

Robert L. Smith

Memorial Proceedings

December 16, 1999

Nebraska Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

IN THE MATTER OF)
JUDGE ROBERT L. SMITH)
MEMORIAL)

Proceedings held at 9:12 a.m., December 16, 1999, in the
Nebraska Supreme Court, State Capitol, Lincoln, Nebraska

APPEARANCES:

Chief Justice John V. Hendry
Justice Lindsey Miller-Lerman
Justice William M. Connolly
Justice John M. Gerrard
Justice Michael McCormack
Justice Kenneth C. Stephan

CHIEF JUSTICE HENDRY: The Supreme Court is meeting in special ceremonial session on this 16th day of December, 1999, to honor the life and memory of former Supreme Court Justice Robert L. Smith and to note his many contributions to the legal profession.

I would like to acknowledge the presence of Court Appeals Judges Richard Sievers, Edward Hannon and Everett Inbody who are also present to honor Judge Smith.

The Court also acknowledges the presence of Justice Smith's family, other members of the judiciary, members of the bar and friends of Justice Smith.

At this time the Court recognizes former Nebraska Supreme Court Chief Justice William Hastings, Chairman of the Supreme Court Memorial Committee, who will conduct these proceedings. Mr. Chief Justice. Good morning.

JUDGE HASTINGS: Good morning. May it please the Court, Mr. Chief Justice, it pleases me that Your Honor asked me to form and chair a committee for the purpose of memorializing Judge Robert L. Smith. I am grateful to those committee members, some of whom are here in person and others unavoidably deprived of the privilege of delivering their remarks.

I did not know Judge Smith at the time that he was appointed to serve on the Supreme Court. However, our careers did parallel in a sense, although he served on the District Court of Douglas County from 1961 to 1965 and was then appointed that year to this bench, the same year that I assumed my duties as a district judge for the District Court of Lancaster County. I met him early on at a Lincoln Bar Association dinner meeting and the one thing I remembered was that we were fellow Presbyterians.

We became quite well acquainted after that during the various times that I have served by designation on this court and before my appointment in 1979. As a district judge I read his opinions with anticipation and marveled at the depth of thought that went into their preparation.

On a personal note, Julie and I were entertained by the judge and his wife Beth who took us to dinner at the Firehouse Dinner Theatre in Omaha.

But enough of my observations. I am pleased to call on James W. R. Brown, Esquire, a distinguished practitioner from Omaha, to offer his remarks.

CHIEF JUSTICE HENDRY: Thank you. Good morning, Mr. Brown.

MR. BROWN: Good morning. May it please the Court: In February of 1946 I was introduced to a young, smiling lieutenant in the United States Navy, Robert Lee Smith. The occasion for our meeting was that Bob and I were to become the two new associates in the law firm of Ellick, Fitzgerald and Smith.

After having served for four years in World War II in the South Pacific and Asiatic theaters, Bob was ready to return to civilian life and to begin the practice of law. Having completed three and a half years in the Army, I shared with Bob the eagerness to get started in the practice of our life work.

Now, most of those who are gathered here today probably did not know Bob until after a serious illness had impaired his personality and the keenness of his mind. For that reason I thought it might be beneficial to describe very briefly the Bob Smith that I knew and that I will always remember.

First of all was his cheerfulness. He would always greet you with a broad smile and with sparkling eyes that made you feel welcome and comfortable in his presence. Having worked with him for a number of years, I always found him pleasant and very easy to work with.

Another characteristic of Bob's was his absolute fairness.

In the years that we worked together as associates and then later as partners there was not a single incident that I felt that either Bob or Seymour acted unfairly. When they decided to set up their own firm, the separation of the practices was made without the slightest problem. In fact, for many years afterward Bob and Seymour would join us in our conference room before the annual dinner of the Nebraska State Bar Association. And Seymour and Bob Hamer would regale us with humorous and hilarious happenings in the law.

Bob Smith himself had a very good sense of humor but in this respect he was overshadowed by his father, the raconteur nonpareil of the legal profession and the Omaha community itself.

Bob was blessed with outstanding analytical ability. It was always a pleasure and a real learning experience to work with him on difficult legal matters.

I have always felt that the practices of Seymour and Bob marked in a somewhat rough way the end of one era in the practice of law and the beginning of another. Seymour's practice came at the end of a period in which the practice of law was to litigate. The contestants were the lawyers and the goal was to outdo the other lawyer or at least embarrass him.

When Bob began his practice the contestants were the clients. The emphasis was more on achieving the client's goal without litigation if possible. And office lawyer was no longer a term of belittlement.

While Bob was primarily a trial lawyer, he clearly belonged to this new era. This is the Bob Smith that I knew and the Bob Smith that I will always remember.

During his long illness Bob received the constant and loving care of his wife Beth. History does not record a greater example of affection, care and sacrifice. Thank you.

CHIEF JUSTICE HENDRY: Thank you, Mr. Brown.

JUDGE HASTINGS: If it please the Court: may I ask the Honorable Leslie Boslaugh, judge retired of this court, to address the court?

CHIEF JUSTICE HENDRY: Please. Good morning, Judge.

JUDGE BOSLAUGH: Good morning, sir. May it please the Court: I am honored to be invited to speak to you this morning briefly concerning the Honorable Robert L. Smith who was a judge of this court from 1965 until he retired in 1973.

Judge Smith was a true gentleman and a scholar of the law. He demonstrated that by everything he did as a judge of this

court. He approached the cases which were assigned to him with a great deal of sincerity. He was a very sincere man.

He also had a final strong sense of the finality which we attached to the results we would adopt. He was careful to be aware that he was involved in each case and he was mindful of his responsibility to understand the propositions and conditions advanced by the parties and their lawyers.

He was careful in adopting an opinion that might be fair to all of the parties. And he did not agree to a rule in a case until he was sure that a proper result had been obtained. His aim was to do that which was right in each situation and he was careful that the result was proper and fair to all. His aim was to achieve justice and that was his goal in every case.

I think the language of Abraham Lincoln is appropriate here. Mr. Lincoln said, "I did the very best I know how, the very best I can, and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won't amount to anything."

We're all glad that Bob Smith was chosen to be a member of this court. He was a valued member of the court and his work remains as a testament to his dedication and ability. If you were to choose two words to describe Judge Smith's performance

to this court I would remember that his activity was done with dignity and integrity. This characterizes Judge Smith during his tenure to this court. Thank you very much.

CHIEF JUSTICE HENDRY: Thank you, Judge Boslaugh.

JUDGE HASTINGS: If it further pleases the Court: May I read the prepared text of the remarks of the Honorable John T. Grant, judge retired of this court, who because of a long-standing commitment was unable to be here, also those of Donald H. Erickson, Esquire, a distinguished lawyer from Omaha who just this week unexpectedly found it necessary to seek the services of a hospital, as did the Honorable Donald P. Lay, Judge of the United States Court of Appeals, who also found it necessary to seek the assistance and care of a hospital. Both of these gentlemen, I am pleased to announce, are progressing nicely.

Judge Grant, I think, was seeking to outdo Bob Smith in the brevity of his remarks but they're very pointed. I quote:

Others have spoken of Bob's life and contribution as a lawyer, district judge, and Supreme Court Judge. I won't be repetitive about Bob's tenure on the Nebraska Supreme Court, but I will say that in 1972 he used the word "anomie" in an opinion and I have remembered that word to this day, although

I've never had the occasion to use it. As Ring Lardner used to say, you could look it up at 188 Neb. 579.

What I want to remember are the great times we had working in the legal field and in our social lives in Omaha in the 1950's. Among other things, we had a floating bridge game with five young lawyers plus a CPA to keep score. It was great fun.

I will always remember Bob as a fine lawyer and a boon companion. The State of Nebraska and the Nebraska bar have lost a good man who will not be forgotten.

And then from Donald Erickson.

Robert L. Smith, a lifelong resident of Omaha, Nebraska, until his later years, was one of America's war heroes, having served in the United States Navy through the entire South Pacific naval and land engagements of Guadalcanal, Iwo Jima, Tarawa and Okinawa. He was decorated for extreme bravery and outstanding valor in the field in every one of those campaigns, each one of which would qualify as a D Day landing.

If you have seen the movie "Saving Private Ryan" and saw the story of those brave soldiers unfold on the screen making the ultimate commitment, you would have witnessed a Robert L. Smith fighting for his country.

I was in the South Pacific during some of those campaigns but was not engaged. I did, however, lose many friends at Okinawa to kamikaze attacks where Robert was fighting in blazing gasoline explosions for over two months.

I mention this because the boys like Robert who returned to America after the war had already lived a lifetime. America never had a more mature or responsible group of citizens than such fighting veterans, and certainly Bob's life showed the enduring commitment he had made to help mankind make our planet a better place to live.

Robert grew up in the shadows of his father, Seymour L. Smith, an outstanding lawyer and civic leader in Omaha. His father was not only colorful but an advocate of law as the highest tool of civilized society. He passed on this love of the law to his son, Robert, who studied and bathed in its pool of principles and precedents as a guide to a better society.

Robert excelled as a student, graduating from Southern Methodist University in Dallas, Texas in 1940 when he entered the law school at Texas University. The war changed everyone's plans and as a returning veteran in 1945 he enrolled in Creighton University Law School and graduated LLB in 1947 when he joined his father in the practice of law at the firm of

Fitzgerald & Smith.

The author of this remembrance of Robert L. Smith joined Fitzgerald & Smith as an associate upon graduation from Creighton Law School in 1948 where he met Robert for the first time.

It didn't take very long after meeting and working with Robert to see that his commitment to his profession was absolute. There never was a doubt in his mind or that of others that the pursuit of excellence in his chosen profession was paramount in his life.

One often hears about those who have succeeded in one profession or another about their outstanding characteristics as evidence of the reasons for their success. Outstanding people in most instances have superlative character traits. Integrity is most mentioned because it has a universal appeal to humanity looking for a mutual trust in their fellow human beings.

In Robert's case integrity was his deepest root. He would have plowed a field unlimited times to get it right, and he often did just that.

To research the law to discover what was right was a love of Robert's life. Not in a static way, but with an eye to

where the law is leading us to right judgment.

If he took your case you had a pit bull for an advocate. There was never a waiver from his commitment to a client for any reason, personal or otherwise, unless the client committed the breach.

When Robert and his father started in the practice of law as Smith & Smith it was movie time. The large theater chains were being challenged in their allocation of movies to the exclusion of small independent movie houses. Antitrust damages were trebled and litigation ensued on a grand scale. Smith & Smith were in the thick of the fray, and in the end Robert L. Smith's discovery and development of the law won their cases and Smith & Smith gained the reputation of a lawyer's lawyer, which is to say the highest praise one can receive in this profession.

In the meantime, Robert had found the love of his life in Beth Haney, employee of the Municipal Court of Omaha, Nebraska. They were married in 1948 and had four children: Craig, Victoria, Calvert and Carey. Robert was as devoted to his family as he was to the law.

When Robert was elected Judge of the District Court of Douglas County in 1961, the bar association was pleased to have

a consummate trial lawyer on the bench. One of their own so to speak. If they expected a loving father figure they did not get it. Robert walked the straight line and avoided all favoritism of any kind. He was a tough trial judge and moved his docket, not always the favorite with many in the bar but a good judge. So good that he was appointed to the Supreme Court of the State of Nebraska in 1964 where he served with distinction until his retirement in 1973 because of physical disability.

Robert was somewhat controversial because of the brevity of his court opinions. There are those who thought he was, on occasion, cryptic or obscure. But he never loaded his opinions with ego or dallied with dictum for self-satisfaction. And above all, the judgments were from deep down integrity where the real foundation of civilized society lies.

And then from the Honorable Donald P. Lay.

Oliver Wendell Holmes once wrote to a friend: "We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done." It seems to me this philosophy is especially appropriate in celebrating the life of Justice Robert L. Smith.

In 1951 I graduated from the University of Iowa Law School

and moved to Omaha, Nebraska, to join the law firm of Kennedy, Holland, DeLacy & Svoboda. Two blocks away, some of my law school friends had entered into the prestigious law firm of Fitzgerald and Smith. These were my immediate friends and I spent a good deal of time with the associates at Fitzgerald and Smith. The two senior partners of that firm were Jim Fitzgerald and the illustrious Seymour Smith.

Seymour's son, Bob, was among the young associates at that time along with Don Erickson and my Iowa friends of Jack Osborne and Chuck Schorr. All of us formed a close bond and spent many hours together eating lunch, playing golf, playing bridge, attending ball games and so forth. During those years my wife and I spent many hours with Bob Smith and his wife. Some of their children were the same ages as our children and also had many common interests.

Throughout this early relationship I came to respect Bob Smith as one of the more scholarly lawyers that I have known. We used to debate legal principles into the night. His life had a great impact upon me. I can honestly say what he has conferred on his family and friends summons all of us to learn and elevate his virtues which by example he has so unselfishly contributed.

Benjamin Disraeli once said "life is too short to make it small." I would say that Bob Smith's greatest virtue was his zest for making one's life count. As I mentioned, he was a fine lawyer, but more importantly he loved his family. He adored his caring wife, Beth, and he was so proud of his children: Victoria, Craig, Calvert and Carey. He left behind nine grandchildren.

Bob lived his life to the fullest. He strived for perfection in everything that he attempted to do. In his early years he was an excellent golfer and bowler. Before graduating from law school in 1947 he had served four years in the United States Navy in the Pacific and received four stars. He was on the assault and capture of Guadalcanal, Iwo Jima, Tarawa, and Okinawa. He practiced law in Omaha from 1947 to 1960 when he was elected to the District Court for the Fourth Judicial District of Nebraska. He served in this position from 1961 to 1964 when he was named a judge for the Second Supreme Court Judicial District of Nebraska.

I can recall visiting with Governor Morrison in 1964 and showing to him several of the opinions that Bob had written as a district judge in Douglas County. It was highly unusual for a district judge to write opinions; only the parties received

them and they were not published. His opinions were scholarly and well written. I remember Governor Morrison stating that he had never seen a district judge who had spent as much time in writing opinions and with such clarity as those of Bob Smith.

I can still remember in 1964 going with Bob and Beth and their family down to the legislative chambers where Bob was sworn in as a new Justice for the Supreme Court. He served in that capacity from 1964 to 1973. Unfortunately, an earlier illness became accentuated and Bob had a great deal of trouble in the last few years in carrying out his judicial duties. He suffered from narcolepsy causing severe headaches and drowsiness. He could not sleep at night and often would go to work at 2:00 o'clock in the morning and return home before noon. I know this became very disconcerting to many of his colleagues on the Court, but they all understood Bob's illness.

When Bob became severely ill and felt that in the interests of the Court he should no longer carry on, he resigned and did not state the reason for doing so. He told me he felt it would be wrong to attempt to get any kind of pension or compensation because of his physical condition. I know that his attitude was directly related to his own perception of inability to serve.

However, thanks to Justice Harry Spencer a claim was made on Bob's behalf for disability retirement so that he and his family were given a pension. He told me afterward that he would always be indebted to Harry Spencer for what Harry had done for him.

Nonetheless, during this period of time he wrote over 400 opinions for the Supreme Court. Most of them were brief and to the point. Several lawyers I can recall were concerned about the brevity of this work, and yet others acclaimed his clarity and writing style as being one of the best on the court.

It has been some time since I read these opinions, but I took time to pull out a few of them. Simply as an illustration I would like to quote a couple of them.

In one domestic relations case the husband had claimed that the alimony award was excessive. Justice Smith wrote:

The finding of fault is correct. Michael angrily struck Maxyne on a number of occasions. Corroboration was supplied by one daughter and by a physician. Some violence was admitted. Perhaps Maxyne's conduct was less than exemplary. Certainly it was much less than cruel. We see no cause to lay blame on her for sexual incompatibility. Quarrels over tidiness of the home and discipline of the daughters have been magnified beyond all

proportion. We can hardly set a standard of perfection for the performance of marital duties. 179 Neb. 29.

In another case involving the writ of habeas corpus, he wrote a three paragraph opinion which covered one-half page and eloquently stated:

Habeas corpus is a writ of right but not a writ of course, and probable cause for its allowance must be shown.... Middlebrook had no judicial remedy, and rightly so. 187 Neb. 705.

In another case involving a workmen's compensation dispute, the employer had delayed making payments to the plaintiff. Justice Smith cited several legislative committee reports and stated:

The cause of plaintiff's justifiable dissatisfaction actually lies elsewhere. Too much litigation which benefits neither employee nor employer is characteristic of the system.... It is desirable that the Legislature simplify practice and proceedings in these cases. 187 Neb. 102.

In another domestic relations case, the husband was awarded a divorce on the grounds of adultery committed by the wife. The wife appealed and Justice Smith wrote:

The misconduct of Kathleen has not been limited to one or

two occasions. Its continuance constitutes a potential source of harm to the moral welfare of the children; free love is not a way of life everywhere. 188 Neb. 316.

In a criminal case, Justice Smith wrote in 1972 relating to the alleged excessiveness of the sentence for error. He wrote:

Another variable is the emotion of the judge in determining and pronouncing the penal sanction. Should we deny its existence altogether, the illusion might cheat the reader.... On the other hand, a sentence dictated by inordinate emotion is suspect. It is only by coincidence that it finds support in the evidence.... At a sentencing hearing it is especially important that the judge steel himself against predilection. Otherwise he may fuel the raging fire in youth against "the establishment." 188 Neb. 579.

Finally there are two cases which I have chosen to illustrate Bob's keen sense of brevity. One related to a zoning case and the interpretation of the statute. Bob wrote:

Semantic skills can justify affirmance or reversal. It is our view that the statutory language does not mean that the voting requirement is moribund in respect to conditional use permits. This interpretation also aligns the statutory

provisions with requirements of notification and hearing. 190 Neb. 733.

In another domestic relations case involving custody of the children, Bob wrote:

The rulings in question were erroneous; the refusal to receive evidence from Manfred on the issue of removal and to appoint counsel was not in the best interests of the children. The award of an absolute divorce is affirmed. 190 Neb. 419.

Bob was a prolific reader of both fiction and nonfiction. He loved reading classics, and particularly in his later years, he became a student of the great philosophers.

A favorite book of mine, entitled Eulogy of Judges, was written in 1942 by a famous law professor, Piero Calamandrei, at the University of Florence, Italy. I treasure this little book because it was given to me by another great humanitarian, Justice Tom Clark. I recalled the following passage which seemed appropriate in commenting on Justice Smith's contribution to our society. In the final chapter, Professor Calamandrei hypothesizes a conversation between a lawyer and a judge. He concludes with the following colloquy:

THE LAWYER: This is our life, O Judge, and if it is given to us to grow old, this in the end will be our fate. And yet I

know I would at no cost alter my destiny.

THE JUDGE: Nor I; for it seems to me that among the professions that mankind can serve no other is better suited to maintain peace among men than that of the judge, the dispenser of a balm for every wound, called justice. For this, even though the end of my life seem lonely, it will be sweet and serene, for I know that the knowledge of having spent the better part of myself to bring about the just happiness of others will give me peace and hope at the end. In this hope, O Lawyer, our destinies meet at their terrestrial conclusion. We are brothers in this common purpose and therefore can shake hands.

Piero Calamandrei, Eulogy of Judges 120-21.

I am privileged to celebrate Justice Robert Smith's great life. He will always be remembered as a friend to me. I close with a little prayer. The author is anonymous:

Servant of God, well done

Thy glorious warfare is past

The battle is fought, the race is won

And thou are crowned at last.

If it further please the Court: may I recognize that Justice Harry Spencer, a long, long time judge of this court,

is here today and was a colleague of Judge Smith's.

Finally, if it further please the Court, I would move that the foregoing remarks be memorialized in the permanent records of this court and that a copy of that record be presented to the family of Judge Robert M. Smith.

CHIEF JUSTICE HENDRY: That will be granted.

Thank you. On behalf of the Nebraska Supreme Court I extend its appreciation to former Chief Justice Hastings who chaired the Court's memorial committee and was primarily responsible for organizing this presentation.

This concludes the special ceremonial session of the Nebraska Supreme Court. The Court would encourage any of the participants, family members and friends of Justice Smith to remain in the courtroom for a moment to greet each other on this occasion. We are in adjournment. Thank you.

(Proceedings adjourned.)