

PROCEEDINGS
IN MEMORY OF
CHIEF JUSTICE EMMETT.

On the afternoon of December 4, 1906, in the court room at the State Capitol, Hon. Thomas Wilson addressed the Supreme Court then in session and said:

The undersigned, committee of the members of this bar, beg leave to present the following memorial and to ask that it be accepted by this Court and incorporated into its minutes:

MEMORIAL

The Honorable Lafayette Emmett, the first Chief Justice of this Court, died at Santa Fe, New Mexico, on the tenth day of August last, and was buried at Faribault in this state on the twenty-ninth day of October. He was born in Ohio in 1822, and lived in that state until he came to the Territory of Minnesota in 1851. He was admitted to the bar in the State of Ohio in 1848, and entered upon the practice of his profession in the City of Mount Vernon, where he was married in 1849 to Elizabeth Ball. His wife died while he lived in Faribault as below stated, and of the nine children born to them but two are living—Mary, the wife of John C. Pichon, who resides in Boston, Massachusetts, and Carrie, the wife of Miguel Otero, of New Mexico, who resides in and for two terms was Governor of that Territory. Soon after Judge Emmett came to Minnesota he formed a partnership with the late H. L. Moss for the practice of the law, and as a member of that firm continued to practice his profession in this city until he was elected Chief Justice in 1857. He held the office of Chief Justice until 1865. He removed from St. Paul to the city of Faribault in 1872, and lived in the latter city until 1878, when he removed to Ortonville in this state. From Ortonville about the year 1885, he went to New Mexico, where he continued to live until the time of his death.

He was a man of good character, good education, and of exceptionally fine presence and engaging manners, and, as the reports of his judicial opinions show, of much more than ordinary ability. Nature endowed him with those attributes which would have enabled him by diligence, had it been his ambition, to take a very high stand in the practice of his profession.

THOMAS WILSON.
W. P. MURRAY
HARVEY OFFICER

JUDGE WILSON also said:
If your Honors please:

I have very little which I wish to say. I had the pleasure of knowing Chief Justice Emmett, as I was a little while on this bench with him. I knew him then and knew him for a little while after. Soon after leaving the bench he ceased to be much known in this state, as he did not take much part either in the practice of his profession or publicly at all. He was a man of a great deal more than ordinary ability; and, as this paper says, a man of very exceptional attractive characteristics and personality. The only comment adverse to Judge Emmett that could be made

would be that he was a little inclined to be indolent. Had he done his best he would have been a man of mark. He was, however, a man of mark, taking into account his personality, his accomplishments and his ability.

HON. HARVEY OFFICER then said:

May it please the Court:

I was introduced to Lafayette Emmett, and to Henry L. Moss, his then law partner, by Capt. Alexander Wilkin, in the month of June, 1855; and from that date until Judge Emmett left the state my professional and personal relations with him were close and intimate.

From 1855 until Judge Emmett became Chief Justice of this Court, in 1858, he was recognized and esteemed as one of the leaders of the bar of this Court, and of Ramsey County; successfully competing with such lawyers as William Hollinshead, Horace R. Bigelow, John B. Brisbin, George L. Otis, Henry J. Horn, M. E. Ames, John M. Gilman, John B. Sanborn, and many others of marked ability and reputation.

As a lawyer Judge Emmett was neither aggressive nor forceful; excelling rather as a counsellor in the office than as an advocate in jury work; but whether before the court or jury, he was always calm, self-possessed, deliberate and scholarly; commanding the respect of the court, and winning the love of his associates at the bar by his uniform courtesy, and his most attractive personality.

Judge Emmett was a man given to hospitality in its largest sense. His old home still stands on West Seventh Street in this city; it was one of the mansions of Territorial days. While he was Chief Justice, on Monday of each alternate week during the winter session of this Court, and the session of the Legislature, he and his family opened their home to all their many friends without formal invitation; and all comers were received with a hearty and generous welcome. Such entertainments were possible in those days, but would not be practicable now under existing conditions; and they were occasions not to be forgotten by the few surviving old residents of the state.

The later days of Judge Emmett's residence in St. Paul were clouded by the long continued sickness of certain members of his family; but he always retained the love and respect of his many friends, as an accomplished and upright gentleman.

I owe to him, and his then associates on the bench, my appointment as Reporter of this Court; and I esteem it as a duty, as well as a privilege, to second the motion to spread the memorial offered by your Committee, on the records of this Honorable Court.

Chief Justice Start then said:

If there are no other speakers Justice Jaggard will respond for the court.

JUSTICE JAGGARD, in behalf of the court, then said:

It accords with recognized propriety and honored custom that your memorial should become a public record.

On February 26, 1857, congress passed an act authorizing the Territory of Minnesota to hold a constitutional convention. The election of members for that convention, held on June 1, 1857, resulted in so close a division of votes between the Republican and Democratic delegates that each party held a separate convention. By means of conference committees, however, they united in one document. That constitution was submitted to the vote of the people October 13, 1857, and was adopted almost unanimously. The constitution thus adopted was approved by the

federal congress May 11, 1858. Section 16 of article 15 of that constitution provided for an election of all state officers at the time of voting upon the adoption of the constitution.

Lafayette Emmett was the logical candidate of the Democratic party for chief justice of the supreme court. He had been the attorney general of the territory from 1853 to 1858. He had appeared in the interests of the city of St. Paul in the litigation consequent upon the act of Joe Rolette in disappearing with the enrolled bill changing the place of government to St. Peter. Judge Nelson, then on the second circuit, had issued a writ of mandamus to Governor Medary and the territorial officers to compel their removal to St. Peter, at the instance of A. F. Howes, president of the St. Peter Land Company. Judge Chatfield appeared for the complainant, Emmett for the officers. Judge Nelson held that the law on file not being the original bill was invalid, and St. Paul remained the territorial capital.

Judge Emmett's nomination for chief justice, occasioned by these and other political and personal circumstances, was largely due to the active part he had taken in the debates and proceedings of the Democratic branch of that convention. He was there recognized as a man of broad opinions in harmony with prevailing views; and with a capacity for their forcible presentation. More particularly the controversy whether the judiciary should be elective or appointive was prolonged and lively. The report of the committee on the judicial department provided that the governor should nominate and, by and with the advice and consent of the senate, appoint the supreme judges. Mr. Emmett moved a substitute, providing for the election of the judges of the supreme court by the electors of the state, for the term of seven years. Mr. Sherburne actively opposed the elective judiciary. He was supported by Mr. Meeker, who said, inter alia: "I contend that the judges who are elected are elected by parties, and are the mere fuglemen of caucuses. The best trickster or the best manager of caucuses is just as likely to be the nominee of the party as the most learned man of the nation." Mr. Emmett, replying, said inter alia: "We hear a great deal of talk about an independent judiciary. The phrase is in everybody's mouth. What does it mean? Independent of whom? Independent of what? Independent of the people? Sir, I say to the gentleman who was last up (Mr. Meeker) that out of his own mouth I propose to condemn him. * * * Sir, if the people are incapable of selecting their judges, they are also incapable of selecting the man who is to appoint the judges. I think the facts will show that the people are much better qualified to select your judges than is the governor. The governor always selects men belonging to his own political party, while the people often select them regardless of parties." The principle of his amendment was adopted.

On May 24, 1858, all state officers elected in the previous October entered upon their respective duties as the first officers of the State of Minnesota. The first supreme court of the State of Minnesota was composed of Lafayette Emmett, chief justice, and Isaac Atwater and Charles E. Flandrau, justices. In 1864, Justices Atwater and Flandrau resigned. S. J. R. McMillan and Thomas Wilson were appointed to fill the vacancies. Chief Justice Emmett served until January 10, 1865, when he was succeeded as chief justice by Thomas Wilson.

The first opinion of Chief Justice Emmett was in *Minnesota & Pacific Railroad Co., v. Sibley*, 2 Minn. 1 (13), granting an application to the court for a writ of mandamus requiring the governor, Henry H. Sibley, to issue state bonds in aid of railways. This beginning of this historic litigation received the sanction of a bare majority of the court. Judge Flandrau dissented. The last opinion of Chief Justice Emmett was *Armstrong v. Hinds*, 9 Minn. 341 (356),

The court as originally constituted prepared opinions in the following number: Flandrau, 217; Atwater, 158; Emmett, 112. After the retirement of the other justices, Chief Justice Emmett handed down twelve more opinions. He dissented in thirty-six of these cases; in twenty-six

instances without opinion. Judge Flandrau dissented nine times and Judge Atwater eight times. In the seven years of the chief justice's services he handed down 124 opinions, or about 17 in one year. It is interesting, in this connection, to note the growth of the work of this court. Its maximum was probably reached in 1895, when the number of cases amounted to 695, or 139 to each judge. During the nineteen years of Judge Mitchell's service, he wrote more than 1,500 opinions, and averaged approximately eighty opinions in a year, about the number of opinions now prepared each year by each member of the present court. That is to say, Justice Mitchell wrote about as many opinions in a year and a half as Chief Justice Emmett in seven years.

His opinions were marked by the same sound common sense which in his first opinion in this court he recognized as the basis of the interpretation of legal instruments. Of necessity they rested upon principle rather than upon authority. Not only were library facilities limited, at a time antecedent to the present plethora of legal literature, but also many of the questions were new in themselves. The reports of this period abound in cases of first impression. The municipal code of the state was in its literal infancy. A very large proportion of his decisions, in some volumes amounting to seventy-five percent, were made without the citation of any authority whatever. For example *Camp v. Smith*, 2 Minn. 131 (155), established the right of a pre-emptor to transfer his interest in land. This principle, now so familiar and indisputable, was determined purely upon principle and without reference to any adjudication.

With the embryonic condition of the laws and of all state constitutions at that time, we are all familiar. It is, however, somewhat of a surprise to have occasion to realize how young, indeed, was the entire nation. For example, at that time, in the city of St. Paul, Judge Emmett's brother, as the author of both words and music, directed the singing for the first time of a song that has become the national hymn of a great part of this republic; that song was "Dixie."

The historical record here made serves in a measure to preserve alike the personal worth and the public services of those great men who laid the foundations of this commonwealth. To such statesmanship, the judgments of all men have always without dissent accorded high praise. The philosopher and historian Hume has thus expressed that universal opinion: "Of all men that distinguish themselves by memorable achievements, the first place of honor seems due to * * * the founders of states who transmit a system of laws and institutions to secure the peace, happiness and liberty of future generations." The founders of the government of this state are, however, entitled to peculiar honor: Because of the circumstances under which they labored; of the spirit of devotion to duty with which they wrought; and of the merits of the results they attained.

They were confronted by all the difficulties arising from diverse-factions and opposing local interests usual in the beginnings of any government. They were also face to face with problems peculiar to sparse populations, newly scattered through primeval forests and unbroken prairies, where they were exposed to a severity of climate more merciful than the malignant enmity of valiant, persistent and cunning aborigines. Moreover, this was at a time when the destiny of the entire nation was unfixed and unknowable, and when the certain vision of the tragedies of the approaching crisis fitted them least for the cold deliberation and clear thinking so essential to their titanic task. The chronicles of the struggles of opposing parties contain no record more honorable in itself nor involving a nobler subjection of partisan advantage to public weal than is to be found in the production by two-hostile political conventions of one constitution embodying the highest principles of both factions of honest and intense men and providing a just basis for the jurisprudence of this state for all time to come. With the abiding efficiency and practical excellence of their colossal-work, the unrealizing world is daily made

familiar, but it is prone to forget the self sacrifice, the prescience, the faith and the patriotism; the unswerving worship of ideals and the exalted wisdom and virtue of the pioneer founders of this state.

Accordingly, with a due appreciation of the gratitude due to lofty and unselfish achievements of the founders of this state, and of the justice of your tributes to the one-time member of this court, "the door of whose mind has been closed on earth to open to the dawn beyond the tomb," it is now directed that your memorials be inscribed on the records of this court, there to remain as a lasting annal of his worthy life and public usefulness.

Chief Justice Start then said:

In memory of Chief Justice Emmett the Court will now adjourn.