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LORD DENNING AND THE JUDICIAL ROLE

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Part II

The Desire To Do Justice

There is no doubt that in his days on the bench Lord Denning was filled with a burning desire to do justice in the case before him. (I had personal experience of it, as I explain shortly.) If the applicable legal rule did not permit him to do justice as he saw it, he was impatient of that rule and would get round it if he could. Technicalities certainly stood no chance against him. I give two examples out of many.

In a case concerning the validity of an enforcement notice, after citing a remark by Viscount Simonds that there must be strict and rigid adherence to formalities[23], Lord Denning went on-

> 'We found that many people were taking an undue advantage of that statement. Formalities were being used to defeat the public good. So we no longer favour them . . . We now reject technicalities and apply the simple test enunciated by Upjohn L.J. in *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196 at 232: "Does the [enforcement notice] tell him fairly what he has done wrong and what he must do to remedy it?"' [24]

Article 8 of Schedule 1 to the Carriage by Air Act 1932 required consignment notes to 'contain the following particulars' (specifying them). Lord Denning held that this

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should not be given 'so rigid an interpretation as to hamper the conduct of business . . . I do not interpret the article as meaning that the waybill must contain the statement *verbatim*. It is sufficient if it contains a statement to the like effect'.[25] This impatience with technicalities is another area in which Lord Denning's example has been influential. But the two examples I have given also show something else. He was always concerned to promote the public interest, and he regarded trade freedom as an important aspect of that. The latter concern was shown in his notable decision in a case where the Jockey Club had sought to exclude a woman trainer. Denning said-

> 'The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule

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[23] See *East Riding County Council v. Park Estate (Bridlington) Ltd.* [1957] A.C. 223 at 233.

[24] *Munnich v. Godstone R.D.C.* [1966] 1 W.L.R. 427 at 435.

[25] *Samuel Montagu & Co. Ltd. v. Swiss Air Transport Co. Ltd*. [1966] 2 Q.B. 306 at 314.

> which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy.'[26]

One of the most troublesome conflicts is that between individual rights and those of society generally. Nor is this an even balance: Coke said *jura publica anteferenda privatis* (public rights are to be preferred to private ones).[27] Denning was inclined to agree. In one case he quoted the dictum by Lord Reid that 'there must be a balancing of relevant considerations'[28] and then added his own rider: 'The most weighty consideration is the public interest'.[29]

Nevertheless Lord Denning had great concern for the plight of the individual, as I have personal reason to know. In 1972, during a period when I was not in practice at the bar, I had occasion to bring a private prosecution against a person who is now a Cabinet minister, Mr. Peter Hain. After a ten-day trial at the Old Bailey Mr. Hain was technically acquitted (the jury had disagreed) on three counts of criminal conspiracy and convicted on a further count. I was awarded costs of the entire prosecution out of central funds; and it was the amount of this costs order that brought me, as a litigant in person, before Lord Denning presiding over the Court of Appeal Criminal Division. The taxing officer taxed my costs at £11,000. After a five-day hearing before the Chief Taxing Master of the Supreme Court, Master Grahame-Green, this figure was increased to £22,787.25. Following this assessment the presiding judge of the South-Eastern Circuit, Mr. Justice Melford Stevenson, reduced the amount to what must have seemed to him the nice round sum of £20,000. There was no hearing before the learned judge, and he gave no reason for what seemed to me an arbitrary reduction. He had deprived me of £2,787.25 which I had actually expended. It was a large sum for me, and I resented the judge's arbitrary action. I sought redress for this injustice, and where better to seek it than before Lord Denning? He heard me with great sympathy and courtesy, but alas had to hold that the rules were too strong even for him to find a way round.[30]

Upholding the Law

Lord Denning's concern for the public interest was shown in a famous decision of his concerning the duty of police chiefs to enforce the law. The Metropolitan police had decided on a local policy of not prosecuting shoplifters. Mr. Raymond Blackburn objected, and the matter came before Lord Denning. He held that it is the duty of every chief police officer to enforce the law, adding-

> 'He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone, save of the law itself.'[31]

This desire of Lord Denning to uphold the law was exemplified in another case concerning the police, which also demonstrated his great learning. The question arose of whether a statutory power of search imported the ancient common-law doctrine of trespass ab initio.[32] Warrants had been issued to search the shops owned by the plaintiff company for goods stolen from the factory of Ian Peters Ltd. No such goods were there, but the police found and took away other stolen goods. These they later returned to the plaintiffs, who then sued the police for trespass.

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[26] *Nagle v. Fielden* [1966] 2 Q.B. 633 at 644.
[27] Co. Litt. 130a.
[28] *A.-G. v Times Newspapers Ltd.* [1974] A.C. 273 at 296.
[29] *Wallersteiner v. Moir* [1974] 1 W.L.R. 991 at 1005.
[30] The case is reported as *In re Central Funds Costs Order* [1975] 1 W.L.R. 1227.
[31] *R. v. Metropolitan Police Comr., ex parte Blackburn* [1968] 2 Q.B. 118 at 136. This duty of the police was later modified by the Prosecution of Offences Act 1985, setting up the Crown Prosecution Service.
[32] *Six Carpenters Case* (1610) 8 Co. Rep. 146a.

The plaintiffs were awarded damages of £500, and the police appealed. It was held that the actions of the police were covered by the warrants, and damages did not lie. Denning weighed two conflicting criteria–

> 'At one time the courts held that the constable could seize only those goods which answered the description given in the warrant. . . If he seized other goods, not mentioned in the warrant, he was a trespasser in respect of those goods: and not only so, but he was a trespasser on the land itself, a trespasser ab initio, in accordance with the doctrine of the *Six Carpenters Case*, which held that, if a man abuse an authority given by the law, he becomes a trespasser ab initio. If such had remained the law, no constable would be safe in executing a search warrant. The law as it then stood was a boon to receivers of stolen property and an impediment to the forces of law and order. So much so, that the judges gradually altered it . . . Now the time has come when we must endeavour to state [the principle]. We have to consider, on the one hand, the freedom of the individual. The security of his home is not to be broken into except for the most compelling reason. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime.'[33]

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The court came down in favour of repressing crime, and declared that the doctrine of trespass ab initio no longer applied.

There are many reported cases which show Lord Denning's great knowledge of the law. This extends to all areas of the common law, including constitutional matters. One unusual aspect concerns church law. Tudor Evans J, was required to decide whether legal policy requires damages for negligence to be disallowed where the negligence consisted in allowing a suicidal person an opportunity (which he took) actually to commit suicide.[34] He found help in the dictum of Lord Denning[35] that suicide is contrary to the ecclesiastical law 'which was, and still is, part of the general law of England'. Lord Denning had cited the following dictum of Lord Blackburn, which gives an indication of the width of the common law–

> 'The ecclesiastical law of England is not a foreign law. It is a part of the general law of England - of the common law - in that wider sense which embraces all the ancient and approved customs of England which form law, including not only that law administered in the Courts of Queen's Bench, Common Pleas, and Exchequer, to which the term Common Law is sometimes in a narrower sense confined, but also that law administered in Chancery and commonly called Equity, and also that law administered in the Courts Ecclesiastical, that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm - and form, as is laid down in *Caudrey's Case* (1591) 5 Co. Rep.1, the King's ecclesiastical law.'[36]

Equity

Lord Denning's learning extended to the most obscure areas of law. Take the medieval prerogative remedy of *quo warranto*. Over time, the writ for this was superseded by informations in the nature of *quo warranto*. These were in turn abolished by the Administration of Justice (Miscellaneous Provisions) Act 1938 s. 9, which substituted a new procedure whereby application could be made for an injunction. Denning felt this new procedure should be applied with the old law in mind. In a 1953 case the Court of Appeal held that the delegation by the London Dock Labour Board, a statutory body, of its disciplinary functions to a port manager

[33] *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299 at 309.
[34] *Kirkham v. Chief Constable of the Greater Manchester Police* [1989] 3 All E.R. 882.
[35] In *Hyde v Tameside Area Health Authority* [1981] C.A. Transcript 130.
[36] *Mackonochie v. Lord Penzance* (1881) 6 App. Cas. 424 at 446.

was unlawful. The manager's purported suspension of workers was therefore a nullity.[37] Denning L.J. said-

> ' . . we are not asked to interfere with the decision of a statutory tribunal; we are asked to interfere with the position of a usurper . . These courts have always had a jurisdiction to deal with such a case. The common law courts had a regular course of proceeding by which they commanded such a person to show by what warrant - *quo warranto* - he did these things. Discovery could be had against him, and if he had no valid warrant, they ousted him by judgment of ouster . . . Side by side with the common law jurisdiction of *quo warranto* the courts of equity have always had power to declare the orders of a usurper to be invalid and to set them aside. So at the present day we can do likewise.'[38]

Denning's deep knowledge of the rules of equity helped him when it came to knotty problems over the fusion of law and equity effected by the Supreme Court of Judicature Act 1873. This used a heavy dose of what I call archival drafting. It involves the incorporation into an Act of a whole body of law as it existed at a given past time. This included the practice prevailing on the relevant date, as well as the substantive law in force at that time. Often the provisions thus incorporated did not otherwise continue in force, so ceased to have a life of their own. I call it archival drafting because, taken literally, it requires persons applying the Act after a considerable period has elapsed since the relevant date to engage in historical research in order to find out what the law thus imported amounts to.

For example section 19(2) of the Supreme Court Act 1981, following earlier precedents, states that there shall be exercisable by the High Court 'all such . . . jurisdiction (whether civil or criminal) as was exercisable by it immediately before the commencement of this Act'. This relates back, by way of the Supreme Court of Judicature (Consolidation) Act 1925 s. 18, to the setting up of the High Court by the Supreme Court of Judicature Act 1873. Section 16 of the 1873 Act in similar language transferred to the new court the statutory jurisdiction of courts such as the Court of Queen's Bench and the Court of Chancery. It even brought in their inherent jurisdiction![39]

Despite the obvious difficulties involved in giving effect to archival drafting of this kind, particularly after the passage of lengthy periods of time, it seems that it is the clear duty of the court to apply the imported law as it existed on the relevant date. Lord Denning however thought differently. He robustly said of the grounds for equitable set-off as applying after the fusion of law and equity:

> 'These grounds were never precisely formulated before the Judicature Act 1873. It is far too late to search through the old books and dig them out . . . we have no longer to ask ourselves: what would the courts of common law or the courts of equity have done before the Judicature Act?'[40]

This bold dictum, which is clearly contrary to the literal meaning of the incorporating provisions, also conflicts with a ruling by the House of Lords.[41] It is however supported by the principle of statutory interpretation that the court seeks to avoid a construction which produces an unworkable or impracticable result. The need for applying Lord Denning's

[37] *Barnard v National Dock Labour Board* [1953] 2 QB 18.
[38] Ibid., at 42.
[39] *Andrews v. Barnes* (1888) 39 Ch. D. 133; *EMI Records Ltd v. Ian Cameron Wallace Ltd.* [1983] Ch. 59 at 70-71; *The Despina G.K.* [1983] Q.B. 214 at 216.
[40] *Federal Commerce v. Molena Alpha Inc.* [1978] 3 W.L.R 309 at 338.
[41] *The Aries* [1977] 1 W.L.R 185: see 132 N.L.J. 815.

heterodox dictum generally, and particularly in relation to judicial review, is illustrated by the fact that the Supreme Court Act 1981 s. 29(1), by another piece of archival drafting, gives the High Court power to make orders of mandamus, but only 'in those classes of cases in which it had power to do so immediately before the commencement of this Act'. This would not work on a literal construction, since the courts are steadily widening their power to make these prerogative orders, so that it does not in fact remain what it was at an earlier period.[42]

Lord Denning did not hesitate to use the rules of equity in order to do justice. Here is just one example. To enable him to evict tenants protected by the Rent Acts, a landlord who was the mortgagor under a bank mortgage of the freehold of the rented property procured his wife to pay off the mortgage. Standing thus in the bank's shoes, she then claimed to evict the tenants on the (true) ground that the lettings had contravened a term of the mortgage deed. Lord Denning held that equity would restrain the wife as mortgagee from obtaining possession-

> '. . . this is one of those cases where equity steps in . . . If [the landlord] himself had sought to evict the tenants, he would not be allowed to do so. He could not say the tenancies were void. He would be estopped from saying so. They certainly would be protected against him. Are they protected against his wife now that she is the transferee of the charge? In my opinion they are protected, for this simple reason: she is not seeking possession for the purpose of enforcing the loan or the interest or anything of that kind. She is doing it simply for an ulterior purpose of getting possession of the house, contrary to the intention of Parliament as expressed in the Rent Acts.'[43]

Thus did Lord Denning utilise his great learning to do justice. It is a typical instance.

Conclusion

My allotted space is running out, and I have only scratched the surface of Lord Denning's contribution over so many years to the development of our jurisprudence. I end on a lighter note.

The ancient legal tradition is that no author of legal texts can be cited in court as an authority in his or her own lifetime.[44] This once enabled Lord Wright M.R. to pay a neat compliment to the octogenarian Sir Frederick Pollock by saying his *Law of Torts* was 'fortunately not a work of authority'.[45] Perhaps the most cogent argument for the writings of the dead is that the authors can no longer change their minds (though their editors might do it for them). However Lord Denning regarded the notion that books by living authors are not works of authority as 'exploded'. He said: 'the more recent the work, the more persuasive it is'.[46] As a humble toiler in the textbook market I thank him for this as for much else.

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[42] For example the former strict rules regarding such matters as locus standi and the nature of the court record have been greatly relaxed: *I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd.* [1981] 2 W.L.R. 722, *per* Lord Roskill at 751.

[43] *Quennell v. Maltby* [1979] 1 W.L.R. at 322-323.

[44] *Union Bank v. Munster* (1887) 37 Ch. D. 51 at 54; *Tichborne v. Weir* (1892) 67 L.T. 735 at 736; *Greenlands Ltd. v. Wilmshurst* (1913) 29 T.L.R. 685 at 687; *Re Ryder and Steadman's Contract* [1927] 2 Ch. 62 at 74.

[45] *Nicholls v. Ely Beet Sugar Factory Ltd.* [1936] Ch. 343 at 349.

[46] (1947) 63 L.Q.R .516.