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## AUGUSTUS NOBLE HAND

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WHEN I came to the Court of Appeals in 1939 the two Judges Hand were already of massive and imposing reputation. I had had very little direct contact with either of them except as I had assisted in the separate awards of honorary degrees to them at the hands of my university. I approached my first sittings with not a little fear and trembling because of the supposedly dread character of these famed judges and the profound traditions of our court. But I need have had no worry, for I discovered both of them to be the most human of persons, to whom the adjective "stuffy" was the least correct description conceivable. Some one has said that "one need not be pompous to be a good judge, but it does help." No such prescription can be found at all useful for the Hand make-up. Both of them abhorred pretentiousness and were quick to appreciate and to pounce joyously on any tendencies toward it.

In fact, my deepest recollection of my years of service with these two distinguished men is of the pure fun involved. Each had a marvelous sense of humor, and to each the foibles and inconsistencies of mankind always made a deep appeal. To say that it was a stimulus to work with them is a vast understatement. It was actually as near sheer delight as one could expect anywhere in the recesses of our somewhat dusty profession. True, we had our intellectual differences; a part of the joy was their tolerance of other expressions of view, combined with their delight in the ensuing intellectual joust. I have been amazed at times to see how

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outsiders have thought to discover possible sears from these affrays; of course there were none.

It is rather difficult to separate the two cousins, for they were such perfect foils to each other. This has been often pointed out, never better than by the Nestor of our bar, Charles C. Burlingham. Of them he wrote with apt characterization: "They are a remarkable pair, both open-minded and fearless — Learned brilliant and speculative — Augustus wise and unwavering."<sup>1</sup> I understand it has been the saying among lawyers about our court that one Hand does not know what the other Hand is doing. Whatever modicum of truth this may suggest, it does remain a fact that often one Hand would decidedly not wish to go along with the other. I have observed many battles of this kind, both legal and personal. Among fond recollections are those of recurring bouts in the midst of Foley Square over the issue where we should have lunch, ending at best in an uneasy truce, with one Hand setting off for a restaurant on lower Broadway, while the other departed for Chambers Street. Willy-nilly the rest of the court had to divide and follow as best it could. But whenever a third person intervened he was likely to find that he had taken on both together, as one rushed to the other's support. Needless to say, this was an opposition hardly to be overborne, as I can testify from many a legal case. Indeed, their reactions to all sorts of happenings, legal, personal, or otherwise, perfectly complemented one another. I can remember one evening of eulogy where Learned responded in somewhat tearful, but highly eloquent, kind, while Gus preserved his accustomed poise and balance. His comment to me the next day was, "Don't you think Learned is too emotional?" Their diversities, as well as the general respect and affection for both, are well illustrated by Justice Jackson's classic barb uttered in an evening of general acclaim: "In short, just a word of advice to you district judges here present: Always quote Learned and follow Gus."

There is no doubt that Learned Hand's brilliant and volatile nature, coupled with his unusual stylistic gifts, has served to render him better known to the general public than his cousin. Nor, I take it, would Augustus have wished otherwise; certainly he did little to draw the crowd and contented himself in performing his judicial task with a competence that was the envy and the delight of the profession. But that he could have gone far as a

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<sup>1</sup> Burlingham, *Judge Learned Hand*, 60 HARV. L. REV. 330, 331 (1947).

judicial stylist I have no doubt. He had a dry wit and a gift of characterization which was deep and sure. And though one would not appreciate it from casual acquaintance — so carefully did he eschew any affectation of learning — he had an excellent classical background upon which he could call if he chose. One is apt to get but fleeting traces of this in his writings, as in his affectionate introduction of a favorite law clerk, Judge Wyzanski, on the occasion of the latter's Cardozo lecture,<sup>2</sup> or in a speech in 1946 before the Pennsylvania Bar Association in a characteristically happy, though nevertheless warmly philosophical, strain.<sup>3</sup> But my own favorite is from a case which became the touchstone for testing in World War II conscientious objection to war service based on religious belief — “a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.”<sup>4</sup> He continued:

A religious obligation forbade Socrates, even in order to escape condemnation, to entreat his judges to acquit him, because he believed that it was their sworn duty to decide questions without favor to anyone and only according to law. Such an obligation impelled Martin Luther to nail his theses on the door of the church at Wittenberg and, when he was summoned before Emperor Charles and the Diet at Worms, steadfastly to hold his ground and to utter the often quoted words: “I neither can nor will recant anything, since it is neither right nor safe to act against conscience. Here I stand. I cannot do other. God help me. Amen.” Recognition of this obligation moved the Greek poet Menander to write almost twenty-four hundred years ago: “Conscience is a God to all mortals”; impelled Socrates to obey the voice of his “Daimon” and led Wordsworth to characterize “Duty” as the “Stern Daughter of the Voice of God.”<sup>5</sup>

As I look back upon it, I wish that he might have let himself soar more often to the end that others beyond his professional intimates might have known the glories of expression of which he was capable. So, too, I wish it were possible to bring back his

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<sup>2</sup> A. N. Hand, *Introduction*, in WYZANSKI, A TRIAL JUDGE'S FREEDOM AND RESPONSIBILITY 3-5 (1952). See also, for example, his opinion cited note 9 *infra*.

<sup>3</sup> A. N. Hand, *Lawyers in a Revolutionary Age*, 18 PA. BAR ASS'N Q. 46 (1946); see also A. N. Hand, *Practice of the Law — Then and Now*, 34 PROCEEDINGS VT. BAR ASS'N 61 (1940).

<sup>4</sup> *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

<sup>5</sup> *Ibid.* See also quotation by Mr. Justice Frankfurter, dissenting in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 658-59 (1943).

salty comments on things and persons: on law professors who "pant for a new chose in action [or new legal remedy] 'As the hart panteth after the water brooks'";<sup>6</sup> on "the children of the dawn" who continually favor change;<sup>7</sup> on a "strong court" whose judgments he selectively chose and respected; on a youthful disregard of disliked decisions, even if representing settled law, "as the mutterings of Balaam's ass, perfectly valid but having no conscious intelligence in the sources from which they proceeded."<sup>8</sup> But these are for the most part lost, since the dignity and restraint of his opinions did not permit of the levity to which his gay and humorous outlook on life continually brought him.<sup>9</sup> Perhaps some touches contained in the memoranda interchanged among his brethren on cases awaiting decision may be rescued in time if these intimate documents may be revealed.

This is not the place to attempt an estimate of his judicial work; that, indeed, covers a wide sweep, touching now a truly liberal charge to the jury in a World War I sedition case,<sup>10</sup> down through his epoch-making decision in the "movie case,"<sup>11</sup> and his notable recognition of property in "Seventeen," the teen-age designation adopted by a magazine for itself and certain selected products.<sup>12</sup> But I would, if I could, recapture the warm human friendship, the steady evenness of temper, the intimate concern for all one was doing and all one's family affairs. Never have I seen him upset or despondent, notwithstanding severe blows of fate; and, while he was capable of righteous indignation, there was not an element in him which was mean or petty. It is not without significance that the most recurring references to him are in such terms as "unwavering" or "steadfast" or — to use Judge Wyzanski's fitting

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<sup>6</sup> A. N. Hand, *Lawyers in a Revolutionary Age*, 18 PA. BAR ASS'N Q. 46, 53 (1946).

<sup>7</sup> *Id.* at 47.

<sup>8</sup> *Id.* at 52.

<sup>9</sup> Thus his powerful and persuasive opinion in *United States v. One Book Entitled Ulysses* by James Joyce, 72 F.2d 705 (2d Cir. 1934), has not achieved the fame (except among lawyers) of the quotable lilt of a part of the opinion below, 5 F. Supp. 182 (S.D.N.Y. 1933).

<sup>10</sup> Charge to the jury in the prosecution of Max Eastman, as quoted in CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 73-79 (1941).

<sup>11</sup> *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323, 70 F. Supp. 53 (S.D.N.Y. 1946), *aff'd in part*, 334 U.S. 131 (1948), *on remand*, 85 F. Supp. 881 (S.D.N.Y. 1949).

<sup>12</sup> *Triangle Publications, Inc. v. Rohrlich*, 167 F.2d 969 (2d Cir. 1948).

summary — “his steadiness of purpose.”<sup>13</sup> The touchstone of his life seems, indeed, to be that passage from Thomas Carlyle’s *Past and Present* which he was fond of quoting<sup>14</sup> and which concludes:

Here is all fulness  
Ye brave, to reward you;  
Work, and despair not.<sup>15</sup>

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<sup>13</sup> Wyzanski, *Augustus Noble Hand*, 61 HARV. L. REV. 573, 591 (1948).

<sup>14</sup> As in A. N. Hand, *Lawyers in a Revolutionary Age*, 18 PA. BAR ASS’N Q. 46, 58 (1946), and A. N. Hand, *Practice of the Law — Then and Now*, 34 PROCEEDINGS VT. BAR ASS’N 61, 79-80 (1940).

<sup>15</sup> P. 130 (Everyman’s ed. 1912).