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Frank H. Hiscock

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# CORNELL LAW QUARTERLY

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## CUTHBERT W. POUND: AN APPRECIATION

FRANK H. HISCOCK

Now that they have been terminated by his death, and I survey in their entirety my association and friendship with Judge Pound, perhaps I appreciate better than I did at the time how complete and intimate they were and what an ample opportunity I had to become acquainted with his fine personality and to witness the constant evidence of his broad and brilliant ability.

When death closed it with such startling suddenness last February, Judge Pound had achieved a career of great and varied activity, usefulness and honor, much of which had been passed in the discharge of the duties of public office conferred upon him by the People of the State. I shall briefly mention some of the more important of these activities.

After finishing his course at Cornell in 1887, he entered upon the practice of law; in 1894 he was elected to the State Senate where he served one term; in 1900 he was appointed a member of the State Civil Service Commission of which he subsequently became the President; in 1905-6 he acted as counsel for Governor Higgins; in 1906 he was appointed a Justice of the Supreme Court to fill a vacancy, to which position he was subsequently elected for a full term by the joint action of Republican, Democratic and Independence League parties; in 1915 he was appointed by Governor Whitman to serve as an auxiliary Judge of the Court of Appeals; in 1916 he was elected a regular member of that Court for a full term and in 1932, by the joint action of both of the great political parties of the State, he was elected its Chief Judge, a position which he held until retiring under the age limit in December, 1934.

And in addition to these activities, it is especially interesting to Cornellians to remember that from 1895 to 1904, he was a teacher in the Cornell Law School, and from 1913 until his death a member of the Cornell Board of Trustees, three times elected by the Alumni, and then elected by the Board to what is usually the more permanent membership of a Board member.

And still further, in addition to the duties which he discharged in all of these positions he wrote many articles and delivered many

addresses, the latter generally at professional gatherings where he was always an inspiring speaker and most welcome guest. It was at one of these assemblies held in his honor that he was speaking when he was fatally stricken.

There is abundant evidence that in all of these positions, Judge Pound so met and fulfilled his obligations as to win the confidence, admiration and respect of those whom he was serving and of those who were acquainted with his work, and to only a small portion of which I shall refer. Dean Charles K. Burdick of the Cornell Law School said of him: "Judge Pound possessed broad learning in the foundation and history of our legal system, constructive imagination, and power of terse and brilliant expression. He kept in close touch with current affairs, and understood how to adapt common-law principles to modern needs. It was these qualities that made him a great leader of a great Court." In a memorial presented to the Cornell Board of Trustees, in connection with his death, former Governor White, who served with him in the Senate, pays a warm tribute to his great worth and ability in that body and elsewhere. Justice Cardozo, his immediate predecessor as Chief Judge, characterized him as "a great figure in the judicial history of New York".

But the tribute to the character, ability and work of Judge Pound, which is most familiar and which will be widely regarded as convincing proof of his merits, was the constant promotion which was conferred upon him by the People of the State in his judicial career. He commenced as a Justice of the Supreme Court, discharging very important duties, but duties which, nevertheless, were those of primary and original jurisdiction. He finished as a member of the court of last resort in this State, which in the exercise of its appellate jurisdiction speaks the final word in the great body of litigation coming before it, and to the Chief Judgeship of which Court he was elected without controversy by the joint action of the two great political parties. This record speaks for itself. The People of the State did not confer upon him such distinction as this except in recognition and reward of real and outstanding ability and high character.

I cannot add anything of substance to the tributes which have been paid to Judge Pound. I can only confirm their justice, speaking in part from a viewpoint which is not available to many, and in so doing I shall first write of the services which he rendered as a Trustee of Cornell University and which were of so much importance to Cornellians.

The Board of Trustees of Cornell University is very remarkable in the manner of its composition. In fact, I doubt if it finds a coun-

terpart in any other University or College of the land. There are six different classes of Trustees—those selected by the Alumni, by the Board itself and by the Governor, representatives selected by the Faculty, a descendant of the Founder, and various officials, State and otherwise, who are *ex officio* members. It might naturally be expected that in a body of such heterogeneous composition, differences of opinion would arise in the solution of questions coming before it which would be so irreconcilable and fixed that they could only be settled by formal vote. And it might naturally be expected that these differences of opinion at times would lead to dissatisfaction and perhaps bitterness on the part of those who were defeated and disappointed. As a matter of fact, however, such has not been at all the history of the proceedings in and by the Cornell Board of Trustees during the many years of my membership. I should say that considerably more than ninety per cent of the problems which have come before it, quite controversial though they sometimes might be, have been settled by fair discussion and deliberation rather than by the force of a majority vote. No one, in my judgment, during the many years when he was a member of the Board, contributed more to this result and to the wisdom of its deliberations or was more carefully listened to than Judge Pound. With his quick mind, he analyzed and discussed fairly and sensibly the questions which were presented for disposition, occasionally injecting into his remarks a bit of humor which we all know does so much to relieve any tensity of a situation, and when he had finished his contribution to the deliberations, every other member felt that he had listened to a very wise, constructive and helpful Trustee. President Farrand, speaking of his services as a Trustee, has characterized his loss as irreparable.

Of course, Judge Pound's judicial services will be recognized as constituting the supreme achievement of his life. Naturally, and indeed necessarily most people, even members of the Bar, largely form their opinion of the ability and worth of an appellate Judge from his published opinions. That is practically the only way in which they can do it and from those opinions there gradually develops a common judgment and "speech of people" in respect of his characteristics, industry and judicial qualifications. There can be no question of the estimate which was formed of Judge Pound as the result of this test. His opinions are spread through more than fifty volumes of the reports of the Court of Appeals, extending over a period of practically twenty years. They are marked by a keen analysis of the facts and law which were involved in the cases in which they were written; his conclusions are logical and generally convincing; they are pro-

gressive without being radical or revolutionary; they are undoubtedly liberal in their interpretation of statute and constitution to the end of upholding legislative action, but after reading them, no one ought to have any thought that Judge Pound was in favor of amending, evading or abolishing the Constitution by any process of judicial interpretation or subversion; their method of expression is always forceful, oftentimes brilliant and classic.

I understand that in this number of the QUARTERLY there will be a comprehensive review of his opinions and I do not intend to infringe upon that review. Perhaps, however, without so doing I may say that there are two of his opinions which seem to stand out conspicuously because of the manner in which they foresaw and largely anticipated what were to become generally accepted views.

In a decision made and opinion written by him in 1910 in the celebrated *Ives* case, while a Supreme Court Justice, Judge Pound upheld the right of the Legislature to impose upon employers the obligation to compensate employees injured in the course of their employment even though the employer was without fault. That principle has now become so familiar that it goes practically unchallenged. But in 1911 the Court of Appeals said that such legislation was unconstitutional and reversed Judge Pound.

The second case to which I make reference is the one in the Court of Appeals in which in 1921 in behalf of the majority of a divided Court he wrote an elaborate and very strong opinion in connection with the enactment of the so-called Housing Laws applicable to New York City, in which he upheld the right of the Legislature in the face of a serious emergency to pass laws for the general welfare to protect tenants from landlords who were disposed to take advantage of the shortage of dwellings to exact exorbitant rents, even though such laws curtailed rights of private property and abridged freedom of contract. While that decision was in effect affirmed by the United States Supreme Court, it was the subject of very earnest controversy. People in 1921 had not become so used as they have in later years to "emergency" legislation.

I have said that almost the only opportunity offered to the Bar at large and to the public for judging of the ability and accomplishments of a Judge is through consideration of his published opinions, and that subjected to that test Judge Pound has been pronounced very able and outstanding. But to the associates of a Judge in an appellate court another opportunity, perhaps more reliable, is available for forming such an estimate of him, and that is observation and con-

sideration of the work which he does from day to day in the seclusion of the Court and especially in consultations. There doubtless are many who do not appreciate how important these consultations are, for it is there that cases are analyzed, the questions presented by them defined and discussed and conclusions reached which are subsequently embodied in the formal decisions of the Court, and which perhaps find expression in a written opinion. Efficiency and meritorious work by a Judge in these consultations require that he should have thoroughly and industriously studied the cases which are presented and be acquainted with the questions involved, that he should have a well considered understanding of the principles of law which seem to be applicable to their solution and that he should be able clearly and forcefully to express his views thereon, perhaps defending his own theories against the contrary ones of some associate and perhaps in turn questioning and attacking the opinion expressed by such associate in some case. And even then, no matter how carefully a Judge may have prepared himself to discuss the questions supposed by him to be presented by a case, there is always the chance that an unexpected proposition advanced by some associate may force him to engage in a discussion largely extemporaneous and to draw upon his general knowledge of legal principles—a trying test.

I am sure that there is no appellate Court where these consultations are more prompt, painstaking and thorough than in our Court of Appeals. Many times they are by no means mere academic discussions of general principles of law but are the earnest expression of differing and well considered opinions on fundamental and important questions which it becomes impossible or difficult to reconcile. While constant divisions of the Judges of an appellate Court may indicate lack of thoroughness of consultations and lack of a reasonable and proper attempt to harmonize conflicting views, too great unanimity in decisions might very well be regarded as denoting a lack of independent study and thought on the part of individual members and too much of a disposition to follow the easy course of accepting without adequate study and analysis the opinion of some other Judge.

During the long period extending from 1915 to 1927, session after session, month after month and year after year, I sat in these consultations with Judge Pound and through them would have learned, even if I had had no other source of knowledge and information, how quick minded, brilliant and able he was. His mind grasped with remarkable accuracy and quickness all the facts and the real questions presented by an appeal. He met all the requirements which I have mentioned. No unexpected view by an associate found him unequal

to its searching discussion. His facility of expression made him able to state questions as they appeared to him, clearly and forcibly, and his broad knowledge of the fundamental principles of law and his remarkable capacity for remembering decisions enabled him to bring to the support of his views, whether defending his own or questioning those of another Judge, a remarkable array of support. With his remarkable memory, it was no unusual thing to see him step back from the consultation table and from recollection rather than citation, take down from a shelf some case which furnished a precedent and authority for his contentions. Perhaps it was this constant and long continued association with, and observation of, Judge Pound in consultations which more than anything else made me appreciate and able to appraise at their just value his great learning and talents.

And in closing this necessarily incomplete and inadequate review of his judicial career, I would not fail to bear testimony to the personal affection which his associates had for him. This was beyond and in addition to the admiration and respect which they had for his great ability. It was the product of an intimate association with a great and fine personality extending in some cases through years. It was abundant and abiding.

The death of Judge Pound for his family and friends was a tragedy, all the more difficult to bear because it came so suddenly and unexpectedly. They suffered a loss which many of them will not live long enough to repair. But when we consider simply and solely our friend himself, one must doubt whether any ending of his life could have been happier or more acceptable. He was not the victim of any long sickness, he did not have a moment of conscious suffering. The end of his life and of his judicial career were practically coincident. There had been no impairment of his conspicuously attractive personality, no waning of his brilliant mind and ability. He was not compelled to make that transition from the judicial work which he loved so much to the exactions of some other form of professional activity and while we who knew him had no doubt that he would successfully meet those requirements he, himself, dreaded the experience. No passage of many years had caused that fading memory of him which so often befalls one who passes from the publicity of high official station to the retirement of private life. As he went from our midst he left behind a vivid remembrance, long to endure, of one who was a loyal friend, an always welcome companion, a most attractive personality and an extraordinarily able and outstanding Judge, and I think that we shall ask ourselves in vain the question, how could we have changed for the better such a termination of his distinguished career?