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[A MONTHLY REVIEW]

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SUPPRESSION OF HORROR COMICS

III.— CONTRAST BETWEEN BRITISH ACT AND INDIAN BILL

The chief objection to the Horror Comics Bill arises from the fact that it is a Censorship Bill, and, as Mr. Roy Jenkins said in the House of Commons in criticizing the English prototype of our Bill, one can never be sure that a measure involving censorship "might not cause almost as much harm as the evil it is called upon to destroy." We have already dealt with this aspect of the subject month before last and do not wish to repeat it here. In this article we propose to institute a comparison between the provisions of the British Act and those of the Indian Bill and to show how the latter are very much wider in scope and more drastic in effect than the former.

Bill's Wider Compass

(i) *Limited to Pictorial Publications.*—The British Act applies only to works which consist "wholly or mainly of stories told in pictures." It has thus a very limited scope; it is restricted in its application to "pictorial publications" of a repulsive or horrible nature. On the other hand, in our Bill, the pictorial nature of the publication does not constitute an essential ingredient of the newly created offence. It applies as well to publications consisting of stories told "with the aid of pictures or without the aid of pictures," thus bringing every class of publications within its compass. It may be argued that if a publication is harmful in its effect, it should make no difference whether it consists mainly of illustrations or is without illustrations altogether. The argument is quite logical, but in Britain the Act was made applicable to a very narrowly defined class of publications, as it was only this class of publication that had created the problem there. This does not mean that the law is powerless to deal with publications not covered by this definition. Criminal proceedings can be taken against them under the ordinary law. But the extraordinary powers which the present Act confers are intended to be employed only against pictorial publications which, as the Home Secretary explained, "have a special attraction and special dangers for children." The Act is designed for the purpose of meeting a particular problem that arose in that country and therefore naturally no wider powers were sought under it than what it was thought would suffice for meeting that problem. We do not suppose that the problem to be faced in India is in any way different, and yet the executive seeks to assume power under the Bill to seize and destroy all publications, whether pictorial or not, which have a certain specified tendency. Thus our Bill extends to the whole range of literature.

(ii) *Exclusion of Newspapers.*—The British Act excludes newspapers from its scope, while our Bill applies to them as well as to books, magazines and other like publications. This extension of the scope also appears logical, but in Britain newspapers are excluded because they have not caused the trouble which the Act was intended to get over. In fact an amendment was moved by private members in Parliament to make the measure applicable to newspapers, but the Government firmly resisted it. Some progressive members appeared to support the amendment, but only as a *reductio ad absurdum*, that is to say, with a view to proving the unsoundness of the basic principle by pointing out the absurdity of its logical consequence. For instance, Mr. Michael Foot said: "If the Government are to make fools of themselves, they may as well do it in wholehearted fashion." The Attorney General opposed the amendment, first, on the ground that the Government did not want to make it appear as if the measure interfered in any way with the liberty of the Press, and, secondly, on the ground that it would be most improbable, almost impossible, "to publish a work wholly or mainly consisting of stories told in pictures which could ever amount to a newspaper." If it was feared by the promoters of the amendment that a horror comic, if broken up into fragments and published serially in illustrated newspapers, would escape the operation of the Act, he said, "the Bill is adequate in its present form to stop evasion of the kind." In other words, a newspaper would be liable to penalties if it allowed itself to be made the medium for publication of what is essentially a horror comic, but newspapers as such are excluded from the operation of the Act.

(iii) "*Likely to Fall into the Hands of Children.*"—Our Bill applies to a book, etc., which tells stories of acts of violence, etc., tending to corrupt a young person. This means that a work in question may not be intended for

young persons nor is it of such a character as ever likely to reach them, and yet it will be regarded as a harmful publication subject to the operation of the Bill after it passes. The British Act also originally was in this form, but the House of Lords, on the motion of Lord Jowitt, Attorney General in the Labour Government, made an amendment in it restricting the scope of the Bill to a book, etc., which, besides being such as to tend to corrupt them, is "of a kind likely to fall into the hands of children or young persons." In explaining the effect of the amendment the Joint Under Secretary of State said: "Recent judgments show that (the words added by the amendment) are to be interpreted in such a way that the question whether the work in question is likely to fall into the hands of a particular class of person is a relevant question in deciding the case." Thus, even if a work tends to corrupt children, the British Act will not apply to it if it is not likely to fall into their hands. This would save books intended for adults and likely by their nature to circulate only among them. Sir Frank Soskice, a critic of the Bill, said in supporting the amendment:

> (The amendment) provides an additional safeguard by excluding from the Bill the kind of work aganist which the Bill is not aimed at all. Many examples have been given such as that of pictures of atrocitics to which grown-up people should have access, because it is necessary from time to time to remind people of the sort of atrocities committed in concentration camps and so on. They would be excluded by the insertion of these words. I believe that the amendment provides a necessary and useful safeguard by limiting the purpose of the kind of publication envisaged, which does in fact constitute the mischief at which we aim.

This safeguard our Bill lacks.

(iv) *Limit of Age.*—Even apart from the lack of this safeguard, the age limit of persons intended to be protected by our Bill is higher than in the British Act. This Act is styled "Children and Young Persons (Harmful Publications) Act," and the statutory age limit of a "child" in Britain is 14 years and that of a "young person" is 17. The Act will operate only if it is held that a publication is likely to corrupt the morals of persons not exceeding 17 years in age, whereas under our Bill the age limit is 20 years. The higher the prescribed age, naturally the wider becomes the range of publications that will come under the ban. If there is some justification for imposing a legal ban in the interest of immature children who cannot distinguish between good and bad literature, there is no justification for imposing it in the interest of those who normally can so distinguish. In this connection we may state that Professor Chafee, speaking of a Massachusetts obscenity law (we refer to it below; the "new remedy" is explained there) which prescribed the age of children at 18, suggested that it should be lowered. He says:

> A college freshman [of the age of 18] is not a child, and yet he is only seventeen. Contemporary novels are often assigned for reading in College English courses, as well as classics which violate orthodox definitions of obscenity. In such a situation a college bookstore is entitled to the benefit of the new remedy [afforded by the law], instead of being obliged to run the risk of having faithful employees arrested and perhaps jailed by some squeamish Judge. The statutory age should be lowered to 17 and perhaps even to 16, when a young person is considered old enough in most states to go out to work and encounter much more corrupting influences than those of the printed page.

The raising of the limit to 20 brings almost the whole range of literature within the scope of our Bill.

(v) "*In Any Other Manner Whatsoever*".—The Indian Bill would penalize works tending to corrupt a child, not only in the three ways specified, viz., by means of "stories portraying (a) the comission of crimes, (b) acts of violence or cruelty, and (c) incidents of a repulsive or horrible nature," but "in any other way whatsoever." These last words were originally in the British Bill also, but their retention was opposed by several members on the ground that if the corruption of the young which the Bill was intended to prevent were not limited to the three specific kinds mentioned in the Bill, the measure would operate in a much larger field than was either justifiable or was perhaps intended by the Government themselves. The Solicitor General assured Parliament that the corruption aimed at was of the kind specified, and though he saw no serious objection to leaving the words in, because they would be construed by the courts as ejusdem generis, that is to say, of a like nature with the preceding words, he agreed to omit the words, saying: "We think that this is a case in which brevity would be the handmaid of clarity,"—and the words were in the end left out. Probably our Government too will agree to delete the words. It is obvious that the Government has based its Bill on the form of the Bill in which it was introduced in the British Parliament and not on the form which it eventually took, and although the Government might perhaps hesitate to adopt other substantial improvements which were later incorporated in the British Act, it is reasonable to hope that it would accept this alteration that was made by the British Parliament.

(vi) Penalty.—The maximum penalty which the British Act provides for sale, etc., of harmful publications is imprisonment for four months and a fine of £100, and four months' imprisonment was provided for only because, as the Home Secretary said, "that would automatically give to the accused person a right to elect for trial by jury." Under our Bill there will be no jury trial at all, and yet the maximum term of imprisonment for which the Bill makes provision is six months and unlimited fine.

Index Expurgatorius

The Indian Bill in cl. 4 contains a provision of a novel kind not to be found in the British Act. State

Governments will be empowered under this provison to place any book which it considers to be harmful to the morals of youth on an Index Expurgatorius. They will, on the advice of their Advocates-General, compile a black list of such publications which, if found anywhere, shall straightway be forfeited. Though this is a very unusual sort of provision, we do not feel called upon to oppose it. On the contrary, we welcome it. For the black list will give a kind of warning to the public to keep away from certain publications. The books will first of all be screened by the principal law officers of State, who may be expected to sort out publications with discrimination. But the administrative decision will by no means be final; that is the only initial stage. For cl. 5 of the Bill provides that any person aggrieved by a book being placed on the black list "may, within sixty days of the date of such order, apply to the High Court to set aside such order, and upon such application the High Court may pass such order as it deems fit." The administrative ban being subject to judicial review, no objection need be taken to it. To the extent that the black list warns off people from certain publications, it may indeed be useful.

In this connection we may cite here a Massachusetts statute about obscenity passed in 1945 (we have referred to it in an earlier paragraph), under which the state inauguarated a system of controlling books by official warnings. Professor Chafee commends this statute, of which the central feature is that "it permits an advance decision on the indecency of a book." Professor Chafee says:

> The new remedy works like this: The Attorney General believes a book on sale to be obscene. He starts a suit in equity against the book. The trial judge examines the book summarily and if he agrees that there is reasonable cause to believe it obscene, then he notifies all persons interested to come in and defend the book. ... If the book is worth anything, contestants are sure to appear. Then the case is set down for speedy hearing. ... Experts may testify and evidence may be given about "the literary, cultural or educational character" of the book [such books are excluded from the purview of the statute]. At the end of the hearing the book is adjudicated obscene or not obscene. Either side can appeal to the Supreme Judicial Court.

Another instance of the administrative mechanism weeding out undesirable books in the first instance but bringing court-room mechanism into play later is afforded by the forfeiture statute of the United States Customs Service, which gives customs officials authority to forfeit obscene and other kinds of objectional books. The Tariff Act of 1930 "reduced the practical control of officials over imported books by writing into the forfeiture statute a clear statement that 'determinations of obscenity (and the other types of unlawfulness) should be made by the United States courts.'" The Act works like this, as described by Professor Chafee:

> Upon the appearance of a book (which a customs inspector has detained on suspicion of obscenity) at any customs office, it is seized and held by the collector to await a decision as to its illegality, and the collector informs the federal prosecuting attorney in that district about its seizure. The district attorney begins a forfeiture proceeding in the United States district court. The decision as to obscenity, etc., (of that court) ... is subject to review by the Circuit Court of Appeals and by the Supreme Court.

Professor Chafee's conclusion on the procedure followed in the forfeiture statute is as follows:

> The action of Congress in giving convenient access to a trial before judge or jury, on top of the previous official sifting-out of obscene importations, has had two notable advantages: (*a*) Whenever the final administrative determination of obscenity is mistaken, it can now be corrected by an impartial tribunal of the sort traditionally intrusted with the task of drawing the line between lawful and unlawful publications. (*b*) What is more striking, the apprehension of reversals in court has brought about improvements in the administrative mechanism, which have reduced official mistakes to such an extent that no final decision in the Customs has been contested by an importer for twelve years. One can almost say that intelligent anticipation of the possibility of court review has eliminated any need for court review in fact.

Since our Bill provides for court review of the declaration made by State Governments as to the harmful character of any publication, we do not take exception to the black list provision in the Bill.

Safeguards Totally Lacking

Apart from the fact that the very limitation of the scope of the British Act operates as a safeguard against misuse of its provisions, there are other positive sefeguards in the Act which are lacking in our Bill. We detail them below.

1.—SEARCH AND SEIZURE

One of these relates to search and seizure provisions which it is worth while to consider at some length. In order to appreciate the vast difference that is to be found in the provisions of the British Act and those of the Indian Bill in this respect, it would be best to set out the provisions of the former measure first, and before proceeding to do so to begin with the consideration of such provisions in the Obscene Publications Act 1857.

In the Bill originally introduced, its sponsor, Lord Campbell, had proposed that the Chief Commissioner of Police be empowered to grant a warrant for searching premises for indecent publications where the Commissioner had reasonable information that such publications were kept. This clause was violently opposed. The effect of it would have been, as was pointed out by critics, that the

report of a mere superintendent of police that he believed there were improper publications in a house would give rise to all kinds of vexatious treatment; an officer would go into the house and search every room including the bed-room, and after all it might turn out that there was nothing to be found; but the householder would have no remedy. In response to this criticism the clause was dropped, and the one that was finally adopted empowers justices of the peace, upon an affidavit being made that obscene publications were kept in a house for sale or exhibition, to grant a search warrant. First, there must be a complaint. The complainant must swear that he has reason to believe, and that he does believe, that there are such publications in such a place, and he must set forth the facts on which he entertained that belief. He must also state which particular publications of an objectionable kind are in the place according to his information and he must further assert that he is satisfied that they are of such a nature that, if published, the party publishing them would be guilty of a misdemeanour by the common law. There was also the further security that the magistrate must be satisfied not only that publication of these books and prints was a misdemeanour but a misdemeanour which ought to be prosecuted by indictment. This requirement was added in order that, as Lord Lyndhurst at whose instance the clause was so amended observed, the magistrate would say, in the case of works like those of Dryden or Pope containing indecent passages, " These are very indecent passages and ought never to have been inserted in the works ; yet there is not a case for prosecution. " After these preliminaries were satisfied, a search warrant would be granted for a constable to go with such assistance as might be necessary and accompanied by the party making the complaint, and if the indecent publications named were found they might be carried away. The relevant section of the Act provides that if, upon complaint, the magistrate is satisfied that " the belief of the complainant (that objectionable books are kept for sale) is well-founded " and is further satisfied that the specified publications " are of such a character or description that the publication of them would be a misdemeanour, and *proper to be prosecuted as such*, " he may give authority by special warrant to any constable or police officer to enter into a house and search for and seize such publications. The procedure laid down after seizure is that the lawfulness of police action is first passed upon by justices of the peace in petty sessions of the district, and if their decision be unfavourable the publications are impounded pending an appeal in quarter sessions by anyone aggrieved by the determination of the justices.

The provision in regard to search of premises in the Horror Comics Act is substantially the same as in the Obscene Publications Act, except for one improvement introduced in the former. As Home Secretary Mr. Lloyd George explained, the 1857 Act enables a search warrant to be granted without the institution of criminal proceedings against the persons concerned and the publications to be destroyed without any conviction, whereas the 1955 Act provides that no search warrant may be granted unless criminal proceedings have already been instituted and that no copies may be destroyed unless there has been a conviction in respect of that particular publication.

In our Bill, however, sale of horror comics is a cognizable offence, and so there is no need for any complaint being lodged, and for that reason all the subsequant safegurads that flow from this indispensable preliminary would necessarily be unavilable here. The British Act provides that " where, upon an information being laid before a justice of the peace (that a person has committed the offence of selling a harmful publication), that or any other justice, if satisfied by written information substantiated on oath that there is reasonable ground for suspecting that the said person has (a harmful publication) in his possession, may grant a search warrant. " But under our Bill any police officer, if so authorized by a State Government, " may seize any harmful publication." There being no requirement of an information, it is not necessary for the police officer to satisfy himself that the information is substantiated. He acts on mere suspicion. The provision in our Bill in this behalf corresponds exactly to the provision which was inserted in the original Obscene Publications Bill of Britain about a hundred years ago and which was ultimatly deleted on account of the criticism it evoked that it would give extensive powers to the police to harass people. The objection then urged holds good in its entirety in respect to our Bill, and the clause must consequently be similarly deleted.

There is another aspect of the question which must be kept in view. The British Horror Comics Act provides that the information or complaint must be in respect of a particular publication which has to be specified and the authority issuing a search warrant must satisfy himself that there is reasonable ground for suspecting that the person against whom the complaint thas been made has " the relevant work " (i. e., the book mentioned in the information) in his possession. Our Bill, however, provides that search may be started and seizure may take place on the basis of a general suspicion on the part of a police officer that some harmful publication is likely to be found with a person. The search need not be in respect of any particular publication ; he as it were gives himself a general search warrant in respect of " any harmful publication." How wide and capable of being misused such a power conferred upon a police officer is can well be imagined. It is true that in Britain a search warrant is to be granted on suspicion that some person has a particular book in his possession and though the search may start on this limited basis it may end in the seizure not only of " the relevant work " but also of " any other work " believed

to be harmful. That is to say, the search will be for some particular book named in the information, but when the search discloses that, along with copies of that book, copies of other similar books are in the possession of a person, these may also be seized. And even such eventual extension of the scope of seizure was strongly objected to in England. "Flavous," for instance, wrote in the "Nation and New Statesman" (19th February 1955) in the "London Diary" column:

> The Bill, as it stands, also perpetuates the unsatisfactory practice by which any malicious or unbalanced member of the public can apply for a summons or for a warrant of arrest or search. [This is unnecessary in our Bill; the police officer may himself be "malicious" or "unbalanced."] This seems to me to be particularly objectionable in its context, as the Bill specifically gives power to a policeman, when seizing a publication which has been actually complained about, to seize also "any other work which he has reasonable cause to believe" might be a harmful publication.

Our Bill provides not only for the seizure of all harmful publications found in the search but for search, not for any particular publication which it is believed to be in the possession of a person, but for "any harmful publication" he may possibly possess. The scope of search is thus indefinitely widened.

2.—Attorney General's Consent

The Horror Comics Act created a new offence — that of selling harmful publications, but the Obscene Publcations Act created no criminal offence; all that happened under that Act was that obscene publications were seized. An offence being created by the Horror Comics Act, the question arose as to who should launch prosecutions. It was feared that any busybody anywhere in the country would be able to start prosecutions under the Bill in its original form. The Bill provided that some one had only to take the matter before a local bench of magistrates, with the result that "most ludicrous and undesirable prosecutions" would be started; and a demand was made that prosecutions should not be instituted without the consent of the Attorney General, who, acting in a quasi-judicial capacity, would have regard to the evidence available and to the public interest to be served. This demand was complied with by the Government and a provision to that effect was inserted in the Act, which runs: "A prosecuti.on for an offence under this section (namely, printing, publishing, selling, etc., of horror comics) shall not be instituted except by, or with the consent of, the Attorney General." The Advocate General himself — Sir Reginald Mannigham Buller — said on behalf of the Government in accepting the proposal:

> Bearing in mind the difficulties that exist in defining precisely the horror comic, we feel that in this instance there is indeed a proper case for inserting in the Bill a further safeguard to secure that prosecutions are not launched against publications of a character which do not really come within the evil aimed at.

There is no corresponding provision in our Bill. It is only in regard to the clause giving power to State Governments to compile a black list of harmful publications that Advocates-General come in at all; the clause relating to this provides that harmful publications may be declared forfeited "after consultation" with the principal law officer of the State. Even here it is not consent that is required but consultation. We may assume perhaps that consultation in this context connotes consent for all practical purposes. But this consultation or consent is required only in respect to the black list; it has nothing to do with the institution of criminal proceedings against persons selling or possessing harmful publications. Thus our Bill lacks what the "Economist" called (2nd April 1955) "an important safeguard against activity by busybodies or prudes."

3.—Defence for Retailers

It was feared that even if the printing or publishing of horror comics be made a punishable offence, it would be a great hardship upon booksellers if the selling of such books is made an offence, as it would result either in some of the booksellers being punished for unwittingly doing something forbidden by law or, in order to escape such punishment, in their electing to keep out of their bookstores all books which might possibly be pronounced to be harmful, thus applying privately a censorship more strict than what Government themselves desired. It was therefore urged that retailers of books should be relieved of this hardship. Sir F. Soskice suggested that no bookseller should be punished for keeping horror comics for sale without it being established that he knew that he was selling a horror comic. The Government recognized the difficulty of retailers but could not agree to place upon the prosecution the burden of proving the intent or knowledge on the part of those who sold books that the books were of the nature of horror comics. However, they consented to insert an amendment in the Bill that a bookseller should not be convicted if he could satisfy the court that he did not know and could not reasonably have known that the books he sold were objectionable. A proviso was thus added in the following terms:

> Provided that, in any proceedings . . . against a person in respect of selling or letting on hire a work or of having it in his possession for the purpose of selling it or letting it on hire, it shall be a defence for him to prove that he had not examined the contents of the work and had no reasonable cause to suspect that it was one to which this Act applies [i. e., it was a harmful publication].

Such a defence is unavailable under our Bill. It is all the more necessary, however to have it, since even newspapers are included in the scope of the Bill, and newsagents and newsboys are not expected to know the contents of what they are selling.

4.—Duration Limited to Ten Years

The British Act limits the term of the Act to ten years. By so limiting the period in which the Act will remain in operation the Government recognised that it was a sort of experimental measure. The evil of horror comics was new; by the action of parents and teachers it was already at the time of passing the Act very much on the wane and there was every likelihood of its being completely stamped out. The measure savoured of suppression to which the British people are inherently opposed. [The Lord Chancellor (Viscount Kilmuir) said: "There were 300 years of history during which there has been a tradition, common to all our political thought, against any imposition of something which might be the beginning of a censorship by the Government of the day."] It was feared by critics that, as Mr. Michael Foot put it, "an Act introduced for an entirely different purpose might, after a number of years (when horror comics had gone out of existence) be distorted for a quite opposite purpose." In order to meet this criticism the Government agreed to an amendment limiting the life of the Act to ten years. The amendment was welcomed on all hands: the "Economist" said: "It guards against the danger that long after the original purpose of the Bill is forgotten, it may be used to censor publications of a different kind."

Our Bill contemplates retention of the extraordinery powers conferred thereby on the police for use permanently, and in our country, more than anywhere else, there is a serious danger of the Bill, being distorted, as instanced by preventive detention which, originally meant for the preservation of the security of the country, was later put into force for the purpose of maintaining law and order and even of preventing the rise of black markets, etc.

M. Lloyd George, in defending the measure in the House of Commons, pointed out that the Bill afforded four principal means of ensuring that it would not suppress publications other than those at which it was aimed. They are:

1. Narrowly defining the class of publication [restriction of the Bill to pictorial publications: "it is essential that it should be the pictures which tell the story"];
2. Deletion of the words "or in any other way whatsoever," thus limiting the possible "corruption" of young persons to that caused in the three specified ways;
3. Requirement of the consent of the Attorney General to prosecutions;
4. Limiting the duration of the Act.

All these safeguards on which the British Government relied for public support for their measure are lacking in our Bill and consequently the latter, if it passes into law, will afford enormous scope for the suppression of freedom of thought and of expression.

Exclusion of Negroes from Jury Panel

Death Sentence Reversed by the U. S. Supreme Court

The Sixth Amendment to the Fedral Constitution guarantees an "impartial jury" in the trial of all crimes, and this guarantee is interpreted to require that the jury represent "a cross-section of the community" and thus to forbid exclusion from jury service of persons on account of race among other things: Glasser *v.* United States, 315 U. S. (1942).

A similar prohibition is imposed upon the states by the equal protection clause of the Fourteenth Amendment, which requires that the jury be selected without discrimination. The Supreme Court has consistently reversed convictions in state courts upon a showing of systematic exclusion of Negroes from the jury panel. The earliest case establishing this principle is that of Strauder *v.* West Virginia, 100 U. S. 303 (1880), and one of the latest is that of Cassell *v.* Texas, 339 U. S. 282 (1945), the second Scottsboro case of Norris *v.* Alabama, 294 U. S. 587 (1935) being the most famous. This second Scottsboso case put an end to the practice followed by the Southern states of avoiding any open discrimination against Negroes in the calling of juries though in fact no names of Negroes found their way onto the jury lists and none were ever called for jury service, officials declaring every time that they had no intention to exclude Negroes in empaneling juries. Mr. Chief Justice Hughes found that Alabama had for long practised "unvarying and wholesale exclusion of Negroes from jury service"—a practice for which "we find no justification consistent with the constitutional mandate" Mr. Hughes said:

> If, in the presence of such testimony as defendant adduced, the mere general assertion by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of Negroes from jury service, the constitutional provision [the Fourteenth Amendment] — adopted with special reference to their protection — would be but a vain and illusory requirement.

The Supreme Court had occasion to give a similar finding in May 1953 in a Georgia case. James Avery, a Negro, was tried for rape in the Superior Court of Fulton

County in that state. He was convicted and sentenced to death. The jury which returned the verdict of guilty was formed by drawing from a jury box a certain number of tickets bearing the names of persons to be called to serve on the panel. The names of white persons were on white tickets and those of Negroes on yellow tickets. Approximately sixty persons were selected to make up the panel in this case, and there was not a single Negro in that panel. Avery contended that the jury which convicted him had been selected by a means repugnant to the equal protection clause of the Fourteenth Amendment, but his contention was overruled. The Supreme Court of Georgia, although it disapproved of the use of separately coloured tickets, affirmed the sentence, holding that the use of white and yellow tickets to represent white and Negro jurors constituted "prima facie evidence of discrimination," but that Avery had failed to prove some particular act of discrimination by an officer responsible for the selection of the jury. The U. S. Supreme Court reversed the conviction and sentence. It said:

> [The Jury Commissioners failed to follow a procedure which would not, as laid down in Hill *v.* Texas, 316: U. S. 400 (1942)] "operate to discriminate in the selection of jurors on racial grounds." If they failed in that duty, then this convication must be reversed — no matter how strong the evidence of petitioner's guilt.

Turning to the argument advanced by the state of Georgia that "it is petitioner's burden to fill this 'factual vacuum'" about the actual practice of discrimination, the Court said:

> We cannot agree. If there is a "vacuum" it is one which the state must fill. We have before [citing Norris *v.* Alabama, Hill *v.* Texas, etc.] that when a prima facie case of discrimination is presented, the burden falls, forthwith, upon the state to overcome it. The state failed to meet this test.

The Court's opinion was written by Chief Justice Vinson. Justice Frankfurter, in a concurring opinion, said:

> The stark resulting phenomenon here was that somehow or other, despite the fact that over 5 per cent. of the slips were yellow, no Negro got on to the panel of 60 jurors from which Avery's jury was selected. The mind of justice, not merely its eyes, would have to be blind to attribute such an occurrence to mere fortuity.

About two months before the decision was given, the Superior Court of the same County in Georgia state had convicted Aubry Williams, a Negro, of the murder of a white man. Williams filed an appeal in the Supreme Court of the state for a new trial, challenging the jury system condemned by the Federal Supreme Court in the above-mentioned case of Avery *v.* Georgia. The high court of Georgia rejected the appeal on the ground that the law of the state requires that a jury panel must be challenged when the trial begins and that it precludes such a challenge for the first time in a motion for a new trial, as was the case here. An appeal was taken to the Federal Supreme Court. This Court remanded for further consideration the Georgia tribunal's refusal to grant a new trial to Williams.

Justice Frankfurter, who wrote the majority opinion, observed that during the arguments Georgia had acknowledged that, "as a matter of substantive law, Williams had been deprived of his constitutional right." He said:

> Fair regard for the principles which the Georgia courts have enforced in numerous cases and for the constitutional commands binding on all courts compels us to reject the assumption that the courts of Georgia would allow this man to go to his death as a result of a conviction secured from a jury which the state admits was unconstitutionally empanelled.

A third case coming from Georgia was decided recently by the U. S. Supreme Court. It concerned Amos Reece, a Negro, who was convicted and sentenced to death for rape of a white woman. Reece was arrested on 20th October 1953 and indicted three days later. He was accused of raping a white woman at whose home he stopped for a drink of water. He was convicted in Cobb County Superior Court on 30th October 1953, but the Georgia Supreme Court set the conviction aside because of lower court errors. He was retried in the same court, convicted on 22nd July 1954 and sentenced to death in the electrical chair. The Georgia Supreme Court affirmed that conviction.

Reece argued before the U. S. Supreme Court that Negroes had been systematically excluded from the Georgia juries, and that the law requiring him to challenge such exclusion before the indictment was returned wa unconstitutional. The Court on 5th December last unanimously reversed the death sentence passed against him. Mr. Justice Clark who wrote the opinion held that there was evidence of systematic exclusion of Negroes in Cobb County and that no Negro had served on a jury there for the last 18 years. He said that indictment by a grand jury which systematically excluded members of a defendant's race was "a denial of his right to equal protection of the laws."

Attempt to Circumvent Desegregation

VIRGINIA'S LAW

Some of the Southern states in the U. S. have been contemplating for some time adoption of some legal device by which they could retain racial segregation in public schools without openly defying the Supreme Court's judgment declaring such segregation illegal. Virginia has passed a law enabling it to abolish public schools as such and treating those schools which will still bar Negro children from admission into them as private schools, to which the state may contribute out of public funds, the

idea being that the state should pay to the white children in these all-white schools their tuition fees. The lagislature has passed such a law, and it will now go to the voters in a referendum as an amendment to the state's Consitution, because the law would otherwise be void. If it survives the amendment, its constitutionality will undoubtedly be challenged as contravening the U. S. Supreme Court's anti-segregation decision indirectly, and it is more than likely that the Supreme Court will hold it unconstitutional as a barefaced subterfuge for evading its mandate of 1954.

Apart from the legal aspect, this move on the part of Virginia involves, as the "New York Times" says, a monstrous injustice. The paper observes:

> Public funds in Virginia, as elsewhere, are raised by taxation. Negroes in Virginia pay taxes as they do elsewhere. What has been authorized in effect, therefore, is that Negroes in Virginia may be taxed to support schools to which they themselves may not be admitted. This is "taxation without representation" with a vengeance, The Virginia subterfuge is unworthy of the state and its citizens.

South Africa's Total Apartheid

The Senate Act and the Appeal Court Quorum Act have together prepared the necessary legal ground for pursuing a policy of total apartheid without let or hindrance. The former has increased the size of the Senate from 48 to 89, with amendment of the voting procedure, and has given the Nationalists a much bigger representation—they now have 77 Senators against a combined Opposition of 12—and an easy two-thirds majority in a joint session of both Houses. The Appeal Court Quorum Act has increased the number of judges of the Appeal Court from six to 11 (filling all the added five posts with men who hold Nationalist views) and requires that any appeals involving constitutional issues shall be heard by the full bench. After the passing of these two measures the Government will be able to carry out its long-cherished project to remove Coloured voters from the common roll and place them on a communal roll to elect special (white) members of Parliament. This project will no longer be blocked, as it was before by the Appeal Court's ruling that the Statute of Westminster had not invalidated the requirement of the Constitution that such legislation must be passed by two-thirds majorities in joint session of both Houses of Parliament.

The legal impediments are thus removed, and the Nationalist Party has not suffered in popularity on account of its racialism but on the contrary it appears to have been strengthened, as the recent elections in South-West Africa suggest. Even so it seems doubtful whether it is as anxious now as before to put into effect its policy of total Apartheid, and this was why the Chairman of the U. N. Committee on S. African segregation said in his report that the pace of segregation had recently slowed down instead of being accelerated. The position in this respect was thus described recently in the London "Times":

> It is on the Apartheid policy that the Nationalists are probably most uneasy. Superficially the scheme is making progress; the clearance of the western areas in Johannesburg is proceeding smoothly, with the transfer of inhabitants to the model housing township of Meadowlands, and increasing support is coming from the African chiefs for the Bantu Authorities Act, which gives Africans some local administrative responsibility through a system of tribal and regional authorities based on chieftainship instead of elected councils. Likewise there is progress in applying the Bantu Education Act.
>
> But this progress is accompanied by drastic change in some of the Nationalist thinking on Apartheid. The implicit promise in the original Apartheid propaganda was that Africans would be prevented from infiltrating and proliferating in the white areas. It was opposed to the United Party's declared policy of integrating Africans into the economy of South Africa; it postulated that to become dependent on African labour was to give Africans economic power, and that economic power would lead to political power—which would so develop (through the Africans' superior numbers) that they would become the dominant race. White civilization would be doomed. But in spite of this argument the number of Africans in white industry has grown steadily since the Nationalists assumed power in 1948, and one prominent Nationalist has said recently that the white areas will probably become "blacker" for the next 20 years. Obviously this situation is irreconcilable with the claims that Apartheid is effective and is for the benefit of all.

Thus a great deal of uncertainty has been created, and it is problematic whether the Strydom Government will succeed in giving effect to its extreme racial policy or will even want to give effect to it.

Compulsory Registration of African Schools

UNDER THE BANTU EDUCATION ACT

The Government of South Africa has taken over in its hands the education of the Natives under the Bantu Education Act, thus trying to suppress the Christian missionaries who were mostly responsible for the education of the Africans. The Act requires that every school conducted for giving instruction must be registered, no non-registered school being allowed to function. Africans generally oppose the Act passed by the Strydom Government as a plank in its aparthied programme, which, they say, is designed to teach children that they are inferior to whites. Thus many unregistered schools have sprung up along with many so-called "cultural clubs."

Now, the Government has started swooping down on all such institutions as giving " illegal education " to Africans. Recently, Miss Meluko Tulo was convicted of conducting an unregistered school. The main instruction that the children received at her hands, she told the court, was in good citizenship, but she also taught them English, Afrikaans, history and geography. A policeman testified that when he visited the place some children were reading books and others were writing on slates and that blackboards were lying on the ground, The magistrate found that a school was being run within the meaning of the Bantu Education Act, held Tule guilty of the crime of giving " illegal education " and sentenced her to a fine of £10. In another case Lawrence Matime was hauled up for conducting what he claimed was a mere " cultural club " and no school. In this case the policeman who raided the place found no blackboard, chalk, slate or any writing materials. The court is to decide whether the club was an illegal school. Whatever the court's finding may be, it is clear that the Government will not tolerate any private school for Africans which is not under its own control,

COMMENTS

Assurance to Christian Missionaries

On the occasion of the celebration in New Delhi of the 1903rd annivesary of the arrival of St. Thomas, one of the twelve disciples of Jesus Christ, in India, President Rajendra Prasad said that Christian missionaries, Indian as well as foreign, were welcome to preach the message of Christ in this country and gave an assurance that the Government " have no intention of curtailing their freedom or coming in the way of their mission. " He said :

> I can give an assurance to all inhabitants of this country that we do not look for conformity of faith. What we expect is loyalty to the country and not to any dogma or faith. As long as a citizen is loyal to the country, he has nothing to fear either from the Government or any non-official agency.

He added that the Government would always give fair treatment to, and equal respect for, all religions. The President stated that it was not an accident that St. Thomas, over 1,900 years ago, found hospitality in India. It was not an accident that the Parsis were warmly welcomed in India. It was not an accident that Muslim saints came to be worshipped and revered by the Hindus. It was only in the fitness of things that Gandhiji owed as much to Christianity as to Hinduism in the shaping of his life and principles. He was doubtful if any Hindu was dearer to Gandhiji than the late Mr. C. F. Andrews and the late Mr. Rudra, both Christians.

" Encroachments on Fundmental Rights "

CONCERN FELT BY THE BOMBAY LAWYERS' CONFERENCE

The Bombay State Lawyers' Conference which met at Dharwar on 25th December passed several resolutions concerning civil liberties. One resolution protested against the large powers conferred upon the executive for rule-making. It was contended that such powers were not conducive to the rule of law and were found to have been exercised in an arbitrary manner seriously prejudicing the rights of the public. The conference demanded that the executive submit to the legislature for approval the rules, regulations and orders it might make.

By another resolution the conference protested against the growing tendency among legislatures to curtail the jurisdiction of civil courts over matters affecting civil rights and public welfare.

It also resented the setting up of administrative courts, tribunals and boards exercising judicial or quasi-judicial powers.

The conference further viewed with grave misgivings the encroachments on fundamental rights through frequent constitutional amendments which resulted in the whittling down of the individual's right to property and personal liberty guaranteed by the Constitution.

Civil Liberties must be Widened

SOCIALIST PARTY'S DEMAND

Deprecating the " totalitarian tendencies " developing in the Congress—" the State is identified with the Government and the Government with the party in power "—the Praja-Socialist Party in its policy statement at its plenary conference in Gaya declared :

> The Constitution will have to be revised with a view to making it a fit instrument of full political and social democracy. For this purpose civil liberties should be made more absolute. Emergency powers of the President should be narrowly defined and the Ordinance-making powers should be strictly limited to cases of great urgency affecting vital interests of the State.

As was to be expected, it agrees entirely with the principle underlying the Fourth Amendment to the Constitution and practically is of the view that the legislatures should have full liberty to deal with economic matters as they choose, no restriction being put upon them by the Constitution. The statement said :

> The fundamental right with regard to property should be so revised that it may be possible for the legislative authority of both the Union and the States to acquire property for public purposes, to sanction its redistribution on an equitable basis and to socialize industries and other economic enterprizes, as well as to authorize public management of private property and undertakings in the general interest of the community or workers concerned on such terms and conditions as the legislative authority concerned may deem fit.
>
> The lagislative authority alone should have the power to determine if and what compensation is to be paid.

HABEAS CORPUS PETITIONS

President's Power in relation to Kashmir

Mr. P. L. Lakhanpal, chairman of the "End Kashmir Dispute Committee," was arrested on 5th October last in Srinagar on an order issued by the Jammu and Kashmir Government to detain him under sec. 3 of the State's Preventive Detention Act. He filed a petition with the Supreme Court under Art. 32 of the Constitution, challenging the Government's order for detaining him as illegal by depriving him of his fundamental rights guaranteed under Art. 21 of the Constitution. There were other pleas in the petition, but the main plea, on which the Court's decision turned, amounted to an attack on the order promulgated by the President of India on 14th May 1954, specifying provisions of the Constitution which would apply to the State. Art. 370 of the Constitution authorizes the President, in applying the Constitution to Kashmir State, to specify any "exceptions and modifications," subject to which the provisions of the Constitution except Art. 1 and Art. 370 itself shall apply to the State, and it appears that the petitioner's complaint was that the exceptions and modifications made by the President deprived him of the right to which he was entitled to full disclosure of the grounds on which the Government's detention order was based.

The Constitution Bench of the Supreme Court on 20th December dismissed the petition, holding that there was no merit in it. The Court observed that no attempt was made on behalf of the petitioner to show how the order promulgated by the President was in excess of the President's powers under Art. 370 of the Constitution. It was not contended that the Article did not authorize the President to promulgate the order. What was suggested was that in promulgating the order which the President was authorized to make under Art. 370 he had exceeded his powers. Beyond saying so, no tangible reason was adduced in support of this extreme position. The Court said:

> It is manifest that Art. 370 (1) (c) and (d) authorizes the President by order to specify the exceptions and modifications to the provisions of the Constitution (other than Arts. 1 and 370), subject to which the Constitution shall apply to the State of Jammu and Kashmir. Clause (c) has been added to Art. 35 of the Constitution only so far as the State of Jammu and Kashmir is concerned. Sec. 8 of the Act is not in excess or inconsistent with the provisions of clause (c) so added to Art. 35 of the Constitution. That being so, the orders as served upon the petitioner are not inconsistent with or in excess of such provisions of Part III of the Constitution as apply to the State of Jammu and Kashmir.
>
> It must, therefore, be held that the petitioner was not entitled to know the grounds upon which he had been detained beyond what is disclosed in the order itself.

Cl. (c) added to Art. 35 (relating to legislation to give effect to the provisions of fundamental rights), in so far as the Article applies to Kashmir State, provides that "no law with respect to preventive detention ... shall be void on the ground that it is inconsistent with this Part" (i.e., Fundamental Rights) for five years from 1954.

INCOME-TAX COMMISSION ACT

Sec. 5 (1) Declared Void

SUPREME COURT'S JUDGMENT

In the case of Mohta & Co. (vide p. iii : 106) the Supreme Court ruled unanimously that sec. 5 (4) of the Income-Tax (Investigation Commisssion) Act 1947, "being a piece of discriminatory legislation, offends against the provisions of Art. 14 of the Constitution (relating to the equal protection of the laws) and is thus void and unenforceable." It was under this section that the Government of India had referred the case to the Commission and not under sec. 5 (1), and therefore the Court had no occasion to rule on the validity of the latter section. In the case of Meenakshi Mills (vide p. iii : 157), in which the Government had referred under sec. 5 (1) a number of cases of income-tax evasion for investigation by the Commission and in which therefore the constitutionality of this section was in question, the Supreme Court, again unanimously, declared the section to be ultra vires of the Constitution as being discriminatory in character. It ruled that sec. 5 (1) had become discriminatory and invalid after the passing of the Income-Tax Amendment Act 1954, by which sec. 34 of the Income-Tax Act had been amended.

Now another case came up before the Constitution Bench of the Supreme Court on petitions filed by Mr. M. C. T. Muthiah Chettiar and two others. The Central Government, in exercise of its powers under sec. 5 (1) of the Income-Tax (Investigation Commission) Act, referred to the Commission three cases relating to the petitioners. The Commission, after holding an inquiry, recorded their findings and held that an aggregate sum of Rs. 10,07,322-4-3 represented the undisclosed income during the investigation period. Their report was submitted by the Commission to the Government on 29th August 1952. The Central Government considered the report and directed that appropriate action under the Income-Tax Act be taken against the assesses with a view to assessing or reassessing the income which had escaped assessment from 1940-41 to 1948-49. In pursuance of the directions of the Central Government notices were issued under sec. 34 of the Indian Income-Tax Act and the Income-Tax Officer, City Circle, Madras, made the reassessment for 1940-41 and 1941-42 and from 1943-44 to 1948-49 based upon the findings of the Commission, which were treated as final and conclusive. On 6th

December 1954, petitions were filed in the Supreme Court contending that the provisions of the Income-Tax (Investigation Commission) Act violated the Fundamental Rights guaranteed by the Constitution.

The Court by a majority of 4 to 1 held on 20th December that sec. 5 (1) of the Income-Tax (Investigation Commission) Act was void on the ground that it contravened Art. 14 of the Constitution. The Court held that cases which were pending before the Income-Tax Commission for investigation as also the aseessment or reassessment proceedings which were pending before the income tax officers concerned on January 26, 1950, would be hit by Art. 14 of the Constitution and be invalidated.

It granted the petitioners a writ of certiorari quashing the report of the Income-Tax Investigation Commission dated 29th August 1952, and the assessment orders of the income-tax officer relating to the petitioners for 1940-41, 1941-42 and 1943-44 to 1948-49 as being unconstitutional, null and void. It also granted the petitioners a writ of prohibition against the respondent from implementing the findings of the Commission with regard to the year 1942-43.

Mr. Justice Jagannadha Das, in his dissenting judgment, held that sec. 5 (1) of the Act was not hit by Art. 14 of the Constitution notwithstanding amendment of sec. 34 of the Income-Tax Act in 1948 and that it continued to be valid.

The majority judgment of the Court was delivered by Mr. Justice Bhagwati.

Mr. Justice Bhagwati said that if the provisions of sec. 34 (1) of the Indian Income-Tax Act, as it stood unamended by Act 48 of 1948, had been the only provisions to be considered, they would have reached the conclusion that sec. 5(1) of the Income-Tax (Investigation Commission) Act was not discriminatory. The position, however, was materially affected by reason of the two amendments which were made in sec. 34 of the Indian Income-Tax Act, one in 1948 and the other in 1954.

His Lordship said that, before the amendment of sec. 34 (1) in 1948, there was no comparison between the provisions of sec. 5 (1) of the Income-Tax (Investigation Commission) Act 1947, and sec. 34 (1) of the Indian Income-Tax Act. But, after the amendment, it could stand comparison and the cases which were covered by sec. 5 (1) could be dealt with under the procedure laid down in sec. 34 (1) of the Indian Income-Tax Act.

After 8th September 1948 (when the amendment came into effect), there were two procedures simultaneously in operation—the one under the Income-Tax (Investigation Commission) Act and the other under the Indian Income Tax Act with reference to persons who fell within the same class or category, namely, that of substantial evaders of income-tax. After 8th September 1948, therefore, some persons who fell within the class of substantial evaders of income-tax were dealt with under the drastic and summary procedure prescribed under the Income-Tax (Investigation Commission) Act, while other persons who fell within the same class of substantial evaders of income-tax could be dealt with under the procedure prescribed in the Indian Income-Tax Act after service of notice upon them under the amended sec. 34 (1) of the Act. The persons who were thus dealt with under sec. 34 (1) of the Indian Income-Tax Act had available to them the whole procedure laid down in that Act, including the right to inspect documents and the right to question the findings of fact arrived at by the the Income-Tax Officer by the procedure of appeal and revision, and ultimate scrutiny by the Income-Tax Appellate Tribunal, which was denied to those persons whose cases had been referred by the Central Government for investigation by the Commission under sec. 5 (1) of the Income Tax (Investigation Commission) Act. His Lordship added:

> The legislative competence being there, the provisions, though discriminatory, could not have been challenged before the advent of the Constitution. When, however, the Constitution came into force on January 26th 1950, citizens obtained the Fundamenal Rights enshrined in Part III of the Constitution including the right to equality of laws and equal protection of the laws enacted in Art. 14, and whatever may have been the position before 26th January 1950, it was open to persons alleged to belong to the class of substantial evaders thereafter to ask as to why some of them were subjected to the summary and drastic procedure prescribed in the Income-Tax (Investigation Commission) Act and others were subjected to the normal procedure prescribed in sec. 34 and the cognate sections of the Indian Income-Tax Act, the procedure prescribed in the former Act being obviously discriminatory and, therefore, violative of the Fundamental Rights guaranteed under Art. 14 of the Constitution.
>
> It would be no answer to suggest that those substantial evaders whose cases were referred by the Central Government for investigation by the Commission before 1st September 1948, formed a class by themselves leaving others, though belonging to the same class or category of substantial evaders of income-tax, to be dealt with by the ordinary procedure prescribed in the Indian Income-Tax Act without infringing the Fundamental Rights guaranteed under Art. 14 of the Constitution.
>
> By the later amendment of sec. 34 of the Indian Income-Tax Act effected in 1954, the time limit for the issue of notice under sec. 34 (1A) had been fixed as 31st March 1956. It was, therefore, clear that the period originally fixed for the reference of cases of substantial evaders of income-tax for investigation by the Commission, namely, 30th June 1948 or the extended period, namely 1st September 1948, provided in sec. 5(1) of the Income-Tax (Investigation Commission) Act or the period fixed by the new sec. 34(1A) of the Income-Tax Act, namely, 31st

March 1956, was not a necessary attribute of the class of substantial evaders of income-tax but was merely an accident and a measure of administrative convenience and was not an element in the formation of the particular class of substantial evaders of income-tax.

The field on which the amended sec. 34(1A) operated from and after 26th January 1950, included the strip of territory which was also occupied by sec. 5(1) of the Income-Tax (Investigation Commission) Act and two substantially different laws of procedure, one being more prejudicial to the assesses than the other, could not be allowed to operate on the same field in view of the guarantee of Art. 14 of the Constitution.

The result, therefore, is that, barring the cases of persons which were concluded by reports made by the Commission and the directions given by the Commission and the directions given by the Central Government under sec. 8(2) of the Income-Tax (Investigation Commission) Act culminating in the assessment or reassessment of the escaped income, those cases which were pending for investigation before the Commission as also the assessment or reassessment proceedings which were pending before the income-tax officers concerned in pursuance of the directions given by the Central Government under sec. 8(2) of the Act on 26th January 1950, would be hit by Art. 14 of the Constitution and would be invalidated.

BOMBAY'S PROHIBITION ACT

Medicinal Preparations with Alcohol

HIGH COURT'S JUDGMENT

The Prohibition Act of the Bombay State as modified after the Supreme Court's judgment in the Balsara case (in which sec. 13 (b) of the Act as it then stood prohibiting consumption of medicinal and toilet preparations was declared invalid) came under attack as to its validity in a case brought up in the Bombay High Court by Messrs. C. R. H. Readymoney Ltd., the sole selling agents of Hall's wine in India.

Under sec. 6 (a) of the Act, the Bombay Government took power to appoint a Board of Experts to advise the Government whether any medicinal preparation containing alcohol was "unfit for use as intoxicating liquor." Power was also taken under the Spirituous Medicinal Preparations Rules to prohibit the sale of a medicinal preparation containing alcohol which was fit for use as intoxicating liquor execept under a license and medical prescription. Accordingly, on the advice of the Board of Experts, Government declared by a resolution on 22nd January 1955 Hall's wine as a medicinal preparation containing alcohol fit for use as intoxicating liquor and that 9·3 ounces of Hall's wine was sufficient to produce intoxication. Further, the sale of this wine was to be under medical prescription. All these proceedings and the provisions of the Act prohibiting the import, export, sale or purchase of liquor [sec. 11 (c) and (d)] and consumption of liquor [sec. 13], as applied to Hall's wine, were challenged in a petition.

Mr. Justice Tendolkar dismissed the petitions on 16th December 1955. It was contended on behalf of the petitioners that it was not within the purview of the Board of Experts to give advice to Government regarding the quantity of Hall's wine sufficient to produce intoxication, and since Government had accepted this advice the resolution passed by Government was bad. His Lordship said that though it was beyond the power of the Board to give advice to Government regarding the quantity sufficient to produce intoxication, still the whole resolution was not rendered bad thereby. His Lordship remarked that the expression "fit for use" meant "capable of being used" as intoxicating liquor, and the expression had the same connotation as "fit for use for beverage purposes" in the American Prohibition Act (Volstead Act).

His Lordship said that though there was no power under secs. 12 and 13 of the Act, after the decision of the Supreme Court in Balsara's case, for imposing restrictions upon medicinal preparations containing alcohol, the Act as amended after the Supreme Court decision had removed the feature of unreasonableness, and so medicinal preparations could now be subjected to reasonable restrictions. His Lordship, therefore, held that the requirement of a medical prescription for the sale or purchase of Hall's wine was a reasonable restriction.

His Lordship, however, observed that under the Rules a person need not go to a doctor, once he had obtained a prescription, to obtain a fresh prescription every time he required Hall's wine, but he could obtain the quantity of Hall's wine prescribed in the same prescription till the whole quantity was exhausted. His Lordship was sure that directions to this effect would be issued by Government to ensure that the procedure outlined would be observed.

In the context of the Prohibition Law, His Lordship said, it was likely that Hall's wine would be resorted to as a substitute for prohibited liquor and that, therefore, it could not be said that the restriction of a medical prescription before sale or purchase of the wine was unreasonable. In the result, the petition failed.

"Police Officers Engaged in Smuggling Liquor"

PRESIDENCY MAGISTRATE'S STRICTURES

Mr. Eric Sorab Kharas was arrested by high police officers on 17th July outside the Red Gate in Bombay on a charge of possessing 71 bottles of foreign liquor and was tried by Mr. Menezes, Presidency Magistrate, Mazgaon Court.

According to the defence which the Magistrate believed, Mr. Kharas was requested by two sub-inspectors of police, as he was sitting in his car at the Alexandra Docks after

giving instructions to his workmen, whether he would take some tinned provisions and vegetables in baskets in his car to the Crawford market where he was going. Mr. Kharas agreed; he gave the car key to the officers to put the things in the luggage-carrier. The officers sat in the car with Mr. Kharas. But as the car was just outside the Red Gate, the officers got out, saying that they had some urgent work on hand. Here the car was barricaded and searched, and 71 bottles of liquor were found in the baskets put in the luggage-carrier.

Mr. Sorab Maneckji Vazifdar who went to the Yellow Gate to inquire about arrest of the accused, who was his cousin, deposed that he was present when Inspector Dhamankar of the Yellow Gate police station spoke on the phone, telling the duty officer that no diary entry was to be made of the report of the two constables who were on duty at the Red Gate until instructions were received from Deputy Commissioner Patil. The Magistrate believed this witness and also two others — Mr. Manuel D'Costa, gate inspector, and Mr. Hakim, assistant shed superintendent—who gave evidence in favour of the accused.

The Magistrate disbelieved the prosecution story and acquitted Mr. Kharas (20th December). He observed that the statement of the accused and the report made by the gate inspector to his superior showed that police officers themselves were smuggling liquor from the docks. He took a serious view of the fact that the statements of two police constables on duty at the Red Gate at the time of the incident were not entered in the diary at the Yellow Gate police station and remarked:

> A station house diary has to be maintained minute by minute as events occur.
>
> Of what value is a station house diary if the events are entered later?
>
> The only inference is that an invisible hand was behind the scenes and ordered Inspector Dhamankar not to record the statements of the constable until he was instructed later. And whose hand could it be except that of Deputy Commissioner Patil?

Referring to the high officers taking part in trapping and arresting Kharas, the magistrate observed:

> Mr. Modak is the head of the Anti-Corruption Department. What was the need for Mr. Modak to have accompanied the police party to the scene of the raid unless Mr. Modak and Mr. Patil had information that their own officers were engaged in the business of smuggling liquor from the docks?
>
> And if I am to accept the evidence of the defence witnesses, which I have absolutely no reason to reject, it follows that when the two police officers who were in the car of the accused got out at the Red Gate, thus eluding the Anti-Corruption Police, Deputy Commissioner Patil had no alternative but to make a scapegoat of the accused.
>
> If the police had not done so, it would have dealt a tremendous blow to the prestige of the police, led as the raid was by two high police officers, Deputy Commissioner Patil and Mr. Modak, Additional Assistant to the Inspector-General.

DISCRIMINATION AGAINST HARIJANS

Bombay High Court's Judgment
AS TO HARIJANS' DISABILITIES IN CANTEENS OF MILLS

Uka Pancha, a Harijan employee in the Anant Mills, Ahmedabad, on 15th September 1954, took a glass of water in a glass which was set apart for caste Hindus in the mill's canteen, and for this, it was alleged, Uka was assaulted by Bhika Punja and some other employees the next day. It was also stated that in the canteen Harijan employees were served by a Harijan boy, while other mill employees were served by others in the canteen.

Bhaishankar Uttamram, manager of the canteen, and Bhika were prosecuted before an Ahmedabad magistrate on the charge of imposing restrictions on Harijans resulting in discrimination against Uka merely on the ground that he was a Harijan. The magistrate found both guilty under the Harijan Act and sentenced them. In appeal, the extra-additional sessions judge acquitted them, holding that a canteen was not a "shop" according to the definition in the Harijan (Removal of Social Disabilities) Act. The State appealed.

Shah and Vyas JJ. at the Bombay High Court on 7th December found Bhaishankar and Bhika guilty and sentenced them to a day's imprisonment and fine. In the judgment Their Lordships observed that it was an elementary rule of construction of statutes that the expressions used therein must be interpreted in the setting and context in which they were used, and the courts could not lose sight of the fact that the practice of untouchability constituted a serious blot on society.

Under the Constitution, equality of citizens had been recognised as one of the important pillars of society; untouchability had been abolished and its practice in any form was forbidden.

The practice of discrimination against Harijans had been penalised by the Harijan Act, and it was in the context of this growing social consciousness that the provisions of the Act had to be viewed.

If the canteen was open to all members of the Hindu community and if any discrimination was sought to be practised against the Harijan employees, it was evident that it was one of the manifestations of the practice of untouchability which the Constitution had forbidden and the Legislature desired to abolish.

Their Lordships held that the canteen was a "shop" according to the Act, and the respondents were guilty under the Act.

They set aside the acquittal order passed by the additional sessions judge and restored the sentences passed by the magistrate.

ACQUISITION OF LAND

Compensation "Merely Nominal"

After the passing of the Fourth Amendment to the Constitution, which gives to the Government full discretion to determine the compensation to be paid to private individuals whose property the Government acquires, any discussion of the principles which were being followed previously in the determination of the question of compensation can have no interest as a guide for the future. It would still be useful to know how before the Amendment was enacted, injustice was sometimes done and how it was rectified by the judiciary of the land. It is in this sense alone that an account of the following case is given here.

Some plots of land belonging to Bharat Chandra Nayak were acquired by the Government of Orissa in the execution of the Hirakud Dam project, and the compensation he was offered in accordance with the provisions of the Orissa Development of Industries (Land Acquisition) Act of 1948 was considered by him to be thoroughly inadequate. He therefore brought a suit in the subordinate judge's court of Sambalpur, praying that the first proviso to sec. 7 (1) (e) of the Act, which governed the underlying principles laid down in the Act for settling the amount of compensation, be declared ultra vires. The impugned proviso entitled the owners of lands which were to be acquired to receive compensation equivalent to the market value of the lands on the date of the issue of the notification of acquisition, or the market value of the lands on 1st September 1939, with an addition of 50 per cent., whichever was less. The adequacy of compensation could be challenged at all, after the adoption of the First Amendment to the Constitution in 1951, because, though the Amendment in Art. 31 (1) (5) saved all existing laws passed more than 18 months before the commencement of the Constitution and in Art. 31 (1) (6) saved all existing laws passed within 18 months before the commencement of the Constitution provided they were certified by the President, the Orissa Act did not happen to have been so certified. If it had been submitted to the President for his certification within three months from the commencement of the Constitution and received his certificate, the matter could not have been ventilated at all. The High Court was enabled to consider the question raised only because the Act, for want of the President's certification, came accidentally to be saved from the saving clause.

A divisional bench of the High Court consisting of Panigrahi C. J. and Mohapatra J. answered the reference made to it on the subject on 17th March. Speaking for the Court, Mohapatra J. said :

> It is needless to say, so far as the present acquisitions are concerned, that the value of the lands and the trees on the dates of acquisition must be several times more than the value on the first day of September, 1939, that is, the pre-war valuation. It is a notorious fact that the market value of the lands in the year 1939 was just a small fragment of the value in 1949, which must be at least five times the value of the lands in 1939. The manifest position therefore is that the value of the lands acquired in 1948 and 1949, according to the rate prevailing in 1939, can never be taken to be reasonable and just compensation. Compensation must always necessarily mean "a just, reasonable and equivalent price of the land acquired."

Observing that the Act in question was not saved from the operation of Art. 31 (2) relating to compensation and that "it is therefore open for the respondent to object to the constitutionality of any of the provisions of the Act," His Lordship proceeded :

> The Act is a permanant Act of the State. The fixation of compensation is at the market value of the land to be acquired under the Act, but the fixation at the rate prevailing in the year 1939 with an addition of 50 per cent. is manifestly an arbitrary one and can never be taken to be a fair, just and equivalent price of the land which may be acquired at any time. Indeed, the State legislature is given discretionary power of laying down the principles which should govern the determination of the amount to be given to the owner for the acquisition of his property; but the position is equally clear that such principles must ensure fixation of just and fair valuation of the appropriated property. Far from conforming to the above standard, the principles laid down by the State legislature will entitle the Government to acquire lands at a merely nominal value.

His Lordship cited as authority for this conclusion the Supreme Court's judgment in the State of West Bengal *v.* Mrs. Bella Banerjee, A. I. R. 1954 S. C. 170. This case involved a proviso to sec. 8 of the West Bengal Land Development and Planning Act of 1948, which provided that the compensation to be paid for land acquired should not exceed the value of the land on 31st December 1946. This Act too, like the Orissa Act, though enacted within 18 months before the commencement of the Constitution, had not obtained the certificate of the President contemplated in Art. 31 (1) (b) and was therefore subject to the operation of Art 31 (2). In its judgment, the Supreme Court said :

> Considering that the impugned Act is a permanent enactment and the lands may be acquired under it many years after it came into force, the fixing of the market value on 31st December 1946 as the ceiling on compensation, without reference to the value of the land at the time of acquisition, is arbitrary and cannot be regarded as due compliance in letter and spirit with the requirement of Art. 31 (2). The fixing of an anterior date for the ascertainment of value may not, in certain circumstances, be a violation of the constitutional requirement as, for instance, when the proposed scheme of acquisition becomes known before it is launched and prices rise sharply in anticipation of the benefits to be derived under it, but the fixing of an anterior date, which might have no relation to the value of the land when it is acquired, may be, many years later, cannot but be regarded as arbitrary.

Being itself on this reasoning, the Orissa High Court declared that the impugned proviso to sec. 7(1)(e) of the Act, was ultra vires as contravening Art. 31 (2) of the Constitution.

"Less than Just Compensation" Provided

A law point similar to that in the above case arose in Than Singh *v.* Union of India (A. I. R., 1955 Punj. 55), which was a reference to a divisional bench of the Punjab High Court consisting of Bhandari C. J. and Khosla J. on the question of the validity of the provisions of the Resettlement of Displaced Persons Act (no. 60 of 1948). The Act enjoined the arbitrator (in case of disagreement) to have the provisions of the Land Acquisition Act 1894 in view and authorized him to fix the amount of compensation to be paid for land acquired for resettlement of D. P.s at (i) the market value of land on 1st September 1939 with an addition of 40 per cent. (if it be less than the market value on the date of the publication of the notice), or (ii) the price actually paid by the purchaser if it was purchased between 1st September 1939 and 1st April 1948. Mr. Justice Khosla, speaking for the Court (29th August 1953), said:

> There can be no doubt that the arbitrary fixation of the dates in the proviso [to sec. 7 (1) (e) of the Act of 1948] will inevitably result in the payment of less than just compensation to the owners. There appears to be no justification why the compensation should not equal the market value of the land on the date on which the notification under sec. 3 is issued.

His Lordship, following the Supreme Court's decision referred to above in Bella Banerjee's case, declared the provisions of the 1948 Act ultra vires and ruled that they could not be given effect to in a court of law.

BOMBAY RENT ACT

Issue of Title to Premises

INTERPRETATION OF SEC. 29-A OF THE ACT

An important ruling was given on 16th November by Their Lordships the Chief Justice and Mr. Justice Dixit at the Bombay High Court as to the meaning to be given to sec. 29 A of the Bombay Rent Act, which provides that a question of title to premises should not be tried by the Special Court set up under the Rent Act, namely, the Small Causes Court, but by the ordinary court competent to decide the question of title.

Their Lordships held that under sec. 29 A of the Act, what was permitted to a party was to establish his title which did not arise by reason of the provisions of the Rent Act but which arose outside the Rent Act. Sec. 29 A did not contemplate the trial of every kind of title to premises by some court other than the Small Causes Court. If, Their Lordships said, the title arose by reason of the provisions of the Rent Act then it was a question arising out of the Rent Act and such question of title could only be tried and determined by the Special Court, namely, the Small Causes Court.

The above ruling was given in an appeal filed by Harswarup Khannamal, a tenant, and Babulal Bhuramal and Ramswarup Ghunimal, his alleged sub-tenants, against the landlord, Naudram Shivram, from a decision of the City Civil Court.

In April, 1948, the landlord filed a suit in the Small Causes Court to eject the tenant, Khannamal. To this suit Babulal and Ramswarup were also made parties because the landlord alleged that they were trespassers.

The Small Causes Court held that Babulal and Ramswarup were not lawful sub-tenants and had no right to be on the premises.

The court, thereupon, passed an ejectment decree against both the tenant and the so-called sub-tenants. The appeal of the three of them was also dismissed by a bench of the Small Causes Court.

The sub-tenants thereupon filed a suit in the Bombay City Civil Court for a declaration that they were the lawful sub-tenants of Khannamal and were entitled to the possession of the premises occupied by them.

The City Civil Court held that by reason of the provisions of sec. 29 A, the suit, being one for title to premises, was maintainable in the City Civil Court. On merits the City Civil Court held that Babulal and Ramswarup were not lawful sub-tenants and dismissed their suit. The plaintiffs thereupon filed this appeal in the High Court and the question was whether the title of a sub-tenant to premises was a title within the meaning of sec. 29 A of the Rent Act and whether the City Civil Court or the Small Causes Court had jurisdiction to try such a question.

In giving judgment, Their Lordships said that under sec. 14 of the Rent Act of 1947 a right had been created in favour of a sub-tenant which right did not exist under the ordinary law. Under sec. 14 a sub-tenant was put in the same position as a tenant and a sub-tenant was, therefore, entitled to claim protection under the Rent Act.

When the landlord filed the ejectment suit against the tenant and the so-called sub-tenants in the Small Causes Court, the sub-tenants raised the very same point which they raised in the Bombay City Civil Court. This point was decided by the Small Causes Court against the sub-tenants and finally by the Bench of the Small Causes Court.

The question, therefore, was whether, it was open to the sub-tenants to reagitate the very same question by alleging that this was a question of title to premises and that, therefore, they were entitled to have this question decided by the City Civil Court.

It could not be disputed that the issue as to whether Babulal and Ramswarup were lawful sub-tenants protected under sec. 14 of the Rent Act was an issue which had been properly tried by the Small Causes Court which had exclusive jurisdiction to try that issue.

In Their Lordships' opinion the City Civil Court had no jurisdiction to try this very issue which only the Small Causes Court had exclusive jurisdiction under the Act to determine.

Their Lordships said that where a landlord filed a suit exclusively triable by the Small Causes Court and if the landlord made as party defendants persons who he alleged were trespassers and these trespassers contended that they were sub-tenants, this issue arose out of the Rent Act and the Small Causes Court had exclusive jurisdiction to try the same and its decision had the same efficacy as a decision under the Rent Act between a landlord and a tenant.

Therefore, Their Lordships held that the title contemplated by sec. 29 A was a title which a party had de hort the Act and a title not arising out of any of the provisions of the Act.

The title which the sub-tenants asserted was a title which had its origin in the provisions of the Rent Act and this title could be determined by the Small Causes Court.

Their Lordships, therefore, held that the suit filed in the City Civil Court was not maintainable and dismissed the appeal.

MADRAS SALES TAX ACT

Levy of Sales Tax

SUPREME COURT REVERSES MADRAS DECISION

Reversing the decision of the Madras High Court, the Constitution Bench of the Supreme Court on 28th October allowed three sales tax appeals filed by the State of Madras against a decision of the High Court and confirmed the orders of conviction and sentence passed on the three respondents, hide and skin merchants of Salem, by the trial court for non-payment of sales tax assessed on them.

Messrs. E. S. Hajee Abdul Kareem, Guruvaiah Naidu and Co., and P. C. Venugopal Naidu, whose business mainly consisted in the purchase of hides and skins and exporting them to foreign countries, were assessed to sales tax in different amounts on their respective turnovers of purchases of skins made by them in pursuance of orders placed with them by foreign buyers. When they failed to pay the tax so assessed, complaints were laid against them under sec. 15 (1) (b) of the Madras General Sales Tax Act.

Before the Magistrate who tried these assesses, it was contended that the purchase of skins sought to be taxed had taken place in the course of their export out of the territory of India and, therefore, no sales tax could be levied thereon by reason of Art. 286 (1) (b) of the Constitution. The prosecution case was that the purchases of skins for the purpose of implementing the orders of foreign buyers were not purchases in the course of export within the meaning of Art. 286 (1) (b) of the Constitution. It was also stated that, under sec. 16-A of the Madras General Sales Tax Act, the validity of assessment could not be questioned in any criminal court.

The Magistrate accepted the contention raised on behalf of the prosecution that the validity of an assessment could not be questioned in a criminal court and in view of the fact that the assessment and non-payment had been proved, he convicted the assessees under sec. 15 (1) (b) of the Act and sentenced them to varying fines with provision for simple imprisonment for 15 days in default of payment. The Magistrate did not, however, decide the question whether the sales here were of the nature contemplated by Art. 286 (1) (b) of the Constitution.

The Madras High Court, in revision, decided the question on entirely new grounds. It held that sec. 16-A of the Madras General Sales Tax Act was ultra vires of the Constitution and, without remanding the case for retrial on the first point based on Art. 286 (1) (b), set aside the convictions and sentences passed by the Magistrate.

Against this order of the High Court, the State of Madras came in appeal to the Supreme Court on the strength of a certificate granted by the High Court under Art. 134 (1) (c) of the Constitution.

In its judgment the Acting Chief Justice, Mr. S. R. Das, speaking for the Court, said :

Unfortunately for the respondents the evidence on record amounts only to this, namely, that after securing orders for supply of skins to the London buyers, the respondents used to go about purchasing the requisite kind and quantity of skins to implement such orders. Such purchases were, it is true, for the purpose of export but such purchases did not themselves occasion the export and consequently did not fall within the exemption of Art. 286(1) (b) of the Constitution.

Even if we concede without deciding that sec. 16-A did not prevent the respondents from questioning the validity of the assessment, it was quite impossible for the respondents, on the evidence adduced by them, to contend, in veiw of the earlier decisions of the Supreme Court, that the purchases were exempt from sales tax by virtue of Art. 286(1) (b) of the Constitution.

The judgment held that the High Court had erred in holding that the prosecution had failed to establish their case and in acquitting the accused.

NOTE

Eviction of Tenants from Public Housing

SUPREME COURT GIVES RELIEF

In the August 1955 number of the BULLETIN we reported two cases in which the Appeals Court (p. iii : 269) and the Illinois Supreme Court (p. iii : 270) gave relief to tenants evicted from public housing projects because of their membership of subversive organizations. A similar case was decided by the Federal Supreme Court on 7th November.

One Mr. Joseph Lawson and his family were living in the Hillside Terrace, a low-rent housing project, and the Milwaukee Housing Authority served an eviction notice on the Lawsons under a housing authority regulation requiring tenants of a project built with Federal funds to swear that they were not members of any subversive organization. The housing authority charged that Mrs. Lawson was a member of an organization on the Attorney General's subversive list.

The Lawsons refused to take the oath. They instituted a suit charging that the regulation violated the free speech and free assembly guarantees of the First Amendment to the U. S. Constitution and the due process clause of the Fourteenth Amendment. They also said it infringed rights guaranteed by the Wisconsin Constitution.

The Circuit Court of Milwaukee County dismissed the suit. It held that the loyalty oath did not violate any constitutional right. The State's Supreme Court, however, reversed the Circuit Court. It held that the requirement of oath violated both the Federal and the State Constitutions.

The housing authority thereupon took the matter to the U. S. Supreme Court, asking that the state court's judgment be set aside. The Supreme Court in a brief order rejected the request : it refused to review the Wisconsin Supreme Court's ruling, which means that the housing authority may not evict the Lawsons under its regulation.

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