THE
MADRAS LAW JOURNAL

I] MARCH [1940

THE TAXING POWER IN THE INDIAN CONSTITUTION

BY

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The way in which the taxing power is dealt with and allocated in the Government of India Act, 1935, between the Federation and the Provinces is fundamentally different from that adopted in the Australian or Canadian Constitution. The power of taxation is conferred in very general terms in the latter constitutions. In Australia the Commonwealth Parliament is given power to make laws for the peace, order and good government of the Commonwealth, *inter alia*, with respect to 'taxation, but so as not to discriminate between States or parts of States'. It has exclusive power to impose uniform duties of customs and excise. The Constitution Act preserves to the States all powers of taxation not exclusively conferred on the Commonwealth. The subjects of taxation are not specified in detail and there is a concurrent field in which both the Commonwealth and State legislatures are free to impose taxation. In Canada the Dominion Parliament has exclusive legislative authority to 'raise money by any mode of taxation', the Provincial legislatures likewise being given exclusive power to make laws in relation to 'direct taxation within the province in order to the raising of money for provincial purposes.' The only distinction in Canada is between direct and indirect taxes. In the Indian Constitution, however, legislative authority in respect of taxation is not given in general terms but only in terms of subjects, the subjects assigned to the Federation and the Provinces being specifically and expressly enumerated in the Federal and Provincial Legislative Lists.

It is frequently said that the Legislative Lists set out in the Seventh Schedule cover the entire field of legislation and furnish as exhaustive an enumeration of the subjects of legislation as is humanly possible, the provision in S. 104 of the Act being intended

only for a very remote and unforeseen contingency. Whether this is meant as a tribute to the ability of the draftsman or is resorted to as an escape from the inconveniences and difficulties arising from the enumeration of the subjects it does not seem to be correct when applied to the subjects of taxation. That the Lists are not exhaustive of the subjects of taxation is made clear not only by an examination of the Lists but also by the terms of S. 104 which expressly clothes the Governor-General with authority to empower either the Federal or Provincial legislature to make laws in regard to subjects not enumerated in the Lists *including a law imposing a tax not mentioned in any such list.*

In the Government of India Act the power to tax any subject-matter is not derived from or comprehended in the general power to legislate with respect to that subject-matter. A few instances will illustrate this position. The power to legislate with respect to 'import and export across customs frontiers' is given to the Federal legislature under item 19 of the Federal List. The power to impose import and export duties is separately conferred under item 44, 'duties of customs including export duties'. The power to make laws with respect to 'succession, save as regards agricultural land' inheres both in the Federal and Provincial legislatures (*vide* item 7 of the Concurrent List) but the power to levy 'duties in respect of succession to property other than agricultural land' is conferred exclusively on the Federal legislature under a different item, namely, item 56 of the Federal List. Item 28 of List I mentions only 'cheques, bills of exchange, promissory notes and other like instruments'. The power to fix the rates of stamp duty in respect of such instruments is granted only under item 57 of that List. 'Betting and gambling' is item 36 of the Provincial List but the power to impose 'taxes on betting and gambling' accrues to the Provincial legislature only under item 50. The subject of 'legal, medical and other professions' is in the Concurrent List being item 16 but the power to impose 'a tax on professions' is confided to the Provincial legislature under item 46 of List II.

Parliament itself proceeded on this view when it recently amended the Government of India Act by inserting an item 'tax on mechanically propelled vehicles' in the Seventh Schedule which would have been wholly unnecessary in view of item 20 of List III, 'mechanically propelled vehicles' if the taxing power was intended to be included in the grant of a general legislative power.

Taxes, duties (including stamp duties), cesses, dues and tolls are different names under which taxation is imposed in the scheme of the Indian Constitution. The Advocate-General of India in the course of his arguments in the Central Provinces Petrol case is reported to

have stated that the expression 'tax' has a larger connotation than 'duty' and that 'duty' is different from a 'tax' in that it is imposed on commodities while taxes are imposed on individuals. While it is true that 'tax' has a larger connotation than 'duty'—the definition of 'taxation' and 'tax' in the Interpretation section, S. 311 makes that clear—the distinction suggested by him is not borne out by an examination of the expressions used in the Lists in relation to the subjects of taxation. For instance, there is succession duty. It is not a duty imposed on any commodity. The distinction is perhaps this. While it must be conceded that 'tax' and 'duty' are used in common parlance and even in the Government of India Act indifferently the expression 'tax' is more often used to connote a recurring levy or one made periodically over the same subject-matter the expression 'duty' is used to connote an impost levied only once or on specified occasions only in respect of a given subject-matter. That this may be the proper distinction is apparent from the several instances of duties that one comes across, for example, customs and export duties, duties on succession to property, stamp duties and excise duties.

The taxing power is, however, not to be confused with the power to levy a fee. In the Government of India Act the power to require a licence for regulating a trade, profession, etc., is treated as falling within the scope of the power to legislate in respect of such trade, profession, etc. But the power to impose a fee for the grant of such licence is treated as an independent legislative power. In each of the three Legislative Lists in the Seventh Schedule there is an item 'fees in respect of any of the matters in this list but not including fees taken in any Court'. There is no such express subject in the Australian or Canadian Constitution. S. 92 of the British North America Act, no doubt, confers power on the provinces to legislate with respect to 'shop, saloon, auctioneer and other licences in order to the raising of revenue for provincial, local or municipal purposes'. But the fees contemplated in item 59 of List I, item 54 of List II and items 25 and 36 of List III are not levies made in order to raise revenue but are intended as *quid proquo* for services rendered or for covering the administration and supervision charges. 'Fee' is defined in the Oxford Dictionary as 'remuneration paid to a professional man for occasional services' ..... 'a sum paid for admission to a society or for entrance to a public building'. Wharton defines it as 'reward or recompense for services'. In Bouvier's Dictionary its meaning is given as 'reward or wages given to one for the execution of his office or for professional services'. That this is also the sense in which it is used in the Indian Constitution is made clear by the terms of S. 37 and of the analogous S. 82 of the Act. S. 37 provides that a bill or

amendment making a provision for imposing or increasing any tax shall not be introduced or moved except under the recommendation of the Governor-General. Sub-S. 2 says that a measure is not to be deemed a taxing one by reason only that it provides for the demand or payment *of fees for licences or fees for services rendered.*

The distinction between a tax and a fee is explained by the Rangoon High Court in *Municipal Corporation of Rangoon* v. *Sooratee Bara Bazaar*[1] and this has been accepted by the other High Courts and by the Privy Council in *Pazundaung Bazaar Co.* v. *Municipal Corporation*[2].

Neither the name given to a particular imposition nor the amount of the levy is conclusive on the question whether it is a tax or a fee. The Madras Regulation of the Sale of Cloth Act (Act XII of 1937) requires an annual licence to be taken out by every dealer in cloth and imposes what is styled a 'fee' of Rs. 2 or Rs. 5 according as the monthly turnover does or does not exceed Rs. 3,000. It exempts dealers dealing exclusively in hand-woven cloth from the payment of the fee for the licence. There are no other provisions in the Act for regulating the sale of cloth. It is clear therefore that though it is called a fee it is really a tax on dealers, the object of the legislation being to encourage hand-loom cloth and to raise a small revenue for provincial purposes.

The recent amendment to the Government of India Act limiting the tax that may be imposed by the Provincial legislatures on trades, professions, callings and employments to Rs. 50 a year gives additional importance to the distinction between a tax and a fee and may give rise to a question whether the limitation in regard to the amount of tax is to be construed as involving the conclusion that a fee imposed by the Provincial legislature for a licence in respect of any trade, profession, calling or employment cannot exceed Rs. 50 and if it does it is *ultra vires* the Provincial legislature.

The taxing power in the Indian Constitution is an exclusive power. If power to impose a tax on any specified subject-matter is conferred on the Federal Legislature it is excluded from the Provincial power and *vice versa*. In other words, there is no concurrent list for purposes of taxation. It may be urged that the rule with regard to the interpretation of the Lists, namely, that a subject which may in one aspect and for one purpose fall within the Federal list may in another aspect and for another purpose fall in the Provincial List when applied to the items in the Lists relating

1. (1927) I.L.R. 5 Rang. 212 at 219.
2. (1931) 61 M.L.J. 740: L.R. 58 I.A. 313: I.L.R. 9 Rang. 440 (P.C.).

to taxation would necessarily lead to the result that even in regard to taxation there might be a concurrent field. In the Central Provinces Petrol case before the Federal Court no such argument seems to have been put forward on behalf of the Provinces. The provisions of S. 100 of the Government of India Act forbid such an argument and the judgment of the Federal Court gives no support to the position that viewed as an excise duty the impugned tax could fall legitimately under item 45 of the Federal List, viewed as a tax on the sale of petrol it could also legitimately fall under item 48 of the Provincial List and that both the Central and Provincial legislature would be competent to impose the tax in question.

Neither the Federal nor the Provincial legislature can enlarge the scope of its taxing powers beyond the limits expressed in the constitution by attempting to define the subject-matter of the power in a particular case. For instance, power to impose a tax on the sale of goods is conferred on the Provincial legislature but it is not open to that legislature to impose a tax on what is not a sale by calling it or including it in the definition of sale. In this view the Explanation to the definition of 'sale' in the Madras General Sales Act which brings a transfer of goods under a hire-purchase agreement within the meaning of a sale even before the option to purchase is exercised would seem to be of doubtful validity. *See also* Isacs and Riche, JJ., in *Waterside Workers' Federation* v. *C. W. Steam Ship Owners Association*[1].

An examination of the language employed in the various items in the Legislative Lists relating to taxation shows that Parliament intended to confer legislative authority to impose taxation in terms of subjects or topics and not with reference to the persons on whom the incidence of the tax might in the first instance or ultimately fall. Barring taxes on passengers (and possibly capitation taxes) which by their very nature are taxes on persons the subjects of taxation enumerated in the Lists are acts, transactions or things and not persons described in terms of their relation to such acts, transactions or things. For instance, item 42 of the Provincial List speaks of 'taxes on land' and not 'taxes on the owner, occupier, mortgagee or other person having an interest in land'. If Parliament intended that a specified tax should necessarily be imposed on a particular person it has expressly said so as in the case of 'taxes on passengers' and has not left the same to be inferred from the language used in the Lists to describe the subjects of taxation. The above view is in keeping with the opinion of the Federal Court in the Central

1. (1929) 28 C.L R, at 232.

Provinces Petrol case where the item 'duties of excise on goods produced or manufactured in India' was construed to be limited to taxes imposed at the stage of or in connection with the production or manufacture of the excisable goods. No member of the Court suggested that the tax should be imposed only on the producer or manufacturer. On the other hand it was observed that a tax on the first seller might well be an excise duty. Again, it would not be legitimate to infer from the use of the expression 'sale' in the item relating to taxes on the sale of goods that it was the intention of Parliament that the tax should be levied on or borne only by the seller of the goods. The expression 'sale' is used only in the sense in which it is used in the law of sale of goods, *viz.*, a transfer of property in the goods for a price. In this view the provisions of the Madras General Sales Act which proceed on the footing that it would be lawful to levy the tax on the seller or the buyer or the broker or any other person who takes any part in or is intimately connected with the transaction of sale would not be open to challenge.

The limits of the taxing power, the detailed examination of the items and the reconciliation of the competing entries in the Federal and Provincial Lists must be reserved to a future occasion.

SUMMARY OF ENGLISH CASES.

MILNE *v.* COMMISSIONER OF POLICE FOR CITY OF LONDON, (1940) A.C. 1 (H.L.).

Crimes—Gaming and wagering—Using the telephone in club premises for betting with book-makers outside—If using the premises for betting purposes.

The mere use of the telephone in club premises for betting with book-makers outside, was not sufficient to establish the offence of using the premises for betting purposes.

CULL *v.* INLAND REVENUE COMMISSIONERS, (1940) A.C. 51 (H.L.).

Income-tax—Finance Act (1931), S. 7—All Schedules Rules, r. 20—Dividend received from company "without deduction of tax"—If to be "grossed up for purposes of sur-tax."

The appellant was the holder of 20,000 ordinary shares of £1, all issued and fully paid in an unlimited company. In March, 1934, a dividend of 21*s.* per share was paid. In his return of total income for sur-tax purposes the appellant included the sum

of £21,000 (his dividend). The Assessing Commissioners added £7,000 as representing income-tax in respect of this dividend.

Held, Neumann v. *Inland Revenue Commissioner*, (1934) A.C. 215, is an authoritative interpretation of S. 7 (2) of the 1931 Act; and *Inland Revenue Commissioners* v. *Pearson and Pratt*, (1936) 2 K.B. 533, were wrongly decided and must be overruled. If a company does not exercise its right of deduction and chooses to pay its dividends without deduction of tax, the dividend is gross even though it is paid out of taxed profits and there is no scope for "grossing up" what is already gross.

(1938) 2 K.B. 109: (1938) 1 All. E.R. 467, reversed.

BARNES *v.* HELY HUTCHINSON, (1940) A.C. 81 (H.L.).

Income-tax—Dividends on preference shares in an Indian company holding shares in two British companies whose profits had suffered British income-tax—If could again be subjected to British income-tax.

The respondent is the holder of 525 preference shares of Rs. 1,000 each in a company registered in Calcutta which is the holder of ordinary shares in two companies registered in England. The whole of the profits of the two British companies were assessed to British income-tax. The Indian company received the dividend after deduction of British income-tax. The Indian company also received other income which had not suffered deduction for British income-tax and the proportion of taxed to untaxed income was agreed to be 44·12 to 55·88. On 22nd June, 1931, the respondent was paid as dividend upon his preference shares Rs. 42,000 without any deduction for income-tax. He was assessed on the full amount of the dividend. His contention that 44·12 per cent. of the dividend having already borne British income-tax could not again be subjected to British income-tax, was upheld by the Courts below.

Held [reversing (1939) 1 K. B. 93], the preference shareholder who receives his full dividend has suffered nothing directly or indirectly. There is no question of double taxation. That a larger sum of profits out of which he receives his dividend is diminished by tax is nothing to him and there is nothing either unjust or contrary to the statute in exacting tax for the first time from him and respondent's claim for abatement fails.

FRANCIS DAY AND HUNTER, LTD. *v.* TWENTIETH CENTURY FOX CORPORATION, LTD., (1940) A.C. 112 (P.C.).

Tort—Passing off and infringement of copyright—Use of the title of a musical composition as title of a talkie—How far infringement of copyright and performing right.

There cannot be an infringement of performing right in a musical composition unless there has been a public performance of the musical composition by the defendant. A bare copying of the title of a musical composition as a title of a talkie film is not an infringement of performing right. In general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition and is not sufficiently substantial to justify a claim to protection, unless it be on so extensive a scale and of so important a character. The two things are completely different and the use of the title in the absence of other circumstances calculated to mislead does not constitute a passing off.

WESTER WEMYSS, *In re*: TILLEY *v.* WESTER WEMYSS, (1940) 1 Ch. 1 (C.A.).

Will— Executors— Administration action by creditor— If plaintiff's right to costs can deprive the personal representative of his right to retainer—Direction of Court as to costs.

Per *Greene, M.R.* and *Finlay, L.J.* (*Luxmoore, L.J., dissenting*),—Assets in respect of which the executor is entitled to exercise and claims to exercise a right of retainer are in effect withdrawn from the pool of assets available for the payment of debts of the same or a lower degree. Payment into Court in an administration action is without prejudice to the executor's right and does not affect the substance of the situation, it being mere machinery for preserving the assets pending a decision upon the executor's claim. The inevitable result is to preserve the priority of that claim over the plaintiff's costs of action. The discretionary power of Court as to costs ought not to enable the Court to override a definite and well-established legal right such as that of retainer.

Decision of Crossman, J., (1939) 1 All. E.R. 382, affirmed.

PAINE, *In re*: WILLIAMS, *In re*: GRIFFITH *v.* WATERHOUSE, (1940) 1 Ch. 46.

Conflict of laws—Marriage—Marriage in Germany by German with deceased wife's sister whose domicile was English—Validity in England.

A testatrix bequeathed a sum outside to her daughter for life and if she left issue absolutely with a gift over in default of issue. The daughter while domiciled in England married her deceased sister's husband (a German) in Germany according to whose laws the marriage was valid. On the death of the daughter leaving an issue surviving,

Held, the marriage could not be made by English Law and the absolute gift failed.

In re——B's SETTLEMENT: B—— *v.* B——, (1940) 1 Ch. 54.

Guardian and Ward—Custody of Ward—Previous order of foreign Court—How far binding.

Under Guardianship of Infants Act, the Court is bound to exercise a judgment of its own when dealing with the custody of a ward. The welfare of the infant is of a paramount consideration whatever orders may have been made by a foreign Court. The weight to be attached to such foreign orders might depend upon the circumstance of the particular case which the Court had to decide.

YOUNGMAN *v.* PIRELLI GENERAL CABLE WORKS, LTD., (1940) 1 K.B. 1 (C.A.).

Master and servant—Death of servant while engaged as electric linesman—Absence of evidence of negligence on defendants' part—Res ipsa loquitur—*If applicable.*

An electric linesman under his foreman's orders ascended a pole carrying a live wire for placing another wire in position. Near the top of the pole he was electrocuted and died immediately. In a claim against the Master under the Fatal Accidents Act by the dependants on the ground of negligence and breach of statutory duty, there was no evidence of negligence and it was contended that the doctrine of *res ipsa loquitur* applied.

Held, in the circumstances the principle *res ipsa loquitur* did not apply.

HICKMAN *v.* POTTS, (1940) 1 K.B. 29.

Landlord and Tenants Act (1709), S. 1—Distress for rents and distress for rates—Priorities—Distress for rates if "execution."

The levying of a distress for rates under a justice's warrant is in reality an execution within Landlord and Tenants Act, 1709, S. 1, and the amount due for rent to the landlord is a first charge on the proceeds of such distress. *"Communis error facit jus"* is a maxim of limited application and affords no ground for perpetuating an error.

PERKINS *v.* HUGH STEVENSON & SONS, LTD., (1940) 1 K.B. 56: (1939) 3 All. E.R. 697 (C.A.).

Workmen's Compensation Act (1925), S. 25 (1) and (2)—Receipt of compensation under act for injuries—Effect on right to claim damages at common law.

Where a workman has received compensation pursuant to a claim made under the Act (even though with no knowlege of his right of option to claim either under the Act or at common law) the effect of the second portion of cl. (1) sub-S. (*i*) of S. 29 is to exempt the employer from liability to pay compensation both under the Act and outside the Act to the same person in respect of the same accident. There is no machinery by which the money a workman has received as compensation can be set off against or deducted from the damages to be awarded to him at common law. The claim under common law must be dismissed.

BARROWFORD HOLDINGS, LTD. *v.* INLAND REVENUE COMMISSIONERS, (1940) 1 K. B. 81 (C. A.)

Finance Act (1922), S. 21 (6)—Subsidiary of foreign company—If "subsidiary company" within S. 21 (6)—Direction as to undistributed income of such company—If can be made.

The subsidiary of a foreign company is not a subsidiary company within the meaning of the Finance Act, 1922, S. 21 (1) as amended by the Finance Act, 1927, S. 31 (3) and a direction as to the undistributed profits of such company can be made so that it can be deemed to be the income of the members for purposes of sur-tax.

(1939) 2 K. B. 607, affirmed.

STOVELL *v.* JAMESON, (1940) 1 K. B. 92: (1939) 4 All. E. R. 76 (K. B. D.)

Betting and Lotteries Act (1934), S. 3 (2)—Football pool—Coupons accepted at premises and despatched to promoters of pool —If premises used to 'effect' betting transactions.

To constitute an offence under the section it was not necessary for the transaction to have been actually completed at the premises. A tobacconist's shop where completed coupons were accepted and despatched to the promoters of the football pool is premises used to "effect" betting transactions.

NELSON *v.* COOKSON, (1940) 1 K.B. 100: (1939) 4 All. E.R. 30 (K.B.D.).

Public Authorities Protection Act (1893), S. 1—Medical officers of County hospital—Claim against for negligent operation —Limitation of six months under the Act—If applicable.

In a claim for alleged negligence in performing an operation on an infant plaintiff against the assistant medical officers of a County hospital, brought six months after the alleged negligence,

Held, the medical officers were performing a public duty (and not independent contractors) and entitled to the protection of the Public Authorities Protection Act, and the claim is barred.

DAVIS *v.* FOOTS, (1940) 1 K.B. 116 (C.A.): (1939) 4 All. E. R. 4 (C.A.).

Landlord and tenant—Removal of gas fire in a room in premises let without replacing a tap on the pipe—Escape of gas causing injury to tenants—Liability of landlord on contract or tort.

Plaintiff and her late husband agreed to become defendants' tenants. Defendants who were occupying the premises removed along with their furniture a gas-fire from the grate leaving the pipe open. At that time gas was turned off at the main. When plaintiff and her husband slept in the room, from which the gas fire had been removed, when gas was turned on, the gas escaped and rendered the couple unconscious. The husband died of gas poisoning and plaintiff was seriously ill. Plaintiff sued for damages in respect of the loss of her husband.

Held, the defendants were not liable in tort, and no contract to exercise any care and skill with regard to the gas-fire by the defendants was proved.

CLARK *v.* SMITH, (1940) 1 K.B. 126 (C.A.): (1939) 4 All. E. R. 59 (C.A.).

Bankruptcy—Trustee in bankruptcy carrying on business of bankrupt—If contrary to Bankruptcy Act, S. 56—Effect on right of trustee to sue on a guarantee in respect of the carrying on of the business.

On the bankruptcy of an eating house-keeper, the creditors decided that the trustee in Bankruptcy should carry on the business. The defendant executed a guarantee to the trustee. When a claim on the guarantee was sought to be enforced the guarantor contended that the carrying on of the business was contrary to the provisions of Bankruptcy Act, 1914, S. 56.

Held, it is only on the motion of persons interested in the estate that resolutions which offend against S. 56 (1) (being for the benefit of the estate) can be impeached and held to be invalid. As against the world the carrying on of the business of the trustee can create legal relations between him and third parties, either as debtor or creditor incurred in the carrying on of the business notwithstanding that it is carried on otherwise than solely for the beneficial winding up of the estate. It is not illegal or void on any basis of public policy and the guarantee is enforceable.

ENGLISH *v.* WESTERN, (1940) 1 K.B. 145: (1939) 4 All. E.R. 345 (K.B.D.).

Motor insurance against third party risks—Exclusion of indemnity against claims by "any member of assured's household" —Sister of insured—If member of his household.

A policy of motor insurance provided that the under-writers shall pay "all sums which the insured shall become legally liable to pay by way of compensation for death or bodily injury to any persons including the passengers, occasioned by or arising out of the use of the car, but excluding.....(*b*) death or injury to any member of the assured's household who is carried in or upon the car." In respect of a claim by the sisters of the insured who was living in his house,

Held, that the claim excluded by the words "member of the assured's household." "Household" means a "family living together" and in no sense are the words confined to people who are under the domestic governance of the *pater familias*, or somebody in *loco parentis*.

HERSCHTAL *v.* STEWART AND ARDERN, LTD., (1940) 1 K.B. 155: (1939) 4 All. E.R. 123 (K.B.D.).

Tort—Negligence—Supply of a reconditioned car with a wheel not properly tightened—No anticipation that there will be any intermediate examination as would be likely to reveal a defect— Liability for accident due to defective condition.

Where the defendants supplied a reconditioned car the rear wheel of which was not properly tightened in circumstances in which they did not anticipate and could not reasonably have anticipated, that there would be any such intermediate examination as would be likely to reveal a defect such as existed in the motor car, and an accident occurred, the defendants are liable on the basis that they were the plaintiff's neighbours in law and were supplying a dangerous article for his user. (Case-law reviewed.)

HOLLOWAY *v.* POPLAR CORPORATION, (1940) 1 K.B. 173: (1939) 4 All.E.R. 165 (K.B.D.).

Resolution by a Borough Council for payment of a gratuity of £268-16-10 payable at 10s. weekly to a retired servant—Payment for some weeks—Claim for immediate payment of balance of whole amount—Enforceability.

In a claim by an ex-employee for immediate recovery of the whole of the gratuity which the employer a borough council had passed a resolution to pay in weekly instalments,

Held, the resolution is not a grant. It does not create nor supply evidence of a contract and it imposes no obligations on the defendant. As to the contention that the statute provided "a gratuity" and the resolution for weekly payments of the amount is *ultra vires*. *Held*, a gratuity payable in instalments is not several gratuities and in any event by Interpretation Act, 1889, singular includes plural.

JOTTINGS AND CUTTINGS.

The Week's Personality.—Though a descendant in the female line of the great Chief Justice Coke, Nathaniel Lindley was not at first destined for the law. At the age of eighteen he was sent to France to learn French with a view to entering the Foreign Office, but he soon gave up the idea of a diplomatic career, and on the advice of an uncle who was a solicitor he joined the Middle Temple in 1847, and there he was called to the Bar three years later. His pupillage in chambers extended over the extraordinary period of four and a half years. For twenty-five years he practiced in Chancery, and by the end of that time was making well over £4,000 a year. In spite of his eminence at the Bar it was something of a suprise to the profession when Lord Cairns offered him a common law judgeship in 1875. The Judicature Act, embodiment of the iconoclastic zeal of the Victorians, had already cast its shadow on the Courts at Westminster, but still none but a serjeant-at-law could ascend the Bench there. Lindley thus became a member of the Order of the Coif which was destined to vanish with him, for when he died in 1921 he was the last survivor. As a Lord Justice in the Court of Appeal, as Master of the Rolls, and finally in the House of Lords, he won a place among the great judges of England.—*S.J., 1939, p. 906.*

Old Elms.—A recent newspaper correspondence about the great age and strength of elms reminded me of a story of Lord Mansfield. A witness named Elm once gave evidence in a case before him with remarkable clarity and force though he was over eighty. On examination by the Chief Justice as to his way of life, he declared that he had always risen early and lived temperately. "Ay," said the judge, "I have always found that without temperance and early habits longevity is never attained". The next to be called was an elder brother of this model witness and surpassed him in clear-headed intelligence. "I suppose," said Lord Mansfield, "that you also are an early riser." "No, my lord", was the reply, "I like my bed at all hours and specially I like it in the morning."

"Ah! but like your brother you are a very temperate man," suggested the judge. "My lord," declared the venerable Elm, "I am a very old man and my memory is as clear as a bell, but I can't remember the night when I've gone to bed without being more or less drunk." Thereupon counsel said that this seemed to show that after all habitual intemperance favoured longevity. "No, no," replied the Chief Justice, "this old man and his brother merely teach what every carpenter knows—that elm, whether it be wet or dry, is a very tough wood".—*S.J., 1939, p. 906.*

Costs.—An old and not unfamiliar story has come down to us of a certain judge, in whom the sense of humour was highly developed, who, having dealt exhaustively with the legal problems involved in the case which he had just tried, proceeded with mock-gravity to say: "Now we come to the real merits of the dispute—the question of costs". No doubt costs play a notable part in litigation; that is inescapable, and has to be faced. Hitherto it has been generally assumed that the House of Lords will refuse to entertain an appeal where the question involved is one of costs only, but last week Lord Wright, in an appeal from Northern Ireland, stated that this cannot be regarded as an inflexible rule. In that case the appellants had been ordered to pay the costs involved of their unsuccessful opposition to the grant of a licence for the sale of intoxicating liquors in Belfast, and the House held that they were entitled as "persons aggrieved" to bring the case by way of appeal to the House. It is true that their appeal failed on the construction of a section of the relevant licensing statute, but Lord Wright's *dictum* should be borne in mind. According to "Blackstone," the common law did not in terms allow costs, though in reality they were considered and included in the grant of damages if these were given. The Statute of Gloucester was, it appears, the first legislative authorisation for the allowance of costs *eo nomine*. Oddly enough, says "Blackstone", a defendant received no costs till much later, but at last it came to be recognised that a successful defendant should be awarded costs just as the plaintiff would have had if he had been the successful litigant.—*S.J., 1939, p. 913.*

No Chewing in Court.—Mr. Harris recently upheld the decorum of the proceedings at Marlborough Street Police Court by ordering the ejection of a youth who was chewing gum. "Nobody is allowed to chew gum in this Court," he declared. "If anybody else is chewing gum he had better go outside". To the best of my knowledge, information and belief that is the

first time that this particular offence against the dignity of judicial officers has been publicly denounced. Wearing or not wearing a hat, according to the sex of the offender, has been a fruitful source of comment. Spitting, too, has been explicitly discouraged. In the case of each, Ireland has produced remarks which could not be bettered. "I see you standing there like a wild beast with your hat on," exclaimed Mr. Justice Mayne once to a man who had forgotten to uncover himself in a Dublin Court. Then there was the judge who ordered out someone who had expectorated in his presence. "You have got the whole of the County of Kerry to spit in without coming into my Court," he said. Even smiling may be taken amiss. At Bodmin there used to live an old man whose face was permanently distorted in a ghastly grin. Once, after there had been some unseemly laughter in the Assize Court, Mr. Justice Denman caught sight of him and called out angrily: "You wicked old man, I'll send you to prison." Of course his expression did not change and eventually he was ejected, still apparently grinning. —*S.J. 1939, p. 922.*

Audience before Tribunals.—There has been comment concerning the right (or denial of the right) of audience before the bodies set up to administer certain of the provisions of the war-time legislation. The tribunals which have been particularly criticised are those set up to deal with aliens, and the "Hardship" committees constituted under the National Service (Armed Forces) Act, 1939. The criticism has been directed to the fact that solicitors and counsel are expressly denied the right of audience before these bodies, as though the evil of the denial is solely in preventing the lawyer from earning his fees. It is true that a man who has spent years in training himself to present the case of his client to the Courts, and who pays heavy dues for the privilege of being able to practice, has some title to claim that the Government to which he pays those dues should not prevent him from practising in circumstances for which his training has particularly fitted him.

This is a reasonable argument, but there is another side to the matter. British subjects and others who are living under the King's protection are denied the right of employing skilled men to put their cases before the tribunals. It is one of the most difficult things in the world for a man without previous training to put his case clearly and adequately before a tribunal. It is more than ever difficult for him to do so when he is appearing before a legal tribunal perhaps for the first time in his life; when the knowledge that on the proper presentation of his case depends his liberty and perhaps ultimately his life puts him into a state of high nervous

tension. Anyone who in the county court or the police court has seen the pathetic attempts of the defendant in person to put his defence before the court, or to cross-examine witnesses, knows the difficulties and hardships which confront the layman who scorns or cannot afford professional assistance. If this applies to an English man appearing before an English court, what an ordeal must it be for an alien—with perhaps a scanty knowledge of the language and probably complete ignorance of the law—to appear before what is to him an alien tribunal.

It is true that a man is allowed to bring to hearings before these bodies, a friend and witnesses, and (in the case of the "Hardship" committees) a representative of the trade union to which he belongs. This, however, does not in any way answer the criticisms which have been suggested above, but rather aggravates the injustice of the position which has been created. Many of the people concerned will not belong to a trade union, but in any event a trade union official is no proper representative to put a man's case before a tribunal, because he seldom has the training or experience necessary for the examination or cross-examination of witnesses.

It is no answer to the criticisms to say that the men at present constituting the tribunals are (as I believe them to be) just and upright men. In the first place they cannot make a satisfactory decision upon a case which is not completely put before them. In the second place it is fallacious to argue that because the present members of the tribunals are just men, and will hold the scales evenly between the claims of the Crown and those of the subject, and will not take advantage of an ignorant man, therefore the tribunals will always be fair.

The tribunals are not strictly judicial bodies in the sense that our Courts of Justice are. They are rather administrative bodies. Even so a subject should not be deprived of the right to employ skilled assistance in dealing with them. The duties of Income-tax Inspectors are also administrative, but the tax-payers are not on that account prevented from employing solicitors to conduct negotiations with the authorities on their behalf.

In a democratic country there is no emergency which can justify depriving a man of his right to have his case put before a tribunal in the most favourable light possible. In war time, when so much depends on the people being contented, it is more than ever necessary to remember the precept that it is not enough that justice should be done—it must plainly be seen to be done. The denial to ordinary people of the right to employ skilled men to present their case in the most favourable light will lead inevitably to the feeling that advantage is being taken of their ignorance

by astute officials, and that their elementary rights are in peril of being taken away from them. They will lose their faith in their judicial bodies, and when that happens the rule of law upon which the constitution rests will crumble away.—*L.J., 1939, p. 350.*

Professor Edward Jenks —The late Professor Edward Jenks, who passed away on 10th November, was a considerable contributor to the literature of English Law, and his contributions cover a wide sphere. His *Law and Politics in the Middle Ages, The State and the Nation,* a development of an earlier and thought-provoking primer on the history of politics, and *The New Jurisprudence,* represent some of his survey of the borderland between law, history and political philosophy, of which he was a most lucid exponent as well as a widely read scholar.

His outline of *English Local Government* and *The Government of the British Empire* display his capacity for interesting narrative without sacrifice of essential detail, and the same may be said of his *Short History of English Law,* all of which books, while valuable to the technical student of law, are appropriate for those who approach these subjects without either any intention of, or equipment for, the professional study of law. An earlier handbook on *Husband and Wife in the Law* showed that the late Professor Jenks possessed a remarkable felicity for expounding law to the laymen, and this reached its highest point in *The Book of English Law,* which surveyed the whole field with a maximum of clarity and the minimum of technicality.

In the sphere of legal studies strictly so called, Professor Jenks contributed in his *Modern Land Law* (1899) a text book which showed him to be a real property lawyer of great learning. Notwithstanding changes which have taken place in the law since its publication, it is still a very valuable work of reference, and characterised by that eloquence of exposition which was the hallmark of all his narrative works. He stamped the influence of his personality upon the several editions of *Stephen's Commentaries* for which he was responsible, obviously most evident in the sections of which he had especial charge. His greatest legal work, however, was that of editorship-in-chief of the *Digest of English Civil Law,* a masterly statement of the existing civil law of England to which he himself was a personal contributor.

DIGEST OF CIVIL LAW.

It is in the nature of a code, although being unofficial it can only claim to state the rules as upheld by the accredited legal authorities. The *Digest,* while in the main limited to the enunciation of the rules, contains notes of acute criticism and the

light of historical research is at appropriate places abundantly manifest. The value of a work such as this in a legal system which is uncodified is obvious, and its utility both for academic and practical purposes has been widely recognised. Quite naturally it has appealed to the foreign jurist both in his pursuit of comparative jurisprudence and in his endeavours to obtain within a short compass a conspectus of the whole of the civil legal system of England. To the common lawyers both of England and the United States of America it has revealed in a bold light the wealth of the legal heritage to which both countries have succeeded.

Professor Jenks collected around him a body of learned lawyers, he himself contributing (*inter alia*) the important sphere of property law—a work of immense labour in the latest edition by reason of the necessity for the incorporation of the new property legislation.

In the preface to this edition the late editor observed that "it is in the nature of things unlikely that" he "will be privileged to take part in a later edition of this work". The lines now have a pathetic interest, but pathos yields to gratitude for the work of a great jurist who enlarged and deepened the learning of the law and endowed it with a broader scope and a wider vision.—*L.J., 1939, p. 355.*

BOOK REVIEWS.

LAW OF INCOME-TAX, by V.S.Sundaram, Published by Messrs. Butterworth & Co., Bombay, 1940. Price Rs. 16/-.

The recent amendments to the Law of Income-tax have almost transformed the Act and all previous commentaries have become both out of date and misleading. The introduction of the slab system, the treatment of foreign companies, the inclusion of accrued foreign income in the case of companies resident in British India, the treatment of unregistered firms, and the institution of an appellate tribunal are a few of the many changes which the amendment has introduced in the Act. It is, therefore, well that the 5th Edition of Mr. Sundaram's book, thoroughly revising everything that had to be revised in his previous edition is published so soon after the coming into force of the Act. The law on this branch of the subject is technical and requires an inside knowledge of the working of the Act in practice quite as much as of the rules of interpretation and the case-law on the subject. Mr. Sundaram's close and intimate connection with the departments administering the law has given him that inside knowledge of the working which makes this commentary invaluable not only to the lawyer and the judge, but also to the tax giver and the

tax gatherer. On the legal aspect of it, his commentary is profuse with quotations, in fact fuller than what a purely legal text book need contain. Extracts from both the leading English and Indian cases abound, and so far as one can see, nothing of significance has been omitted. From the businessmen's point of view, the book is replete with illustrations which bring out in a concrete form the actual problem and how it was solved. The rules made by the Central Government appear at the relevant places to guide one, either in the interpretation or the application of the sections. In solving the many difficult problems that may arise as to the mode of taxation, the ambit of taxable persons, the rules of exemption, the provisions against evasion, and above all on what is and what is not income, this latest book, dealing exhaustively, as it does, with those intricate questions, will be found to be of invaluable assistance to everyone that has to deal with this branch of the law. We commend the book as a very useful contribution to the literature on the subject.

BROOM'S LEGAL MAXIMS (Tenth Edition) by R. H. Kersley, M.A., LL.M. Publishers, Sweet and Maxwell, Ltd., 2 and 3, Chancery Lane, London, W. C. 2. 1939, Price 32*s*. 6*d*. net.

To praise the worth and usefulness of a book like Broom's Legal Maxims nearly a century after its first publication in 1845 and especially after the many editions it had run through under able editors is to gild the gold. "The frequency with which maxims are not only referred to by the Bench, but cited and relied upon by counsel in their arguments; the importance which has, in many decided cases, been attached to them; the caution which is always exercised in applying, and the subtlety and ingenuity which has been displayed in distinguishing between them, seem to afford reasonable grounds for hoping that the mere Selections of Maxims here given may prove useful to the profession, and that the examples adduced and the authorities referred to by way of illustration, qualification, or exception, may, in some limited degree, add to their utility" are the words of Dr. Broom himself describing his purpose when launching this publication into the legal world. True, that many of the Maxims given here are derived from the Roman law, but at the same time they are so well grounded upon reason, public convenience and necessity, that it is no wonder they have been accepted as recognised principles in the codes of many a civilized nation. Moreover, the work of Dr. Broom may be said to be comprehensive also in that the various branches of law which have come under his purview range over topics like Constitutional Law, Property, Marriage and Descent, Interpretations of Deeds, Contracts and Evidence. If it is no mean labour to consult Reports, both ancient

and modern, and also standard treatises on leading subjects of law in order to find out what Maxims are of frequent occurrence in legal matters and of immense practical value, then again we should have no hesitation in owning that Dr. Broom showed wonderful capacity for selection and plan of execution.

Hence, there is every justification for as many editions of the book as there have been occasions caused by statutory developments necessitating the re-writing of parts of the text as well as additions in the shape of judicial decisions altering the course of law. The present edition has slightly grown in size over the previous one which was published in 1924. The change, if any, in the topical arrangement is negligible and is made only to such an extent as has been found inevitable by the circumstances.

It is said that the work became a legal classic even long before the death of Dr. Broom. The fame that is its due has stood the test of time, and when we stand in the middle of the twentieth century and gaze back at its date of origin, we feel proud to recognize the results of human endeavour lasting in their utility.

THE LAW OF INCOME TAX IN BRITISH INDIA by Messrs. Radhabinod Pal, M.A., D.L. and Balai Lal Pal, M.A., B.L., Volumes I and II. Published by the Eastern Law House, 15, College Square, Calcutta. Price Rs. 15.

This work in two volumes is a commentary on the Indian Income-tax Act as amended upto date by Dr. Radhabinod Pal who is an author of several well-known text books on important branches of law and a Tagore Law Professor. The subject of Income-tax Law is not one with which the ordinary legal practitioner is familiar and the recent amendments to the Act have not made it more intelligible. The learned authors have done their difficult task of expounding the subject in a satisfactory way by their explanatory notes and commentaries on the provisions of the Act. In the first volume, they give the original and the amended provisions in parallel columns to facilitate their comparison. The rules framed under the Act are then given. Then follow the commentaries explaining the sections and giving the decisions English and Indian with an examination of the principles underlying them. In cases of conflict, the learned authors mark their predilection by giving their reasons for their opinion. By way of illustration, we would refer to the commentaries under S. 54 of the Act, where they discuss the cases on the question of the admissibility of the copies of assessment orders and the statements made by the parties before the Income-tax authorities and give their opinion against the recent decision of the Madras High Court in *Pentapati Venkataramana* v.

Pentapati Varahalu, 50 L.W. 681. The second volume gives all the Indian enactments on Income-tax from the beginning with the statements of their objects and reasons and the texts of the English Statutes of 1842 and 1918. We hope that with such valuable material, the work will meet with the popularity which it so richly deserves.

THE MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938) by Messrs. R. Narasimha Aiyar, M.A., B.L. and C. V. Srinivasa Aiyar, B.A., B.L., Vakils, Tuticorin. Published by The Huxley Press, Madras. Price Rs. 1-8-0.

The Madras Agriculturists' Relief Act though passed only in 1938 has given rise to many difficulties in the construction of its provisions and various questions under the Act have been coming up frequently before the courts and their decisions have not been uniform. Under these circumstances, a commentary of the Act which collects the decisions given up to date and discusses the language of the sections is bound to be of use. The learned authors of this small book have done this service. The difficulty of their task has been increased by the fact that many of the decisions have not been fully reported but have appeared only in short notes in legal journals and short notes apart from indicating that decisions have been given on particular points are not always full in the statement of facts or law. In spite of these difficulties, the learned authors have to be congratulated on the quality of the work which leaves little to be desired. Fairly long extracts have been given of the cases reported in the short notes in the legal journals and references have been given to the decisions fully reported. The commentaries are both explanatory and analytical. The appendices to the book give the rules framed under the Act. We have every hope that the book will be widely used by all those having to deal with the Act.

THE CODE OF CIVIL PROCEDURE (ACT V OF 1908) by Messrs. V. V. Chitaley, B.A., LL.B., Senior Advocate, Federal Court and Editor, All India Reporter, Nagpur and K. N. Annaji Rao, B.A., B.L., Advocate, High Court, Madras. Volumes 1 and 2 (Third Edition). Published by the All India Reporter, Ltd., Nagpur. Pre-publication Price Rs. 30.

We acknowledge with thanks the receipt of volumes 1 and 2 of the third edition of Mr. Chitaley's Civil Procedure Code. Ever since the appearance of the first edition of this work, it has taken a leading place among the commentaries on the Civil Procedure Code by reason of its comprehensiveness and collecting together all the materials contained in the previous works on the subject. It has

also rendered references to the digests unnecessary in a large measure. It has therefore become a useful book of reference to the busy lawer. Since the appearance of the last edition, both the legislature and the High Courts have introduced changes in the body of the Code and its first schedule. They have all been incorporated in these volumes and all the decisions have been noticed. It is therefore the most up to date commentary on the enactment.

PRINCIPLES OF INSURANCE LAW IN BRITISH INDIA by Mr. Nrisinha Das Basu, B.L., Advocate. Published by The Eastern Law House, Calcutta. Price Rs. 8.

It is with great pleasure that we acknowledge the receipt of the Principles of Insurance Law by Mr. Basu. Mr. Basu is already familiar to lawyers as the author of many legal publications and the book under review deals with the subject of Insurance Law which is dealt with in its natural order in a number of chapters each dealing with a particular topic and its sub-divisions. He has drawn largely from the works of the leading authors on the subject whose works will not be easily available to the practitioners and judges, especially in the mofussil. The introduction to the work gives a connected account of the law tracing it from its origin and bringing it to the present day. It is needless to say that all the Indian and the important English decisions have been referred to and fairly long extracts have been quoted from the judgments of eminent judges. The appendices give the enactments on the subject. The first appendix gives the Insurance Act of 1938 with notes. We are sure that the book will be found useful by all persons having to do with the subject of insurance.
