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Book Reviews

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BOOK REVIEWS

MERCHANTS OF GRAIN. Dan Morgan. New York: The Viking Press, 1979. Pp. xiv, 387. $14.95. *Reviewed by Leo V. Mayer.**

After the Russian grain purchases of 1972, higher food prices for United States consumers and food shortages in other parts of the world aroused widespread interest in the conduct and organization of world trade in foodstuffs. When these events were followed by a second massive grain sale to the Russians in 1975, Washington Post reporter Dan Morgan was drawn into three years of study and travel to find information on the men, money and methods that allow five or six large multinational companies to control most of the international trade in basic farm products. He organized his findings into a book describing these "Merchants of Grain" that is impressive for its description of their organizational techniques and frightening for its explanation of the massive economic power that they possess.

Perhaps the most illuminating aspect of the book is its insight concerning what multinationality really means to a large international company, *i.e.*, what it means for a business to carry on day-to-day activities that transcend national boundaries and national loyalties. The five grain companies—Cargill, Inc. of Minneapolis, Continental Grain of New York, Andre of Lausanne, Switzerland, Louis Dreyfus of Paris, and the Bunge Corporation of Argentina (Cook Industries of Memphis was forced out of the grain business in 1977 by huge monetary losses)—all operate on a worldwide scale, buying grain where it is cheapest and selling where it is dear.

One of the companies, Cargill, is the exclusive agent for the Australian Wheat Board and sells its wheat, as well as the wheat of United States farmers. The effect of such a dual representation can be interesting. Morgan describes how the American agricultural attache' in Tehran helped develop an Iranian market for United States farm products in the late 1960's by working with, among others, Cargill's Geneva subsidiary, Tradax. To the attaché's later surprise, he learned that some of the additional im-

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ports of wheat that he had engineered were coming from Australia. To his further surprise, when he complained to his superiors in Washington, they took Cargill's side and cabled instructions that the attache' was "to notify the Iranian government that Tradax is a reputable international trading firm for which you have no basis to question their reliability as a supplier and that any earlier information you submitted is withdrawn."[1]

Morgan describes a second and far more serious example of how the companies operate without regard to national loyalty. In 1976, when world wheat supplies began to accumulate again, the Canadian Wheat Board, sensing that it would be unable to move a major part of its 17 million tons of wheat at going prices, called in Cargill, Continental, Dreyfus and other firms and made them an offer: for $135 a ton, it would sell them 4 million tons of wheat then selling in Minneapolis at $148 a ton. According to Morgan, "this gave the companies a chance for a highly profitable arbitrage. They could sell wheat futures in Minneapolis for something close to the $148 figure and obtain the actual grain in Canada for considerably less than that. It would be up to them to find their own cash customers."[2]

When the companies moved aggressively to find customers for that wheat in Europe, South America and the Caribbean, USDA officials in Washington became concerned and tried to ascertain what was happening. The Canadians refused to reply to official requests for information and the companies quietly ignored Government officials. While Morgan doesn't point it out, the final impact showed up in the cold statistics on exports for that year: United States wheat exports fell 6.1 million tons from a year earlier; Canada's increased by 1.1 million tons.[3] Despite the Canadians' actions, both countries experienced sharp increases in carryover stocks for that year.

Apparently, and despite such actions, it was not unusual for USDA to maintain close working relationships with the multinational grain companies. A major stimulus that led Morgan to write the book was the supposedly cozy relationship between USDA and the grain firms that many people felt caused the so-called "Russian Grain Robberies" of 1972 and 1975. Morgan re-

1. D. MORGAN, MERCHANTS OF GRAIN, 126 (1979).
2. *Id.*, at 252.
3. U.S. DEPARTMENT OF AGRICULTURE, FOREIGN AGRICULTURE CIRCULAR (FG-11-79), at 16 (1979).

views this issue in some detail but he also provides so much offsetting background information leading up to those sales that one comes away feeling that USDA is almost exonerated.[4]

For example, Morgan describes the burdensome farm surpluses that began to develop in the late 1940's and how strategists at USDA and the grain companies saw the solution in persuading people in other countries to eat as Americans did. He notes, in passing, that "For better or worse, the encouragement of maximum U.S. exports was momentous in its long-range economic, diplomatic, political and social implications."[5]

While he does not make the connection immediately, he later implies that one reason the 1972 sales continued even after their immense impact and inflationary effect became obvious was because "twenty-four years of single-minded policy could not have been turned around overnight."[6] Having spent the last half of 1972 at the highest levels of the federal government worrying about the inflationary impact of the Russian sale, I can attest to the slowness with which policies change after they have been in effect for a quarter of a century.

A second theme of the book relates to the secrecy with which the large multinational grain firms operate. A writer with a more favorable view of their activities might have described the companies as operating quietly and efficiently rather than in secrecy, but, in either event, it is true that their day to day activities are carried out behind closed doors. There are no requirements that they must disclose even the magnitude of their annual gross sales or the origins and destinations of the sales and certainly not the net incomes of the owning families. The ability to do this stems from the nature of ownership; seven families control the six companies. These seven families were, until quite recently, able to accumulate the necessary capital to grow and expand without tapping public money markets. Only Cook Industries finally had to "go public" to finance its expansion and the lesson of its forced publication of public reports at inopportune times will not be lost on the other companies.

Secrecy in grain merchandising is not solely a fact of private

4. USDA actions also meshed well with the high priority given Soviet trade expansion by the Nixon Administration. *See* C. Osakwe, *Legal and Institutional Barriers to United States-Soviet Trade: Soviet Perspectives,* 8 VAND. J. TRANSNAT'L L. 85 (1974).

5. D. MORGAN, *supra* note 1, at 100.

6. *Id.,* at 155.

ownership. Morgan describes in detail the actions in the grain pits at the Chicago Board of Trade, where prices advance and fall on any small piece ofnew information. He observes that even the "sex life of corn" becomes important since if rainfall interrupts the pollenization process at the critical stage, the crop can be damaged. If this happens, a smaller crop will result and prices can skyrocket. For companies that may already have sold millions of bushels of that crop to overseas customers at a fixed price, bankruptcy may hang in the balance. It pays to know, consequently, before anyone else does, whether the likelihood is for good or bad crops, both in the supplying areas and in the buying areas. All this naturally leads toward a secretive environment for the operation of the grain trade.

Beyond the secrecy, or perhaps in support of it, each of the companies conducts a worldwide information gathering network that allows it to know what is going on around the world. This communication and information system provides the most up to the minute source of information possible and one that is generally thought to be superior even to the United States government's system. This, at least, was the view of USDA's Assistant Secretary for International Affairs in 1976. He testified before the Senate Subcommittee on Multinational Companies in favor of a tax break for the grain companies because "There's a U.S. public interest in supporting the companies. They're the ones who keep us posted as to what's going on all over the world. Their system is ahead of ours."[7] What he did not point out was that they also have the ability to withhold information when it is to their advantage, and apparently have done so in the past, if USDA's version of the Soviet grain sales is accepted.

It is at points like these that Morgan's book is a bit frightening. By the nature of their activities—the purchase, allocation and distribution of items essential to human survival—and by the nature of their massive size—Morgan claims Cargill and Continental each handle about a quarter of United States farm exports which now run at about $32 billion annually (and this is only the United States part of their sales)—the companies operate on a scale and with such influence that they almost make the federal government look small.

In fact, their actions are often more effective than those of the United States government. Morgan cites the case of the West Afri-

7. *Id.*, at 224.

can country of Zäire which, as prices for its primary export of copper fell in 1974, was unable to maintain its international payments. While other creditors complained to their government, Continental Grain in late 1976 took the step of diverting its monthly wheat shipment to another location. As flour output dwindled and lines of people formed outside bakeries, "Zäirean officials hastily convened with representatives of Continental and agreed to all the company's demands."[8] Morgan notes that wheat has joined oil and technology as a means of wielding unique power over governments and people.

The troubling part about the new international importance of food is that unlike oil and technology, the exchange of food between nations is conducted without significant direction from a code of international law. While there are international treaties governing the exchange and use of patented or copyrighted items, the exchange of food is based largely on the principle of *caveat emptor*. Actions between the companies are based on a gentlemanly trust which is not always followed. In this voracious environment, the massive size of the companies becomes a substitute for legal recourse but even size is relative. This was the lesson Cook Industries learned in 1977 when, having lost millions to the Hunts of Texas in the soybean pits at Chicago, it was forced to sell major parts of its grain operations to Mitsui, a giant Japanese trading company.

The economic risk of operating in a legal no-mans land is substantial but there are other risks as well. The very fact that ownership of the companies is concentrated in so few families raises a prospect of personal danger for family members. Extremist groups who feel that the companies use their power unfairly can act violently to redress that inequity. One such event occurred on September 19, 1974, in downtown Buenos Aires, when members of an Argentine youth movement, the Montoneros, stopped rush hour traffic and kidnapped brothers Jorge and Juan Born, heirs apparent to the power and fortune of the Bunge Corporation. Brother Juan was released in March 1975 after a near-emotional collapse and brother Jorge was released on June 18, 1975, but only after $60 million had been handed over to the Montoneros. Morgan claims that the ransom amount was equivalent to one-third of the annual Argentine defense budget. Placing that much money in the hands of an insurgent group must have caused a certain amount of anxi-

8. *Id.*, at 227.

ety in Argentine government circles. But the company acted to protect its line of management in which the government apparently had an inherent interest.

Events that cause personal harm to members of the owning families are rare. But the prospect does keep the families living secluded lives. One of the more interesting parts of Morgan's book is the description that he gives of the personal lives of the dynastic grain-trading families. From their original trading activities in the middle of the 19th century, the grain trading families have been risk-takers, demonstrating a capacity to gain control over critical links in the grain trade systems. First, it was the flour mills on which people depended for bread, then it was the railroads and the ocean shipping vessels that controlled movement of grain, and next came the purchase of hundreds of small-town elevators that dot the landscape of the Midwest.

Today, the Companies own fleets of railroad hopper cars that allow them to move grain at exactly the right time from their Midwest elevators to their Gulf elevators that load it on ocean-going vessels at ports like Galveston or New Orleans. Overseas, the companies own similar kinds of facilities that are essential to feeding millions of people everyday. As one reads what little Morgan could discover of their operations, it seems clear that their activities can be viewed as benevolent or dictatorial or a combination of the two.

What is far more clear from Morgan's book is that the grain companies are profitmaking enterprises that take risks unimaginable to the average person. For the burden of carrying those risks, they expect to be paid and in general they achieve that end. But they also experience losses such as the 35 million loss suffered by Continental Grain in early 1975 when Turkey cancelled high-priced contracts for American wheat. Continental Grain had already bought the grain from American farmers at the high prices and when the sale was cancelled, Continental had to find a new buyer at lower prices. While it was an unusual experience, American wheat growers probably benefitted at Continental's expense.

Morgan also deals with a number of other important issues, including the question of whether an international grain reserve should be created. Morgan observes that "almost everyone knowledgeable about this subject agrees that some kind of international system of grain reserves is essential to prevent a recurrence of the near calamity of 1972-74"[9] but he goes on to describe the political

9. *Id.*, at 358.

problems that stand in the way of any international agreement. The picture he paints is not very optimistic: food shortages and price surges are not part of the past.

He spends most of the final chapter of the book reviewing information on the problem of world hunger and its solution. With the aplomb that is probably best suited to the subject, he notes that "the food crisis is like the oil crisis in that figures on production, reserves, and demand can be juggled to suit any theory about the future."[10] Few serious analysts of the subject would argue with him.

Where analysts of the grain trade will argue with Morgan is in his general assesssment of the role of the grain companies in solving international food problems. The grain companies view themselves as acting in humanitarian ways, albeit it for a profit. In fact, a favorable view of them would be that they do have the capacity to move quickly and to feed people that might otherwise starve during sudden drops in local food production. Similarly, they also make it possible for the United States Government to operate food aid programs in the most remote areas of the world to prevent famine. But the other side of this coin is that the price they charge for these humanitarian services is high, measured in terms of the profits they gain from the rest of their trading activities. The question Morgan implicitly raises is whether they should be allowed the oligopolistic position they now hold for the beneficial aspects of what they do or whether a more public grain trading system would be desirable. As one reads the book, it is possible to be swayed in both directions at different times and even with the actions of the different companies.

The companies do differ in their operations and their codes of conduct. One major reason for taking the time necessary to read this very readable book is the author's insights on how the companies operate. Their actions are important to anyone with a serious interest in the world's food system and a concern about the next round of world food shortages.

10. *Id.*, at 347.

THE DISCIPLINE OF LAW. Lord Denning. London: Butterworths, 1979. Pp. xxii, 331. *Reviewed by P. F. Ashman**

Since 1945, the United Kingdom has seen a probably irreversible shift of power over almost every aspect of the life of the citizen away from the individual and towards small groups, most notably the Government, national and local administrators, companies and trade unions. The law has, to a large extent, been employed to effect this shift. At the same time, many Britons have looked to the law for protection against the careless use, and especially abuse, of those powers, and to safeguard individual rights generally. How has the law fared in these new circumstances? More particularly, how have the judges fared in their duty to interpret and apply the law?

In THE DISCIPLINE OF LAW, Lord Denning sets out to demonstrate that "the principles of law laid down by the Judges in the nineteenth century—however suited to social conditions of that time—are not suited to the social necessities and social opinion of the twentieth century. They should be moulded and shaped to meet the needs and opinion of today." Few people in England are better qualified to make such a judgment than Lord Denning, who celebrated his 80th birthday in January of this year. Called to the Bar in 1923, he was appointed a High Court Judge in 1946, a Lord Justice of Appeal in 1949, created a Lord of Appeal in Ordinary in 1957, and appointed Master of the Rolls in 1962.

The book is divided into seven parts, each examining through the cases one aspect of the principles of law—procedural and substantive—"as they have been, as they are and as they should be" where progress has been most marked. These are: the construction of documents; the misuse of Ministerial powers; *locus standi*; abuse of "group" powers; the "High Trees" principle; negligence; and the doctrine of precedent. In each area of the law Lord Denning has played the major part in reform, or in proposing reform, and he quotes extensively from his own judgments—not, as he says, out of conceit—but because he is most familiar with them.

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No one should be put off by this. Lord Denning is a master craftsman in the use of the English language. Simplicity and clarity are his hallmarks and few judges have equalled his ability to translate the most arcane and complex legal and factual issues into language readily comprehensible to the layman. Indeed, one suspects that this, as much as their content, is the reason for the enduring popularity of his judgments among law students and for their usefulness to practitioners.

Undoubtedly, Lord Denning is one of the most able English judges of this century. With a remarkable degree of success, he has sought to rid English law of many of its archaic fetters: to banish the "officious by-stander" from the construction of documents; to extend natural justice so that tribunals are brought within the purview of the courts; and to curb the royal prerogatives which Ministers now exercise for the Crown. He has all but killed off the doctrine of consideration in contracts by smothering it under the shield of promissory estoppel. Negligence has been expanded under his guidance so that today "the boundaries of negligence are never closed," and he has fought hard to free the judges from their self-imposed restraints on matters of public policy and the doctrine of *stare decisis.* Indeed, in many ways the title of this book seems ironic. Although "Discipline" is used in the old sense of learning, Lord Denning has never taken kindly to its popular meaning.

Lord Denning's perception of the role of the judiciary has not gone unchallenged. His most vocal critics have been the judges in the House of Lords (the Law Lords) when they have been given the opportunity to review his judgments. Few appellants have the resources to take cases up to the House of Lords and the procedural hurdles are also difficult to overcome, so most appeals proceed no further than the Court of Appeal. In 1957 Lord Denning was created a Law Lord, but it is no secret that he felt too constricted there and in 1962 he returned to the Court of Appeal to become Master of the Rolls, the head of its Civil Division. A Master of the Rolls can choose which cases to hear and, to a limited extent, ensure that at least one of the other two Lords Justice of Appeal are sympathetic to his views. This position gives him enormous influence over the development of case law, and even his dissenting judgments have great persuasive authority.

Now it is axiomatic in English law that judges apply the law in accordance with settled principles and decided cases and that they do not seek to create law, which is the job of Parliament. Inevitably, however, when litigation takes place, a judge has to choose between differing interpretations; of statutes, or documents, or he

must determine how the principles derived from precedent should be applied to new and unforseen factual situations. This is the way in which the law develops. Lord Denning's view is that the role of the judge is to do "what to justice shall appertain," as the Sovereign used to commend to the Justices on the opening of every Assize. Where the judge is faced with a choice, he should "choose the meaning which is in accord with reason and justice" rather than adopt the meaning which will impart certainty into the law at the expense of injustice to the individual litigant.

To the more conservative judges, this approach was almost tantamount to heresy, and throughout his book there are examples of criticisms of Lord Denning by the Law Lords ("the voices of infallibility") for going too far, too fast; or dissent from his brethren in the Court of Appeal ("the timorous souls"). His greatest critic was undoubtedly the late Viscount Simonds, a Law Lord from 1944 to 1962, and Lord Denning quotes one passage from the case of *Midland Silicones Ltd. v. Scruttons Ltd.*,[1] which exemplifies Viscount Simonds' traditional view of the role of the English judge and his hostility to the whole Denning approach. In that case the House of Lords had to consider the rights of a third party beneficiary to a contract. In the Court of Appeal, Lord Justice Denning, as he then was, had suggested in several cases that it was open to judges to hold that such contracts could be enforced for the benefit of the third party, as had been recommended by the Law Reform Committee in 1937. Lord Simonds condemned his efforts thus:

> . . . (There is) a principle which is, I suppose, as well established as any in our law, a 'fundamental' principle . . . an 'elementary' principle as it has been called times without number that only a person who is a party to a contract can sue upon it. . . . Learned counsel for the respondents claimed that this was the orthodox view and asked your Lordships to reject any proposition that impinged upon it. To that invitation I readily respond. For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I be easily led by an undiscerning zeal for some abstract kind of justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of those principles is the task not of the courts of law but of Parliament. Therefore I reject the argument of the appellants under this head and invite your Lordships to say that

1. [1962] A.C. 446.

> certain statements (of Denning LJ) which appear to support it in recent cases . . . must be rejected.

On an earlier occasion, Lord Simonds had described Lord Denning's proposition that it was the duty of the courts to find out the intention of Parliament when interpreting statutes as "a naked usurpation of the legislative function under the thin disguise of interpretation." Lord Denning's answer to these criticisms is that the Lords are "somewhat out of touch with contemporary problems," and there is no doubt that he has largely succeeded in sidestepping the limitations on him by the use of "adroit procedural steps."

No one who reads this fascinating account of the beliefs and *modus operandi* of a brilliant judge can deny the very real benefits that Lord Denning has bestowed on English law. In presenting his case for greatly increased judicial discretion, however, he has done rather less than justice to the arguments of his opponents. English law has no code of principles or written constitution to guide the judges in their interpretations of the law. Principles are derived from precedents and when citizens enter into legal relations with one another their legal advisers are guided by these precedents. They are entitled to expect that what is lawful one month should not suddenly be unlawful during the next month because some deserving litigant comes before the court and the precedents are overruled in order to do him justice. A judge will only hear argument from opposing counsel and many other issues may be involved in the legal principle under question which go unargued by either counsel and are thus not considered by the judge. Unless an *amicus curiae* is to be employed at many more cases than at present, much injustice can be done without anyone realizing it. This is particularly true of property transactions which are intended to be of long duration. Lord Denning has been notably successful in protecting the equitable interests of deserted wives, of mistresses, and of the other dependents of the holders of legal titles. While this may have done much justice for the individuals who have come before him, it has created much concern and trouble for mortgagees, prospective purchasers and others whose legitimate interests are also deserving of protection.

Equally, in a democratic society it is right and proper that the elected representatives of the people should be the major initiators of law reform, after consideration of all the issues involved. No group of judges, however wise, can be an adequate alternative for the deliberations of Parliamentary Committees, Law Commissions, Law Reform Committees and other official bodies which

canvas the widest opinion before making recommendations. Moreover, such bodies are far more likely to be familiar with contemporary problems and to reflect the often competing interests of social groups than the English judiciary. In a report on the judiciary published by JUSTICE in 1972, a survey of the social class origins of the judges of the Superior Courts revealed that in 1968 some 15.3 percent of judges were drawn from the traditional landed upper class and 60.1 percent from the upper middle classes. Only 9.6 percent were drawn from the lower middle class and 1.3 percent from the working classes, who comprise over half the population. This last figure is less than half the number of judges of working class origin in 1820.

These figures are important because the various social classes have very different views about what rights are important to protect. Thus, for example, in the field of labour law the upper middle classes are much more concerned to protect the right of the individual to carry on his occupation without interference, whereas the working classes place much more importance on group rights vested in bodies such as trade unions. Similar differences appear in health, education, housing and welfare; and in recent years there has been much controversy about the private versus the public provision of these services. Some matters are supremely political in character, and the judges—appointed at the discretion of the Lord Chancellor and holding office until retirement—can run the risk of doing considerable harm to their reputation for unbiased impartiality by intervening in them.

A good example can be found in the *Gouriet*[2] case, which is quoted at length. In 1977, the Union of Post Office Workers decided to break the law by refusing to handle mail to South Africa for one week as a protest against apartheid. The Attorney-General refused to bring proceedings or give his consent to a relator action to stop them. Mr. Gouriet, a private citizen, sought an order to restrain the union, which took the objection that he had no *locus standi.* The Court of Appeal overruled this objection and granted the order. Lord Denning considered whether the courts could review the refusal of the Attorney-General to act and held that they could. The House of Lords overruled him. Lord Wilberforce, in a passage not quoted in the book, stated:

> The distinction between public rights, which the Attorney-General could, and the individual having no special interest could not, seek

2. Gouriet v. Union of Postal Workers [1978] A.C. 435.

> to enforce, and private rights is fundamental to our law. To break it . . . is not a development of the law, but a destruction of one of its pillars . . . . (Executive decisions) which were of the type to attract political criticism and controversy showed that they were outside the range of discretionary problems which the courts could resolve.

Despite this reversal, there is no doubt that Lord Denning has put politicians on their guard—which is no bad thing—so that today no Minister can be sure that his legislation is "Denning-proof," as one junior Minister in the last Labour Government put it.

Another interesting example of the dangers which some see in the Denning approach and which also bears on the influence of the social outlook of judges is to be found in *Ward v. Bradford Corporation*,[3] a famous case not mentioned in this book. Miss Ward was a student at a teacher training college who, contrary to the regulations, had permitted her boyfriend to spend two months with her in the student hall of residence. On being discovered, she was asked to quit the hall, which she did. The matter got into the local press. The Disciplinary Committee of her college considered the events and expelled Miss Ward in a process which the Courts found to be in clear breach of the rules of natural justice. The Court of Appeal declined to exercise its discretion to quash the expulsion order. Lord Denning said:

> Instead of going into lodgings, she had this man with her, night after night, in the hall of residence where such a thing was absolutely forbidden. That is a fine example to set to others! And she, a girl training to be a teacher! I expect the Governors and the staff all thought that she was quite an unsuitable person for it. She would never make a teacher. No parent would knowingly entrust their child to her care.

Such decisions inevitably induce one to question the extent to which the judges are familiar with contemporary morals in a pluralistic society, and to which they should permit their particular moral outlook to determine their view of justice.

In a television interview to mark his 80th birthday, Lord Denning summarized his views thus:

> I do what I think is right. And I know a thing is right because I feel it. And because I feel it, I know I am right.

Faced with this view, many lawyers and laymen might prefer the

3. [1972] 70 L.G.R. 27.

judges to be tied to certain law, despite occasional injustices, rather than see justice tied to certain judges, despite the law.

This is an important book for all students of common law jurisdictions. No more persuasive argument for setting the judge free to keep law and justice close together, in accordance with reason, is likely to be found. The "turbulent" Master of the Rolls has done more than most "to keep the path of justice clear of obstructions which would impede it." Indeed, few would dissent from the proposition that Lord Denning, whatever his faults, has been both necessary and beneficial to English law throughout the post-war era of rapid change. It is doubtful, though, that the same unanimity of opinion could be found for the view that far more judges should be like him.