In Memoriam: Talbot Smith

Donald P. Lay

Chief Judge, United States Court of Appeals for the Eighth Circuit
IN MEMORIAM: TALBOT SMITH

Hon. Donald P. Lay†

Dear Senator Hart:

For many years I have regularly made a systematic study of the decisions of our State courts as reported week by week in the national reporter system of the West Publishing Co. Some 5 years ago my attention was attracted to some opinions of Judge Talbot Smith, then a recently appointed judge of the Supreme Court of Michigan. Since that time I have followed his work with much interest. I have no hesitation in saying that his work stands along with that of Judge Traynor of the Supreme Court of California, and Chief Justice Schaefer of the Supreme Court of Illinois. I also have no hesitation in saying that the work of these three judges has stood out along with that of Mr. Justice Cardozo in the Supreme Court of the United States, and of Judge Learned Hand in the U.S. Court of Appeals for the Second Circuit in the progress of American law. Indeed I should feel that Judge Smith ought to be on the bench of the circuit court of appeals. But at any rate he is eminently qualified in every way for a Federal judiciary appointment. It would be a serious loss to the administration of justice if his appointment were not confirmed. He is preeminently the type of judge who should be upon the bench of our highest courts.

Yours very truly,

Roscoe Pound

My goal this evening is first to reflect upon Talbot Smith’s life as an unusual and gifted person and second, to underscore his career not so much as the judicial giant he was, but as a tremendous witness and teacher to all mankind.

As many of you know, Judge Smith was a graduate of Annapo-
lis and served several years in the Navy before graduating from Michigan Law School in 1934. One of his first ambitions was to teach law school. He commenced his teaching career at the University of Missouri, where he taught at the law school from 1937 to 1941. Those early roots were to pull him back to Missouri in 1970 when he assumed senior status and volunteered his services as an appellate judge on the Eighth Circuit. During his close association with our court Talbot often fondly recollected his teaching days working with young people. Talbot never gave up the cloak of his early teaching profession; his later distinguished career as a jurist constantly set forth written examples for us all to follow. His many opinions reflect a continuing concern for the general well-being and happiness of the individual, as well as for the legitimate interests of institutions within both the public and private sectors.

I know of no other jurist who could "turn a phrase" as artistically as Judge Smith. But this humble, gracious man was not just a writer of artistic prose. It should be obvious that what Judge Smith passed on to us in work power was not only a philosophy concerning the law but a discipline concerning life itself.

As a jurist, Talbot was not a slave to abstract legal maxims, rather he applied the experience and common sense gained through his diverse careers and contact with people.

This pragmatic discernment is found throughout his legal writings. For example, he wrote: "The law, then, has many meanings. It refers to many different kinds of things, just as the word music does. There's not much similarity between Beethoven's Fifth Symphony and the Yellow Cat Blues, yet each is called music by many people though not without violent dissent from a few." Writing on stare decisis, he once observed: "Isn't enforcing a rule when the reason for it is gone something like hanging your hat on a hook when the hook is gone? You can't in real life. Should you be able to in the law?" Another favorite passage should hold meaning for us all: "It is well for the lawyer to remember, always, if he should tend to become dogmatic and intolerant, that today's axioms may be, tomorrow, merely the quaint sayings of those who thought the earth was flat."

Talbot's legal writings reflect a deep and abiding faith in the law as moving and evolving standard to cope with the conflicts of changing interests. His philosophy of the law is embodied in the following passages:

3 Id. at 36.
4 Id. at 167.
So, we come face to face with a stark truth: The law is a living thing. It has roots. It grows, and it dies. Old branches are lopped off by storm, and by man, and new growth takes their places. You must be aware of it as a living thing. In the past will be found its roots. Hence you must study certain kinds of history. In the present you find its soil and climate. . . . Its future growth will be shaped by forces now at work, the rainfall, the winds, and the sunshine. . . . Actually, reviewing afresh a field of law after the passage of a few years is like revisiting a once-familiar garden. When you return, after a substantial time, some of the plants will have died, some withered, and others grown strong and possibly dominant. . . . Of only one thing in the law may you be sure: Change.5

In challenging the law student, Judge Smith spoke:

Your study of the law, then, must comprehend the past. It must also include a study of the dynamic forces now at work, the great aggregations of business, of labor, of powerful central governments, and of the increasing awareness of the dignity of man himself, without which none of his institutions has dignity. . . .

But regardless of the path you choose, if you keep faith with the law you will keep faith with yourself and your fellow man. If you keep your oath as a lawyer, your days will be full of excitement and reward, your nights full of rest, your years full of honor, and your name full of respect. I have, you will note, said nothing of money. Thus I give the subject the space it should have in a lawyer's scheme of things.6

Then he added:

But riches beyond the power of description will be yours. You will give strength to the weak and tongue to the terrified. You will walk with honor on one side and integrity on the other and you will know their warmth and their companionship. Finally, when the wheel comes full circle, you will look back and you will see, with the vision granted those who will shortly need vision no more, flashes of pic-

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5 Id. at 51, 178-79.
6 Id. at 51, 125.
tures in rapid succession as the reel winds back. You will see distress relieved and suffering solaced and endeavors aided and ambitions realized, all through the work of your mind and your hands and your heart. In that moment you will be glad and proud that you have lived. The earth can give you no greater reward.\(^7\)

As to his lofty view of the judicial officer he observed:

I want to put before you a vision: The Judge our people should have. He who listens with his heart, as well as his head. The Judge who weighs the sins of the malevolent, the sins of the wise, the sins of the crafty on different scales than the sins of the helpless and the weak. The Judge who sees the bench as an altar, rather than a counter, or a ladder. The Judge who respects the mother's need, and the dignity of her barely coherent pleas for mercy for the boy who has taken the wrong turn in the road, the girl on whom society has turned its back. The Judge who can hear the faint whisper of the fatherless above the road of industry.

This judge often seems to walk alone. Never, for him, will come the cheers of the crowds. Those who remember him control no crowds, no airways. But though he signs alone, in his dissents, he is not alone. He walks with a great unseen host. Cardozo, Holmes, and Brandeis sometimes fall in step with him in his solitary vigils through the dark thoughts pressed upon him. Far from being alone, he is attended night and day by those powerful forces of good which so long for expression in all, but find it, for reasons beyond human control, in so few.\(^8\)

I stated I would not extoll Talbot's virtues as a judge. I pause with exception. I think two of the most outstanding legal opinions written in Anglo-Saxon law appear in the Michigan Reports. For sheer reading excitement I invite you to examine them in their entirety. In *Wycko v. Gnodtke*,\(^9\) Mr. Justice Smith discarded the archaic doctrine that the only damages parents could obtain for the wrongful death of an infant child must be based on monies contributed by the child to the parent. After tracing the ancient

\(^7\) *Id.* at 187.

\(^8\) Speech by Justice Smith entitled The Philosophy of Dissent As Applied to the Courts (March 27, 1956), *reprinted in T. Smith, On Behalf of the People . . . Justice Talbot Smith Dissents* i, vi (1956).

and evil history of the rule he wrote:

That this barbarous concept of the pecuniary loss to a parent from the death of his child should control our decisions today is a reproach to justice. We are still turning, actually, for guidance in decision, to "one of the darkest chapters in the history of childhood." Yet in other areas of the law the legal and social standards of 1846 are as dead as the coachman and his postilions who guided the coaches of its society through the dark and muddy streets. . . .

What, then, is the pecuniary loss suffered because of the taking of the child's life? It is the pecuniary value of the life. We are aware, of course, that there are those who say that the life of a human being is impossible to value, that although we will grapple mightily with the value of the life of a horse, of a team of mules, we will stand aloof where a human is concerned and assign it no value whatever. This kind of delicacy would prevent the distribution of food to the starving because the sight of hunger is so sickening. But we cannot shirk this difficult problem of valuation. In the cases coming to us a life has been taken and it is our duty, as best we can, to put a fair valuation on it. In so doing, we will keep in mind that the act is remedial in its character and our duty is to construe it liberally in favor of the beneficiaries. 10

In Lyshak v. City of Detroit, 11 Justice Smith, writing for the majority of the Supreme Court of Michigan, reversed a lower court decision which had taken away a verdict for a seven-year-old boy whose eye was put out when struck by a golf ball on a golf course, holding that he was a trespasser and thus could not recover.

And yet, if a defendant baits traps with stinking meat and thus lures a trespassing dog to destruction, the defendant had been held liable [citation omitted]. There seems to be here a valid (and perplexing) analogy. The theory is that one is liable if he lures something to its destruction. In the case before us, a great city maintained, in a densely populated residential section, a park-like area, a golf course, with ample lawn, trees, and "a little

10 Id. at 337-38, 105 N.W.2d at 121-22.
creek.” Upon this area, in the summer, children entered daily. They were drawn to it for purposes of play as naturally as the dog to the bait. The city of Detroit knew this, knowing it the only way a “city” can know anything, through the knowledge of its employees, servants, and agents.

We will assume that the infant plaintiff, like the dog, was a trespasser. The dog’s owner, nevertheless, recovered for his loss. The boy, according to the trial court, is to get nothing. What kind of law is this? Is there a real difference in the cases? . . . If duty is born of danger, the duty of the city of Detroit, knowing that children frequent a certain area, is clear. 12

Although I was only priviledged to know Judge Smith in his twilight years, in that short time he has left me a lifetime of lessons. Notwithstanding his failing health, one heart attack after another, one hospitalization after another, his indefatigable courage to continue his self-imposed judicial responsibilities will never be forgotten.

12 Id. at 233-34, 240, 88 N.W.2d at 598, 601.