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The Indian Civil Liberties Bulletin

[A MONTHLY REVIEW]

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U. N. Representative's Report on Kashmir

Proposal to Plant a U. N. Force on Pakistani Soil

Dr. Frank P. Graham, the U. N. mediator, could hardly have made any other suggestion for the breaking of the Indo-Pakistani stalemate in regard to Kashmir than to urge the parties in dispute to make a fresh attempt to seek settlement by direct bilateral negotiations, helped if necessary by mediation on the part of the U. N. to smooth away differences but there seems no early prospect of the talks being initiated, not to speak of their making progress towards bridging the prevailing gulf between the disputants. India has rejected all the suggestions, including that of an early summit conference such as the one that was held in 1953. If India had shown reluctance to enter on any conversations with Pakistan, either with or without the presence of the U. N. mediator, because of the extreme political instability of Pakistani Governments that has become manifest latterly, no one would have regarded such reluctance as unreasonable. But the reasons advanced by the Indian Government are different: to start any negotiations on the disputed points would mean the aggressed party putting itself on the same level as the aggressor party and the former condoning the wrong that the latter has done. These objections only show that India from her past experience has become weary of carrying on long-drawn talks which end in nothing fruitful happening as a result of them, but since the Kashmir dispute is such that an amicable agreement must be reached on it one day, in our own interest as well as in the interest of international peace, we for our part feel no doubt that the objections now stated will be got over when a propitious moment arrives and fresh talks will in fact begin. The considerations stated by Dr. Graham so eloquently in the closing paragraphs of his report cannot fail to make their appeal to a politician of Mr. Nehru's stature.

But what we are immediately concerned with is India's rejection of a novel suggestion made by Dr. Graham which, by bringing about the demilitarization of the Pakistan-occupied territory of the Kashmir State, would eventually make it possible for a plebiscite to be held to determine the future political status and affiliations of the State. To the holding of such a plebiscite both India

Civil Liberties Conference

Ambala, 26th and 27th April

The All-India Civil Liberties Conference will hold its sixth session at Ambala on 26th and 27th April under the presidency of Mr. N. C. Chatterji.

The Punjab Civil Liberties Council, which is organizing it, requests all interested in the civil liberties movement to attend the Conference and help it to formulate sound views on the many subjects of great importance that it will have to consider such as

- The Punjab Press Act, 1956;
- The Supreme Court's judgment in a case concerning the application of the Act;
- Renewal of the Preventive Detention Act;
- Administrative Tribunals;
- Curtailment of Fundamental Rights in their application to the Kashmir State;
- The Press Council;
- Public Safety Acts of States.

Fee for Reception Committee members — Rs. 5;
fee for Delegates — Re. 1.

Further details can be had of—

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and Pakistan are irrevocably committed; and indeed, so far as India is concerned, a free plebiscite held under the United Nations auspices is her own offer, not forced upon her by the Security Council. But that was barred so far because of Pakistan's failure to carry out demilitarization. When it was known that Pakistan was not a mere silent

spectator but an actual participant in the tribal invasion of Kashmir territory, the United Nations Commission for India and Pakistan proposed, putting first things first, that the Government of Pakistan should first "withdraw its troops from the State" and then see to it that tribesmen similarly withdraw, and after both these withdrawals have been effected and when the Commission was satisfied about their adequacy, the Government of India should "begin to withdraw the bulk of its forces in that State." These withdrawals were to be a preliminary to the holding of the plebiscite. But since Pakistan failed to carry out her part of the undertaking, time never came for the plebiscite to be arranged.

With a view to resolving this deadlock caused by Pakistan's intransigence, Dr. Graham now suggests that a United Nations force be sent to the Pakistani side of the Pakistan-Kashmir border (not as Pakistan proposed last year to the Pakistan-occupied territory of the Kashmir State). Pakistan has already agreed to admit U. N. troops. If this is accompanied by a Pakistani withdrawal of her army from the area of Kashmir which she occupies, as is not unlikely, the only impediment to the holding of a plebiscite and the final and peaceful solution of the Kashmir problem would be removed, and as Dr. Graham says, the "continuous draining off" of the resources of both countries which, "cuts deeply into their hopeful programme for education, health, production and welfare" will at last be put a stop to. One would have thought that India would enthusiastically welcome this ingenious suggestion of Dr. Graham, in which "the onus of performance" is only on Pakistan and in respect of which India has to do nothing at all except that when it fructifies she should be ready to hold the plebiscite which will put an end to the present unsettled conditions in Kashmir State. But, curiously enough, India does not look with favour on this suggestion, saying in fact that even to promote it would be regarded by her as "an unfriendly act." Bakshi Ghulam Mohammed, who is given to making irresponsible statements, goes even farther: he sees in it a ruse on the part of imperialist powers to obtain a foothold in the sub-continent and to re-enter India. On the contrary, those powers which have such a design would desire nothing better than that India and Pakistan would be continually fighting with each other instead of solving the dispute which, in the words of Dr. Graham, is "corroding their relations" and eating into their vitals.

It may be that after all Pakistan will not, even in the presence of a U. N. force, withdraw her troops, but if this happens the responsibility for throwing a roadblock in the way of a permanent solution of the problem will once more be hers, and any sympathy other countries may have with her will be dissipated, and in any case India will be none the worse. But it may well be that Pakistan wants to take advantage of some face-saving device to do what she could have done without a U. N.

force being planted on her soil. If this be the case, the sending of the force to Pakistan will result in the "vacation of aggression" which India calls for. One can see no reason therefore for India taking such a hostile attitude to the suggestion. The "Times of India" says that the suggestion "is no more than a stratagem to force a plebiscite." Is a plebiscite of the Kashmiri people so unwelcome to the Government of India that it should resist anything which brings about demilitarization, which in itself would mean liquidation of aggression, but which sheerly because of India's commitment would make a plebiscite necessary? No doubt the "Times of India" thinks that "the accession of Kashmir to India was finalised by the people of the State" when elections to Kashmir's Constituent Assembly were held. Bakshi Ghulam Mohammed has been repeating it ad nauseam; even Mr. Krishna Menon said so last year before the Security Council. But the Government of India as such never adopted that attitude. Indeed, when in October 1950 the Kashmir National Conference passed a resolution asking for elections to the Constituent Assembly which would determine "the future shape and affiliation of the State" and Pakistan protested against it in the Security Council, and when on 30th March 1951 the Security Council stated in a resolution that any action the National Conference might take in this direction "would not constitute a disposition of the State" in accordance with the mutual acceptance of a plebiscite by India and Pakistan, the Government of India was very apologetic about the National Conference resolution, declaring that though it could not physically prevent Kashmir's Constituent Assembly from expressing its opinion about the future of Kashmir, it would not be bound by this opinion.

Though Mr. Krishna Menon has said that the accession of Kashmir to India is final, the Government of India has never accepted that position and one can never imagine that Mr. Nehru, sedulous as he always is on the strict observance of international ethics, would support this stand. It is on record that when Lord Mountbatten, as Governor-General of India, asked in the Defence Committee towards the end of October 1947 that "he should be allowed to add (in accepting the Maharaja's accession offer) that this was conditional on the will of the people being ascertained as soon as law and order were restored," this "was at once freely accepted and unilaterally proposed by Nehru." The condition being accepted, Mr. Nehru on 21st November 1947 informed the Premier of Pakistan: "I have repeatedly stated [even within a month of the despatch of Indian troops he could say "I have repeatedly stated"] that as soon as the raiders have been driven out of Kashmir or have withdrawn and peace and order have been established, the people of Kashmir should decide the question of accession by plebiscite or referendum under international auspices such as those of the United Nations." In fact even in the

very complaint about the violation of Kashmir territory which India took to the United Nations, she reiterated the pledge "that once the soil of the State had been cleared of the invader and normal conditions restored, the people would be free to decide their future by the democratic method of a plebiscite or referendum which, in order to ensure complete impartiality, might be held under international 'auspices.'" And Mr. N. Gopalaswami Ayyengar as India's representative at the meeting of the Security Council which considered the complaint, described this self-imposed pledge as "high-principled statesmanship," and he went so far as to say that "whether she (Kashmir) should withdraw from her accession to India, and either accede to Pakistan or remain *independent*,—all this we have recognized to be a matter for unfettered decision by the people of Kashmir after normal life is restored to them," thus supporting Sheikh Abdullah's claim that a plebiscite includes within its compass even independence for Kashmir as a

sovereign State. India's pledge to offer self-determination to the Kashmiri population is, indeed an act of high-principled statesmanship, but now for India to do something which would seem as a crude stratagem somehow to go behind the pledge would be the very reverse of high-principled statesmanship. And why should India be guilty of such a breach of faith? Has Mr. Nehru reason to fear that the vote of the people of Kashmir would possibly go against the confirmation of the admittedly conditional accession of the State to India? But even if there were such a possibility and the Kashmiris proved in the end to be averse to the linking up of the fate of Kashmir with India's, would there be any practical advantage in the long run in holding the State by force in the Indian Union, as Hungary has been kept within the fold of the Soviet empire? In any case, for India the moral integrity of her conduct must be the overriding consideration.

SAFEGUARD AGAINST "THIRD DEGREE" PRACTICES

EXCLUSION OF CONFESSIONS BECAUSE OF DELAY IN ARRAIGNMENT

The criminal law of the United States (as of every democratic country), and of nearly all the states in the U. S. A., provides that the police may not arrest a person upon mere suspicion but only on "probable cause" and then must bring him as quickly as possible before the nearest available committing magistrate [cp. Art. 22 (2) of our Constitution] to show that legal cause exists for detaining the arrested person. The magistrate informs the arrested person of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. If at the preliminary examination it appears to the magistrate that there is probable cause to believe that an offence has been committed and that the arrested person has committed it, the magistrate orders a trial; otherwise he discharges him. So much is common to all countries. But the U. S. Supreme Court has interpreted the provision of law that the arrested person shall be brought "without unnecessary delay" before the committing magistrate so strictly as to leave no time for the police to start on a process of interrogating the arrested person and eliciting from him damaging statements to support his arrest and ultimately extracting a confession of the offence before taking him to the magistrate. The Court has done this by holding that any such statements or confession obtained in these circumstances from federal prisoners are inadmissible in evidence.

A unanimous judgment to this effect was rendered on 24th June last year in the case of *Mallory v. United States*, which has disturbed the police so much that a proposal is now being put forward so to change the law

as to admit any confession, if voluntarily given, into evidence and thus to reverse the Supreme Court's decision.

Since we did not report the case at the time, some details of it may now be given to enable the readers to appreciate the issue. Andrew Mallory, a 19-year-old lad of limited intelligence was arrested by the police on suspicion of rape. Even though the police had ample evidence from other sources for regarding him as a chief suspect, they did not place him before a magistrate at once. They detained him in the police headquarters "within the vicinity of numerous committing magistrates"; they questioned him for half an hour; and when this interrogation produced no confession, they asked him to submit to a "lie-detector test." After four hours of detention at police headquarters, he was subjected to steady interrogation by the operator of the lie-detecting machine for an hour and a half. Still no confession came; and it was only after he had dictated the confession to a typist that the police were prepared to take him to a committing magistrate. The confession was introduced in evidence at his trial and he was convicted and sentenced to death. The Court of Appeals affirmed, but the Supreme Court on certiorari reversed.

Mallory was arrested between 2 and 2-30 in the afternoon but the police placed him before the committing magistrate only the next morning, though they could easily have done so much earlier. The question before the Court was whether this delay in arraigning him was not in violation of the requirement of Rule 5 (a) of the Federal Rules of Criminal Procedure to the effect that

the arresting officer "shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offences." The Court ruled that Mallory's detention was contrary to this Rule. It said:

Provisions related to Rule 5 (a) contemplate a procedure that allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate.

Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But the delay must not be of a nature to give opportunity for the extraction of a confession.

We cannot sanction this extended delay, resulting in confession. . . . In every case where the police resort to interrogation of an arrested person and secure a confession, they may well claim, and quite sincerely, that they were merely trying to check on the information given by him. Against such aim and the evil potentialities of the practice for which it is urged stands Rule 5 (a) as a barrier.

Presumably, whenever the police arrest they must arrest on "probable cause." It is not the function of the police to arrest, as it were, at large, and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on "probable cause."

The Court further held that the confession obtained under the circumstances disclosed in the case was inadmissible. This holding, it was explained, was necessary "in order adequately to enforce the congressional requirement of prompt arraignment."

McNabb v. United States

In ruling inadmissible "incriminating statements elicited from defendants during a period of unlawful detention" (i. e., detention for a period beyond that required for taking arrested persons before committing magistrates) as a sanction against "unwarranted detention," which leads "to tempting utilization of intensive interrogation, easily sliding into the evils of 'the third degree,'" the Court followed the earlier decision of *McNabb v. United States*, 318 U. S. 332 (1943). In this case three young McNabbs, two twin brothers and the third a cousin, were convicted of second-degree murder of an official of the Bureau of Internal Revenue. Incriminating statements were secured from them while in police custody and these statements were admitted in evidence at the trial and formed the basis of their conviction.

Freeman and Raymond McNabb, twin brothers, were arrested in the middle of the night at their home. Instead of being brought before a United States Commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. Benjamin's (the cousin's) confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made.

The Court ruled that the petitioners' confessions obtained in such circumstances could not be received in evidence against them and that their convictions based on this evidence could not stand.

It should be noted that the judgment does not show that the Court held that McNabbs' confessions were not voluntary and therefore excludable from evidence. Involuntary confessions are of course constitutionally inadmissible because of violation of the provision of self-incrimination in the Bill of Rights. The Court held that the confessions must be excluded because the arresting officers failed to comply with the requirement of law to take them promptly before a committing magistrate and it announced this rule of evidence, as a sanction against third degree methods, by virtue of its supervisory authority over the administration of criminal justice. The Court said:

While the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice", which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. . . .

The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. And in formulating such rules of evidence for federal criminal trials the Court has been guided by

considerations of justice not limited to the strict canons of evidentiary relevance.

This rule regarding the inadmissibility of evidence secured from prisoners under police custody by subjecting them "to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers" was laid down in order to ensure proper enforcement of the congressional law requiring the arrested persons to be placed "without unnecessary delay" before judicial officers. The purpose of this law was thus described by the Court:

A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counselled that safeguards must be provided against the dangers of the overzealous as well as the despotic.

Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For, this procedural requirement checks resort to those reprehensible practices known as the "third degree" which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement.

Speaking of the treatment meted out to the McNabbs, the Court said:

Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of conviction in the federal courts would stultify the policy which Congress has enacted into law.

We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies congressional

legislation. The history of liberty has largely been the history of observance of procedural safeguards, and the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.

Bills are now introduced with a view to reversing this decision laying down the rule that confessions obtained from defendants while in illegal detention may not be used in evidence against them. A Senate sub-committee on Constitutional Rights began hearings on these bills on 7th March, and the first witness to plead against the Supreme Court's ruling was Judge Holtzoff, the very judge who sat in the Mallory case and sentenced the defendant to death. He argued that the exclusion of confessions because of a delay in arraignment "often unnecessarily blocks the work of the police" and lets the guilty go free. This reflects the police view that they can work more efficiently if they question suspects before bringing them before a magistrate for arraignment.

These arguments were countered on the opening day by three witnesses—Professor Sutherland of the Harvard Law School and two well-known criminal lawyers of Washington. They argued as follows: Bringing a defendant promptly before a magistrate was the only way to make sure he was told of his constitutional rights to have a lawyer, avoid self-incrimination and have bail. The police are not likely to announce these rights. A prompt arraignment was the only way to be certain that the police did not break the law by arresting persons on mere suspicion. At a magistrate's hearing the police have to show "probable cause" for arrest. There was no real way to check later whether a confession was voluntary. The best method to prevent the physical or psychological coercion of a prisoner is not to let him remain indefinitely in the exclusive control of the police. Finally the only way to make the police obey the requirement of prompt arraignment was to deprive them of confessions if they should disobey. Professor Sutherland said that he knew of few cases in which policemen who had illegally detained or coerced a prisoner were punished criminally or held liable for damages. The only "effective sanction," he said, is for courts to exclude confessions so obtained;

Obscene Libel

The "Economist" of 8th March draws attention to the urgent necessity of adopting legislation to straighten out the mess created largely by the judgment of Chief Justice Cockburn in *Regina v. Hicklin* 3 Q. B. 360 (1868), in which he said that the test of obscenity should be:

Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall,

As this judgment is held to be controlling in India, we should be very deeply interested in the matter. A strict application of this test has brought many authors and publishers of the highest reputation into trouble. Latterly, some judges have dared to depart from the Hicklin test, but where the test is followed there is almost no defence for an author or a publisher. As the "Economist" says :

There have been enlightened judges who have interpreted the Cockburn judgment with liberal mind. They have refused to condemn a book because it might have an undesirable effect upon some gawky schoolgirl or spotty adolescent boy. They have not considered that a book should be judged by the standards of a mentally or emotionally perverted adult. But such judges have been in the minority. More often juries have been directed to regard it as their moral responsibility to condemn any book containing explicit references to matters which are part of their normal adult lives. It has been held that such books *might* fall into wrong hands. For publishers and authors, confronted by that kind of direction from the bench, defence has often been futile. There is no way of preventing any book sold in the ordinary commercial market from falling into the hands of anybody at all.

It will be noted that in the U. S. A. the Hicklin test has latterly been explicitly rejected. In *Roth v. United States* (vide iv : 307 of the BULLETIN), the Supreme Court said :

The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedom of speech and press. [The test now adopted in the U. S. A. is :] whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

Another defect of the present British law is that it takes no account of the literary quality of a book charged with obscenity, and that the author or publisher is not allowed to bring in expert evidence to guide the jury. On this point the "Economist" says :

An adult, educated person would think it necessary to consider the quality of the thought and of the writing before deciding whether a book was obscene and likely to corrupt or not. But this is precisely what the law does not allow. No expert evidence as to literary quality is permitted. It is possible to argue that a jury might be thrown into a grand confusion by a conflict of opinion among authors and critics called to testify. But that confusion would be preferable to the present situation in which the jury are left in ignorance

about the assessment of the book by fellow-writers. Nor are they asked to make any assessment of that kind for themselves. They are always brought back to the Cockburn judgment, and that judgment is totally unconcerned with literary values.

The "Economist" then goes on to draw attention to the hardships created by the application of the Obscene Publications Act of 1857 concerning search and seizure — and destruction — of books supposed to be obscene. [We referred to this subject at p. iv : 49 in dealing with our Horror Comics Bill because the Bill, now enacted, provides for similar powers of search and seizure.] Our contemporary says :

In some ways an even greater evil in the law is that any bumble of magistrates may, by an Act of 1857, order the destruction of a book without author or publisher having the right to be heard in its defence. In the worst recent year, 1954, the Swindon magistrates ordered the destruction of Boccaccio's "Decameron," by which the civilized world, unconscious of the moral dangers to which it was exposing itself, had been entertained for some six hundred years. The destruction of Boccaccio's work can be treated as a joke; the destruction of the work of living authors cannot. Frequently they do not hear of an impounding until the deed has been done and it is too late even to protest. A bookshop can be raided and, if a book of literary merit happens to be on the shelves along with some paper-backed smut, then it has every prospect of being "arrested" and bundled off in the van with the rest.

The effect upon authors and publishers of prosecution for obscenity, even if found not guilty, is injurious. They feel that the stain stays on their names. Less obviously, an author's confidence can be disturbed, and a publisher may well be deterred from showing ever again the kind of courage that may land him in the dock. Printers and booksellers may be even more cautious about the work they handle, and when officialdom is convulsed with one of its cyclical fits of morality, the trade runs for safety by exercising an unofficial censorship, damaging to authors and publishers and to literature as a whole.

To cure these defects in the law Lord Lambton last year brought forward a bill, which was referred to a select committee, but, according to procedure, was dead because the committee was unable to report by the end of the parliamentary session. The bill proposed, among other things, that the prosecution should be obliged to show that the producers of a book knew it to be obscene; that expert evidence on its literary quality should be received by the courts; that a book should be judged, not on passages isolated from their context; but on its dominant effect when read as a whole; and that it should no longer be

possible for a book to be destroyed by the Customs and Excise without a magistrate's order. Though the bill itself is dead, the select committee on it has been revived and charged with a broader task of considering "whether it is desirable to amend and consolidate the law relating to obscene publications." The committee's report is expected to be published soon, and it was in view of this that the "Economist" has brought the subject to the notice of the public as a matter that requires urgent consideration. The paper has made another suggestion which deserves consideration; it is that "all prosecution must be subject to the imprimatur of the Attorney-General, thus ensuring a uniformity in the administration of the law which is conspicuously and ridiculously lacking at present." It should be noted that the British Horror Comics Act has such a provision, though our Act lacks it.

[See "The Test of Obscenity" in the "Notes" column in this issue.]

COMMENTS

Repression in Kashmir

ABDULLAH REITERATES DEMAND FOR A PLEBISCITE

Sheikh Abdullah's obdurate refusal to recognize the validity of Kashmir's accession to India unless confirmed by an approving vote of the people of the State as indicated in a free plebiscite held under the auspices of the U. N. has posed a difficult problem for the Bakshi regime now in control. It is clear that the Sheikh's advice to the Kashmiri population would be not to change over from India to Pakistan, but to maintain an independent status for Kashmir, seeking the help of both India and Pakistan in that venture. He contends that the self-determination that has been solemnly promised to the State permits of this as an alternative to accession either to India or to Pakistan. If Sheikh Abdullah is adamant in holding on to the pledge of a plebiscite, so is the Bakshi regime adamant in its plea that Kashmir's accession to India is final and irrevocable. The State's National Conference, the ruling party, passed a resolution saying that the issue of a plebiscite was no longer valid as the Constituent Assembly of the State had already confirmed the State's accession to India, and that this decision could not be overthrown. Two conferences of non-Kashmiri Muslims were also got together which voiced the same feelings. The Premier has left no one in doubt that any attempt to overturn the decision about accession would be regarded by the State Government as treason, and his warnings that severe action would be taken against those who would break the solidarity and integrity of the State have been followed up by a new spurt of repression. Public meetings and demonstration have been banned in the State and arrests are taking place, Maulana Mohammed Syed Masoodi, formerly General Secretary of the National Conference and a close

associate of Sheikh Abdullah, has been detained under the Preventive Detention Act for his "subversive activities." (Although Premier Bakshi asserts that he is confident that Kashmiris would not be misled by the Sheikh's false and malicious propaganda for a plebiscite, the Nationalist Conference thought it necessary to carry on an intensive campaign of political education of the people of the State.)

Acharya Kripalani, leader of the Socialist Party, condemned this repression in the Indian Parliament, while criticising India's steadily growing military budget. He remarked that an increase of about Rs. 100 crores in military expenditure in recent years was thoroughly unjustifiable when India was faced with no danger from any quarter. If the increase in armaments was thought to be necessitated by the military aid which Pakistan received from the U. S. A., Mr. Kripalani declared that the fear that the aid would be turned against India was baseless; he believed that the U. S. A. Government would never let Pakistan use the armaments she received from it in any aggressive designs on India, and he recalled how the U. S. A. countered Britain and France when they attacked Egypt. The truth of the matter was, he said, India was suffering from the same fear complexes and neuroses on which Mr. Nehru was never tired of blaming other countries. According to him, India was being accused of hypocrisy, of talking one thing and doing another. He said:

We preach to the world that there should be no nuclear tests, that there should be no use of nuclear weapons. But we go on increasing what are called the orthodox weapons. If anybody suggested to us that we should leave the orthodox weapons, because they are more destructive, and take to swords and arrows, would we listen to such advice? How could we then advise people who have far sharper instruments of destruction to leave those weapons? How can we ask Europe not to be afraid of Russia, or the Russian people not to be afraid of the U. S. A. when we are afraid of Pakistan? I believe that we are giving the impression that we do not mean business.

Indeed, Mr. Kripalani said, India, the land of the Mahatma, should set an example of unilateral disarmament to the war-weary world. And coming back to Kashmir, he remarked that if we wish to save Kashmir we must rely upon the people of Kashmir, and asked: Has India tried to get a good government there or helped the Kashmiris to have full civil liberties?

If India thinks an increase in her military establishments has become necessary because of the military help Pakistan receives from the U. S. A., Pakistan on the other hand is firmly convinced that India's increased military expenditure could only be understood by India's preparations against herself. And it is interesting to observe how Pakistani newspapers come to the conclusion that the reason advanced by Mr. Nehru for going back upon

the pledge of a plebiscite in Kashmir, viz., that the entire situation was changed and the balance of power was upset when Pakistan entered upon military pacts with other countries, was but an excuse. One paper says that India was going to spend this year Rs. 278 crores—a third of her income—on military establishments. Was the money to be spent on the propagation of non-violence which Mr. Nehru is constantly preaching to the world? India has so far received Rs. 463 crores from other countries by way of pecuniary help and has been promised further aid of Rs. 350 crores, though this aid is not specifically military. Is there in principle any difference between Pakistan receiving from a friendly country limited military help for defensive purposes and India receiving as much as Rs. 463 crores of help from other countries, part of which she can utilise on armaments, so far as the maintenance of balance of power is concerned?

NEWS OF CIVIL LIBERTY UNITS

Punjab Civil Liberties Council PROTEST AGAINST POLICE EXCESSES

The Punjab Civil Liberties Council, which has recently formed several Civil Liberties Unions in the State, at a meeting held on 14th March, elected Pandit Shri Ram Sharma, M. L. A., as its President.

The meeting then adopted the following resolutions :

This meeting deplores that in carrying out their functions, the police in general, especially in the subordinate ranks, employ highly objectionable and unlawful methods in the investigation of crime, such as use of outrageous and inhuman methods for extracting confessions from suspected persons, abuse of powers, violating the fundamental liberties and rights of the citizens, etc. Such behaviour results in untold sufferings to the people and thus brings the Government into disrepute.

The Council, therefore, urges the Punjab Government to appoint an independent commission of inquiry to examine the present activities of the police in the State and devise ways and means of reforming the administration.

The meeting suggests to the Punjab Government to appoint special prosecuting officers who should be attached to the High Court and whose exclusive function should be to entertain complaints against police excesses and violations of law, to investigate into such complaints and then to prosecute the offenders.

The meeting drew the attention of the Punjab Government to the shocking allegations contained in Dr. G. C. Narang's letter about inhuman cruelties perpetrated on Shri Jigyasu, published in the "Tribune" dated March 9, and to the necessity of instituting a thorough inquiry through a senior judicial officer.

The Council urged upon the Chief Minister the necessity of an early and impartial investigation by an officer of the status of a High Court Judge into the distressing allegations of police excesses and barbarities in the Bahu Akbarpur and Nayabans occurrences.

COMMISSIONS OF INQUIRY ACT

Supreme Court's Decision

IN INQUIRY INTO DALMIA-JAIN CONCERNS

The constitutional validity of the Commissions of Inquiry Act, 1952, and the notification of the Central Government setting up a Commission of Inquiry to investigate the affairs of nine Dalmia-Jain concerns was impugned in an appeal filed before the Supreme Court by Mr. Ramkrishna Dalmia and four others.

The Commissions of Inquiry Act was enacted "to provide for the appointment of commissions of inquiry and for vesting such commissions with certain powers." The material portion of sub-sec. (i) of sec. 3 of the Act provides :

The appropriate Government may, if it is of opinion that it is necessary so to do and shall, if a resolution in this behalf is passed [by the legislature], by notification in the official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly.

In exercise of the powers conferred on it by sec. 3, the Central Government issued a notification on 11th December 1956 appointing a Commission of Inquiry, with Mr. Justice Tendolkar as chairman, to inquire into the administration and affairs of certain firms promoted or controlled by the appellants. The notification said it appeared that there had been gross irregularities in the management of companies connected with the appellants and manipulation of their funds. The notification further stated that it appeared to the Government that the moneys subscribed by the investing public in such companies had been used in a very considerable measure not in the interest of the companies but for the ultimate personal benefit of those in control. The Commission was required to point out irregularities or frauds if any and to suggest corrective measures.

The appellants first filed petitions in the Bombay High Court challenging the validity of the notification and also of the Act, but the High Court upheld the validity of the Act and all the clauses of the notification excepting the last part of cl. 10. The matters on which the Commission was to report under this clause were :

Any irregularities, frauds or breaches of trust or action in disregard of honest commercial practices or contravention of any law (except contraventions in respect of which criminal proceedings are pending in a court of law), in respect of the companies and firms whose affairs are investigated by the Commission which may come to the knowledge of the Commission, and the action which in the opinion of the Commission should be taken as and by way of securing redress or punishment or to act as a preventive in future cases.

The High Court held invalid the part of cl. 10 of the notification which called upon the Commission of Inquiry to make recommendations about "the action which in the opinion of the Commission should be taken as and by way of securing redress or punishment or to act as a preventive in future cases." The High Court rejected the principal contention of the appellants that the notification was in excess of the legislative competence of Parliament. The other objections to the validity of the notification and the enactment raised by the appellants before the High Court were that the notification contravened Art. 14 of the Constitution; that since one clause of the notification was ultra vires the whole notification must be declared void; that in setting up the Commission the Government had encroached upon the judicial functions of the State and that the action of the Government was prompted by a mala fide motive and to secure a collateral purpose.

As the High Court rejected all these contentions the appellants came to the Supreme Court, having obtained a certificate of fitness to appeal from the High Court. The Supreme Court also had before it an appeal by the Union Government against the invalidation by the Bombay High Court of a part of cl. 10 of the notification.

SUPREME COURT'S JUDGMENT

The Constitution Bench of the Supreme Court on 28th March dismissed the appeals by Mr. Ramkrishna Dalmia and others and allowed the Union Government's appeal in part. It was contended by Mr. Dalmia and other appellants that since the Commissions of Inquiry Act enabled the Government not only to hold an inquiry but to vest additional powers in the Commission, it was ultra vires; that the notification transgressed the ambit of the Act inasmuch as it gave the Commission powers which were not contemplated by the enactment itself and did not relate to any "definite matter of public importance," and that since all the terms of cl. 10 of the notification were necessary to the scheme of the notification and were not severable, the entire notification must go if any portion of the clause is bad.

On the question of the validity of the Act, the Court held that the legislature was fully competent to enact a law with respect to inquiry and leave it to the appro-

priate Government to set up a Commission of Inquiry under certain circumstances referred to in the Act. The Court said :

The Commission was merely to investigate and record its findings and recommendations without having any power to enforce them. The inquiry or report cannot be looked upon as a judicial inquiry in the sense of its being an exercise of judicial function properly so called, and consequently the question of usurpation by Parliament or the Government of the powers of the judicial organs of the Union of India cannot arise on the facts of this case.

With regard to the contention that whereas the Act only authorized the appointment of a Commission to inquire into any "definite matter of public importance," in the present case no such matter was involved and that therefore the notification went beyond the powers of the Government under the Act, the Court, rejecting this contention, stated that the "act or conduct of individuals may assume such dangerous proportions as may well affect public well-being and thus become a definite matter of public importance. We do not, therefore, agree that the notification should be struck down for the absence of a definite matter of public importance calling for an inquiry."

The Court held that only that portion of cl. 10 of the notification which called upon the Commission of Inquiry to recommend action to be taken "as and by way of securing redress or punishment" was ultra vires of the Act and stood deleted while the rest of the clause was valid.

ART. 14 OF THE CONSTITUTION

It was contended that the Act and the notification violate Art. 14 of the Constitution because the Act vests Government with an unguided and arbitrary power to select any individual for purposes of inquiry; that the Act makes no reasonable classification based on any intelligible differentia; that even if the Act sets out some policy and declares the principle which is to guide the Government, in the present exercise of power the Government has failed to exercise its discretion properly and has acted so as to discriminate against the appellants; and finally that the petitioners and their companies have been singled out arbitrarily for the purpose of hostile and discriminatory treatment and subjected to a harassing and oppressive inquiry. On this point the Court examined its earlier judgments and found that the decisions of the Court established :

(a) That a law may be constitutional even though it related to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others that single individual may be treated as a class by himself;

(b) That there is always a presumption in favour of the constitutionality of an enactment and the bur-

den is upon him who attacks it to show that there has been a clear transgression of the constitutional principles ;

(c) That it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds ;

(d) That the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest ;

(e) That in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times, and may assume every state of facts which can be conceived existing at the time of legislation ; and

(f) That while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

On these considerations and in view of the principles applicable to cases of a valid classification under Art. 14 the Court held that the enactment and the notification were valid except as to the words "as and by way of redress or punishment" in cl. 10 cited above.

With regard to the contention of the appellants that the Government had selected them arbitrarily for hostile treatment, the Court referred to the allegations which had been made against them. These allegations were that "a small group of persons had from before 1946 acquired control over a number of companies including a banking company and an insurance company; that the funds of the companies were utilized in purchasing shares in other limited companies having large reserve funds with a view to getting control over them and utilizing those funds for acquiring shares in other companies or otherwise utilizing those funds for the personal benefit of these individuals, etc." The Court said :

The question before us is not whether the allegations made on the face of the notification and in the affidavits filed on behalf of the Union of India are true but whether the qualities and characteristics, if honestly believed to be found in the petitioners, are so peculiar or unique as to constitute a good and valid basis on which the petitioners and their companies can be regarded as a class by themselves.

The Court held that the facts stated supported the presumption of the constitutionality of the notification.

On these findings the Court dismissed the petitions and appeals except to the extent indicated above with regard to cl. 10.

WORKING JOURNALISTS' ACT

Upheld by Supreme Court but for one Section

WAGE BOARD DECISION DECLARED ULTRA VIRES

In June 1957 writ petitions were filed in the Supreme Court under Art. 32 of the Constitution by the Press Trust of India and by the owners of several newspapers challenging the constitutional validity of the Working Journalists of Act of 1955 and the legality of the decisions of the Wage Board constituted thereunder, fixing the scales of wages for working journalists in the newspaper industry, and five of these petitioners also appealed against the Wage Board decisions under Art. 136. On 19th March the Constitution Bench of the Supreme Court in a unanimous decision upheld the validity of the Act except for sec. 5 (1) (a) (iii), which requires payment of a gratuity in cases of voluntary resignation after three years of service as well as in those of resignation. This section the Court held imposed an unreasonable restriction on the petitioners' right to carry on business and was liable to be struck down as unconstitutional.

Apart from challenging the vires of the impugned Act, the petitioners contended that the decision of the Wage Board itself was illegal and void. The Court stated that the decision of the Wage Board could not be challenged on the grounds that the impugned Act under which the decision was made is ultra vires or the decision itself infringes the fundamental rights of the petitioners. In these circumstances, it considered the challenge only on the third ground, viz., that the decision is ultra vires the Act itself, and in respect of one of the contentions advanced by them against the Wage Board, viz., failure to consider capacity to pay, the Court's judgment was in favour of the petitioners. The judgment on this point resulted in the Wage Board's decision being set aside.

Before proceeding with consideration of the rival contentions urged by the parties, the Supreme Court considered the principles of wage fixation and the machinery normally employed for the purpose in various countries. It examined the concept of "the living wage," "the minimum wage" and "the fair wage" and thereafter stated the following principles which should govern wage fixation in industry.

(1) In the fixation of rates of wages which include within its compass the fixation of scales of wages also, the capacity of the industry to pay is one of the essential circumstances to be taken into account except in cases of

bare subsistence or minimum wage where the employer is bound to pay the same, irrespective of such capacity.

(2) The capacity of the industry to pay is to be considered on an industry-cum-region basis after taking a fair cross section of the industry.

(3) The proper measure for gauging the capacity of the industry to pay should take into account the elasticity of demand for the product, the possibility of tightening up the organization so that the industry could pay higher wages without difficulty, and the possibility of increase in the efficiency of the lowest-paid workers resulting in increase in production, considered in conjunction with the elasticity of demand for the product no doubt against the ultimate background that the burden of the increased rate should not be such as to drive the employer out of business.

Dealing with the question whether the Wage Board had taken into consideration the capacity to pay of the newspaper industry, Mr. Justice Bhagwati, who delivered the judgment of the Court, said that after carefully examining the proceedings of the Wage Board and the different tables and statements prepared by them, they did not see any satisfactory evidence to show that the capacity of the industry to pay had been examined genuinely by the Board in fixing the wage structure.

It was no doubt open to the Board, His Lordship said, not to attach undue importance to the statements of profit and loss accounts submitted by various newspaper establishments, but since these statements prima facie showed that the trade was not making profit, it was all the more necessary for the Board to satisfy itself that the different classes of newspaper establishments would be able to bear the burden imposed by the wage structure which the Board had decided to fix.

Mr. Justice Bhagwati observed that the whole of the record before the Board, including the Chairman's note, gave no indication at all that an attempt was made by the Board to consider the capacity of the industry to pay in this manner. His Lordship said :

There is nothing on the record to suggest that both as regards the rates of wages and the scales of wages which it determined the Wage Board ever took into account what the impact of its decision would be on the capacity of the industry to pay either as a whole or region-wise.

If they had been satisfied that the Board had considered this aspect of the matter, His Lordship said, they would naturally have been reluctant to accept the challenge to the validity of the decision on the ground that the capacity to pay had not been properly considered.

After all, Mr. Justice Bhagwati said, in cases of this kind where special boards were set up to frame a wage structure, this Court would normally refuse to constitute

itself into a court of appeal on questions of fact, but in the present case, an essential condition for the fixation of wage structure had been completely ignored and so there was no escape from the conclusion that the Board had contravened the mandatory requirements of sec. 9 of the Act and in consequence its decision was ultra vires the Act itself.

His Lordship said that on a consideration of all the grounds of attack levelled against the validity and the binding nature of the decisions of the Wage Board, they had, therefore, come to the conclusion that the decisions could not be sustained and should be set aside, and the petitions allowed together with the appeals.

SALES TAX VALIDATION ACT 1956

Levy of Sales Tax

By States on Inter-State Sales

SUPREME COURT'S MAJORITY JUDGMENT

Some cotton yarn dealers in the city of Madras carrying on business in Andhra were asked by the Andhra sales tax authorities to submit returns of their sales in which goods were delivered in the Andhra State for consumption. These dealers, among whom were Mr. P. V. Sundaramier, A. M. Rajalingam Chettiar and Pokkali Radhakrishniab Chetty, disputed the liability of the Madras dealers to pay any tax in respect of sales to the Andhra dealers. They filed petitions in the Supreme Court challenging the right of the Andhra State to levy tax on these sales, arguing that the sales proposed to be taxed were inter-State sales and that they were immune from taxation under Art. 286 (2) of the Constitution.

After the formation of the separate State of Andhra in 1953, the Madras General Sales Tax Act 1939 continued to operate in the new State. To this Act a new sec. 22 was added, after the coming into force of the Constitution, in order to bring its provisions into accord with Art. 286. It provided :

Nothing contained in this Act shall be deemed to impose, or authorize the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place (i) outside the State of Madras or (ii) in the course of import of the goods into the territory of India or of export of the goods out of such territory.

Explanation. — For the purposes of sub-clause (a) a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale

or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce.

While these petitions were pending before the Supreme Court a similar point arose for decision in the appeal preferred by the Bengal Immunity Co., Ltd., against the State of Bihar. In that case the Court examined the true scope of Art. 286 of the Constitution which governs the power of the States to legislate with respect to the imposition of sales tax on inter-State sales. The Court reviewed its previous decision in the case of *The United Motors (India) Ltd.*, and held that "sales falling within the Explanation, being inter-State in character, could not be taxed by the State by reason of Art. 286 (2) unless Parliament lifted the ban; that the Explanation to Art. 286 (1) (a) controlled only that clause and did not limit the operation of Art. 286 (2), and that the law had not been correctly laid down in the *United Motors* case."

Following this decision dealers all over the country instituted proceedings against the respective State authorities for the refund of sales tax realized from them in respect of sales falling under the Explanation. In order to remedy this position the Sales Tax Laws Validation Ordinance 1956 was promulgated and was later replaced by the Sales Tax Laws Validation Act. The Act enables the States to enforce laws for the levy and collection of sales tax on inter-State sales. Sec. 2 of this Act ran as follows :

Notwithstanding any judgment, decree or order of any court no law of a State imposing, or authorizing the imposition of, a tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between the 1st day of April, 1951, and the 6th day of September, 1956, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce and all such taxes levied or collected or purporting to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law.

The petitioners urged that in spite of the Validation Act the levy of sales tax upon them was unconstitutional. They contended that the relevant Sales Tax Act does not impose a tax on sales which fall under the Explanation and therefore the Validation Act can have no effect on them as it related only to sales under the Explanation; that the Validation Act itself is unconstitutional; that even if it is valid it does not validate sec. 22 of the Sales Tax Act; that in any case at best it only validates levies and collections already made and does not authorize fresh proceedings for their realization; and, lastly, that no action can be taken on the basis of sec. 22 because, being wholly unconstitutional when enacted, it never existed in law.

On these contentions the Supreme Court framed the following principal points for determination :

1. Whether the Andhra (Madras) Sales Tax Act in fact imposes a tax on the class of sales falling within the Explanation to Art. 286 (1) (a).

2. Whether the Sales Tax Laws Validation Act is ultra vires on the ground that it is not authorized by the terms of Art. 286 (2).

3. Whether the impugned Act validated only levies and collections made during the specified period or whether it authorized the imposition and collection of taxes on such sales in the future.

4. Whether sec. 22 of the Sales Tax Act was null and void on the ground that it was in contravention of Art. 286 (2) and whether the proceedings sought to be taken thereunder on the strength of the impugned Act are competent.

5. Whether a tax on inter-State sales is within the exclusive competence of Parliament and whether the impugned Act is, in consequence, bad as authorizing the States to levy the tax.

The Supreme Court, speaking through Mr. Justice Venkatarama Aiyar, held on 11th March that the Andhra (Madras) Sales Tax Act clearly purported to impose a sales tax on the class of transactions falling within Art. 286 and that since such levies had been declared invalid by the Supreme Court in the *Bengal Immunity Company's* case, the object of the Validation Act was to validate these taxes. The Court expressed the view that the Sales Tax Laws Validation Act was intra vires and its effect could not be confined in the collections and levies already made but extended to any proceedings for the assessment of tax under sec. 22 of the Sales Tax Act.

The argument that the imposition of a sales tax on inter-State sales being wholly void, such a law could not be validated retrospectively, was examined exhaustively

by the Court. His Lordship said that the true scope of the impugned Act (Validation Act) was that it lifted the ban imposed on the States against taxing inter-State sales and not that it validated or ratified any such law. Considering the legislation in its substance, there was no doubt that it was within the scope of the authority conferred on Parliament by Art. 286 (2) and therefore the legislation was not ultra vires. There was nothing express in Art. 286 (2) imposing a restriction on the power of Parliament to enact a law with retrospective effect. Mr. Justice Aiyar stated that unconstitutionality might arise either because the law is in respect of a matter not within the competence of the legislature or because, the matter itself being within competence, its provisions offend some constitutional provision.

According to authorities, he stated, only a law in excess of competence was a nullity, but a law within competence but otherwise unconstitutional was only unenforceable. The latter kind of laws, in the opinion of the Court, could be validated by the removal of the bar and the present case fell within this latter category.

On this reasoning the Court held that as soon as Parliament passed the validating law, the provisions of sec. 22 taxing inter-State sales became enforceable. The Court also rejected the contention that a State legislature was not competent to enact any laws with regard to taxes on inter-State sales. Having rejected all the grounds urged by the petitioners, the Supreme Court by a majority judgment dismissed the petitions and upheld the right of the State to levy tax on the inter-State sales effected by the petitioners.

Mr. Justice Sarkar delivered a dissenting judgment and expressed himself in favour of allowing the appeals. In his view the Andhra (Madras) Sales Tax Act did not authorize the levy of a sales tax on goods which were delivered in Andhra but in which the property passed to the purchaser in the State of Madras.

CRIMINAL LAW

Cases Tried by Special Judges

MADRAS HIGH COURT'S RULING

Is sec. 350, Cr. P. C., part of the procedural law applicable to the trial of an accused person by a Special Judge appointed under the provisions of the Criminal Law Amendment Act (Central Act 46 of 1952)? This question was answered in the negative by a Full Bench of the Madras High Court consisting of Their Lordships Mr. Justice P. Rajagopalan, Mr. Justice N. Somasundaram and Mr. Justice P. V. Balakrishna Iyer on 7th March.

Differing from an earlier Bench decision of the Madras High Court, Their Lordships held that the ordi-

nary rule in criminal matters, that the judgment should be delivered only by the person who had heard the whole of the evidence in that case, was applicable in respect of cases tried by Special Judges.

The case was referred to the Full Bench under the following circumstances: In a criminal case, an accused person was prosecuted under sec. 161 I. P. C. and sec. 5 (1) (d) read with sec. 5 (2) of the Prevention of Corruption Act (receiving illegal gratification). The case, was first heard by the then Special Judge, Coimbatore. On his transfer, his successor continued the hearing. The accused filed an application praying that the prosecution witnesses should be resummoned and reheard. This application was dismissed and the accused eventually convicted and sentenced to undergo simple imprisonment for six months.

The matter was taken on appeal to the High Court and counsel for the appellant raised the point before the Judge who heard the appeal that the failure of the Special Judge to grant the application of the accused to resummon and rehear witnesses vitiated the entire proceedings and that for that reason the conviction was bad. In view of the conflict of decisions on this point the Judge referred the matter to a Division Bench, who in their turn referred it to a Full Bench for an authoritative decision.

Their Lordships, examining sec. 350 Cr. P. C., observed that prior to the amendment of the Cr. P. C. in 1955 the right of the accused to resummon and rehear witnesses when there was a change in the personnel of the magistrate who tried the case, was absolute and unqualified. By the amendment of 1955 the accused lost his right to insist, as a matter of course, that any witness should be resummoned and reheard. It was left to the discretion of the magistrate to decide whether it was necessary in the interests of justice to resummon and rehear any witness.

Examining next the question whether a Special Judge appointed under Act 46 of 1952 was a 'magistrate' so as to attract the provisions of sec. 350 Cr. P. C., Their Lordships observed that it placed a Special Judge in the same position as a magistrate for certain purposes and in the same position as a Sessions Judge for certain other purposes. If they could say that a Special Judge was a 'magistrate' they would be justified in concluding that sec. 350 Cr. P. C. would apply to the proceedings before him. On the other hand, if they concluded that a Special Judge was not a 'magistrate,' then sec. 350 would not be applicable to the proceedings before him.

On an analysis of the scheme of Act 46 of 1952 Their Lordships observed that a Special Judge was neither a magistrate nor a Sessions Judge.

The ordinary rule in criminal matters was, Their Lordships observed, that "the judgment may be delivered only

by the person who has heard the whole of the evidence in that case," and this principle was well established and the only exception was that created by sec. 350 Cr. P. C., which empowered a magistrate to dispose of a case on evidence heard in part by himself and in part by his predecessor. Even so, as the section stood before it was amended in 1955, it gave the accused person an unqualified right to demand a de novo inquiry or trial. That provision was evidence of the reluctance of the legislature to depart from the old familiar and cardinal principles of law referred to above. If at the time the legislature placed the Central Act 46 of 1952 on the statute book, it intended to create a breach in so ancient a rule, one would expect it to have used explicit language to that effect. When the legislature omitted to say in the Central Act 46 of 1952 that it would not be necessary to hold a de novo trial in those cases where there had been a change in the personnel of the Special Judge trying a case, one should be justified in concluding that it did not want to take away the right of the accused to insist that "the judgment shall be delivered only by the person who has heard the whole of the evidence in that case. Except where the legislature has used manifestly plain words or where, from the context, such appears to be the necessary intention of the legislature, we do not feel we shall be justified in creating an exception to a principle so salutary and ancient."

Their Lordships, in the result, answered in the negative the question referred to them.

HABEAS CORPUS PETITION

Detention Order Held Valid

GROUND NOT "VAGUE"

The Supreme Court on 10th March dismissed a habeas corpus petition filed by Dr. Bheem Ratnalikar of Hyderabad who is under preventive detention on charges of being engaged in secret activities aimed at committing violence on the person of the Prime Minister and other top members of the Government.

It was alleged that before his arrest in Delhi on October 17 last Dr. Ratnalikar had been touring the country to collect men and money to achieve his alleged objective.

Dr. Ratnalikar, who appeared before the court in person, argued that the Government had misunderstood his objective. He claimed that his intention in touring the country was to organize a "constitutional body" to contest the general elections in 1952 and to propagate his views.

Dismissing his petition, the Court said that the grounds of detention as supplied to the petitioner were

neither vague nor insufficient. The order of his detention was, therefore, legal.

After his arrest Dr. Ratnalikar was produced before a magistrate who remanded him in custody for 13 days. This period was extended by two more days. On November 2 another magistrate remanded him in judicial custody for 10 days.

On November 9 he was put under detention under sec. 3 of the Preventive Detention Act under the order of the Home Ministry. He made a representation to the Advisory Board which confirmed his detention.

RIGHTS OF GOVERNMENT SERVANTS

Dismissal of Police Officer Quashed

CONCLUSION BASED ON HEARSAY EVIDENCE

Mr. Mahommed Ibrahim, a sub-inspector of Rasulabad police station in Kanpur, was suspended on 28th September 1951. Earlier on the same day some police officers had raided the house of a head constable and recovered a bundle containing Rs. 8,312 in cash. The charge against the sub-inspector was that this sum represented money extorted by him and some other police officers as illegal gratification. A departmental inquiry was held by the superintendent of police, who held that four of the specific charges brought against sub-inspector had been satisfactorily proved and that the fifth had been partially proved. This finding was confirmed by the deputy inspector-general of police, who by an order dated 17th July 1952 dismissed the sub-inspector from service under sec. 7 of the Police Act. The inspector general dismissed his appeal on 24th June 1953. The revision was dismissed by the State Government.

A single judge of the Allahabad High Court dismissed the sub-inspector's writ petition. But in a special appeal it was allowed. The High Court was of the opinion that there was no evidence produced at the departmental inquiry which could establish the charges which had been held to have been proved. It held that the finding that the sub-inspector committed acts which the tribunal held to be established was founded on inadmissible evidence and that accordingly the finding could not be sustained; and although (it pointed out) it did not ordinarily interfere with a matter of discipline in the police force, it directed the issue of a writ quashing the order of the inspector general dated 24th June.

Thereupon the U. P. State applied for leave to the Supreme Court against this judgment of the High Court

and on 4th March the Chief Justice Mr. Mootham and Mr. Justice Srivastava dismissed the application.

It was now urged on behalf of the State that the proceedings at the departmental enquiry were purely of a departmental nature and the tribunal was entitled to base its conclusions on such material as it thought fit including in particular hearsay evidence and documentary evidence, the authenticity of which had not been established.

Their Lordships said that the powers of punishment vested in the police officer under sec. 7 of the Police Act were dependent on the observance, at the departmental inquiry, of the provisions of the U. P. Police Regulations. Sec. 7 made it quite clear that the powers conferred on the officer named in the section were to be exercised subject to such rules as were made by the State Government.

Rules 1 and 3 of Regulation 490 made it clear that hearsay evidence was not admissible and documents which it was proposed to make exhibits (unless certified copies of public records or of a formal nature are admitted) must be proved.

The question of procedure to be followed at the departmental inquiry under the Police Regulations was no doubt of importance, Their Lordships said, but there did not appear to them to be sufficient doubt as to the legal position to justify this Court in granting a certificate under Art. 132 or 133 of the Constitution.

Supreme Court Holds Dismissal Illegal

The appeal by the Union of India challenging the decision of the Judicial Commissioner, Ajmer, holding that the removal from service of Mr. Jeewan Ram, the respondent, was illegal was dismissed by the Supreme Court on 13th March by a judgment delivered by Mr. Justice S. K. Das.

The respondent was a clerk in the former B. B. & C. I. Railway and after being charge-sheeted for misconduct he was removed from service. He instituted a suit seeking a declaration that his dismissal was wrongful and he should be granted compensation, but his suit in the trial court was dismissed and this order was upheld by the District Judge. The Judicial Commissioner of Ajmer, however, in second appeal reversed the decisions of the lower courts and held that the order of the respondent's removal from service was illegal as it contravened the provisions of sec. 240 (3) of the Government of India Act.

The appellant contested the correctness of the decision of the Judicial Commissioner and urged that since the removal of the respondent from service had been effected in accordance with his contract of service, the

provisions of sec. 240 did not apply to the case. It was further submitted that the removal was not by way of punishment and therefore it was unnecessary to comply with sec. 240 or to give the respondent an opportunity to show cause against the punishment proposed to be meted out to him.

The Supreme Court referred to its decisions in the cases of P. L. Dhingra and Khem Chand. In the former case it was laid down that the protection given under Art. 311 (2) of the Constitution " is available to a Government servant only in those cases where the Government intends to inflict three forms of punishment, viz., dismissal, removal or reduction in rank, and when the Government intends to inflict any of these punishments the Government servant must be given reasonable opportunity of showing cause against the action proposed to be taken against him." The Court stated in accordance with the principles laid down in these cases that it was essential not only to give a charge-sheet and opportunity for an explanation in cases involving the disciplinary action of removal, but it was also incumbent upon the authorities to give a further opportunity for showing cause against the punishment which was proposed. In the present case the Court found that the removal of the respondent was clearly by way of punishment and since it was admitted by the appellant that no such opportunity had been given, the order of removal was illegal.

On this view the Supreme Court dismissed the appeal by the Union of India and upheld the order of the Judicial Commissioner.

NOTES

Test of Obscenity

Has the Book the " Slightest Social Importance " ?

The Supreme Court judgment in the Roth case decided on 24th June last year is naturally being followed in the states of the U. S. A. That judgment, it will be remembered, expressly rejected the standard of obscenity allowed in Regina v. Hicklin, 3 Q. B. 360 (1868), which our courts regard as binding, and said that while publication of material which treats sex " in a manner appealing to prurient interest " can be constitutionally punished, " all ideas having even the slightest redeeming social importance have the full protection of the guarantees " of the First Amendment.

The judgment was recently followed by a San Francisco judge (Judge Horn) in a case in which the publisher and the distributor of " Howl and Other Poems " were charged with the breach of a law of California which

provides that whoever "wilfully and lewdly" publishes or sells obscene or indecent material is guilty of a misdemeanour. The judge let off the distributor because there was no proof that he knew the contents of the publication (and there was nothing on the cover to suggest pornographic content), and scienter is an essential requirement of the law. But in the case of the publisher the judge had to rule whether or not the book was obscene as he could be assumed to be familiar with its contents.

The judge found that although the book presented "unorthodox and controversial ideas" and used words considered coarse and vulgar in some circles of the community, it was not obscene because it had ideas of "some redeeming social importance." He laid down some criteria for determining whether printed matter is obscene.

If the material has the slightest redeeming social importance, it is not obscene because it is protected by the First and Fourteenth Amendments of the United States Constitution and by the California Constitution. If it does not have, it may be obscene.

The book or material must be judged as a whole by its effect on the average adult in the community. If the material is objectionable because of coarse and vulgar language, which is not erotic or aphrodisiac in character, it is not obscene.

Knowledge that the book contained obscene material must be proved.

The test of obscenity in California is that the material must have tendency to deprave or corrupt readers by exciting lascivious thoughts or arousing lustful desire to the point that it presents clear and present danger of inciting to social or immoral action.

Clear and Present Danger

It should be noticed that Judge Horn, while following the Supreme Court's decision in the Roth case, took issue with it when he held that before a book could be banned there must be some showing that its reading would lead to a clear and present danger of inciting anti-social conduct. In the Roth case the point was raised on behalf of the defendants but was rejected by the Court as of no merit. The Court said :

It is strenuously urged that these obscenity statutes offend the constitutional guarantees because

they punish incitation to impure sexual *thoughts*, not shown to be related to any overt anti-social conduct which is or may be incited in the persons stimulated to such *thoughts*. . . . It is insisted that the constitutional guarantees are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of anti-social conduct [*Schenck v. United States*, 249 U. S. 47 (1919)] or will probably induce its recipients to such conduct [according to the interpretation of "clear and present danger" in *Dennis v. United States* 341 U. S. 494 (1951)].

To this objection the only answer the Court deemed it necessary to give was to refer, in view of its holding that "obscenity is not protected speech," to the following passage in the Court's judgment in *Beauharnais v. Illinois*, 343 U. S. 250 (1952) :

Libellous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the state courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.

We should add that Justices Douglas and Black dissented from the Roth decision in that under the statutes "punishment is inflicted for thoughts provoked, not for overt acts nor anti-social conduct." They said :

This test cannot be squared with our decisions under the First Amendment. Even the ill-starred Dennis case [*supra*] conceded that speech to be punishable must have some relation to action which could be penalized by Government.

To allow the State to step in and punish mere speech or publication that the judge or jury thinks has an undesirable impact on thoughts but that is not shown to be a part of unlawful action is drastically to curtail the First Amendment. . . . Government should be concerned with anti-social conduct, not with utterances. . . . Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it. . . . The standard [adopted by the Court] does not require any nexus between the literature which is prohibited and action which the legislature can regulate or prohibit.