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# Perspective of a Judicial Era: Judge Desmond in the New York Court of Appeals

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*New York Court of Appeals*

# PERSPECTIVE OF A JUDICIAL ERA: JUDGE DESMOND IN THE NEW YORK COURT OF APPEALS

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## INTRODUCTION

WHEN it is remembered that the New York Court of Appeals had been in existence less than 100 years when Charles S. Desmond joined it on January 1, 1941, his service of a quarter of a century occupies a large place in the total span of the court as a judicial institution.

Life is change and law is constantly adapting to life. The pressing and specific public problems, which led the people of New York to call a Constitutional Convention in 1846 and resulted in the reorganization of the whole judicial establishment and the creation of the Court of Appeals, have become scarcely remembered items of history.

The pressure in 1846 had been to end the feudal tenures and the long land leases in control of a few families so that land in fee title would be available to the needs of a growing state. Quite as important a public demand was to create a judicial establishment at once selected by democratic choice at the polls and sufficiently adaptable in structure to provide judicial services adequate to the rapidly expanding growth of New York. Both an elected and elastically organized and functioning supreme court and an elected Court of Appeals emerged from this historic convention.

There is a wide chasm between the cases coming to the Court at its opening and the cases now coming before it. This difference lies in the kind of legal problem likely to be considered, in the method of treatment, and significantly, in the volume of cases reaching the Court for adjudication.

But the most accelerated rate of change in the Court's history occurred during the precise period Chief Judge Desmond has been a member. The changes in the world outside have been large and accelerated in this period, and those changes were inevitably reflected in judicial decisions.

There is almost as great a contrast between the substance and texture of the judicial problems before the Court in 1965 and those in 1941 as there is between 1941 and 1847. Judge Desmond himself played a continuously active role in these changes.

It seems useful, and it is surely professionally interesting as an inquiry in legal contrasts, to examine the work of the Court at the beginning of his judicial career, the characteristic kind of problem that faced the Court then and characteristic approaches to solution, and compare them with the recent past.

The work of a court is not a sweet generalization but the adjudication of cases. In order to compare what the Court was doing at the beginning of Judge Desmond's service with what it has recently been doing, it is necessary to look at some samples of its decisions.

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For the purpose of this discussion, something of the method employed by Karl L. Llewellyn in *The Common Law Tradition: Deciding Appeals* is helpful. Llewellyn took samples of short periods to sense the work and flavor the spirit of the decisional efforts of particular courts and examined the results.

Here two periods are examined. One January 7, 1941 to March 19, 1942,[1] and the other from about the middle of 1962 to the end of December, 1963.[2]

## Early Years

The decade from 1930 to 1940 witnessed a profound change in the law of labor relations. New public machinery was set up to facilitate the process of collective bargaining. Statutory procedures were enacted to circumscribe sharply the use of the injunctive process in labor disputes; the right to picket and its limitations were spelled out more specifically by the Court; and there seemed to be a growing judicial reluctance to interfere.

Yet at the beginning of the 1940 decade, the issue of sound judicial policy in the field of labor relations was far from settled. Some aspects of the controversy are still open; but it is instructive to notice as one reads the cases at the beginning of the decade how much remained undecided and how deep-seated habits of judicial thinking persisted concerning what was and was not justifiable in implementing demands of labor.

By a coincidence, Judge Desmond came to the Court in the midst of one of the most vigorously controverted cases arising in the law of labor relationships during the period. This was *Opera on Tour, Inc. v. Weber*,[3] argued December 3, 1940, before Judge Desmond took his seat, and held over for a decision until April 24, 1941, when Judge Sears, who had heard the argument, was out of office. Hence six judges participated in the decision.

The facts are simple. Plaintiff was in the business of presenting grand opera. Instead of employing musicians to accompany the singers, it used "canned" music.

Defendant Weber was the president of the American Federation of Musicians. Plaintiff alleged that the federation threatened to cause the Stagehands' Union to refuse to service plaintiff's performance unless musicians were employed to accompany the singers. This was described by plaintiff as a conspiracy to coerce it to employ musicians.

Both the federation and the Stagehands' Union were made defendants. An injunction had been granted at Special Term restraining defendants from advising or directing any person to cease performing or not to perform services for plaintiff. The Appellate Division dismissed the complaint. The statute provided that a court could not prohibit a peacefully conducted strike growing out of a "labor dispute" which was defined as any controversy over employment

1. New York Reports Nos. 285, 286 & 287.
2. New York Second Series Reports Nos. 11, 12 & 13.
3. 285 N.Y. 348, 34 N.E.2d 349 (1941).

regardless of whether or not the disputants stood in the relation of employer and employee.[4]

By a four-to-two vote the Court reversed the Appellate Division and sustained the injunction. The opinions occupied twenty-five pages in the report. Judge Finch wrote for the majority and Chief Judge Lehman for the minority. It is a significant case and its contemporary importance was the opening note in the majority opinion: "The question presented for decision is far reaching and of vital importance to the best interests of unions of employees, of employers and of the general public. The only issue is whether the leaders of the defendant unions were engaged in promoting a lawful labor objective when the Musicians' Union induced the Stagehands' Union to join in a combination to destroy an enterprise solely because of the use of machinery in the production of music in place of the employment of live musicians."[5]

The effect of long habits of judicial thinking and the strong underlying resistance to any statutory limitation on the injunctive process, where the labor controversy did not follow a traditionally simple employer-employee pattern of dispute, is obvious.

This dispute involved the effect of pressure "to destroy an enterprise" by one union in sympathy with another to compel a hiring of people having no existing relation with the employer. The case was typical of the period. It suggested the difficulty of adjusting the judicial process to new concepts affecting labor relations and new pressures on business by labor.

The decision in *Opera on Tour* was followed within a few months by an interesting sequel.[6] Plaintiffs were musical artists. They had an independent organization, but the American Federation of Musicians insisted that plaintiffs join the Federation. Otherwise, musicians belonging to the Federation would not be permitted to perform at the artists' functions.

An injunction was sought which the Appellate Division denied. The Court of Appeals reversed and affirmed the Special Term Order denying the motion to dismiss the complaint and granted plaintiff's motion for judgment on the pleadings.

The Court held, on the authority of *Opera on Tour*, this was not a labor dispute. The opinion was by Judge Loughran, who had dissented in *Opera on Tour*; Chief Judge Lehman again dissented, noting that the decision being made "throws into bold relief the narrowly restrictive interpretation"[7] of the statute in *Opera on Tour*.

He was joined by Judge Desmond, who, in a separate memorandum, reached the heart of the issue in a sentence: "This complaint defeats itself, since it asserts the existence of a labor dispute within the definition of section 876-a

4. N.Y. Sess. Laws 1935, ch. 477, § 1 (former N.Y. Civil Practice Act, § 876-a).
5. 285 N.Y. at 352, 34 N.E.2d at 350.
6. American Guild of Musical Artists, Inc. v. Petrillo, 286 N.Y. 226, 36 N.E.2d 123 (1941).
7. *Id.* at 232, 36 N.E.2d at 126.

of the Civil Practice Act, and then demands such an injunction as is forbidden by that statute in such situations."[8]

But there were contemporary signs of a different emphasis; of a new future direction; and of a more liberal interpretation of labor union activities designed to compel a change in hiring policies. In *People v. Muller*[9] defendants were charged with disorderly conduct for picketing in front of complainant's place of business.

Defendants were employees of a company which installed burglar alarms. One alarm was installed in the complainant's store. The installer agreed with the store owner to service the alarm equipment. The union of the installer's employees was in dispute with installer over wages and hours. It picketed the customer's store stating that the maintenance of the alarm system was unfair to the union unless the storekeeper obtained union labor to service the system.

A conviction for disorderly conduct was reversed, by a four-to-three vote, on the ground the picketing was orderly and "for the purpose of promoting the lawful interests of a labor union in a labor dispute."[10] The majority opinion was by Chief Judge Lehman joined by Judges Loughran, Lewis and Desmond.

Judge Finch, writing for the minority and relying in part on *Opera on Tour*, opened the dissent with a rhetorical question throwing in sharp relief the intensity of the division in the Court on the labor issues before it: "May a storekeeper suffer damages through loss of business and be annoyed, disturbed, interfered with and offended by having his store picketed because there is used therein an electrical burglar alarm installed four years before with an incidental agreement by the supplier to keep the machine in order?"[11]

In another labor case,[12] decided the same day, the precarious balance in the Court shifted against the position of labor and of the State Labor Relations Board in a controversy with an employer. Judge Lewis, who in *Muller* had voted to reverse the conviction of the pickets, voted with the employer and against the Labor Board.

The issue was whether employees, who selected a bargaining agency which had made a contract with an employer, might select another bargaining agency which the board could approve with the purpose of obtaining a new agreement with the employer. The specific legal point was whether the Court should annul a decision of the Labor Board which found the employer guilty of unfair labor practice, directed an election to determine what bargaining agency the employees wanted, and, following the election, held that the new agency lawfully represented the employees.

The issues were complicated. The opinions of Judge Finch for the majority and of Chief Judge Lehman for the minority occupy more than thirty pages

8. *Id.* at 232-33, 36 N.E.2d at 126.
9. 286 N.Y. 281, 36 N.E.2d 206 (1941).
10. *Id.* at 284, 36 N.E.2d at 207.
11. *Id.* at 285, 36 N.E.2d at 207.
12. Triboro Coach Corp. v. New York State Labor Relations Bd., 286 N.Y. 314, 36 N.E.2d 315 (1941).

of the report. The majority held that a change could not be effected in a bargaining agency after a contract had been made in order to avoid the contract. The basis of the minority logic in part was that when the contract was made the employer knew a new bargaining agency had majority support of the employees[13] and the Labor Board should have freedom to supervise selection of a new agency in the equivocal circumstances shown by such a record. Judge Loughran and Judge Desmond joined the dissent.

Interestingly, the first majority opinion by Judge Desmond in a labor case was delivered in a case holding that an unincorporated union could sue for libel.[14] A terse statement laid the basis of the decision: "Labor unions play a large and important role in modern life. . . . We know that they are rarely incorporated. We should not require them to assume the form of corporations, in order to be recognized as possessing reputations which the law will protect."[15]

The effect of the economic depression which began in the Fall of 1929 was still reflected in the litigation finding its way into the Court in 1941. Many of the relevant legal issues had by then been settled, but the rehabilitation of mortgages and mortgage certificates, which had suffered heavily in collapsing real estate values, remained in court as a sort of backwash from the early and mid-thirties.

One such appeal, rather typical of this area of litigation, came to the Court in an early 1941 case,[16] where the issue was whether the owners of guaranteed certificates based on a mortgage had priority over the rights of the guarantor which had repurchased some of the certificates from the public and had cancelled them. The Court held the guarantor's rights, acquired by an assignee, were subordinate to the other holders.

Appeals to the Court in 1941 also echoed the far-flung legal consequences of the closing of the banks by the President and the Governor in March of 1933.

In a significant case,[17] plaintiff's assignor had been a stockholder in a national bank. Within sixty days before the bank's insolvency, plaintiff's assignor transferred his shares to others who in turn transferred them to defendant. Under a federal statute plaintiff's assignor was liable for the full amount of the par value of the stock and a judgment was obtained against him by the receiver of the bank. The Court held, that as between plaintiff's assignor and defendant who was the actual owner of the stock by transfer as of the time of insolvency, the true liability for the assessment rested on the defendant.

No economic or legal survey of this period should overlook the milk question. The dairy farmer was hard pressed during the depression; yet it was essential to maintain a milk supply. Legal ingenuity was harnessed to create

13. *Id.* at 345-46, 36 N.E.2d at 328.
14. Kirkman v. Westchester Newspapers, Inc., 287 N.Y. 373, 39 N.E.2d 919 (1942).
15. *Id.* at 381, 39 N.E.2d at 921.
16. Matter of People (Union Guar. & Mtg. Co.), 285 N.Y. 337, 34 N.E.2d 345 (1941).
17. Brown v. Rosenbaum, 287 N.Y. 510, 41 N.E.2d 77 (1942).

institutions and to write statutes and regulations which would sustain milk prices to insure the industry's survival. These devices had a thorough shaking out in the courts but some aspects of the process survived much beyond 1941.

One means of milk regulation was restriction of distribution and sale. The Board of Health of the City of New York, for example, was authorized to promulgate regulations designed to protect public health. The Board under this authority restricted a certain class of independent milk distributors to those who had been in business before June 1, 1939. This was upheld by a Court divided four to three against the argument that the regulation was discriminatory and in violation of constitutional rights.[18]

The ground for decision was that an increase in the number of independent dealers would bring into the business more dealers than were normally required and increase the risk of sanitary code violations. Judge Lewis said: "We regard these considerations, which influenced the Board of Health to promulgate the regulation here in question, as bearing a reasonable relation to an effort by the Board to safeguard the milk supply of the city of New York and thus to protect and promote public health."[19] With this view Judge Desmond agreed.

Other events in the world outside the Court had an inevitable consequence on litigation. One was the repression and inhumanity of Hitler's Germany during the 1930's and the flight of people able to escape to the freedom of the United States. A significant issue was the licensing of German physicians on the basis of their prior professional standing. The leading case, *Marburg v. Cole*,[20] came to the Court in the summer of 1941 involving an Austrian physician. The statute authorized the Commissioner of Education to endorse a license to practice in New York where the physician had been in reputable practice ten years and had "reached a position of conceded eminence and authority in his profession."[21]

Commissioner Cole refused to endorse Dr. Marburg's license. Dr. Marburg had submitted evidence, from a number of American physicians, that he was " 'the leading neuropathologist in Europe' " and that he had the " 'respect of the world-wide medical profession' " and was " 'unquestionably the most prominent of recent emigres.' "[22] The refusal to endorse the license by the Commissioner was sustained five-to-two by the Court as within the frame of statutory discretion. Judge Desmond in a trenchant dissent—one of his earliest—noted: "When, by a wealth of proof unanswered and presumably unanswerable, petitioner showed his 'conceded eminence and authority' defendants went far outside the bounds of their broad discretion in denying his application."[23]

It is worthwhile to look at the kind of public law question affecting the

18. Stracquadanio v. Department of Health of City of New York, 285 N.Y. 93, 32 N.E.2d 806 (1941).
19. *Id.* at 101, 32 N.E.2d at 810.
20. 286 N.Y. 202, 36 N.E.2d 113 (1941).
21. N.Y. Educ. Law § 1259 (now § 6509).
22. Marburg v. Cole, 286 N.Y. 202, 214, 36 N.E.2d 113, 118 (1941).
23. *Id.* at 215, 36 N.E.2d at 119.

government of the State or of localities to which the court addressed itself in this period.

The most singular case[24] and one which has long piqued the curiosity of the Bar concerned the filling of a vacancy created by the death of the State Comptroller on October 12, 1941. The statute provided that a vacancy occurring before October 15 should be filled at the next election.[25] Certificates of nomination were filed by the recognized political parties on October 20 and 21. On October 23 an independent nominating petition was filed. The Appellate Division held that under another provision of the statute the filing was too late.[26] Appellants argued that the statute so construed was void. The Court agreed four-to-three with the construction of the statute prohibiting the filing of the independent petition, but having reached that conclusion, in a *per curiam* opinion stated: "Since any statute which provides for an election where only political parties can make nominations is in violation of the State Constitution, the provisions of section 42 of the Public Officers Law (Cons. Laws, ch. 47) are to that extent void. . . . It follows that no election for the office of Comptroller can be held this year."[27]

A public law question of large importance concerned the power of New York City by local law submitted to popular referendum to abolish the ancient county office of Sheriff, and the offices of Register, Register of Deeds, and Registrar and to create instead the city-wide offices of City Sheriff and City Register to be appointed by the Mayor after competitive civil service examination.[28] The Court by a divided vote sustained the governmental changes.

On the opening day of Judge Desmond's first court session, January 7, 1941, a case involving public power was argued.[29] The question was whether the legislature in the exercise of its law-making power could delegate by joint resolution its authority to investigate to a single member of a committee.

The general power of a legislative committee to investigate matters of state concern was by then well-recognized; but it was argued that the subpoena to the Teachers Union to produce its membership list was really returnable before one member of the committee, Senator Coudert, and therefore was not enforceable by contempt because it did not conform with the law.

The joint resolution had expressly authorized issuance of subpoenas by "each member" of the committee and the Court sustained the order for contempt. A dissent by two judges was based on a construction of the resolution rather than an assumed absence of power.

It is worth looking at one other decision addressed to the exercise of public power which casts an interesting light on a judicial attitude toward impairment

24. Moore v. Walsh, 286 N.Y. 552, 37 N.E.2d 555 (1941).
25. N.Y. Sess. Laws 1922, ch. 649, § 1.
26. Moore v. Walsh, 262 App. Div. 1060, 30 N.Y.S.2d 685 (3d Dep't 1941).
27. Moore v. Walsh, 286 N.Y. 552, 553, 37 N.E.2d 555, 556 (1941).
28. Burke v. Kern, 287 N.Y. 203, 38 N.E.2d 500 (1941).
29. Matter of State Educational System (Teachers Union), 285 N.Y. 1, 32 N.E.2d 769 (1941).

of contract which was of marked influence from 1890 to 1930. The Court unanimously ruled, the Chief Judge abstaining, that because the city of New York had granted a private bus company a franchise to operate in both directions on a two-way street, it was without power thereafter as a police regulation to make the street a one-way street in the interest of public safety even though reasonable alternate routes were offered to the bus company.[30]

Here was a contract with a private company enshrined beyond infringement, even by a regulation to promote the general safety of public streets. Although the Police Commissioner did not have legal authority to grant a compensatory change in the franchise to use other streets, the Court expressly stated it did not reach or consider this aspect of the case.[31] There was no showing that reasonable alternative routes conformable with change in street directions would not have been granted by the proper authority.

The case arouses nostalgic echoes of another day and a different judicial viewpoint when in the highest federal and state courts rigidity of the "impairment of contract" theory time and again frustrated the efforts of government to adapt to changed conditions and to new needs.

During this period there were also developments in the slowly evolving law of family relations. The Court held that an unemancipated child could not sue his father as the owner of a car and the estate of his mother as the driver for negligence,[32] and the Court distinguished another case[33] where recovery by an unemancipated child against his unemancipated sister was upheld. As between plaintiff and his mother's estate the ingenious argument was advanced by plaintiff that he was an emancipated child; but the Court held that when he was injured his mother was alive and he was not then emancipated.

A case of large importance in public policy affecting the family relationship held that a wife may not relieve a husband of all obligation for future support in consideration of a lump sum payment.[34] Of procedural significance was the decision that a husband's obligation to pay support under a valid separation agreement was not, as a matter of law, terminated where, in lieu of the payments under the agreement, the wife accepted payments directed by the court in the husband's action for annulment which had been discontinued.[35] Also of procedural significance in this field is a case holding that the amount of alimony may not be submitted by a husband and wife to arbitration.[36]

Finally, and rather typical of the then prevailing view in state courts in the slowly emerging constitutional freedoms issue, is a decision in which the

30. Eighth Ave. Coach Corp. v. City of New York, 286 N.Y. 84, 35 N.E.2d 907 (1941).
31. *Id.* at 88, 35 N.E.2d at 909.
32. Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942). Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E.2d 551 (1928) was followed in its basic principle.
33. Rozell v. Rozell, 281 N.Y. 106, 22 N.E.2d 254 (1939).
34. Kyff v. Kyff, 286 N.Y. 71, 35 N.E.2d 655 (1941).
35. Woods v. Bard, 285 N.Y. 11, 32 N.E.2d 772 (1941).
36. Stern v. Stern, 285 N.Y. 239, 33 N.E.2d 689 (1941).

Court unanimously affirmed a conviction of two ministers who had circulated religious pamphlets from door to door in the Village of Southampton in violation of an ordinance which excepted from its prohibition residents of the village.[37]

RECENT YEARS

When we turn from this period, at the beginning of Judge Desmond's service, to the recent past we find ourselves in quite a different *milieu*. There are new judicial preoccupations, a different emphasis on old problems, and some concerns which had not worried the court a quarter of a century earlier. Indeed, it was rather a different world both within and without the consultation room.

One example of the direct effect of the development of atomic energy concerned the labor troubles besetting the *N. S. Savannah*, the first merchant ship using nuclear power, which came to the Court in an arbitration controversy.[38] The new form of developing energy had made changes necessary in the engineering staff, and the arbitration award in dispute had made conformable adjustments for the deck officers.

Another problem of large public importance to contemporary and future times arises from the population density in large cities. The Court addressed itself to the air pollution problem and held that the operation of automobile paint spraying was within the regulative control of the Board of Air Pollution Control and of the City Department of Air Pollution Control.[39]

The adjustment of the criminal law and of police procedures to judicial views of constitutional safeguards was a major concern of the Court during this recent period. In part this was a response to the promptings of the United States Supreme Court; but in large part it represented policies which the Court of Appeals had long been shaping for New York and which were in advance of Supreme Court pronouncements. This preoccupation with the criminal law was largely addressed to confessions taken in custody; to prompt arraignment and trial; to searches and seizures; and to the right of counsel at all stages.

In a landmark decision, *People v. Donovan*,[40] the Court held that a written confession taken from the defendant in a police station after his lawyer had been refused access to him was inadmissible as a denial of effective assistance of counsel and as contrary to "the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."[41]

The Court was sharply divided, four to three, on the announcement of this policy. There were strong dissents. The place of Judge Scileppi who did not participate was taken by Justice O'Brien who voted with the majority.

37. People v. Bohnke, 287 N.Y. 154, 38 N.E.2d 478 (1941).
38. Matter of States Marine Lines, Inc. (Crooks), 13 N.Y.2d 206, 195 N.E.2d 296, 245 N.Y.S.2d 581 (1963).
39. West Bronx Auto Paint Shop, Inc. v. City of New York, 13 N.Y.2d 730, 191 N.E.2d 913, 241 N.Y.S.2d 861 (1963).
40. 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).
41. *Id.* at 153, 193 N.E.2d at 630, 243 N.Y.S.2d at 844, quoting from People v. Waterman, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 448, 216 N.Y.S.2d 70, 75 (1961).

The Court at this time also reiterated its prior rulings that a post-arraignment statement by a defendant would be held inadmissible; and the rule was implemented to include not only admissions overheard by police after arraignment, but also the receipt in evidence of guns found in an attic without a search warrant, the location of which was disclosed by the overheard conversations.[42] The Court was unanimous but it seems here to have acted under compulsion of Supreme Court pronouncements.[43]

In *People v. Meyer*[44] the Court had held that even a voluntary and unsolicited statement made by a defendant after arraignment was inadmissible, thus extending its earlier rule[45] that a solicited statement was inadmissible.

Radical consequences were imposed on undue delays in criminal trials. In *People v. Masselli*[46] defendants were in a state prison while another criminal charge was pending. They wrote to the district attorney requesting that the pending charge be brought to trial as required by statute. The warden refused to forward these requests because of his mistaken concept of applicable law. The resulting delay in trial was ten months. The Appellate Division's dismissal of the indictments was affirmed.

In the same direction is the case of a prisoner serving a prior sentence.[47] There was a delay of almost two years in his arraignment on an indictment for another felony. There was a unanimous Court to dismiss.

The problem of searches and seizures following upon *Mapp v. Ohio*[48] became troublesome to the Court as, indeed, it was to most state courts, and radical adjustments to its rule became necessary. One example is *People v. Moore*[49] where, after observing four men approach defendant and give him money a policeman arrested him on policy writing and in a search of his person found policy slips. Here the search was found unlawful in an opinion by Chief Judge Desmond and the judgment of conviction reversed.

A search of a house without warrant resulted in dismissal of another policy charge.[50] The Chief Judge wrote the opinion holding that the point of law had been sufficiently preserved on the record to justify review, although at the time of trial *Mapp* itself had not been decided. But in another case tried before *Mapp*, it was held that in the absence of objection the constitutional point was not saved.[51] Here the Chief Judge and Judge Fuld dissented.

Notwithstanding *Mapp* the Court held in *People v. Dinan*[52] that intercepted telephone conversations were admissible in a book-making case. Even

42. People v. Robinson, 13 N.Y.2d 296, 196 N.E.2d 261, 246 N.Y.S.2d 623 (1963).
43. *Id.* at 301, 196 N.E.2d at 262, 246 N.Y.S.2d at 625.
44. 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962).
45. People v. DiBiasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).
46. 13 N.Y.2d 1, 191 N.E.2d 457, 240 N.Y.S.2d 976 (1963).
47. People v. Bryant, 12 N.Y.2d 719, 186 N.E.2d 127, 233 N.Y.S.2d 771 (1962).
48. 367 U.S. 643 (1961).
49. 11 N.Y.2d 271, 183 N.E.2d 225, 228 N.Y.S.2d 822 (1962).
50. People v. Yarmosh, 11 N.Y.2d 397, 184 N.E.2d 165, 230 N.Y.S.2d 185 (1962).
51. People v. Friola, 11 N.Y.2d 157, 182 N.E.2d 100, 227 N.Y.S.2d 423 (1962).
52. 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962).

though the interception was itself a violation of federal law, this did not affect its admissibility. Judge Fuld dissented in an opinion in which he was joined by the Chief Judge and Judge Burke.

Turning to the civil side, a decision of large importance in the conflict of laws area was made in *Babcock v. Jackson*.[53] Plaintiff was a guest in defendant's automobile in a trip starting in Rochester and continuing into Ontario where an accident occurred and plaintiff was injured. Both were New York residents.

The Ontario law absolved the owner of a vehicle from liability to a guest for negligence. The choice of laws became a choice of New York law based in some part on the rationale of "center of gravity" and "grouping of contacts" which had been applied to contract problems. Ultimately, as the opinion by Judge Fuld developed, justice, fairness and the best practical result were found by applying the rule of the jurisdiction having closest relationship to the parties and the greatest concern with the specific issue in the case.[54] The landmark decision in *Kilberg v. Northeast Airlines*[55] was part of the basis of the Court's reasoning.

Of equal significance was the extension by a decision the same day (May 9, 1963) of products liability in *Goldberg v. Kollsman Instrument Corp.*,[56] where in an opinion by the Chief Judge the manufacturer of an instrument installed in an airplane as well as the maker of the plane itself were held responsible on breach of warranty of fitness of their products where defects caused a crash and the death of a passenger.

The significant question as posed in Chief Judge Desmond's opinion was: "does a manufacturer's implied warranty of fitness of his product for its contemplated use run in favor of all its intended users, despite lack of privity of contract?"[57] The answer to this was affirmative and based on an enlargement of the liability for breach of warranty stated in *Greenberg v. Lorenz*[58] and *Randy Knitwear v. American Cyanamid Co.*,[59] the latter case having "at least suggested that all requirements of privity have been dispensed with in our State."[60]

The *American Cyanamid* case decided the year before, one of the decisional props supporting *Goldberg*, depended in some measure upon the publicly advertised nature of the defendant's product to bridge over the absence of direct contractual relationship between the parties. This case was an important step in the direction in which the Court was moving.

53. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).
54. *Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.
55. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).
56. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). See generally Laufer, *Tort Law in Transition: Charles S. Desmond's Quarter Century on the New York Court of Appeals, infra*, this issue.
57. *Id.* at 434-35, 191 N.E.2d at 81, 240 N.Y.S.2d at 593.
58. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).
59. 11 N.Y.2d 5, 181 N.E.2d 339, 226 N.Y.S.2d 363 (1962).
60. Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d at 435, 191 N.E.2d at 82, 240 N.Y.S.2d at 594 (1963).

In the area of government and public administration *St. Clair v. Yonkers Raceway, Inc.*[61] is a significant decision. The plaintiff, a private citizen, brought an action to declare unconstitutional a statute which reduced by about 42,000,000 dollars the amount which race tracks would have paid the State in taxes. Judge Fuld, dissenting, described the action as one to prevent the alleged misapplication of more than 42,000,000 dollars.[62]

But the Court held, four to three, that plaintiff was without standing to maintain the action and adhered to what had been the rule in New York for over a century.

The dissenting judges observed the New York rule has been sharply criticized, not followed in many other jurisdictions and not consistent with some decisions in New York itself dealing with nonfiscal matters.[63]

In the same public law area it was held that the establishment by statute of a private screening board for the appointment of members of the New York City Board of Education by the Mayor was valid.[64] The statute required that appointment be made from a list of nominees made up by a group of university presidents and presidents of civic organizations.[65] Here, too, the court was sharply divided on the constitutional issue with the Chief Judge concurring in the majority opinion.

Finally, in the area of public law there is the policy decision that New York will not entertain an action by Philadelphia to recover its gross receipts tax against a New York resident.[66] There is, also, the intriguing little clothesline case in which a conviction of violation of a city ordinance was sustained where the defendants had hung out on a clothes-line in their own front yard old clothes and rags as a protest against high municipal taxes.[67] Judge Van Voorhis regarded the impact of the ordinance as an interference with the property rights of defendants and dissented.

## Conclusion

Thus in this quarter-of-a-century long period of profound change in the law, of continuous adaptation of judicial thinking to meet new conditions and to solve new problems, Judge Desmond sat in the very center of a world of judicial action.

He sat not as an observer or a commentator on what was going forward, but in the decisive role of one who gave creative articulation to emerging policy and who helped formulate the legal solutions and new and suitable rules by which the people of New York were led to govern themselves wisely and justly.

61. 13 N.Y.2d 72, 192 N.E.2d 15, 242 N.Y.S.2d 43 (1963).
62. *Id.* at 77, 192 N.E.2d at 16, 242 N.Y.S.2d at 45.
63. *Id.* at 77-78, 192 N.E.2d at 17, 242 N.Y.S.2d at 45-46.
64. Lanza v. Wagner, 11 N.Y.2d 317, 183 N.E.2d 670, 229 N.Y.S.2d 380 (1962).
65. N.Y. Sess. Laws 1961, ch. 971.
66. City of Philadelphia v. Cohen, 11 N.Y.2d 401, 184 N.E.2d 167, 230 N.Y.S.2d 188 (1962).
67. People v. Stover, 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963).