Fordham Law Review

Volume 24 | Issue 1 Article 1

1955

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Recommended Citation
Thomas F. Grimes, *The Contribution of Judge Albert Conway to the Jurisprudence of New York*, 24 Fordham L. Rev. 1 (1955).
Available at: https://ir.lawnet.fordham.edu/flr/vol24/iss1/1

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FORDHAM LAW REVIEW

VOLUME XXIV SPRING, 1955 NUMBER 1

THE CONTRIBUTION OF JUDGE ALBERT CONWAY TO THE JURISPRUDENCE OF NEW YORK

*THOMAS F. GRIMES**

JUDGE CONWAY took his place on the Court of Appeals in January, 1940. During the first session in which he took part in the work of the Court, he was called upon to write the majority opinion in *People v. County of Westchester*.[1] This first opinion illustrates his basic approach to the legal problems he has been called upon to resolve in his capacity of judge on the State's highest tribunal.

The controversy arose when the County of Westchester attempted to collect tolls from motorists using a portion of the Hutchinson River Parkway in Westchester County. The Hutchinson River Parkway was originally constructed as a rural parkway by the Westchester County Park Commission on lands acquired by the County for park purposes. After construction, the parkway passed along its entire length through landscaped and beautified park lands. The County contended that the Hutchinson River Parkway was not a public highway but was a park for the use of which the County could charge a fee.

In 1927, in *Matter of County of Westchester (Hutchinson River Parkway)*,[2] the Court of Appeals had decided that the Hutchinson River Parkway was not a public street or highway within the meaning of the Railroad Law, holding that "Its roadways and bordering grounds constitute a park and nothing else."[3]

But, in subsequent years, the State of New York, with the assistance of Federal funds, had extended the Parkway southerly into New York City and northerly to meet the Merritt Parkway in Connecticut with the result that it came to provide a through route for motor vehicles travelling between New York City, northern New York and Connecticut. On the basis of this altered factual situation, Judge Conway distinguished the *Matter of County of Westchester* case with the following statement:

"Even more important, the opinion [in the County of Westchester case] spoke of times and conditions antedating the determination that it was expedient or necessary to construct the continuations and extensions of the parkway so as to extend it into

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1. 282 N.Y. 224, 26 N.E. 2d 27 (1940).
2. 246 N.Y. 314, 158 N.E. 881 (1927).
3. Id. at 321-322, 158 N.E. 881 at 884.

the City of New York and to the Connecticut line so as to join the Merritt Parkway of that State . . . . The language of the opinion did not establish or fix the then conditions so as to make them unchangeable and may not now be held applicable to entirely different ones."[4]

Another illustration of Judge Conway's approach to the cases he is called upon to decide is furnished by his opinion in *Clawson v. Central Hudson Gas & Elec. Corp.*[5] There plaintiff's intestate was driving his automobile along a state highway near Greenville in the Catskills when his automobile skidded and turned over in crossing a highway bridge that was covered with a sheet of ice. The ice had been caused by the freezing of spray and mist produced by the defendant utility company's operation and maintenance of a dam nearby. The defendant had built the dam in 1906 near an old state bridge that had a floor of planking. Although the dam cast mist and spray upon the old bridge, ice did not form then as it did on the new bridge with a concrete roadway that the State erected in 1929 and 1930. Mist and spray arising from the dam formed ice on the new bridge when the nearby roads and highways were clear. On these facts the plaintiff obtained a judgment against the defendant utility company that operated the dam.

In the Court of Appeals the defendant argued that the fault lay with the state highway authorities on the ground that:

"The undisputed proof is that the dam was no source of danger to anyone prior to 1929. It was the action of the state highway authorities, of that year, in replacing the old bridge by a new one, of colder road surface, that created the icy condition that caused the accident in question. Also . . . this was an action which the defendant was 'legally powerless to prevent, and which it was without authority to supervise and direct.' "[6]

To that argument Judge Conway gave the following answer:

"In the instant case, the substitution of a steel bridge with a concrete deck for an iron truss bridge with wood plank flooring was without doubt in response to the growing need and demand of the users of the public highway. The defendant had always been under a duty to maintain its dam in such a manner that it would not interfere with or endanger safe passage on the adjacent highway. It was not permanently relieved of that duty by the construction of the new highway bridge. After 1930, defendant's duty had to be discharged in the light of the changed conditions. No landowner may expect the area surrounding his property to remain in a static condition. Times change and responsibilities change with them. The *extent* of defendant's duty increased with the development of the community, but the duty itself was always present and may not be shifted to the State."[7]

The foregoing opinions demonstrate two of Judge Conway's outstand-

4. 282 N.Y. 224, 230, 26 N.E. 2d 27, 30 (1940).
5. 298 N.Y. 291, 83 N.E. 2d 121 (1948).
6. Id. at 294, 83 N.E. 2d at 122.
7. Id. at 296, 83 N.E. 2d at 123.

ing characteristics as a judge, namely: strict attention to and careful evaluation of the facts of the case before him and a willingness to adapt the law to new conditions.

The New York Reports paid tribute, many years before he ascended the bench of the Court of Appeals, to his passion for careful preparation of the facts of the case. In *People v. Kane*,[8] decided in 1915, the Court complimented young Assistant District Attorney Conway for obtaining from a murderer, just after the crime, a statement sufficient to prove all the elements of the crime, without his overstepping the limits set by the law.[9] This ability to deal with the facts of the case before him in both the civil and criminal field is illustrated by such opinions as those in *Matter of Ryan*,[10] *People v. Buchalter*,[11] and *People v. Davino*.[12] His ability to adapt the law to new conditions and new conceptions of public welfare are exemplified in many of his opinions in various fields. Some of those opinions will now be examined.

Probably the most frequent problems confronting the New York Court of Appeals are those arising from the impact of the State's huge industrial and transportation activities upon the lives of the individual citizen, affecting particularly the safety and health of the men who work and of the ordinary citizen or the child who each day walks or plays within reach of the monstrous moving parts of this great industrial machine. The legislature has acted with respect to some of those perils, leaving to the courts only the task of carrying out its commands, e.g., the Workmen's Compensation Law and the Labor Law. In other respects, the legislature has not acted and the courts have had to devise their own answers to these problems. Judge Conway's approach to such problems has been to construe liberally the remedial legislation that has been enacted and, in fields where the legislature has not spoken, to use the tools of the common law to broaden the area in which protection and compensation are afforded the individual who, through no fault of his own, is in danger of health or limb or life from the perils of an industrialized society.

Judge Conway's approach to cases arising under the Workmen's Compensation Law is evidenced by the following two decisions.

In *Matter of Pestlin v. Haxton Canning Co.*,[13] a sixteen-year-old boy suffered the loss of his right arm while operating a machine that removed the tops of beets stacked on the ground on a farm across the street from his home. The Workmen's Compensation Law does not cover "farm

8. 213 N.Y. 260, 107 N.E. 655 (1915).
9. Id. at 264-265, 267, 107 N.E. at 655-656.
10. 291 N.Y. 376, 52 N.E. 2d 909 (1943).
11. 289 N.Y. 181, 45 N.E. 2d 225 (1942).
12. 284 N.Y. 486, 31 N.E. 2d 913 (1940).
13. 299 N.Y. 477, 87 N.E. 2d 522 (1949).

laborers"[14] but the Compensation Board made an award based upon a finding of fact that claimant was the employee of the cannery to which the farmer had agreed to sell his beet crop. The Appellate Division dismissed the claim against the cannery, however, saying that:

"The agreement relative to the beets did not change the situation. This was merely a contract of purchase and sale whereby Totten [the farmer] agreed to deliver to Haxton [the canner] ten acres of beets."[15]

The majority of the Court of Appeals affirmed the decision of the Appellate Division with an opinion that said, in part:

"That such work was farm labor seems to me to be obvious, and it was farm labor whether claimant was working for the farmer Totten or for Haxton Canning Company, Inc., for whose ultimate use in its cannery the beets were grown."[16]

But Judge Conway, employing the statutory presumption that a claim comes within the statute[17] and the statutory mandate that the Board's determination of questions of fact is conclusive,[18] voiced the following views in a dissenting opinion:

"On the question of whether claimant was a farm laborer, we have decided that work for a farmer on a farm does not *of necessity* constitute farm labor within the meaning of the Workmen's Compensation Law. (*Matter of Butterfield v. Brown*, 287 N. Y. 623)....

"Section 21 of the Workmen's Compensation Law entitled 'Presumptions' provides that:

" 'In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed *in the absence of substantial evidence to the contrary*

" '1. That the claims come within the provision[s] of this chapter; . . .'

"Claimant was thus entitled to the benefit of the presumption that his claim came within the provisions of the statute, and the notices posted thereunder, and the board was required to find that the claimant was doing work incidental to the canning business and that he was *not* a farm laborer *unless* there was *substantial evidence to the contrary*. Here there was no evidence that claimant was employed to work or did in fact work in connection with the tilling of the soil or in cultivating and harvesting crops. The work which he was engaged in exclusively was to tow the topping machine and assist in its operation. The board whose findings are final under Section 20 of the Workmen's Compensation Law was justified in finding as it did that claimant was not a farm laborer at the time of the accident but was an employee of Haxton."[19]

In *Matter of Ahern v. South Buffalo Ry. Co.*,[20] the decedent, em-

14. Workmen's Compensation Law § 2(4).

15. 274 App. Div. 144, 147, 80 N.Y.S. 2d 869, 872 (3rd Dept. 1948).

16. 299 N.Y. at 480, 87 N.E. 2d at 522.

17. Workmen's Compensation Law § 20(1).

18. Workmen's Compensation Law § 20.

19. 299 N.Y. 490, 491-492, 87 N.E. 2d 522, 529 (1949). See also the dissenting opinion in Matter of Sacripante v. United Metal Spinning Co., 299 N.Y. 419, 424, 87 N.E. 2d 437, 440 (1949).

20. 303 N.Y. 545, 104 N.E. 2d 898 (1952).

ployed as a switchman by the railroad company, suffered a coronary occlusion while attempting to throw a switch that had stuck. Thereafter, he filed a claim for compensation with the Workmen's Compensation Board. The railroad company contested the claim on the grounds of accident and causal relation. It made no point of the fact that the Workmen's Compensation Board had no jurisdiction because the accident had occurred in interstate commerce where the State compensation law did not apply because that field had been preempted by Congress with the enactment of the Federal Employers' Liability Act.[21] An award was made pursuant to which the railroad company made payments to the decedent. Four years after the accident, the decedent died. By that time the three-year statute of limitation contained in the Federal statute had run against any claim that might have been asserted under its provisions. Then, for the first time, the railroad company advanced the contention that the Workmen's Compensation Board had no jurisdiction, addressing this objection to an award covering the last two weeks of the decedent's life.

In *New York Central R. R. Co. v. Winfield*,[22] the United States Supreme Court had held that the New York Workmen's Compensation Law could not be applied to railroad employees engaged in interstate commerce even though such employees might have no claim under the Federal Employers' Liability Act and might therefore be left without compensation for industrial accidents. The Supreme Court said:

"Only by disturbing the uniformity which the (Federal Employers' Liability) act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress."[23]

Nevertheless, the New York Court of Appeals upheld the award to Mrs. Ahern and her family under the provisions of Section 113 of the Workmen's Compensation Law which provides in substance that awards according to the provisions of the law may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty and interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under the statute. Judge Conway's opinion said in part:

"Section 113 of the New York Workmen's Compensation Law, unlike the New Jersey statute, does not require the parties to choose between the Federal Act and

21. New York Central R. R. Co. v. Winfield, 244 U.S. 147 (1917); Matter of Baird v. New York Central R. R. Co., 299 N.Y. 213, 86 N.E. 2d 567 (1949).

22. 244 U.S. 147.

23. Id. at 153.

the State Workmen's Compensation Law, nor does it impute such an election to them by means of a presumption as did the New Jersey statute. Section 113 merely offers the parties a means whereby they may compromise their dispute, if they are *mutually desirous* of so doing. . . .

". . . In the case now before us it is clear that there was no agreement between the parties when the initial hearings were held. . . . However, it is clear that the conduct of the parties subsequent to the board's ruling on the questions of accident and causal relation and its decree that compensation be paid, establishes, as conclusively as the evidence in the *Heagney* case (*supra*), that it was the mutual desire of the parties that the board, acting as an impartial third person, should determine the amount to be paid in discharge of the claim by the deceased.

"On the oral argument counsel for the employer asserted that its conduct in denying accident and causal relation on the initial hearings establishes that the payments of compensation made by the employer thereafter were involuntary payments . . . .

"The employer, in thus arguing, overlooks the fact that its other conduct belies its protestations of lack of intent and does evince the intention to enter into a compromise whereby the dispute in question might be settled without litigation: *First:* No appeal was ever taken by the employer from any of the awards made except that herein which has to do with the award covering the last two weeks of the decedent's life, and *second:* From the outset the employer was represented by counsel and is chargeable with the knowledge that the board was powerless to require it to pay compensation unless it waived its Federal rights and remedies. The records in our court commencing with *Ives v. South Buffalo Ry. Co.* (201 N.Y. 271) and continuing through *Herke v. South Buffalo Ry. Co.* (227 N.Y. 618) and *Keogh v. South Buffalo Ry. Co.* (233 N.Y. 31) indicate clearly that the various counsel for the Railway Company, and thus the Railway Company, over the last forty years have been cognizant of the nature of its liability to its employees, and the remedies of the latter both under the Compensation Law and the Federal Employers' Liability Act. Nevertheless, the employer made payments for four and one-half years in accordance with the directions of the board *choosing not to assert that the board lacked jurisdiction* . . . . The employer herein was aware that the employee desired to have the board determine the payments to be made in discharge of his claim rather than resort to litigation, and with this knowledge it continued to make payments beyond the time when the Statute of Limitations had run on the plaintiff's claim for negligence under the Federal Act—indeed, it has run as to the death claim, too. The employer cannot validly urge that it should be permitted to make payments beyond the period of the Statute of Limitations, thus leading the employee to believe that it was equally agreeable to the employer that the board act, without having its silence construed as an acceptance of the employee's offer to compromise the claim by having the amount of the claim fixed by the board."[24]

The foregoing decision was affirmed by the United States Supreme Court[25] with the comment that the New York Court of Appeals had construed the Compensation Law "with meticulous care" to avoid conflict with the Federal law.

The case of *Cifolo v. General Electric Co.*[26] presented a different problem. The Workmen's Compensation Law provided compensation in

24. Supra note 20 at 557-563, 104 N.E. 2d at 905-908.

25. 344 U.S. 367, 372.

26. 305 N.Y. 209, 112 N.E. 2d 197 (1953), cert. denied, 346 U.S. 874 (1953).

silicosis cases only when the workman had become totally disabled or was dead. No compensation was provided for cases of partial disability. Here the plaintiffs attempted to maintain a common law action against the employer to recover damages for partial disability due to silicosis which they sustained, so they asserted, because the employer violated its statutory duty to keep the air in their place of work free of dust and other impurities. The majority of the Court of Appeals dismissed the action as being impliedly barred by the provisions of the Compensation Law, saying:

"Whatever be the wisdom or justice of such a limitation, its constitutionality is clear. It is of the essence of workmen's compensation that the benefits therein provided as to any accidental injury or occupational disease are exclusive, and that, once the Legislature has specified those benefits, no damages or remedies against the employer are available elsewhere . . . ."[27]

But Judge Conway dissented, saying, in part:

"Years ago our court in an opinion written by Lehman, J., before he became Chief Judge, in *Barrencotto v. Cocker Saw Co.* (266 N.Y. 139), decided that no workmen's compensation payments had been provided for sufferers from dust diseases acquired while working in industry and that, therefore, such sufferers had remedy by action at law since it would be violative of our State Constitution to take away a common-law and statutory action without substituting another remedy. . . . That is still the decisional law of our State. Subsequently, *Per curiam* opinions and memoranda of our Court have been misinterpreted by some members of the Bar but generally courts and judges have realized that we have never held that those injured by dust disease incurred in industry either (a) because of disregard and violation of common-law and statutory duties imposed to safeguard workers in industry, or (b) because of injuries sustained constituting less than total disability as defined in the Workmen's Compensation Law, although sustained without fault by the employer, were without remedy until the diseases had run their course to the point where the workers were totally disabled. . . . The mere statement of the thought is its refutation for it would be monstrous to say that such sufferers were to be economic derelicts and without aid from any source as they coughed their way to total disablement."[28]

One other decision in this field that may be noted here is *Sweezey v. Arc Electrical Construction Co.*[29] Section 56 of the Workmen's Compensation Law provides in substance that a general contractor, whose contract involves or includes a hazardous employment, shall be liable for and shall pay compensation to any employee of a subcontractor injured in the course of the employment unless the subcontractor has secured compensation for the employee. In the cited case the plaintiff, an employee of a subcontractor, brought a third-party negligence action against the general contractor who asserted as a defense that, since the subcontractor had failed to

27. Id. at 214-215, 112 N.E. 2d at 199.
28. Id. at 220-221, 112 N.E. 2d at 202-203.
29. 295 N.Y. 306, 67 N.E. 2d 369 (1946).

secure compensation, it was liable under Section 56 to provide compensation to the plaintiff. This liability, it was asserted, was the plaintiff's exclusive remedy. That argument was accepted by the Appellate Division, which said, in part:

"When a general contractor incurs the statutory liability, the remedy thus afforded the employee, in my opinion, is exclusive and not cumulative or an alternative to the common-law remedy. . . . Statutory liability necessarily must be based upon the premise that a general contractor, under the circumstances, is an employer of the subcontractor's employees."[30]

Under the decision of the Appellate Division, the injured workman would be barred from recovering tort damages in a third-party action against the general contractor and would have been restricted to his compensation remedy. However, the Court of Appeals reversed in an opinion by Judge Conway, adopting the plaintiff's contention that the law preserved his right to sue the general contractor as a negligent third party. The opinion said, in part:

"The defendant argues that plaintiff's interpretation is inconsistent, in that general contractors would be regarded as strangers to their subcontractors' employees in defending the negligence action, and as 'constructive employers' of these workmen in a compensation proceeding. The inconsistency arises, however, only because of the defendant's conception of the basis of the liability imposed by section 56. The contractor is conditionally liable, as a guarantor is conditionally liable. He is not bound to *secure* compensation as an employer (Workmen's Compensation Law, §§ 10, 11, 50). He is liable to *pay* compensation if the subcontractor does not secure it. Nor need this liability be based on a fictional relationship between him and the injured workman. It may be said more reasonably, in the light of the spirit of the act, to be based upon the contractor's relationship to the subcontractor. He is in a better position than the workman to select a responsible subcontractor, and to see to it that the subcontractor secures compensation. He need not select a subcontractor who will refuse to obey the law requiring him to obtain workmen's compensation insurance. His contract with the subcontractor may be drawn to cover this requirement. . . . Section 56 is merely a device to secure enforcement of the act with relation to the real employer—the subcontractor."[31]

Judge Conway has consistently taken a similar approach to cases arising under the Labor Law. *Hente v. Shercoop Corporation*[32] is an example. There the defendant, the owner of a six-story loft building, had leased the entire building to Bostock, Rhoades & Co., Inc., reserving only the right to enter and make repairs. Bostock, Rhoades & Co., Inc., in turn, sublet a portion of the fourth floor to plaintiff. Plaintiff sustained personal injuries when, in the dark, he fell into an open elevator shaft.

30. 266 App. Div. 623, 626, 44 N.Y.S. 2d 478 (1943).

31. Supra note 29 at 312, 67 N.E. 2d at 371. See also Judge Conway's opinion in McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 332, 107 N.E. 2d 463, 473 (1952) respecting a similar construction of the Federal Longshoremen's and Harbor Worker's Compensation Act.

32. 289 N.Y. 140, 44 N.E. 2d 402 (1942).

He sought recovery for his injuries from the defendant, the owner of the building, on the ground that the elevator shaft was unguarded and unlighted in violation of Sections 255 and 257 of the Labor Law[33] and that the owner of the premises was responsible therefor.

Section 315 of the Labor Law defined "owner" to mean "the owner of the premises, or the lessee of the whole thereof, or the agent in charge of the property . . . ." But the defendant argued that, under the foregoing definition, it was not responsible because it was out of possession, citing *Homin v. Cleveland & Whitehill Co.*[34] There a window cleaner had fallen to his death while cleaning a window from the outside and his administratrix had sought to hold the owner of the building responsible under Section 202 of the Labor Law which provided that "The owner, lessee, agent, manager or superintendent in charge of a public building shall not require nor permit any window in such building to be cleaned from the outside unless means are provided to enable such work to be done in a safe manner." The Court of Appeals held that the foregoing provision imposed no liability on an owner out of possession, saying:

"The statute holds the owner liable only in the event that it was in charge of the building and required or permitted the window to be cleaned from the outside without providing safety devices required by the statute and the Rules of the Industrial Board."[35]

On the strength of this precedent the Shercoop Corporation contended that a similar construction of Section 315 of the Labor Law relieved it from liability because it, too, was not in control of the premises, urging that:

". . . if the Legislature had intended to place the burden of maintenance on an owner out of control, it would have provided that where the term 'owner' was used, it meant both the owner *and* the lessee of the whole premises; that the use of the disjunctive was intentional and placed the duty of safe maintenance solely upon the one in immediate control of the premises."[36]

However, the premises involved in the *Homin* case were an office building; in the *Hente* case, the building was a "tenant-factory." On that basis Judge Conway distinguished the *Homin* case by calling attention to

33. Section 255 of the Labor Law provided, in part, that: "In all factory buildings, every elevator and every elevator opening and the machinery connected therewith and every hoistway, hatchway and well-hole shall be so constructed, guarded, equipped, maintained and operated as to be safe for all persons . . . ."

Section 257 of the Labor Law provided that:

"1. . . . In every factory proper lighting shall be provided during working hours for:

a. . . .

b. All elevator cars and entrances; . . . ."

34. 281 N.Y. 484, 24 N.E. 2d 136 (1939).

35. Id. at 488, 24 N.E. 2d at 138.

36. Supra note 32 at 144, 44 N.E. 2d at 403.

Section 316 of the Labor Law, applicable to tenant-factories, which provided, in part:

". . . The owner of a tenant-factory building, whether or not he is also one of the occupants instead of the respective tenants, shall be responsible for the observance of the following provisions of this article, anything in any lease to the contrary notwithstanding:

"Section two hundred and fifty-five [relating to maintaining elevators in safe condition]. . . .

"The owner shall also be responsible for all other provisions of this article in so far as they affect those portions of the tenant-factory building or its premises that are used in common or by more than one occupant. . . ."

Section 257, relating to illumination during working hours, is contained in the same article.

In the light of the provisions of Section 316, Judge Conway said of the *Homin* case:

"The case of *Homin v. Cleveland & Whitehill Co.* (281 N.Y. 484) is not in point. The section of the Labor Law there involved was section 202. Section 316 was not applicable since the building was not a tenant-factory building."[37]

Thus the Court refused, in effect, to extend a prior decision limiting the liability of an owner of business property.

Not only has Judge Conway favored a construction of the Labor Law that extends tort liability to the injured among a wide class of persons but he has also favored the view that ultimate responsibility under the law can not be shifted by contract from one to another but rests equally upon all. Thus, in *Walters v. Rao Electrical Equipment Co.*,[38] a workman, the employee of a subcontractor on a construction job, was hit by a piece of pipe dropped from the floor above by the employee of another subcontractor. The pipe dropped through a four-inch space adjacent to a column which had been left unplanked in violation of Section 241, subd. 4, of the Labor Law which required all contractors constructing buildings with iron or steel floor beams to plank over thoroughly to not less than six feet beyond such beams. When the plaintiff brought an action against the contractor, the latter served a cross-complaint against the subcontractor whose employee dropped the pipe, relying on an indemnity agreement whereby the subcontractor agreed to hold harmless and indemnify the contractor against liability for damages caused by the subcontractor or his employees. Judge Conway wrote for the majority of the Court of Appeals that "The failure of the general contractor thoroughly to plank over the steel beams was a breach of a primary non-delegable duty . . . [therefore] the general contractor and the subcontractor were joint

37. Id. at 144, 44 N.E. 2d at 403-404.

38. 289 N.Y. 57, 43 N.E. 2d 810 (1942).

active tort feasors."[39] Under that analysis there could be no recovery over by the general contractor under the indemnity agreement. Thus the general contractor was compelled to share with its subcontractors the ultimate responsibility for the safety of the workmen on its construction job.[40]

Warney v. Board of Education[41] involved both the Labor Law and the Compensation Law. There a twelve-year-old pupil in the defendant's school was employed in the school cafeteria, receiving a fifteen-cent lunch as compensation. While standing upon a stool putting away dishes, she fell and sustained serious injuries when the stool toppled over, allegedly because one of its four legs was shorter than the other three. The child brought a negligence action against the Board of Education, alleging that her employment was in violation of Section 130 of the Labor Law which forbade the employment of children under sixteen years of age in a "restaurant" or "in or in connection with or for any other trade, business or service." Two Judges of the Court of Appeals thought that the Labor Law should not be construed to forbid employment of a pupil in a school cafeteria on the ground that "the Labor Law is directed against various evils not found in connection with lunchtime employment of children in a school cafeteria . . . ."[42] Furthermore, the defendant had interposed the defense that it had procured workmen's compensation coverage so that, in any event, plaintiff's remedy, if any, was solely an award under the Compensation Law. The majority of the Court, in an opinion by Judge Conway, rejected both contentions, saying:

"The defendant Board pleaded in its answer and urges upon this appeal that plaintiff was an employee within the meaning of the Workmen's Compensation Law but not within that of the Labor Law nor of the Education Law. Thus it argues: 'The plaintiff Virginia Warney, was an employee of the School District rendering assistance in return for a free meal in the cafeteria.' It urges, however, that the Legislature in enacting the Labor Law and the Education Law did not contemplate a situation such as is here presented but rather a more commercial one. We do not think that it may reasonably be said that the Legislature had in mind that rather fine distinction."[43]

In addition, since compensation coverage would not have applied to the employment unless by the joint election of employer and employee, Judge Conway added that, apart from other considerations which he had discussed in his opinion, "it would be contrary to the public policy of this State to hold that a child of twelve years, illegally employed . . . ,

39. Id. at 61, 43 N.E. 2d at 811.
40. Semanchuck v. Fifth Ave. & 37th St. Corp., 290 N.Y. 412, 49 N.E. 2d 507 (1943).
41. 290 N.Y. 329, 49 N.E. 2d 466 (1943).
42. Id. at 336, 49 N.E. 2d at 470.
43. Id. at 335, 49 N.E. 2d at 469.

could make an election to take compensation coverage for injuries which might be suffered by her in her illegal employment."[44]

Turning to cases where no statute was applicable, three cases, *Edkins v. Children's Hospital*,[45] *Tierney v. Dugan Bros.*,[46] and *Elliott v. New York Rapid Transit Corp.*,[47] were decided by the court in opinions written by Judge Conway.

In *Edkins v. Board of Education*, the plaintiff, a fifteen-year-old boy, was operating a power-driven lathe in the machine shop of a vocational high school when his sweater got caught in the machine. In attempting to extricate himself, he suffered the amputation of his right thumb. Section 256 of the Labor Law requires guards upon machines in factories and protective covering for workmen operating them. Although this statute was not applicable to the machine shop of a school, an expert witness at the trial testified that for forty-six years New York City schools had made a practice of supplying protective covering to students. In that state of the proof, Judge Conway wrote that the defendant Board of Education had violated its statutory duty to "purchase and furnish such apparatus, maps, globes, books, furniture and other equipment and supplies as may be necessary for the proper and efficient management of the schools and other educational . . . activities and interests under its management and control."[48] Judge Conway construed that statute, as follows:

"We think that the word 'equipment' in the statute includes not only books and pencils but protective clothing for child students similar to that necessarily furnished by employers to men performing the same machine shop operations in industry. . . . It seems clear that the Legislature did not intend that *children* in schools should be subjected to the danger of serious injury because of lack of equipment which it was requiring employers to furnish to *men*."[49]

In *Tierney v. Dugan Bros., Inc.*,[50] where an infant was injured when he started a truck that the defendant's driver had left parked at the curb while making house-to-house sales, the opinion by Judge Conway held the defendant responsible (despite the fact that the "attractive nuisance" doctrine does not obtain in this State) because the defendant was practically using the street as a platform for the conduct of its business and the resulting danger to children at play there was apparent. In the *Elliott*[51] case a helplessly intoxicated passenger had boarded the defend-

44. Ibid.
45. 287 N.Y. 505, 41 N.E. 2d 75 (1942).
46. 288 N.Y. 16, 41 N.E. 2d 161 (1942).
47. 293 N.Y. 145, 56 N.E. 2d 86 (1944).
48. N.Y. Education Law, § 868(4).
49. Supra note 45 at 509, 41 N.E. 2d at 76-77.
50. Note 46, supra.
51. Note 47, supra.

ant's elevated train, rode for about fifteen minutes and then alighted at a station only to discover, apparently, that he had gotten off at the wrong stop. Thereupon, he grabbed onto the outside of a car as the train was pulling out of the station. All this took place in the immediate presence of the conductor who, nevertheless, failed to stop the train promptly with the result that the passenger was carried, with his feet dangling, past the station platform and fell to his death in the street. On these facts Judge Conway wrote that a *prima facie* case of negligence had been made out, seeing that, among other things, the passenger's helpless condition and his position of peril required that the defendant not run on callously but that it act to avert the disaster. In reaching that result, he invoked both the doctrine of "last clear chance" and that of the carrier's duty, under the circumstances, to come forward with an explanation for the death of its passenger.

An extended treatment might be written about the Judge's approach to problems arising under the rent control laws,[52] his contributions to the law of the insurance contract,[53] to the law of evidence,[54] to the proper administration of the criminal law,[55] to the protection of the individual's right to a livelihood against arbitrary administrative action,[56] and to the law of charitable trusts.[57] However, this essay will conclude with a discussion of several cases dealing, respectively, with the civil rights of

52. See Matter of Hutchins v. McGoldrick, 307 N.Y. 78, 120 N.E. 2d 335 (1954) where he dissented from the court's ruling that ten small apartments, all, with one exception, without bathrooms, created by the conversion of a one-family house, were decontrolled housing accommodations under the residential rent control law. He said that the legislature did not intend to extend the benefit of the statute to landlords who create substandard housing accommodations. See also Estro Chemical Co. v. Falk, 303 N.Y. 83, 100 N.E. 2d 146 (1951).

53. Wilkes v. Equitable Life Assurance Society, 289 N.Y. 63, 43 N.E. 2d 812 (1942); Foley v. Equitable Life Assurance Society, 290 N.Y. 424, 49 N.E. 2d 511 (1943); Burr v. Commercial Travelers, 295 N.Y. 294, 67 N.E. 2d 248 (1946); Equitable Life Assurance Society v. Milman, 291 N.Y. 90, 50 N.E. 2d 553 (1943); Metropolitan Life Insurance Co. v. Schmidt, 299 N.Y. 428, 87 N.E. 2d 442 (1949).

54. Matter of Seigle, 289 N.Y. 300, 45 N.E. 2d 809 (1942); Crawford v. Nilan, 289 N.Y. 444, 46 N.E. 2d 512 (1943); Bloodgood v. Lynch, 293 N.Y. 308, 56 N.E. 2d 718 (1944).

55. People v. Phillips, 284 N.Y. 235, 30 N.E. 2d 488 (1940); People v. Rakiec, 289 N.Y. 306, 45 N.E. 2d 812 (1942); People v. Minet, 296 N.Y. 315, 73 N.E. 2d 529 (1947); People v. Snyder, 297 N.Y. 81, 74 N.E. 2d 657 (1947); People v. Levine, 297 N.Y. 144, 77 N.E. 2d 129 (1948); People v. Leavitt, 301 N.Y. 113, 92 N.E. 2d 915 (1950); People v. Gezzo, 307 N.Y. 385, 121 N.E. 2d 380 (1954). In People v. Palmer, 296 N.Y. 324, 329, 73 N.E. 2d 533, 536 (1947), in a dissenting opinion, he said: "The lower in type and more abject the prisoner, the more does he need protection in order that the administration of justice be evenhanded."

56. People ex rel. Patterson v. Board of Education, 295 N.Y. 313, 67 N.E. 2d 372 (1946); Hecht v. Monahan, 307 N.Y. 461, 121 N.E. 2d 461 (1954).

57. Matter of Potter, 307 N.Y. 504, 121 N.E. 2d 522 (1954).

individual citizens, the rights of organized labor, and the duties of professional people and of public employees.

In *People v. Feiner*,[58] the defendant, a college student, had been convicted of disorderly conduct for his refusal to obey a policeman's demand that he stop speaking at a street corner meeting. The intermediate appellate court affirmed the conviction and thereafter the Court of Appeals also affirmed, in an opinion by Judge Conway. Finally, the decision of the Court of Appeals was upheld by the United States Supreme Court,[59] over the dissent of Justice Black, who said:

"The record before us convinces me that petitioner, a young college student, has been sentenced to the penitentiary for the unpopular views he expressed on matters of public interest while lawfully making a street-corner speech in Syracuse, New York. Today's decision, however, indicates that we must blind ourselves to this fact because the trial judge fully accepted the testimony of the prosecution witnesses on all important points. Many times in the past this Court has said that, despite findings below, we will examine the evidence for ourselves to ascertain whether federally protected rights have been denied; otherwise review here would fail of its purpose in safeguarding constitutional guarantees."[60]

The right of the United States Supreme Court to review the facts in civil rights cases, indeed, seems to be clear, for the Court said in *Niemotko v. Maryland*,[61] that: "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions were founded."[62] The New York Court of Appeals has no such liberty to examine the facts, for, in criminal cases, the State Constitution gives it power to weigh the evidence only in capital cases.[63] In the light of that constitutional mandate, Judge Conway said in the *Feiner* case:

"The courts below have found, and we are bound by the finding, that the [arresting] officer was motivated solely by a proper concern for the preservation of order and the protection of the general welfare, in the face of an actual interference with traffic and an imminently threatened disturbance of the peace of the community.

"We are well aware of the caution with which the courts should proceed in these matters. The intolerance of a hostile audience may not, in the name of order, be permitted to silence unpopular opinions. (49 Col. L. Rev. 1118) The Constitution does not discriminate between those whose ideas are popular and those whose views arouse opposition or dislike or hatred—guaranteeing the right of freedom of speech to the former and withholding it from the latter. We recognize, however, that the State must protect and preserve its existence and, unfortunate as it may be, the

58. 300 N.Y. 391, 91 N.E. 2d 316 (1950).

59. 340 U.S. 315 (1951).

60. Id. at 321-3, citing Norris v. Alabama, 294 U.S. 587, 589, 590 (1935).

61. 340 U.S. 268 (1951).

62. Id. at 271.

63. N.Y. State Constitution, Article 6, Section 7.

hostility and intolerance of street audiences and the substantive evils which may flow therefrom, are practical facts of which the courts and the law enforcement officers of the State must take notice."[64]

The majority opinion in the United States Supreme Court approved the foregoing ruling, saying, in part:

"We are not faced here with blind condonation by a state court of arbitrary police action. Petitioner was accorded a full, fair trial. The trial judge heard testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. After weighing this contradictory evidence, the trial judge reached the conclusion that the police officers were justified in taking action to prevent a breach of the peace. The exercise of the police officers' proper discretionary power to prevent a breach of the peace was thus approved by the trial court and later by two courts on review. The courts below recognized petitioner's right to hold a street meeting at this locality, to make use of loud-speaking equipment in giving his speech, and to make derogatory remarks concerning public officials and the American Legion. They found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.

". . . When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious, ... This Court respects, as it must, the interest of the community in maintaining peace and order on its streets."[65]

Matter of Abeel (Ackeman)[66] involved a labor union and an employer who had, in 1945, submitted a dispute over wages and holiday and vacation pay to the National War Labor Board. The decisions of that Board were advisory only. Under Federal law the union had the right to strike. But at the hearing before the labor board, counsel for the employer said, "Keep the mill running until the Hearing Officer has made her report and the Board decided. Needless to say, we are bound by the decision of the Board." Four months later the regional board handed down a decision in favor of the union but the employer appealed to the National Board. Thereupon the employees went on strike. Three days later the employer sold all its assets. Subsequently, the national board upheld the regional board's decision. Four years later, in the dissolution proceeding under Section 105 of the Stock Corporation Law, members of the union filed claims against the employer, based on the awards of the

64. Supra note 58 at 401, 91 N.E. 2d at 130.

65. 340 U.S. at 319-320. For further expressions of his opinion on freedom of speech, see Judge Conway's opinion in People v. Hass, 299 N.Y. 190, 86 N.E. 2d 169 (1949), and his dissenting opinion in People v. Kunz, 300 N.Y. 273, 279, 90 N.E. 2d 455 (1949). The majority decision in the Kunz case was subsequently reversed by the United States Supreme Court (340 U.S. 290, 295 (1951)).

66. 302 N.Y. 479, 99 N.E. 2d 295 (1951).

War Labor Board. The Appellate Division, First Department, disallowed the claims, holding:

"In signing the usual form for submission of this dispute to the National War Labor Board, there was no apparent intention to grant to the Board or to its hearing officer more than customary jurisdiction in such cases. Directives of the National War Labor Board have been held by the federal courts to be advisory only, and not enforceable in courts of law . . . . Moreover, the purpose of the National War Labor Board was to aid in resolving industrial disputes without strikes during wartime. The conduct of appellants (claimants) in striking prior to the final decision by the National War Labor Board would have constituted a breach of the contract of submission if the instrument signed were to be construed as a submission to a legally binding arbitration."[67]

However, a unanimous Court of Appeals concurred in Judge Conway's opinion for reversal, in which he called attention, first, to the statement of counsel for the employer, quoted above, that the employer would be bound by the board's decision and second, to an admission by counsel for the employer, contained in the petition in the dissolution proceeding, that the parties had agreed to embody the board's decision in a collective bargaining contract between them. Upon these facts, Judge Conway concluded that "We are persuaded that the parties here construed their submission of differences by conduct and writing so that they became bound to abide by the decision of the board."[68] The opinion continued:

"It is urged that by going out on strike on October 6, 1945, and remaining on strike for either two or three days during the pendency of the appeal of the Company from the Regional Board of the National Board, the employees lost all right to any wage claims. There is no evidence of an agreement not to strike, and such an agreement should not be implied, in view of Executive Order No. 9017 which established the National War Labor Board. Paragraph 7 of the order provided: 'Nothing herein shall be construed as superseding or in conflict with the provisions of . . . the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 457, 29 U.S.C. 151 et seq. . . .'

"Section 163 of Title 29 of the United States Code Annotated provided during the period that the controversy was before the board as follows: 'Sec. 163, *Right to strike preserved.* Nothing in sections 151-166 of this title shall be construed so as to interfere with or impede or diminish in any way the right to strike. . . .'

"Thus, under the provisions of Executive Order No. 9017 and of Section 163 of Title 29 of the United States Code Annotated, the right to strike was expressly preserved to the employees. In view of the absence of any proof or evidence of a waiver of such right to strike, we conclude that the employees did not lose their rights to the wage awards granted to them by the board."[69]

Decisions like that in the *Abeel* case, however, should not be taken as indicating a bias in favor of, or a prejudice against, any particular group in the community. Thus, in dissenting from the Court's decision in

67. 277 App. Div. 404, 405, 100 N.Y.S. 2d 264, 265, 266 (1st Dep't 1950).

68. Supra note 66 at 484, 99 N.E. 2d at 297.

69. Id. at 485, 99 N.E. 2d at 297.

Martin v. Curran,[70] Judge Conway said that "the realities of present day trades-union organization"[71] require that such unions be treated by the law as legal entities for purposes of responsibility in tort. Rather, the mainspring of his judicial work appears to be his high concept of the office that he holds. His views in that regard can be appraised from some of the opinions in which he has expressed himself with regard to the duties of professional people in general, and public employees in particular. Thus, in *Matter of Bell v. Board of Regents*,[72] where a dentist who had split fees with a runner contended his suspension for "unprofessional conduct" was unwarranted because no specific rule or canon of the dentistry profession condemned such fee-splitting, Judge Conway said that:

"It seems to us that there is one course of conduct which in each and every profession is known as a matter of common knowledge to be improper and unprofessional. That is conduct by which, after a professional man has been licensed by the State, he enters into a partnership in his professional work with a layman, by the terms of which he divides with the latter, on a percentage basis, payments made by client or patient for professional services rendered."[73]

In one of the very first opinions he wrote for the Court of Appeals,[74] he rejected the contention of police officers that they were not subject to removal from office under Section 6, Article 1, of the State Constitution (effective January 1, 1939) for refusing to sign waivers of immunity and testify with respect to their official conduct prior to the effective date of the constitutional provision, holding that the People of the State had the sovereign right retroactively to impose more stringent requirements for the holding of public office. Finally, in a very recent case,[75] he had occasion to express himself with regard to the public employee's duty of loyalty. There teachers in the New York City school system had pleaded their privilege against self-incrimination in refusing to answer questions put to them by a United States Senate investigating committee as to whether they were or had been members of the Communist Party. As a result they were dismissed from their jobs under a provision of the New York City Charter providing for the forfeiture of his job by an employee of the City who refuses to testify, upon the ground of self-incrimination, concerning the property, affairs or government of the City or the official conduct of any employee of the City. Overruling the teachers' contention that the inquiry put to them by the Senate Committee did not relate to their official conduct as City employees, Judge Conway said:

70. 303 N.Y. 276, 101 N.E. 2d 683 (1951).
71. Id. at 294, 101 N.E. 2d at 693.
72. 295 N.Y. 101, 65 N.E. 2d 184 (1946).
73. Id. at 111, 65 N.E. 2d at 189.
74. Canteline v. McClellan, 282 N.Y. 166, 25 N.E. 2d 972 (1940).
75. Matter of Daniman v. Board of Education, 306 N.Y. 532, 119 N.E. 2d 373 (1954).

"In this Court we are all agreed that the Communist party is a continuing conspiracy against our Government. . . . We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official conduct of an officer or employee of the City of New York. Loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government. (See N.Y. Const., Article XIII, § 1; Education Law, § 3002; Civil Service Law, §§ 12a, 30; L. 1951, Ch. 233, §§ 1, 8). Communism is opposed to such loyalty. . . ."[76]

The foregoing opinions are some of many that Judge Conway wrote as an Associate Judge of the Court of Appeals. Extended editorializing about them would be futile; they speak for themselves.

Since he has now become the presiding officer of the Court, the bar and the public have good reason to look forward to more years of fruitful judicial labor by Chief Judge Conway.

76. Id. at 540-541, 119 N.E. 2d at 379.