BOOK REVIEW


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Lord Denning, Master of the Rolls, celebrated his eightieth birthday in January, 1979. This book is his own contribution to the event and it is already a best seller. It was sold out shortly after publication and is now in its third printing.

Lord Denning is one of the best-known figures in English public life. He has been a judge since 1944 and, apart from five years in the House of Lords as a Lord of Appeal in Ordinary, has sat in the Court of Appeal since 1948, presiding over it as Master of the Rolls since 1962. His is a record of judicial service not likely to be equalled in the future, particularly because judges appointed after 1959 have to retire at the age of seventy-five. One of his colleagues, Lord Scarman, has described the past quarter of a century as "the age of legal aid, law reform—and Lord Denning." ¹ A newspaper columnist puts it more emphatically: "Lord Denning is a man who, unlike the hordes of wretched humbugs who claim to stand up for the people of England against 'The Establishment,' actually does so. . . . [T]his admirable judge is one of the greatest living Englishmen." ²

His book is about law reform—the necessity of reshaping the principles laid down in the nineteenth century to meet the needs of the twentieth. It discusses seven branches of English law with the development of which Lord Denning has been concerned, in the form of extensive quotations from his judgments linked by a running commentary. He hopes that his proposals for reform will be discussed in law schools "and perhaps in future years find acceptance." ³ It is not an easy book to characterize; it is hardly a textbook, but it is much more than an anthology. Probably it is best

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² Simple, The Daily Telegraph, Aug. 8, 1979 at 12, col. 3 (emphasis in original).

viewed as an essay in judicial autobiography. It is certainly not the sort of book that is susceptible of a standard academic review, and it would be premature to attempt a summing-up of a man who is reported to admire all the Christian virtues except Resignation.

Lord Denning is most widely known for his decisions on public law. Three sections of the book are devoted to discussing abuse of ministerial powers, problems of *locus standi*, and abuse of "group" powers. Lord Denning has administered some notable checks to bureaucracy in his time, and the language of his judgments on abuse of governmental power is reminiscent of the constitutional struggles of the seventeenth century. The cases on the abuse of "group" powers are more controversial because the groups Lord Denning has in mind are trade unions. An American reader may be a bit baffled by the intricacies of English trade-union law, but the political overtones of these cases will be clear. Lord Denning does not think of himself as being opposed to trade unions, but his individualistic philosophy inevitably brings him into conflict with a movement based on collective action.

Private law is represented by sections on the rules of construction, the doctrine of promissory estoppel, and liability for negligent statements. Lord Denning's views on construction are unorthodox, but the other doctrines are among his most successful developments. The *High Trees* doctrine (that a representation intended to be acted on, and in fact acted on, by the representee may raise an estoppel against the representor) has, in the view of some writers (including Lord Denning), revolutionized the law of contract. Similarly, his dissenting judgment in *Candler v. Crane, Christmas & Co.*, vindicated thirteen years later by a unanimous House of Lords, opened up in England the ever-expanding area of liability for negligent statements. Interestingly enough, Lord Denning is beginning to have doubts about recent developments in the law of negligence. After casting a disapproving glance at the growth of

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4 They were rejected by the House of Lords in Liverpool City Council v. Irwin, [1977] A.C. 239.

5 Central London Property Trust, Ltd. v. High Trees House, Ltd., [1947] K.B. 130. "Whenever I speak to students, someone is sure to call out—"High Trees." It is greeted with acclaim. This is very different from the reception it used to get in days past from the higher judiciary." DENNING, supra note 3, at 199.


7 [1951] 2 K.B. 164 (C.A.).

medical malpractice suits in the United States, he concludes that the time may have come to call a halt.\(^9\)

The final section of the book is on the doctrine of precedent. Here, where Lord Denning is concerned, we reach the heart of the matter. The doctrine of precedent is, of course, applied much more strictly in England than in the United States, and Lord Denning has long chafed under the restrictive English rules. His own views appear in the epigraph he has chosen for his book: "If we never do anything which has not been done before, we shall never get anywhere."\(^{10}\) This section tells the story of Lord Denning's unsuccessful battle with the House of Lords for a relaxation of the doctrine. In particular, because the House of Lords is no longer bound by its own previous decisions, Lord Denning would like a similar freedom for the Court of Appeal. His most recent attempt to assert this freedom, in *Davis v. Johnson*,\(^{11}\) led to what he describes as his most humiliating defeat. He received a "crushing rebuff"\(^{12}\) from the House of Lords, but Lord Denning remains unrepentant, and, lacking the power to overrule previous decisions of the Court of Appeal directly, he attempts to justify turning a blind eye to the authorities as a means of provoking an appeal which may result in the law being changed. As he points out, this technique has been successful in some of his most controversial cases; even in *Davis v. Johnson*,\(^{13}\) the House of Lords upheld his interpretation of the statute in question while condemning his views on precedent.

The technicalities of precedent are, however, only one aspect of the differences between Lord Denning and the House of Lords, and not really the most important one. Behind the dispute over the powers of the Court of Appeal there is a much more fundamental disagreement as to the extent to which law reform is a matter for the courts at all. While English courts have moved a long way in the last thirty years towards accepting openly the influence of policy considerations on their decisions,\(^{14}\) there are still limits on the kinds of law reform which it is thought proper for the courts to undertake. Lord Denning's critics believe that he oversteps these limits.

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\(^9\) "Enough has been done for the sufferer. Now remember the man who has to foot the bill . . . ." DENNING, supra note 3, at 281.


\(^{12}\) DENNING, supra note 3, at 299.


It is rather a pity that Lord Denning does not discuss *Launchbury v. Morgans*, because that was a particularly illuminating example of where the line is drawn. The case concerned a highway accident involving a driver who was neither the owner of the car nor employed by her, and the question was whether the owner was liable for the driver's negligence. English law has only a limited doctrine of vicarious liability for agents, and in the Court of Appeal Lord Denning sought to extend it to include liability for whoever drove the "family car." His argument was based on social policy, in this case the policy that victims of careless driving should be compensated. The House of Lords rejected this extension, not because they were unsympathetic to the policy, but because this was the sort of reform which could be achieved only by Parliament. While recognising that "it is an important function of this House to develop and adapt the common law to meet the changing needs of time," the House thought that it was not appropriate for the courts to introduce "such a radical and far-reaching departure from accepted principle." Several reasons were given, but the most significant was that the law on highway accidents is inextricably bound up with a complicated legislative structure as to insurance, and it would be dangerous and irresponsible "judicially to alter the basis of liability without adequate knowledge (which we have not the means to obtain) as to the impact this might make on the insurance system . . . ." This was a case in which "[t]he questions of policy need consideration by the government and Parliament, using the resources at their command for making wide inquiries and gathering evidence and opinions as to the practical effects of the proposed innovations." *Launchbury v. Morgans* is one of several recent cases in which the invitation to innovate has been declined on these grounds.

The House of Lords has made little use of its own power to overrule its previous decisions and is relatively conservative in its attitude to judicial legislation, not because it is opposed to change, but because it regards the judicial process as inappropriate for making

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18 Id. 137 (Lord Wilberforce).
19 Id. 142-43 (Lord Pearson).
changes involving major shifts in social policy. Modern law reform is a technical business and English courts lack the machinery for acquiring the necessary social and economic background information; there is, for instance, no English equivalent of the "Brandeis brief." It was in recognition of these limitations on judicial reform that the Law Commission was set up by statute to consider and recommend law reform for implementation by Parliament. The Law Commission has developed its own techniques of research and consultation and has secured a great deal of statutory reform of private law in the last decade. It is increasingly regarded as the proper agent of major reform.

Lord Denning stands for an older, wider conception of the judicial function. He believes that law reform is primarily a matter for the judges, and he has never been reluctant to express his conclusions on matters of social policy. He sees no need for the judges to wait for the Law Commission.\(^\text{21}\) "They should develop the law, case by case, as they have done in the past: so that the litigants before them can have their differences decided by the law as it should be and is, and not by the law of the past."\(^\text{22}\) It is a noble vision, but it does not correspond with the focus of the times.

Lord Denning's conclusion is that he feels that many of his endeavours have failed. If he had time, he says, he would have told us about three more of his innovations which have been struck down by the House of Lords and about a fourth "not up to now condemned by higher authority."\(^\text{23}\) The striking thing about his examples of failure is that in two of them his views have in fact largely prevailed, but by means of statute rather than case law.\(^\text{24}\) The statutes are not mentioned. Perhaps he thinks that they do not go far enough,\(^\text{25}\) but whatever the reason, Lord Denning does not do himself justice. His judgments have on several occasions been influential in leading to important statutory reforms.

\(^\text{21}\) "Some people seem to think that now that there is a Law Commission the judges should leave it to them to put right any defect and to make any new development. . . . I decline to reduce the judges to such a sterile role." Liverpool City Council v. Irwin, [1976] 1 Q.B. 319, 332 (C.A.) (Lord Denning, M.R.).

\(^\text{22}\) Id.

\(^\text{23}\) DENNING, supra note 3, at 315.

\(^\text{24}\) Unfair exemption clauses, insofar as they appear in specified types of contract, are now controlled by the Unfair Contract Terms Act, 1977, c. 50. A spouse's right to occupy the matrimonial home is protected by the Matrimonial Homes Act, 1967, c. 75, as amended by the Matrimonial Proceedings and Property Act, 1970, c. 45 § 38, and the Domestic Violence and Matrimonial Proceedings Act, 1976, c. 50.

The most important of the omissions is Lord Denning's work in property law. His decisions on licenses to occupy land have been socially and doctrinally important in creating an informal, discretionary, quasi-proprietary interest which seems to transcend the rules of real property. They also illustrate Lord Denning's favourite argument, the appeal to equity as a solvent of traditional classifications. The Court of Appeal cases giving wives an equitable interest in the matrimonial home arising out of direct or indirect contribution to its purchase are also, as Lord Denning has recently said, remarkable. They have been superseded by statute in the context of matrimonial breakdown but are likely to enjoy a new lease on life as a means of solving the property disputes of unmarried couples.

This, however, is only to say that one would have liked Lord Denning to write a much bigger book. Let us hope that one day he will because, whether one agrees with him or not, Lord Denning is always worth reading. This reviewer, like other English law teachers, spends much of his working life arguing with students about his judgments. As Lord Wilberforce said in Launchbury v. Morgans, "we may be grateful to Lord Denning M.R. for turning our thoughts in a new direction . . . ."