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CHARLES S. DESMOND: A JUDGE FOR THE CHANGING YEARS

ALTHOUGH close association with a colleague may—as has been said—disqualify one from writing about his work, it cannot deter me from paying tribute to a dear and cherished friend. I hail Charles S. Desmond not only as the twenty-eighth Chief Judge of the Court of Appeals¹ but, by virtue of a recent amendment to the Judiciary Law, the first “Chief Judge of the State of New York.”² No one has equalled his quarter-century of service on the Court and few have matched his contributions to our jurisprudence.

Judge Desmond has brought to his judicial labors a keen intellect, a profound knowledge of the law, an innate sense of justice, indefatigable energy and extraordinary administrative ability. Thriving on hard work, he has tirelessly and cheerfully borne not only his share of the Court's heavy caseload but also the arduous administrative responsibilities imposed upon him as its presiding officer and as Chairman of the State Judicial Conference and of its Administrative Board. Notwithstanding these burdens, he has also managed to teach and lecture at law schools—to lawyers-to-be as well as to experienced jurists—and to write extensively on a myriad of subjects ranging from the abstract and the academic to the highly practical and pragmatic, from philosophic musings³ to discourses on the abolition of the civil jury.⁴

The bulk of his work is, of course, to be found in his more than 700 opinions which appear in some three dozen volumes of the New York Reports. Succinct, pithily phrased and in a vigorous and forceful style, the opinions clearly state what Judge Desmond clearly sees, reflecting his acuity and directness of thought, his faculty for penetrating to the very heart of a case and dissecting its pivotal issues. And, covering a wide range of subjects, the opinions demonstrate his craftsmanship with both the unspun fibre of the common law and the fine weave of legislation. Many of them have been concerned with constitutional issues of high importance,⁵ while others, less publicized but of equal if not

1. There were twelve Chief Judges under the Constitution of 1846 and seventeen under the Constitutional Amendments of 1869 and 1894; however, Chief Judge Robert Earl served both before and after the 1869 Amendment was adopted.

2. N.Y. Judiciary Law § 210.

3. See, e.g., “Musings,” 54 L. Library J. 29 (1961); *The Formation of Law: The Interrelation of Decision and Statute*, 26 Fordham L. Rev. 217 (1957); *Natural Law and the American Constitution*, 22 Fordham L. Rev. 235 (1953).

4. See, e.g., *Current Problems of State Court Administration*, 65 Colum. L. Rev. 561, 563 et seq. (1965); *Juries in Civil Cases—Yes or No*, 36 N.Y.S.B.J. 104 (1964); *Should It Takes 34 Months for a Trial?*, N.Y. Times, Dec. 8, 1963, § 6 (Magazine) p. 29.

5. See, e.g., *People v. Alfinito*, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965); *Matter of Orans*, 15 N.Y.2d 339, 206 N.E.2d 854, 258 N.Y.S.2d 825 (1965), *appeal dismissed*, 34 U.S.L. Week 3117 (U.S. Oct. 11, 1965); *Balaban v. Rubin*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964); *Defiance Milk Prods. Co. v. Du Mond*, 309 N.Y. 537, 132 N.E.2d 829 (1956); *People v. Richetti*, 302 N.Y. 290, 97 N.E.2d 908 (1951); *Robbins v. Chamberlain*, 297 N.Y. 108, 75 N.E.2d 617 (1947); *St. Nicholas Cathedral of the Russian Orthodox Church v. Kreshik*, 7 N.Y.2d 191, 218, 164 N.E.2d 687, 701, 196 N.Y.S.2d 665, 675 (1959) (dissenting opinion), *rev'd*, 363 U.S. 190 (1960); *St. Nicholas Cathedral of the Russian Orthodox Church v. Kedroff*, 302 N.Y. 1, 35, 96 N.E.2d 56, 75 (1950) (dissenting opinion), *rev'd*, 344 U.S. 94 (1952).

greater significance, have quickened the legal processes and made them responsive to the problems of a changed and changing society.⁶

Law is informed and educated justice, and Judge Desmond is a firm believer—to employ Learned Hand's striking phrase—that “Right knows no boundaries, and justice no frontiers.”⁷ Judge Desmond's juridical quest has ever been for justice and righteousness within the compass of legal principle.⁸ He is not the slave of precedent and does not fear to walk in dark places as yet unilluminated by the wisdom of others; nor has he permitted *stare decisis* to take the place of thought and analysis. He chooses, instead, to deal with questions on principle, to grapple with reason and right rather than simply to balance precedents. And he has ever been ready to re-examine and reappraise earlier decisions in the light of new conditions, changed circumstances, a different way of life.

By its very nature and history, Judge Desmond has staunchly maintained, the common law cannot remain static. “Since the common law is wholly ‘unwritten,’ non-legislative and non-codified, and since its great merit is its adaptability and elasticity,” he has noted, “it would forfeit its prime argument for existence and continuation if the courts refused to review and revise it, when necessary.”⁹ Applying that philosophy in an opinion, written for the Court; which overruled an earlier decision, he rejected the contention that the courts must defer to the legislature for needed changes in the decisional law. “I think,” he wrote, “as New York State's court of last resort, we should make the law conform to right We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.”¹⁰

But Judge Desmond does, of course, recognize the necessity of judicial restraint and the importance of preserving the guideposts provided by the essential tradition and principles of the common law. Departure from established decisional doctrine, he has maintained, must be warranted by a “convincing . . .

6. See, e.g., *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); *Latham v. Father Divine*, 299 N.Y. 22, 85 N.E.2d 168 (1949); see also, *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

7. *A Pledge of Allegiance*, in *The Spirit of Liberty* 193 (1952).

8. See, e.g., *People v. Witek*, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965); *People v. Adams*, 12 N.Y.2d 417, 190 N.E.2d 529, 240 N.Y.S.2d 155 (1963); *People v. Di Biasi*, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960); *People v. Richetti*, 302 N.Y. 290, 97 N.E.2d 908 (1951); *Hogan v. New York Supreme Court*, 295 N.Y. 92, 65 N.E.2d 181 (1946); *People v. Brown*, 7 N.Y.2d 359, 361, 165 N.E.2d 557, 558, 197 N.Y.S.2d 705, 707 (1960) (dissenting opinion); *People v. Tomaselli*, 7 N.Y.2d 350, 357, 165 N.E.2d 551, 555, 197 N.Y.S.2d 697, 703 (1960) (dissenting opinion).

9. *The Formation of Law: The Interrelation of Decision and Statute*, 26 *Fordham L. Rev.* 217, 218 (1957).

10. *Woods v. Lancet*, 303 N.Y. 349, 351, 355, 102 N.E.2d 691, 692, 694 (1951).

showing of injustice and impracticality," and should be made only "one step at a time."¹¹ In short, he has subscribed to the philosophy of Holmes and Cardozo that the responsibility rests on the judiciary of preserving the delicate balance between continuity with the past and adaptability to the present; between *elegantia juris*, on the one hand, and elementary justice, on the other.

In criminal cases he has been an outspoken champion of the right of every defendant to the procedural safeguards provided by constitution, statute and the rules of evidence. As he has expressed it, "the mantle of due process, like the rain, falls alike upon the just and the unjust."¹² "This defendant," he wrote in another case, "may be a hoodlum and a killer but it is such wretches who most need the constitutional guarantees. And, if such a man be deprived of his basic rights under the law, what man is safe?"¹³ "It will be a bad day," he has further stressed, "when the police become the judges as to who is, and who is not, entitled to those ancient rights."¹⁴

As head of the State's Judicial System, and in a host of other activities, he has devoted himself to the objective of achieving greater simplification, expedition and efficiency in the administration of justice and he has been particularly concerned with the problem of reducing calendar congestion in our trial courts. It is a testimonial to his administrative ability that he has kept the Court of Appeals abreast of its calendar notwithstanding the more than 27 per cent increase in its caseload during his tenure as Chief Judge.

Over the years, difference of opinion around the conference table has, on occasion, been sharp and deep, based (needless to say) on conclusions firmly held. A man of strong convictions, Judge Desmond urges his views upon his associates fervidly and persuasively, eager to have them prevail yet always willing to modify his position when discussion engenders doubt. But, throughout the period that he has sat on the Court (and I speak with the first hand knowledge acquired during the last twenty years), such difference of opinion, as there may have been, has never lessened the confidence and affection in which his fellow judges have held him.

It was a happy thought on the part of the Editors of the Buffalo Law Review to arrange for this commemorative issue. Our State is fortunate indeed to have as the presiding officer of its highest court a man so able, so far sighted and so dedicated as Charles S. Desmond. Such gifted men are rare, and our need for their continuing guidance is greater than ever.

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11. *Greenberg v. Lorenz*, 9 N.Y.2d 195, 200, 173 N.E.2d 773, 775-6, 213 N.Y.S.2d 39, 42 (1961).

12. *People v. Prior*, 294 N.Y. 405, 423, 63 N.E.2d 8, 17 (1945) (dissenting opinion).

13. *People v. Spano*, 4 N.Y.2d 256, 267, 150 N.E.2d 226, 232, 173 N.Y.S.2d 793, 802 (1958) (dissenting opinion), *rev'd*, 360 U.S. 315 (1959).

14. *People v. Perez*, 300 N.Y. 208, 221, 90 N.E.2d 40, 47 (1949) (dissenting opinion), *cert. denied*, 338 U.S. 952 (1950).