LEGISLATION

THE SYDNEY CITY COUNCIL (DISCLOSURE OF ALLEGATIONS) ACT, 1953

The Sydney City Council (Disclosure of Allegations) Act, 1953[1] was introduced into the Legislative Assembly of the New South Wales Parliament in Bill form on November 25, 1953, and passed through all stages on that day. The Bill came before the Legislative Council on November 26 and received the assent of the Governor six days later. The scope of the Act was very limited.[2] It contained only five sections. It remained in operation for less than four months. Yet, this Act has aroused more local and overseas comment than any other recent Act of the local Legislature.[3]

This world-wide comment was not primarily concerned with the public allegations of bribery and corruption against aldermen and officials of the Sydney City Council, which were the background to the Act. It was directed more to the methods decided upon by the State Government to investigate these allegations. For it was felt that the enactment clearly impinged upon those well-recognised common law liberties expressed in the phrase "the freedom of the press." The first part of this review will examine how far any such concepts were involved.[4]

The focal point of the Act was Section 3(1). This Section provided that where any statement had been published suggesting that any member or servant of the Council or any other person had been guilty of offering or accepting a bribe or secret commision, a Judge of the Supreme Court "may upon the affidavit of a superintendent or inspector of police showing reasonable grounds for believing that any person or body of persons, corporate or unincorporate, named in the affidavit has in his or its possession any documents upon which such statement, report or matter was based, or has within his knowledge or control any information upon which such statement, report or matter was based, order such person or body of persons to produce such documents or disclose such information to such superintendent or inspector of police." By sub-section (3) of the same Section any person who failed to comply with any requirement of such an order or gave false information committed an offence and thereupon became liable to a fine or imprisonment or both.[5]

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[1] Act No. 24, 1953 (N.S.W.)

[2] As the Preamble stated, it was "an Act to require persons having information relating to certain offences or suspected offences to disclose or produce such information; and for purposes connected therewith."

[3] See for example leading articles in the London "Times" and London "Daily Mail" on December 4, 1953.

[4] That this was an issue of opinion can be seen from the contrasting statements of two well-known Australian lawyers. "There has never been a bill to approach this for oppression and interference with the freedom of the press." (Sir David Maughan). "To talk about freedom of the press in this connection is quite beside the point. It does not come into it." (Dr. H. V. Evatt).

[5] The maximum penalties were in the case of a corporation £1000 and in the case of any

Although in terms made applicable to statements and reports generally the Act was obviously primarily directed to the widespread allegations which had been made in the Sydney newspapers. Moreover, the Act was expressly worded so as to apply retrospectively to statements published prior to its enactment.[6] This retrospective operation in itself was "opposed to sound principles of legislation."[7] But according to critics the most unsavoury feature of the Act was the interference with the confidential relationship between a newspaper and its sources of information.

The special position of the newspaper in regard to sources of information has not been extensively discussed in English or Australian legal literature.[8] The earliest battles for the freedom of the press were directed against the system of licensing. Consequently, early definitions of the freedom of the press are concerned with emphasising the absence of previous restraints on publication. "The liberty of the press consists in printing without any previous licence, subject to the consequences of the law."[9] The area of possible penalty after publication is left unlimited and there is no express recognition of any privilege attaching to communications made to newspaper reporters.

Perhaps the beginning of a recognition of the special position of newspapers can be seen in the rules adopted by the Judges of the King's Bench Division, in the latter half of the 19th century, in deciding whether to grant interrogatories in libel actions.

The interrogatory, which was first introduced by the Common Law Procedure Act, 1854[10], was an extension to common law actions of the equity bill of discovery. It enabled a plaintiff prior to the trial to demand answers on oath from the defendant on matters material to the plaintiff's case. The power was strictly construed by the judges. In particular, it seems at first to have been considered that in actions for the publication of defamatory statements no interrogatory would lie to compel a defendent to disclose the source of his defamatory material.[11] However, it was later appreciated that in libel actions where the defence of fair comment or qualified privilege had been raised, the attitude of the defendant to his sources of information was a matter very relevant to the issue of malice or no malice. By 1905 at least, it was settled that in such cases it was permissible to interrogate a defendant not only as to the information on which his statements had been based, but also as to the source from which that information had been obtained.[12]

To this general rule an exception was recognised. In no case was an inter-

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other person £500 or 12 months imprisonment or both (s.(4)).

[6] S. 3 (1): "Where before or after the commencement of this Act . . . "

[7] To use the words of Broom, *Legal Maxims* (8 ed.) 25. The Act was not fully retrospective in the sense that it made illegal an act which when done was legal. However, it did confer a new right in regard to previously published statements and was retrospective within the meaning of the rule of construction applied in *Strachan* v. *Irmer* ((1910) 27 W.N. (N.S.W.) 45), a case on s.11 of the Defamation (Amendment) Act, 1909. Here, however, the section was clearly intended to be retrospective.

[8] *Cf.* American case law and literature. See Wigmore, *Evidence* (2 ed.) s.2086 and authorities there referred to; F. S. Siebert, *The Rights and Privileges of the Press*, especially s.48.

[9] Lord Mansfield in *The Dean of St. Asaph's Case* (1784) 4 Doug. 73, at 170. Blackstone in 4 *Commentaries on the Laws of England* 151, expressed his view that the liberty of the press "consists in laying no *previous* restraints upon publication, and not in freedom from censure for criminal matter when published."

[10] 17 & 18 Vict. c. 125, s.51, *Whateley* v. *Crowter* (1855) 5 E. & B.709, was an early case in which the section was discussed.

[11] *Blanc* v. *Burrows* (1896) 12 T.L.R. 521 (Court of Appeal).

[12] *White & Co.* v. *Credit Reform Association and Credit Index Limited* (1905) 1 K.B. 653. In that case Collins, M.R. said: "The issue being as to the condition of mind of the defendants when the libel was published, and whether they were actuated by malice, an important factor would be, not merely what enquiry they made into the truth of the statements published, but to whom such enquiry was addressed." (at 658). See also *Elliott* v. *Garrett* (1902) 1 K.B. 870; *Lyle-Samuel* v. *Odhams Ltd.* (1920) 1 K.B. 135; *Korda and Others* v. *Odhams Press Ltd. and Anor.* (1948) W.N. (Eng.) 376.

rogatory as to the source of published material granted against a newspaper.[13] In the working out of this exception there was no clear statement of any independent principle of law.[14] The nature of the development of the rule is illustrated by Lord Esher, M.R.: "It appears to me that in the case of *Hennessy* v. *Wright*[15] the very same question in substance as that in the present case came before the Court of Appeal, namely whether the defendant in an action for libel published in a newspaper ought to be forced to disclose who it was who supplied him with the materials for the libel which had been published. To the judgment in that case I was a party; and Lindley, L.J., after being informed that the general practice of the judges of the Common Law Courts had been for a long series of years not to order inspection in such a case, or to force the defendant to disclose who gave the information on which the libel was published, accepted that practice as binding upon him and did not dissent from the view taken by myself and Lopes, J."[16] Later judges, although occasionally doubting the wisdom of the rule, accepted this exceptional immunity of newspapers as binding upon them.[17] The only statement of any wider principle appears to have been that of Buckley, L.J. in *Adams* v. *Fisher*.[18] The third person Times Law Report of his remarks is as follows: "His Lordship had asked in the course of argument why newspapers had been treated differently from other people in this matter. It seemed that two answers might be given . . . The second answer was that a newspaper stood in such a position that it was not desirable on grounds of public interest that the name of the newspaper's informant should be disclosed."

There were, however, definite limits to this special immunity of newspapers. In the first place, the privilege was merely a rule of practice adopted by the Judges who were called upon to decide a special type of interlocutory application.[19] Moreover, the privilege applied only to pre-trial interrogatories; the immunity never attached to testimony in Court. At a trial, a journalist can always be compelled to disclose the source of information which he has used in writing articles in a newspaper.[20]

If this was to be the basis of one of the principles of a wider concept of the freedom of the press, the foundation stone was patently a weak one.

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[13] *Hennessy* v. *Wright* (1890) 24 Q.B.D. 445; *Hope* v. *Brash* (1897) 2 Q.B. 188; *Plymouth Mutual Co-operative & Industrial Society Ltd.* v. *Traders Publishing Association Ltd.* (1906) 1 K.B. 403; *Lyle-Samuel* v. *Odhams Ltd.* (supra n. 12); *Georgius* v. *The Vice-Chancellor and Delegates of the Press of Oxford University* (1949) 1 K.B. 729.

[14] "What I have called the special newspaper immunity does not rest on any independent principle of law, but it is in truth an exception, the grounds of which have not been very completely defined, carved out of the general field of relevance . . ." Scott, L.J. in *South Suburban Co-operative Society Ltd.* v. *Orum* (1937) 2 K.B. 690, at 703.

[15] *Hennessy* v. *Wright* (1890) 24 Q.B.D. 445.

[16] *Hope* v. *Brash* (1897) 2 Q.B. 188, at 191.

[17] For example, Scrutton, L.J. in *Lyle-Samuel* v. *Odhams Ltd.* (1920) 1 K.B. 135, at 146.

[18] *Adams* v. *Fisher* (1914) 30 T.L.R. 288, 288. The precise nature of the public interest involved was not elaborated by the learned Lord Justice, but it is generally that of freedom of the press. "It may be that in that passage, the Lord Justice was alluding to what is compendiously spoken of as freedom of the press; that it is in the public interest to maintain the freedom of the press; and that it would be difficult to maintain that freedom if a newspaper publisher felt that he might be compelled to disclose the name of the person upon whose information he was acting in making the comment or inserting the statement." Bankes L.J. in *Lyle-Samuel* v. *Odhams Ltd.* (1920) 1 K.B. at 141.

[19] "There is a rule of practice in these courts that such an interrogatory is not allowed in the case of newspapers except in special circumstances. That is a rule of practice which has become so established that this court might interfere if it were not observed." Denning, L.J. in *Georgius* v. *The Vice-Chancellor and Delegates of the Press of Oxford University* (1949) 1 K.B. 729, 732.

In England the position is now covered by Statute. Ordinance 31 Rule 1a of the Rules of the Supreme Court (Statutory Instruments 1949 No. 761) provides: "In an action for libel or slander where the defendant pleads that the words or matters complained of are fair comment on a matter of public interest or where published on a privileged occasion, no interrogatories as to the defendant's sources of information or grounds of belief shall be allowed." This applies to all defendants whether newspapers or not. See *Adams* v. *Sunday Pictorial Newspapers Ltd. and Champion* (1951) 1 K.B. 354.

[20] *McGuinness* v. *Attorney-General of Victoria* (1940) 63 C.L.R. 73.

However, the great common law liberties have traditionally developed not by legal guarantee, but by a general, often tacit, recognition of their inviolability. It is in the general absence of legislative restraints that we find the basis of the liberty of the press.

In the whole course of modern English legislation there has been only one Act which has required a journalist to disclose other than in a court of law the names of persons from whom he has obtained confidential information. The unique power was conferred by Section 6 of the Official Secrets Act, 1920.[21] This section enabled a chief officer of police to require any person to give information relating to any offence under the Official Secrets Acts; failure to comply with such an order constituted a misdemeanour. The Official Secrets Acts penalised a wide variety of misuses of official information and Section 6 could be invoked in relation to the unauthorised advance publication of details of wills admitted to Probate as well as for serious cases of espionage. In 1939, after some vigorous debates in both Houses of Parliament, the Official Secrets Amendment Act, 1939[22], was passed. The new Section 6 introduced by the Act restricted the police power of interrogation to cases of espionage and, in addition, made any exercise of the power subject to the authorisation of the Secretary of State. The obviously vital nature of the interests of public security here protected emphasises the importance of the liberty which was superseded by this unique provision.

In Australia the Parliaments have also given power to require disclosure of information, and in particular of confidential Press information, only on rare occasions. Section 74 (1) of the Defence Act, 1903-1952[23] gives such a power in relation to the enlistment and enrolment provisions of that Act. Section 30 A B of the Commonwealth Crimes Act, 1914-1950[24] gives the Attorney-General power to interrogate any person whom he believes has in his possession "any information or documents relating to an unlawful association." However, like the Official Secrets Acts, these enactments concern matters of national security whose paramount importance can scarcely be denied.

An enactment of this kind not concerning national security is the New South Wales Defamation Act, 1912.[25] Section 12 of this Act provides that where a plaintiff has commenced a libel action against a newspaper, he may make application to a Judge of the Supreme Court who "may if he sees fit" direct that the name and address of the person who supplied the defamatory article to the defendant be disclosed. In the initial test case,[26] the High Court ruled that the quoted words gave the Judge a discretion as to the making of the order and subsequent Judges have exercised the power only in special circumstances.[27] Applications have so far been successful only where it has been shown that an anonymous campaign of vilification was being carried on[28] or where the newspaper proprietor concerned was the proverbial man of straw.[29] In such special circumstances one may surmise that an interrogatory would probably have been granted under the former English practice.

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[21] 10 & 11 Geo. 5 c. 75, (Eng.).

[22] Official Secrets Act, 1938-9 (Eng.) 2 & 3 Geo. 6 c. 121.

[23] No. 20, 1903 — No. 98, 1952 (Cwlth.), Section 74(1): "Any person of whom information is required by an officer or person in order to enable him to comply with the provisions of this Act relating to enlistment or enrolment who refuses or neglects (without just cause, proof whereof shall lie upon him) to give such information, or gives false information, shall be guilty of an offence."

[24] No. 12, 1914 — No. 80, 1950 (Cwlth.).

[25] Act No. 32, 1912 — Act No. 39, 1948.

[26] *Hollingsworth* v. *Hewitt* (1911-1912) 13 C.L.R. 20.

[27] *Peat* v. *Eley & Another* (1915) 32 W.N. (N.S.W.) 96; *Meyer* v. *Humphries* (1916) 33 W.N. (N.S.W.) 126; *Campbell* v. *John Fairfax & Sons Ltd.* (1935) 52 W.N. (N.S.W.) 154; *Goodhew* v. *Daniel Bros. & Co. Pty. Ltd.* (1948) 65 W.N. (N.S.W.) 133.

[28] *Meyer v. Humphries* (1916) 33 W.N. (N.S.W.) 126; *Goodhew* v. *Daniel Bros. & Co. Pty. Ltd.* (1948) 65 W.N. (N.S.W.) 133.

[29] *Meyer v. Humphries* (1916) 33 W.N. (N.S.W.) 126.

Considered in this historical framework the Sydney City Council (Disclosure of Allegations) Act, 1953 appears to have been a sufficiently unprecedented enactment to warrant the wide reaction which it provoked. It applied to the affairs of a local council a police power of compulsory interrogation which in the past had been limited to the gravest issues of national security and the most wanton attacks on individual reputation.

The subsequent history of the Act may be shortly recorded. Within 24 hours of the Royal assent to the Act an application was made for an order directing John Fairfax & Sons Pty. Ltd., the publishers of *The Sydney Morning Herald*, to disclose the names of two aldermen who according to an Editorial in the paper had made allegations of Council graft and corruption. Acting under the special procedure provided for in the Act[30], Mr. Justice Owen directed that notice be served on the Company and the matter was heard in Public Chambers on December 9, 1953.[31]

In argument, two main issues were raised — both questions of interpretation. In the first place the counsel for the defendant company argued that the word "may" in Section 3(1) was permissive and a Judge in exercising his discretion should make such an order only where the public benefit clearly required it. Reference was made to the authorities on the interpretation of this word and in particular Section 23 of the Interpretation Act, 1897.[32] His Honour, however, considered that the primary meaning of "may" was here clearly displaced.[33] The Section, he held, imposed an imperative duty on the judge to make the order once it was positively shown that there were reasonable grounds for believing that the respondent possessed the information sought.

The second and successful argument on which the application was opposed, was based on the different expressions used in Section 3(1) in relation to the possession of documents and the possession of information. After qualifying the word "person" by the description "corporate or unincorporate," the Section refers to "his or its possession of documents," but speaks only of information "within his knowledge." Counsel for the respondent argued that although the machinery of the Section applied to both natural and corporate persons when the production of documents was being sought, it did not give the judge power to make an order against a corporation for the disclosure of information. With this submission His Honour agreed and the application was dismissed.[34]

This defect of the Act was one which was capable of easy legislative amendment. Yet, after remaining unused for several months, the Act was repealed on March 12, 1954.[35] It is permissible to hope that a legislature

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[30] Sydney City Council (Disclosure of Allegations) Act, 1953, s.4.

[31] The case is reported as *Re Calman and John Fairfax and Sons Pty. Ltd.* (1954) 71 W.N. (N.S.W.) 79.

[32] Section 23 of the Interpretation Act, 1897 (N.S.W.) (Act No. 4, 1897), lays down the rule of construction: "Whenever in an Act a power is conferred on any person by the word 'may', such word shall mean that the power may be exercised, or not, at discretion." This Section was primarily declaratory of English case law. See esp. *Julius* v. *Bishop of Oxford* (1880) 5 A.C. 214.

[33] *Re Calman and John Fairfax and Sons Pty. Ltd.* (1954) 71 W.N. (N.S.W.) 79, 83, 84. His Honour adopted a passage from Lord Cairns L.C.'s judgment in *Julius* v. *Bishop of Oxford* (1880) 5 A.C. 214, 225, which set out the *exceptions* to the primary meaning of the words being considered.

[34] *Re Calman and John Fairfax and Sons Pty. Ltd.* (1954) 71 W.N. (N.S.W.) 79 at 84. His Honour regarded his decision primarily as one of construction. However, he did go on to say that there may have been a good reason for the differentiation between natural and corporate persons. "A document, if it is shown to be in the possession of the company, can be produced and it cannot refuse to speak, but this is not so where information, not in documentary form, lies and can be only in the mind of a natural person." (at 85). Such a view runs somewhat contrary to recent English decisions which have tended to assimilate the position of natural and corporate persons as much as possible, avoiding as far as possible reasoning from the nature of corporate personality. See *D.P.P.* v. *Kent and Sussex Contractors Ltd.* (1944) 1 K.B. 146; *Moore* v. *Bresler Ltd.* (1944) 2 All E.R. 515; *R.* v. *I.C.R. Haulage Ltd.* (1944) 1 K.B. 551.

[35] Section 5 of the Act provided that the Act was to cease upon a day appointed by

contemplating the grant of such a power in the future will give long and earnest consideration to the competing public interests involved. The free criticism of existing institutions by newspapers and others should not lightly be put in jeopardy.

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HEARD AND MACDONALD ISLANDS ACT, 1953

The Heard and Macdonald Islands Act of 1953, proclaiming Australian sovereignty over these islands, was passed as a result of the 1948 Australian National Antarctic Research Expedition, which had been sent to the Antarctic for the purpose of choosing suitable bases for meteorological stations, and to strengthen Australia's claim to her southern territories[1] by a display of governmental activity.

However, the mere proclamation of sovereignty, even where it is supported by discovery[2], does not, in the absence of effective occupation, confer territorial sovereignty upon the proclaiming State. But actual settlement or use of the territory is not essential for effective occupation; indeed, this condition is satisfied by the establishment of any organisation, however rudimentary, or by any system of control which, having regard to the nature and condition of the particular territory, is sufficient to maintain order among such persons as might go there or to exploit such of its resources as are capable of exploitation.[3] In modern international law, the requirement of effectiveness of occupation is so much a matter of degree that the borderline between this attenuated condition of effectiveness of occupation and the total abandonment of the condition has become "blurred to the point of obliteration".[4]

International law now predicates a reasonably continuous display of state activity as an essential requirement for that effective occupation which confers a title to territorial sovereignty. It involves two elements, both of which must be shown to exist.[5] There must be (1) an intention and will to act as sovereign,

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the Governor and notified by proclamation in the Gazette. A proclamation in the Government Gazette (N.S.W.) No. 41 of 1954, duly appointed March 12, 1954, as the date on which the Act was to cease.

[1] These comprise all the islands and territories, — other than Adelie Land which is claimed by the French — situated south of the 60th degree south latitude and lying between the 160th degree east longitude and the 45th degree of east longitude.

[2] Discovery may, however, confer an inchoate title in which case such a title exists without external manifestations of sovereignty. But unless perfected, an inchoate title has the same vice as a sphere of influence, in that it seeks to exclude the sovereignty of others without providing any of the guarantees for the observance of International Law which sovereignty entails. However, since the 19th century the view of International Lawyers has been that an inchoate title based upon discovery must be completed within a reasonable period to be effective occupation of the region claimed to have been discovered. But in any case, an inchoate title could not be made to prevail over the continuous and powerful display of authority by another state.

Hall suggests that an inchoate title is good as against another occupying state, for such time as "allowing for accidental circumstances or moderate negligence might elapse before a force or a colony are sent out to some part of the land intended to be occupied." (*International Law* (3 ed. 1890) 106). But that in the course of a few years the presumption of permanent intention afforded by such act dies away.

Britain, Norway and France have all put forward claims on the basis of discovery as creating an inchoate title which prevents others from acquiring possession until this prior right is lost.

[3] Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926) 4-6.

[4] Lauterpacht, "Sovereignty over Submarine Areas" (1950) *B.Y.B.* 376.

However, Hackworth argues that any relaxation of the strict requirement of effective occupation should be kept within rigid bounds limited to the waiving of the necessity of settlement as a condition for perfecting a right of sovereignty, provided, however, that the claimant State can establish its ability to exercise control (1 *Digest* (1940) 449).

[5] P.C.I.J. Series A/B No. 53. See also *Island of Palmas* (1928) 22 *A.J.* 867.