Denning: The Due Process of Law, The Rt. Hon. Lord Denning, M.R., London: Butterworths, 1980. Pp. 263. $30.00 (cloth).

It has been said that judges are the guardians of the gate of ordered society;[1] to them belongs the onerous office of ensuring that the principles of right dealing according to law are pursued by private citizens towards each other, and towards the state and, most crucial of all, by the State towards private citizens. To them also, on at least one of the received interpretations, belong two further tasks: that of ensuring that the various practical constitutive elements of the legal process are kept clear and pure so that parties may proceed safely and expeditiously, and that of ensuring that when parties do proceed the remedies available are consonant with the demands of the age and with those of justice and equity. It is these last two facets of the judicial office — guardianship of the effective and equitable operation of the legal process — that is the subject matter of Lord Denning's latest collection of essays, *Due Process of Law.*

Due Process of Law, the second offering by the Master of the Rolls in as many years, is not, as the title might lead one to expect, an examination of the rules of procedure. These, we are told, are far too dull. Rather, in pursuit of his subject-matter Lord Denning chooses a more immediate and readily accessible medium: the law in which persons count. "So I tell you about the cylinder of laughing gas; and the judge who talked to much; and the ship which sank without a trace; and the wife who was deserted."[2] The orientation throughout is upon the practical, not upon the bookish subjects taught in the Law Schools of Universities. The style, tone and omnipresent note of self-justification with which all this is served up will be familiar to readers of last year's *The Discipline of Law.*[3] Also familiar will be the thematic thread: that principles of law demand a pragmatic and teleological interpretation, an interpretation which takes into account consequences involving questions of equity, social development and the common good. It is not surprising that the author *wishes* both books to be considered as companion volumes.

The topics chosen for inclusion in *Due Process of Law* are determined, Lord Denning tells us, by his own familiarity with them. ". . . I have tried to do — what the cobbler should do — to stick to his last — to those topics of which I have most experience."[4] The book is

[1]See Hanbury, H. and D. Yardley, *English Courts of Law* (Oxford: Oxford University Press, 1979), at 126; see also Perelman, C. H., *Justice* New York: Random House, 1967), at 4.

[2]Denning, at vi.

[3]London: Butterworths, 1979; see also, (1980) 29 *U.N.B.L.J.* 275-8.

[4]*Supra,* footnote 2.

comprised of eight essays. The topics canvassed are: contempt of court; inquiries into conduct; arrest and search; the Mareva injunction; immigration law; family law; the deserted wife's equity; and the wife's share in the home. This practically oriented grab-bag — each of the essays, we are told, contains a lesson of practical importance — divides into two groups. The first five essays deal, broadly speaking, with the fair and effective working of the machinery of the legal process, while the latter three deal with recent developments in the field of family law, focusing particularly on Lord Denning's contributions to matrimonial property law. Throughout both groups, however, there is one unifying central theme: *viz.* that the judge as the guardian of the gate of ordered society should have sufficient latitude to shape the law in accordance with the exigencies of the times and the demands of justice.

For Lord Denning development of this theme within the context of the first group of essays is co-extensive with providing an explanation of the phrase 'due process'. In the preface we read: ". . . by due process I mean the measures authorized by the law so as to keep the streams of justice pure: to see that trials are fairly conducted; that arrests and searches are properly made; that lawful remedies are readily available; and that unnecessary delays are eliminated."[5] The *Modus operandi* used will be readily recognized by those conversant with *The Discipline of Law.* Each essay opens with the presentation of a problem that has faced the English judiciary since the Second World War and proceeds with an exposition of the manner in which that problem has been solved or attempted to be solved. As is to be expected in a work of general interest, emphasis everywhere is not so much upon scholarly minutae but rather upon a broad brush presentation of the central notion that the genius of the common law lies in its ability to provide fair solutions to novel and changing demands.

An apt instance of the evolutionary genius of the common law is found in the growth of the Mareva injunction. Until 1975 there was no procedure in English Law whereby a creditor before judgment could make application for an order restraining his debtor from removing property outside the jurisdiction or otherwise dealing with it. This lacuna, which did not exist in either civil legal systems or American Law, gave wide scope to the sophisticated or absconding debtor, particularly under modern conditions of banking and travel. There was a clear and perceived need to fill the gap and, as Lord Denning relates the story, he and his colleagues in the Court of Appeal were ready to meet the challenge. The result was the introduction into English Law of a procedure similar to the *saisie conservatoire* of French Law. The key decisions were *Nippon Yusen Kaisha* v. *Karagcorgis*[6] and *Mareva* v. *International Bulkcarriers,*[7] and both decisions, despite a rebuke from the

[5]*Ibid.*, at v.

[6][1975] 1 W.L.R. 1093 (Eng. C.A.).

[7][1975] 2 Lloyd's Rep. 509 (Eng. C.A.).

House of Lords in *The Siskina*[8] for the ostensible usurpation by the Court of Appeal of the legislative process, remain good law.

A further and more widely discussed instance of the common law's evolutionary capacity is the subject of Lord Denning's final group of essays; *viz.* recent developments in the field of family law and in particular in the area of matrimonial property law. The story of emancipation is briefly summarized, as is the growth of an equitable principle of co-ownership of all matrimonial assets. Lord Denning's survey includes a review of both case law and legislation, but he leaves little doubt as to which he considers prior. It is development in case law, we are told, which led the way and which prepared the ground for the work of Lady Summerskill and the third Report of the English Law Commission on Family Property. Indeed Lord Denning's claim is stronger. It is judges who led the way. It is to them that we owe these recent developments, for in essential respects it has been they, by which we are to understand particularly the judges of the Court of Appeal, who have been the pioneers.

By now it should be clear that Lord Denning's view of the role of the judiciary in law reform is in essence an activist one. He states his position in the preface in a passage which, though lengthy, deserves to be cited in full:

> Many proposals have been made by us in the Court of Appeal. Time and again we have ventured out on a new line: only to be rebuffed by the House of Lords. On the ground that the legislature — advised by this body or that — can see all round; whereas the judges see only one side. This I dispute. The judges have better sight and longer sight than those other bodies: especially in the practical working of the law and in the safe-guarding of individual freedom. And when it is said that some other body should first investigate and report I ask: "How long, O Lord (Chancellor), how long?"[9]

This passage might be characterized as vintage Lord Denning; certainly it perfectly embodies the judicial frame of mind that has been the source of constant annoyance to constitutional traditionalists and those of more conservative learning. Certainly, too, if carried to its uttermost it would lead to a considerable melding of the constitutional functions exercised by the judiciary and the legislature, functions which all students of Montesquieu know are best kept separate and distinct from one another. But must we say that judges are to play a role in shaping legal principles? And as legislation, as opposed to litigation, the only acceptable method of law reform? Lord Denning's answer to these questions is clear and unmistakeable.

Delineation of the proper function of the judiciary in ordered society, to return to the point from which we began, is a thorny and

[8][1979] A.C. 210 (H.L.).

[9]Denning, at v-vi.

perhaps unresolvable question. Some place for judicial creativity seems inevitable in any instance where a judge has to decide between two competing tenable arguments; a judgment is not a computer print out. But whether it is desirable to go all the way with Lord Denning's view of judicial activism, given present ill-defined methods of choosing the judiciary, seems doubtful. Lord Denning's own thirty-six year career on the English Bench has been a remarkable one, and one well-chronicled by himself. It is best to leave to history the final verdict on both it and his own peculiar brand of creative law-making.

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Canadian Mortgage Practice Reporter, Gerald S. Fields and Bernard Gersham (editors-in-chief), Toronto: Richard DeBoo, 1979. 2 Vols. $225.00 (loose-leaf service).

With the proliferation of reporting services reaching the Canadian legal market, the *Canadian Mortgage Practice Reporter* would at first glance appear to be a priority acquisition for those solicitors engaged in mortgage financing. The title itself would lead one to such a conclusion. However, it might be advisable to consider the adage, "never judge a book by its cover" and indeed more so where the initial cost alone merely reflects a highly inflationary economy.

The first question one might ask is whether this two volume series does, in fact, relate to the practice of mortgage law in Canada? Secondly, to what part of the Canadian market is the Reporter series directed? The questions in themselves might appear trite, if not the inauguration of an overly critical review, yet ultimately the practitioner will have to be the sole judge.

The first volume of the "Reporter" contains the editorial commentary, conveniently divided according to topic followed by forms, precedents and check lists. Volume II will eventually contain the relevant statutes and regulations for both the provincial and federal jurisdictions. Accordingly, it may be convenient to look at each volume separately.