W.K. Thomas

Satire For Those Over Thirty *A Herbert Come to Judgement*

Samuel Bloggs owned two monkey-boats, on which he lived with his wife and three children, and on which he transported freight up and down the canal between London and Birmingham. As day by day they travelled through the quiet countryside, pursuing their trade, Mr. Bloggs also undertook to instruct his children in the rudiments of education. This was not good enough, however, for the school board of the County of Middlesex. They charged him with breaking the law in failing to send his children to their school "for the purpose of receiving elementary education". He was convicted but appealed up the appellate ladder to the Court of Criminal Appeal. There the Lord Chief Justice, in pronouncing judgement, began by agreeing with Mr. Bloggs that he had indeed put forward a reasonable defence, in that "it was difficult for him to send children who were constantly in motion to a school which remained stationary."

Fictitious? Yes, but eminently satisfying to those of us who have come to feel somewhat encumbered by government and who would dearly like to see the premises on which government agencies busy themselves shown up to be as logically flawed as we feel they really must be. The incident just related occurs in one of sixty-six "cases" written by A.P. Herbert in the nineteen-twenties and thirties, published usually in *Punch,* and then collected first in three separate volumes of "Misleading Cases" and then in an omnibus volume entitled *Uncommon Law.*[1] These "cases" are more accurately parts of cases, being usually the pronouncements of the presiding judge or, less often, the argument presented by a barrister. They are usually on topics of such fundamental and recurring concern that we of a later decade can readily see the applicability of them to irritants in our own day. Moreover, Herbert

presents them in such a way, especially by using as spokesmen the very epitomes of sane reason and sound logic, that those of us who are over thirty can rejoice greatly. We have learned to live with life's frustrations, with seeing the pushy succeed, the playboys prosper, and the petty tyrants of government flourish. We observe all this and do not outwardly complain – often, but inwardly we long to see the perpetrators of authorized wrong-doing tripped up – just once, and, even more importantly, we yearn to see our cherished, sat-upon, and much laughed-at opinions proved, publicly and irrefutably, *right*. And this Herbert does for us.

In the case mentioned, of Mr. Bloggs, the Lord Chief Justice had to admit, reluctantly, that "a defence founded on nothing more than reason and practicability" was easily brushed aside by a government agency (such is life, we have to agree), but he then consequently turned to the fundamental question raised by Mr. Bloggs in his defence, "What is Education?"[2] This in turn gave the Lord Chief Justice, and A.P. Herbert, a chance to satisfy our secret suspicions that formal education is not always really all that necessary – certainly not to the extent that we as taxpayers should have to be responsible for educating every child in whatever the pedagogues think necessary. The Lord Chief Justice, proceeding by distinctions as a good judge must, shows us why we are right. Parliament itself, in its legislation, has nowhere defined what elementary education is, and wisely so, "for the notion of what constitutes elementary education must obviously vary in every age, country, and class." The school board, in its inability (so typical of government) to make such distinctions, insisted that "elementary education" is the same for everybody: instruction in reading, writing, and arithmetic. But Bloggs, the Lord Chief Justice notes approvingly, argued instead that "the words mean education in the elements or first parts to be learned of any subject which may be useful or necessary to the good citizen in that state of life for which he is destined by Providence, heredity, or inclination." For the Bloggs children, who will succeed to their father's trade, this means acquiring the rudiments of how to handle boats and navigate canals: "They are able in an emergency to steer a boat into a lock, to open or close a lock-gate, to make bow-lines and reef-knots, clove hitches and fisherman's bends, and to do many other useful and difficult things which the members of this Court, we admit, are unable to do."

What if the senior Bloggses are slow in teaching their children to read, write, and calculate? "In these days a person unable to read would be spared the experience of much that is vulgar, depressing, or injurious; a person unable to write will commit neither forgery nor free verse; and a person not well grounded in arithmetic will not engage in betting, speculation, the defalcation of accounts, or avaricious dreams of material wealth." Instead, Mr. Bloggs is "carefully, lovingly, and without cost to the State" giving his children an elementary training in the arts of the noble profession of navigation, which is the foundation of national prosperity and, indeed, of the British character itself, and in doing so he has wisely neglected those "formal studies which are not essential to a virtuous, God-fearing, and useful life in the calling of their forefathers." In all this he has acted within the meaning of the Acts of Parliament concerning education. "He was wrongfully convicted, and the appeal must be allowed."

What a superbly sensible argument, graced by the prestige of high office! Solomon himself could not do better.

The law is really a noble institution: customs may change, and even the majority's view of morals may change, but the law does not. It remains, the stalwart defender of decency and honesty, however much those qualities may be scoffed at nowadays. A case in point is the very common practice, current among all political parties now, of wooing the electorate with promises of money, in the form of increases in family allowances, pension allowances, and the like. Actually such promises are bribery, and, since the money to pay for the increases would come from increases in our taxes, the politicians are bribing us with our own money. But does anyone object? Certainly not the electorate, or certainly not that part of it which would benefit. A.P. Herbert, however, saw the practice for what it is, even though in his day the bribe was not in the form of money, let alone the electorate's money, but simply in promises of employment. He had his favourite litigant, Albert Haddock (a more likable form of Ralph Nader), charge the whole of the Parliamentary Labour and Liberal Parties, including the Prime Minister and Cabinet, under the Corrupt Practices Act.[3] As the presiding magistrate pointed out to the jury, there was no doubt about the case. The law clearly says that any person shall be guilty of bribery who promises to procure any employment for a voter in return for his vote, and all the M.P.'s charged had clearly done just that.

Many of us have no doubt tried – and failed – to convince our young people of what should be perfectly plain: that the only difference between the old politician who used to buy votes with a bottle of whiskey and the modern one who promises an increase in allowances is the size of the bribe and the person who pays for it. Perhaps our argument has not been philosophical enough: if so, we shall especially welcome the comprehensive and philosophical explanation which the magistrate gave for the thinking of the Parliament that passed the Corrupt Practices Act of 1854:

> In the much-abused nineteenth century the exercise of the suffrage was valued more as a public duty than as a private right. Men voted, or were expected to vote, after long internal debate, for reasons directed to the general welfare; to remove an incompetent Ministry, to uphold the honour or save the soul of their country, to defend religion or succour the oppressed, but not to advance their personal fortunes. And Parliament, in the [Corrupt Practices Act], took special steps to secure that the vote should never be bartered for private material gain, whether in the shape of money, place, or employment.

That should be enough to show the immorality of offering to take money out of the pockets of one group of people and put it into those of another. Not that the showing will have any practical effect, of course – apart from assuring us that, in logic, we are right.

On the subject of taxes A.P. Herbert writes about another case, which could have been of practical assistance to us if our plight were not so much worse than his was. Those of us who think about it are appalled by the fact that, under the law of this land, tax money is taken from us as much as fifteen months before it is due. This practice is of course technically legal, but unjust. Herbert's situation was not nearly so bad, for with him the government waited until the tax was due before trying to collect it. This fact allowed his hero to fight law with law.[4] When the income tax department laid a levy upon him, he disputed the amount and refused to pay until the dispute was settled. Whereupon the tax collector sent him the following letter, printed in bright red ink:

> *Previous applications for payment of the taxes due from you on the 1st day of January, 1930, for the year 1929-1930, having been made to you without effect, DEMAND is now made for payment, and I HEREBY GIVE YOU FINAL NOTICE that if the amount be not paid or remitted to me at the above address within SEVEN DAYS from this date steps will be taken for recovery by DISTRAINT, with costs.*
>
> E. PUDDLE, *Collector.*

Mr. Haddock, Herbert's hero, promptly appealed to the Common Law and charged the Tax Collector with blackmail.

The Justice, in addressing the jury, quickly defined terms: a person who sends a letter demanding with menaces and without reasonable cause any chattel, money, or other property commits blackmail and is liable to penal servitude for life. "Now, the 'Demand' is clear," he told the jury;

> indeed the word, as you will notice, is printed in block capitals. And you have to say, first of all, whether or not that "demand" is accompanied by menaces. You will take everything into consideration, the terseness, I almost said the brutality, of the language, the intimidating red ink, the picking out in formidable capitals of the words "DEMAND," "SEVEN DAYS," and "DISTRAINT," and any other circumstance which may seem to you calculated to cause alarm in the mind of the recipient. You will observe in particular the concluding words, "Steps will be taken for recovery by DISTRAINT, with costs."
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> "DISTRAINT." What is the exact meaning of that? It means the forcible seizure of a person's goods; it means the invasion of his home by strangers; it amounts to licensed burglary . . . .

The tax Collector in his defence said that such burglary had not been his intention,

> that the words "steps will be taken for recovery" indicated a preliminary summons to the Court. You may think that in that case he would have done better to print those words in the same large type as the word "DISTRAINT"; and you may think, as I do, looking at all the circumstances, that the letter was deliberately planned and worded with the intention of creating alarm, and, through that alarm, extracting money from Mr. Haddock, who is a sensitive man.

All that remained for the jury to consider was whether the menacing demand had been made with reasonable cause. Evidently not, for not only was the question of the amount due still in dispute, but also the Tax Collector, in a manner typical of government bureaucracy, had made a monumental gaffe. "Steps will be taken", he had written, for what? For *"recovery"*, as if Mr. Haddock had taken money from the Collector, instead of the Collector trying to take it from him. The Collector was of course quickly found guilty. If only we of the present day could fight law with law! But at least we have the inner satisfaction of knowing that while the law was still just, it was on our side, and David could still slay Goliath.

Not always, fortunately, does the government have to be confronted so directly. It can sometimes be circumvented, especially if one knows

the essence of the law better than the government does. On another occasion Mr. Haddock felt obliged to pay his income tax, but did so in a form that was rather unusual.[5] He led into the Tax Collector's office a large white cow, on whose dexter horn was affixed a twopenny stamp and on the back and sides of which were stencilled these words:

> *To the London and Literary Bank, Ltd.*
> Pay the Collector of Taxes, who is no gentleman, or Order, the sum of fifty-seven pounds (and may he rot!).
> 57/0/0 ALBERT HADDOCK

The Tax Collector, failing to distinguish between form and essence, declined receipt of the bovine cheque and charged Mr. Haddock with non-payment of income tax.

In his defence Mr. Haddock pointed out that there was nothing in law that said a cheque had to be written on a piece of paper of specified dimensions:

> A cheque, it was well known, could be written on a piece of notepaper. He himself had drawn cheques on the backs of menus, on napkins, on handkerchiefs, on the labels of wine-bottles; all these cheques had been duly honoured by his bank and passed through the Bankers' Clearing House. He could see no distinction in law between a cheque written on a napkin and a cheque written on a cow. The essence of each document was a written order to pay money, made in the customary [verbal] form and in accordance with statutory requirements as to stamps, etc.

He was, of course, quite correct, and was duly found innocent. Before leaving the dock, however, he provided us with that grace-note which is a mark of genius: the form of payment he had chosen was in fact the oldest form of payment, payment in kind, which "more often than not meant payment in cattle. Indeed, during the Saxon period . . . cattle were described as *viva pecunia,* or 'living money' . . . ." So again the ignorance of government has been shown up, and the superior learning and intellect of the private individual has triumphed again.

When the government has taken our money from us, they often then seek to remove whatever little pleasures we have left. The fact that in doing so they are courting the votes of minority pressure groups, like the W.C.T.U., merely aggravates the injury. But again A.P. Herbert provides the balm. To show how benighted the prohibition of alcohol is, whether in a local area or throughout a nation, he turns to the law of the wet, wet sea.[6]

Mr. John Walker, a British citizen, was

> proceeding peacefully towards the coast of America in a small craft which carried a cargo of whisky, the produce of Scotland. Without warning or provocation the occupants of an American vessel opened fire on Mr. Walker; and he, judging that he had to do with pirates or sea-rovers, returned their fire. An American citizen was killed.

The American government sought to have Mr. Walker extradited to the United States, where he would be tried for murder. But the Lord Chancellor raised the question whether the extradition treaty with the United States could still be in force, since such treaties were made only with civilized nations. He illustrated by referring to Communist Russia, which had passed certain stringent laws against the ministers of religion. If a Russian bishop were to flee from the operation of those laws and be rescued by a British seaman, who brought him to England, the House of Lords would refuse to deliver up either the mariner or the bishop "to the inhuman treatment of a Russian tribunal. If we were confronted with some old treaty we should reply that when that treaty was signed we did not contemplate that the other party to it was likely to sink into a condition of savagery, and that by that unfortunate relapse our obligations were extinguished."

The same held true for Prohibitionist America. The policy of Prohibition and the decrees passed to enforce it

> are contrary to the concerted usage of civilized nations. There are certain rights, customs, liberties, and practices which have been accepted by the enlightened peoples of the world as necessary to the life of civilized men. There is the right to personal freedom – the negation of which is slavery. There is the right to freedom of worship according to the conscience and belief of the individual – the negation of which is religious persecution. There is the right of all men to the peaceful use of the seas – the negation of which is piracy. And there is the right of free choice in such matters of personal behaviour, dress, and diet as do not affect the safety of the realm or the rights of other individuals – the negation of which is Prohibition.

The lawyers who appeared for the United States offered

> the ingenious argument that Prohibition was to be regarded as a "moral experiment" and therefore deserved our practical sympathy. This argument did not impress me. The evidence is that this "moral experiment" has been in fact productive of more death, degradation, and civil dissension than any enactment of recent times. Apart from that I must remind your Lordships that the laws of Russia, already mentioned, are also commended by the Government of Russia as a "moral experiment".

The Lord Chancellor concluded thus:

> The Eighteenth Amendment is an offence against the customs of the civilized world, *jus gentium*. No other civilized nation has been guilty of this offence; and the nation guilty of it now must be considered as an international outlaw. It may take effect within the coasts of North America, but it cannot be acknowledged or condoned beyond them. It follows that individuals acting in pursuance of that enactment have, as against the nationals of other countries, no rights; they have the status of pirates, cannibals, marauding savages; and they may be shot down or apprehended by the decent citizens of any civilized nation.

So much for the W.C.T.U. Not, of course, that we would expect to find reason in a group of women, and here again the law proves us right – in spite of Women's Lib. A certain woman was sued for negligence in operating a motor launch on the River Thames: the plaintiff, a man, had caught cold from being immersed as a result of the collision.[7] The lower court judge had instructed the jury to ask itself whether the woman had exercised reasonable care. It decided she had not, and the plaintiff was awarded £250. The woman appealed, and her barrister (a man) put forward the argument, with which the judge agreed, that, whereas at every turn in British law one encounters the Reasonable Man, whose activities are offered as the touchstone for judging behaviour, there is nowhere mentioned such a thing as a Reasonable Woman. The Reasonable Man always exercises proper caution, proceeds logically, and is full of virtues – to such an extent, admittedly, that he is sometimes hard to take. But there he is, and always appealed to. But in law there is not a single mention of a Reasonable Woman, "for the simple reason that no such being is contemplated by the law; . . . legally at least there *is* no reasonable woman. The learned judge should have directed the jury that, while there was evidence on which they might find that the defendant had not come up to the standard required of a reasonable man, her conduct was only what was to be expected of a woman, as such."

We can of course afford to be gracious about it, as is indeed the law itself, always the epitome of what is best in man. As the judge commented,

> It is no bad thing that the law of the land should here and there conform with the known facts of everyday existence. The view that there exists a class of beings, illogical, impulsive, careless, irresponsible, extravagant, prejudiced, and vain, free for the most part from those worthy and repellent excellences which distinguish the Reasonable Man, and devoted to the irrational arts of pleasure and attraction, is one which should be as welcome and as well accepted in our Courts as it is in our drawing-rooms – and even in Parliament.

One group in society who are drawn to woman's "irrational arts of pleasure and attraction" – and who in fact get more than their fair share of them – are the playboys, and often have we over thirty longed to get even with them for their platinum blondes and their flashy cars. About the blondes, alas, we can do nothing (we're much too gentlemanly for that), but about their cars perhaps we could, if only we could devise the means. Herbert's hero, the redoubtable Mr. Haddock, again satisfies our inner longings in a most ingenious – and perfectly legal – way.[8]

He watched and came to detest a certain playboy who constantly drove his costly Botellini-Nine as if he were "a law unto himself on the highroads". He knew that he had no chance of trapping him with his own automobile but bided his time for the appropriate opportunity. It came one spring day when the Thames overflowed its banks and covered Chiswick Mall, which runs alongside, to a depth of from two feet on the river side of the road to a few inches on the landward side. The playboy came driving along, on the left-hand side of the road, of course, which fortunately for him was the shallow side, but was startled "to see ahead of him, and coming towards him on the same side of the road, the defendant, Mr. Haddock, who was navigating with a paddle a small boat of shallow draught." The playboy blew his horn vigorously and waved the boatman towards the proper side of the road. Mr. Haddock held his course. The playboy shouted, "Out of the road, you fool!" and Mr. Haddock replied, "Port to port, you foxy beetle! Are you not acquainted with the Regulations for Prevention of Collision at Sea? I am going to starboard." The playboy perforce swerved to the right, into the deep water, and his car stopped, unable to move until the tide ebbed and a tow truck came. Since the playboy suffered damages, in costs of repair to the car and from a missed business appointment, he sued the estimable Mr. Haddock for recovery.

The judge, who must have had a streak of the playboy in him, frequently expressed extreme disapproval of Mr. Haddock, but the virtue of the law required that he do him justice, and this he did:

> The law of the land says one thing; the law of the water says the contrary; and it seems elementary that (upon navigable waters) the law of the water must prevail. It is idle to say that Chiswick Mall was not at the time of the accident navigable water. Mr. Haddock was, in fact, navigating it, and if [the plaintiff] chooses to navigate it at the same time he must be bound by the appropriate regulations and should make himself familiar with them.

The playboy's barrister argued that, "since the highroad was only covered with water by an exceptional inundation of short duration, it cannot be held to have lost the character of a highroad." But the law is completely logical, as Mr. Haddock well knew, and as the judge had to admit:

> Differences of degree cannot be allowed to derogate from principle. The fact that a certain area of water was once dry land and is expected to be dry land again is unimportant. Much of what we now know as land was once covered by the ocean, and *vice versa;* but a motorist would not be allowed to appeal to the customs of the sea because he was crossing the Romney Marshes, on the ground that that land used to be sea.

Moreover, at the time the scene of the mishap was not just water, it was tidal water, and since "the regulations upon which Mr. Haddock relies are not of British origin or sanction only [but] govern the movement and secure the safety of the ships of the world," it was unthinkable that the Admiralty Court of Great Britain would "play fast and loose with them for the benefit of a motorist." So once again David smote the Philistine.

Motor cars can be used in other irritating ways, of course. We are all familiar with the plight of the person who has sought out a quiet neighbourhood in which to make his home. He has carefully chosen an area in which the winding streets will force motorists to go at a slow pace and so preserve both the safety of children and old people and the quiet of the neighbourhood. And then what happens? Somebody finds that the street to which our unfortunate soul has moved makes a fine short-cut, and soon hundreds of cars are swishing by. Since the frequent curves make it impossible to see far enough in advance, the motorists, instead of slowing down, take to sounding their horns, so that children, old people, and oncoming traffic will know to stay out of their way. It's no use trying to get a noise-abatement law passed: there are too many pressure groups to overcome. But there is a way – in law, of course, and once again A.P. Herbert leads us on – to mental satisfaction at least.

His plaintiff, who was placed in a similar predicament, charged a particularly noisy motorist with committing a nuisance under the Common Law.[9] In his defence the motorist contended that he sounded his horn because the roadway was dangerous. The judge commented:

> The only thing that has made it dangerous is the passage of motor-cars driven in such a manner and at such a speed that if they do not warn the world of

> their approach they may cause damage to life and property. In order to avoid doing damage to those on the roads the [defendant says] that [he is] entitled to do damage to those in the adjoining houses – damage to nerves and health and mental efficiency . . . . Was there ever so queer, selfish, and anti-social a proposition? . . . . What the [defendant says] in effect is: "I am a public danger. I am so dangerous that I am entitled to wake up the neighbourhood by shouting 'Look out! I am coming!'; but once I have shouted I am not to be blamed for what happens."

Having paraphrased the defence, the judge, in a typically legal way, then drew an analogy:

> If a man fired off a revolver in the public street he would not be forgiven because he fired a warning rocket first; and if he let loose a man-eating tiger on the highway it would be no defence that the tiger was accustomed to give a very loud roar before pouncing on its prey.
>
> It is the duty of those who choose to possess dangerous things, instruments, or beasts, so to control them that they will do no damage. It is the duty of the [defendant] so to direct his dangerous vehicle that no warning of his approach is necessary, and if a deaf cripple be crossing the road round the next corner he will still be able to avoid him. The continual making of offensive noises does not excuse but is an aggravation of uncivilized behaviour.

Being a perceptive man, and humane, the judge concluded that a substantial offence was in fact "being done to ears, minds, and feelings, to the quiet and comfort of peaceable homes, and to the value of property."

Those motorists who move into a quiet, respectable neighbourhood and, by sounding their horns, change it into something worse are like our young radicals, of whatever party, who are always sounding off in an effort to change things. The law has a surprise for them too. When a group of protesters in London argued that they had a right to "free speech", the Lord Chancellor set them right, and our young dissidents would do well to listen to him.[10]

> There is no reference to Free Speech in Magna Carta or the Bill of Rights. Our ancestors knew better. As a juridical notion it has no more existence than Free Love, and, in my opinion, it is as undesirable. The less the subject loves the better; and the less everybody says the better. Nothing is more difficult to do than to make a verbal observation which will give no offence and bring about more good than harm; and many great men die in old age without every having done it. . . . It may well be argued that if all public men could be persuaded to remain silent for six months the nation would enter upon an era of prosperity such as it would be difficult even for their subsequent utterances to damage. Every public speaker is a public peril, no matter what his opinions.

The Lord Chancellor proceeded to make a recommendation that our own government would do well to implement:

> Public speech should be classed among those dangerous instruments, such as motor-cars and fire-arms, which no man may employ without a special licence from the State. These licences would be renewable at six-monthly periods, and would be endorsed with the particulars of indiscretions or excesses; while "speaking to the public danger" would in time be regarded with as much disgust as inconsiderate or reckless driving.

The same case applies in another way to our young protesters, who not only sound off but also clog the streets with their marches. As the Lord Chancellor pointed out, there are no rights in a public street whatsoever,

> for there is no conduct in a public thoroughfare which cannot easily be brought into some unlawful category, however vague. If the subject remains motionless he is loitering or causing an obstruction; if he moves rapidly he is doing something which is likely to cause a crowd or a breach of the peace; if his glance is affectionate he is annoying, if it is hard he may be threatening, and in both cases he is insulting; if he keeps himself to himself he is a suspicious character, and if he goes about with two others or more he may be part of *(a)* a conspiracy or *(b)* an obstruction or *(c)* an unlawful assembly; if he begs without singing he is a vagrant, and if he sings without begging he is a nuisance.

"But nothing is more obnoxious to the law of the street", the Lord Chancellor continued, with special application for our marchers,

> than a crowd, for whatever purpose collected, which is shown by the fact that a crowd in law consists of three persons or more; and if those three persons or more have an unlawful purpose, such as the discussion of untrue and defamatory gossip, they are an unlawful assembly; while if their proceedings are calculated to arouse fears or jealousies among the subjects of the realm they are a riot. It will easily be seen, therefore, that a political meeting in a public place must almost always be illegal. . . . It was held so long ago as 1887 by Mr. Justice Charles that the only right of the subject in a public street is to pass at an even pace from one end of it to another, breathing unobtrusively through the nose and attracting no attention.

Our young dissidents must realize that there is nothing which does not have a law against it. When Mr. Haddock, who is usually a paragon of conservative virtue, was so ill-advised (or intoxicated) as to jump off Hammersmith Bridge during a Regatta, he was charged with a variety of offences.[11] He forced the Lord Chief Justice to agree that he had successfully countered each charge until he made the mistake of saying "that this was a free country and a man can do what he likes if he does nobody any harm". As the Lord Chief Justice remarked,

> With that observation the appellant's case takes on at once an entirely new aspect. If I may use an expression which I have used many times before in this Court, it is like the thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions. For it would be idle to deny that a man capable of that remark would be capable of the grossest forms of licence and disorder. It cannot be too clearly understood that this is *not* a free country, and it will be an evil day for the legal profession when it is. The citizens of London must realize that there is almost nothing they are allowed to do.

The Lord Chief Justice then proceeded to give examples. They will remind us of the by-laws which the Borough of Etobicoke, in Ontario, sought to implement, regulating the height of grass in lawns and the temperature of water in baths – all in a commendable effort to preserve some measure of respectability and decency.

> *Prima facie* all actions are illegal, if not by Act of Parliament, by Order in Council; and if not by Order in Council, by Departmental or Police Regulations, or By-laws. They may not eat where they like, drink where they like, walk where they like, drive where they like, sing where they like, or sleep where they like.

(We can all think of places where these activities are prohibited.)

> And least of all may they do unusual actions "for fun." People must not do things for fun. We are not here for fun. There is no reference to fun in any Act of Parliament. If anything is said in this Court to encourage a belief that Englishmen are entitled to jump off bridges for their own amusement the next thing to go will be the Constitution.

An ever-present defence against the encroachments of attempted change is our law. Unfortunately, it does have a weakness, like any other human institution. It is possible for some young judges, not as perceptive as their elders, to seek, in effect, to change the law itself by changing its application. We have seen this sort of thing happen below the border and can expect to see it happen here in Canada any time now. But against the time that happens, Herbert has prepared a defence – albeit only a mental defence.

In a case heard before the highest appellate court (and it is of course there that change in the application of law is either initiated or confirmed), Herbert's barrister contended that the judgement of the Court was in the nature of an Act of God, which, by legal definition, is "something which no reasonable man could have expected".[12] What made the judgement unexpected, indeed unexpectable, was that, among the multiplicity of judges of the Court, there could be a number who

were "dyspeptic", "deaf", or "irritable". We need only add "reform-minded" to complete our defence and prepare ourselves for the advent of the unreasonable. When the young get to the law and change it on us, we shall still have our solace, for a Herbert will have come to judgement, yea, a Herbert.

FOOTNOTES

1 All published by Methuen of London, *Misleading Cases in the Common Law* appeared in 1927, *More Misleading Cases* in 1930, *Still More Misleading Cases* in 1933, and the omnibus *Uncommon Law* in 1935, being reprinted frequently, the last time 1969.
2 Case 21, "Rex *v.* Bloggs: What is Education?" pp. 133-37.
3 Case 42, "Rex *v.* George, MacDonald, Maxton, and Others: Corrupt Practices," pp. 275-78.
4 Case 25, "Rex *v.* Puddle: Blackmail," pp. 159-63.
5 Case 32, Board of Inland Revenue *v.* Haddock; Rex *v.* Haddock: The Negotiable Cow," pp. 201-06.
6 Case 29, "*In Re* John Walker: prohibition and Barbarism," pp. 183-88.
7 Case 1, "Fardell *v.* Potts: The Reasonable Man," pp. 1-6.
8 Case 37, "Rumpelheimer *v.* Haddock: Port to Port," pp. 237-42.
9 Case 46, "Tripp *v.* The Milko Corporation, Ltd.: The Echoing Horn," pp. 297-302.
10 Case 15, "Engheim, Muckovitch, Kettelburg, Weinbaum, and Oski *v.* The King: Free Speech — Why?" pp. 89-94.
11 Case 5, "Rex *v.* Haddock: Is It a Free Country?" pp. 24-29.
12 Case 49, "Dahlia, Ltd. *v.* Yvonne: Act of God," pp. 314-19.