

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

Editorial Committee:
Prof. P. M. LIMAYE,
S. G. VAZE,
Member and
Secretary respectively of
the All-India Civil
Liberties Council

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Curb on Christian Missionary Activities

Recommendations of a Madhya Pradesh Committee

The Christian Missionary Activities Committee, appointed by the Madhya Pradesh Government, may well take rank, for its wild premises and reckless conclusions, with the notorious Anti-American Activities Committee of the U. S. Congress which has done such terrible mischief in its so-called campaign of uncovering subversives. The committee has given a finding (and we have no reason to disagree with this finding) that "the Government of Madhya Pradesh has throughout followed a policy of absolute neutrality and non-interference in matters concerning religion, and allegations of discrimination against Christians and harassment of them by Government officials have not been established." This exculpation of the Madhya Pradesh Government is, however, accompanied by a recommendation that "the large influx of foreign missionaries," which it says has taken place in recent years, "is undesirable and should be checked" by the withdrawal of those missionaries whose primary object is proselytization. The recommendation is based on such premises in regard to the activities of Christian Missions (and in this respect the committee's inquiry was not local, but national and even global) as the following:

Evangelisation in India appears to be a part of the uniform world policy to revive Christendom for re-establishing western supremacy and is not prompted by spiritual motives. The objective is apparently to create Christian minority pockets with a view to disrupting the solidarity of the non-Christian societies, and the mass conversions of a considerable section of Adivasis with the ulterior motive is fraught with danger to the security of the State.

The manner in which the missionary movement goes on in certain places is clearly intended to serve some political purpose in the cold war.

If an activity is found to be political but carried on under the cloak of religion, the continuance of such activity is fraught with danger to the security of the State.

Moreover, to exploit the need and distress of the people for adding to the numbers of what is styled as world community, for the purpose of promoting the

cause of world peace and justice as conceived by a foreign nation, is interference in the internal affairs of India, and is repugnant to the principles of Panchshila.

On the basis of premises such as these the committee makes recommendations which are not only logical but almost inevitable. Its most important recommendation is:

An amendment of the Constitution may be sought, firstly, to clarify that the right of propagation has been given only to the citizens of India and, secondly, that it does not include conversions brought about by force, fraud or other illicit means.

Suitable control on conversions brought about through illegal means should be imposed. If necessary legislative measures should be enacted.

The second part of the amendment suggested is wholly unnecessary, as no one could ever think that a State is debarred by the Constitution as it stands from taking legitimate measures to prevent the use of force or fraudulent means in bringing about conversions. But the first part of the amendment, which would confine "the right freely to profess, practise and propagate religion," guaranteed in Art. 25(1), to "citizens" of India would be a highly retrograde step. Fundamental rights are guaranteed in the Constitution and thus placed above the reach of temporary majorities in the legislature just because they are fundamental or essential human rights, and as such they belong to all, whether citizens or aliens. The Bill of Rights in the United States Constitution extends the protection it affords to everyone irrespective of whether he is a citizen or a non-citizen. Thus freedom of speech or of the press and freedom of assembly (Amend. 1), the right to privacy (Amend. 4), the right not to be deprived of "life, liberty or property without due process of law" (Amend. 5), the right of the accused to a fair and speedy trial (Amend. 6), the privilege of the writ of habeas corpus or prohibition of a bill of attainder or ex post facto law (Art. 1, sec. 9.2 and 3), are rights to which every person is entitled. The guarantees, as one commentator has remarked, "reflect the concern of the 18th century Americans over the possible emergence in the young Republic of a home-grown despotism even more abhorrent than the British rule so recently denounced." The rights

are limited to citizens only where the citizens alone, from the nature of the case, can enjoy the particular right. For example, Amend. 15 says: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, colour, or previous condition of servitude" and Amend. 19 adds another ground, viz., sex.

Our own Constitution generally, though not wholly, follows the same principle, that while discrimination between citizens and aliens may be made in regard to political rights, no such discrimination is allowable in respect of what the United Nations Charter calls "human rights and fundamental freedoms." E. g., in the matter of equality before law (Art. 14), rights of the accused (Art. 20), protection of personal liberty (Art. 21), and right to property (Art. 31), our Constitution speaks not of "citizens" but "persons." This wholesome principle is followed in the matter of freedom of conscience (Art. 25). Conspicuous exceptions to this sound rule are to be found in the matter of the "right to freedom" in general and the right to freedom of speech and expression in particular (Art. 19) and in the matter of prohibition of discrimination on grounds of race, caste, sex, etc. (Art. 15). These exceptions are wholly unjustified, and the Madhya Pradesh committee would now add the right to free propagation of religion to these exceptions. But this addition would make the Constitution even more open to objection than it is and must be strongly resisted. The committee has made the suggestion because it believes that what it regards as mischievous activities of Christian missionaries emanate from foreign missionaries. But one would like to ask what would happen if indigenous missionaries indulge in such activities. The constitutional amendment proposed by the committee would obviously not serve our ends in such a situation. The committee would obviously in that case ask us to rely on a law penalizing forcible or fraudulent conversions. If such legislation, which the Government can enact any day without infringing the Constitution, would be sufficient to cope with the mischief wrought by indigenous Christian missionaries, it should also be sufficient to counter effectively the mischievous activities of foreign Christian missionaries. Put down the evil where it raises its head, whether among propagandists of the Christian or any other religion and whether these propagandists are home-born or foreign-born. That is the only right way to proceed in the matter; the kind of constitutional amendment which the committee would like to see inserted would meet with stern opposition from all persons, Hindus, Muslims or Christians, who set any value on civil liberties.

See how the committee's subsidiary recommendations would bestow unfettered discretion on the Government at every point, to exclude which is the very purpose of incorporating Fundamental Rights in the Constitution. Among these recommendations are the following :

Circulation of literature meant for religious propaganda without approval of the State Government should be prohibited.

Non-official organizations (providing education and other social services to backward people) should be permitted to run institutions only for members of their own religious faith.

No non-official agency should be permitted to secure foreign assistance except through Government channels.

Programmes of social and economic uplift by non-official or religious bodies should receive prior approval of the State.

No foreigner should be allowed to function in a scheduled or a specified area either independently or as a member of a religious institution unless he has given a declaration in writing that he will not take part in politics.

Comment upon the recommendations is superfluous. We would only add that the last is like the affidavit which is required in the United States from potential subversives to the effect that the persons concerned are not Communists — a requirement which our readers well know is strongly condemned by all liberty-loving people of that country.

Dr. John Matthai, referring to foreign Christian missionaries working in India, said in a statement that he had come to regard them not merely with respect but with affection. "No class of foreigners working in India," he said, "during the past hundred years have by and large served the country with greater zeal and interest than missionaries," and "whatever their failings, these are outweighed by what they have done in the cause of building up a self-respecting and self-reliant India." He added :

The general attack that is now launched against them among certain sections of the public is not merely unfair but ill-founded. If some of them have been found guilty of misconduct either in respect of India's foreign relations or in respect of inter-communal feelings, the Government has enough power to deal with it and nobody can complain of whatever action Government may think fit to take. But this is a matter of dealing by appropriate means with individuals who have broken the law or acted against the public interest. It is no justification for the vast generalizations which are sometimes made against missionaries as a whole and against the Christian Church here and abroad.

And Dr. Matthai concluded his statement thus :

There was a time when India was a haven of refuge for people suffering religious persecution in other countries, in the same way as England offered an asylum to those persecuted for political reasons abroad. Surely, the advent of independence is not going to leave us less tolerant than we have been in the past.

Presiding over the 81st annual general meeting of the Young Women's Christian Association, Bombay Branch, Mr. Hare Krishna Mahtab, Governor of Bombay, said with reference to the M. P. committee's report that foreign Christian missionaries had made considerable contribution towards the progress of the country and it was wrong to conclude that they were exploiting the unsophisticated and uneducated classes in backward areas. The educated and the strong tended to exploit the weak and ignorant irrespective of religion and even the Hindus were exploiting them. At a time when the world was moving towards

one religion they should not think of closing the doors against the votaries of any religion. On the other hand, competition among the various religions to help the poor and the needy should be encouraged in order to bring about the welfare of suffering people. By preventing foreign missionaries from coming here, a great injustice would be done to the backward classes. To think in terms of exclusiveness would block all progress. What was required was that the weak and uneducated tribals should be helped to come out of the ghetto in which they had lived all this time, altogether apart from the civilized world.

MCCARRAN ACT PRESERVES HABEAS CORPUS NO LIKENESS WITH OUR PREVENTIVE DETENTION ACT

A misapprehension prevails in India about the Internal Security Act 1950 of the United States, viz., that this notorious legislation, which popularly is called the McCarran Act, provides for some kind of preventive detention. Apologists for our preventive detention law always point to this Act when opponents of the principle of detention without trial cite Art. I, sec. 9 (2) of the U. S. Constitution, which says that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it," in order to establish that preventive detention in situations like those in which the Preventive Detention Act is applied in our country is constitutionally barred in the United States. Defenders of preventive detention such as is enforced in India say in effect that whatever the Constitution of the U.S. might lay down, in practice people are put, or at least are capable of being put, in concentration camps under the McCarran Act. Mr. Tek Chand, for instance, said in Parliament the other day when the Preventive Detention Act was under discussion that the statement made by Mr. Kamath that in no civilized country does such an Act exist was unwarranted, since the McCarran Act sanctions preventive detention in the United States. We had occasion to show previously (vide p. ii:149) that the impression that is current in some quarters in India that the McCarran Act confers power to detain a person without trial as if habeas corpus was suspended is wholly unfounded, and in fact when the Act was passed we wrote (see p. 159) : "Let it be clearly understood that the detention allowed by the law is not preventive detention of the kind that the Indian Constitution allows." But since the misapprehension is widespread, we may set out here in some detail the provisions of the Act in order to make clear what kinds of restraints are authorized by the Act and what are not authorized.

The Internal Security Act consists of two parts : the first is aimed against communist subversion in normal times and the second against such subversion in times of

emergency such as those contemplated in Art. 352 (1) of our Constitution. In normal times the Act provides for compulsory registration of communist organizations, and in times of national peril the Act provides for "emergency detention." What this detention implies we shall see later, but it should be clearly understood that the detention, whatever it is, can be enforced only when the President has declared that an "internal security emergency" exists. Such an emergency is defined in very precise terms. Sec. 102 says :

In the event of any one of the following :

- (1) Invasion of the territory of the United States or its possessions,
- (2) Declaration of war by Congress, or
- (3) Insurrection within the United States in aid of a foreign enemy,

and if, upon the occurrence of one or more of the above, the President shall find that the proclamation of an emergency pursuant to this section is essential to the preservation, protection and defence of the Constitution and to the common defence and safety of the territory and people of the United States, the President is authorized to make public proclamation of the existence of an "Internal Security Emergency." "Invasion," "war," and "insurrection" are not loose terms; on the "occurrence" of these events, not on the threat of their occurrence, the President is authorized to put the detention provision into effect, and no President will be so foolish as to detain persons only when hooliganism prevails. He cannot pretend in such a situation that either invasion or war or insurrection has taken place. Nor is the President given sole discretion in the matter, for if he were to declare an emergency where none exists, the state of emergency so declared is made liable to be terminated by "concurrent resolution of the Congress."

Now let us see what the detention provisions of the Act are: who are detainable, who is the detaining authority, and what is the kind of review to which a

detention order is subject. The Act authorizes the President "whenever there shall be in existence such an emergency" to apprehend and detain persons as to whom there is reasonable ground to believe that they will engage in "acts of espionage and sabotage." Thus possible spies and saboteurs alone are liable to detention under the Act, and these too only in specified grave emergencies. Persons thought to be involved in espionage or sabotage can be apprehended upon the issuance of warrants by the Attorney General—and no lesser official. The arrest is meant for detention, but the order for detention cannot be passed by the Attorney General himself. Within 48 hours after being apprehended, the arrested person has to be placed before a hearing officer, who must not be an employee of the Justice Department within the preceding three years, and it is this officer who has it in his power to issue a detention order. At the preliminary hearing the person concerned is advised of his rights and of the grounds for the action taken against him. He may be represented by counsel and may introduce evidence in his behalf and may cross-examine witnesses against him except when it is thought by the Government that it would be dangerous to national safety and security to divulge the identity of Government agents. The hearing officer may order the person apprehended for detention to be discharged, and the Attorney General has no appeal from such an order. However, if on hearing evidence it appears to the officer that there is probable cause for detention, he issues a detention order.

The detainee in such a case may appeal to the Board of Detention Review. The Board requires the Attorney General to inform the person detained of grounds on which he was apprehended for detention and to furnish to him as full particulars of the evidence as possible including the identity of informants, subject to the above limitation. It is also provided that the Board shall take into consideration such evidence as the Government thought could not be publicly revealed for reasons of national security. At this review also the detainee is afforded full opportunity to be represented by counsel. The Board may confirm, modify or revoke the detention order. If the Board determines that there is not reasonable ground to believe that the detainee is engaged in spying or sabotage, it states its findings of fact and serves upon the Attorney General an order revoking the order of detention, and the Attorney General has no appeal from this order either.

If the order for detention is confirmed by the Detention Review Board, a detainee, aggrieved by such an order, is entitled to judicial review in the appropriate Court of Appeals. "The findings of the Board as to the facts, if supported by reliable, substantial and probative evidence, shall be conclusive." Though the jurisdiction of the court of appeals is exclusive and its judgment final, it is also subject to review by the Supreme Court of the United States upon writ of certiorari.

It will be seen from the above description of the Act's provisions that the Act is far more limited in scope, than the Indian Act inasmuch as the detention provided for is emergency detention and can be enforced only against supposed spies and saboteurs, and furthermore it is surrounded by many safeguards lacking in our Act; e. g., arrest of suspects can take place only on an order of as high an official as the Attorney General, and the detainee has the facility of counsel both at the preliminary hearing and a hearing by the Detention Review Board. This is what led a critic of the Act like Mr. Arthur E. Sutherland, Professor of Law at the Harvard Law School, to express his opinion that "the procedural amenities of the new Act are generous and careful" (see "Harvard Law Review" for January 1951). But the main question is whether the Act takes away the privilege of the writ of habeas corpus, as is assumed by Mr. Tek Chand and others. In the preliminary section which defines the "declaration of purpose" of the Act it is stated that emergency detention "shall be so authorized, executed, restricted and reviewed as to prevent any interference with the constitutional rights and privileges of any person," and a section is inserted in the Act to give effect to this intention. It says:

Nothing contained in this sub-chapter (i. e., part 2 dealing with emergency detention) shall be construed to suspend or to authorize the suspension of the privilege of the writ of habeas corpus.

President Truman, it would be recalled, vetoed the Bill, but the Congress overrode his veto. In his veto message Mr. Truman dealt mostly with the first part of the Act ["Subversive Activities Control"] relating to compulsory registration of Communists, which he denounced in strong terms. To the other part ["Emergency Detention"] he did not deign to devote much attention because in any case the detention provisions would be "ineffective" for the reason that "they would not suspend the writ of habeas corpus." The "New York Times," which also strongly condemned the Act, had this preservation of habeas corpus in mind when it said that the only effect which the detention provision would have is that "a Communist or anyone else suspected of prospective overt acts could be jailed in the morning and released that afternoon, and would cover no detention at all." This part of the Act has not been brought into use at all; it has lain dormant on the statute book.

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One aspect of this question may here be dealt with. The Act provides for detention in three situations: 1. invasion, 2. rebellion, and 3. declaration of war. The habeas corpus provision in the Constitution referred to above provides for suspension of the writ in the first two situations and does not provide for it in the third situation, viz., in case of foreign war. What is the significance, then, one may ask, of anybody maintaining that the Act does not scrap habeas corpus in cases of invasion or insurrection if the Constitution itself allows it to be

scrapped? The significance is great. It should not be assumed that habeas corpus is automatically suspended as soon as invasion takes place or rebellion breaks out. The constitutional provision should be carefully studied. It says: habeas corpus "shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This makes it clear that a necessary condition justifying suspension of the privilege is not merely that invasion or rebellion has occurred, but furthermore that in such a situation the public safety requires suspension. And it is not the Executive or Congress which determines whether suspension of habeas corpus is required in any particular case by considerations of security. "In order to meet the constitutional requirement," says Willoughby,

"actual and not simply constructive necessity by a declaration of the legislature is necessary; and the courts will be the judge" ("Problem of Government," p. 105). It is for the judiciary to determine whether an exigency justifying suspension of the writ of habeas corpus has arisen or not.

We have no desire to defend the Act by any means; in fact one cannot adequately condemn it, but atrocious as the legislation is, one must not find in it vices which it does not contain. Anyhow, it cannot be used as authority for our Preventive Detention Act, the like of which is not to be found anywhere in the world. There is not the least resemblance between that Act and the McCarran Act.

COMPULSORY TRADE UNIONISM SUSTAINED

SUPREME COURT MOVED "FULL CIRCLE" FROM THE ADAIR CASE

A "right to work" statute of Nebraska was under the consideration of the United States Supreme Court in its last term for the law's constitutional validity and on 21st May the Court in a unanimous opinion struck down the law in its application to the railroads.

Like the "right to work" laws of eighteen states, the Nebraska law forbids the employer to deny any person the opportunity to obtain or retain employment because of non-membership in a labour organization, the object being to safeguard the opportunity of non-union members to get and hold jobs free from discrimination against them because they are non-union workers. And, in order to attain this object, the law further forbids employers and employees to enter into agreements which exclude any person from employment or continuation of employment because of non-membership in a labour organization, the object of such prohibition being that the agreements should not prevent those who refuse to join a labour organization from acquiring or retaining employment. The validity of such contracts, variously designated as "closed shop contracts" or "union security contracts" or "union shop contracts," obligating an employer to employ none but union members, was involved in the instant case.

The Union Pacific Railway Company and labour unions representing various groups of its employees had entered into such a union shop agreement. Under the terms of that agreement all employees of the company, as a condition of their continued employment, must become members of the specified union within sixty days and thereafter maintain that membership. The non-union employees of the railway company brought suit against the company and the labour organization purporting to represent employees to enjoin the enforcement of the union shop agreement. The Nebraska Constitution provides that no person shall be denied employment "because of membership in a labour organization or refusal to join a labour organization." It further prohibits "any contract,

written or oral, to exclude persons from employment because of membership or non-membership in a labour organization." A state law was enacted to make this constitutional provision effective.

The constitutionality of state statutes which in substance prohibit an employer from entering into a closed shop contract or all-union agreement with a labour union was before the Supreme Court seven years ago in a group of cases, the principal of which was *Lincoln Federal Labour Union v. Northwestern Iron and Metal Company*, 335 U. S. 525 (1949). In this case a North Carolina statute providing that no person in the State shall be denied an opportunity to obtain or retain employment because he is or is not a member of a labour union and forbidding employers to enter into contracts obligating themselves to exclude any persons from employment because they are or are not labour union members, and a "right to work" amendment to the Nebraska Constitution to the same effect, were challenged. The statutory and constitutional provisions of these two states outlawing the closed shop were attacked on the ground that they deprived the appellants of their liberty of contract without due process of law in violation of the Fourteenth Amendment. The appellants contended that the provision that employers must not discriminate against either union or non-union members and the provision banning contracts which if performed would bring about such discrimination deny due process of law. The question before the Court thus was: Does the due process clause forbid a state to pass laws designed to safeguard the opportunity of non-union members to get and hold jobs? The Court decided that the laws did not offend due process.

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This decision showed what a startling evolution of judicial doctrine had taken place since *laissez faire* principles were in the ascendant in those times. As Justice

Frankfurter has put it, "basic human rights expressed by the constitutional conception of 'liberty' were equated with theories of *laissez faire*." What were called "yellow dog contracts" were current then—agreements whereby the worker was required to bind himself not to be a member of a labour union while remaining in employment, and these contracts received judicial sanction. In *Adair v. United States*, 208 U. S. 161 (1908), the Supreme Court struck down a federal law which prohibited discrimination against union workers. The Court held, over the dissents of Justices McKenna and Holmes, that the railroad whose agent had been convicted for having discharged an employee because of membership of a union, had a constitutional right under the due process clause to discriminate against union members and therefore could do so through use of yellow dog contracts. The restriction imposed by the statute penalizing an interstate carrier for discharging an employee because of union membership was held by the Court to abridge the employer's freedom of contract essential to due process of law, although, in the words of one commentator, "the employer's 'freedom' thus protected was, of course, freedom to require that those who worked for him should not be free to join a union." In *Coppage v. Kansas*, 236 U. S. 1 (1915), the Court pronounced a like judgment upon a state statute making it an offence to require an agreement not to join a union as a condition of employment. From this judgment Justices Holmes, Day and Hughes dissented. The helplessness of the individual employee in the matter of obtaining reasonable terms of employment from the employer and the necessity of trade unions as an indispensable weapon of self-defence on the part of workers were not recognized, and the Court interpreted the general pronouncement of the Fourteenth Amendment against deprivation of liberty without due process as blocking all ameliorative legislation that the states might pass. Justice Holmes set his face against it. In the *Adair* case he wrote :

I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men, but of the railroads and the country at large.

And generally he pleaded for greater deference being paid to the legislative judgment when the Congress or the states tried by legislation to correct economic maladjustments that had become rampant. As the Court said in the instant case (*Railway Employees' Dept., A. F. L., v. Hanson* decided in May last), the *Adair* decision "marks the nadir of denial to Congress of power to regulate the conditions for assuring the Nation's dependence on the peaceful and effective operation of its railroads."

In the Lincoln Federal Labour Union case, Mr. Justice Black, who delivered the opinion of the Supreme Court sustaining the validity of the impugned state laws, said :

The Court [latterly] has steadily rejected the due process philosophy enunciated in the *Adair-Coppage*

line of cases. In doing so, it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition or of some valid federal law. Under this constitutional doctrine the due process is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

Appellants now ask us to return, at least in part, to the due process philosophy that has been deliberately discarded. Claiming that the Federal Constitution itself affords protection for union members against discrimination, they nevertheless assert that the same Constitution forbids a state from providing the same protection for non-union members. Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union works.

The "right to work" laws were sustained in this case, while the law of Nebraska state to the same effect was upset in the instant case, out of which the above considerations arise. But what led the Supreme Court to declare invalid Nebraska's "right to work" law prohibiting railroad union shop agreements was a provision that was inserted in the Railway Labour Act of 1926 in 1951. Prior to that date the Act prohibited union shop agreements. This prohibition came about in 1934, when the union shop was being used by employers to establish and maintain company unions, "thus effectively depriving a substantial number of employees of their right to bargain collectively." By 1950 company unions in the field of railroads had practically disappeared and between 75 and 80 per cent. of railroad employees were members of labour organizations. An amendment was therefore written into the Railway Act in 1951 providing that, notwithstanding the law of "any state," a railroad and a labour organization may make an agreement requiring all employees within a stated time to become members of the labour organization, provided that the organization is in other respects an open union, i. e., that membership therein is available to all on ordinary, appropriate terms.

The Nebraska trial court issued an injunction and the supreme court of Nebraska affirmed, holding that the union shop agreement violated the First Amendment in that it deprived non-union employees of their freedom of association. The U. S. Supreme Court reversed, taking its stand on the 1951 amendment of the Railway Labour Act permitting the negotiation of union shop agreements, notwithstanding any law of "any state." Justice Douglas who delivered the judgment of the Court said :

A union agreement made pursuant to the Railway Labour Act has, therefore, the imprimatur of the federal law upon it, and by force of the supremacy clause of Art. VI of the Constitution could not be made illegal nor vitiated by any provision of the laws of a state.

This Article declares that "the laws of the United States . . . shall be the supreme law of the land the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." The finding of the Court thus is that, if Congress sanctions compulsory unionism and an employer grants it in collective bargaining, any provision to the contrary in a state Constitution or law is thereby overridden.

Prior to Justice Brandeis' appointment to the Supreme Court, he had expressed the fear that a compulsory all-union shop would substitute "tyranny of the employee for the tyranny of the employer." He did not favour a "monopoly" of membership by a union. A union, he said, "need not include every member of the trade. Indeed, it is desirable for both the employer and the union that it should not. Absolute power leads to excesses and to weakness." Thus it was recognized that in fostering trade unionism, protection should be given to non-union members against any possible injustice unions may perpetrate. The decision in the 1949 case cited above was to the same effect. But in doing so reliance was placed on the policy which legislatures might choose to pursue, and the qualifying phrase in Justice Black's opinion that the due process clause does not restrict the power of the states to legislate against what are found to be injurious practices in their internal affairs, "*so long as their laws do not run afoul of some specific federal constitutional prohibition or some valid federal law,*" should be taken note of. Now the Supreme Court invalidates rights to work laws declared valid in the earlier case, because the Court gives precedence to a federal law (the Railway Labour Act) over a state law. The essence of the matter is that the legislative judgment should be allowed by the Courts to prevail in economic matters, which are, as Justice Frankfurter remarked, are "matters of trial and error."

In the instant case too the Supreme Court approached the question of "whether the long-run interests of labour would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop" from the same point of view. Justice Douglas said:

The ingredients of industrial peace and stabilized labour management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary . . . To require, rather than to induce, the beneficiaries of trade unions to contribute to its costs may not be the wisest course. But Congress might well believe that

it would help insure the right to work in and along the arteries of interstate commerce.

Thus, as Justice Frankfurter said in his concurring opinion in this case, the Supreme Court has "come full circle from the point of view in the Adair case."

COMMENTS

Police Used Excessive Force

IN LATHI-CHARGING PROCESSIONISTS AT HOSHIARPUR

It reflects great credit on the Congress High Command that it instituted an inquiry into the incidents connected with a lathi charge by the police against the Maha Punjab Front processionists at Hoshiarpur on 17th June. The credit is all the greater if, as is widely believed, the local Government was against holding any inquiry into the incidents. The Congress authorities at the centre must have intervened only because it thought, and rightly, that it was no longer a local affair but had assumed in the public eye an importance far transcending a purely localised question. The inquiry was not a judicial one as had been demanded but an inquiry conducted by the Congress party itself, though subsequently a retired judicial official was associated with it. The inquiry committee's finding is that the police used excessive force in handling the situation. The conclusions of the committee were:

Till the evening of June 16 the oppositionists were the aggressive party.

In the lathi charge of June 17 more force was used than necessary. The lathi charge continued even after the processionists had taken to their heels.

Some of the over-zealous and misguided members of the police force were in a revengeful spirit and pursued and attacked some of the processionists in neighbouring houses where they had taken shelter.

In their lathi charge on the crowd, the members of the police force did not spare women and children. Some of them were deliberately beaten with batons and lathis.

Apart from receiving injuries as above, women were roughly handled, inasmuch as they were pulled by the hair and by their garments, resulting in the tearing of their clothes and removal of their dupattas from their persons.

Firing in Bombay in Nov. 1955 and Jan. 1956

"CARTE BLANCHE TO THE POLICE"

The holding of an inquiry by the ruling party into what relatively was a small matter in Hoshiarpur over the head of the local Government immediately concerned presents a strong contrast the Government of India helping the Bombay Government "to hush up an inquiry" into the "carnage" brought about by the "uncontrolled" and "indiscriminate" firing in Bombay City in the months of November

1955 and January 1956. Mr. C. D. Deshmukh, in resigning his portfolio of Finance Ministership in the Government of India, pin-pointed this contrast in the statement he made in Parliament explaining why on grounds of principle he was constrained to tender his resignation. The statement brings to light for the first time that he had urged the Prime Minister to order an inquiry into shooting which there is "a great deal of prima facie evidence" to prove was unjustified. Mr. Desemukh roundly charged the Prime Minister and the Home Minister of "being false to their [professed] principles in regard to the safeguarding of civil liberties" in this matter. One point in the statement is worthy of particular note: "There is evidence to show . . . that the deliberate use of tear gas before intended firing [which meant shooting at sight and shooting to kill] brought out women and children from their rooms choking for breath, only to be shot down by the indiscriminate firing of the police."

This part of Mr. Deshmukh's statement must be given here in full. After saying that the Government's decision in regard to Bombay City was in his opinion unfair and unjust and that the "cavalier and unconstitutional manner" in which the decision was made was open to strong exception, Mr. Deshmukh says:

Even more summary and discourteous has been the rejection by the Prime Minister and the Home Minister of my request that they promote an inquiry into the Bombay firings of November 1955 and January 1956.

I am convinced that they are being false to their principles in regard to the safeguarding of civil liberties in helping to hush up an inquiry. Since the Prime Minister has at a later date argued that the question of Bombay City cannot be reconsidered just now because Bombay had misbehaved, he cannot argue that the matter is one concerning the Bombay Government alone. His view that such an inquiry will only exacerbate public feelings further is not valid, since truth can never embitter, and what is alleged with a great deal of prima facie evidence is that the police showed lack of fire control and grossly exceeded their legal powers. There is evidence to show that they were instructed by the Chief Minister to shoot at sight and shoot to kill; that the deliberate use of tear-gas before intended firing brought out women and children from their rooms choking for breath, only to be shot down by the indiscriminate firing of the police, using tommy guns, firing several rounds to the second; that there were 2,500 rounds fired resulting in 80 persons dead and 450 injured. As compared with this the injuries to the police by stones and acid bulbs were insignificant and not contemporaneous with the firing episode.

That the ruling party should have thought fit to order an inquiry into the Hoshiarpur lathi charge when they resolutely refuse to order an inquiry into

the Bombay firings, to my mind shows an animus against Maharashtra with which I refuse to associate myself.

I drew the attention of the Prime Minister to many of these matters and informed him that I was thoroughly dissatisfied with the apathy with which this matter has been viewed by him. I pointed out to him that in any other country calling itself civilized, with such a carnage, a judicial inquiry would have been compulsory by law.

Even now when the coroner has held in several cases that the firing of November 1955 was unjustified, there seems to be no intention to inquire into the matter.

These matters, viz., the usurpation of the powers of the Cabinet by an inner circle and the denial of civil liberties by giving a "carte blanche" to the Bombay police have a bearing on public interest going far beyond the range of the dispute over Bombay City.

Violence can only be curbed by justice and rational behaviour. The aggressive non-violence of many men responsible for the Bombay decision will do far more to disrupt the unity of the country than outbursts of violence, which no sane man will condone and which must be dealt with firmly, but not brutally, especially where hundreds of palpably innocent citizens are involved.

Mr. Nehru, without denying the truth of any of the allegations in the statement, merely turned down the demand for an inquiry as likely to inflame the relations between the Marathi-speaking and the Gujerati-speaking peoples.

"Bombay Way" of Curbing Mob Outbursts

It is reported that the Government of India is trying to evolve uniform principles as to how to handle mass demonstrations of agitators. In this connection the United Press of India says:

Preliminary examination indicates that the method adopted by the police to quell them (disturbances) can be broadly defined as the Calcutta method and the Bombay method

The Calcutta method is taken to be a patient study of the developments and application of force by stages, carefully measuring the effect at each stage.

Application of the maximum force in the very beginning is taken to be the principle underlying the Bombay method.

The argument advanced in favour of the Bombay method is that it breaks with one stroke the core of a violent demonstration, and makes it easier and quicker for the authorities to control it.

The Calcutta method, it is argued, gives scope for the relatively sober elements among the demonstrators

and their leaders to think again of the consequences that might follow any violent act on their part and helps the authorities to win over public opinion.

"Free and Fair Elections" in Kashmir

The Prime Minister of Kashmir (it is to be carefully noted that he is not to be called a mere Chief Minister—it would degrade Kashmir's prestige if she were to be regarded as one of the several Indian States) announced in New Delhi recently that, along with the elections in the rest of India, elections would be held in Kashmir also—though under the State's own election commissioner (to hold them under India's election commissioner would apparently detract from Kashmir's status as an autonomous State).

The question then arises: Will those who are opposed to Kashmir's accession to India be allowed to participate in the elections? He answered the question by saying that the basic concept of Kashmir's Constitution which Kashmir itself was drafting was that the State was an integral part of India and that "we expect all those who participate in the elections will do so on the clear condition that they endorse the basic concept of our Constitution, viz., that Jammu and Kashmir is a part of India."

From this one would gather the impression that those who oppose accession of Kashmir to India would be debarred from the elections. But he dispelled such an impression by saying: "We will allow even those to participate in the elections who will ask for accession of the State to Pakistan provided their acts are not designed to subvert the integrity of the State."

It is not subversive opinions that will be banned, but subversive acts. There is, however, one opinion which is so subversive as to lead inevitably to subversive acts, and those who hold this opinion will have no place in the elections. He said: "We will not allow anyone to use the elections to subvert the peace of the State or to start a communal conflagration by suggesting that the Hindu majority area should go to India and the Muslim majority area to Pakistan."

The enormous number of persons who are held in detention because of their pro-Pakistan propaganda (which one thought, however distasteful to us, should be freely allowable in view of the impending plebiscite on that very issue) will apparently not be released. A press correspondent indeed asked the Premier whether Sheikh Abdullah would be restored to freedom. The Premier replied that that ceased to be a political question; it was now a security question, and Sheikh Abdullah would not remain under detention a minute longer than necessary. When those now in jail would be excluded from participation in elections if in the opinion of the Kashmir Government security considerations would require them to be locked up, the elections, one would think, are far from being "fair and free."

NOTES

Censorship—Compulsory and Voluntary

Motion Picture Industry's Code

CENSORSHIP INVOLVED IS CONDEMNED BY A. C. L. U.

The Motion Picture Association of America, which is a voluntary organization of the major producers of motion pictures in the United States, has evolved a code of ethics for the industry, under which it bans what it regards as objectionable films on grounds such as that of obscenity. Though its ban has no legal force and the censorship it exercises is a kind of self-censorship for its members, civil liberties bodies have often to protest against the ban as restrictive of freedom of expression.

The Association's Code is particularly exceptionable because it treats certain subjects to be depicted on the screen as altogether taboo. Addiction to drugs is one of such subjects. When recently the United Artists were about to release a film called "The Man with a Golden Arm," a picture dealing with the subject of drug addiction, the Association refused its seal of approval to the picture. The United Artists are, however, going to show the picture, resigning membership of the Association.

The American Civil Liberties Union has protested against the Association's action as "an effective restraint of trade in ideas." In its letter to the president of the Association, it says:

The maintenance and welfare of democracy depends upon a free market place of ideas, in which freedom of speech is allowed. The degree of that freedom is measured by the availability of channels to and from the market place, and the lack of restraint on beliefs expressed within it. Diversity of opinion and belief is the fundamental basis on which the market place operates. The A.C.L.U., therefore, supports measures which broaden channels of communication and restrain monopoly of the means of transmission of ideas, and of course, opposes any limitation on or prohibition of the free exchange of ideas.

Freedom in the trade of ideas is limited by industry agreements or practices, such as those represented by the M. P. A. A. Code. The Code is an agreement undertaken by industry members of media of communication, which is intended to set standards of propriety. Insofar as the Code sets forth limitations on what may be said or done, it is a restraint upon freedom of expression.

While our emphasis, naturally, is on the constitutional protection of the First Amendment, we are not unmindful of the question of obscenity in films. This problem, we submit, can best be handled by criminal prosecution, under obscenity laws, in the courts where the standards of due process are practised.

Apart from the fact that the banning of films because they deal with certain subjects is vulnerable on constitutional grounds, there are, according to the A. C. L. U., practical reasons for condemning the banning. It proceeds.

The subjects tabooed or which require special treatment are all being discussed and represented to the public by other media of public information. For example, the problem of drug addiction has been explored by Congressional committees, state and local government agencies, newspapers, magazines, and the film's sister media, the theatre and television. What this proves is that a real problem that faces society can never be hidden, that eventually it must be dealt with. And the mass media, including motion pictures, have a responsibility to present the public information and understanding of the problem so that, in a democratic manner, the public can decide how it wishes to cope with it.

We believe that the motion picture is a medium for the presentation of information and ideas and, as such, is entitled to exactly the same protection guaranteed to the press under the First Amendment.

Control of Burlesque Performances

Many U. S. A. States have passed laws and cities have passed municipal ordinances penalizing performances which are in intent lewd, obscene and lascivious. But the City Council of Newark in New Jersey recently amended its ordinances for the control of allegedly improper burlesque performances, requiring burlesque and other theatrical operators to obtain licenses, thus imposing pre-censorship on such performances. The amendments further provide for the revocation of the license if any theatrical performance exposed the male or female torso in nude form or if "any dance, episode or musical entertainment depicts sexual subjects, acts or objects offensive to the public morals and decency." The local branch of the American Civil Liberties Union has issued a statement in protest, saying that licensing used as a device to control the specific content of a form of entertainment "is one of the oldest techniques of censorship known" and that if the ordinances were to be strictly enforced it would ban some of the greatest works of contemporary and classical art in the city of Newark. The statement proceeds:

It would be impossible to give dramatic illustrations of many episodes of the Bible; half of Shakespeare could no longer be taught in the schools; as for the ballet theatre, it would vanish from Newark completely.

Apart from the fact that it is utterly impossible to define in advance whether a performance is an artistic composition or one merely intended for obscene purposes, the fact remains that even after the event the determination is very often a subjective judgment depending on the taste or temperament of the parti-

cular viewer. The ordinances treat nudity as obscene per se. This would banish much of the Sistine Chapel, one of the monumental and artistic triumphs of western culture. It would seem rather absurd that the members of the Newark City Council should pit their artistic judgment against the judgment of the centuries. Prior restraint inevitably becomes a dictatorial, narrow, partisan, and totalitarian device for imposing the artistic or literary prejudice of one group upon the entire community. It inevitably leads to bootlegging in ideas and speakeasies in entertainment.

The Right to Read

The Post Offices Department of the United States delivers "propaganda" materials from abroad to newspapers, universities and certain special individuals, but may withhold such publications from delivery through the mails to the general public. The American Civil Liberties Union has protested against this practice on the ground that the Post Office has no legal authority to make the kind of distinction it is making between institutions and special individuals on the one hand and the public at large on the other. It says:

The meaning and tradition of the First Amendment is that the Government may not, except on grounds of "clear and present danger," deny any person in the United States the right to read—a right correlative with the right of freedom of speech guaranteed by the First Amendment.

Once the government assumes control over the reading material of its citizens, it has taken a long step down the road of totalitarianism. For these reasons we urge the Department to consider all materials sent directly to persons from abroad as mailable, whenever the source is properly disclosed to the receiver thereof.

HABEAS CORPUS PETITIONS

Two More Detainees Ordered to be Released DETENTIONS IN CONNECTION WITH UNITED MAHARASHTRA MOVEMENT

While dismissing the applications of seven others, Gajendragadkar and Gokhale JJ. at the Bombay High Court allowed on 25th July the applications of two detenus for a writ of habeas corpus and ordered them to be set at liberty.

One was from Mr. Krishnaji Narayan Dhulap, who was ordered by the Commissioner of Police, Bombay, to be detained for having published three articles in his bi-weekly paper, "Jai Maharashtra," inciting Maharashtrians in Bombay to resort to violence for the establishment of United Maharashtra with Bombay City. While the detention order was passed on 27th January, the Commissioner sent his report to Government, as required

by sec. 3 (3) of the Preventive Detention Act, on 6th February and the Government confirmed the detention on 7th February.

Their Lordships held that the delay on the part of the Commissioner in sending his report to Government vitiated the detention order, as sec. 3 required that the detaining authority should forthwith report to the State Government. The reason given for the delay was that the situation in the city being tense, the Commissioner was unable to send the report earlier, but the Court did not accept the reason as sufficient. While conceding that the situation was tense, Their Lordships remarked that the detaining authority in its report had only to give a bare outline of the grounds of detention and of impugned articles to Government so that Government might determine whether those articles were inflammatory and whether the detention should be confirmed or not. If the Commissioner was proceeding on the assumption (Their Lordships added) that the limitation was eleven days, he was committing a grave error.

The other application which the Court allowed was from Mr. Vasant Rajaram Raut, Secretary of the Peasants and Workers Party, Bombay Branch. Mr. Raut was arrested on 22nd February on the order of detention passed by the Commissioner on 13th January on the charge that he was promoting lawlessness and disorder and that since 1st November he had been inciting the public to observe hartals and defy the orders of Government. He was furnished with details of the disorders that took place in Bombay between 18th and 21st November and certain other particulars. On the detenu complaining that the grounds of detention were vague, the Commissioner gave some additional facts in an affidavit, saying that "as the activities were continuous and secret, the specific date or dates and the manner, method and mode of instigation could not be stated." Their Lordships stated in their judgment that, but for this reference in the affidavit to the secret activities of the detenu, they would have upheld the detention order. But having regard to the fact that the Commissioner had kept back from the detainee an important part of the report received by him in regard to Raut's activities, Their Lordships thought that the communication made by the Commissioner to Raut about the grounds of detention was radically defective.

Therefore, when the detainee made his representation against the ground communicated to him, he could never have thought that any secret activities were attributed to him, in which case it was impossible to say to what extent the ultimate decision of the detaining authority was influenced by the public activities of the detenu and by his secret activities. In Their Lordships' opinion, failure to supply an important part of the particulars to the detainee in such a case must be held to impair the constitutional right of the detainee to make a representation.

Their Lordships therefore held the detention order to be invalid.

THE LAW OF DOMICILE

Order of Expulsion Set Aside

BOMBAY HIGH COURT'S RULING IN THE CASE OF A GOA-BORN RESIDENT

The order passed by the Government under the Foreigners Act directing 38-year-old Goa-born Michael Anthony Rodrigues to leave India was set aside by the Chief Justice and Mr. Justice Dixit at the Bombay High Court on 27th July.

Rodrigues came to Bombay from Goa in 1927 at the age of nine. After education in the city, he joined his father's tailoring business. For a time he served in the Royal India Air Force and was discharged in 1956. Thereafter for over a year, he served in a firm and later re-joined his father's business. He was a voter on the municipal rolls.

Against the order of the Government Rodrigues filed a petition in the High Court, but Mr. Justice Coyajee held that the petitioner had failed to establish his Indian domicile and dismissed the petition. Rodrigues appealed.

In allowing the appeal, Their Lordships said that when Rodrigues wished to establish that his domicile of choice was India, he had to establish the fact of his residence in this country and further to establish the animus of intending to reside permanently or for an unlimited time in India. What the Court had to consider was not residence in itself but the quality and character of that residence. If the quality and character of that residence led to the clear inference that the residence was not intended merely for a temporary purpose, but was intended to live permanently in the place, then the residence itself would have a bearing on the question of animus.

Their Lordships said that a place was properly the domicile of a person in which his habitation was fixed without any present intention of removing therefrom. Therefore Rodrigues had to prove not merely his residence as a factum, but to prove those circumstances with regard to his residence and his other activities and with regard to his conduct which would go to show that the residence was intended for a particular purpose.

It was contended on behalf of the Government that Rodrigues visited Goa and that he had not cut off his connection with his domicile of origin. On the other hand, Rodrigues had stated that he visited Goa occasionally for change of air and that he had no interests in Goa.

In Their Lordships' opinion, occasional visits to the place of birth for change of air could not possibly affect the question of animus which the Court had to settle.

It was alleged that the appellant was indulging in anti-social and anti-Indian activities, but these had been denied by Rodrigues.

Their Lordships said that, even assuming that Rodrigues' conduct was anti-social and anti-Indian, that conduct could have no bearing on the question as to whether the appellant was a foreigner or not; the law of the land

was strong enough to deal with him without resorting to the Foreigners Act and trying to send the appellant out of India.

In Their Lordships' opinion, the appellant had established his Indian domicile. They therefore set aside the Government's order.

DISMISSAL OF A GOVERNMENT SERVANT

Order Set Aside by High Court

NO OPPORTUNITY AFFORDED TO MEET THE CASE

Mr. C. Subramanian, a tahsildar, was alleged to have practised corruption when in charge of assigning lands to political sufferers in Madurai district. After an investigation by the C. I. D., the Madras Government referred the case to the Tribunal for Disciplinary Proceedings for inquiry and report. The Tribunal found him guilty of having demanded and received illegal gratifications from political sufferers who had applied for assignment of lands. Thereupon, after calling the officer to show cause why he should not be dismissed from service, the Government passed an order of dismissal against him on 27th November 1953.

The officer denied the charges and complained that he was not allowed to produce witnesses before the Tribunal in order to disprove the charges of which the Tribunal had found him guilty. N. Rajagopala Ayyengar J. on 23rd July ruled at the Madras High Court that the Government's order of dismissal was not justified and must be set aside. His Lordship held that the Tribunal was not justified in refusing permission to the petitioner to examine certain witnesses furnished in the list submitted by him. His Lordship added:

It is clear law that if an officer has not been afforded an opportunity to meet the case against him at the departmental inquiry and the Government, acting on that report, ordered the dismissal of the civil servant, the order of dismissal had to be set aside as not being in conformity with Art. 311 of the Constitution.

TOPICS

Revision of Security Procedures

RECOMMENDATIONS BY A COMMITTEE OF LAWYERS

Since the Supreme Court's decision in *Cole v. Young* (vide p. iv : 130) that the federal security programme could be applied only to federal employees in sensitive posts, bills have been introduced to overturn the decision by making the programme applicable to non-sensitive as well as sensitive jobs, and the Attorney General has endorsed the bills. But this extension of the programme to all jobs in the Federal Government will presumably last till the Administration revises the programme after

consideration of the report of a committee appointed by Congress to look into the matter, which will be submitted in the spring.

In the meanwhile a committee of distinguished lawyers appointed by the Association of the Bar of the City of New York has produced a comprehensive study and critique of the existing programme, which contains many valuable suggestions for reform of the present practices. It recommends that the Administration should concentrate on clearance of sensitive jobs alone, as that "would enhance rather than lessen the national security." "We have to choose," it says, "between a more effective security system in critical posts or a less effective one in all." Sensitive posts are defined as those which handle top-secret and secret data or perform a policy making function "which bears a substantial relation to national security." So limited, the programme would be reduced in coverage by 75 per cent.

Under the committee's proposal all federal employment would be barred to persons advocating unlawful overthrow of Government and defence jobs would remain forbidden to members of Communist-action organizations. The committee also proposes that would-be entrants into Government service and probationary employees should be given an opportunity to rebut adverse information.

One important proposal is that the Attorney General's list of allegedly subversive organizations should be entirely abolished, or if retained should be limited to those organizations that have had a chance to be heard, and even then it should be laid down that membership alone would not establish an individual as subversive.

The committee has advocated improved screening and processing of suspected individuals. Among the specific procedural reforms suggested is the creation of a central screening board to avert "excessive filing of charges" and introducing subpoena power for screening and hearing boards for both Government and employee witnesses. Confrontation by adverse witnesses would be encouraged though not in all cases required. The rights of the accused would be more carefully safeguarded. If the programme is thus revised, it would not only be curtailed in extent but would go far to reconcile the claims of security and individual liberty.

Deliberate Slow-Down Tactics

THEIR EFFECT ON COLLECTIVE BARGAINING CONTRACTS

A New Jersey corporation making surgical dressings and other products (namely, the Personal Products Corporation) arrived at a collective bargaining contract with a C. I. O. textile union. The contract expired in 1952, and negotiations for a new contract failed on account of the "harassing tactics" employed by the union. The National Labour Relations Board found on inquiry that the union engaged in slow-downs and unauthorized extensions

of rest periods, walk-outs or partial strikes for portions of shifts or entire shifts, induced employees of other concerns not to perform work for the company and refused to work special hours or overtime. Consequently the board held that though the union did not strike during negotiations nor tried "to frustrate the duty to bargain collectively by delivering an ultimatum on a 'take it or leave it' basis," it employed "a new technique" of pressure on the employer, and that because of this the union failed to bargain "in good faith" as required by the Taft-Hartley Act. The board therefore unanimously ordered the union to "cease and desist."

The union petitioned the Appeals Court for a review of this decision, and the Court recently sustained the part of the board's order that forbade the union from "restraining or coercing employees." But with respect to the finding on the semi-sit-down strike the Court divided, 2 to 1. Chief Judge Edgerton, with whom another judge concurred, said :

Courts have held that similar union tactics are "unprotected" [by the Taft-Hartley Act] in the sense that employers may lawfully discharge employees for using them. . . . But the board's theory that such tactics are evidence that a union is not bargaining in good faith and may therefore be forbidden . . . will not stand analysis. There is not the slightest inconsistency between *genuine desire to come to an agreement* and use of economic pressure to get the kind of agreement one wants.

As the board intimated . . . no inference of failure to bargain in good faith could have been drawn from a total withholding of services during negotiations in order to put economic pressure on the employer to yield to the union's demands. As a simple matter of fact, it is equally clear that no such inference can be drawn from a partial withholding of services at that time and for that purpose.

Judge Danaher dissented, remarking that the reasoning "amounts to saying that . . . the union is free to adopt and put in practice any tactics it may select which have not been specifically interdicted by Congress and assigned to the board's jurisdiction." He said :

Certainly . . . the union could have called a strike, and thereafter it could have negotiated further with the employer. It could have continued its members at work. . . . It did neither. This was not "a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which they sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment.

An employee cannot work and strike at the same time. . . . He cannot collect wages . . . and at the same time engage in activities to injure and destroy his employer's business." [This quotation is from another Appeal Court's opinion delivered in 1946.] I believe that to be a correct statement of the law.

The issue here was : what is bargaining collectively "in good faith" in the eye of law? A commentator writes on the split decision in this case :

Probably to many laymen, whatever the letter of the law may be, ethics and morals, as well as the promotion of industrial peace (the stated objective of the Taft-Hartley Act), will appear to march with Judge Danaher. But so does the legal definition of "good faith" that appears in Bouvier's Law Dictionary. It is described as "an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law."

Use of Government Informers

—(i) IN CRIMINAL CASES

The notorious Harvey Matusow, an ex-Communist, who appeared as a Government witness in the conspiracy trial of thirteen second-flight Communist officials in New York and then publicly recanted (vide p. iii : 211), again appeared as a witness recently in a criminal case against a union official on the charge of making a false affidavit to the National Labour Relations Board that he was not a member or affiliate of the Communist Party. The jury, relying on the evidence of Matusow, gave the verdict of guilty.

The case attracted wide attention because of the confessed perjury of Matusow. Since this disclosure it was announced on behalf of the Government that hereafter only casual informers would be employed by them in the detection of crime but no paid full-time informers would be employed any longer. The instant case brought up the question whether a Government informer could at all be employed in a criminal trial. The Circuit Court of Appeals sustained the Government's use of such informers. The Court said :

The Government is frequently compelled to look to the criminal element, including accomplices, for its witnesses. The enforcement of the criminal law would be rendered impotent if convictions should be set aside merely because one of such witnesses essays to repudiate his testimony when it seems profitable to do so. Particularly is this true here where the recantation was so completely under the sponsorship and tutelage of appellant and his agents. [This referred to the fact that Matusow recanted after getting financial backing for a book from persons interested in setting aside the conviction his original testimony had greatly influenced.]

Such a shackling of law enforcement cannot be tolerated if justice is to be preserved.

(ii) IN THE INTERNAL SECURITY PROGRAMME

The use of informers in criminal trials should not be confounded with such practice in matters affecting the national security, for instance, in dismissing Government employees on the basis of information given by secret informers. In criminal cases a conviction is based on the open testimony of an informer, produced by the prosecution, who confronts the accused. In the internal security programme, however, dismissals take place on the basis of "faceless" witnesses who are not allowed to confront the person removed as a security risk. Such non-confrontation is believed by many people to be corrosive, if not violative, of the Bill of Rights.

This constitutional issue has so far been by-passed by the Supreme Court, as for instance in the case of Dr. Peters (vide p. iii : 249). It is widely believed that until the Court decides that even in loyalty cases informers should be made to confront the accused if the latter is to be removed from service, some method ought to be devised for confrontation and cross-examination of secret informers. It is of interest to note in this connection that Senator Herrings of Missouri made a proposal for the administrative solution of the problem in his speech to a group of lawyers and judges in St. Louis on 2nd November. He said :

I fully realize that the clash between the reluctance of the Government to disclose the sources of its information and the right of the accused to be confronted with witnesses against him presents difficulties of the first order. . . . It might be possible to appoint a sufficiently large panel composed of members of the bar who could get top security clearance, and whose characters would not be tainted by religious, racial and other bias. [These] lawyers will have the right, on the request and in behalf of the accused and his counsel, to confront and to cross-examine the undisclosed witnesses.

Censorship of "Obscene" Films

SUPREME COURT'S JUDGMENT

In a 1952 decision striking down a New York State ban on the film "The Miracle" as "sacrilegious," (vide p. ii : 136 of the BULLETIN,) the U. S. Supreme Court ruled : "We conclude that expression by means of motion pictures is included within the free speech and free press guarantee of the First and Fourteenth Amendments." The opinion overturned a position held by the Court since

1915 that movies were "business pure and simple" (Mutual Film Corporation v. Ohio Industrial Commission, 236 U. S. 230), and hence not included in the constitutional guarantees.

However, the Court specifically left open the question of censorship of films on grounds of obscenity.

In 1953, a case involving obscenity came up. The Kansas State Board of Review banned the film "The Moon is Blue" on grounds that it was "obscene, indecent and immoral and such as to tend to debase or corrupt public morals. A county judge overthrew the ban mainly on grounds that the construction given by the board to the word "obscene" was so vague and broad as to render it unconstitutional as a basis for censorship. The Kansas Supreme Court reversed the ruling of the county judge, and the case went to the U. S. Supreme Court.

Last month the Supreme Court, without giving an opinion, upheld the original ruling of the county judge that the ban was unconstitutional. The Supreme Court decision does not mean that states may not ban a film on grounds of obscenity. What it does mean is that a state must clearly define what it means by "obscenity"—or any other ground on which it seeks to impose censorship—and that the courts must find the definition not violative of the constitutional guarantees of freedom of speech. Then the only issue remaining is whether the movie in question comes within the proscription.

A "Public Defender" Law

The Attorney General of the United States took to the ailing President in December last at Denver a programme for a more efficient administration of the country's judicial and penal systems, which the President has approved. An item in this programme is to send to Congress a "Public Defender" law for the purpose of giving wider opportunities to accused persons in necessitous circumstances to engage legal counsel. Those who are too needy to have their own private lawyers will be enabled hereafter to have public ones to a larger extent than at present. The forlorn and hapless offenders in Federal courts will under the proposed Act now be provided a better defence.

The President also endorsed the Attorney General's proposal to outlaw eavesdropping on jury-room deliberations. This proposal stems from reaction against a project carried out by the University of Chicago to study the jury system by planting secret tape-recording devices in jury rooms (see the November issue of the BULLETIN, p. iv : 29).