Regd. No. B. 5681

Editorial Committee:
N. M. JOSHI,
S. G. VAZE,
Vice-President and Secretary respectively of the All-India Civil Liberties Council

The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

Edited by R. G. KAKADE, M. A., LL. B., PH. D.,
Assistant Secretary, All-India Civil Liberties Council
Office: Servants of India Society, Poona

Annual Subscription: Rs. 5
Per issue: annas 8
including postage

No. 68-69

May-June 1955

This number of the Bulletin, as in previous years, goes out as a joint number for May and June. There will not be a separate issue of the Bulletin next month.

Constitution Amendment Act

The Constitution (Fourth Amendment) Bill was passed substantially in the form in which the Joint Select Committee recommended it, and therefore the comments made on it last month in these columns do not need any modification. The Bill received an overwhelmingly large support in both houses of Parliament, and if fundamental rights could justifiably be cut down in accordance with the prevailing temper of those who happen to sit in Parliament at the time, we must admit that there is every justification for extinguishing the Right to Property, as it is our contention the Amendment Act does. But if this is the criterion to be applied to fundamental rights, the enlargement of restrictions on Freedom of Expression which the First Amendment sanctions may also be claimed to be fully justifiable, though many of those in the civil liberty movement who have lent their support to the Fourth Amendment will be loath to accept the claim. And when we have prominent members of Parliament like Mr. N. V. Gadgil who deny that any particular sanctity attaches to fundamental rights and urge that these rights should be curtailed if at any time they are found to be in conflict with national interests, we shall probably have many occasions on which we may have to condemn measures as abridging fundamental human freedoms though they receive unanimous or near-unanimous support of the legislative wing of Government.

Stripped of legal arguments which only serve to mystify the common man, the principle underlying the guarantee which the Constitution as it stood before amendment afforded to owners of property was simply the principle of "asteyam," the maxim that one must not lay one's hands on what does not belong to one. The maxim is scrupulously observed in decent private life, and the Constitution merely said that the maxim must be as scrupulously observed in the State's dealings with private persons. It stands to reason too, and because it stands to reason it is embodied in the written constitutions of all democratic countries and never deviated from in practice in countries with unwritten constitutions. The only difference between private and public dealings concerning property is that the State is supposed, very rightly, to have the inherent right to take private property if required for public use, and in order to conform to the principle of non-stealing, the State is subjected to the legal obligation to requite the owner whose property it is compelled to take. To have recourse to the shorter cut which Justice Holmes reprobates in words which have since become memorable, is to throw what is properly the community's burden on the shoulders of a few private individuals whose property the community has a need to take in the larger interest. This would clearly be immoral.

Much concern was shown in Parliament that if private property could be taken, as it can be under the amendment now made, without paying any compensation or after paying compensation which is less than full, men of small property who happen to come under the operation would suffer. In order to relieve such misgivings, Government gave the assurance that they would take care to see, in exercising the power which the amendment confers on them, that men of small means whose property they acquire are paid compensation in full. The Home Minister reinforced the assurance by pointing out that no Government which depends for its existence, in a regime of universal suffrage, on the votes of the common man, can afford to ignore the wishes of men of limited means. Politically, this is no doubt a sufficient guarantee that when properties of such persons come to be acquired, they will be paid adequate compensation in spite of the power given to the legislatures to settle their claims for less. But we cannot understand what moral justification there is for discriminating against wealthy persons when their property is taken. They can be made and they should be made to make a proportionately larger contribution in the provision of finance for plans of social welfare, but is it necessary and is it just, when adjudicating their claims for compensation for property which the State takes from them, to pay them at a lower rate? We think not.

When some members urged outright confiscation of the property held by foreigners in this country, the Prime Minister put his foot down, saying that even in Soviet Russia the Government did not deprive nationals of other countries of their property without paying them full compensation. For the sake of a few thousands or lakhs of rupees, he said, we cannot act contrary to the rules of international morality and bring our country into discredit in the comity of nations. The Home Minister said: "So far as foreigners are concerned, we will deal with their cases, *whatever be the law*, with a high sense of international honour and dignity." This is the right attitude to take, but there is no justification for acting otherwise in the case of our own nationals. If the prestige of the country abroad is a precious asset, so is the confidence among own countrymen that they will not be unjustly dealt with: such confidence will pay as high dividends in the long run in the national field as in the international field. Mr. Nehru said that he for his part did not set much value on material wealth. This is very true. The immense sacrifices he has made in the past in the country's interest have few parallels and are an exemplar to the rest of us. But to commend his example, as one must in all sincerity, is not to justify the taking of private property without paying the holders thereof anything less than the equivalent of the property by way of compensation. We would only like to say to Mr. Nehru that among the critics of this policy there are some who condemn the Fourth Amendment from purely disinterested motives. They are never likely to be subjected to the deprivation of their property; for they have no property of which they could be deprived.

One of the arguments on which the ousting of the courts' jurisdiction in the determination of compensation was sought to be justified by the Home Minister was that by their very nature the courts are incompetent to take into consideration some of the factors, international and national, which become relevant in such an issue. He did not leave his audience in suspense as to what international factors the body which is to determine the quantum of compensation must take into account. He mentioned, as an example, "the repercussions here of certain reforms in China." He said: "In the light of that we have to determine what compensation we should pay. It is impossible for any court to assess the exact reaction of the action taken in China. It is beyond their purview." That Mr. Pant advanced such an argument seriously shows what little value he attaches to the intelligence of members of Parliament. His real argument was what he called "the universally recognized principle of the supremacy of Parliament." He chose to ignore, in using this argument, the well-known fact that if the Right to Property is to be a constitutional right as in India, Parliament cannot be the ultimate guardian of it; that role properly belongs to the courts.

What weighed with Parliament, apart from a vague feeling that in carrying out social welfare plans on a big scale the payment of adequate compensation would be a serious impediment, was apparently the plea of Mr. Nehru that the changes being made in the Constitution were really meant to restore the Constitution to the form which the framers had intended to give it. This statement is of course highly questionable. But anyhow even if compensation was meant to be a non-justiciable matter by the framers of the Constitution, it is on record that Mr. Nehru himself did not approve of such a provision. He expressed the view at a cabinet meeting that to take away the power of the courts in the matter of determining compensation was tantamount to the nullification of the right to property as a constitutional right. The view he expressed then is the correct one, and it is a pity that he has now departed from it.—S. G. V.

RIGHT TO CONFRONT AND CROSS-EXAMINE INFORMANTS

IN CASES OF DISMISSAL OF GOVERNMENT EMPLOYEES FOR DISLOYALTY

The important question whether Government employees whose services are terminated on the recommendation of the Loyalty Review Board (which investigates cases of those suspected of disloyalty) have a constitutional right to confront and cross-examine the informants on whose derogatory information they were dismissed from service will be canvassed by the U. S. Supreme Court in a case which, because of the importance of the constitutional issue involved, has attracted much notice. A vital part of the proceedings in many of the loyalty and security cases under both the Truman and Eisenhower Administrations has been reports submitted to the loyalty board by the Federal Bureau of Intelligence. They often serve as the chief basis, sometimes the only basis, for adverse decisions on an employee. But the reports frequently do not disclose to the board or the employee either the source, or detailed documentation, of the information they contain.

The case at issue is that of Dr. John Punnett Peters, Senior Professor of Medicine at Yale University. It started in 1951 when it was alleged that he had been either an outright Communist or a willing aid to Red causes. Despite periodic "clearances," Dr. Peters was removed from an advisory post with the United States Public Health Service. It was a non-sensitive part-time Government job. In 1953 the Loyalty Review Board held a hearing, at which all the testimony was favourable to him. However, on the basis of information received from sources whose

identity was not disclosed to Dr. Peters, nor known, in all cases, to the board itself, the board ruled that there was "reasonable doubt" as to his loyalty.

He has challenged, in an appeal to the Supreme Court, that the procedures established in President Truman's Loyalty Order contravene his constitutional rights in two main particulars: (1) They do not meet the requirements of fair trial because they do not disclose the identity of accusers and do not give the accused an opportunity to confront and cross-examine those who have informed against him. (2) They take away from him the protection afforded by the Fifth Amendment of the Constitution which requires that no one shall be deprived of "life, liberty or property" without due process of law. Dr. Peters' attorneys told the Supreme Court in the third week of last month that they were not challenging the Government's authority to dismiss him. But they said that since the Government had chosen to establish a whole "panoply" of procedures involving formal hearings, the procedures had to conform with the Fifth Amendment which provides a guarantee against deprivation of property without due process of law. Reputation, they argued, was an intrinsic part of the right to property and Dr. Peters' reputation had been damaged by a hearing which did not accord him due process.

The Justice Department in a brief filed with the Supreme Court has taken up the position that the Executive Branch of the Government has a right to keep confidential the sources of its information in loyalty cases; and that judicial standards of due process do not apply to procedures used to remove a Government employee from his job. The brief says:

> Never in our history has it been thought that a Government employee could not be dismissed without a hearing that meets the procedural requirements of the Fifth Amendment. In fact, in loyalty cases, dismissal from Government service could properly be based not on proved facts but on suspicion.

The Government argued before the Supreme Court that dismissals under the loyalty programme were administrative, not judicial, and hence no constitutional right of confrontation existed. A finding of "reasonable doubt" as to loyalty was not determination of guilt, the Government stated, and no consequences flowed from it except termination of employment. It is the Government's contention that insistence on the right of confrontation would jeopardise national security by forcing the Government to reveal the identity of secret agents and by discouraging "casual informants" from telling what they know to the F. B. I. It is the official position of the Justice Department that those dismissed for disloyalty have no constitutional rights not applicable to those dismissed for other reasons; that the Supreme Court cannot control the President's authority to appoint and dismiss Government employees; and that, under the doctrine of the separation of powers, the judiciary must keep hands off.

The American Civil Liberties Union has filed an amicus curiae brief in the Peters case, in which it criticises the use of confidential information, which is not even disclosed to those it is directed against, and the absence of provision for confrontation and cross-examination of witnesses, and asserts that the procedure adopted has harmed rather than strengthened national security. The Union's friend-of-the-Court brief says:

> With fair procedures, government employees need no longer fear the faceless accuser, the fantastic allegation, the charge to which one can give no answer except to state under oath that it is not so. With fair procedures, perhaps our most able minds will not hesitate to undertake important and vital jobs upon which our very survival may depend. If the existing loyalty-security procedures do not present a greater risk to the "national security" than the alleged need for protecting confidential informers, we respectfully submit the term has lost its meaning.

A member of the Federal Subversive Activities Control Board, Mr. Harry P. Cain, recently expressed belief that the security system had worked "well and fairly on the average" but that conspicuous and inexcusable examples to the contrary had occurred much too often. He added, "Our nation can't long tolerate a system which doesn't soon eliminate the possibility for errrors which are disastrous." Mr. Cain said that in the struggle to remain free, "we must keep three elements in balance. They are justice, security, and freedom. It seems apparent to me that none of these elements can stand alone and that no two can operate successfully without the other." And he made some concrete suggestions which he thinks will help maintain this balance and improve the security system.

The position which the Government has taken up in the Peters case has support from a Court of Appeals decision in the Dorothy Bailey case; and for this reason we give below an account of that case.

Dorothy Bailey Case

Miss Dorothy Bailey was dismissed for disloyalty from a non-sensitive job in the classified civil service after she had held it, and apparently very efficiently served in it, for nearly eight years. Information was received that she was associated with Communist-front organizations, which led the Regional Loyalty Board and later the Loyalty Review Board to report that reasonable grounds existed for believing that she was disloyal. The procedure laid down in the President's executive order of March 1947, concerning the employees' loyalty programme, was gone through. After a preliminary investigation, she was given a hearing. But "on the other hand, she was not told the

names of the informants against her; she was not permitted to face or to cross-examine those informants; she was not given the dates or places at which she was alleged to have been active in the named alleged subversive organizations." Miss Bailey challenged the legality of the dismissal order on the ground that she was denied due process, which required, more particularly, "specificity in charges equivalent to that of valid criminal charges, confrontation by witnesses, cross-examination of them, and hearing upon evidence openly submitted."

The Court of Appeals (1950, 189 F 2d 46) in Bailey Richardson rejected this claim, saying:

> Never in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service. That record of a hundred and sixty years of Government administration is the sort of history which speaks with great force. ... Moreover, in the acute and sometimes bitter historic hundred-year contest over the wholesale summary dismissal of Government employees, there seems never to have been a claim that, absent Congressional limitation, the President was without constitutional power to dismiss without notice, hearing or evidence. ...
>
> In the absence of statute or ancient custom to the contrary, executive offices are held at the will of the appointing authority, not for life or for fixed terms. If removal be at will, of what purpose would due process be? To hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting ideas. Due process is not applicable unless one is being deprived of something to which he has a right....
>
> It is urged upon us that dismissal from Government employ for suspicion of disloyalty is an exception to the established doctrines and rules generally applicable to Government employees and their dismissal from service. It is said on behalf of appellant that disloyalty is akin to treason and that dismissal is akin to conviction. Forthwith it is asserted that Miss Bailey has been convicted of disloyalty. As we have seen, nothing resembling a conviction has been visited upon her. She was merely refused Government employment for reasons satisfactory to the appointing authorities. But it is said that the public does not distinguish, that she has been stigmatised and her chance of making a living seriously impaired.... If no constitutional right of the individual is being impinged and officials are acting within the scope of official authority, the fact that the individual concerned is injured in the process neither invalidates the official act nor gives the individual a right to redress.
>
> The line of cases in which this court has said that courts will not review the action of executive officials in dismissing executive employees, except to insure compliance with statutory requirements, is unvaried. As early as 1904, this court said that the rule had been announced so many times as not to require citation of authority....
>
> (The other contention is that) disloyalty is a thing apart, suspicion of which gives rise to constitutional rights not applicable to suspicion of criminal offences. It seems to us that in so far as suspicion of disloyalty has peculiarities which distinguish it from suspicions of bribery, seduction and other offences, they are adverse to appellant's conclusions. We must look not only at appellant's but also at the public side of this controversy. From that point of view, the retention in the Government service of one suspected of theft or a similar offence would not be of great importance, and the revelation of the method of detection and the names of informants would probably not affect the public interest. But disloyalty in the Government service under present circumstances is a matter of great public concern, and revelation of the methods of detecting it and of the names of witnesses involves public considerations of compelling importance.
>
> Infiltration of government service is now a recognized technique for the overthrow of Government. We do not think that the individual rights guaranteed by the Constitution necessarily mean that a Government dedicated to those rights cannot preserve itself in the world as it is.... In the light of all that is well known, we cannot say that a policy of caution in respect to members of the Communist Party in the Government service under current circumstances is forbidden by any restriction in the Constitution. The risks are for the President to estimate, and the assumption of risk is for him to decide.... The judiciary cannot dictate that he must either retain in Government service those whom he reasonably suspects or else reveal publicly the means and methods by which he detects disloyalty.

An appeal was preferred to the Supreme Court against this decision but because the Supreme Court divided 4 to 4, the Appeal Court's decision stands, it being the rule that a lower court decision may not be overturned by an evenly divided Supreme Court.

COMMENTS

Afro-Asian Conference at Bandung

The 29 countries in Asia and Africa which met at Bandung in Indonesia to seek co-operation among themselves and to bring about as far as possible a co-ordinate policy in tackling the immense problems that face them discussed a number of political questions. But they also discussed some problems in which we as a CIVIL LIBERTIES BULLETIN are deeply interested, and it would be in the fitness of things if we considered the

decisions of the conference on these problems, leaving aside the purely political problems which are beyond our province.

Human Rights

First, the Afro-Asian Conference pledged its support for the human rights principles set forth by the United Nations. It said :

> The Afro-Asian Conference declared its full support of the fundamental principles of human rights as set forth in the Charter of the United Nations and took note of the Universal Declaration of Human Rights as a common standard of achievement for all peoples and nations,

This statement would be warmly welcomed everywhere, and it is particularly welcome as Communist China, who played a leading part in the conference, is also a party to it. For a country which is being denied a seat in the U. N., to proclaim its faith in the U. N. Charter and to agree to abide by its principles is indeed a great thing. Such an attitude is hard to find at international gatherings of late.

Colonialism

It was but natural that the conference consisting of countries most of which have just emerged from a dependent to an independent status should think of other countries in the region which have not yet so emerged and should call for independence of all colonial peoples. This matter, however, raised a controversy. All were agreed that colonialism should end, but controversy was over what the deprecation of colonialism should include. The representatives of some countries insisted that it was not enough to condemn the classical colonialism of the west, but that the conference should specifically condemn the new form of colonialism and imperialism which was growing up in the east, under which a nominally sovereign status is maintained for satlellite countries but their people and rulers are subjected to control far worse than is seen in western colonialism. The view of these countries was that the freedom of peoples is endangered by international doctrines which "seek to dominate, exploit and subjugate peoples through methods of force, infiltration and subversion." In this connection the countries of Eastern Europe were mentioned as being in all but name subjugated by "a new super-barbarism, a new super-imperalism, a new super-power." Mr. Chou En-lai, Red China's Prime Minister, denied that Eastern European countries were subject to foreign domination, asserting that they were as free in fact as in theory. Mr. Nehru, our Prime Minister, could not make such a categorical statement, but tried to bring harmony into the conference by saying that for the purposes of the conference they must assume such countries to be really free. Ultimately, reconciliation between these conflicting views was achieved by a declaration that "colonialism in all its manifestations is an evil which should speedily be brought to an end" and by denouncing "subjection of peoples to alien subjugation, domination and exploitation." It should be stated that Mr. Nehru equally opposed the Communist Cominform and all other similar agencies threatening the independence of countries.

Regional Pacts

Another topic which occasioned controversy in the Asian-African conference was as to whether countries in this region could or could not enter into pacts of collective defence. This particular controversy was unnecessarily raised by Mr. Nehru, who at Bandung as often in this country condemned all regional groupings, as if they were an evil in themselves in all circumstances and advocated non-alignment as an eternal policy for every country, saying that Indians would not join any war if it should break out again. Seeing that the Philippines, Thailand and Pakistan are members of the Manila Pact and that Turkey (with Iraq as its ally) is a member of the North Atlantic Pact, this view of Mr. Nehru was bound to be opposed; so was it opposed by some other countries like Ceylon which have not joined either of these pacts.

The Foreign Minister of Thailand, Prince Wan Waithaykon, defended the decision of his country to join SEATO thus :

> Truly in self-defence ... and not for any aggressive or even provocative purpose whatsoever, Thailand has had to join with seven other powers in concluding a collective defence treaty under Art. 53 of the Charter of the U. N.

Gen. Carlos Romulo of the Philippines said his was a small country unable to defend itself against attack by a large country without outside assistance. He said regional groupings were for countries like the Philippines a necessity imposed by the times. He analysed the SEATO Pact point by point, explaining that the Pact was for purely defensive purposes, and self-defence was a right sanctioned by the U. N. Charter. He cited Kashmir and said that while Mr. Nehru and Mr. Mahommed Ali were men of peace, yet both of them kept huge armies and had huge defence budgets. Surely they were not preparing for war but were thinking of self-defence. He said that small nations could not say, as Mr. Nehru did for India, that they would remain aloof in a world war.

If Mr. Nehru had criticised the Manila Pact or any other pact as uncalled for in the circumstances, it would have been another matter; then the discussion would have turned on the circumstances in which the particular pact was made. But he attacked military alliances as unjustifiable in all conditions and as something basically immoral. However, such a view is opposed to the international law laid down by the U. N., as collective security is the very basis on which that world organization is founded. Ultimately, the U. N. principle was vindicated in the declaration on World Peace made at the conference. This ten-point declaration included "respect for the

right of each nation to defend itself singly or collectively in conformity with the Charter of the United Nations."

As if to save the face of those who stood for neutralism in all circumstances, a sort of qualification was added, which called for "abstention from the use of arrangements of collective defence to serve the particular interests of any of the big powers." The qualification has no meaning except that pacts of aggression should not be entered into under the guise of collective defence, and such illegitimate pacts can be made by small nations with one another in order to crush another small nation as with big nations. The important thing is that the right of collective defence was recognised and genuine defence pacts sanctioned. The controversy that arose in the conference was quite worthwhile inasmuch as a sound principle was established in the end with the concurrence of all the countries represented at the conference, including India.

"No Partnership between Black and White"

MR. STRYDOM'S STATEMENT

Just when the Afro-Asian countries' Bandung Conference was condemning racial discrimination as between nations, Mr. Johannes Strydom, the Premier of the Union of South Africa, declared on 20th April in the House of Assembly: "Either the white man dominates or the black man takes over."

He flatly rejected a partnership between the black and the white as a policy for South Africa and also scorned the suggestion that the white man could retain the leadership on merit alone.

It was because the voting power was in the hands of the white man that the white man was able to govern today, said Mr. Strydom. Under existing laws it was not possible for non-whites through merit or any other means to get the government of the country in their hands.

Under no circumstances would non-whites be given political power in "white" areas, he said. Non-whites would, however, be allowed to develop in separate areas set aside for them and there they would be given greater rights under white supervision.

Racialism in the South African Union

Three significant events have occurred recently in connection with the Union Government's blatantly racialist policy. First, the Government has announced that it will have no parley with the Government of India on the position of Indian settlers in South Africa. Second, the Afro-Asian Conference at Bandung has condemned the Union Government's policy, extending its support "for the courageous stand taken by the victims of racial discrimination, especially by the peoples of African and Indian and Pakistani origin in South Africa." Third, the Union Minister of External Affairs, declared in Parliament on 5th April that the Government had decided to terminate South Africa's participation in the Unesco because of the U. N. agency's "interference in South Africa's racial problems." South Africa has complained before of the intervention by the United Nations in what the Nationalist Government contends are domestic problems. It will be recalled that co-operation was refused to a special U. N. committee that investigated racial problems in South Africa, its representatives being refused entry. The committe's reports were critical of the Nationalist Government's apartheid policies.

The Minister announced also that South Africa would not participate in deliberations which are to take place this month before the International Court of Justice on its administration of the territory of S. W. Africa under the League of Nations mandate. The territory was incorporated by South Africa in 1949. This step of incorporation was not approved by the United Nations, which sought to persuade South Africa to accept trusteeship of S. W. Africa under U. N. supervision. South Africa ignored this view, holding that the world organization had no legal right to exercise supervision or to interfere with the administration of the territory. The World Court is to consider voting procedures in the United Nations in connection with reports and petitions from other nations and individuals affecting S. W. Africa. South Africa's withdrawal from the Unesco does not appear to be meant—so far—as a prelude to withdrawal from the United Nations itself.

Total Apartheid

The policy of total apartheid on which the Strydom Government has launched with such enthusiasm, as being essential for the security and supremacy of the whites, is from the nature of the case an utter impossibility. It should be remembered that Dr. Malan, the former Nationalist Prime Minister, knew this and always discouraged this policy. In a petty sense apartheid was practised; for instance, separate entrances and exits were maintained for the Natives at post offices and railway stations. But the separation of the blacks from the whites in the whole gamut of economic relations is something which simply cannot be carried out. When some time ago a conference of ministers of the Dutch Reformed Churches, which strongly support the Nationalist Party, passed a resolution advocating total apartheid, Dr. Malan was the first to reject it as impracticable. In 1932 the Native Economic Commission, of which a majority of the members were Nationalists, unanimously reported: "Nobody advocates this. It would be impossible and uneconomical even if possible."

No doubt a colour bar is imposed even in the economic sphere, in order to restrict the Natives to low-paid labouring work and to keep the skilled and high-paid occupations for the whites. Apart from the moral objection to such a bar, intended to prevent the black man because of the colour of his skin from developing

and using his ability and skill, it is having harmful effects in practice even for the whites. The small white population cannot provide all the workers needed to perform the work from which the blacks are excluded. Not only are the postal and railway services seriously hampered and rendered inefficient by reason of the fact that there are not sufficient whites to do the work, but the national income of the country is kept absurdly low. Despite the colour bar, the industrial revolution which has taken place since the second World War has introduced a comparatively large number of semi-skilled and some skilled black workers into factories. And the Labour Minister in the Strydom Government seems intent to put an end to it, which however he will find it almost impossible to do.

Mr. F. A. W. Lucas, a former judge in the Supreme Court of the Transval Provincial Division, draws attention in the columns of the "New York Times" to the land system of South Africa and says that it is on this land system that the policy of total apartheid must inevitably flounder. Three quarters of the total population of South Africa are blacks. With total apartheid, Mr. Lucas points out, they would need at least two-thirds of the land. But they have at present only one-ninth. And although at present only one-third of the Natives live in reserves they find that the reserves are too small for that fraction. If all the Native are to be driven into the reserves, who will provide the necessary land for them? In 1936 Parliament authorized the purchase of enough land to bring up the total area to be available for occupation by Natives to 13 per cent. But the white landowners refused to sell much more than half of what was necessary for this purpose. They are not likely to agree to give up two-thirds of the country.

"A burning hatred of the whites" is growing rapidly among the Natives and although this may not culminate in the immediate future in a violent outburst, Mr. Lucas says: "In these days of speedy changes he would be greatly daring who would venture to assert that such a thing could not happen in the next ten or even the next five years."

Right of Proselytization Asserted

AS SANCTIONED BY THE CONSTITUTION

The National Christian Council of India, with which all major Christian bodies of the country except the Roman Catholic Church are affiliated has issued a statement urging its constituents not only to shed foreign missionary control but also to try and be independent of foreign aid. It says, however, that the Church has the right to give and receive both financial and personal assistance on an international basis without restricting in any way its truly Indian character.

The Council said the Church could not give up spreading its faith among non-Christians with the aim of conversion without "mutilating" its religion. While it repudiated the gaining of proselytes by coercion or material and social inducements, the Council said that the Church's freedom to preach the gospel to non-Christians "is essential to its existence."

The Indian Constitution protected the Churches in the fulfilment of their religious duty of preaching the Christian gospel," the statement said.

Enquiries into missionary activities instituted by certain Governments, the Council said, "had reached beyond their secular functions insofar as they have questioned the right of the Christian Church to exist and work freely like other religious organisations."

MALABAR TENANCY

Validity of the 1930 Act Upheld

On 13th April Mr. Justice Govinda Menon and Mr. Justice Krishnaswami Naidu at the Madras High Court ruled, in a batch of cases in which the validity of the various provisions of the Malabar Tenancy Act, No. 14 of 1930, and the amending Acts of 1951 and 1954 was challenged, that none of the provisions of the 1930 Act was ultra vires of the constitution, but they differed with regard to the validity of several provisions of the amending Acts. While Mr. Justice Menon held all the impugned provisions of these Acts also valid, Mr. Justice Naidu held as many as 15 provisions of the Act void as being opposed to the fundamental rights guaranteed to citizens under Part III of the Constitution. It was therefore directed that the matters on which the two Judges differed might be placed before the Chief Justice for being referred to another Judge or Judges. We give below the substance of the Court's judgment on the point on which the Court was unanimous.

The main question that arose in the cases for determination was what was the real status of the Kanamdar vis a vis the Jenmi before the Tenancy Act was passed: the latter contended that he was the absolute owner of the land and that the Kanamdar was only a mortgagee, while the former contended that he was a co-proprietor of the soil. Mr. Justice Govinda Menon ruled that neither of these contentions could be wholly upheld.

His Lordship entered into an elaborate discussion on the incidents of Jenmam and Kanam rights in Malabar prior to the Malabar Tenancy Act of 1930 to find out the changes, if any, that had been effected or whether by that statute there had been a declaration of the rights in the soil in the respective tenure holders and observed;

> It will be seen that prior to the Malabar Tenancy Act of 1930 (Act XIV of 1930) there was a very hot controversy with regard to the origin and nature of the Kanam rights and the only conclusion that is possible is that the legislature intervened to bring in a legislation to define and declare the legal incidents as well as duties and the rights and obligations vis-a-vis the Kanamdar and Jenmis. It cannot therefore be said that there was any well-recognised common

law principle before that time whereby the Kanamdar was not a tenure holder but only a mortgagee.

On the one hand the Jenmi asserted that Kanam was only a mortgage while on the other hand the Kanamdar very vehemently protested against such inferior status and claimed that he was co-proprietor of the soil.

After analysing the decisions quoted by both the sides in support of their rival contentions, His Lordship observed;

> I do not think there is any decision prior to Act XIV of 1930 or subsequent to that, which holds the view that 'Kanam' was only a mortgage as contended on behalf of the plaintiff. From the review of the controversy regarding the nature of the Kanam to which I have already alluded, it is clear that there was a large body of well-informed opinion to the effect that English Judges made the mistake in attributing any of the incidents of a mortgage to the Kanam and that it was essentially a tenure peculiar to that part of the country to which by a misunderstanding of the conditions of the land tenures, the incidents of mortgage were attributed.

Adverting again to the mixed nature of the Kanam tenure, His Lordship pointed out that despite erroneous views taken by the foreign administrators, the Kanamdar vehemently contested such a position (that he was only a mortgagee) and claimed co-proprietorship of the soil as agriculturist just as the Kudiwaram tenants in the Zamindari areas. It was to settle this controversy and to bring in harmony in the relationship between the Jenmi and the Kanamdar as well as other classes of tenants that Act XIV of 1930 was passed which, as a compromise, defined the relationship between the Jenmi and the Kanamdar as it ought to have been. It could not therefore be said that prior to the passing of this Act of 1930, the Kanamdar was only a mortgagee and that the Jenmi was the absolute owner of the soil.

The Malabar Tenancy Act of 1930 conferred reciprocal rights and also imposed similar obligations on both the parties. While defining the Jenmi as the absolute proprietor of the soil, the Kanamdar's right to get compulsory renewal with certain conditions attached was also recognised, observed His Lordship.

His Lordship then analysed the respective rights and obligations of the Kanamdars and Jenmis under the Malabar Tenancy Act of 1930 and observed that all the provisions of the Act laid emphasis more on the 'lease' aspect of the relationship between the two and the 'mortgage' aspect was completely submerged, except in certain specified categories. The result therefore of the Malabar Tenancy Act of 1930 was to convert the relationship between the Jenmi and the Kanamdar into one between landlord and tenants and to define the state of things as it ought to be. After that Act was passed, it was no longer possible for anyone to contend that the Kanam was only a mortgage and that it was redeemable at the pleasure of the Jenmi. Likewise, it was difficult for the Kanamdar to claim co-proprietorship of the soil and to say that he had as much right on the soil as the Jenmi.

The position that had to be considered was, His Lordship remarked, whether there had been any deprivation of the Jenmi's right by taking possession of or acquisition as effected by Sections 17 and 20 of the Madras Act XIV of 1930. The Jenmi's position as absolute proprietor was not recognised by the Kanamdar for the past three quarters of a century. By the Act XIV of 1930 reciprocal rights were conferred and disabilities imposed as between the Jenmi and the Kanamdar so that it was impossible to say that the Act took away any admitted right of ownership in the Jenmi. What the Act did was a settlement of the controversy and conferment and declaration of *new* rights on both the contending parties. The definitions of Jenmi and Kanamdar were the culmination of the negotiations and settlement of the disputations regarding the respective incidents of each and "it cannot, therefore, be said that the Madras Act XIV of 1930, in any way interfered with the undisputed and well-recognised rights of the Jenmi or attracted the provisions of Art. 31 (2) of Constitution." It was only where certain incidents of ownership or bundle of rights inherent therein which were universally recognised were sought to be interfered with, that Art. 31 (2) of the Constitution could be invoked. To regulate the relationship of landlords and tenants and thereby diminish the right hitherto exercised by the landlord in connection with his land was different from compulsory acquisition.

The Madras Act XIV of 1930 was enacted only as a compromise measure and the Madras Government, by the Devolution Rules, was competent to pass it. Therefore, His Lordship held secs. 17 and 20 of the Madras Act XIV were neither repugnant nor opposed to Art. 31 (2). The Sections did not contravene the provisions of Art. 19 (1) (f) relating to reasonable restrictions since his view was that there was no limitation. The provisions of those Sections did not attract the provisions of Article 14 also. "I am, therefore, definitely of the opinion" His Lordship added, "that no part of the Madras Act XIV of 1930 does, in any way, infringe or is repugnant to any of the Fundamental Rights conferred by Chapter III, of the Constitution."

Mr. Justice Krishnaswami Naidu, in the course of his judgment, observed that after examining the materials placed before them as to the customary incidents of the Kanam, he had no hesitation in holding that the definition of "Kanam" in the 1930 Act embodied practically all the necessary customary incidents of the "Kanam transaction" as settled by judicial decisions and as understood by long and established usage. The framers of the 1930 Act, after a thorough examination and careful consideration of the relationship between the Jenmi and Kanamdar, as existing

on the date of the enactment, had fairly and accurately described the relative incidents of "Kanam" in the definition. It might, therefore, be safe to accept that definition without further embarking into an investigation for ascertaining all the customary incidents of the Kanam. On the question as to whether the Kanam was a mortgage or a lease, (coming within the definition of Section 58 or 105 of the Transfer of Property Act), His Lordship felt that there was no difficulty in concluding that it was neither a mortgage nor a lease; but a mortgage and lease combined, the incidents of both being present. But, the Courts had chosen to treat it as an "anomalous mortgage", as defined in the Transfer of Property Act. The essence of such an anomalous mortgage was that the rights and liabilities of the parties flowed from the terms of the contract.

It appeared to His Lordship that the question whether it was really a mortgage or a lease was really of academic interest since for their present purpose, it appeared to be immaterial whether it was an anamolous mortgage under the Transfer of Property Act or not, as the question that had to be considered was whether the provisions of the Malabar Tenancy Act of 1930 as amended subsequently, infringed the fundamental rights conceded under the Constitution and one had, therefore, only to ascertain as to what were the rights of property of the Jenmi, in a Kanam and whether any of those rights of property had been interfered with by these enactments and whether such interference offended the Constitution.

His Lordship further observed that the contention that the Malabar Tenancy Act of 1930 intervened and created a new kind of relationship between the Jenmi and Kanamdar, whereby their respective position was equated to that of landlord and tenant, ignored the nature of the Kanam tenure, even as defined in the Act of 1930. The Act no doubt conferred certain rights on the Kanamdar, such rights being the creations of the statute and not rights which could be said to have existed prior to the enactment. The granting of such rights to the Kanamdar resulting in the consequential curtailment of the rights of the Jenmis was now the ground for complaint by the plaintiffs who contended that these contravened the fundamental rights guaranteed under the constitution. His Lordship further observed that if, on an examination of these new rights conferred on the Kanamdar it was found that there was a curtailment of the rights of the Jenmis, which offended the provisions of the Constitution, then it was open to Courts to declare such provisions as void and the result would be that the Kanamdar by this Act could no longer be exercised to his benefit. In this view, His Lordship held that it was open to the plaintiffs to argue that the Act of 1930 was itself an invasion of the fundamental rights guaranteed by the Constitution.

After elaborately analysing the arguments put forward by both the sides in this connection, His Lordship held that the Malabar Tenancy Act of 1930 was the final culmination of the anxious efforts of the Government, the public and the representatives of all interests in property in Malabar and was the result of the labours of successive committees ending with the Raghavayya Committee and a conference of representatives of Jenmis and tenants. The Government gave the best consideration to the views put forward both on behalf of landlords and the tenants and the result was the introduction and enactment of the 1930 Act. The object of this Act was to improve materially the conditions of the tenants without prejudicing the inherent rights of the landlords and to bring about better relations between them. "Viewed in this background, the provisions of Act XIV of 1930 could not be urged as amounting to any unreasonable restrictions on the citizen's right to acquire, hold and dispose of property," observed His Lordship.

BOMBAY PROHIBITION ACT, 1949

Interpretation of Sec. 85

An important decision relating to the construction of sec. 85 of the Bombay Prohibition Act, which deals with penalty for being drunk and for disorderly behaviour, was delivered by the Chief Justice and Mr. Justice Desai at the Bombay High Court on 13th April, while disposing of an appeal filed by the State of Bombay, a reference made by an additional Sessions Judge of Poona, and two revision applications.

The common question involved in all the four matters was whether under sec. 85 (1) (3), a person could be deemed to have committed an offence only if he drank prohibited liquor and would not be guilty of any offence if he took permitted liquor.

Their Lordships first disposed of an appeal by the Government of Bombay against the acquittal of Trimbak Dhondu Bhoir, a resident of Bhiwandi.

Trimbak Bhoir was found "drunk" in a village near Bhiwandi on April 3 last year. The defence of the accused before the Judicial Magistrate of Bhiwandi was that he had consumed a "medicated tonic" called "B. G. Phos." In support of it he produced a bottle of the preparation and a cash memo. The charge against the accused was under sec. 66 (b) (consuming liquor without a permit). But as he was found in a public place, the Magistrate convicted him under sec. 85(1) (3) of the Prohibition Act. Further, the Magistrate had held that there was no evidence that the accused consumed "B. G. Phos" under medical advice.

The Sessions Judge of Thana set aside the conviction and ordered Bhoir's acquittal as he held that the section prohibited a person from being found at a public place "after having consumed prohibited liquor alone," but in the present case the prosecution has not proved that he had consumed prohibited liquor. The Magistrate had convicted Bhoir only on the evidence of his being found

smelling of drink. The Sessions Judge was of the opinion that sec. 85 (1) (3) applied to a case where a person had taken prohibited liquor and that the prosecution had to prove, according to the recent Supreme Court decision, that Bhoir had taken prohibited liquor.

Their Lordships in their judgment traced the history of legislation regarding intoxication and observed that intoxication by itself was never an offence before the Prohibition Act came into force. So far as sec. 510 of the Penal Code was concerned, a person who appeared in a public place intoxicated, but who did not cause annoyance to anyone, was not guilty of any offence. The same position obtained with regard to the District Police Act and the Bombay Police Act before the passing of the Prohibition Act. What was made punishable under the Police Acts was not drinking as such or even getting drunk as such, but the commission of certain acts which resulted from a person being drunk.

The same policy was first maintained under the Prohibition Act. For sub-secs. (1) and (2) of sec. 85 (1) of the Act subjected to penalty a person who in a public place "is drunk or incapable of taking care of himself" or "behaves in a disorderly manner under the influence of drink." But later the policy was changed when to these two sub-sections sub-sec. (3) was added which purported to punish also a person who in a public place "is found drunk but who is not the holder of a permit granted under the provisions of this Act or is not eligible to hold a permit under sec. 40, 41 or 46." Under that sub-section, for the first time, the Legislature was aiming "to punish either the effect of drinking or intoxication although neither the one nor the other may produce harmful results."

The Advocate-General had argued that, under sub-sec. (3) of sec. 85 (1), if a person drank permitted alcohol and went into a public street, that by itself was sufficient to constitute an offence. The Chief Justice, who delivered the judgment, said in rejecting this argument:

> The startling argument was put forward that even if the most honest and most law-abiding citizen drank medicine which contained alcohol which had been prescribed by a doctor and which he was permitted under the law to take and, if after taking that medicine, he had the misfortune to go out on a public road, he would be committing an offence under sub-sec. (3) of sec. 85 (1).

Reference was made to the definition in sec. 2 (12), "'to drink,' with its grammatical variations, means to drink liquor or to consume any intoxicating drug," and it was contended that the expression "drunk" was nothing more than a grammatical variation of the expression "to drink." (The Sessions Judge of Thana had rejected that contention. His view was that the mere drinking of liquor was made punishable only in that limited class of cases where a person drank prohibited liquor without a permit.) In His Lordship's view, it was necessary to keep before one's mind the essential distinction between "drinking" and "getting drunk." "It is not every act of drinking that necessarily results in drunkenness," he added.

He further pointed out that it was a sound canon of construction not to attribute to the Legislature any legislation which was unreasonable. It would be strange indeed that the Legislature, having permmitted a person to drink liquor which was not prohibited in the shape of a medicine or a tonic, should punish him because, having drunk, he should leave his home and be in a public place, although he did not commit any act which might be considered objectionable.

The Supreme Court had held that to prevent a citizen from consuming a medicinal preparation would be contravening his fundamental right under Art. 19.

His Lordship stated that the offences constituted under sub-secs. (1), (2) and (3) of sec. 85 (1) were all against public interest and the restrictions imposed by the Legislature were perfectly reasonable.

The Advocate-General had suggested that if a person was given a permit, he was allowed to drink and, therefore, his case was taken out of sub-sec. (3) of sec. 85 (1). His Lordship said:

> We do not understand why a person who is given a permit to drink could get intoxicated and go to a public place. It almost seems as if permit-holders have been looked upon under this section as a favoured class. To be intoxicated in a public place or to be incapable of taking care of oneself while drunk in a public place or behaving in a disorderly manner under the influence of drink in such a place is indefensible, whether the act proceeds from a person who has a permit or one who has no permit but has taken a medicinal preparation.

His Lordship then referred to the decisions of the Supreme Court and observed that the Supreme Court had held that if the prosecution was under sec. 66 (b) the burden would be upon the prosecution to establish that the liquor consumed was prohibited liquor and not permitted liquor. But if the prosecution was under sec. 85, no question of discharging any burden arose, for a person would commit an offence even if he drank permitted liquor, if he was drunk and incapable of taking care of himself or if he behaved in a disordely manner, or if he was intoxicated.

In the case of Trimbak Bhoir, the only evidence of being drunk was that "the accused smelt of liquor." He had been convicted under sec. 85 (1) (3) and as the evidence did not constitute an offence under that section, the Government appeal was dismissed.

As regards the reference in connection with Walmik Santu Koli, who had been fined Rs. 150 for consuming alcohol by a Magistrate of Baramati, Their Lordships said that the conviction was under sec. 66 (b) for consuming liquor but the prosecution had failed to show that it was prohibited liquor. They, therefore, accepted the refer-

ence and set aside the conviction and the fine imposed on Koli.

Regarding the revision application of G. C. Bothabhai of Mehsane, who had been convicted and fined under sub-secs. (1) and (2) of sec. 85 (1), Their Lordships held that in his case drinking had resulted in drunkenness. Hence his application was dismissed.

Regarding the revision application of J. B. Pathak, a former Sanitary Inspector of Nadiad, who had been convicted and fined under sub-sec. (3) of sec. 85(1), the medical evidence revealed that he was conscious and non-garrulous, his pupils were equal and reacting to light but his gait was slightly unsteady. Their Lordships did not find the evidence sufficient to constitute the offence of intoxication and therefore the conviction and sentence were set aside.

Denial of a Temporary Resident's Permit

PETITION FOR A WRIT OF MANDAMUS DISMISSED

Mrs. Dorean Roy, a woman of British nationality who had married an Indian citizen, applied to the Collector of Bombay for a temporary resident's permit for consumption of foreign liquor under sec. 40 (1) (c) (i) of the Bombay Prohibition Act. The Collector replied that her request could not be granted, suggesting, however, that she could apply for a foreign liquor permit on grounds of health under sub-sec. (b) of sec. 40 (1). She had such a permit in former years, but now she wanted a permit of the other sort. The Director of Excise and Prohibition, who was next approached, also gave the same answer. Thereupon Mrs. Roy filed a petition in the Bombay High Court for a writ of mandamus requiring the State of Bombay to issue to her the permit she wanted.

The case made out in the petition was that the petitioner satisfied all the conditions that had been laid down in the rules for the grant of such a permit and that it was obligatory on the Collector to issue a permit as she had satisfied all the requisite conditions. The Collector in an affidavit took up the position that he was not bound to assign any reasons for refusing a permit, but proceeded to state that the petitioner's husband, who was an Indian citizen and had an Indian domicile, had a permanent home in India, and it could not be said of her that she had a fixed and settled purpose of making her sole and permanent home in Great Britain. [The condition prescribed in clause (c) (i) of sec. 40 (1) for eligibility for a foreign liquor permit is "that such person was either born and brought up or domiciled in any country outside India where such liquor is being generally used or consumed," subject to the proviso "that such person has been residing and intends to reside in India temporarily and that such person has a fixed and settled purpose of making her sole and permanent home in any country outside India."]

Mr. Justice Tendolkar on 19th April dismissed the petition. His Lordship said that in this particular case it was quite impossible to say that if the Collector came to the conclusion that it could not be said of this lady that she had a fixed and settled purpose of making her sole and permanent home in Great Britain he was acting, either arbitrarilly or capriciously. There could be two possible views on the point, but it could not be said that if an officer held that an English wife of an Indian national would ordinarily reside with her husband in India and could not have the fixed and settled purpose of making her sole and permanent home in Great Britain he was either acting arbitrarily or capriciously.

There was a provision laid down in the Act itself for determining whether the conditions laid down in sec. 40 (1) for the grant of the permit were or were not satisfied. Under sub-sec. (4) of sec. 40, the Legislature had provided a machinery whereby any question as to whether a condition had been satisfied should be finally determined and it was to that machinery that resort should be made by the petitioner if she wished to challenge the findings of the Collector that she did not satisfy the requirements of the provision to sec. 40 (1) (c) (i). [In 1952 sec. 40 (4) was added, which says : " If any question arises whether the conditions imposed by clause (c) of sub-sec. (1) are satisfied or not in any case, the State Government shall decide the question and its decision shall be final."]

There was an insuperable difficulty in the way of the pititioner doing so by reason of the fact that at no stage of the proceedings was she told that she did not satisfy a particular condition laid down in sec. 40. His Lordship was clearly of the opinion that it was the duty of the authority who refused a permit on the ground that the applicant did not satisfy any of the conditions of sec. 40 to inform the applicant of the reason for which the permit had been refused, so that she might be enabled to approach the State Government to determine whether she had or had not fulfilled the condition.

The only ground alleged in the affidavits in reply for not issuing the permit to the petitioner was that in the opinion of the Collector and the Director she had not satisfied proviso (a1) to sec. 40 (1)(c) (i). She had a right to approach the State Government to decide finally whether the officers of the Government were right in that view or wrong; and apparently if the State Government took the view that the officers were wrong in that view, there would be no objection to the permit being granted to the petitioner.

But the remedy of the petitioner, now that she knew the ground on which the permit had been refused, appeared to His Lordship to be to approach the State Government for determination of this disputed question and not a writ.

The only authority under the statute who could determine the existence of this particular question was the State Government. His Lordship said that the Court would have no jurisdiction to determine for itself whether or not the lady satisfied the requirements of proviso to section 40 (1) (c) (i).

In the result, the petitioner was not entitled to any relief on this petition and the petition stood dismissed.

ABOLITION OF JAGIRS

Rajasthani Act Uphold by Supreme Court

The Constitution Bench of the Supreme Court on 15th April dismissed over 200 petitions filed under Art. 32 of the Constitution by nearly 4,000 Jagirdars of Rajasthan challenging the validity of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952, under which the State Government had assumed power to resume the jagirs within its territory.

The 73-page judgment of the Court on the petitions was delivered by Mr. Justice T. L. Venkatarama Aiyar, who rejected the contentions raised on behalf of the petitioners on the question of the constitutional validity of the impugned legislation. He however allowed a few petitions filed in respect of izaras of lands dedicated for religious services on the ground that they were not covered by the Act.

The validity of the impugned Act was challenged in the Supreme Court on five grounds. Firstly, it was contended that the Rajpramukh of Rajasthan in the absence of a duly elected legislature had no competence to enact the law, and the Act in question was therefore not a valid piece of legislation. It was also argued that the Bill which became the present impugned Act was not prepared by the Rajapramukh as required by Art. 212-A (2) and that therefore the law was not validly enacted.

It was further contended that "resumption" was not one of the topics of legislation enumerated either in the State List or in the Concurrent List in the Seventh Schedule of the Constitution, and the Act was therefore ultra vires of the powers of the State.

The argument was also advanced that the impugned Act did not provide for adequate compensation, nor was there any public purpose involved in it, and so it contravened Art. 31(2) of the Constitution. It was further urged that the impugned Act was discriminatory and it was not saved by Art. 31-A of the Constitution which protected laws providing for the abolition of "estates" from attack on the ground that they infringed fundamental rights because the lands resumed were neither estates, nor grants similar to jagirs, inams or maufi.

The fifth argument advanced on behalf of some of the petitioners was that the properties sought to be resumed were not jagirs as defined in the Act, and the notifications under sec. 21 in so far as they related to them were illegal.

On the first argument Mr. Justice Venkatarama Aiyar relied on Art. 385 of the Constitution to hold that the Rajpramukh had power to enact the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952. His Lordship also rejected the contention that the Act, was bad for non-compliance with Art. 212-A (2) of the Constitution or for other procedural defects.

Regarding legislative competence of the State Legislature, Mr. Justice Venkatarama Aiyar held that the Act in substance was a law relating to acquisition and was thus covered by entry No. 36 in the State List.

Dealing with the contention raised on behalf of some of the petitioners that with reference to the properties held by them the impugned Act was not saved by the definition of "estates" in Art. 31-A of the Constitution, Mr. Justice Venkatarama Aiyar, said that they did not find any sufficient ground for putting a restricted meaning on the word "jagir" used in Art. 31-A of the Constitution. At the time of the enactment of that Article through the Constitution (First Amendment) Act 1951, the word had acquired both in popular usage and legislative practice a wide connotation, and it would be in accord with sound canons of interpretation to ascribe that connotation to that word rather than an archaic meaning to be gathered from a study of ancient tenures.

Moreover, His Lordship said, the object of Art. 31-A was to save legislation which was directed to the abolition of intermediaries so as to establish direct relationship between the State and the tillers of the soil, and construing the word in that sense, which would achieve that object in full measure, they must hold that "jagir" was meant to cover all grants under which grantees had only rights in respect of revenue and were not the tillers of the soil. Maintenance grants in favour of persons who were not cultivators such as the members of the ruling family would be jagirs for purposes of Art. 31-A.

On the basis of this interpretation of the word "jagir" used in Art. 31-A of the Constitution, Mr. Justice Venkatarama Aiyar held that the Bhomichara tenure of Marwar, Bhomat tenure of Mewar, Tikandaraj tenure of Shekhwati and Subaguzari tenure of Jaipur were covered by the words jagirs and maufi used in Art. 31-A of the Constitution and therefore the petitioners who owned these estates could not challenge the validity of the Rajasthan Land Reforms and Resumption of Jagirs Act, on the ground that it contravened the provisions of the fundamental rights chapter of the Constitution.

BOMBAY BIGAMY ACT

Marriages Outside the State Covered

CLARIFICATION BY THE HIGH COURT

A division bench of the Bombay High Court, consisting of Chainani and Gokhale, JJ., on 21st April clarified an important point of law in connection with the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, while allowing a revision application filed by Radhabai against her husband Mohandas Verhomal from a decision of a Presidency Magistrate acquitting her on a charge of bigamy.

The parties in the present case were married in Sind in 1941 and they came down to Bombay after the partition of India. They stayed together in Mahim for three years, after which they separated in 1951 as differences arose between them. Radhabai said that Mohandas

married a lady called Ambika at Gwalior on June 8, 1952. She therefore filed a complaint charging Mohandas with committing bigamy under the provisions of sec. 3 of the Act, read with sec. 4 (b).

Mohandas denied that he had contracted a second marriage or that he was domiciled in Bombay. He also urged that the Magistrate had no jurisdiction to try the case against him as the alleged offence had been committed outside his territorial jurisdiction.

The Magistrate upheld the plea of jurisdiction and ordered the acquittal of Mohandas, whereupon Radhabai filed the present revision application. The State of Bombay supported the application.

In their judgment Their Lordships first held that Mohandas had been residing in Bombay at the time of the second marriage and that the evidence on record disclosed that he had intended to settle permanently in Bombay. Mohandas was therefore a person who had his domicile in Bombay within the meaning of sec. 4 (b) of the Act, which declares a bigamous marriage to be void "if it is contracted beyond the limits of this Province after the coming into force of this Act and either or both the contracting parties to such marriage are domiciled in this Province."

The Court then considered the question whether the Bombay State Legislature had power to prohibit a person amenable to its jurisdiction from contracting a marriage outside its limits during the life-time of his first wife.

As the State Legislature could make such laws affecting all persons residing within its jurisdiction, it was difficult for Their Lordships to see why the State Legislature could not also require persons domiciled in the State (that is, having permanent homes in the State) to obey the law even when they went outside the State temporarily, because the consequences of their action were likely to arise within the State.

The object of sec. 4 (b), according to Their Lordships, was to compel permanent residents of the State to obey the State law with regard to marriages and to prevent evasion of the law by the commission of bigamy outside the State. The Act was enacted for the welfare and benefit of the people residing within the State and it was within the legislative competence of the State Legislature to enact it. Their Lordships felt that the Act should not be interpreted so as to allow it to be defeated by crossing the boundary and doing the act prohibited by it on the other side of the State's border.

The Act applied to marriages in which either or both of the parties contracting the marriage were domiciled in the State. There was therefore sufficient territorial nexus between such marriages and the State of Bombay, the nexus being provided by a party to the marriage having a domicile within the State. Their Lordships held that the Bombay State Legislature had not exceeded its territorial jurisdiction in enacting sec. 4 (b) and that the section was intra vires of the State Legistature.

Their Lordships, then dealing with the question whether the offences under sec. 5 of the Act were triable by a Magistrate in Bombay, referred to sec. 8 of the Act, which says: "Notwithstanding anything in the Code of Criminal Procedure, 1898, an offence under sec. 5 may be tried by any Court of a Presidency Magistrate or a Magistrate of a First Class," and said that the words therein "notwithstanding anything contained in the Code" referred to the determination of the place of trial, and that such provisions did not apply to cases falling under sec. 5 of the Act. Therefore, the offences under sec. 5 of the Act were justiciable throughout the State of Bombay.

Their Lordships therefore set aside the order of the Magistrate and directed him to dispose of the case on merits.

U.P. INDUSTRIAL DISPUTES ACT

Labour Appellate Tribunal's Decision Quashed

FAILURE TO EXERCISE JURISDICTION

The Kanpur Mazdoor Congress and the Electrical Workers' Union of Bareilly made a petition for a writ of certiorari praying that the judgment of the Labour Appellate Tribunal of 30th October 1953 dismissing the appeals of these registered trade unions of clerical and industrial workers be set aside.

With a view to finding out the proper basic salary and dearness food allowance which should be paid to the employees of textile and electricity works, the Government first appointed a committee to go into the matter. The committee made a report and after consideration of the report, the Government accepted many of its recommendations and disagreed with some of them and on 6th December 1948, it issued a Government order under sec. 3 (b) and (g) of the U. P. Industrial Disputes Act, 1947, laying down the principles for the payment of basic wages and dearness food allowance payable to clerks and other industrial workers of the textile and electricity undertakings. The order was limited in duration of time and the period during which it was to remain in force was extended on different occasions.

The workmen appeared to have been dissatisfied with certain portions of the order and a number of representations were made by them to the State Government. Nearly four years after the date of the passing of the above order, the State Government referred the dispute for adjudication on 20th November 1952. The award of the state industrial tribunal was delivered on 20th April 1953. In certain matters its opinion was that the clerical staff and some other industrial workers also should be given better conditions of service than those provided by the order of the State Government. Both parties appeared to be dissatisfied with the award and a number of appeals were filed before the labour appellate tribunal. The tribunal, on 30th October 1953, allowed the three appeals filed by the employers and dismissed the two filed by the workmen.

On 7th April Mr. Justice Chaturvedi at the Allahabad High Court allowed the writ petition and issued a writ of certiorari quashing the appellate tribunal's judgment and ordered that the tribunal should dispose of the petitioners' appeals according to law. His Lordship held that the appellate tribunal had failed, on a clearly erroneous view of law, to exercise the jurisdiction vested in it and that the error was apparent on the face of the judgment. His Lordship said the very fact that the Government referred this dispute for adjudication after a lapse of nearly four years showed that the Government was not certain that its previous order of 1948 did not require modification and in order to decide that matter, it could and did refer the question for adjudication by the industrial tribunal. By allowing the appeal and setting aside the decision of the state industrial tribunal on the ground that there was a Government order passed under clause (b) of section 3, the appellate tribunal had made it impossible now for the State Government to give its consent or revise the decision of the state tribunal.

CIVIL SERVICE RULES

Penalty of Reduction in Rank

ORDER SET ASIDE : NO OPPORTUNITY TO SHOW CAUSE

Mr. Justice P. Rajagopalan at the Madras High Court on 2nd March allowed a petition for the issue of a writ of certiorari filed on behalf of Mr. E. S. Devasahayam a Tahsildar of Tirunelveli district, to set aside an order of the Government.

The petition was filed under the following circumstances : The petitioner held a substantive post of Tahsildar in the Madras Revenue Subordinate Service, when he was appointed to the post of Deputy Collector in Madras Civil Service. This was a temporary appointment, which did not admit him to the membership of that service On April 6, 1949, six charges were framed against the petitioner by the Collector of Tirunelveli and he was asked to show cause why he should not be reverted to his substantive position as Tahsildar. The petitioner submitted his explanation on December 27, 1950, and the Government directed the removal of the petitioner's name from the list of Deputy Collectors and reverted him to the post of Tahsildar. He memorialized the Governor and that memorial was rejected. He submitted a petition to the Chief Minister for reconsideration and that too was rejected. Against this, the present application for the issue of a writ of certiorari to set aside the order of the Government was made.

His Lordship, in his judgment, observed that the main basis on which the validity of the order of the Government was challenged was that the petitioner had not been given an opportunity to show cause against the imposition of the penalty of reduction in rank. An opportunity was not, His Lordship went on, given to the petitioner before the Government punished him. The only question to which he had to address himself was whether the order terminating the appointment originally made under Rule 4 (b) of the Madras Civil Service Rules in form and substance should be declared invalid on the ground that the petitioner was not given an opportunity. In the case of the petitioner the order in form and substance imposed a penalty of reduction in rank from Deputy Collector to Tahsildar. In imposing that penalty, His Lordship stated, the Government contravened the provisions of Rule 17 (b) (2) of the Classification Rules and that vitiated the exercise of juridiction which the Government had to punish the petitioner.

In the end, His Lordship set aside the order of the Government and allowed the writ.

REVISIONAL POWERS UNDER SEC. 439, CR. P. C.

Supreme Court's Interpretation

Pilot U. J. S. Chopra was convicted by a Presidency Magistrate for an offence under sec. 66-B of the Bombay Prohibition Act and sentenced to undergo imprisonment till the rising of the court and to pay a fine of Rs. 250. He appealed to the Bombay High Court against the conviction and sentence, but the High Court summarily dismissed the appeal on 19th January 1953. Thereafter, the State of Bombay filed a criminal revision application with the High Court for enhancement of sentence.

When this application came up for hearing, the court was not satisfied that there was any ground for allowing the application. Counsel for the accused then wanted to argue his case for an acquittal, relying upon the Cr. P.C. which provided that the accused could show cause against his conviction when a notice for enhancement of sentence was issued.

The Court, however, did not allow counsel to argue this question and dismissed the application for enhancement of sentence.

Thereupon Chopra applied for leave to appeal to the Supreme Court. Leave was granted for the determination of the question whether a summary dismissal of an appeal preferred by an accused person precluded him from taking advantage of the provisions of sec. 439 (6), Cr. P. C., when he was subsequently called upon to show cause why the sentence imposed upon him should not be enhanced.

The Supreme Court on 25th March allowed the appeal and directed the High Court to allow the appellant to show cause against his conviction.

Two judgments were delivered: one by Mr. Justice S. R. Das and the other by Mr. Justice Bhagwati with whom Mr. Justice Imam concurred.

On the interpretation of sec. 439 (6), the Court held, by a majority, that if the judgment of the lower court had been replaced by a judgment of the High Court pronounced after a full hearing in the presence of both the parties,

there was no occasion at all for the exercise of the revisional powers under sec. 439 (1).

If, however, no such judgment had replaced that of the lower court, the High Court had the power to issue a notice for enhancement of the sentence, and, in spite of whatever had happened in the past, the accused had, while showing cause against the notice for enhancement of the sentence, also the right to show cause against his conviction.

NOTES

Desegregation in Public Schools

By the middle of last month the U. S. Supreme Court finished hearing arguments as to what procedures should be adopted for enforcing its historic decision of last year to the effect that state laws imposing or permitting racial segregation in their public school systems were unconstitutional. At present 17 States and the District of Columbia, which is the national capital, have segregated schools involving 8·2 million white children and 2·53 Negro children. It is expected that the Court will frame its decree on the subject by the end of this month when the present term of the Court will end. If this happens, a decision on the process of implementing its ruling will have been taken a year after the ruling was announced.

While the states urge a gradual end to the separation of white and Negro pupils, the Negroes have insisted that the Court's decrees should be such as to end segregation everywhere by September of next year at the latest. The Government through its Solicitor General recommended what he called a "middle course." It proposed that the Court, without ordering an end to segregation forthwith or without even fixing a deadline for all areas for the ending of segregation, should give to each area what in its opinion would be a reasonable time for the integration of its public schools. In order to ensure that such integration would come about as expeditiously as local conditions permitted and that officials in reluctant areas would not "drag their feet" or use the discretion left to them so as "to accomplish frustration," the Government suggested a well thought out plan of action.

In regard to the five pending cases which evoked the Supreme Court's ruling about the unconstitutionality of segregated public schools the Government suggested that the Court might remand these cases to the lower federal courts with instructions to local authorities to submit within 90 days a plan to end segregation "as soon as possible." If no satisfactory plan were offered, the courts should issue "appropriate orders" directing an end to be put to segregation at the beginning of the next school term. The courts would decide whether the plan was offered in good faith and would fix the earliest date for its completion.

A similar procedure was proposed for the other states. They would be called upon to submit plans for transition to an integrated school system. The district courts would examine the plans and make sure that no unnecessary delay would result in bringing about desegregation. Even where the plans were approved, the courts would require progress reports from time to time in order to see that no avoidable delay occurred in the execution of the programme. The courts themselves would be required to submit periodic reports to the Supreme Court, which would in this way retain jurisdiction to issue any further orders it might deem necessary to carry out its decree.

The essence of the suggestion is that while it should be possible for states and localities to work out varying plans suited to their local conditions, the approval of the plans and later their execution should be under the control of the lower courts, in order to secure that if the pace of integration is not uniform throughout the country it would be as quick as possible in the circumstances. It appears to us that the suggestion has great practical merit.

No Paid Informers to be Employed

The self-confessed perjury of a professional informer, Harvey Matusow (see p. iii: 211) has led to the discontinuance of the practice of employing such informers by the Government in the detection of crimes connected with communism. Matusow was produced before a federal judge for having committed perjury in the prosecution of 13 second-string communist officials. The judge convicted Matusow of giving false testimony which helped to convict and jail two of these thirteen officials. The informer had also charged that some Government attorneys had suborned in his perjury. The judge cleared these attroneys of this charge, but had observed that they had been "credulous" in accepting the evidence of "a completely irresponsible witness." New trials were ordered for the two communists whom Matusow had helped to convict, on grounds that each might have escaped conviction without Matusow's perjured testimony. The judge ruled that Matusow's false evidence did not affect the guilty verdicts against the eleven others.

The shock produced by Matusow's announcement that he had perjured himself against 280 persons in various investigations of communism was so great that the Attorney General declared that while the Justice Department would have to employ casual informers, it would no longer carry informers on its pay-roll as full time employees.

Segregation in Public Parks Outlawed

THE "SEPARATE BUT EQUAL" THEORY OVERTHROWN

The city of Baltimore and the State of Maryland operate the beach and bath-house facilities in two public

parks on the principle of racial segregation, denying the use of these facilities to Negroes. In the federal district court at Baltimore two petitions were filed praying that the city and the State be prohibited from enforcing the separation of races in the use of such facilities. The federal district court denied the injunctions, holding that segregation in public recreational facilities was permissible if both races were given equal facilities. This is the "separate but equal" doctrine adopted by the Supreme Court in 1896 in regard to transportation.

But, on appeal, the Fourth Circuit Court of Appeals on 14th March reversed the district court's decision, holding that segregation of the races in public parks and playgrounds was unconstitutional. It took its stand on the Supreme Court's decision of last May which scrapped the "separate but equal" doctrine in the matter of public schools. The Court said:

> It is now obvious ... that segregation cannot be justified as a means to preserve the public peace merely because the tangible facilities furnished to one race are equal to those furnished to the other. It also is obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the state.

This opinion puts racial segregation in public parks in the same class with racial segregation in public schools.

Permission to Tap Wires Refused

Under the law of New York State police officials have to obtain permission from the courts if they wish to tap telephone wires in order that the information so received might enable them to detect crime. Recently three such applications were made by the Police department, because the police suspected that the telephone was being used for bookmaking, and all the three applications were dismissed by the Supreme Court of the State in mid-January, Justice Hofstadter saying that he had granted similar applications in the past, but always with a sense of misgiving. The Judge went on to say:

> A tapped wire is the greatest invasion of privacy possible. However rationalized, its authorized use has its roots in the amoral doctrine that the end justifies the means. ... The tap is maintained continuously, day and night. Everything said over the line is heard, however foreign to the stated objective of the law-enforcement officers. As evil as an actual interception is the fear bred in the mind of the average citizen.

He also explained that some time ago he had laid down the rule that police officers to whom he granted the right to tap wires would have to turn in written reports of the results. But, he said:

> The reports received by me, instead of allaying my anxiety, merely deepened it. These showed some arrests and fewer convictions and then rarely, if ever, for a heinous offence. ... It cannot be said in partial extenuation of this revolting practice that it yields worthwhile results.

Denial of Passport

Mr. William Clark, chief justice of U. S. courts in Germany, was suspended a year ago, and later his diplomatic passport was confiscated, one good only for travel in the United States being granted to him. Mr. Clark has now brought a civil action against the Secretary of State, and the American Civil Liberties Union has filed an amicus curie brief in the case supporting Mr. Clark.

The brief argues that without due process of law no person may be denied a passport to leave the country, and such denial violates not only the Fifth Amendment but also the English common law tradition of freedom to travel first established by Magna Carta in the year 1215. The brief says:

> Here the Secretary has acted under no express law of regulation, but merely under his own unexpressed and presumed power to deny exit for reasons sufficient to himself. ... How can it be presumed that Congress, representing the people assembled, could have intended to vest in the Executive so arbitary and absolute a discretion to strip the people of constitutionally guaranteed rights? ...
>
> There is at stake a liberty believed essential to free men since Magna Carta. Nothing less than a full and fair hearing can serve to satisfy the demands of constitutional due process.

A Movie Ban Declared Unconstitutional

The city of New Haven in Connecticut proposed to make an ordinance banning from the city any commercial firm which had not received the Motion Picture Association's "seal of approval," but the ordinance has been declared illegal. The city's corporation counsel ruled that the suggested law would violate the First and Fourteenth Amendments. He added:

> It would be novel indeed to hale an inhabitant of Connecticut into Court, deny him the right of confrontation and other constitutional safeguards, and then proceed to penalize him for violating some rule promulgated by a voluntary and self-appointed group of standard makers in Hollywood, California.

Printed by Mr. K. G. Sharangpani at the Aryabhushan Press, 915/1 Shivajinagar, Poona 4, and published by Mr. R. G. Kakade, M. A., LL. B., Ph. D., at the Servants of India Society, Poona 4.