise of a power of legislation must, therefore, be taken to be conferred by the Constitution with that power. Now the legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure. The aim of all legislatures is to project their minds as far as possible into the future, & to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases, & therefore, legislation from the very earliest times, & particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the particular class of persons or goods to which it shall be applied. In the case of "*Marshall Field & Co. v. Clark*" (1892) 143 US 649, which was cited to us by Mr. Lamb in the course of his argument, there is a passage which has a direct bearing upon this aspect of the power of the legislature. In delivering the judgment of the Court, Harlan J. said, quoting from another case "*Moers v. City*

of Reading" 21 P S R 188, "Half the Statutes on our books are in the alternative depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law. So in "Lock's Appeal" 72 PSR 491, "To assert that a law is less than a law, because it is made to depend upon a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future & impossible to fully know". The proper distinction the Court said was this: "The legislature cannot delegate its power to make a law; but can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of Govt. There are many things upon which wise & useful legislation must depend which cannot be known to the law-making power, & must, therefore, be a subject of inquiry & determination outside the halls of legislation.

182. Moreover, it stands to reason that when a measure of social reform which, on the one hand, denudes the state of a large revenue &, on the other, imposes additional duties & expenses for the purposes of preventing & penalising the evasion of the law, it should be applied stage by stage & in the light of the experience gained. For this reason, power must be conferred upon some one to" determine the "conditions & circumstances" in which the measure would be applied. The conferral of such power by the legislature upon Govt. is neither delegation of legislative power nor discrimination & so in our judgment, the impugned provisions are perfectly valid.

183. Now, as regards discrimination between one person & another. The relevant provisions of the Act are the preamble, Section 6 (1) & the proviso there to, Section 29 (2) & Section 32 (a) to (f). Section 6 (1) penalises the possession, sale, consumption etc. of intoxicating liquor, but the proviso thereto renders the penalties imposed by Section 6 (1) inapplicable to an act done "under, & in accordance with, the provisions of this Act or the terms of any rule, notification, order, license or permit issued thereunder." Section 29 (2) enables the Provincial Govt. to exempt, wholly or partially, & subject to such conditions as it may think proper, any person or class of persons from all or any of the provisions of the Act or rules made thereunder throughout the province or in any specified area or for any specified period or occasion. Clause (a) of Section 32 permits grant of permits by the Prohibition Commissioner or an officer empowered by him to grant, subject to rules made by the Provincial Govt., to any person for consumption of liquor. Broadly speaking, the remaining clauses permit grant of licences to persons or institutions to consume or possess liquor or to sell it to persons entitled to possess liquor. In addition to these provisions, there is the preamble to the Act which makes it clear that it is not the purpose of the Act to prohibit the use of intoxicating liquor for "sacramental, medicinal, scientific, industrial & such like purposes."

184. It is not seriously contended that permitting the use of intoxicating liquor for the last mentioned purposes amounts to discrimination. And, indeed, it could not be so contended because what the law in substance proposes to prevent is what it regards as the "abuse" of intoxicating liquor & not its use in a proper way & for a proper purpose. To prevent its use for a proper purpose would, on the other hand, be a serious inroad on the rights conferred upon an individual by Article 19 & so, in our opinion, be void.

185. Now, as to the other provisions. It is said that these provisions are repugnant to Article 14 of the Constitution & have, therefore, become void by virtue of Article 13 (1). It would be useful to quote Article 14. It runs thus:

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Almost all Constitutions, which guarantee the right to equality, contain the expression "equality before the law" or "equal before the law". The Constitution of the United States of America, however, used the expression "equal protection of the laws". Our Constitution has thus incorporated both the expressions. While both the expressions aim at establishing what may be regarded as equality of legal status for all, there is some difference between those expressions. The former expression is somewhat a negative concept implying the absence of any special privilege in favour of an individual while the latter is a more positive concept implying equality of treatment in equal circumstances. There is, however, one dominant idea common to both the expressions, that is, equal justice (See Basu, p. 50). Jennings on the Law of the Constitution, p. 49, has expounded the principle of equality thus:

Equal before the law means that among the equals the law should be equal & should be equally administered, that like should be treated alike.

At the same time, equality before the law does not mean absolute equality of men, which is a physical impossibility. Nor does it mean that things -which are different shall be treated as though they were the same. What it does mean is the denial of any special privilege by reason of birth, creed or the like, & also equal subjection of all individuals & classes to the ordinary law of the land. This is the general rule but there are certain exceptions, but it is not necessary to deal with those exceptions here because they have no bearing on the present case.

186. There is no denying the fact that it is impossible for any law to make or regard two things different in themselves as the same. What is meant by equality of status is that rights of the same kind are to be treated equally, i.e., in the same way, as between different individuals. Robson in his book on Justice & Administrative Law, 1947 says at p. 264:

This leads us to the principle of equality in that when a given set of facts or a particular group of individuals have been thrown into their appropriate legal

categories, the judge must apply to the individual concerned the law that governs the entire class of objects,, or persons situated in those circumstances. All petitioners for divorce must be subjected to the same rules of law, adultery cannot be excused in one respondent because of his laudable war record; or because he & the judge have a mutual friend. This disinterested treatment of each member of a legal category on similar lines, regardless of race, religion, antecedents, physical appearance, intellect, public spirit or occupation is the foundation of judicial impartiality. In this sense equality before law may be said to have a real existence.

187. Acting on this principle, it has been held in scores of cases by the Supreme Court of the United States that reasonable classifications by law is not denial of equal protection. One of the leading cases on the point is "Barbler v. Connolly" (1885) 113 US 27, where it was pointed out that what the constitutional guarantee forbids is class legislation but not classification which rests upon reasonable grounds of distinction. Amongst the recent cases which take the same view are the following: "Monnesota v. Probate Court" 309 U S 270; "Madden v. Kentucky" 309.US 83; "Tigner v. Texas" 310 US 141; "Snowden v. Hughes" 321 US 1 & "Prince v. Massachusetts" 321 US 158. It is clear from all these decisions that the constitution does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. As observed in "John Hayes v. State of Missouri" (1887) 120 US 68:

It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances & conditions both in the privileges conferred & in the liabilities imposed.

Then, again, as pointed out in "Pembine Mining Co. v. Pennsylvania" (1883) 125 US 181, what is prohibited by the constitution is deliberately treating a person or a class of persons in a prejudicial way.

188. The classification permissible by the state extends to all kinds of activities & the state has wide discretion in the matter. It is only where there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory. But even then, as held in "Lindsley v. Natural Carbonic Gas Co. (1910) 220 US 61 & Plessy v. Ferguson" (1896) 163 U S 537, it is the duty of the Court to sustain the classification if any state of facts can reasonably be conceived in justification of the classification. Further, the burden is upon the person who assails the classification to show that it does not rest upon a reasonable basis.

189. As observed by Willis at p. 580: "Many different classifications of persons have been upheld as constitutional. A law applying only to one person or one class of persons is constitutional if there is sufficient basis or reason for it." On this ground certain laws applicable only to Negroes or Red Indians have been upheld. It would be sufficient to point out that classification not only of persons but of objects, occupations etc. & classification in the matter of taxation on

geographical basis & so on, has been upheld by the Supreme Court of the United States of America. Numerous such cases are to be found at pp. 581-598 of Willis's Constitutional law.

190. Bearing these principles in mind, it would be clear that most of the impugned provisions are not by themselves discriminatory, though they permit the making of classifications, for they do not themselves create any discrimination. The conferral of unguided administrative discretion to put in one class those who obtained the consent of an authority & into another class those who do not, does not violate "due process" & equality but what is bad is only the arbitrary exercise by the authority. "Plymouth Coal Co. v. Pennsylvania" (1914) 232 US 531. See also Dr. N.B. Khare Vs. The State of Delhi, . Even though no standard has been set up by the legislature to avoid the violation of equality, those exercising the discretion must act as though they were administering a valid standard (Willis, p. 583). Where it is shown that what is committed to an authority is not discretion to be exercised upon a consideration of the circumstances of each case, but a naked arbitrary power to give or withhold consent & that power is directed by the authority so exclusively against a particular class of persons or in favour of another as to warrant the conclusion that the law was intended to be applied with an unequal mind & in an oppressive manner, the law will have to be declared to be discriminatory & therefore void. "Yick Wo v. Hopkins" (1886) 118 US 356; "Tarrance v. Florida" (1903) 188 US 519. But it must be borne in mind that the Court will not pronounce the law itself as discriminatory even though it lends itself to the practice of discrimination unless it is clear that in the guise of conferral of discretion upon an authority, arbitrary power is given to it With the sole or dominant intention that it be used for favouring or oppressing a particular class, community, race or other group. "Snowden v. Hughes" 321 US 1. There is no reason for saying that any of the impugned provisions of the Act have been made with any such ulterior object.

191. Indeed, Section 29 (2) in particular, which enables the Provincial Govt, to exempt any -person or class of persons from all or any of the provisions of the Act or of the rules made thereunder, recognises the principle that persons differently situated, where the difference in situation is real, may have to be exempted from the operation of the Act. Thus, for instance, it may be necessary to allow a person on medical grounds, or for medicinal purposes, to consume liquor. Similarly, it may be necessary to allow another to possess liquor for sacramental, scientific or industrial or a similar purpose. To provide for such cases, it was necessary to confer power upon Govt. to exempt classes or persons from the penalty of the law. The mere conference of such power does not of itself create inequality (See Willis p. 582). For these reasons, we are of the opinion that neither the proviso to Section 6 (1) nor Section 29 (2) has been rendered void.

192. The question then is whether the provisions of Section 32 offend Article 14 on the ground that they permit making arbitrary discrimination between one

person & another. This section enables the appropriate authority to grant permits for the various purposes set out in Clauses (a) to (f). We shall confine ourselves to Clause (a) as we do not think that the applicant is entitled to an opinion on any clause other than that since he is not even remotely interested in the other clauses.

193. Under Clause (a), the Prohibition Commissioner, or any officer empowered by him, can, subject to the rules made by the Provincial Govt., issue permits authorising any person to consume & possess for private consumption any liquor. It thus enables the appropriate authority to put in a special class those who obtain his consent. Here again, the question would be, as with regard to Section 29 (2), whether the classification actually made under this provision is arbitrary or is founded on a reasonable ground. The clause itself is not rendered void because of the power it confers upon certain officers. The grant of permit under this clause is subject to rules made by the Provincial Govt. That is, the legislature has left it to the Provincial Govt. To make a classification by laying down certain standard or standards. Accordingly, the Provincial Govt. has made certain rules of which Rule 7 is the relevant one. The question therefore is whether the classification made thereunder is reasonable.

194. A close & careful analysis of the cases in which, in the exercise of the police power of the State classification which purports to confer some advantage on some persons or on a class of persons is made rests upon the principle of extending protection where it is needed. It is common place that women & minors are at a disadvantage, as compared with men & adults, in the matter of making contracts. That is why in "West Coast Hotel Company v. Harrish" 300 US 379, legislation providing for the establishment of a minimum wage for women & minors was upheld. It is not necessary that such a law should seek to protect other classes of persons who also need similar protection. For, it is well established that there is no doctrinaire requirement that a protective law should be couched in all embracing terms so as to reach all who need protection, in the instant case however, the law is primarily intended to reach all persons in the area to which the law has been applied & a provision is made in the rules to exempt a certain class of persons from its operation.

195. Apart from the case just cited, laws creating classifications have been upheld in several other cases on the ground that they were intended for the protection of individuals or a class or classes of persons or for the promotion of the public good. Where a law grants protection to a class, which needs it, it has the effect of placing that class if not on a par with the rest of the community, at least as nearly so as is practicable. It would therefore be correct to say that the whole object of classification is to minimise & not to accentuate inequality, (unless the special interest of the State requires such a course, as for example the granting of a monopoly to someone to run buses for providing transport in an area where the transport facilities are inadequate). But, from the test formulated by Willis, which we have quoted earlier, it would clearly follow that a classification

which allows some to do what all are not, in the public interest, allowed to do, will not be upheld.

196. Rule 7 enables any person who satisfies the appropriate authority that "his social & economic status & habits" warrant the granting to him of a permit, to obtain a permit for the consumption of intoxicating liquor, not as a medicine but for his enjoyment as a beverage. The question is whether this amounts to discrimination. Where a law prevents the people in general from drinking intoxicating liquor, presumably on the ground that it is not desirable for anyone to do so, what justification is there to put in one class men of certain social & economic status & habits & allow them to drink? To give them this concession is not granting them a "protection" but is just conferring a privilege on them. It may be said that the people in that class can well afford to drink & that their social status is a good enough guarantee that they will not be disorderly. That is hardly a legitimate ground upon which the classification could be made. Such classification would not satisfy the test formulated by Willis.

197. It is the natural right of every person, high or low, rich or poor, to eat & drink what he likes. Where, however, it appears to the State that it is in the public interest to restrict or regulate the right, it can do so. So, where it declares that a particular commodity like intoxicating liquor is hurtful to society & that none should consume it, it thereby trenches upon the rights of all citizens but then each citizen must readily acquiesce in such a course for the common good. Having placed an embargo upon the consumption of intoxicating liquor, how can the Govt. relax the rigour of the law in the case of some because of their social & economic status & permit them to do that which upon the very premiss on which the legislature has legislated is contrary to the public good?

198. We do not see the slightest reason for inferring that what is bad for the health or prosperity of the ordinary man ceases to be so in respect of one of a certain social & economic status. The justification for social control over the consumption of intoxicating liquor as a beverage is said to be the ill effect of intoxicating liquor on the health & prosperity of the community. If that is so, how can a line be drawn between one section of the community & another & say, arbitrarily, that those on one side of the line will not be affected in health or prosperity & can be allowed to drink but not so those on the other?

199. Indeed, if it is in the public interest to delimit the personal freedom of all, what relation has the grant of a concession to some to the public interest sought to be served? As was said in "Power Manufacturing Co. v. Saunders" 274 US 490, classification should not be arbitrary but based upon a real & substantial difference having a reasonable relation to the subject of the public legislation. In other words, classification must rest on differences pertinent to the subject in respect of which the classification is made. It is obvious that there is no real or substantial difference as amongst persons who are used to drink which has a reasonable relation to the subject of the Act, namely prohibition. Classification of such persons on the basis of wealth or special position clearly amounts to

invidious discrimination & is the very thing which the 14th Article of our Constitution forbids.

200. Inequality before the law was the principle which prevailed in by-gone times & its relics are to be found in our own country. As an instance of this inequality, we would refer to the special provisions in the Criminal Procedure Code with regard to the trial of offences committed by European British subjects. The intention of the framers of our Constitution was to make a clean sweep of all privileges & special treatment based on the ground of birth, sex, race, caste, creed, religion, position or property. It would therefore be wholly inconsistent with that intention to hold that the accident of birth or the holding of a position & the possession of wealth entitles a man to be placed above the general law of prohibition.

201. We are aware of the decisions of the United States Supreme Court, among which are *Miller v. Wilson*" 236 US 373 ; *"West Coast Hotel Company v. Ernest Parrish"* 300 US 379 & *"Minnesota v. Probate Court"* 309 US 270, which lay down that a legislature can recognise degrees of harm, that a statute enacted by it may not extend to all cases which it might be possible to reach & that it can confine its application to those classes of cases where the need is deemed to be the clearest or, as it is sometimes said, "hit the evil where it is roost felt". But these cases are not applicable to the present case because the law enacted by the legislature was primarily intended to apply to all persons in the areas in which it was brought into force. Moreover, it is not a temperance law but a "prohibition" law, expressly intended to reach all. Such being the intention of the legislature, a provision which removes a person or a class of persons from the purview of the law, without a reasonable ground, must be classed not only as discriminatory but as being in excess of the authority conferred on the Govt. by the legislature.

202. Apart from putting in one class persons of certain social status Rule 7 makes an arbitrary discrimination between persons of Asiatic & non Asiatic domicile, between members of the Armed Forces & the rest of the community & between members of the Armed Forces of Asiatic & non-Asiatic domicile. The rule provides that persons of Asiatic domicile, & not belonging to the Armed Forces, should pay Rs. 100 as a condition for obtaining a permit while those of non-Asiatic domicile & those belonging to the Armed Forces need not. Then it requires members of the Armed Forces of Asiatic domicile to conform to certain-conditions before they can obtain a permit while it relieves members of the Armed Forces of non-Asiatic domicile from compliance with these conditions. There is no reasonable basis whatsoever for such discrimination. We are, therefore, of the opinion that the whole of Rule 7, being repugnant to Article 14, has become void under Clause (1) of Article 13 after the commencement of the Constitution.

203. Rule 7 is not part of the Act & therefore even though it is invalid, the Act remains unaffected by it. It is however said that the law is being administered in a discriminatory manner because a class of persons is allowed to enjoy a special

privilege & that therefore it should be declared to be void as was done in the well-known case of "Yick Wo v. Hopkins" (1886) 118 US 356 Reliance is placed, in particular, on the following observations of Matthews J. which have now become classic:

Though the law itself be fair on its face & impartial in appearance, yet, if it is applied & administered by public authority with an evil eye & an unequal hand, so as practically to make unjust & illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

204. We have referred to this case earlier but, for considering this argument it is desirable to notice it again & in greater detail. In this case a San Francisco Municipal Ordinance made it unlawful to carry on a laundry, except in a brick or stone building, without a permit from the supervisors. No criterion by which fitness was to be tested was laid down in the Ordinance & the grant of permission was left to the uncontrolled discretion of the supervisors. The actual administration of the Ordinance disclosed that of a total 320 laundries 310 were in wooden buildings & that of some 200 Chinese laundrymen not one had been granted permission to carry on the business in wooden buildings. However, such permission was granted to all save one white applicant. It was upon these facts that the United States Supreme Court held the Ordinance to be void. The reasons given by them were that (i) what the Ordinance gave to the designated officials was not discretion to be exercised according to certain principles but naked & arbitrary power to give or withhold consent & (ii) that the evidence showed that the administration of the law was so exclusively directed against persons of the Chinese race as to warrant the conclusion that it amounted to a practical denial by the State of the equal protection of the law which is secured of all persons "by the broad & benign provisions of the Fourteenth Amendment" to the Constitution. It was in these circumstances that Matthews J. who delivered the judgment of the Court declared the general doctrine which we have already quoted. The doctrine so laid down has to be examined against the background of the particular facts of that case. That was a case in which naked & arbitrary power was conferred by the statute upon certain officials & that power was exercised "with an evil eye & an unequal hand". It would seem that for the doctrine to apply the two things found in the case must co-exist & so the case is no authority for the proposition that a statute, good when enacted, became void by reason of its invidious application. Had no arbitrary power -- but only discretion -- been conferred by the law but the law had been abused by those on whom the discretion was conferred, the law could have remained unaffected though the exercise of the discretion in a discriminatory manner would have come within the "prohibitions of the Constitution".

205. What the Court did in "Yick Wo's case" was to look through the Ordinance to ascertain how it actually works. It found that denial of equal protection lurked in the practical administration of that Ordinance & so came to the conclusion that

it was only a covert attempt to practise discrimination against the Chinese race. Such is not the case here. The rule-making power conferred on Govt. by Section 68 (2)(I) is couched in the following terms:

(2) In particular & without prejudice to the generality of the foregoing provision, the Provincial Govt. may make rules:

* * * * * (i) prescribing the authority by which, the form in which, & the terms & conditions subject to which, any licence or permit shall be granted.

This provision does not confer "naked, arbitrary power" at all. The Act itself contemplates legitimate or justifiable use of intoxicating liquor & it must be understood that the power granted by the rule is intended to regulate such use & to make provision for the grant of permits to those who could properly be granted permits for a purpose not falling within the general ban imposed by the Act.

206. If a rule made in the exercise of the power permits making of an unwarranted discrimination between one person & another, it has now become void under Article 13 (1). But because it has become void the power under which it was made cannot be characterised as arbitrary. Indeed, It could not be characterised as arbitrary even if the rule when made was an abuse of the authority conferred by the rule-making power. Nor can the rule-making power be characterised as arbitrary because it is based on wide discretion to Govt. to frame rules for the purpose of carrying into effect all or any of the provisions of the Act.

207. If the rule-making power conferred by the Act is not arbitrary, the decision in "Yick Wo's case" does not govern this case at all. The argument based on it must therefore fail.

208. That would be so even though discrimination has been made in pursuance of a power conferred by the Act. The result of the practice of such discrimination would be to render the administration of the law invalid & not the law itself. Thus, in "Tarrance v. Florida" (1903) 188 US 519, though it was laid down that an actual discrimination is as potential in creating inequality of rights as a discriminatory law, what was invalidated was not the law but its discriminatory administration.

209. We are, therefore, of opinion that the unequal application of law by the Govt. by making Rule 7 being unconnected with the law itself does not render the law invalid. What other effect it has is not a matter which we are called upon to consider here because the applicant does not complain before us that he has been or is being proceeded against under that law.

210. Another contention of the learned Counsel is that Section 29 (2) & Clause (a) of Section 32 amount to delegation of legislative power. We do not think that the power delegated by these provisions is a legislative power. This is merely a power to determine the circumstances in which the law shall be applied or to what areas its operation shall be extended or the particular class of persons to

whom it shall be applied. This is what has been held by the Privy Council in a long line of cases right from "The Queen v. Burah" 5 IA 178 to AIR 1945 48 (Privy Council) . These cases, & "Baxter v. Ah Way" to which we have already referred, directly support our view. In the last mentioned case, the power conferred upon the Governor-General in Council to declare by proclamation what goods shall be prohibited (from import was challenged on the ground that it amounted to delegation of legislative power. The quotation we have already given from the judgment of O'Connor J. contains the reason upon which the delegation so made was held not to be that of a legislative power at all & so valid.

211. Finally, we will refer in this connection to the very recent decision of the Supreme Court in State of Bombay Vs. Narothamdas Jethabai and Another, . In that case, the decision of the Bombay High Court holding that Section 4, Bombay City Civil Courts Act, is "ultra vires" the Provincial legislature as it delegated to the Provincial Govt. to extend by notification the pecuniary jurisdiction of the Court from Rs. 10,000 to a value not exceeding Rs. 25,000 was reversed by the Supreme Court. The decision of the Supreme Court supports our view & we may mention that it has been followed by a Full Bench of this Court in "Misc. Petn. No. 128 of 1950 decided on 30-3-1951".

212. What remain to be considered are the objections to the validity of Clauses (b), (c), (d) & (e) of Section 32, to the provisions of Rule 7 regarding payment of certain fees for obtaining a permit & the restriction of permit to the consumption of foreign liquor. We do not see how the applicant himself is affected by Clauses (b), (c), (d) & (e) & therefore, following the view of Brandels J. in "Ashwander"s case" we decline to pronounce upon their validity.

213. The contention of the applicant that the rule in so far as it creates a discrimination in the matter of payment of fees for obtaining a permit has been already dealt. He then says that none could be made to pay fees. We fail to see how, under the rule-making power, the provincial Govt. was prevented from making a provision regarding the payment of fee.

214. As regards the limitation of permits to the consumption of foreign liquor & the exclusion of country liquor, we are of opinion that there is no discrimination as classification of objects can be properly made on the ground that one is more harmful than the other. This seems to be the basis of the decisions in "Mugler v. State of Kansas" (1887) 123 U S 623; "Powell v. Pennsylvania" 127 US 678 & "W. T. Price v. Illinois" (1915) 238 US 446. The Provincial Govt. is not extending the grant of permits to the consumption of country liquor must be presumed to have regarded country liquor as more harmful than foreign liquor. We are, therefore, of the opinion that Rule 7, in so far as it excludes country liquor, does not contravene Article 14 of the Constitution.

215. In the view we take, we would dismiss the application but, in the particular circumstances, make no order as to costs.