

## RESTRAINTS ON THE FREEDOM OF THE PRESS\*

By D. M. SELBY

THERE are times when a cliché is more descriptive than a page of writing and since the use of cliché could never be more appropriate than when speaking of the press, I make no apology for describing a free press as a necessary evil. Human infirmity makes it necessary because so long as men are men there will be corruption, oppression, extortion and injustice, but a free press by the very threat of exposure and publicity which it implies will always be a deterrent to these evils. It is itself evil because of these same human weaknesses. The press includes the shareholders who require their profits, directors, editors and sub-editors, reporters and all those who make a living from newspapers. The power which the threat of exposure gives to the press in itself tends to corruption. Then the fierce competition between newspapers, in itself desirable, has led to a base pandering to the masses in the form of sensationalism and distortion of the truth. Inherent in the existence of a free press are the evils of invasion of privacy, degradation of the language and those undesirable elements which always seem to accompany excessive power. At times it has seemed that the power of the press was about to be challenged by new inventions such as wireless and television but the press has been astute to meet the challenge by obtaining interests in these new forms of mass dissemination of news and propaganda. So we have the makings of a vicious circle. A free press is a necessary deterrent to some of the vices of human nature but the power which it thereby acquires leads to a concentration of those very vices in the press itself. What deterrents are there to curb this corruption? *Quis custodes custodiet?*

We are not left entirely defenceless. In British communities the press is never entirely free since the law provides various brakes on unbridled licence in any sort of publication. There are prohibitions on sedition, obscenity, defamation and the perversion of justice and the greatest of these is the last one, the prohibition on the perversion of justice. It is by proceedings for contempt of Court that this prohibition is enforced.

Before dealing with these, let us consider the part the press plays with us in our everyday affairs. Probably few of us are consciously aware of the part it plays in our lives or the extent to which we have come to depend on it. There are innumerable bits of information which we require from day to day and we have come to rely on the press to supply these as a matter of course.

\* The Presidential Address delivered to the Fifth Annual General Meeting, 10 September, 1958.

It tells us who has died and the time the funeral will take place, who are engaged or married, who have had children. The housewife looks to it to tell her where the best bargains are, the yachtsman looks to it to advise him of winds and tides, the lawyer to tell him what cases are listed and in which Court. The traveller turns up the paper to find the departure time of his ship, the investor to find the state of the stock exchange, someone else to find the winner of the 3.30, another to find the fate of his favourite comic strip character. The daily paper has become almost like a drug to most of us and the addicts have a vague feeling of discomfort if they go to bed without having seen their favourite daily. Except in times of international tension, the news, properly so called, is probably quite a secondary matter to vast numbers of newspaper readers. It is probably our reliance on the papers for all this diverse information which has given us such a strong, though frequently misplaced, but nearly always unconscious, faith in the paper. How often do we find ourselves in argument stating a fact with positive assurance when, if we stopped to consider the source of our information, we would probably be surprised to find it was something we had read in the news and of which we had no first hand information at all. But how critically do we read that news? Over and over again a headline will state a positive fact, "Princess Engaged"—"British Troops to Quit Jordan" and so on. Careful reading of the letterpress below the headline may show that the paper is merely quoting a columnist in a disreputable foreign paper or the opinion of some amateur strategist, but how often do we spot the deception? It is at times of great international tension that we are most vulnerable and most uncritical of what we read. Since our future depends on what is happening at a conference table or on a foreign beach we are desperately thirsty for information, and like the man parched for water, we are not too fussy to enquire whether it came from a tainted source. Being vulnerable and uncritical, how susceptible we become. Huge black headlines one morning can ruin the taste of our breakfast coffee. Next morning, if the headlines are back to normal size or the foreign news pushed onto the third page by some local scandal we breathe a sigh of relief and say, "Thank goodness, things are settling down in the Middle East." There is little wonder that we have come to regard the power of the press as commonplace but to a great extent we have ourselves to blame.

How often do we fall for the tricks of sub-editors and reporters. Even a word can colour our views of what we read. Take that depressing word, "grave". It can still send a shudder down our spine. If the international situation is described as grave we feel quite certain we are on the brink of war; if an injured man's condition is described with the same word we give up all hope of him. Some words, on the other hand, are so overdone that they lose all significance for us. "Horror" used to be quite a good word. Now that it has become a favourite press adjective we laugh at it. Hardly a week passes but the placards tell us of Horror Death, Horror Ship, Horror Stretch. It has become quite meaningless. A *crisis* should be something rather terrifying. But to us who have seen it widen, deepen, broaden, it has become nothing. There is more than something mildly irritating about this

injury to our language. English is a superb tongue but it is not ours to keep. It is an heirloom which has been handed down through the centuries from generation to generation, each century polishing and enriching it for the next. Like every generation before us, we hold it in trust for posterity. The gentlemen of the press have betrayed this trust in driving good words from our vocabulary, leaving our language tarnished and poorer. It is a mighty tree which has weathered the storms of ages to be lopped and butchered in a day by vandals. Do we ever stop to think of the unfair technique so often used in reporting press interviews? A visiting celebrity shocks us by the banal and fatuous remarks he is reported to have made on arrival, "I think your Bridge is wonderful". "Australian girls are the most beautiful in the world." "I'm in favour of capital punishment." In many cases the poor man is surrounded by reporters shooting questions at him from all angles—"Don't you think our Bridge is wonderful?"—"Do you consider Australian girls the most beautiful in the world?"—"Are you in favour of capital punishment?" The poor harassed wretch, wanting only to get his baggage through the Customs, then settle in at his hotel, answers, "Yes" to everything, and finds when he reads the afternoon edition that the reporters have put their own words into his mouth. The old story of the Bishop of Durham is probably apocryphal but the technique rings true. He is said to have been making his second trip to New York after twenty years and, knowing the ways of American reporters, was on his guard. The first one asked him, "What do you think of the prostitute problem in New York?" and, determined to be non-committal he replied, "Have you still got prostitutes in New York?" He hurried to buy the afternoon paper to see how he had been treated. It read, "Sporting English Bishop Arrives. New York, Friday. The first question the sporting Bishop of Durham asked on his return to New York this morning was, 'Have you still got prostitutes in New York?'"

It is clear beyond argument that the press as we know it is here to stay. We would be lost without it. But some questions still remain open to argument. Should the press be free or restrained? If restrained, to what extent should the restraints go and what form should they take? All this is a matter of opinion, and opinions will never be unanimous on the subject. Before passing judgment it would be well to remember the function I mentioned at the beginning; one quite apart from the dissemination of news, the advertising of sales and the announcement of social events. The complex state of the society in which we live has made us dependent on the actions of many people whom we may never meet, whom we may not even know by name. But much of our lives can be influenced by their actions and the decisions which they make. For our own protection we need a watchdog, and rightly or wrongly the press has assumed the role of public watchdog. It has taken up residence in our backyard. Are we going to muzzle it or put it on a chain? If chained, how long is the chain going to be?

The experience of other countries can teach us something, for the extremes between which the freedom of the press has been restrained are wide apart. In Germany during the Second World War we saw a press which had lost all vestige of freedom.

Everything that was published had to be approved by the Ministry of Propaganda administered by Dr. Goebbels with a quite brilliant unscrupulousness. His absolute control of the press gave him the power to help Germany's war effort to a remarkable degree. For instance he cleverly built up the reputation of the *Frankfurter Zeitung* as the only independent paper in Germany, so that when he wanted to invent a bit of propaganda for foreign consumption it would appear in that paper. He must have chuckled with glee when he read in an Allied newspaper a report of his own propaganda beginning with the words, "It has been reported from a usually reliable foreign source . . .". An example of how this worked occurred in the Winter of 1942. The Russians were desperately anxious to know whether the main German spring offensive would take place on the central or the southern front, and the Germans were equally anxious to conceal the information. One day an article appeared in the *Frankfurter Zeitung* from a special correspondent describing his visit to the central front and mentioning the enormous accumulation of arms and equipment taking place there. The article had been inserted by Goebbels himself but to make the deception more realistic, late editions of the paper were suppressed and the editor was flung into a concentration camp for allowing the disclosure of military information. When the Spring offensive came it was mounted, not on the central, but on the southern front. Whenever Churchill made a cunningly designed speech aimed at inciting the Germans to throw off the Nazi yoke, saying that the Allies' quarrel was not with the German people but with the Nazis and that the Allies were prepared to make peace with a true representative of the Germans, Goebbels ruthlessly suppressed it. When Vansittart, who belonged to the school which considered that the only good German was a dead German, spoke of the Allies' determination to continue the war till Germany was so deeply ground into the dust that she would never rise again, Goebbels saw in this the best propaganda to bolster the German will to resist and the speech was headlined.

The opposite extreme is found in some of the States of the United States of America. There, the constitutional guarantee of the freedom of the press is taken literally, only being curbed in the most exceptional cases. One of the great evils of this attitude is that a trial which arouses any public interest is frequently pre-tried and pre-judged in the press before it reaches court. This sometimes occurs with such violence and intemperance that it must have a tremendous effect on the potential jurymen who read it. Many newspapers have special teams of investigators and publish interviews with potential witnesses and the results of investigations before the trial begins. Lawyers hold press conferences and issue press releases. A few years ago, for example, one Robert Irwin killed his wife and two children. He was indicted for murder and his counsel let it be known that he would plead insanity, describing him as "mad as a bed bug". It was a feast for the newspapers. In an editorial, the Brooklyn *Eagle* said, "Everyone knows that Irwin is insane but the killer should be wiped out". The *Daily News* published a cartoon showing Irwin, his hands dripping with blood, standing before a figure representing Justice. Irwin was saying, "I am murderously insane so spare my life". Justice was

replying, "You are murderously insane. For the sake of others I cannot let you live". On the eve of the trial another paper published a huge picture of him with the caption, "You say you are insane but American women and children must be protected. You must burn". To the British lawyer, these are horrifying examples of contempt.

British countries adopt a position halfway between these extremes and it is by the law of contempt that this type of attempt to pollute the streams of justice is prevented. Fair and accurate reporting of a trial is permitted. Discussion and even criticism, provided it is not intemperate, of a judgment or of a Judge, is allowed. So is the report of a crime and the arrest of a suspect. The law steps in only when there is a danger that a publication may lead to injustice. Intention plays no part in the matter. The reporter or the editor may be honestly mistaken. He may act from the best of motives. The test which the court applies is, "Does the article tend to pervert the course of justice?" If it does, contempt has been committed. The question of intention is only relevant on the degree of punishment administered and many cases of contempt have been dealt with lightly because the offender has satisfied the court that he sinned in ignorance.

There can be little doubt but that many newspapers of the present day are developing an arrogance which suggests that they consider they are above the law, a fact which probably accounts for the comparative frequency of contempt proceedings in modern courts, but while the law of contempt remains as it is we are not likely to see in a British country the unbridled licence which some American papers enjoy.

In dealing with this type of contempt, British courts are always careful to ensure that honest criticism and discussion are not stifled and will only use their powers of committal to prevent any possible injustice or lowering of the court's authority in the eyes of the community. An example of this care occurred recently in Melbourne.<sup>1</sup> A left-wing newspaper published a scurrilous article criticising a recent appointment to the Victorian Supreme Court Bench. It was obvious that the writer's real objection to the new Judge was that most of his life had been spent in association with wealthy people and corporations. The article contained statements such as these, "His whole life has been a sheltered one: his main mission has been defending the positions of power and privilege of the wealthy"; "his knowledge of real life is nil—he knows nothing of the lives of the people"; "he has rarely been in the criminal court—not only is it beyond his capacity, but it is beneath his dignity." Then the writer hit out at the Bench as a whole, referring to it as "an institution forming an integral part of the repressive machinery of the State."

The publisher was charged with contempt of court but the Judge who tried the case wisely treated the matter with contempt himself and dismissed the charge, virtually on the ground that although the article was offensive and many of the statements in it were untrue, it could not have the effect of perverting the course

<sup>1</sup> *R. v. Brett* [1950] V.L.R. 226.

of justice. An important feature of the judgment was the emphasis which the Judge laid on the fact that courts are not immune from discussion and criticism. He quoted an extract from a judgment of the Privy Council in these words, "But whether the authority and position of an individual judge or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising the right of criticism, and are not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".<sup>2</sup>

Somewhat less enlightened was the attitude of a Queensland court some years ago. A newspaper contained a fairly temperate criticism of a Judge's ruling but finished with the words, "And the shade of Judge Jeffreys tore his ghostly hair". This was held to be contempt, the principal reason being that other cases of a similar nature were about to be tried and could be prejudiced by the article.<sup>3</sup>

Sometimes the tone of an article, by expressing too obvious contempt, in the non-technical use of that word, can get the author into trouble. At the beginning of the century, Darling J. warned the press not to publish certain particularly unsavoury details of a case he was trying. Next day a paper printed these words, "No newspaper can exist except upon its merits, a condition from which the Bench, happily for Judge Darling, is excused. Judge Darling would do well to master the duties of his own profession before undertaking the regulation of another."

The editor was asking for it and he was duly fined £100 for contempt.<sup>4</sup> The Court considered that it was letting the editor off lightly with this fine, Lord Russell C.J. saying that but for the abject apology which the editor had made the Court would have considered that it was its duty to send the editor to prison "for a not inconsiderable period of time". The editor had wisely made an affidavit in which he said, amongst other things, "In writing this article I used language referring to Mr. Justice Darling in terms which were intemperate, improper, ungentlemanly and void of the respect due to his Lordship's person and office. I deeply regret the publishing of the article and the inexcusable and insulting language in which it referred to one of Her Majesty's judges, and I humbly apologise to His Lordship and to the Court for my conduct which I now, upon consideration, see reflected not only upon the individual judge but upon the bench of judges and the administration of justice".

It is interesting to see that in a footnote to the case in the Law Reports it is stated that jurisdiction to punish for this type of contempt is obsolete in England,

<sup>2</sup> Lord Atkin, *Ambard v. A.G. for Trinidad* [1936] A.C. 322, 325.

<sup>3</sup> *R. v. Bolger* (1937) 31 Q.J.P. 152.

<sup>4</sup> *R. v. Gray* (1900) 2 Q.B. 36.

although it still seems to be exercised in the Colonies. (This was in 1900.) One of the earliest reported cases of this kind in New South Wales occurred in 1880.<sup>5</sup> Windeyer J. had tried a libel action and in his summing-up to the jury made some uncomplimentary references to an *Evening News* reporter who had given evidence. *The Evening News* hit back with a long article containing these words, "His Honour the Temporary Judge has had another opportunity to show his utter want of judicial impartiality and from the bench he has delivered once more a bitter and one-sided advocate's speech". The article described the summing-up as "a degradation of the judicature of this colony" and added, "No man can be sure of justice when he may find the Judge as one of the advocates against him, and, moreover, as an advocate who is not bound by the rules which regulate the conduct of members of the bar". It finished with the words, "With such a system of judicial advocacy it is only when the jury are exceptionally intelligent as was the case yesterday, that anything approaching justice can be expected to result from a trial before Mr. Windeyer". In the inevitable contempt proceedings which followed, the Chief Justice, Sir James Martin, pointed out that courts, in carrying out their important social function, depended not on armed guards and locked doors but on the confidence and respect of the community. When mistakes became pernicious and comment turned to vilification, the court was under a duty to protect itself. The publishers were convicted of contempt and fined £250.

The same year the legal profession in this State was divided into barristers and solicitors but a paper called *The Australian* disapproved of the rule that barristers were to wear wigs and gowns. In an article, it said, "The first civil term of the Supreme Court after the Division of the Bar, which we scruple not to call an illegal and unjust act, enforced in a most ungracious and ungentlemanlike manner, will commence on Monday next. Their Honours, it is understood, propose to appear in all the dignity of silk and scarlet and have intimated a desire that the whole ten barristers should attend in the full paraphernalia of wigs and gowns, silver buckles and black satin smallclothes. Let the Judges smile over the private ruin they have effected and the skill they have shown, after five years of abeyance, in secretly procuring from home the gratifying confirmation of a dead letter. It is not to them that the attorneys need look; for the same headpieces which can interpret the clause of the Act of Parliament to give a power to make an ex post facto rule, will not be wanting in sophistry to justify the act nor in obstinacy to persevere". This gay piece of contempt swelled the revenue of the Colony by another £50.<sup>6</sup>

This type of direct attack on a Judge was dealt with by the New South Wales Full Court a few months ago. For some reason the *Daily Mirror* set out on a campaign to vilify Judge Brennan. The Judge had tried a case in which a motorist had killed someone in an accident. Other cases were pending against him arising out of the same accident. The *Mirror* was dissatisfied with the Judge's sentence of two years'

<sup>5</sup> Re *The Evening News* 1 N.S.W. L.R. 211.

<sup>6</sup> *R. v. Stephen* 1 N.S.W.L.R. 244.

imprisonment and came out with a headline, "Judge Brennan Shocks Community". Then followed an article in which the driver was referred to as a monster and a self-confessed killer and the accident was referred to as one of the most inhuman road killings on record in New South Wales. There were many inaccuracies in the paper's account of the evidence. Shortly afterwards the Judge tried another case arising out of an accident causing death and sentenced the driver to four years' imprisonment. This time the *Mirror's* headline read, "Judge Brennan Shocks Again" and the accompanying article referred to the sentence as farcical. The editor and publishers were charged with contempt. The Full Court, in its judgment, referred to the principle that criticism and discussion were permissible, even if mistaken, but pointed out that here it was distorted and one-sided. One of the articles had completely ignored matters which were favourable to the accused and which Judge Brennan had commented on. Both articles were liable to prejudice the accused in other cases which were pending. They were calculated to discourage them from exercising their right of appeal since, on such an appeal, the appellate court has the power to increase a sentence. They might even have tended to persuade the Attorney-General to exercise his right of appealing against the sentences on the ground that they were too lenient. Both editor and publishers were held guilty of contempt, the editor being fined £50 on each charge, the publishers, £250 on each charge.<sup>7</sup> An appeal to the High Court was dismissed a few weeks ago.

When a person is about to be tried for crime and any question of his identification is likely to arise he can be severely prejudiced if his photograph is published before the trial has ended and the courts always regard such publication as contempt.<sup>8</sup>

English courts are much more severe in their sentences for contempt than Australian ones.

As early as 1742 the printer and publisher of the *St. James Evening Post* were sent to prison for attempting to pre-judge a case which was pending. The case concerned the executors of a will and the *Post* concluded its article with these words, "This case ought to be a warning to all fathers to take care with whom they trust their children and their fortunes lest their own characters, their widows and their children be aspersed and their fortunes squandered away in law-suits." It also referred to some of the witnesses as "affidavit men" an expression which in those days had a common meaning as men who were prepared to make affidavits whether or not they had any knowledge of the facts to which they were swearing.<sup>9</sup>

Two hundred years later, in 1949, before the Haigh trial began, a paper published a photograph of a man said to have been murdered by Haigh with a full description of the way the crime was supposed to have been committed. Goddard L.C.J. fined the paper £10,000 and sent the editor to gaol for three months. He even

<sup>7</sup> *A.G. v. Truth and Sportsman & Toohey*, April 1958.

<sup>8</sup> *Re Auld* 36 S.R. (N.S.W.) 596.

<sup>9</sup> *Roach v. Garvan* 2 Atk. 469.

warned the directors that if a similar offence were committed again by the paper they would find themselves in trouble.<sup>10</sup>

In England at the present moment another safeguard against injustice to accused persons is being considered. When a man is charged with an indictable offence the case is first heard by a magistrate who enquires whether a *prima facie* case can be made out. The witnesses for the prosecution give their evidence, but usually the accused reserves his defence and says nothing before the trial begins, often a month or so later. This gives him a considerable tactical advantage because his defence can then be prepared to meet the case which the Crown has disclosed but the prosecution is left in the dark as to what witnesses he is going to call, what alibi he is going to set up or what his own evidence will be. However, even a scrupulously honest report of the magisterial enquiry may seriously prejudice the accused. Before the trial starts the public has only read the side of the prosecution. If it is a case which arouses great public interest it is discussed in clubs and bars and trams and trains and it is inevitable that people will form opinions as to his guilt or innocence. Twelve of these people are going to form the jury who try him. This problem arose last year in the murder trial of Dr. John Bodkin Adams. The magistrate enquired into a number of alleged murders but the Doctor was only put on trial for one. The preliminary proceedings were given intense publicity, great public interest was aroused and, as may be imagined, it was extremely difficult to get an impartial jury. To try to find a way of avoiding this possible injustice the British Government set up a committee with the ponderous title The Departmental Committee on Proceedings Before Examining Justices. It was presided over by a famous jurist, Lord Tucker, and gave its report last month. The report recommends that in normal proceedings the magisterial enquiry should be heard in open court but that any report of these proceedings should be restricted to the name of the accused, the charge, and the finding of the magistrate. It will be interesting to see if Parliament amends the law to implement this recommendation.

You may recall the case referred to as the Sundown Murder Trial which was heard in Adelaide a few months ago. At the magisterial proceedings counsel for the defence put up a very strong plea that the case should be heard *in camera* to avoid the giving of publicity to the Crown case which alleged three murders but the plea was rejected and each day as the enquiry went on there were long reports in the papers of the evidence given by the witnesses for the prosecution. The papers were acting perfectly legally in reporting this and nothing could be done to stop them. But probably every potential jurymen in Adelaide had read these reports before the trial began.

There is one real objection to the Tucker recommendation. It quite often happens that it appears during the magisterial enquiry that there is a weak or even missing link in the Crown case. People reading the report in the paper sometimes realize that something they have seen or heard which appeared quite unimportant

<sup>10</sup> *R. v. Bolan* (1949) 93 S.J. 220.

at the time may be of vital importance to the Crown and sometimes they come forward to supply the essential piece of evidence. After all, in our anxiety to do justice to the accused we should not overlook the fact that justice also demands that the guilty should be convicted and punished.

Coming back to the subject of contempt, although it has nothing to do with the press I must refer briefly to a variety of contempt which is more familiar to the layman—contempt in the face of the court. This is not very common in modern times but the old cases give some grim examples of the way they were dealt with. Every law student knows one of the earliest reported cases on the subject, reported in the quaint old mixture of Norman French and English used in reporting in the seventeenth century. A man had been convicted of felony whereupon he became so annoyed that he was foolish enough to throw a brick at the Chief Justice. In the language of the report, “Il Ject un brickbat a la tete de Chief Justice que narrowly mist”. He was at once charged and convicted of contempt of court and sentenced to have his right hand cut off. This was done forthwith, then, as the report relates, he was “immédiatement hangé”.<sup>11</sup> The savagery of the sentence apparently had little deterrent effect as three years later another felon threw a stone at the Judge on the bench. He, too, had his hand cut off, this time in open court, the hand being fixed over the entrance where, according to the report, it remained for some time.

Over two hundred years later, Vice Chancellor Malins was the target for a less lethal weapon—an egg. He remarked that the present was no doubt intended for his learned brother, Vice Chancellor Bacon, who was sitting in the next Court. Despite this pleasantry, the culprit served five months in prison for contempt.

Barristers, of whom fearless advocacy is expected, are given a fair amount of latitude in expressing their opinion of the Judge's knowledge of the law, provided they do so in reasonably polite language. Even the notorious Judge Jeffreys was never known to commit a barrister for contempt although he often threatened to do so. There is a well-known story of a barrister who was expressing himself a little more freely than was altogether prudent and when the Judge said to him, “It seems to me, Mr. Blank, that you are doing your best to express your contempt of this Court,” he is alleged to have replied, “On the contrary, your Honour, I'm doing my best to conceal it.”

There are many other aspects of the law of contempt, all aimed at preventing any impediment to the course of justice. They consist of such things as threatening jurymen, interfering with bailiffs, marrying a ward of Court without the Court's permission and even disobeying certain types of Court orders but I am probably wandering a little too far from my subject.

Let me leave contempt and deal with another restraint on the freedom of the press, namely the rather difficult subject of the prohibition of the publication of

<sup>11</sup> Anon. (1631) Dy. 188, b, n.

anything which is indecent or obscene. The difficulty arises from the impossibility of defining in clear legal terms the precise meaning of indecency and obscenity. Where, for instance, does art and science end and obscenity and indecency begin? Look at some of the nudes which Ingres painted. They wear no stitch of clothing but they have a purity which would make them quite a suitable decoration for the nursery. The cover of *La Vie Parisienne* used to sport most beautifully drawn nudes but the addition of a pair of gloves, a pair of stockings or perhaps a hat gave an effect which would be enough to bring half the Police Force down on any Sydney shopkeeper who put one in his window. Public opinion changes with the years; some of the language of the Bible would not be tolerated in polite society today. On the other hand, although at the beginning of the century the word "bloody" in a play would have brought the Lord Chamberlain on the run and it probably brought sniggers of shocked surprise when Shaw's "Pygmalion" was first performed; now a modern play is hardly complete without it. Questions of taste are outside the ambit of the law and we have seen noticeable changes in this regard in recent years. Twenty years ago if a fair-haired woman had been knocked down in a street accident she would have been described in the newspapers as "Miss Florence Smith, an attractive blonde". A couple of years ago she would have been, "Attractive Flossie Smith, 25". Today she would be, "Shapely blonde Flo Smith, 38, 22, 34", these cryptic figures, I am told, being referred to as vital statistics.

But I am moving imperceptibly away from the problem of obscenity. Perhaps the real question is, are you legislating for the protection of the kindergarten age group, the impressionable adolescent or the depraved adult? A few years ago the printers and publishers of a book called *The Philanderers* were charged with publishing obscene matter, and the Judge summed up to the jury in such a practical common-sense way that the law reporters took the unusual course of publishing his summing up in the current law reports.<sup>12</sup> He directed the jury that they had to apply an old test of 1868 namely, "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall"<sup>13</sup> but he warned them that in applying this test they were not to judge the matter on 1868 standards of thought but on those of the present day. He referred to the suggestion that such a book tended to put ideas into young heads in these words, "Really, is it books that put ideas into young heads or is it nature? When a boy or a girl reaches that stage in life's journey when he or she is passing from the state of blissful ignorance through that perilous part of the journey which we call adolescence and finds himself or herself traversing an unknown country, without a map, without a compass and sometimes, I am afraid, from a bad home without a guide, it is a natural change from childhood to maturity that puts ideas into young heads." He pointed out that the book dealt crudely with sex but warned the jury that they were not dealing

<sup>12</sup> *R. v. Martin Secker, Warburg Ltd.* (1954) 2 All E.R. 683.

<sup>13</sup> *R. v. Hicklin* L.R. 3 Q.B. 371.

with questions of taste or literary standards. They had to consider whether the book was pursuing an honest thread of thought or was merely written for the sake of pornography. The jury returned a verdict of, "Not guilty".

In 1955 the controversial Obscene and Indecent Publications (Amendment) Act was passed in New South Wales. Despite the outcry in the press the Act, apart from its provisions requiring registration of publishers, did not greatly alter the common law. It somewhat enlarges the definition of obscenity by declaring that "without prejudice to the generality of the meaning of the word 'obscene' any publication or advertisement shall be deemed to be obscene if it unduly emphasises matters of sex, crimes of violence, gross cruelty or horror". It then lays down a sort of guide for the court in this somewhat elaborate provision :

"In determining for the purposes of the Act whether a publication or an advertisement is obscene, the court shall have regard to—

- (a) the nature of the publication or advertisement, and
- (b) the persons, classes of persons or age groups to and amongst whom the publication or advertisement was intended or likely to be published, distributed, sold, exhibited, given or delivered, and
- (c) the tendency of the publication or advertisement to deprave, corrupt or injure the morals of any such persons, class of persons or age group, to the intent that a publication or advertisement shall be held to be obscene when it tends or is likely in any manner to deprave, corrupt or injure the morals of any such persons, or the persons in any such class or age group notwithstanding that persons in other classes or age groups may not be similarly affected."

It then exempts literary, artistic, medical and scientific works. This gem of Parliamentary draftsmanship appears to do little more than add crimes of violence, gross cruelty and horror to the short, pithy definition of obscenity which was applied in 1868.

A final form of restraint requires brief mention—the right of action for defamation. Words are defamatory if they tend to bring a person into ridicule, hatred or contempt and a person defamed may sue for damages. This form of action is not entirely satisfactory, especially when a newspaper is the defendant. Most newspaper companies are so wealthy that they are highly dangerous to pick on. A person bringing an action for defamation puts his character in issue; the real question for the jury is "What is his reputation worth and what damage has it suffered?" A newspaper with all its resources can, and often does, bring hordes of witnesses to testify to every peccadillo the plaintiff has committed, dragging the proceedings out until the costs run into thousands, appealing to a higher court if the verdict goes against it. Long before it is all over the unfortunate plaintiff often wishes he had done nothing about it but let the matter die a quiet death.

One thing perhaps I should have made clear. Nearly all the legal principles I have mentioned apply with equal force not only to the press but to every member

of the community, and the laws applying to the community in general apply with equal force to the press. The press and its representatives have no privileged position in the sight of the law. Anyone can stick a card labelled " Press " in his hatband and sling a camera over his shoulder but he acquires no special rights by so doing, whether he is on the payroll of an influential newspaper or happens to be the local garbage man. If he goes onto private property to take photographs because a sensational murder has been committed there, he is a trespasser. If he lays a hand on anyone to stop him so that he can get a story, he is guilty of assault. It is strange how many people do not realize this and imagine that pressmen have all sorts of rights over and above those of any other citizen. Judges have often mentioned this misconception but perhaps none so lucidly as Sir James Martin in *The Evening News* case of 1880 which I mentioned earlier. The Chief Justice said, " It has become a fashion to speak of the duties of the Press when claim is made for recognition of what are often erroneously called its privileges. So far as the public are concerned, the writers in, or the publishers and proprietors of, a newspaper, have no duties whatever imposed upon them. They receive no appointment from the public, and they acknowledge no subordination to authority. The publication of a newspaper is a commercial speculation, just as much as the buying and selling of wool and tallow. The public are anxious to know certain facts that are daily and hourly occurring, and certain persons find it profitable to employ reporters and printers to satisfy this want. No question of duty whatever is involved. The journalist publishes what he thinks will be profitable to him, and the public pay him for his trouble."

Should the press have special privileges? Should it be free? Should it be fettered? Opinions on these points will always vary. As one who greatly admires the majority of British institutions I consider that we have reached a sensible and workable compromise. Few people like to have cameras thrust in their faces and flash-bulbs popped off before their eyes. But British law recognizes no copyright in faces and people are free to do these things. There are many other things we dislike. We are irked by sensational and misleading headlines, distortion of news, abominations perpetrated on the English language and gross breaches of taste. But we are irked by overmuch restraint too and a free press has its vital part to play in the way of life which we regard as precious. Provided there are strict controls on attempts, deliberate or otherwise, to pervert the course of justice, curbs on attempts to deprave the impressionable and remedies for defamation of character, I consider we should let the press go its merry way to Heaven or perdition as it chooses. The state of the law in British countries seems to indicate that that has been the view of the majority of British people for many years.