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Stephen Underwood
(READ BY CURTIS BRASHEAR)

INTRODUCTION

The following paper was produced by the writer following an interview with retired Christian Circuit Court Judge, Ira Smith. The conversation and interview with Judge Smith were tape recorded and then transcribed by this writer for use in this paper so as to preserve and not alter the unique qualities of such an experience. The compilation and editing of this paper were undertaken by the writer bearing in mind this object of preservation.

At the request of Judge Smith, the final product is not designed to be biographical in nature and, where possible, a discussion of what might be considered to be politics has been avoided, in keeping with the principles of this Society.

CHANGES I HAVE SEEN IN THE LAW (By Judge Ira D. Smith, as told to Stephen E. Underwood, 2/5/81)

Before I was elected to the Circuit Court bench in 1928, I had been practicing law here in Hopkinsville for about eighteen years. I was absent for one year during that period of time due to the First World War. I went to MIT to train up there as part of the Air Force and the Navy and then at Pensacola, USMRA. Well, when I came back from the war, I practiced for awhile but I got interested in politics and went to the legislature in 1922. Although I did accomplish one or two things - I got a little appropriation through for the Jeff Davis monument down there - I didn't care so much for the legislative seat. I did have a right interesting experience, however, while I was in the legislature. The fundamentalist members of the church wanted to pass an anti-evolution law. They said that teachers were teaching evolution - that man started from a monkey - and that wasn't right to them. You have no idea how many people believe that that is wrong. That is, they are fundamental believers and what the Bible says, that the Lord created heaven and earth and man too. Well, anyway, they brought up the bill and I didn't particularly please them too much at that time. That was before that case down in Tennessee. I thought the bill would probably be defeated. Its wrong for the

legislature to tell the schools what they ought to teach, anyway. It got to a narrow vote in the House and there was one representative that hadn't cast his vote. He passed when his name was called. Well, it so happened that I knew this fellow who had passed when his name was called. It so happened that I had been appointed on a contest committee, his seat had been contested by the Republican and we had a hearing. We decided that he ought to have his seat, he was a Democratic and the other fellow was a Republican anyway. I must say, really, the Republican didn't have the right to be in the House because he was a magistrate and had never resigned his job as a magistrate. The law says that if you run for the legislature you have got to resign your job. Well anyway, the vote got so close, goosh I went to him and said - How are you going to vote? He said - I don't know. Well, I said - if you should vote against this bill, it's wrong, it's fundamentally wrong. Well, he said that he would do that and remembered that I had helped him a little bit on this committee and he cast his vote that way. You know what, that bill passed by 1 vote. We had something like Tennessee.

Well, that had repercussions. When I came home, as I say, I decided that I did not want to be in the legislature anymore and it looked to me like it was a good time to consider running for the bench since Judge Bush had been there eight or ten years and he was getting old. Because I had gotten into politics, I had a good many friends and they all persuaded me to run for Judge Bush's job.

Well, I got into the race and it was kind of a three cornered race. Judge Ryan down at Cadiz announced and Judge Bush then announced for re-election. We were all going for the same spot. I've forgotten how many speeches we made, but during the race Judge Bush's health kind of got to worrying him and his doctor advised him not to keep in the race. We were scheduled to meet down at Lynn Grove in Calloway County, one of the four counties in my district, for a debate. I went to the schoolhouse and we really had a big crowd. Just about the time the proceedings had opened up, Herman Southall came in, said that he was representing Judge Bush and that Judge Bush had resigned from the race. Well, all my friends were very happy. But that didn't last too long because then Frank Reeves announced for the race when he heard that

Judge Bush was out of commission and filed within just two days of the deadline. Well, as it turned out I won very nicely in the primary but I wasn't done. Prentice Thomas, who was County Attorney down in Cadiz, a Republican - I've forgotten now just how he happened to be elected, but he announced to run against me. Well you know there are just swarms of Thomas' down in Trigg County and he had a whole lot of kinfolks. His main thing in the race was the fact that I had voted against the evolution law and you know he got out a postcard - I wish I had it, with Smith carrying a monkey in a baby buggy and circulated this postcard all over the district. You can imagine that it was kind of a tactless thing to do, but it got him votes. He carried Trigg County, but I had such a big majority in Calloway County and I think the vote was about even in Christian County, but I won overall by about 3500 votes. Can you imagine, the idea of carrying a printed postcard with my name on it - Smith - and this monkey in the baby buggy? .

When I went on the bench, there was no such thing as a probation law in criminal cases at all. Although there was a parole law, I've never believed too much in parole - in the system. I think if a man is sent to the penitentiary he ought to be kept there, but he might be entitled to sometime off of his sentence for good behavior. I don't really think the parole law has worked very well. But now the probation law is a different thing. It is supposed to apply to a young and first offender and it gives them a chance not to have a criminal record against them. A man that is convicted and sent to the penitentiary well, his life is done usually. He can't come back very well under a parole system in my opinion. The parole law has been greatly abused. But they didn't have any probation laws at the time I took the bench and I got sick and tired of sending those defendants to the penitentiary for stealing a \$4.00 hog or a \$2.00 chicken and making them serve 1, 2 or 3 years. But there was nothing much I could do about it. The jury had convicted him and I had sentence them and I couldn't give them any suspended or probated sentence. It's hard to realize now that that was true, but it was. So I went to work and when Jim Breathitt was Lt. Governor in 1932 or 1933 I think, and along with a great many Judges doing stuff like I did, we had the first probation law. Of course, it

has been greatly amended but it gave us the leeway to give these first offenders, these youngsters that had no criminal instincts, a chance in life - a second chance. I think it has worked out very well, I know it did in my district.

Although people don't think of it now very much, I think there has been another very important change in the law. As you know, for years and years it was the law that when a husband died without a Will the widow received an interest in only one-third of the real estate for life. Well, what usually happened was that the widow didn't know how to run a farm and you had to appoint commissioners of the Court to go out and decide what her dower interest was under the law. As a result, she normally got rid of the farm and normally there weren't many other assets either, so she got a pretty poor deal. Well, another Breathitt came along then, Ned Breathitt, and was elected to the legislature. I got him to introduce a bill and with some modifications it became the present law, that the wife is entitled to one-half of the real estate, absolutely, just like she is entitled to one-half of the personal property. I don't know that people always realize what an important change in the law that this was, but I consider it to be one of the greatest things that was done.

There have been so many changes that I have seen take place. It is hard to realize, but when I went on the bench they were paying Circuit Judges \$400.00 a month. You could not earn over \$5,000.00 a year and you didn't get any expenses or have any offices or any secretaries. For years and years the constitution limited all state officers to \$5,000.00 a year as salary. It is my understanding now that Judges are getting \$30 to \$35,000.00 a year. I guess I was just born at the wrong time. That reminds me of something I wanted to ask you. How do you lawyers get the right to charge as much as you do? When I started practicing law, I made - well you make as much in a week as I did in a year. Of course, inflation has something to do with it. But lawyers are charging their clients \$50 or \$100 an hour. I just can't see that. I don't see how you can measure, fix a fee. I think a fee ought to be considered on the seriousness of the person's case and the time that you have used up studying and practicing the case and also consider the value that you absolutely gave to your client. But to just arbitrarily fix a \$50 or \$100 an hour fee - I just don't see it. You know, it has

gotten so that lawyers are making all the money in the cities - such as corporate lawyers, corporation advisors, bond advisors. But I just bet that some of our lawyers are charging too much too - like the doctors. I think the costs make people afraid to go to a lawyer. Even the corporations have gotten so that they would much rather settle a case then go through the courts because it cost so much. It's just too expensive. I don't think litigation ought to be made so expensive. But of course, I know lawyers have a great many expenses these days that didn't have before. I mean that books cost more, typewriters and gadgets, all those things, prettying up the offices - oh yeah you lawyers are riding high. You've got nice and bigger offices. And I'm sure that your secretaries cost alot also. When I started practicing I think we paid our secretaries about \$12.50.a week. I don't know now how they lived on it, but I guess they did. It bothers me that so many lawyers drift to the bigger cities and get associated with large law firms. Take the Louisville firm that was in the news - I understand that they merged and that they got 30 or 40 lawyers working under that firm. Well, when you do that you are destroying the personal intimacy that a lawyer has with his client. I think that meant a great deal in the old days and it makes good sense now.

I also saw changes in the lawyers that would come in front of me as I stayed on the bench through the years. Back in the old days, the lawyers loved to harangue the jury. But as the years passed, they didn't do that so much. It used to be the peoples opinion that a lawyer that couldn't harangue a jury and make a good speech wasn't much of a lawyer and the public used to really come and listen to the cases be tried. The public seemed to enjoy the Courthouse. Take Commonwealth Attorneys, like Dennis Smith and John King, well, they were really ace prosecutors, but now it has gotten so that the Court of Appeals says that that is too much and that they will set the verdict aside because the prosecutor prejudiced the jury. Well, I never could see that. I always thought that a juror had enough sense that although he might be emotionally influenced to a degree, he would still try the case on its facts rather than on just a speech.

As I am sure you realize, you are going through a kind of change in the courts system since this new judicial amendment. Well,

I was for the change. I think it had gotten so that the wheels of justice were running too slow and clogged up with too much delay. The idea of having to wait two years for the Court of Appeals to pass on case is wrong. It appears to me that the people have gotten used to the new Court of Appeals, but I'm not sure that everybody has gotten quite used to the District Courts yet. I hope that it is like a new pair of shoes, in time it will get more comfortable. Our courts system really ought to have been changed, when it was and John Palmore of the Kentucky Supreme Court, deserves alot of credit for what he has done in bringing about the efficient administration of the courts.

I think it is right that the people have always been able to elect there Judges in your State courts. It bothers me that the Judges in the Federal Court system are never voted on. They serve for life on good behavior. I take the position that our United States Supreme Court, with all it's decisions affecting the rights now as they do of so many people, ought to be only a term proposition. I think they ought to serve for eight years, long enough to give them some stability, but I think they ought to be required to go before the people after eight years at an election. These life time Judges - well, back in the old days that might have been alright, but with the power and what they do now, I think that is a change that ought to be made in the law.

In looking back, I have often thought about the death penalty. You know, I sentenced five men to death, every one of them passed on with my conviction on them and they all paid the extreme penalty. I hated to do it, but it wasn't up to me. The jury decided they ought to pay the penalty. I have often thought that that was one reason during my long term of 42 years on the bench, there was not a single lynching in my district. There wasn't a single lynching in my 3rd judicial district. I had some pretty close calls sometimes - we had to protect the prisoners sometimes and sometimes they got transferred out of the County very quickly - but there were not any lynchings. It looks like some people are just willful killers. I was reading the other day about one man who went to the penitentiary three times for murder. He was paroled the first time, paroled the second time and still kept on killing

people. I want to be humane and I believe in human kindness, but when a man shows that he is such a degenerate as to just go out and slay people such as that fellow in Chicago that killed so many nurses all in one night, now what are you going to do with an human animal like that. He has got no business circulating in society. Its hard to say, but I would have to be in favor of permitting capital punishment.

Of course, another thing I have seen change has been the large increase in the size of the awards of damages made by jurys. I've read about jurys giving millions of dollars as damages. When I was practicing before I went on the bench, I had hard luck with my verdicts. Just to show you, right before I was Judge, we were trying to sue for the widow of a methodist man who had been confined to Western State Hospital. I don't know whether you might have ever heard about the case or not, but he died out there. Well, instead of notifying his widow of the death, they packed up his body and shipped it to a medical school in Louisville for research. When the widow found out about it, she immediately wanted to claim the body. So the medical school up there said alright and they preserved it for her and shipped it back. So they put it in a casket and it came from some town down here in Western Kentucky, I've forgotten which, but when they opened the casket it was a redheaded boy and you can imagine that that created a whole lot of commotion. Well, the widow lived in Henderson and she employed this attorney over there and they came to see us and we filed suit against the hospital, medical school and against the fellow that was the superintendent at the hospital. We tried the case out and you can imagine that it had some ramifications. The jury returned the verdict here in Christian County of \$18,000.00. That was one of the biggest verdicts ever made in this County. Well Judge Bush was on the bench and that looked to big for him so he set it aside as being excessive. Of course, it wouldn't be excessive now. So we had to try it again and the next time we tried it we got a verdict of \$10,000.00, but for some reason they left out the superintendent - the jury left out the superintendent and simply made the Judgment against the hospital and the medical school. Well Seldon Trimble's father was representing the other side. And I was about to get worried about the case. It went to the Court of Appeals, we had an oral argument and they reversed it. They said that Christian County did not have jurisdiction. The hospital

actually belonged to the State and the medical school in Louisville, which was not a State institution, had the right to be sued in the County where it was located and that technicality lost the case. I remember that I wanted to settle the case after the first verdict, but my friend in Henderson was so elated about the verdict, the widow was too, that they wouldn't talk about settling it. Mr. Trimble realized it too, that it was a dangerous case and he was willing to pay some more, but wouldn't everyone agree. Well, I guess that shows you some of the changes. Not just because of that particular old case, but I have always had the opinion that the doctrine of sovereign immunity has been too strictly applied in the law. Its just not logical to say that the government, now that it is involved in so many things, in every day life, cannot be held responsible for damages that they cause. I guess this is slowly changing somewhat, as it should, but it seems to me that its still being applied too strictly. There is one final thing that I would like to comment on although it is not necessarily a change that I have seen, it is a change that I hear is being suggested and I don't think it is a good idea. I've read that the Chief Justice of the United States Supreme Court has advocated that some types of cases should not be decided by a jury, but being decided instead by only the Judge, whether the parties agree to that or not. That's a very bothersome idea. I think that the jury system ought to never be done away with. Like so many things, it could stand to be improved, but it should never be done away with. Neither is it right to keep a jury more than a week at a time. I don't like this Federal business of keeping a Federal Grand Jury for 12 to 18 months simply looking for something to indict an official on or something. The jury can't possibly see enough or memorize enough evidence in that period of time to make a fair decision and I think it is wrong to take up so much time. But of course that increases the lawyers fees, doesn't it? Maybe that's the reason they want to charge \$50 an hour.

I guess I may think of something else, but I think you could put together a pretty interesting paper on the changes in the law since I have been Judge based on what we have talked about. You know that I served as Circuit Judge longer than any Circuit Judge ever in the history of Kentucky. Although they didn't allow me much money, the

people have been mighty good to me and I'm glad I had the durability to go ahead and serve.

Respectfully submitted,

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