

J. Foster Symes

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLORADO

Be it remembered that at a session of the District Court of the United States for the District of Colorado, at Denver, Colorado, on the 6th day of January, A. D. 1950, the Honorable J. Foster Symes presiding, there being also present the Honorable Orin L. Phillips, Chief Judge of the United States Court of Appeals, Tenth Circuit; the Honorable Sam C. Bratton, the Honorable Walter A. Huzman, the Honorable Alfred P. Murrain, and the Honorable John C. Pickett, Associate Judges of the United States Court of Appeals, Tenth Circuit, and a large number of the members of the Bar of the Court, and others, the following proceedings were had:

THE COURT: Is there any business this morning, Gentlemen?
Mr. Groves.

MR. JAMES K. GROVES: May it please the Court, the matter of the retirement of Your Honor after an extended period of high service has prompted a desire on the part of the Colorado Bar Association at this time to make a record of fact and of public sentiment.

The attorneys of Colorado, not only for themselves but in a much larger sense, as representatives of the people of the state, are deeply appreciative and grateful for the vast contribution that Your Honor has made. It is in mind that

there is a proud history and heritage of this Court closely and intimately related to the progress and status of this state, its people, its industry, its property, and its privileges, and that Your Honor has played an important and beneficial part in this history and heritage. By reason of his competent advocacy before the Bar of this Court on many occasions, and by reason of Your Honor's deep respect for him, the officers of the Colorado Bar Association have requested Mr. Erskine R. Myer to convey our sentiments.

It is a pleasure to introduce Mr. Myer to Your Honor, and to the distinguished members of the Judiciary, the members of the Bar, and others here assembled. Mr. Myer.

MR. MYER: Your Honor, please, members of the Judiciary, Ladies and Gentlemen: I have waited almost thirty years for the opportunity to speak freely in this Court, about this Court. Often I have been tempted to do so and have mustered up my courage to say what I really wanted to say. I have restrained myself because I have thought it might be unbecoming, and because Your Honor would doubtless have overruled me and have stricken my remarks from the record, no matter how complimentary they might have been. Now, however, backed by the Colorado Bar, I bespeak your indulgence because at longlast, I am to have my say on behalf of the lawyers who have practiced before you for over a quarter of a century.

I stand before you this morning with deep and mixed emotions--regret that you will infrequently be upon this bench in the future, and pleasure that you are about to have lighter

3

burdens—a well-earned reward. I am certain that all those present at this occasion will feel the same way.

The members of the bar of this state come here today to pay you, officially, in the court room in which you have so long and so well presided, their tribute of respect and affection. It is a serious thing to mark any man's retirement from the work to which he has given the best years of his life. It is a fitting thing that it should be marked at the scene of his labors, in the court room where scores of sharp contests have taken place before him, where hundreds of men and women of foreign birth have become citizens of our beloved country, where the law has been invoked and applied, where even-handed justice has been dealt out over the years to the high and the lowly, the rich and the poor, with dignity, firmness, restraint and intelligence.

And yet our tribute to you, Sir, is not limited to your work on the bench alone. The people of this city and this state have long felt and profited by your influence in many ways. Your service upon public boards and as a trustee of a great university, your sympathetic attention to many matters affecting veterans of both great wars, your constant and generous help in civic and charitable enterprises, have won for you the regard and affection of men of all groups and in all walks of life.

We do not forget that you are a Coloradan born, the son of a judge and a soldier, that your roots are deep in the prairies and the mountains of this state, that from

your early youth, you have known every square mile of this commonwealth and that you have kept yourself familiar with the temper and the customs and the convictions of the people who live here.

We also remember that when the President of the United States sounded his call to arms in 1917, that you, with no legal obligation, recognized a higher duty, bore arms with younger men, fought in France, commanded a battalion in the storming of Bois de Mort Mare at Saint Mihiel, and led it with stubborn courage in the dark recesses of the Argonne and on the grueling but triumphant march across the Rhine. You have undoubtedly forgotten that it is written in the official history of your great division that in the morning of November 3, 1918

"In the center Captain Symes and his troops were chafing at the delay in receiving orders to advance and repeatedly requested permission to attack without artillery support. No such permission being received, Captain Symes determined to do so upon his own responsibility and did so, penetrating the woods and capturing the Forêt de Dieulet by midnight."

It is a long time since the Argonne and yet in the meantime we have often seen you in these intervening years, upon your own responsibility, penetrate the shadowy woods of equity, and by sheer force of character attain the primary objective of all litigation - substantial justice between men. We who have practiced before you recognize the constant effort required on your part to get us promptly to trial that other

causes too might also be speedily heard. We value, too, the industry and hard work expended in the consideration of our cases and the conscientiousness with which you disposed of them.

The people of this state will long remember the patience and skill with which you brought about the inclusion of the Moffat Tunnel and the Salt Lake Railroad into the Denver and Rio Grande system and directed the rebuilding and reorganization of that railroad upon which so many important industries of Colorado so largely depend. They will not forget that you presided in this Court through the difficult days of prohibition, the great depression, and the second world war, when problems novel in the extreme were created and demanded solution under the law. It is given to but few men to serve their country for thirty years. It is within the limit of the abilities of few men to serve it so well for so long. You have followed in the footsteps of two great trial judges and all men will always say of you that you have maintained the high standard and traditions of your Court and are entitled to your place alongside the great names of Hallett and Lewis in the history of this Court and of this state.

I think it was Cicero who said that since he liked a young man in whom there was something of the old, therefore, he liked an older man in whom there was something of the young, and that whoever followed such a maxim would always be young in mind and spirit. We have no fear that in your retirement, you will continue to hold this maxim as your own. Surrounded by your many friends, possessing the companionship of lovely

daughters and stimulated by the activities of growing grand-children, your retirement is truly an opportunity, as well as a reward. And when, from time to time, you return again to preside in this court room, you can rest assured that your friends at the Bar will welcome you with confidence and with pleasure.

Upon the coat of arms of a famous English family is inscribed in Latin the motto - courage, conscience and ability. Upon the simple gift which the lawyers of this state now tender you in recognition of your retirement appear the words -

"Courageous, conscientious and able Judge of the United States District Court for the District of Colorado for a quarter century."

Such an inscription is a fair motto on any man's escutcheon and it is most appropriate on yours.

On behalf of the lawyers of Colorado, I present this token of their respect and esteem.

(Presentation to the Court.)

MR. GROVES: May it please the Court, Mr. Ivor O. Wingren, distinguished member of the Bar and for many years associated with the staff of the United States Attorney's office, has some remarks that he would like to make to Your Honor at this time.

MR. WINGREN: May it please the Court, Judges, members of the Colorado Bar Association, Ladies and Gentlemen: Last summer when it became evident that because of ill health Judge Symes would be forced to retire, members of the Symes family, that is, his sister, Mrs. Katharine Symes Crane, his brother,

George Clifford Symes, and his two daughters, Virginia McMurtry and Cynthia Maer, conceived the idea that it would be an appropriate thing to have an oil painting of His Honor painted to be presented to the United States District Court for the District of Colorado, to be hung in this courtroom of that Court in an appropriate place, to perpetuate the likeness of His Honor as an inspiration to his successors and so that in the future those attorneys who had practiced before His Honor might view with pleasure or otherwise the likeness of the Judge before whom they had successfully or unsuccessfully presented their matters in this Court, and for the purpose of permitting the new members of the Bar who never had the privilege of practicing before His Honor to see a likeness of the man who presided over this Court for twenty-eight years, and who, with his two predecessors whose likenesses now hang in this courtroom, presided over this Court for the last seventy-three years, or the entire length of time that this Court has been in existence from the founding of the State of Colorado to the present day.

I have been selected by the Symes family to make this presentation.

It is therefore with great pleasure on behalf of the Symes family that I now present to this Court and to the United States Government as a gift from the Symes family, an oil painting of Judge J. Foster Symes, United States District Judge for the District of Colorado.

Thank you.

(Unveiling of portrait of the Honorable J. Foster Symes.)

MR. GROVES: May it please the Court, the Honorable Crie L. Phillips, Chief Judge of the United States Court of Appeal, Tenth Circuit, will make the acceptance on the part of the United States of America.

CHIEF JUDGE PHILLIPS: Judge Symes, Brethren of the Bench and Bar, Ladies and Gentlemen:

At a meeting of the bar association held last Wednesday in honor of Judge Symes, Judge Murrah and I, speaking for our Court, paid tribute to the long and distinguished career of Judge Symes as United States District Judge for the District of Colorado. It would not seem appropriate therefore to undertake to reiterate what was said on that occasion; but lest those of us now here and those of us to come after shall too soon forget, and in forgetting fail to reap in the fullest measure the rich inspiration and the influence for good emanating from the life, the work, the achievements, and the character of this good and just man, it is indeed fitting and proper to hang in this temple of justice where he so long presided, this portrait of Judge J. Foster Symes as a gift from his family to his country which he loved and honored with a high order of public service.

Therefore, in behalf of the United States District Court for the District of Colorado, and the United States of America, I accept the gift and tender sincere thanks to the donors.

THE COURT: Are there any other proceedings, Gentlemen?

MR. GROVES: Your Honor, I believe you would be interested to know that on behalf of the Colorado Bar Association, Mr. Fritz Nagel, of the Denver Bar, was in charge of the arrangements for these proceedings this morning.

I do have a motion to make with respect to the record of this proceeding, but we would prefer to wait until any comments that may come from Your Honor are completed.

THE COURT: Ladies and Gentlemen, members of the Bar, and Judges: This is indeed a very happy occasion for me, as you can all imagine. I don't know whether this is really holding my obsequies or what it is. I am in the position of a man who is retiring from a position and at the same time he is present to see the proceedings and take part in them in so far as he may. But whatever it may be, it is indeed a very pleasing occasion to me and I want to say right at the start that all the kind things that have been said about me by my friends and by members of the Bar are hardly deserved.

But be that as it may, this Court has been in existence for over 70 years, and it may be fitting at this time to review my predecessors, Judge Hallett and Judge Lewis, who have presided in this Court previous to me.

Judge Hallett, as you all know, came to Colorado from Illinois, of New England parentage. He was brought up on a farm with a common school education. He studied law in Chicago, was admitted to the bar in that city, and came to Colorado in 1860. He was one of the thousands lured to Colorado

by the discovery of gold in the region then known as Pike's Peak. For a year or so he mined a gulch claim in Gregory's Gulch, near Central City, before coming to Denver to begin the practice of law. He was a member of the Legislative Council of the Territory of Colorado in 1864 and 1865. At that time Golden was the capital of the Territory of Colorado.

Moses Hallett later formed a law partnership with Alfred Sayre, and at one time was city attorney for Denver. He soon attracted the attention and gained the respect of the bar by his studious habits and ability. He was appointed Chief Justice of Colorado by the then President of the United States, Andrew Johnson. He took his seat upon the bench in the Territory of Colorado in the days when Colorado was a young frontier of civilization and by sheer force of character and courage brought order out of seething chaos.

The first session of the Federal Court was held at 1626 Larimer Street on December 3, 1876 at Ford's Hotel. Elzer S. Dundey, Justice of the United States District Court of Nebraska, presided, but there was no Bar in existence at that time and therefore admission to the Bar for the first lawyers was moved by Samuel H. Elbert of the Supreme Court of this State.

Judge Hallett was assigned to what was known as the Third Judicial District at that time, including all the territory south of "The Divide," which extended to New Mexico, and from Kansas on the east to Utah Territory on the west with

headquarters at Pueblo.

Judge Hallett retained the office until Colorado became a State of the Union in 1876, when he was appointed by President Grant as Judge of the United States District Court of Colorado. He thereafter resided in Denver. He later taught law at the Colorado state university, which university later conferred on him the well-deserved honor of Doctor of Laws.

Judge Hallett's death was a notable epoch in judicial history of Colorado, following his voluntary resignation as judge after 40 years of continuous judicial service, over 30 years of which was upon this particular bench.

As a judge, Judge Hallett insisted on strict rules of pleading because, as he said, not to observe them was to indicate either a poor or a slovenly lawyer, and the interests of clients required such weakness should be corrected.

This was under the procedure of common law, but when the code system became the rule of the state, he freely construed all questions of pleading in the liberal spirit demanded by the code.

The district to which he was assigned required Judge Hallett to travel thousands of miles by wagon and stage. From the very beginning of his service he enforced the strictest order and established a courtesy and decorum on the part of the bar unexcelled in any court.

During his 40 years administration of his judicial duties he made more sound law and good law than any other

jurist that ever graced the bench in Colorado. This, due to his studious and self-contained nature, his dignity of bearing and tenacity of opinion, gave to his court and personality a force and influence which made an indelible stamp on the legal profession and judiciary.

He made the law on many new legal questions that were constantly arising in the western country, including water rights and usages in irrigation, mining and the public domain. He was the first to declare the inapplicability of the ancient common-law doctrine of riparian rights to waters of non-navigable streams, and to announce the rule of water rights based on prior application by one seeking the use of water for necessary or beneficial purposes. He also recognized that a settler for the irrigation of land, even though held under a mere possession title, had a right not only to divert water from the streams but to convey it by ditches or flumes through lands of another without the owner's consent.

This was afterward incorporated into the Constitution of Colorado, and has been followed as the prevailing law in most, if not all, of the states in the arid and semi-arid West.

In addition, he compiled the first two volumes of Colorado Supreme Court Reports, containing the important decisions of the territorial courts, down to the time of the admission of Colorado to statehood. He was the first judge to try and decide a case under the doctrine of the Apex Rule in

mining litigation, which was very important in the mining law which afterwards grew up in this state.

Judge Fallett was succeeded by Judge Robert S. Lewis who presided in this court until 1922 and whose work upon the bench was recognized by all as that of a great Judge. He was one who perhaps a good many of you here present will remember as a judge of this court, as he presided over this court while many of us were young, and many of us were admitted to the Bar at that time. He was rewarded for his splendid service upon the bench in this court by promotion to the Presiding Judge of the Tenth Judicial Circuit when it was first created and started to function, having been carved out of the Old Eighth Judicial Circuit.

I assure you, Gentlemen, that these two men, the only men who presided in this court before me, were an inspiration to me to do a good job as judge of this court, and their examples and their decisions have always been inspiring to me and have long been a good precedent for any law or any decision that might be made by this or any other Court.

Are there any more remarks this morning, Gentlemen?

MR. GROVES: If it please the Court, Mr. Reporter, would you make four certified copies of the transcript of these proceedings this morning in order that one may be spread upon the records of the court, that one may be presented to Your Honor's family, that one may be had by the Colorado Bar Association, and that the fourth may be presented to the Colorado

State Historical Society.

THE COURT: It will be so ordered, Mr. Groves.

MR. MORRISON SHAFROTH: Your Honor, I wonder if it would be possible to incorporate in that record the remarks made by Judge Murrah and Judge Phillips at the luncheon which Judge Phillips referred to in his statement.

MR. GROVES: If we can prevail upon Judge Murrah to reduce them to writing, may we incorporate that, Your Honor?

THE COURT: With Judge Murrah's consent, it will be so ordered.

JUDGE MURRAH: It will be an honor.

THE COURT: If there is nothing more, Court will stand adjourned.

UNITED STATES OF AMERICA

District of Colorado

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I, R. Forrest Branner, the Official Court Reporter for the District Court of the United States, for the District of Colorado, hereby certify the above and foregoing to be a true and correct transcript of the proceedings had in the above-entitled matter in said court at the time and place as set forth.

R. Forrest Branner

Certified Shorthand Reporter