"Experience made him sage"

—John Gay

To Roscoe Pound was given an invaluable experience rarely granted to a legal philosopher and teacher, the experience afforded by a position upon a judicial tribunal of high rank. In April 1901 the Supreme Court of the State of Nebraska, then consisting of a chief justice and two judges, found itself confronted with a docket hopelessly in arrears. The legislature, coming to the aid of the court, created the Nebraska Supreme Court Commission. Nine commissioners were appointed by unanimous vote of the supreme court to prepare and submit opinions in over fifteen hundred cases which had accumulated in the court. The commissioners were organized into three “departments” each consisting of three members, one of whom served as chairman of his department.

Appointed as one of the original commissioners, Roscoe Pound, was assigned to the “Second Department”. During Pound's tenure as a commissioner, the members of the supreme court itself wrote almost no opinions. As the docket was called, the cases were assigned equally to the departments and the chairman of each department re-assigned these cases to its members. There followed the usual hearing,
orally and by brief, before the department, the consultation by its members, and the selection of one of their number by the chairman to write the opinion. Each opinion was brought before the department and, if approved, it was submitted to the supreme court. If the court was satisfied with the result and the reasons supporting it, the opinion was accepted and the case was so decided. On the other hand, if the judges, or any of them, disapproved of either the result or of the rationale upon which the result was founded, the opinion with their objection was returned and a new opinion was prepared. Of Thomas McIntyre Cooley it has been said, "he was a great judge but with only the opportunities afforded by a state tribunal". With equal truth, this may be said of Roscoe Pound. From the date of his appointment as a supreme court commissioner in April 1901 until his resignation from the commission in the winter of 1903, Pound wrote one hundred and three opinions, of which twenty-two were in reversal of judgments in the courts below and four in modification of their judgments. The opportunities which the supreme tribunal of the state of Nebraska, as it existed at the turn of the century, afforded to a creative jurist were scarcely adequate to reveal his potential.

6. Each of the departments would dispose of approximately twelve cases per week. Letter to the author from William G. Hastings (commissioner of first department).

7. By the spring of 1904 the accumulated cases were out of the way and the commission of nine members was discharged and a new one of only three commissioners established. Letter of William G. Hastings to the author. Since that time the membership of the Supreme Court of Nebraska has been increased to seven members, a chief justice and six associates. Neb. Comp. Stat. (1922) § 1066.

8. The following judgment upon Cooley as a judge is quoted at length because, on the basis of a complete reading of Pound's opinions, the statements with regard to judicial attitude and inherent limitations enforced by the tribunal of the time and place and the questions before it, might be with equal truth applied to Roscoe Pound, suaeis sui: "He [Cooley] was a great judge, as were his associates. He was a great judge with only the opportunities afforded by a state tribunal. Whatever he did in this field he did thoroughly well. But his chief title to distinction lay in his ability as an expounder of constitutional questions, and this he exercised as an author more largely than as a judge. Could he have had the opportunities that Marshall had, such was his grasp upon fundamental principles and such his ability for logical, forceful and exact statement that he would undoubtedly have been the equal of Marshall upon the bench. It is, however, with Judge Cooley as he was upon the bench and not as he might have been, that we have to deal. And it is no exaggeration to say that he was the ideal judge. He combined in a rare way the qualities that go to make up the judicial temperament. No one who appeared before him could forget the careful and painstaking attention with which he followed the argument of counsel. He was pre-eminently a good listener, and one always felt that his occasional questions were a positive aid in the development of the subject under discussion. He moreover always gave the impression that he was bringing to the consideration of the case his best thought and judgment. No one ever detected in him the slightest tinge of prejudice. He always preserved the judicial attitude." Hutchins, Thomas McIntyre Cooley in 7 Lewis, Great American Lawyers (1909) 431, 458.

9. These are found in volumes 61 to 69 inclusive of the Nebraska State Reports. See Cassidy, Dean Pound: The Scope of His Life and Work (1930) 7 N. Y. U. L. Q. Rev. 897, 910, where the number of opinions written by Pound is erroneously given as ninety-nine.
genius.\textsuperscript{10} Much of the litigation then in the court was concerned with comparatively simple questions of property law which required only the application of a fixed rule to accomplish adequate justice.\textsuperscript{11} The tribunal of which Pound was a member represented a state which, compared to its eastern sisters, was sparsely settled. Nebraska then was decidedly an agricultural community and the legacy of the pioneer was still everywhere in evidence.\textsuperscript{12}

Despite the inevitable limitations which characterized the justiciable questions before the tribunal at that time and in that place, an examination of the opinions written by Roscoe Pound affords an interesting and profitable insight into the evolution of his juristic creed. Even though Pound had not labored under the limitation of comparatively unimportant controversies, one should scarcely expect to find in any of these opinions, or in their aggregate, any full-blown statement of Poundian philosophy as it is known today. We are to remember that it was approximately a decade after Pound left the bench before he prepared a reasonably adequate statement of the scope and purpose of his juristic creed.\textsuperscript{13} But that the controlling attitudes, if not the formulated principles, of that creed were already operative during Pound’s career on the bench seems eloquently argued from the fact that immediately upon leaving judicial office, on the occasion of his inaugural as Dean of the College of Law at the University of Nebraska, he described in some detail the hopes and aspirations of his “new school of jurists”.\textsuperscript{14} It is significant to note that it was neither the years of teaching, nor the protracted reflections of a scholar that prompted the first call, but rather, it was prompted by the stern practicalities of adjudicating controversies in a court of law. How much of Pound’s philosophy is to be found expressed or applied in his judicial

\textsuperscript{10} Cf. Cassidy’s estimate: “Lawyers who have long admired cogency and lucidity of the style of Mr. Justice Holmes and of Lord Shaw of Dunfermline, will discover here opinions which are models of form and substance, of comprehensiveness and brevity.” \textit{Ibid}. The opinions are “cogent” and carefully prepared but, taken as a whole, it is somewhat extravagant to class them with the opinions of either Holmes or Shaw. To say this is not to say that, given the materials, Pound might not have produced opinions equal to those of Holmes and Shaw. It is, however, too much to expect that statues of fine marble be chiseled from inferior clay.

\textsuperscript{11} The wholly adequate justice which Pound seems to attain in the property disputes which came before this court appears to argue eloquently the desirability and the efficacy of his certainty by rule technique in disposing of property questions.

\textsuperscript{12} In 1900 the population of Nebraska was preponderantly rural, more than two-thirds of the people being farm-dwellers. \textit{Census of 1900}.


\textsuperscript{14} Pound, \textit{A New School of Jurists}, 4 \textit{U. of Neb. Studies} (1904) No. 3. See also Pound, \textit{Do We Need a Philosophy of Law?} (1905) 5 \textit{Col. L. Rev.} 339; \textit{The Need of a Sociological Jurisprudence} (1907) 19 \textit{Green Bag} 607; (1907) 31 \textit{A. B. A. Rep.} 911.
opinions? For the answer we look first to his juristic philosophy and then to the opinions themselves.

I. THE POUNDIAN PHILOSOPHY

The basic aim in the juristic philosophy of Roscoe Pound appears to be the balancing of security of society and the individual life. Viewing a developed body of legal precepts, which seem to be the most common instruments used in striking the balance thought to be desirable, Pound finds two characteristic elements, an imperative (enacted) element and a traditional (habitual or customary) element. Of course, these elements cannot be separated into mutually exclusive categories at any particular time or place. There is constant interplay between them, the traditional element becoming imperative through the transforming medium of legislation, and the imperative being incorporated into the body of the common law through the transforming medium of judicial decision. Coming to the more all-embracing view of jurisprudence, the philosophical jurist has long insisted upon a third element in law, the ideal element. Pound has defined it as a body of received ideals "of the end of law, and hence of what legal precepts should be and how they should be applied. . ." In the nineteenth century the significant question was which of these three elements commanded an exclusive significance. From Pound comes the comforting answer that all three are significant and that no adequate discussion of basic juristic problems is possible unless account be taken of the precept element, the traditional element (which in practice amounts to the traditional art of the lawyer's craft—the authoritative traditional tech-

15. "Pound was only thirty-three when he left the Commission and I doubt if he had then developed a philosophy of law. He was already interested in legal history, but I think he rather avoided putting it much into his opinions; for at that time and place it was not advisable to be known as a 'high-brow.'" Letter to the author from Charles Sumner Lobingier, Esq., who served as a commissioner of the Supreme Court of Nebraska during 1902 and 1903. In a conversation with the writer, the late Professor Edwin H. Woodruff reported the late Frank Irvine, who was a supreme court commissioner in Nebraska from 1893 to 1899, as holding an opinion substantially similar to Judge Lobingier's.

16. Cassidy says: "Seven opinions may be noted as illustrative of the whole." He then proceeds to discuss six of them. It is difficult to understand just why these were singled out for discussion. They are interesting cases on their facts but they do not represent Pound's best technique. Indeed, if they are intended to serve as illustrations for the extravagant claim with reference to Pound's place as a judge beside Holmes and Lord Shaw, they shoot wide of the mark. If six (or seven) cases were to be discussed as illustrative, certainly a more fortunate selection out of the one-hundred and three could have been made. Cassidy, Dean Pound: The Scope of His Life and Work (1930) 7 N. Y. U. L. Q. Rev. 897, 910-914. For a complete table of Pound's opinions see Appendix, p. 327 infra.


nique of finding the grounds of decision in the mass of precepts), and the body of received ideals with regard to the end and purpose to be served by the legal order.

In dealing with the precept element in law, Roscoe Pound has analyzed and classified the varied types of legal precepts as follows:

1. **Rules** (in the narrower sense)—precepts attaching a definite detailed legal consequence to a definite, detailed factual situation.

2. **Principles**—authoritative points of departure for legal reasoning, employed continually and legitimately where cases are not covered or are not fully or obviously covered by rules in the narrower sense.

3. **Conceptions**—authoritative categories to which types or classes of transactions, cases, or situations are referred, in consequence of which a series of rules, principles and standards become applicable.

4. **Doctrines**—systematic joining of rules, principles, and conceptions with respect to particular situations or types of cases or fields of the legal order, in logically interdependent schemes, whereby reasoning may proceed on the basis of the scheme and its logical implications.

5. **Standards**—general limits of permissible conduct to be applied according to the circumstances of each case.\(^{20}\)

While in rules Pound finds "the bone and sinew of the legal order",\(^{21}\) it is through the standard that modern law chiefly realizes a desirable individualization of application, particularly in the province of law governing conduct and the control of enterprises.\(^{22}\) Such standards are typified in the law of negligence by "the reasonable, prudent man"; in the field of public utilities by the standard of "reasonable service and reasonable facilities"; in relations of trust by the "fair conduct" of the fiduciary.

Examining the status of the ideal element in law, Dean Pound finds that the first ideal of the legal order is the simple ideal of keeping the peace. Successively the ideal of the legal order has been the maintaining of the social status quo (evolved by Greek philosophers), reversion to the ideal of keeping the peace (the Dark Ages), readoption of the ideal of maintaining the social status (the Middle Ages), and the ideal which prevailed through the nineteenth century, i. e., the ideal of a maximum of free individual self-assertion as the greatest good (Post-Reformation-Kantian). Today, we are told, that ideal is yield-

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\(^{21}\) Pound, *Hierarchy of Sources and Forms in Different Systems of Law* (1933) 7 Tulane L. Rev. 475, 486.

\(^{22}\) Id. at 485.
ing as a result of the persistent criticism of received ideals by the social-philosophical and sociological schools.23

One of the attempts to formulate a new ideal as to the end of law Pound finds in an endeavor to substitute an idea of cooperation for the once dominant idea of free competition.24 Another attempt to formulate a new ideal lies in the conception of law in terms of social engineering.25 When Pound conceives of law as social engineering, he is regarding law and its administration as a part of a much wider process of social ordering, functioning through courts and administrative agencies with the aid of legal precepts serving as partial guides. This task of social ordering presupposes a sincere effort to avoid, or at least to ameliorate, collisions resulting from the conflict of interests. All the varied activities of the legal order—the efforts of courts, administrators, legislatures, jurists—are to be directed toward the adjustment of relations, the compromise of conflicting claims, the securing of interests by determining boundaries wherein each may be asserted with a minimum of friction, and the finding of means whereby a greater number of claims may be satisfied with a sacrifice of fewer. If law is viewed as social engineering, its end is conceived to be the satisfaction of all demands and the securing of all interests with a minimum of conflict so that the means of satisfaction may have the widest possible distribution.

A perplexing problem which has received much consideration from Roscoe Pound is the relation of law and morals.26 Sweeping through history he finds that in the earliest stage (preceding lawyer's law) law and morals were identified; when strict law (lawyer's law) became dominant, law and morals were sharply differentiated. In the age dominated by natural law and equity a standard of rationalistic morality was made to comprehend not only conduct in general but the formulated legal precept as well, whereas in the nineteenth century, an age of legal maturity, law and morals were usually contrasted, the dominant analytical jurist of the time contending that morals were within the province of the legislator and outside the province of the jurist. In the contemporary attitude of his own sociological school


24. It was this ideal which seemed, in the main, to inspire the legislation of N. R. A. days toward relaxation of the rigid operation of the anti-trust laws to the end that cooperation rather than competition stood as the ideal to be encouraged. See Reuschlein, Aluminum and Monopoly: A Phase of an Unsolved Problem (1939) 87 U. of Pa. L. Rev. 599, 511, n. 9.

25. Pound, An Engineering Interpretation in Interpretations of Legal History (1923) 141-165.

26. The attitudes of three traditional schools of jurisprudence, analytical, historical, philosophical, is developed in his Law and Morals (2d ed. 1926).
Pound finds much to suggest a revival of the natural law jurist's attitude with its attendant subordination of jurisprudence to ethics. The desired relationship between morals and law he defines as a situation wherein morals are regarded as an evaluation of interests and law as a delimitation of interests in accordance with such a valuation.\footnote{Pound's view of the relationship of law to morals is essentially that of John F. Dillon who wrote: "Theoretically, and for many purposes practically, lawyers must discriminate law from morality, and define and keep separate and distinct their respective provinces. But these provinces always adjoin each other; and ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live." \textit{Dillon, Laws and Jurisprudence of England and America} (1895) 17.}

But in this attitude is the fundamental weakness of Pound's creed. For unless the immutability of certain principles is admitted, such as the right to life and property—a philosophy results which is only half moral, and that means immoral. It is perfectly possible to admit the immutability of certain fixed principles and adjust our economy to necessary changes; that is the happy and peculiar genius of "natural law with a changing content." There is something faintly suggestive of the Victorian compromise in Pound's unwillingness to admit the complete identification of law with morals. Such a compromise as Pound suggests is dangerous. Admittedly, it may not be dangerous in Pound's own hands, but in the hands of men less scrupulous than he and less deft than Holmes, the possibilities are alarming.\footnote{Pound himself has given it that "Happily, men seldom practice exactly what they preach. Yet what they preach has no little effect on what they practice." \textit{Pound, Contemporary Jurisprudential Theory} (1940) 9. For an able development of the thesis that complete identity of the legal with the moral, that certain broad absolutes and immutables are basic to the security of democracy, see Lucey, \textit{Jurisprudence and the Future Social Order} (1941), 16 Social Science 211, who says, at 216, "There is no use talking about fundamental rights from a positivistic or pragmatic point of view because there are no fundamentals or permanents, not to mention inalienables, where there are no absolute values,—where the important of today can be the unimportant of tomorrow."}

As suggested by Sir Henry Maine and Judge Dillon, Pound considers that "all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change."\footnote{"Law must be stable and yet it cannot stand still," \textit{Pound, Interpretations of Legal History} (1933) 1.} Out of such a conflict has come, to him, the particularly vital problem of the province of rule and discretion. The traditional attitude of the analytical school regarded justice according to law necessarily to mean judicial justice according to formula.\footnote{Pound, \textit{Justice According to Law} (1913) 13 Col. L. Rev. 696, (1914) 14 id. at 103.} This attitude, supported by the political dogma of the separation of powers, which the courts viewed with sanctity, made for a stout antagonism toward any growth in administrative justice.\footnote{It is an antagonism readily explicable in a polity which gloried in "a government of laws and not of men."} To Pound, the problem of rule and discretion does not involve a rigid exclusion of one or the other from the
legal system, but rather a recognition of the unique value of each; judicial justice is restrained by authoritative legal precepts; administrative justice is potent with possibilities for individualization. A proper adjustment between the two types effects justice.

The question as to whether law is or ought to be certain, in whole or in part, has provoked much heated discussion in recent years. Pound divides the domain of the legal order into two zones. In the one, certainty, which is attendant upon rules, will be the dominant legal characteristic, while in the other discretion and flexibility should prevail. Certainty is held to be highly desirable and readily possible in the fields of property law (inheritance and succession, interests in property, conveyancing) and the law of commercial transactions, but flexibility is indispensable in the field of law which deals with the more intimate problems of human conduct (e.g. domestic relations, torts). To substantiate his contention Pound cites the success with which codes and uniform state laws have achieved their purpose in the law of property, the law of succession, and commercial law; whereas they have achieved little or nothing in the law of torts. Administrative tribunals which have been constructed to individualize the application of law deal with cases involving the moral quality of individual conduct in various enterprises rather than with matters of property and commercial law.

The peculiar merit of Roscoe Pound's philosophy has been that it pierced the nineteenth century discussion of rights to something far more tangible and it has given us his celebrated theory of interests. Pound posed the question: why do men seek to enforce rights, if it is not for the interests which are behind them? Under a jurisprudence of conceptions, every right is like every other right; the infringement of any one right no matter of how little substantial value it may be, is as serious a matter as the infringement of any other right, since it threatens to menace all rights. Such a method of reasoning originated when there was real need for the security of individual rights from the arbitrary interference of political power. It succeeded to a marked degree in checking the designs of oppressive governments. Jhering, than whom none was more hostile to a Begriffsjurisprudenz, nevertheless imposed a duty upon the party injured to assert his right, even where, materially, it would not pay to do so. In defense of his right, the individual defended the whole body of law, and thus contributed

32. The urge for individualization has been perhaps even more pronounced on the Continent. So recent German Juristic writing abounds with discussion of Freie Rechtsfindung.
to the maintenance of social order.  Jhering regarded individual rights from the social standpoint; for him they were but a means whereby society realizes its end. In this way Jhering paved the way for Pound's theory of social interests.

Pound and Jhering agree that the sanction of a right lies not in the right itself, but rather in what is behind the right, i.e., the interest which gives rise to the social demand for the enforcement of the right. It is important to note that social interest not only can dictate the enforcement of a right, but it can also delimit or even abridge the right. Whether the social interest demands enforcement or delimitation must depend upon the peculiar conditions of a particular society at a given time and place. So viewed, it becomes the primary function of law to guard the public against arbitrary action in the exercise of power—whether that power be political, religious, cultural or economic. The significant question is: where should the line be drawn between the reasonable and the arbitrary exercise of power? Pound creates this test: does it secure the greatest number of interests with the least possible sacrifice of other interests?

In Pound's own words:

"An interest is a demand or desire which human beings either individually or in groups seek to satisfy, of which, therefore, the ordering of human relations civilized society must take account.

"The law does not create interests. It classifies them and recognizes a larger or smaller number; it defines the extent to which it will give effect to those which it recognizes, in view of (a) other interests, (b) the possibilities of effectively securing them through law; it devises means for securing them when recognized and within the determined limits."  

He divides the interests which law is to secure into three groups: individual, public, social. An outline of his tentative classification of interests follows:

A. Individual Interests

i. Personality:
   a. The physical person
   b. Honor- Reputation
   c. Privacy and sensibilities
   d. Belief and opinion

ii. Domestic Relations

37. Id. at 61-69.
3. Substance:
   a. Property
      Succession and testamentary disposition
   b. Freedom of industry and contract
   c. Promised advantages
   d. Advantageous relation with others
      (1) Contractual
      (2) Social
      (3) Business
      (4) Official
      (5) Domestic
   "The Right of Association"

B. Public Interests
   i. Interests of the state as a juristic person:
      a. Personality
      b. Substance
   ii. Interests of the state as guardian of social interests

C. Social Interests
   i. General security:
      a. Safety
      b. Health
      c. Peace and order
      d. Security of transactions
      e. Security of acquisitions
   ii. Security of Social Institutions:
      a. Domestic
      b. Religious
      c. Political
      d. Economic
   iii. General Morals
   iv. Conservation of social resources:
      a. Use and conservation of natural resources
      b. Protection and education of dependents and defectives
      c. Reformation of delinquents
      d. Protection of the economically dependent
   v. General Progress:
      a. Economic progress:
         (1) Freedom of property from restrictions on sale or use
         (2) Free trade
         (3) Free industry
         (4) Encouragement of invention
b. Political progress:
   (1) Free criticism
   (2) Free opinion

c. Cultural progress:
   (1) Free science
   (2) Free letters
   (3) Encouragement of arts and letters
   (4) Encouragement of higher education
   (5) Improvement of aesthetic surroundings

6. The Individual Life

The significant aspect of these interests is that they have no fixed values which are eternal and immutable. On the contrary, their values are subject to change with time and place. Generally, each interest might be said to rise and fall in value in direct proportion to the demand of the time and place. The Poundian theory of interests seems unique in that it is applicable to all types of situations, simple and complex. Much of the merit of the theory lies in the fact that an emphasis of one interest does not imply a neglect of the others. The theory of social interests is not dogmatic in its pretensions; it admits the utility of doctrines ancient and new, but it confines such doctrines to the particular sphere in which they duly serve the social good. Under this theory the ancient and oft-maligned doctrine of the natural rights of man looms as the most effective tool to be employed in a country where the chief interest, for the time being, to be secured is freedom, political, religious or economic. But the difficulty is that the theory of interest does not attach sufficient importance to the doctrine.

Every court, before it can make a final disposition of any controversy which may come before it, must weigh and balance social interests. It seems clearly possible to state even individual interests in terms of social interests. Pound observes that

"In weighing individual interests in view of the social interest in security of acquisitions and security of transactions, we must take account of the social interest in the human life of each individual, and so must restrict the legal enforcement of demands to what is consistent with a human existence on the part of the person subjected thereto." 88

As a pragmatist Pound came inevitably to study functionally the limits of effective legal action. 89 Formerly, jurisprudence frequently

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fixed logical and philosophical limits to what law could be expected to do effectively. Sociological jurists interest themselves in the practical limitations upon the scope of law. They state that these limitations inhere in the nature of our legal machinery and are not to be attributed to logically imposed or philosophically demonstrated barriers. Again the Poundian faith in the efficacy of effort appears; we are told that with improved legal machinery the limits of effective legal action may be extended. But even after all is done that can be done to reform procedure and set legal structure aright, much will remain which cannot be done effectively through the legal process. Just what it is which cannot be achieved through law must be determined through a theory of values. Where legal interference causes sacrifice of values, reliance should be placed upon other devices of social control. In such cases, the best that law can hope to do is to safeguard and preserve the kind of social order in which these other devices can operate with satisfactory results.

Pound was one of the first to emphasize the need of devising an effective legal apparatus for ascertaining the social facts involved in law-making and in the process of judicial decisions. He has pointed to the work of European ministries of justice in this direction and has recommended similar agencies in the United States as a possible means of rectifying the present wasteful and ineffective systems. Such ministries of justice or similar agencies would undertake the sorely needed study of the functioning of our legal institutions, the application and enforcement of law in order to discover reasons for the failure of law to do adequate justice, and would attempt to devise means for meeting new situations which constantly arise. Such an agency, it is expected, would also furnish intelligent guidance to those who make and to those who administer our laws.

Pound has demonstrated the significant change which has come over contemporary society, whereby Sir Henry Maine's famous formula


41. Dean Pound regards such a ministry "needful as it is" nevertheless, "a long way off." "It is out of line with the genius of English-speaking peoples... Moreover, the public would be likely to assume that the work of such ministries would be vitiated by politics, and without the confidence of the public they could achieve little." Pound, What Use Can Be Made of Judicial Statistics (1933) 12 ORE. L. REV. 89, 95. The most eloquent plea for a Ministry of Justice in this country has been made by Mr. Justice Cardozo, A Ministry of Justice (1921) 35 HARV. L. REV. 113.

42. For a trenchant criticism of some current methods of gathering factual data about these matters, see Pound, What Use Can Be Made of Judicial Statistics (1933) 12 ORE. L. REV. 89.
“from status to contract” has been undermined and a new relational scheme, a “new feudal system” has resulted in which “status” again has come to be an honored concept.

To him, one of the most promising opportunities of legal science lies in the effort it should and must make to direct creative effort toward new methods, new precepts and new machinery for preventive justice. While Pound states that good work has been done through juvenile courts and administrative agencies for probation and parole, for the most part, accomplishments of preventive justice in criminal law are wrought by extra-legal agencies. In the field of civil law the development of preventive justice has progressed more satisfactorily; yet even here study of its possibilities has only commenced.

As a result of our emergence from the simple, pioneer, agricultural society of the past, there exists the colossal problem of individualizing the application of law to meet the needs of a complex industrial, urban society. Rules were adequate to serve the demands of justice in a community where points of contact between men were relatively few, but in the great urban centers of today, when individual claims conflict and overlap, delicate discriminations become necessary. These cannot be achieved readily through the medium of rules. This demand for individualization of treatment has resulted in the rapid multiplication of administrative boards. Whereas much of the traditional legal science of the past denied all else save the logical application of clearly defined precepts, contemporary juristic thought recognizes the desirability and the need of an administrative element in the legal system.

43. “If then we employ Status, agreeably with the usage of the best writers, to signify those personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.” MAINE, ANCIENT LAW (Pollock’s ed. 1906) 174.


45. Pound has drawn an analogy to medical treatment. He points out that the medical practitioner today is more given to the treatment of individual patients than to the treatment of categorical diseases. In the field of law, he argues, individualization of treatment is equally desirable. “It is no more possible to treat negligence in the abstract than rheumatism in the abstract.” The Theory of Judicial Decision (1923) 36 Harv. L. Rev. 802. It is likely that Pound is following SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT (Jastrow’s trans. 1911) 8, 10, who characterizes the classical theory of criminal law as seeming somewhat as if a physician were to maintain that there are only diseases and no patients.

46. Pound, Growth of Administrative Justice (1924) 2 Wis. L. Rev. 321. In his earlier writing Pound was much less willing to admit the desirability of having the administrative element play a prominent part in the legal order. See Executive Justice (1907) 55 Am. L. Rev. 137; Justice According to Law (1913) 13 Col. L. Rev. 656, (1914) 14 id at 103; The Revival of Personal Government (1920) Ga. Bar Ass’n Rep. 113, (1917) 4 N. H. Bar Ass’n Proc. (N. s.) 13; Administrative Application of
Much of Pound's effective early work was done in the field of procedural reform. He has constantly insisted that

"If we demand that our courts do things, we must give them power to do things—we must set them free to do things . . . we must not make the substantive law nugatory by loading the courts with procedural requirements. We must cease to prescribe the details of procedure by legislation." 47

His views with regard to the general direction which reform of judicial procedure should take are best summarized in his four canons.

1. Legal procedure is a means, not an end; it must be made subsidiary in the substantive law as a means of making that law effective in action. That procedure is best which most completely realizes the substantive law in the actual administration of justice.

2. There should be no such thing as an individual procedural right—i.e., a recognized absolute claim to a procedural advantage merely as such.

3. The ideal of mechanical disposition of one narrow issue or of one simple application for a specific remedy should be replaced by an ideal of complete disposition of entire controversies in one proceeding in which all the remedies of the legal system are available in order to give full effect to the substantive rights of the parties.

4. The ideal of appellate procedure should be not a separate proceeding in a distinct tribunal but an application for rehearing, new trial, vacation or modification, as the case may require, made in the same cause before another branch of the same tribunal." 48


47. (1933) 17 J. Am. Jud. Soc. 7.


A. B. A. J. 664.
Of course, the betterment of the American bar has received much of Pound's thought and effort. He has been thoroughly familiar with its ills; among the chief of these he has labelled traditional antagonism of the lawyer to reform. He has essayed, however, an explanation of the hostile attitude of the layman toward the lawyer. Professional prestige dictates that the lawyer cease to decry the futility of legislation and that as a lawyer he undertake the careful and studied reform of the legal system before the public loses patience and lays violent hands upon the complacent legal order. Pound is, of course, an advocate of the organized bar. For the salvation of the profession, he looks largely to our university law schools; in them he sees the only unifying agency which is ready to hand. 49

II. THE OPINIONS

A. Zones of Certainty and Zones of Discretion

One salient aspect of Pound's philosophy which has received much attention during the recent years is his insistence upon the recognition in the law of two areas, the one embracing the law of property and commercial transactions and the other dealing with the more intimate problems of human conduct. In the former, certainty born of comparatively rigid rules is deemed desirable; while in the latter, flexibility, individualization and discretion are to be preferred. 50

Pound is perhaps guilty of overstatement when he says "every promissory note is like any other. Every distribution of assets repeats the conditions that have recurred since the Statute of Distributions." 51 It may be significant that he has nowhere repeated the idea in such extremely dogmatic form. Of this Jerome Frank has said: "Fee simples (interests in real estate) or bills of exchange often come before the courts owned or claimed by men who have been negligent or deceitful. An examination of the facts of a case relating to business


50. Pound's best statement of the division of law into zones of certainty and zones of flexibility will be found in his INTRODUCTION TO THE PHILOSOPHY OF LAW (1922).

51. POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 142.
transactions often reveals that the case is *sui generis*." But if Pound is guilty of making everything like everything else, is not Frank equally extravagant in insisting that everything is different from everything else? When Frank says "often", how often does he mean? Many ("often") of these cases may come as *sui generis* but if most of them do not, Pound stands uncontroverted. Despite the audacity displayed in recent years in the collection of judicial statistics, Frank is not likely to be in a position to show the falsity of Pound's position by an array of statistical or factual data, or if one prefers, vice-versa. In this connection it is interesting to recall Professor Llewellyn's comment: "In its eager attack on the illusion of complete certainty it (Law and the Modern Mind) under-emphasized what certainty there is; in its perception of the importance of particulars it well-nigh denies the importance of generals. But what of that? Are pathfinders to have no prerogative of exaggeration?" If pathfinders are to be permitted some "prerogative of exaggeration", ought not Frank to pardon the initial exaggeration by Pound on the ground that Pound too was doing a bit of path-finding—indeed, finding paths upon which Frank might later tread? A comparison of Pound's opinions dealing with questions of real property law with his opinions in cases wherein strictly personal relations are involved, seems to indicate that Pound, as judge, was differentiating between the two types of legal questions in the court-room quite sometime before he formulated the classification into a definite tenet of his juristic philosophy.

With respect to Pound's early insistence upon a strict interpretation of the rules in questions involving real property, one may examine his opinion in *Knight v. Denman* where he reversed the judgment of the district court awarding title to certain land to the defendant upon his plea of adverse possession. In his reversal, Commissioner Pound's technique is simple. While the facts are set out with care, the point of focus is not upon them, but upon the rule prescribing the factors necessary to adverse possession. The opinion does not proceed upon a possible point of differentiation between the plea of adverse possession entered by the defendant in the case at bar, and of the one entered by the litigant who may have entered a similar plea in a preceding case, on a factual basis. On the contrary the technique employed merely asks successively: what are the rules requisite to sustain a plea of adverse possession? Did the defendant make out a case

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52. Frank, Law and the Modern Mind (1930) 209.
53. Law and the Modern Mind: A Symposium (1931) 31 Col. L. Rev. 82.
54. Sympathetic to Pound's apportionment of the domain of law between the field of rule and the field of discretion see Dickinson, Legal Rules: Their Application and Elaboration (1931) 79 U. of Pa. L. Rev. 1052, 1080.
55. 64 Neb. 814, 90 N. W. 863 (1902).
squarely under those rules? The court below had sustained an instruction to the jury to the effect that, if the owner of lands does not bring an action against one who wrongfully withholds possession within ten years after his cause of action accrues, he loses his right to bring or maintain such action. Pound denied the correctness of the instruction, observing that the error in giving an incorrect or misleading instruction is not cured by giving other instructions which state the law correctly where the several instructions are inconsistent or conflicting. Where the rule governing is so well settled, Pound held it error for the court not to state definitely the rule that defendant’s “possession must be continuous, open, notorious, exclusive and adverse during the full period of ten years.” An analysis of the case reveals that justice was achieved.

In Dunn v. Thomas, the plaintiff, a lower riparian owner, was claiming by virtue of adverse user the right to receive water from defendant’s (upper riparian owner’s) land. The suit was brought in 1901; the plaintiff had maintained a ditch on defendant’s land ever since 1890. In 1899, two years before this suit, he had extended the ditch materially. The lower court had dismissed the petition. In affirming the decision below, Pound resorted to the expected technique, i.e., the application of the tests long since established by a rigidly fixed and formal rule:

“In order to acquire an easement by prescription, the adverse user must not only be continuous in point of time, but also substantially identical, during the whole statutory period. . . . In consequence, one who seeks to acquire an easement of maintaining a ditch over another’s land by adverse user, must maintain it without material change of location for the full statutory period.”

The dominance of the fixed rule in property transactions is likewise illustrated in Battelle v. McIntosh which reversed and remanded a decree dismissing a petition for foreclosure of certain tax liens. Pound held that the defendants were estopped to question the lien of the county for taxes and that the plaintiff’s assignor became entitled to assert such lien by reason of payment of the taxes named in the certificate, on the ground that “The case appears to come squarely within the well settled rule that one who purchases subject to a lien can not question its existence or validity in subsequent proceedings.”

56. Id. at 816, 90 N. W. 863, 864 (1902).
57. 90 Neb. 683, 96 N. W. 142 (1903).
58. 61 Neb. 684, 96 N. W. 143.
59. 62 Neb. 647, 87 N. W. 361 (1901).
60. Id. at 649, 87 N. W. at 362. Pound is aided in arriving at his decision in this case by the facts that: 1) not only is the rule announced embodied in the case law of Nebraska (Arlington Mill and Elevator Co. v. Yates, 57 Neb. 286, 77 N. W. 677,
Again the result of the case seems eminently just, for the defendant had purchased the property in question at a judicial sale, and the tax in question had been duly certified and deducted in the appraisement as a lien and, further, while the purchaser had bid somewhat more than two-thirds of the appraised value of the property, yet his bid was considerably less than the gross appraised value.

A similar application of definite and certain rules is made in the case of *Davis v. Kelly* 61 where the defendant had borrowed two thousand dollars, giving as security for the loan a mortgage upon certain real estate. When the holder of the mortgage sought to foreclose, defendant attempted to defeat the foreclosure by claiming the mortgaged house as his homestead at the time of executing the mortgage. In reversing the lower court which had allowed the exemption claimed, Pound admits that the rule requiring “occupancy” of the homestead is sometimes construed to mean “constructive occupancy”; 62 but of far more significance than that admission is his statement with regard to the method of construing such rules:

“It is true that actual occupancy is not absolutely required in every case where a homestead is claimed. Nevertheless, occupancy is the test established by the statute, and it is only through liberal construction to meet the beneficent ends of the statute that certain substitutes therefor have been permitted.” 63

Again the insistence upon the general rule requiring occupancy operated satisfactorily, for in this case the claimant and his family actually lived upon other land belonging to him. The claimant had said that he and his family did not live upon the premises in which they claimed a homestead because they were financially unable to furnish the home, but, as a matter of fact, the family did furnish a house which the husband owned and in which they were then living.

A rigorous application of fixed rule to the field of commercial transactions occurs in the commissioner’s opinion in *Baker v. Union Stock Yards National Bank*. 64 In that case the bank’s indorsee of a promissory note signed by the defendant, Baker, as accommodation maker, brought suit upon the note. In affirming a judgment for the bank, the court summarily stated the rule:

(1898); Farmers Loan and Trust Co. v. Schwenck, 54 Neb. 697, 74 N. W. 1063 (1898), but also in a statute making the possession of a tax certificate presumptive evidence of the regularity of all prior proceedings (Bartelie v. McIntosh, 62 Neb. 647, 690, 87 N. W. 361, 362); and 2) there exists a general presumption in favor of official acts. *Ibid.* 61. 62 Neb. 642, 87 N. W. 347 (1901).

62. “Constructive occupancy” is defined in the opinion as temporary absence without abandonment or a bonafide present intent and preparation to occupy followed by actual occupancy within a reasonable time. *Id.* at 644, 87 N. W. 347.

“That a promissory note was executed by way of accommodation is a good defense as against the payee, but not as against the indorsee, from whom money was obtained by virtue thereof, even though he had notice of the relation of the parties to each other.”

Here too, just decision attends the application of the rule. In the Baker case, the indorsee was a corporation and the notice of the relation of the parties to each other was the notice of the corporation’s cashier, one McPherson. The bank had parted with its funds, representing the interests of depositors and stockholders, not McPherson’s.

All these opinions present simple problems. The technique by which they are handled is the technique which seems best adapted to a field of law which must always find itself subservient to the general interest in the security of acquisitions and the security of transactions.

The employment of this technique in cases involving property and commercial transactions has been somewhat derisively referred to as “a slot-machine theory”. To thus name the technique does not seem to detract from the fact that, on the basis of a factual analysis of the cases involving “property” and “commercial and business transactions” in the light of the agreed social policy to be served in each instance, the employment of this technique to that type of controversy seems to have resulted in the greatest degree of justice demonstrably attainable. Whether he did so or not, Pound might well have learned the wisdom of employing rule-technique to these types of cases from his own experience upon the bench. On the other hand, the realist might remind us that the cases really prove nothing about Pound’s technique because we cannot be certain that any judge decides cases for the reason he records on paper. Then, too, it may be that these cases, because of their simple character, do not establish overmuch.

B. The Balancing of Interests

More fundamental in his philosophy than Pound’s insistence upon zones in the law, a zone of certainty and a zone of discretion, is his

65. Id. at 805, 89 N. W. at 270. And see Pound’s opinion in Roblee v. Union Stock Yards National Bank, 69 Neb. 180, 95 N. W. 61 (1903), holding that incorporation of a collateral agreement in a promissory note, which requires payment to be made of uncertain sums at uncertain times before maturity, and thus renders it impossible to say how much, if anything, will be due at maturity, renders the note non-negotiable. The rule which flatly settled matters in the case is this: “In order to be negotiable, an instrument must bear on its face entire certainty as to the amount to be paid at maturity, without regard to extrinsic evidence.” Id. at 183, 95 N. W. at 62.


67. “In such cases [i.e. involving property and commercial or business transactions] the courts should employ judicial slot-machines, the facts being inserted in one end of the machine and the decision, through the use of mechanical logic, coming out at the other end.” Frank, Law and the Modern Mind (1930) 208.
recognition that in every justiciable dispute involving a right, the claims of the litigants are grounded upon the interests which the parties and the state have in the dispute. That is the point of departure of Pound’s juristic technique, and it is against this fundamental background that the division into the rule-certain and the discretionary fields is to be made. The eminent critic who spoke of slot-machine theories spoke from an incomplete understanding of the theory as a whole. To denounce Pound’s argument for certainty in some fields of the law without taking cognizance of the initial operation in the judging process, the weighing of interests, is to caricature his philosophy quite unjustly. It is to label Pound’s appeal for certainty an appeal for certitude when it is not that at all. The first operation in the adjudication of any case is the process of evaluating interests in terms of the greatest social good. It is true that where interests of property are dominant upon both sides of the dispute, experience has taught us that the social good invariably requires certainty. But where interests of property and interests of human life and liberty clash, under Pound’s theory, if the protective certainty which ordinarily attaches to interests of property must give way to flexibility and discretion in order to effect justice, no violence whatever is done to any fixed legal formula. It is true that black may not always be too clearly separated from white, but it comes with ill grace from those who glory in legal flux to pronounce a scheme of classification useless merely because it is not absolutely rigid or because a specific rule may not work in every situation.

During his years upon the bench, Pound had before him several cases involving a conflict between claims of individuals and a public service corporation or a municipality. These afforded excellent opportunities for him to apply his theory of social interests in the solution of concrete controversies. In one case, the plaintiff applied for an injunction to restrain the defendant telephone company from mutilating or injuring trees planted in the street adjacent to her property. The lower court had given judgment on demurrer, denying the injunction. Pound, in affirming the district court, concluded that, though the use of the street for the telephone poles was not ordinary use but an added burden, although there was an injury, or taking of property, a suit for damages at law would compensate the plaintiff adequately. In arriving at his decision it seems clear that he consciously weighed the conflicting

68. Pound would subscribe whole-heartedly to Mr. Justice Holmes’ observation that “Certitude is not the test of certainty. We have been cock-sure of many things that were not so.” Holmes, Natural Law (1918) 32 Harv. L. Rev. 40, reprinted in COLLECTED LEGAL PAPERS (1921) 310, 371, THE DISSERTING OPINIONS OF MR. JUSTICE HOLMES (Lief ed. 1929) xiii, xiv; and to his other observation “Delusive exactness is a source of fallacy throughout the law.” Truax v. Corrigan (dissenting opinion), 257 U. S. 312, 342 (1921).

interests behind the claims asserted and concluded that the unfortunate circumstance that the telephone poles and wires necessitated removing a few branches of Lenora Bronson’s trees must not interfere with the interest in the maintenance of efficient telephone service in the community. After making this evaluation, Pound reads the scales thus:

“We do not think public utilities of this kind ought to be suspended until every abutting owner upon the streets or highways to be used has been duly appeased. If he has been substantially or appreciably injured, an action at law will ordinarily afford him full compensation. If he has not, no opportunity for extorting an unreasonable settlement should be afforded him.”

In Re Anderson involved a complaint against violation of an ordinance of the city of Omaha, enacted pursuant to an enabling statute, which prohibited the circulation and distribution of printed dodgers, handbills and circulars upon the sidewalks and in other public places. The ordinance was challenged as unconstitutional because in contravention of Section 5, Article 1 of the state constitution, providing that “every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty.” The court sustained the constitutionality of the ordinance as a legitimate police regulation “intended to further the public health and safety by preventing the accumulation of large quantities of waste paper . . . which might occasion danger from fire, choke up and obstruct gutters and catch-basins, and keep the street in an unclean and filthy condition.” The commissioner here weighed the individual’s interest in his claim to a right of free speech against the public interest in health and safety; the balance decidedly favored the public interest. This technique of balancing the conflicting individual and public interests is implicit in virtually every decision under the police power. Pound states:

“In all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached.”

In Sturdevant v. Farmers and Merchants Bank, one Ross, who was about to bring an action of replevin against Sturdevant Brothers,

70. Id. at 117, 93 N. W. at 203.
71. 69 Neb. 688, 96 N. W. 149 (1903).
72. Id. at 689, 96 N. W. at 150. It is interesting to compare the results of the balancing of interests by the Supreme Court of the United States (whose result was so different from that which Pound reached) in Schneider v. State, 308 U. S. 147 (1939), the effect of which has been to unsettle judicial opinion in all those states where anti-littering ordinances have been sustained with little hesitance as valid exercises of police power. See, among the more interesting comments upon Schneider v. State, (1940) 53 Harv. L. Rev. 487; (1940) 40 Col. L. Rev. 531; (1940) 28 Geo. L. J. 649, 702; (1940) 24 Minn. L. Rev. 570.
73. 62 Neb. 472, 87 N. W. 156 (1901).
applied to Wood, a lawyer and a director, though having nothing to do with the active management, of the defendant bank, to furnish surety upon undertaking an accommodation. Wood referred him to Armstrong, cashier at the bank, who took an indemnity bond running to the bank and executed the required undertaking in the bank's name, signing it "Farmers and Merchants Bank of Rushville, by W. D. Armstrong, cashier." The sheriff accepted this undertaking and delivered the property to Ross. The trial resulted adversely to Ross. The property having been sold and the alternative judgment for its value being unsatisfied, suit was brought on the undertaking. The district court gave judgment for the defendant bank, and this Pound affirmed. He argued that the cashier was powerless to obligate the bank on an undertaking in replevin where the bank had no interest; that where an obligation is so clearly *ultra vires* that no one can be misled, no estoppel arises; and that a bank will only be estopped where it has acquired and retains property by virtue of the contract. The technique of balancing interests is evident, and the interest of depositors and stockholders is found to outweigh the interest of the party accommodated:

"Where so extravagant a liability is incurred without benefit and as a mere accommodation, the interests of depositors and stockholders have to be taken into account. It would be highly impolitic to permit the money of depositors, placed in a bank on the faith of its capital, to be imperiled by sanctioning such transactions. If the act is of a nature which public policy, or the very nature of the corporation, prohibits it from doing, there could be no ratification." 74

C. Toward a Simplified Procedure

Another important tenet of Pound's philosophy is the need and wisdom of procedural simplification and reform, 75 the subordination of the mere "etiquette of justice" to justice, and the discouragement of technicality where there is no necessity for it. 76 Not until the beginning of Roscoe Pound's academic career was the public supplied with his systematic exposition, but it is apparent from his opinions that

74. Id. at 475-6, 87 N. W. at 158. For another illustration of the judicial interest—balancing technique as employed by Pound on the bench, see Dodge County v. Diers, 69 Neb, 361, 95 N. W. 602 (1903).


76. "Undoubtedly, one cause of the tendency of scientific law to become mechanical is to be found in the average man's admiration for the ingenious in any direction, his love of technicality as a manifestation of cleverness, his feeling that law, as a developed institution, ought to have a certain ballast of mysterious technicality." Pound, The Etiquette of Justice (1908) 3 Proc. Neb. Bar Ass'n 231, 232.
as a supreme court commissioner he had already acquired a definite attitude toward the ills which beset the adjective law.

_Lydick v. Chaney_ serves to illustrate the commissioner's opposition to the type of procedure which insists upon doing by indirection that which may be more efficiently and more justly done by a direct method. Lydick as executor for Matthews had submitted his final report to the county court. Upon examining his report, the court found two bequests had not been paid and directed the executor to pay them. The executor having failed to comply with the order, execution was levied on his lands. The executor sought to enjoin the levy. The bill for an injunction was dismissed by the district court; Pound affirmed the dismissal. He indicated that the legatees had two possible means of enforcing payment of the bequests, either by decree of execution directly against the executor or by the suit on the executor's bond. His reason for allowing a direct levy was that to do by indirection what might be directly done was not only unfair to the legatees but tended to multiply litigation and to delay justice as well. He disposed of the case simply with the observation:

"But if the liability of the executor may be enforced directly, the parties ought not to be relegated to a separate action unless the statute so required. We think the decree of distribution is enforceable by a simpler method wherever the executor is able to respond."  

In accordance with the ideal of disposing of a controversy completely, in so far as possible, with one trial, was Pound’s inclination to allow the pleadings to be amended. As a result, where the defendant was guilty of an omission of essential averments in a cross-petition, it was held that the omission might be cured by allegations in the answer which amounted to an admission of facts upon which the right to relief depends.  

77. 64 Neb. 288, 89 N. W. 891 (1902).
78. The opinion contains an able and exhaustive exposition of the probate jurisdiction of the county court in Nebraska.
79. 64 Neb. 288, 291, 89 N. W. 891, 892 (1902); See also Pound’s opinion in Harlan County v. Whitney, 65 Neb. 195, 90 N. W. 993 (1902).
80. "The ideal of mechanical disposition of one narrow issue or of one simple application for a specific remedy should be replaced by an ideal of complete disposition of entire controversies in one proceeding in which all the remedies of the legal system are available in order to give full effect to the substantive rights of the parties." Pound, _The Canons of Procedural Reform_ (1926) 12 A. B. A. J. 541, 545. Cf. "Only too frequently in the past have procedural rules been regarded as ends in themselves upon whose rigid altar has ultimate justice been sacrificed. Having been presented with a brief, simple set of Rules of Procedure [speaking of the New Federal Rules], they should be construed as avenues to justice and not dead-end streets without direction or purpose." Laverett v. Continental Briar Pipe Co. (E. D. N. Y. 1938) 25 F. Supp. 80, 81.
But like most good things, the privilege of amending may at times be abused. This Pound recognized. In one case a bank sued the maker and endorser on a note, and service was had upon the endorser by leaving a summons at his house in Douglas County. An alias summons issued thereon to Buffalo County was served upon the maker. The maker appeared and answered to the merits but later set up the defense of no jurisdiction over his co-defendant for the reason that the latter was a resident of Illinois and had no residence in Douglas County at the time of the service of summons. Pound, in affirming the district court’s judgment for the bank, pointed out that while the defendant might properly raise the defense set up in the amended answer by answer in conjunction with other defenses, a special appearance being unnecessary, he was, nevertheless, under a duty in such a case to plead the want of jurisdiction as soon as called upon to answer. To permit the defense to be raised by amended answer after the court had prepared to devote itself to the merits, savors of obstruction, frustration and surprise.  

In a case where the plaintiff, who had been appointed guardian to an aged man weak of mind, brought suit to set aside a conveyance of real estate by his ward to a brother-in-law, and failed to allege specifically that he had been appointed guardian though the fact appeared plainly enough, Pound said:

"So long as the defect is merely a lack of definiteness and precision in essential allegations, not a complete absence thereof, it should not be considered at this time."  

423, 91 N. W. 398 (1902), holding that independent action for an injunction in a cause already pending is not maintainable where adequate relief may be had by motion in the original cause. Cf. "The time has gone by when amendments on the trial are to be viewed with suspicion and granted grudgingly. If it appears that the proposed amendment tends to bring the real controversy between the parties fairly before the court, the amendment should always be allowed, opportunity being given to the opposing party to meet it in case of surprise." Winslow, C. J. in Mallon v. Tonn, 103 Wis. 365, 369, 157 N. W. 1993, 1999 (1916). For a generous endorsement of this attitude toward amending by Judge Clark see his HANDBOOK OF CODE PLEADING (1928) 431. So many of these procedural decisions of Pound suggest the spirit of the New Federal Rules of Civil Procedure. See Rule 15; see also HOLTZOFF, NEW FEDERAL PROCEDURE AND THE COURTS (1940) 50.

83. Bennett v. Bennett, 65 Neb. 432, 436, 91 N. W. 409, 410 (1902). See also Abbot v. Campbell, 69 Neb. 371, 95 N. W. 591 (1903), holding that the word "instrument" imports a writing and hence a verification by an attorney, in an action upon an instrument for the payment of money only, is not defective because it fails to state expressly that the instrument sued on is in writing. "Notice pleading" as the ideal to be sought has received wide and learned endorsement. Thus Clark says: "The aim of pleadings should be therefore to give reasonable notice of the pleader’s case to the opponent and to the court. This does not go as far as the technical notice pleading, since it requires notice of the pleader’s entire cause, not merely that he has a claim. The notice to the court is perhaps the more important, for in general the opponent knows enough about the case to relieve us of worry about him." HANDBOOK OF CODE PLEADING (1928) 30. Sounding a similar note, see Pound, Review of CLARK ON CODE PLEADING (1928) 38 YALE L. J. 127, 129; Report of Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost of
In the great majority of his opinions, Pound amply illustrated that he regarded procedure as the servant and not the master of substantive law. In *Leigh v. Green*, the plaintiff brought an action to quiet title to certain real estate claiming title on the basis of prior attachment proceedings. The defendant's claim was based on proceedings more recently had by the foreclosure of tax liens. Since this proceeding was in rem, the plaintiff contended that the court had failed to acquire jurisdiction over the land because it was inadequately described. Although it was evident that the description was wanting in exactness, it was clear exactly which land was meant, so Pound refused to deny a remedy for that mere breach of etiquette, saying:

"A great many titles depend upon foreclosure proceedings based on service by publication. If no reasonable person can be misled by a description, we ought not to imperil titles by criticising it overminutely."

The plaintiff also claimed as a matter of right, that he should have been personally served and since he had not been so served that he had been denied due process of law. This Pound denied. He pointed out that the procedure was anything but summary; it required all proper persons to be made parties to the suit if known, or due notice to be published upon showing by affidavit if they were not (as in this case), and in the proceedings wherein proof is made of levy and sale, any interested person might intervene:

"The opportunities afforded to all persons affected to make known their claims are ample. They have no right to lie by and suffer the taxes to get many years in arrears, without exercising any diligence to protect their claims."

Inasmuch as this procedural claim gave rise to a federal question, the case was appealed. The United States Supreme Court squarely affirmed the commissioner's decision.88

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84. "Legal procedure is a means, not an end; it must be made subsidiary to the substantive law as a means of making that law effective in action. That procedure is best which most completely realizes the substantive law in the actual administration of justice." Pound, *The Canons of Procedural Reform* (1926) 12 A. B. A. J. 541, 543.

85. 64 Neb. 533, 90 N. W. 255 (1902), aff'd 193 U. S. 79 (1904).

86. 64 Neb. 533, 540, 541, 90 N. W. 255, 257 (1902).

87. 64 Neb. 533, 546, 90 N. W. 255, 260 (1902).

Gibson v. Hammang involved a review of the trial court's refusal to cancel a conveyance of properties procured by undue influence from an aged widow, much weakened by illness, who lived in a remote jurisdiction far from her Nebraska properties. The appellee invoked the rule that the findings of fact of the district court are not to be disturbed on appeal if there is evidence sufficient to sustain them. Pound forcefully illustrated his doctrine that procedural rules should be employed as means and not as ends in themselves. He stated that this rule is entirely of judicial origin, intended to promote justice by leaving the determination of questions of fact to those best situated to reach a sound conclusion. This case was heard almost entirely upon depositions involving transactions in another state so that the trial judge did not know the parties or witnesses. The reason of the rule did not operate on the facts before the court. Since injustice would result if the rules were allowed to dictate the decision, Pound held that it was his duty to review the facts and to reach an independent conclusion. He reversed the judgment of the district court.

Pound had no sympathy whatever with the attempt by a trial judge to force the "certain ballast of mysterious technicality," inevitably attaching itself to the pleadings, upon a helpless jury. In reviewing a case in which the judge instructed the jury upon the question of the burden of proving "the material allegations" of an answer setting up an affirmative defense, without setting out the issues involved but merely referring the jury to the pleadings, Pound declared that

"The pleadings are supposed to be drawn in a more or less artificial and technical style, addressed to the understanding of trained judges. The instructions are supposed to be drawn in a plain, direct and simple style, addressed to the understanding of laymen. Hence reference to the pleadings instead of statement of the issues directly, is considered a reprehensible practice, and may be ground for reversal unless the error appears to have been without prejudice in the particular case."

To Pound's avowed ideal of a simplified procedure, we may attribute his judicial construction of statutes so as to minimize, wherever possible, procedural formalities. In construing a Nebraska statute which governed probate cases, he declared formal pleadings to be discretionary rather than mandatory. His decision was justified by social economy.

89. 63 Neb. 349, 88 N. W. 500 (1901).
90. 63 Neb. 349, 351, 88 N. W. 500, 501 (1901).
92. In the immediate case the judgment of the district court was affirmed since it was deemed that there was no prejudice from the error. Murray v. Burd, 65 Neb. 427, 428, 91 N. W. 278, 279 (1902).
"It is well known that the expense incident to administration of estates is always large. The evident purpose of the statute is to dispense with formalities wherever reasonably possible, in order to keep down the costs." 93

*Van Every v. Sanders* 94 illustrates the satisfactory result which the technique of balancing interests secured in the determination of the question: did the plaintiff state a cause of action? This was a suit in equity to set aside a judgment for alleged fraud whereby the plaintiff was induced not to make a defense to the action. The plaintiff, however, did not allege that the judgment had operated, or does operate, or will operate to his injury. The lower court sustained a demurrer. In affirmance, Pound weighed the interest of the plaintiff in the alleged violation of his rights against the public interest in discouraging retrial and review upon mere procedural claims. 95 He concluded:

"Nothing is better settled than that equity will not interfere with a judgment on a mere showing of a nominal or technical violation of plaintiff's rights. . . . In consequence it would seem clear that a petition for relief against a judgment, which goes no further than to allege the rendition thereof, without stating its nature or setting forth facts showing that it operates or might operate to the prejudice of the plaintiff in some substantial particular, does not state a cause of action." 96

Illustrative of Pound's conviction that there should be no such thing as an individual procedural right, i.e., a recognized absolute claim to a procedural advantage merely as such, 97 is his decision that a grantee of real estate should not be estopped by the mere words of a conveyance from asserting the invalidity of an apparent lien existing at the date of the transfer. He argued that

"'incumbrances' meant valid incumbrances, and the covenants and recitals in their deed did not preclude them from insisting that the assessment in question had no legal standing as a charge upon the property." 98

94. 69 Neb. 509, 95 N. W. 870 (1903).
95. Cf. "... it should be for the court, in its discretion, not for the parties to vindicate the rules of procedure intended solely to provide for the orderly despatch of business, the saving of public time, and the maintenance of the dignity of tribunals; and that exercise of judicial discretion in such cases should be reviewable only for prejudicial abuse." Pound, *The Canons of Procedural Reform* (1926) 12 A. B. A. J. 541, 544.
96. 69 Neb. 509, 510, 95 N. W. 870 (1903).
In accord with the same conviction is the commissioner’s opinion in Stewart v. Rosengren.\(^9\) In that case the plaintiff, a lawyer, brought an action in Lancaster county against his client Rosengren, a resident of Saunders county, upon a contract. He joined Anderson, another client who lived in Lancaster county, as party defendant. While the plaintiff had separate and distinct causes of action against each, he had definitely assured Anderson “not to worry”. In indicating that Anderson was a mere nominal defendant, having been joined collusively for the purpose of acquiring jurisdiction over Rosengren and that there was no identity of obligation, Pound observed that the entire purpose of the code provision governing jurisdiction would be defeated if “jurisdiction over residents of other counties may be obtained in actions upon contracts by the easy device of misjoinder of causes of action,” that “such a course savors too much of fictitious proceedings by ac etiam and latitat for a modern court,” and that “courts are instituted to try actual controversies and have no time to waste on moot causes or fictitious proceedings.”\(^{100}\)

In his later writing Pound has often paid deference to Dean Wigmore’s felicitous phrase, “the sporting theory of justice”\(^{101}\) only to deprecate much of the undesirable practice that the phrase embraces.\(^{102}\) Even during his days on the bench he spoke in this vein. In holding that a deposition regularly taken and filed in a cause but not used by the party taking it may be offered and read by the other party whether he participated in taking it or not, he declared:

“The common law originally was very strict in confining each party to his own means of proof, and, as it has been expressed, regarded a trial as a cock-fight, wherein he won whose advocate was the gamest bird with the longest spurs. But we have come to take a more liberal view and have done away with most of those features of trials which gave rise to that reproach.”\(^{103}\)

\(^{100}\) Id. at 447, 448, 450, 92 N. W. at 587, 588.
\(^{101}\) Quoted in Pound, Criminal Justice in America (1930) 163. Cf. “Mr. Healy in the course of the argument made an allusion to the struggle between advocates in Court as a game. He complained that something said or done was ‘not cricket’, ‘was not playing the game’ . . . I think it more dignified and more illuminative to take the analogy of a struggle of war, in which each contestant relies not merely on the troops he can bring into the field, but also on the strategy with which they are handled.” Dodd, J., in Flanagan v. Fahy, [1918] 2 Ir. R. 361, 373, and, “. . . the judge must cease to be merely an umpire at the game of litigation. Often he is little more. This, to be sure, is in part the continuance of a tradition, inherited from the spirit of gentlemanly sportsmanship which dominated the administration of British justice. But it has been intensified, instead of lessened, by the spirit of strenuous struggle and unrestrained persistence which drives the bar of our country to wage their contests to the extreme of technicality.” Wigmore, Evidence (2nd. ed. 1923) 209.
\(^{102}\) Pound, Criminal Justice in America (1930) 163 et seq. and his many articles on procedural reform.
\(^{103}\) Ulrich v. McConaughey, 63 Neb. 10, 20, 88 N. W. 150, 154 (1901).
D. Toward a Better Bar

Even as a judge, Pound had begun his crusade for a careful, capable and thoroughly trained bar. One finds numerous opinions in which he does not hesitate to call counsel severely to task for lack of care and diligence in preparing the pleadings or for failure adequately to comprehend the issues in order to place them before the court. The following statement is typical:

“We have stated the difficulties involved in an endeavor to ascertain what rulings are to be reviewed with some detail, because such cases come before us much too often. Counsel are retained and paid to present their clients’ cases in such form that this court may know wherein their rights have been infringed, and in what manner. We can not be asked to do their work for them.”

In one case where plaintiff was suing for the cancellation of a check given for certain municipal bonds upon which he had bid “subject to our attorney’s opinion as to the legality of the issue,” Pound, in sustaining the cancellation, emphasized the point that plaintiff’s lawyer had been subject to a protracted and severe cross-examination

“from which it appeared that he was a young man, of no long experience in the profession, but trained at a law school of high standing and possessed of as much experience and practice as might well be expected under the circumstances.”

E. The Hierarchy of Precepts

Although Roscoe Pound’s hierarchy of legal precepts did not appear in its completed form until a few years ago, it would seem

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104. Ketelman v. Chicago Brush Co., 65 Neb. 429, 430, 91 N. W. 282, 283 (1902). “We are strongly inclined to think that this case ought to be disposed of summarily, for lack of assignments of error presenting anything which the court can review.” Pound, in Kingman v. Davis, 63 Neb. 578, 579, 88 N. W. 777, 778 (1902). “This cause has given the court a great deal of trouble, because of the condition of the pleadings and the many questions to which the peculiar course by which the issues were made up has given rise.” Pound, in Solt v. Anderson, 67 Neb. 103, 105, 93 N. W. 205 (1903).

105. Thurman v. City of Omaha, 64 Neb. 490, 495, 90 N. W. 253, 254 (1902). Where, on appeal, able counsel had supplanted incompetent counsel below, Pound felt it his duty not to permit the record to stigmatize the able counsel who had newly come upon the scene: “It may be proper to say that the able counsel who now appear for the plaintiff in error seem to have had no part in the proceedings in the lower court till after issues had been made up and two trials had been had, and that they were limited on the third trial to the issue as to the value of the stock. We presume that some of the points presented were in a measure, forced upon them.” Hargreaves v. Tennis, 63 Neb. 356, 363, 88 N. W. 486, 488 (1901).

106. Pound, "Hierarchy of Sources and Forms in Different Systems of Law" (1933) 7 Tulane L. Rev. 475, 482-486, enumerating (1) Rules, (2) Principles, (3) Concep-
that he was differentiating between certain of these precept elements in his technique on the bench thirty years before. True, the cases point only to a distinction between rule and principle, for which almost no originality can be claimed. But it is important that a realization seems to have begun with Pound at this time of the fact that there were different forms of precepts, and that the shadowy and blurred areas lying about "rule" and "precept" called for peculiarly elastic treatment. At a subsequent date, an articulate nomenclature, which was evolved as definition, embraced the distinguishing features of the present hierarchy. In rationalizing this suspicion with regard to the diversity of the precept element, he realized that law must not and ought not to be rigidly fixed. In a suit by subsequent stockholders, who had acquired their shares and their interest in the corporation from the alleged wrongdoers through prior mismanagement, Pound held that the plaintiff was not in a position to complain of such prior mismanagement. He saw clearly the value of a technique sufficiently elastic to shift from one precept form to another in the interests of justice, as the situation might require.

"To permit persons to recover through the medium of a court of equity that to which they are not entitled, simply because the nominal recovery is by a distinct person through whom they receive the whole actual and substantial benefit, and that nominal person would, in ordinary cases, as representing beneficiaries having a right to recover, be entitled to relief, is a perversion of equity. It turns principles meant to do justice into rules to be administered strictly without regard to the result."

107. "Because the inequitable conduct of Barber shocks the conscience of a chancellor is no reason why he should give his conscience a further shock by allowing Funkhouser and his associates to recover money to which they have no legal or equitable claim." Pound, in Home Fire Ins. Co. v. Barber, 67 Neb. 644, 664, 93 N. W. 1024, 1031 (1903).

108. "They are not the work of lawmakers nor of courts. They come from lawyers, usually from writers and teachers, and are best formulated in doctrinal writing.

In practice the hierarchy of forms is less likely to be observed in case of principles. Where they come into play choice of starting points is the decisive consideration, and this choice is seldom authoritatively fixed." Pound, Hierarchy of Sources and Forms in Different Systems of Law (1933) 7 Tulane L. Rev. 475, 484.

109. "These are precepts attaching a definite detailed legal consequence to a definite, detailed state of facts. If one likes, they are definite threats of definite, detailed official action in case of a definite, detailed state of facts." Pound, note 108 supra at 482.

In *Williams v. Miles* 111 Pound observes that principles are that form of the precept element which serves as the source of rules (in the narrow sense): 112

"We can not think, and we do not believe this court has ever understood, that the legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require." 113

The opinion in *Meng v. Coffee* 114 also illustrates the utility of a sound understanding of the respective natures of principles and rules and of their proper perspective in the hierarchy of precepts.

**F. Master of the Facts**

There are several opinions which demonstrate Pound's tendency to individualize, where possible, the treatment of a case. 115 In certain of these decisions his technique has been to describe carefully the fact situation and then to indicate that these facts constitute a peculiar situation which in the interests of justice requires that the case be removed from the scope of a fixed rule; 116 in others to show that the factual situation may have changed during the time elapsing between a first and second trial; 117 or in others to insist that a fiction be pierced and that the stubborn facts which lie behind the fiction be recognized. 118

In numerous opinions, Pound takes cognizance of the economic conditions of the time, and there seems little doubt but that the eco-

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111. 68 Neb. 463, 94 N. W. 705 (1903). The opinion contains an exhaustive study of the law in Nebraska governing subsequent wills made and lost. The pointed criticisms in Pound's opinion are commended by Van Devanter, J., in *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116 (1912).

112. See notes 107 and 108 supra.

113. 68 Neb. 463, 470, 94 N. W. 705, 708 (1903). Italics added.

114. 67 Neb. 509, 93 N. W. 713 (1903).

115. "Analyses and abstract conceptions that serve us well in the legal securing of interests of substance, where cases are alike and the economic order admits of no individualization, are vain as anything more than organizings and rationalizings of experience when applied to the individual human life." Pound, *The Theory of Judicial Decision* (1923) 36 Harv. L. Rev. 940, 945, (1924) 2 Can. B. Rev. 443, 448. See also Pound, Introduction to Saleilles, *The Individualization of Punishment* (Jastrow's trans, 1911) xvii.


nomics of a given situation at times dictated his decision. *Boggs v. Boggs* \(^{119}\) presents a tale familiar enough to those of us who have watched events since 1929. In that case, Pound refutes the allegation of undue influence exercised upon a testator by his wife by demonstrating that the testator had in mind a fixed sum which his wife was to receive at his death and that the depression of 1893 had reduced his fortune to approximately one-half of its original amount so that, in order to assure his wife the sum he had long desired her to receive, a new will eliminating other legatees became necessary.\(^{120}\) When Pound was confronted with a case involving a business enterprise about which, like most jurists, he might be expected to know but little, we find him mastering the economics and the mechanics of that enterprise. As a result his opinions include convincing expository essays on public tax sales and the dilatory procedure of tax collection in Nebraska,\(^{121}\) the planting, storage, manufacture and marketing of chicory,\(^{122}\) and the manufacture of dandruff cure,\(^{123}\) to mention but a few.

G. The Comparative and Historical Methods

Roscoe Pound’s interest in the history and the present application of principles through a study of comparative legal systems is self-evident.\(^{124}\) One who served contemporaneously with him as a court commissioner in Nebraska has said that Pound had developed an interest in legal history while on the bench.\(^{125}\) His repeated narration of the history of the immediate question for adjudication with which
his opinions supply us demonstrates the truth of that statement. One interesting case gave Pound a chance to do research work in the canon law. In *Bonocum v. Harrington*, the bishop sought to compel the defendant priest to relinquish his parish. The question at issue was whether the priest was removable at the behest of the bishop as a guest in the diocese or, because *incorporated* therein, whether he was entitled to a due hearing. Ordinarily, courts will not review the judgments or acts of the governing authorities of a religious organization in regard to internal matters for the purpose of ascertaining their regularity or accordance with the discipline and usages of the organization. The commissioner said:

"We have only to turn to the annotations of our public statute books to see that scarcely less law is made by construction and interpretation than by direct legislative enactment. In such a case as this there would be greater danger that the ideas of the court would run counter to those of the fathers of the church, and make laws by construction which were never intentionally adopted.

"Each religious organization must determine its own polity, and be the judge of its own laws . . . we must not forget that contentious methods of investigation are largely English, that the Roman system, from which the church has derived its procedure, has always been and still is to a large degree inquisitorial. . . . We must not forget that ideas and methods which seem strange to us are often older than those which, from familiarity, we are prone to think part of the order of nature." Accordingly, the court affirmed the finding of the Bishop of Lincoln that the defendant was a guest in the diocese.

Inasmuch as Pound's approach often led him carefully to review the history and evolution of the law governing the problem at hand, there were many times when his researches revealed that in the decision of the controversy before him, he was likely to have an enviable opportunity to remove confusion, to reconcile, distinguish or repudiate conflicting authorities and to fix the Nebraska law governing the question. In *City of Lincoln v. Morrison*, after reviewing the early English decisions governing the mingling of trust funds with trustee's general assets, he considered three prior Nebraska decisions, only to overrule

126. An excellent illustration of Pound's historical approach is to be found in his opinion in Williams v. Miles, 68 Neb. 463, 470, 94 N. W. 705, 708 (1903), where the history of a subsequent will made and lost under both the common law and canon law is concisely presented.
127. 65 Neb. 831, 91 N. W. 886 (1902).
128. 1 HIGH INJUNCTIONS (4th ed. 1905) §§ 310, 310a.
129. 65 Neb. 831, 835, 836, 837; 91 N. W. 886, 887, 888 (1902).
130. 64 Neb. 822, 90 N. W. 995 (1902).
them and to fix the settled doctrine of the Nebraska Supreme Court. When Pound dealt with the question of the review on appeal of the trial court’s finding of fact, he discovered the precedents in hopeless confusion. Out of the chaos of Nebraska decisions he brought order with the characteristic remark:

"Such a condition should not be tolerated, and we think it time that this subject be re-examined, and a definite settled rule announced." 132

Haskell v. Read 133 gives one an insight into the caution and care with which Pound followed the craft of constructing precedent. In denying a motion for a rehearing, he discovered that he had overstated a proposition in general terms. 134 Although the proposition was unnecessary to the disposition of the case, Pound suggested that that particular question be left open, lest it be seized upon in some future examination of his opinion:

"It sometimes happens that a proposition true enough in respect of the case in hand, is put in a general form which not only is broader than the decision to be rendered really requires, but is open to question in point of law. We think we fell into such an error in our former opinion in this cause." 135

The American law is indebted to Dean Pound for his contribution to the law of water rights. 136 His interest in that subject can be traced to the opinion which he prepared in Meng v. Coffee, 137 where he so ably restated the common law in respect of the rights of riparian owners. He sketches the history of the doctrine of appropriation, as contrasted to the common-law rule of equality among riparian owners, making a thorough survey of the application of the two rules in arid and semi-arid states, and in states having both amply-watered areas and semi-arid areas, such as Nebraska. The Meng case served to remove the confusion existing in the minds of many with respect to the law of water rights in Nebraska. Again, the opinion is a fine example

133. 68 Neb. 107, 115, 96 N. W. 1007 (1903).
134. The "over-statement" follows: "Where a corporation has a fixed capital stock, divided into a definite number of shares, a majority of all the shares is necessary to a valid election, in the absence of some rule to the contrary." Haskell v. Read, 68 Neb. 107, 115, 96 N. W. 997, 999 (1903).
135. 68 Neb. 107, 115-116, 96 N. W. 1007 (1903).
137. 67 Neb. 500, 93 N. W. 713 (1903).
of Pound’s ability to draw his conclusion from an exhaustive survey of the historical evolution of the law governing his problem.

III. Afterglow

One cannot turn to the judicial opinions of Roscoe Pound and clearly read in them the tenets of his Sociological Jurisprudence as one finds them expounded in his later juristic writings. But one may discover in the opinions the way in which he took problems as they came before him for adjudication and in their solution experimented with techniques which later he was to formulate for the guidance of others: the techniques of weighing and evaluating interests, of subordinating procedure to substance, of assessing the conflicting demands for rule and discretion, for certainty and flux in the legal order, of taking cognizance of social and economic conditions, of utilizing the good in other legal systems and of drawing upon the resources of history. The cases which came before him were of little consequence as celebrated controversies of the law, but in each case he attempted to effect justice by a thorough study of the problem. He was a good judge. To him every problem was sufficiently important to merit the best that he could give.

Since Pound graced the bench, the tasks and problems of the judicial office have multiplied; the transition from an agricultural to an industrial economy has been accelerated. Litigation in Nebraska has been profoundly changed by such intrusions as the automobile. Yet, for Pound, whether consciously or quite by accident, his years upon the bench served as an experimental laboratory for the philosophy, the method and the dynamic which he was later to recommend to all who follow the lawyer’s craft. He, like the judges of the formative era of our law, did not believe that it was “psychologically impossible to decide objectively and impartially.”

It is the writer’s belief that Roscoe Pound, as a judge, visibly demonstrated the virtues of his philosophy. But Pound worked upon simple materials and his court sat in a society not far removed from the pioneer. It is to be remembered that, when, in later life, Roscoe Pound speaks of the relationship between law and morals, he deals with them as two separate and distinct disciplines. He does not regard

139. “The judges of the formative era of our law did great things because they believed they could do great things. They did not hold it psychologically impossible to decide objectively and impartially. They did not conceive that they were of necessity only the mouth pieces of an economically or socially dominant class nor that in the nature of things valid judgments were impossible, justice was a superstition or pious fiction, and reason a camouflage for prejudice.” Id. at 737.
morals as a body of precepts or principles which controls all human activity of which law is but a phase. While he tells us that morals suggest to law the ends it should pursue, apparently morals do not control law in the pursuit of those ends.\(^\text{140}\) That is dangerous doctrine, for what is not moral is, at best, unmoral. If Pound were sitting as judge today, it may be that his failure to identify completely the moral with the legal might lead to unfortunate decisions paving the way for some of the very things against which he himself protests and which he fears.\(^\text{141}\)

\(^{140}\) Law and Morals (2d ed. 1926) 106. Recently Roscoe Pound has put it: "If as lawyers must, we look at law, in all of its senses, functionally with respect to its end, as that end is at bottom the end of social control, our science of law cannot be self-sufficient. Ethics has to do with another great agency of social control covering much of the ground covered by the legal order and having much to tell us as to what legal precepts ought to be and ought to bring about." (Italics added). My Philosophy of Law: Credos of Sixteen American Scholars (1941) 252. Why not "all" instead of "much"? In his Contemporary Jurist Theory (1940) 43, Pound says "Good and bad are irrelevant to questions of physics. They go to the root of many things in the social sciences." (Italics added). Do they not go to the root of all things in the social sciences? Even though there be things "indifferent" in the social sciences, they will not in any wise suffer because judged against objective standards of "good" and "bad".

\(^{141}\) Pound himself has grouped these tendencies, conditions and possibilities under the appropriate head, "The Revival of Absolutism". Contemporary Jurist Theory (1940) 1-28

### Appendix

I. The Opinions of Roscoe Pound

Bender v. Kingman, 62 Neb. 469, 87 N. W. 142 (1901).
Brown v. Hotel Ass'n of Omaha, 63 Neb. 181, 88 N. W. 175 (1901).
Cizek v. Cizek, 69 Neb. 797, 96 N. W. 657 (1903).
Doane v. Dunham, 64 Neb. 135, 89 N. W. 640 (1902).
Dodge County v. Diers, 69 Neb. 361, 95 N. W. 602 (1903).
Dunn v. Thomas, 69 Neb. 683, 96 N. W. 142 (1903).
Fox v. State, 63 Neb. 185, 88 N. W. 176 (1901).
German Ins. Co. v. Shaver, 68 Neb. 1, 93 N. W. 972 (1903).
Gibson v. Hammang, 63 Neb. 349, 88 N. W. 500 (1901).
Hargreaves v. Tennis, 63 Neb. 336, 88 N. W. 486 (1901).
Haskell v. Read, 68 Neb. 107, 93 N. W. 997 (1903), rehearing denied, 68 Neb. 115, 96 N. W. 1007 (1903).
Haslach v. Wolf, 66 Neb. 600, 92 N. W. 574 (1902).
Horton v. State, 63 Neb. 34, 88 N. W. 146 (1901).
Insurance Co. of North America v. Parker, 64 Neb. 411, 89 N. W. 1040 (1902).
Johnston v. Phelps County Farmers' Mutual Ins. Co. 63 Neb. 21, 88 N. W. 142 (1901).
Kingman v. Davis, 63 Neb. 578, 88 N. W. 777 (1902).
Knight v. Denman, 64 Neb. 814, 90 N. W. 863 (1902).
Leigh v. Green, 64 Neb. 533, 90 N. W. 255 (1902).
Lincoln, City of, v. Morrison, 64 Neb. 822, 90 N. W. 905 (1902).
Lydick v. Chaney, 64 Neb. 288, 89 N. W. 801 (1902).
Meng v. Coffee, 67 Neb. 500, 93 N. W. 713 (1903).
Merrill v. Wright, 65 Neb. 794, 91 N. W. 697 (1902).
Modern Woodmen of America v. Lane, 62 Neb. 89, 86 N. W. 943 (1901).
Murray v. City of Omaha, 66 Neb. 279, 92 N. W. 299 (1902).
Newbro v. Undeland, 69 Neb. 821, 96 N. W. 635 (1903).
Nothdurft v. City of Lincoln, 66 Neb. 430, 92 N. W. 628 (1902).
Philadelphia Mortgage & Trust Co. v. City of Omaha, 65 Neb. 93, 90 N. W. 1005 (1902).
Poessnecker v. Entenmann, 64 Neb. 409, 89 N. W. 1033 (1902).
Ribble v. Furmin, 69 Neb. 38, 94 N. W. 967 (1903).
Smith v. Thompson, 67 Neb. 527, 93 N. W. 678 (1903).
Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 549 (1903).
State v. Fawcett, 64 Neb. 496, 90 N. W. 250 (1902).
State v. Paxton, 65 Neb. 110, 90 N. W. 983 (1902).
Thurman v. City of Omaha, 64 Neb. 490, 90 N. W. 253 (1902).
Tidball v. Challburg Bros, 67 Neb. 524, 93 N. W. 679 (1903).
Topping v. Jeanette, 64 Neb. 834, 90 N. W. 911 (1902).
Ulrich v. McConaughey, 63 Neb. 10, 88 N. W. 150 (1901).
Van Every v. Sanders, 69 Neb. 509, 95 N. W. 870 (1903).
Welch v. Tippery, 66 Neb. 604, 92 N. W. 582 (1902).
Williams v. Fuller, 68 Neb. 354, 362, 97 N. W. 246 (on rehearing 1903).
Williams v. Miles, 68 Neb. 463, 94 N. W. 705 (1903), rehearing denied, 68 Neb. 479, 96 N. W. 151 (1903).

II. Concurring Opinions

South Omaha, City of, v. Wrzesinski, 66 Neb. 790, 801, 92 N. W. 1045, 1049 (1902).
Weston v. Herdman, 64 Neb. 24, 30, 89 N. W. 384, 386 (1902).

III. Dissenting Opinion