TEMPTATIONS OF THE BENCH

THE HONOURABLE SIR ROBERT MEGARRY*

In this short but very interesting article, which was originally an address delivered at a joint meeting of the Bars of Alberta and British Columbia, the Honourable Sir Robert Megarry discusses some of the problems and temptations judges face when on the bench. Although the article is written in a light, humouristic tone, it does give the reader some insights into the workings of the judicial mind.

In choosing *Temptations of the Bench* as my subject, I hope to persuade you towards a little more tolerance and sympathy for judges. I do not, of course, put them forward as being a noticeably oppressed body of men and women; but does the Bar really appreciate them? Are you kind enough to the judges? It all looks so easy. There is the judge sitting comfortably on the Bench. Everything that he needs for his decision is put before him. All that he has to do is to listen, and at the end of it all utter some words, as many or as few as he likes, and at his own pace, giving his decision. He has respectable vacations, he is adequately paid, and he has the ultimate joy in a lawyer's life, freedom from the tyranny of the telephone. Is it not a lovely life? Or is the reality rather different? Many years ago, Lord Pearce said that in court the judge "seems to float along on the Bench with effortless serenity like a swan on the mirrored surface of the lake". But, he said, the litigant should be reminded that "the judge, like the swan, is paddling madly underneath." As one who has been paddling madly for some ten years, I propose to say something—far less than I could say—about the problems and temptations of the Bench.

I do not intend to waste time on crude matters such as bribery. It has happened, of course. In 1621, that great lawyer best known as Sir Francis Bacon[1] was removed from his high office of Lord Chancellor for accepting bribes. That is well known. What is perhaps less well known is that after his death problems arose in the administration of his estate. He died insolvent; and it became necessary to distinguish between many of the sums of money that he had received. If they were loans, the creditors could prove for their debts in the insolvency, with the prospect of recovering perhaps a shilling or two in the pound. But if they were bribes, then, very properly, nothing could be recovered.

I shall spend no more time on bribery. Bacon was our last case, and the subject has long had no reality.[2] I turn elsewhere. While preparing this address I remembered a little book that had come to me when I was book review editor of the *Law Quarterly Review*. It is called *Handbook for Judges*, and it was published in Chicago in 1961. The foreword encouragingly states the purpose of the book. It is to bring together various writings "which might be of inspirational or other help to judges in the performance of their dedicated work. A possible incidental use of this handbook is to furnish useful quotations to judges preparing

* The Vice-Chancellor, of the Chancery Division of the High Court of Justice. This is an address delivered at a joint meeting of the Bars of Alberta and British Columbia at Jasper, Alberta, on June 2, 1977, shortened and revised by the speaker to fit it for appearance in print.

1. He had become Lord Verulam and then Viscount St. Albans before he was disgraced.

2. So much so that when Lord Gardiner recently spoke of it in the House of Lords, *Hansard* (1977, vol. 382 (H.L.), col. 834) made him speak of "taking a bride from a litigant".

public speeches or writings on subjects relating to the judiciary." This seemed promising, although I was not quite sure about "dedicated work". There is a chapter called *Canons of Judicial Ethics*, and I gratefully borrow from the Opinions quoted in this. Opinion No. 52 is: "It is improper for a judge to conduct a newspaper column of comments on current news items and matters of general interest." There seemed to be little temptation in this, and so I passed on to Opinion No. 166: "It is improper for a judge to participate in a radio program sponsored by a commercial concern, in which legal advice is given". Such conduct has even less allure; and giving advice is apt to be dangerously revealing. The one that I liked best was Opinion No. 89. "It is improper for a judge to accept a loan from a lawyer on a second mortgage of property which has no investment value."[3] With that, I put the book down. Somehow I thought that it would not carry me very far today. So I fell back on my own resources; and from these I have chosen five of the temptations to which I think judges may be exposed.

1. Temptation of the Tongue

Let me take first the temptation of the tongue, or, less grandly, the urge to talk. A member of the Bar is made a judge. For 20 or 30 years he has been arguing cases in the courts, talking and talking and talking. Now he finds that he is expected to sit silently through every case until the time comes for judgment. No doubt it will be said that this picture is rather overdrawn: but the total change in the way of life is beyond argument. The habit of leaping in whenever the interests of the client demand it (and sometimes when they do not) has to be discarded overnight. Over 150 years ago Sir William Alexander C.B. truly said: "Nobody knows how much energy it requires in a judge to hold his tongue."

Three courses are open to the judge. He may maintain silence until he gives judgment; at the other extreme, he may talk as much as he wishes; and, in between, he may exercise a policy of rigid but not inflexible restraint. The first course has the high authority of the great Christopher Palles, Chief Baron of the Exchequer in Ireland for over forty years. When he was appointed, he placed a notice on his desk in court where it would always be before his eyes. It read: "A judge should keep his mouth shut and his mind open: when he opens his mouth he shuts his mind." Yet is this right? The difficulties that it makes for counsel are great. If counsel were to speak his thoughts aloud, he might say: "I wonder if the judge has really got my point. I have already put it twice, in two different ways, and yet there is not a flicker of his eyelids to show whether he understands it. The only safe thing is to go round the course once or twice more, varying my language, in the hope of getting some indication whether I have struck oil yet."[4] Complete judicial silence inevitably lengthens the argument. Counsel cannot take chances, and so he must try, try and try again. He may be pushing at an open door, or at a door that is barred and bolted: either way the repeated argument is time-wasting and, for that matter, boring. Only if the door is ajar is the time well spent. Total silence from the Bench conceals the state of the door. Another peril of complete silence is that the judge may, even after repetition, misunderstand some argument and decide the case without

3. The book sets out two different versions of this Opinion. I have conflated them.

4. I do not see why counsel, communing with himself, should not mix an occasional metaphor; and at least this mixture is not inappropriate in Alberta.

ever having really appreciated what counsel is contending. For myself, I would, with great respect, refrain from following Palles C.B. on the point.

I would also reject the other extreme, that of indulging in unrestrained intervention. One of the vices of this indulgence is that, like complete silence, it lengthens everything. It also has the more grave defect of tending to deprive the litigant (and his counsel) of having his own case conducted his own way. It cannot be right for there to be silent battles of will between counsel and the judge about who will ask the witness the next question, or which of the various heads of argument is to be discussed, and so on.

There is nothing new in this sort of problem, of course. Towards the end of the last century it was to be found in the Second Division of the Court of Session in Scotland, an appellate court of four judges. In 1896 there appeared in the *Juridical Review* an article written by a practising advocate; and it was critical of the court. I am happy to say that the article does not appear to have impeded the author's career in the law, for in due time he was appointed to the Bench. One of his many complaints about the Second Division was that "by a system of constant interruption from and conversation upon the Bench, the arguments of counsel are torn to tatters; that it is frequently thereby rendered impossible to state an argument with intelligence or connection, and sometimes counsel who have a strong case are hunted to earth without any opportunity of stating it. . . . How can counsel perform their duty if argument is turned into dialogue in which they play the part of targets or occasional interlocutors? If counsel is stating the facts, the court is instantly curious to put legal conundrums; if he is citing precedents, nothing will serve them but the exact age of the most unimportant witness. One often sees an unfortunate counsel trying to face four questions at once, all on different points, like the early Christian exposed in the arena to fight simultaneously with an elephant, a tiger, a leopard and a bear." That, of course, is good strong stuff: one wonders with which animal each of the judges identified himself.

With complete silence and unbridled speech both rejected, there remains the middle course of a rigid but not inflexible self-restraint. The judge should talk enough to let counsel see how his mind is moving. If he cannot follow a point that counsel is trying to make, he should say so. If instead he thinks that he can follow it, he should put it to counsel in his own language so that he can find out whether he has understood it correctly. If the judge says: "As I see it, Mr. Jones, what you are saying is so-and-so", counsel, if he is any good, may say: "Yes, my Lord, that is just how I would put it." Of course, if counsel is a seasoned advocate, he will say: "Your Lordship has put the point far better than I could have hoped to have put it", and then gently make minor adjustments as he continues with his speech. On the other hand, if the judge has got it completely wrong, counsel will say: "My Lord, I would put it a little differently", and then, the decencies observed, the judge will know that he must try again. Only when this process has been carried to its end can the judge feel confident that what he has recorded in his notebook truly represents what counsel wants to convey.

Transcending these exchanges between Bench and Bar there must be a judicial self-restraint which never lets the judge take over the conduct of the case from counsel, and never takes counsel out of his course. If counsel is engaged in arguing Point A, then however much the judge may

explore and test that point, he must restrain his curiosity about Points B, C and D; in due time they will be presented, and it is then that they can be examined by the judge. So too with witnesses. There may be many questions that the judge wishes to ask, but he cannot know whether, or when, or in what order, counsel will ask them, or whether counsel is deliberately delaying the exploration of some aspect of the topic for some very good reason. If the judge waits until counsel is turning to a different topic, the judge can usually ask his questions without unduly disturbing counsel's presentation of the case, whereas an intervention in mid-topic may unfairly disrupt counsel's plan of presentation. Of course, I am speaking of substantive questions, and not about questions concerned only with audibility or intelligibility or the like. The judge should not deny himself his question periods, but he should not let them interfere with counsel in running his own case his own way. The judge should tread the path that counsel is hewing out, and not try to hew out a different path of his own.

2. Temptations of the Bar

My test is a dictum of Erle C.J. "It is easy for a judge to be impartial between plaintiff and defendant, indeed, he is almost always so; it is difficult to be impartial between counsel and counsel." There is a profound truth there. The immediate and sustained impact of counsel upon the judge is one thing, the more remote and transient impact of the litigants is another. Yet when counsel on both sides are within the normal range of experience and competence, ranging from the adequate to the distinguished, there is usually little difficulty. The real problems come with the extremes, with the paralytically bad and the devastatingly good. Oddly enough, in the end these two extremes may produce much the same difficulty.

I begin with the paralytically bad. The judge is confronted with counsel who is incoherent, rambling, irrelevant, confused and confusing, bull-headed, or a dozen other things. Some three centuries ago, Roger North delineated one of the aspects of incompetence: "Much squeak and no wool, and but an impertinent contention to no profit". The inborn ability to utter many words without ever really saying anything is instantly recognizable. I need not describe the judge's feelings in any detail. The predominant urge is to leave the Bench, either to escape, or, more probably, to go down into the body of the court and take the conduct of the case out of counsel's hands. He can, of course, do neither; but he can do something, and he usually will. He will not sit back and let counsel take the consequences of his own incompetence, because what matters is not so much counsel as his client; and justice must not fail. Without taking the case out of counsel's hands, the judge will try to make sense out of counsel's incoherence; he will ask the witnesses questions which counsel ought to have put but did not; and he will attempt to frame the propositions of law that counsel ought to have conceived or perceived. The judge does what he properly can for the unfortunate client, as unostentatiously as possible. There are problems, of course. I am told that in the U.S.A. a question by a judge to a witness at once brought the plaintiff's counsel to his feet to enquire whether the question was being put on his behalf or on behalf of the defendant. "What does it matter?" said the judge. "Just this", replied counsel, "if it is put on behalf of the defendant I object to it, and if it is put on my behalf I withdraw it."

When a judge feels impelled to intervene in this way, the real difficulty

that may emerge is that he ends up by putting the case as he would have put it. The propositions of law are those that he has thought of himself, and they are expressed in his own language. He who frames such arguments is liable to find his own products unduly seductive. The more the judge does for counsel that counsel ought to have done for himself, the more the judge moves into counsel's shoes and into the perils of self-persuasion.

I turn to the other extreme, where counsel is one of those superlative creatures who do everything superbly. He claims no more than is fairly arguable. After disclosing the full range of the points on his side, he is ready to jettison the bad or unattractive at an early stage, and concentrate on the viable. He fully observes Lord Greene's advice that you should always get your case on its feet on the merits before you turn to the law. He is the essence of reason and reasonableness. His pace is the pace of the judge. He does all the right things. So how can it be said that he gives rise to much the same difficulty as counsel who is abysmal? The answer, I think, was given by a distinguished Italian lawyer, Piero Calamandrei, some 30 or 40 years ago: "A lawyer should be able to suggest the arguments which will win his case so subtly to the judge that the latter believes he has thought of them himself." Once more there is the peril of the judge being over-persuaded by what he believes (though in this case erroneously) to be his own arguments. I know of no remedy save that of giving full rein to the well-developed sense of awareness that comes with a seat on the Bench, and reserving judgment until the impact of advocacy has drained away. For good advocacy and bad, meditation and, above all, a good night's sleep are wonderful aids in restoring balance and reality. So often it is not only joy but also reason that cometh in the morning.

3. The Temptation of Brevity

You may well wonder why I describe "brevity" as a temptation. Is it not a virtue in a judge for him to keep things short, to dispose of his cases quickly and so make inroads on the full and over-full lists of cases waiting to be heard? What merit can there be in not taking the shortest path that will bring about a proper decision in the case? These are cogent considerations, and they must be given due weight. Yet there is another consideration. Sometimes I ask students to say whom they consider to be the most important person in a court room. Many pick the judge; others give a variety of answers. Once one even opted for the usher, without being able to explain why. My answer, given unhesitatingly, is that it is the litigant who is going to lose. Naturally he will usually not know this until the case is at an end. But when the end comes, will he go away feeling that he has had a fair run and a full hearing? Some litigants, of course, are so unreasonable that nothing will satisfy them, even if they win. But take the reasonable defeated litigant (you will all have known many of these), and see whether he feels that he has had a fair crack of the whip. One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process.

Let me take an example from some twenty years back. My client was a business man who had an option to renew a lease. Without taking advice, he sent a letter to the landlord's agent which he was later to say amounted to an exercise of the option. In fact, the letter was a poor thing, making inquiries and comments, but looking nothing like an exercise of

an option. Nevertheless, the tenant claimed that he was entitled to a renewed lease, and when this was refused, he insisted on suing the landlord. The defence, when it came, was threefold. First, the landlord's agent was a mere rent collector and not a managing agent who had any authority to receive notices on the landlord's behalf. Second, in any case the tenant's letter had not been received in due time. Third, even if these contentions failed, the letter was no exercise of the option. This defence inflamed an already irate tenant. He pressed on with the action, and in due course it came on before Danckwerts J. The short way of deciding the case was obviously to decide the last point, a point which was painfully clear and would make it unnecessary to go into the other points. Instead, the judge heard the whole case through. He held that the agent had sufficient authority to receive a notice exercising the option, and that he had received the letter in time, but (to the surprise of none) that the letter was incapable of exercising the option.

The course taken by the judge must have prolonged the hearing by an hour or two. But the effect on the defeated tenant was striking. True, he had lost the last point and the case as a whole; but he had been victorious on the other two points. All that nonsense about the agent's lack of authority and the letter not having been received in time had been blown away by the judge. It was a pity about the wording of the letter, of course; but he had seen his case being put in full, and none of his grievances had been left unheard or unresolved. If he had been told that one important aspect of justice is the defusing of litigants, I do not doubt that he would have agreed that he had been defused.

I am not for a moment suggesting that every case ought to be played out to the ultimate and at its full amplitude. Sometimes it is right in every respect to take the short cut. But the claims of brevity must not be allowed to prevail over the legitimate interests of the defeated litigant. Justice in full takes time: but often it is time well spent.

4. The Temptation of Law

Sometimes there are at least two ways in which a case can be decided. It may be decided on the facts, so that whether it is the plaintiff or the defendant who is right on the law, the result will be the same. The decision on the facts will prevent the point of law from arising. Or the case may be decided on the law, so that the result will be the same whether it is the plaintiff or the defendant who is right on the facts. The decision on the law makes it unnecessary to resolve the dispute on the facts. All this is familiar enough. But let me turn to the judge. Judges, like other lawyers, vary in the depths of their affection for the law; and this factor may influence the way in which a judge decides a case of this kind. If the judge's heart is in the law, he may feel a temptation to decide an interesting point of law when there is no real need to do so. What I propose to consider is when a judge is justified in yielding to such a temptation.

Let me put a hypothetical example before you. Suppose that a block of flats has been leased. War-time conditions then make it difficult for the lessee to find tenants for all the flats, and half of them are unlet. The lessee then persuades the lessor to agree to accept rent at half the agreed rate. For some while the lessor accepts rent at half rate, but then finds out that the block is once more fully let; and so he claims rent at the full rate. I pause merely to say that if any of you find this any resemblance to the

High Trees case,[5] you are fully entitled to find what you may. Litigation ensues, and the lessor advances two contentions. First, as a matter of fact he says that the agreed period for a reduction of rent had come to an end. Second, as a matter of law he says that his agreement to accept a reduced rent, made without valuable consideration, did not bind him. If he is right on either point, he will win, and it would then be unnecessary to decide the other point. If he wins on the question of fact, there will be no more than a decision, totally unreportable, that if a lessor sues for the rent when no agreement to reduce it is in force he will succeed. On the other hand, if the case is decided on the question of law, there will be a highly reportable case on the doctrine of promissory estoppel; in short, there would stand *High Trees*. The question that I am considering is thus whether a judge is justified in deciding a question of law which, because of his findings of fact, need not be decided, and so on at least one view will be merely *obiter*.

I doubt if there is any simple answer. The starting point, in my view, is that the policy should be one of restraint. There are many reasons for this. One is that a judge ought to be slow to put forth unappealable decisions of law. In the example that I have just given, the point of law was decided against the lessor: his promise to halve the rent bound him, even though made without valuable consideration. Yet as he won the case on the point of fact, he could not appeal against the decision on the law, however much it might harm him in other cases; and the lessee, who won on the law, would have no incentive to challenge it on appeal, and might well have no prospects of success in an appeal on the facts.

The policy that I suggest is one of restraint, not prohibition. Sometimes there will be good cause for deciding a point of law that is unnecessary for the decision of the case. But what is good cause? First, I think that the judge must be satisfied that the point has been fairly and fully argued on both sides. Second, the judge must also be convinced that to decide the point will be likely to do more good than harm. Such a conviction may arise in a variety of ways. The point, though of general importance, may be devoid of authority, so that a decision or dictum on it would help the profession and the public. Or there may be conflicting decisions on the point, each, perhaps, made in ignorance of the other; or there may be a solitary decision on the point which tantalizingly fails to state any principle. In such cases, if the judge is satisfied that he can resolve the point, dispel the confusion, and state an intelligible principle, I do not see why he should not be regarded as a benefactor for doing so. Again, the judge may be justified in deciding the point in case his decision on some other point is reversed on appeal, or if the parties join in asking him to decide it in order to assist them in resolving other disputes between them.[6] In all such cases, the reason for deciding the point is not merely to gratify the judge's interest in the law, but to assist others; and that seems to me to be a worthy cause, free from any reproach of a gratuitous spawning of judicial *dicta* or *obiter dicta*. Perhaps I may add that I would respectfully express my entire agreement with the course that Denning J. took in the *High Trees* case,[7] synthesizing and restating what could be discerned in a thin line of authority.

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5. *Central London Property Trust Ltd.* v. *High House Trees Ltd.* [1947]K.B. 130.

6. As occurred in the massive *Ocean Island* case: *see Tito* v. *Waddell (No. 2)* [1977] Ch. 106 at 125.

7. *Supra*, n. 5.

5. The Temptation of Discovery

What should a judge do if he reserves judgment and then discovers relevant authorities that have not been cited to him? Three courses are possible. He may ignore the new authorities; he may restore the case for further argument on them; or he may use the authorities in his judgment without any further argument. Of these three courses, the first may readily be rejected. It would be unfair to the party who is aided by the authorities. It would be misleading to those who afterwards refer to the case, for they would think either that no such authorities existed or that the judge had decided the case in ignorance of them. It would in any case be quite wrong for a judge to deliver a judgment deliberately ignoring relevant authorities of which he knows.

The question, then, is whether to restore the case for further argument, or whether to use the authorities in the judgment without more ado. Each has its objections. Restoration means delay and probably an increase in the costs. On the other hand, there are perils in using the authorities in the judgment without troubling counsel further. Many a case wears a different aspect after it has been dissected in argument. What at first sight appears to decide A may ultimately emerge as having really decided A minus B, or A plus C, or even X. Further, such a use of the authorities may mean that one of the parties will find that he has been defeated by authorities of which he has never heard, without having any opportunity of saying a word about them or producing countervailing authorities. Even the most reasonable defeated litigant is entitled to feel a sense of grievance about this.

I do not think that any dogmatic answer is possible for all cases and all jurisdictions. In general, however, I would make a distinction.[8] If the uncited authorities appear to support the decision that the judge would have reached without their aid, or if they do no more than provide him with apt phrases or useful illustrations, then I do not see why he should not include them in his judgment without calling for further argument. The discovery of the authorities has made no difference to the result: the loser would have lost anyway. It is different if the uncited authorities change or materially modify the decision that the judge would otherwise have made. In most cases I would say that justice to the party who would have won but is now going to lose (or not win so much) requires the case to be restored for further argument, or at least that the party against whom the authorities strike should be given the option of claiming this. Counsel may be able to distinguish the authorities, or weaken or destroy their effect by producing other authorities or cogent reasons why they ought not to be followed. Even if he cannot do this, the litigant will have the consolation of having been defeated only after his counsel has been able to say all that he could against the ultimate weapons in his defeat. Any decision whether to appeal, too, will not have to be made in ignorance of how his arguments against the uncited authorities stand in the view of his adversary and the judge; and *quoad* those authorities the appellate court will not be reduced to being a court of first instance.

Some years ago I had an illustration of this sort of problem which I should like to put before you.[9] I state it in broad terms. A member of a trade union had been expelled from it without a shred of natural justice. A

8. *Re Lawrence's Will Trusts* [1972] Ch. 418 at 436.

9. *Leary* v. *National Union of Vehicle Builders* [1971] Ch. 34.

local body of the union had simply resolved that he should be expelled, without giving him any notice of the proposal or of the charge against him. He appealed to a central body of the union, which gave him all the natural justice that anyone could want; but in the end his appeal was dismissed. He turned to the courts, and so there arose the question whether full natural justice on appeal cured the initial (and total) absence of natural justice. After full argument, my provisional conclusion was that it did not. The right to natural justice was, I thought, one that should go the whole way, and not merely start half-way up. But many authorities had been cited (none directly on the point), and I had to reserve judgment. While a table in my room at the Law Courts was bearing all the reports and document in the case, a former colleague of mine when I had been teaching at Osgoode Hall Law School called to see me. After a while he enquired about the long row of law reports on my table; and I told him what it was. At once he said that he thought that there had been a recent Canadian decision on or near the point; and in the library he unearthed for me the Supreme Court decision in *King* v. *University of Saskatchewan*.[10]

That was a case of not expulsion from a trade union but of the denial of a degree to a student at a university. But it raised much the same point, and supported the view that natural justice on appeal could cure the absence of natural justice below. That, of course, was contrary to the view that I had provisionally formed, and so I thought that I ought to restore the case for further argument. On behalf of the union the future Peter Pain J. strongly espoused the *King* doctrine, duly emphasizing the eminence of the court and the judges, the cogency of the reasoning, and so on. Turner-Samuels was on the other side, and at one stage I thought that I detected a twinkle in his eye. When his turn came, he at once told me that he had a New Zealand decision to the opposite effect.[11] I have often reflected on the pleasure that it must have given him to produce that case: his adversary relies on a Canadian ace, and he then produces a New Zealand trump. Marvellous! It is true that, unlike the ace, the trump was not a decision of a court of last resort; but it went the way that I thought the decision ought to go, and in the end I felt able to hold that the fair appeal had not cured the unfair trial.

That, then, is my quiverful of temptations. Let me emphasize that in discussing them I have been speaking for myself alone. What I have found to be problems would probably give very little hesitation to any of my brethren, whether on my side of the Atlantic or yours. Yet they seemed to me to be worth discussing; and although I can leave the temptations there, I have not quite done. I have a complaint to make. It harks back to 1971, when I came to Banff for the annual meeting of the Canadian Bar Association. The complaint is about your statute books, both federal and provincial. They are too plain. I have read many, many pages of them; and I found that I could understand all that I read—or nearly all. That is not the sort of thing that one ought to find in any well-mannered statute book. If all is clear, what prospects are there for bigger and better litigation? And what hope is there for me in my search for further contributions to a third—and perhaps a fourth—*Miscellany-at-Law*? England is carrying far more than its fair share.

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10. [1969] S.C.R. 678.

11. *Denton* v. *Auckland City* [1969] N.Z.L.R. 256.

Let me give you one example, from our Land Compensation Act 1961. I shall attempt to read section 26(3) with the measured tread that it so richly deserves: "Subject to subsection (4) of this section, subsections (3) and (4) of section twenty-five of this Act shall apply where the provisions of section twenty-three of this Act have effect as applied by subsection (1) of this section as they apply where those provisions have effect as applied by subsection (1) or subsection (2) of the said section twenty-five." You may be consoled to know that a musical friend of mine has observed that with a little ingenuity this can be set to the tune of 'O God our help in ages past'.

If you say that this enactment is a little prosaic, I can remind you of the flight of fancy in section 468(10) of our Income Tax Act 1952. This provides that a body corporate "shall not be deemed . . . to cease to be resident in the United Kingdom by reason only that it ceases to exist." But perhaps you think that I am claiming too much for England. After all, it is merely part of one of the islands in the British Isles. So let me take you over the sea to Dublin, where a dozen years back some death duty legislation was enacted. One provision began in good, wide death duty style, sweeping everyone possible into the net. It enacted that "relative" means "a husband or wife, ancestor, lineal descendant or brother or sister or descendant of a brother or sister". But that, of course, did not go far enough; the draftsman's thoughts soon turned to companies. So it was provided that: "A company which is controlled by any one or more of the deceased or relatives of the deceased shall be regarded as being itself a relative of the deceased." Just look at the uncertainties that this creates. Is your aunt's company your aunt or your uncle? If your brother's company merges with your sister's company, what is the status of all their little subsidiaries? And what do you understand by the expression: "My sister was wound up last week"?

I come to Canada. I am glad to say that since I was here in 1971 some signs of progress have emerged. Only a few days ago an Ontario judge drew my attention to the Municipal Act, to be found in the Revised Statutes of Ontario 1970. Section 591 (numbering on that scale is always encouraging) runs as follows: "In all cases where land is sold for arrears of taxes whether such sale is or is not valid, then so far as regards rights of entry adverse to a *bona fide* claim or right, whether valid or invalid, derived mediately or immediately under such sale, section 10 of The Conveyancing and Law of Property Act does not apply, to the end and intent that in such cases the right or title of a person claiming adversely to any such sale shall not be conveyed where any person is in occupation adversely to such right or title, and that in such cases the Common Law and sections 2, 4 and 6 of the statute passed in the 32nd year of the reign of King Henry VIII, and chaptered 9, be revived, and the same are and shall continue to be revived." I was delighted to be shown what was being continuously revived in Ontario. To my tactless question why the section had not been repealed, the judge tentatively suggested that nobody understood the section; and he added the unquestionable verity that it is very dangerous to repeal anything that you do not understand.

Well, that is Ontario; but what are you doing in the West? Have Alberta and British Columbia (the order is purely alphabeticel) no contribution to make to my collection of Enactments That Must Never Be Forgotten? Cannot you do better than Ontario? Perhaps you need a little encouragement; and so I shall give it to you. It comes from Florida. It is

very short; but I think that it ought to find a place in every statute everywhere. It is unlikely to do much good; I am certain that it would do no harm; but it should be included for the sheer beauty of its language and the nobility of its concept. It runs: "Whenever applicable, the provisions of this Act shall apply notwithstanding any provision of this Act to the contrary."