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# LAWYERS AND COURTS OF MINNESOTA PRIOR TO AND DURING ITS TERRITORIAL PERIOD.\*

BY JUDGE CHARLES E. FLANDRAU.

Judges and lawyers generally occupy such a large space in the growth and progress of a country that what they say and do makes one of the factors of history, and usually gets itself upon the records in some way. It certainly cannot be the result of self-assertion, as their modesty is proverbial. I am inclined to attribute it to the fact that their doings possess some real interest to the other members of society. They ought to be men of learning, and, as a general thing, they individually and as a body possess a large share of the brilliancy and wit of a community. They fill a large share of the public trusts, and shape the policy and laws of a country as naturally as water seeks its level. Their light is seldom hidden from the generation of which they form a part; but there always seems to be a desire to learn of their career in the early and unwritten period of a country, and I have been requested to prepare a paper for this occasion, noting who they were and what they did in the early days of Minnesota.

Our state had rather a mixed origin. Its mothers were the Northwestern Territory and Louisiana. The first gave us what lies east of the Mississippi, and the last what we embrace west of that stream; and before this area became Minnesota, it was, on the west side of the river, first Louisiana, then Missouri, then Michigan, then Wisconsin, then Iowa.

On the east side of the Mississippi it was, first, a part of the Northwest Territory, which belonged to Virginia and was

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ceded by that state to the United States; later it was a part of Indiana; and afterwards of Wisconsin.

I once took the trouble to look up all the acts of Congress which created these several changes, and I have the dates of their passage, but I will not inflict them upon you at this time, preferring to confine myself to those matters that are more germane to the subject in hand. When Wisconsin was a territory, its part lying west of the St. Croix river was in St. Croix county, which included St. Anthony Falls, Stillwater, Point Douglas, Marine Mills, Arcola, and St. Paul, and was the home of a good many men of standing and ability. The admission of Wisconsin into the Union in 1848, with the St. Croix river for its western boundary, left all the country west of that stream without any government, and the lawyers without courts, which presented quite a formidable obstacle to their business prospects; but they were equal to the occasion. They claimed that the remnant which had been abandoned by Wisconsin, as a state, was still Wisconsin as a territory. They induced Mr. John Catlin, the Secretary of the Territory of Wisconsin, to remove from Madison to Stillwater, and, as ex-officio governor, to proclaim the existence of the territory and call an election for a delegate to Congress. Henry H. Sibley was elected, and was admitted to a seat from Wisconsin, and in March, 1849, procured the passage of an organic act for the Territory of Minnesota.

Sibley was a lawyer, but he never practiced the profession. He lived at Mendota, then called St. Peter's, and hung out a lawyer's sign in 1835. This sign was in the possession of his family at the time of his death, and either is, or should be, now in the museum of this Society.

While living at St. Peter's, Mr. Sibley was the first judicial officer who ever exercised the functions of a court in Minnesota. He was commissioned a justice of the peace in 1835 or 1836 by Governor Chambers of Iowa, with a jurisdiction extending from twenty miles south of Prairie du Chien to the British boundary on the north, to the White River on the west, and to the Mississippi on the east. His prisoners could only be committed to Prairie du Chien. Boundary lines were very dimly indicated in those days. Minor magistrates were in no fear of being overruled by superior courts, and tradition asserts that the writs of Sibley's court often extended into Wisconsin and



other jurisdictions. One case is recalled which will serve as an illustration: A man named Phalen was charged with having murdered a sergeant of the United States army named Hayes, in Wisconsin. He was arrested under a warrant from Justice Sibley's court, was examined and committed to Prairie du Chien, and no questions were asked. Phalen Lake, from which our water supply is partially derived, is named after this prisoner. Sibley was the first governor of the state, commanded a large part of the forces in the Indian war of 1862, and was made a Major General of Volunteers by the President for his services. He was one of our best citizens and is lamented by all.

An attempt was made in 1842 to hold a court in St. Croix county by Judge Irwin, then one of the territorial judges of Wisconsin. It came about in this way: There was a very enterprising settler here then, named Joseph R. Brown, who came to Fort Snelling with the regiment which laid the cornerstone of the fort, in 1819, and was discharged from the army in 1826 or thereabouts. In 1842 he was clerk of the courts in St. Croix county, and for some reason, best known to himself, procured the Legislature of Wisconsin to appoint a court in his county. Judge Irwin came up to hold it; and on arriving at Fort Snelling he found himself in a country which indicated that disputes were more frequently settled with the tomahawk than by the principles of the common law. The officers of the fort could give him no information, but fortunately he discovered Norman W. Kittson at his trading house near the Falls of Minnehaha. Kittson knew Mr. Brown, the clerk, who then lived on the St. Croix near where Stillwater now stands, and directed the judge to him. He furnished a horse, and his honor struck across the country and found his clerk, who had either forgotten all about the court or had never heard of it. The disgusted judge took the first chance down the river, a very angry man.

After five years from this futile attempt, the first court was held by Judge Dunn, then Chief Justice of Wisconsin. This occurred in June, 1847. The term was important, not alone as being the first term ever held in what is now Minnesota, but on account of the trial of an Indian chief named "Wind," who was indicted for murder. Samuel J. Crawford, of Mineral Point, was appointed prosecuting attorney for the term, and Ben C. Eastman, of Platteville, defended the prisoner. "Wind"

was acquitted. This was the first jury trial ever had in any part of the region now embraced in Minnesota.

The admission of Wisconsin into the Union left Morton S. Wilkinson and Henry L. Moss in Stillwater, the former having located there in 1847 and the latter in 1848. Mr. Wilkinson afterward became distinguished in his profession as a lawyer, and also in political life. He represented our state in the House of Representatives and Senate of the United States, and was always a genial and interesting man, much beloved by the old settlers up to the time of his death.

Mr. Moss was appointed United States District Attorney, when the Territory of Minnesota was organized, and practiced law for some years, but has been engaged in other business during a long time past. Mr. Moss is one of the very few survivors, in fact, I think the only one, of the lawyers dating back of the organization of our territory. He still lives, and has added some of his recollections of those interesting times to the annals of our Society on this occasion.

The first court house that was erected within the present limits of Minnesota was in Stillwater in 1847. A private subscription was taken up and \$1200 raised, to be supplemented by the county of St. Croix with sufficient to complete the structure. It was perched upon the top of one of the high points in that town, and many are the citizens who have been winded and made to blaspheme in ascending to its lofty pinnacle. The first territorial court of Minnesota was held in it in 1849, and I held one there in 1857.

The first judges of Minnesota Territory were Aaron Goodrich, Chief Justice, and David Cooper and Bradley B. Meeker, Associate Justices; and the first court, of which I have spoken, was presided over by Chief Justice Goodrich, assisted by Judge Cooper. The court lasted one week. There were thirty-five cases on the calendar. The grand jury returned ten indictments, one for assault with intent to maim, one for perjury, four for selling liquor to Indians, and four for keeping gambling houses. Only one of these indictments was tried at this term, and, being the first, and the prisoner being a prominent member of the bar, Mr. William D. Phillips, it may be interesting to give a brief history of the case and of the defendant.

Mr. Phillips was a native of Maryland, and came to St. Paul in 1848. He was the first District Attorney of the county of

Ramsey, elected in 1849. He left this country when General Franklin Pierce was elected to the presidency, and never returned. He was a very eccentric person, and many anecdotes are related of him. On one occasion, when discussing the construction of a Minnesota statute with an attorney fresh from the east, his adversary made some classical allusion in which the name of Cicero or Demosthenes occurred. Mr. Phillips, answering, became very much excited, and in a rising flight of eloquence said: "The gentleman may be a classical scholar; he may be as eloquent as Demosthenes; he has probably ripped with old Euripides, socked with old Socrates, and canted with old Cantharides; but, gentlemen of the jury, what does he know about the laws of Minnesota?"

Another story is told of him, which proves that he possessed in a high degree that prime quality generally attributed to the profession, of always charging for services rendered. Mr. Henry M. Rice had presented him a lot on Third street for the purpose of building an office for his business, and when he presented his next bill for services to Mr. Rice there was a charge of four dollars for drawing the deed.

The indictment against Mr. Phillips charged him with an assault with intent to maim. In an altercation with a man, he had drawn a pistol on him, and the defense was that the pistol was not loaded. The witness for the prosecution swore that it was, and further, that he could see the load. The prisoner, as the law then was, could not testify in his own behalf, and he could not directly disprove this fact. He was convicted and fined \$25. He was very indignant, and explained the assertion of the witness that he saw the load in this way. He said he had been electioneering for Mr. H. M. Rice against Mr. Sibley, and from the uncertainty of getting his meals in such an unsettled country he carried crackers and cheese in the same pocket with his pistol, a crumb of which had got into its muzzle, and that the fellow was so scared when he looked at the pistol that he thought it was loaded to the brim.

Many of the first lawyers of the territory were admitted to the bar at this term, among whom were Morton S. Wilkinson, Henry L. Moss, Edmund Rice, Lorenzo A. Babcock, Alexander Wilkin, Bushrod W. Lott, and a good many others. Of the whole list, Mr. Moss is the only survivor.



Edmund Rice was one of the pioneers of our railroad system. Mr. Babcock was Attorney General of the Territory from 1849 to 1853. Alexander Wilkin commanded our Ninth Regiment in the Civil War, and was killed at the battle of Tupelo; and Bushrod W. Lott was the first president of the village of St. Paul, and afterwards was United States Consul at Tehauntepec, Mexico.

Among the "forty-niners" were William P. Murray and George L. Becker. Mr. Murray served many terms in Minnesota legislatures, was for a long series of years corporation attorney of St. Paul, and is now living in this city. If Mr. Murray is engaged in the practice of law now, he enjoys the distinction of being the oldest living practitioner in the state in date of service. If he has retired from practice, that honor belongs to me, as every lawyer who was in practice forty-three years ago, at the date of my arrival, except Mr. Murray, has either died or retired from the profession. Mr. Becker was prominently connected with our railroad system, and is now on the Railroad and Warehouse Commission of the state.

Henry F. Masterson and Orlando Simons also came in 1849. They were partners for many years. Mr. Masterson was the first railroad lawyer we ever had. He was attorney for the first corporation formed. Mr. Simons became District Judge of Ramsey county.

The year 1850 gave us William Hollinshead, who was at the head of the bar for several years; Rensselaer R. Nelson, who became one of the territorial judges of the Supreme Court, and was made judge of the United States District Court on our admission into the Union, which position he still holds, being the oldest United States judge to-day, by date of commission; Lafayette Emmett, who was the first Chief Justice of our State, and who now resides in New Mexico; William H. Welch, who was Chief Justice of the Supreme Court of the Territory; and Jacob J. Noah, who was first clerk of the Supreme Court of the State.

I recall a very good anecdote in which the Major, as we called Mr. Noah, figured. He lived at Mendota and practiced law there. About the year 1855 Mr. John B. Brisbin arrived in St. Paul and commenced practice. A great deal of the business was done in courts of justices of the peace, and Mr. Brisbin was called to Mendota to defend a client who was charged with

trespassing on another's land, or, as we then called it, "jumping his claim." Major Noah appeared for the plaintiff and filed his complaint. Mr. Brisbin demurred to it, and made a very eloquent and exhaustive argument in support of his position. The Justice was a very venerable looking old Frenchman (the greater part of the population being French at that time). He listened very attentively and occasionally bowed when Mr. Brisbin became most impressive, leaving the impression upon the speaker that he comprehended his reasoning and acquiesced in his conclusions. When Mr. Brisbin closed his argument, Major Noah commenced to address the court in French. Mr. Brisbin objected; he did not understand French, and judicial proceedings must be conducted in English. The Major replied that he was interpreting to the court what Mr. Brisbin had been saying. "I desire no interpretation; I made myself clear," said Mr. Brisbin. "Certainly," said the Major, "Your argument was excellent, but the court don't understand any English," which was literally true. Tradition adds that, when the court adjourned, the judge was heard to ask the Major, "Est ce qu' il y a une femme dans cette cause la?" Whether the judge decided the case on the theory of there being a woman in it or not, history has failed to record.

In 1850 Allen Pierce from Mississippi, who had been a partner of Senator Henry S. Foote of that state, settled in St. Paul, but did not remain any length of time. He went to Willow River (now Hudson), in Wisconsin.

Charles J. Hennis, an Irishman, came from Philadelphia and settled in St. Paul. The very mention of his name recalls eloquence and scintillating wit. He was a jovial fellow, but died early in the fight.

C. S. Todd, of Kentucky, and William G. Le Duc, arrived in 1850. The former remained only a short time. General Le Duc became Commissioner of Agriculture under President Hayes' administration. He now lives in Hastings.

In 1851 came DeWitt C. Cooley, of New York, who emigrated here from Texas; also a Frenchman named T. P. Watson, from Detroit. I do not recall that either of these gentlemen developed more than a routine professional career.

In 1852 Mr. Isaac V. D. Heard settled here. He was prominent at the bar, and was the author of a history of the Sioux war of 1862, in which he acted a prominent part as aid-de-camp



to the commanding general. Mr. Charles L. Willis, from Ohio, also coming in 1852, settled in St. Paul and practiced for some years. He is the father of Judge John W. Willis, now on the district bench of Ramsey county.

Mr. Daniel Breck, of Kentucky, was likewise an acquisition of 1852, but, in true Kentucky style, he killed a man shortly after his arrival and departed.

Mr. John E. Warren settled in Minnesota in 1852, coming from Troy, New York. He was a lawyer by education; but, having ample means at his command, he followed the dictates of his taste, which led him into literature and travel. He wrote a work on Spain, and another entitled "Para, or Adventures on the Amazon." He was once mayor of St. Paul, and United States District Attorney of the territory. I recall with much pleasure the sumptuous but refined hospitality of Mr. Warren's house, which was made doubly attractive by the brilliancy of his charming wife. They are both alive and reside somewhere in the east.

We must keep in mind that St. Anthony was part of Ramsey county up to 1856, and that it contained some of our prominent lawyers. Conspicuous among them were Isaac Atwater, afterward Associate Justice of the Supreme Court of the state; Ellis G. Whitall, William H. Hubbard, James H. Strader, and Samuel M. Tracy; William H. Welch, whom I have heretofore mentioned as Chief Justice of the territory; George A. Nourse, who emigrated to Nevada and became Attorney General of that state; Israel I. and Dan M. Demmon; George E. H. Day; David A. Secomb, a very militant gentleman, whom some one once spoke of as being in collusion with a party, to which my old partner, Mr. Bigelow, who knew him intimately, answered: "It can't be true; he never colludes,—he always collides;" Mr. John W. North, who also went to Nevada and became one of its territorial judges; Abram R. Dodge; James M. Shepley; George W. Prescott, who was for a time clerk of the territorial Supreme Court, and the first clerk of the United States District Court after the admission of the state; E. L. Hall, R. L. Joice, Henry W. Cowles, and a good many others whose names I forget. The only survivors of all these gentlemen that I know of are Judge Atwater, who lives in Minneapolis, and, I think, George A. Nourse, who, when I last heard of him, lived in California.

The growth of the country was very rapid from 1852 to its admission into the Union, on May 11th, 1858. Many considerable towns had sprung up along the Mississippi river, and throughout the interior, and of course had their quota of lawyers; but St. Paul, Minneapolis, St. Anthony, Stillwater, and Winona, were the centers of judicial and legal business. In the latter years of the territorial period many distinguished lawyers took their place at our bar. Willis A. Gorman came as the second governor of the territory. He was from Indiana. Among others who came during that time were J. Traverse Rosser, from Virginia, secretary of the territory under Gorman's administration; Westcott Wilkin, from New York, who presided over the District Court of Ramsey county for a quarter of a century with distinguished honor and ability; E. C. Palmer, who became the first District Judge of Ramsey county; William Sprigg Hall, from Maryland, who became the first judge of the Court of Common Pleas of Ramsey county, which court was afterwards merged into the District Court; S. J. R. McMillan, who filled the position of Associate and Chief Justice of the Supreme Court of the state, and served two terms in the United States Senate; and Michael E. Ames, from Vermont, a queer but talented specimen.

Mr. Horace R. Bigelow and I arrived in 1853. Mr. Bigelow was one of the best of men, and at the head of his profession. He allowed his name to go before the first Republican convention ever held for the nomination of state officers, and was nominated for Chief Justice; but the Democrats won the fight. He would never run again for any office. I was a little more given to politics and office than my partner, Mr. Bigelow, and sat in the Legislature, in the Constitutional Convention, and on the Supreme Bench of both territory and state, and administered the affairs of the Sioux Indians; but I always excused myself and my constituents on the ground that we were very young and inexperienced in those days.

Previous to the admission of Minnesota as a state, there also came Alexander C. Jones, who was Judge of Probate of Ramsey county, and has for many years represented our country in China and Japan; John B. Sanborn, much distinguished as a fighting general in the Civil War; John Penman, a Methodist preacher turned lawyer, who was Judge of Probate of Ramsey county; Morris Lamprey, once a Regent of the State Uni-

versity; Oscar Stevenson, Judge of Probate of Ramsey county; John M. Gilman; James Smith, Jr.; Thomas Wilson, of Winona, afterwards Chief Justice and member of Congress; George L. Otis; Henry J. Horn; William P. Warner; William Lochren, now Commissioner of Pensions; George W. Batchelder, of Fari-bault; and many more gentlemen whom I will have to omit for want of time and space.

The bar of Minnesota in its early days was especially a fraternal and agreeable body among its members. I recall no incidents that reflect any discredit upon it. There was no jealousy within its ranks, but a generous courtesy existed. The professional word of a reputable lawyer has always passed current and rarely failed of redemption. What is termed sharp practice has been so universally discountenanced that it never gained a footing, and the progress of the profession has been characterized by a reciprocal accommodation among its members, which has made it a graceful fellowship of gentlemen. I have had forty-three years of actual experience both at the bar and on the bench, and I think I can speak with some degree of authority.

The period of the state is outside of the limits of this paper, but I am proud to be able to say that although the bar has been augmented vastly in numbers since our admission into the Union, my observation leads me to the conclusion that if any change has occurred in its ethical development, it has been on the side of improvement, rather than deterioration; and, so far as its professional and intellectual growth is concerned, it has produced, and now embraces within its membership, some whose fame extends throughout the national domain, and one who is attracting the consideration of the country as worthy of the highest honors at the bestowal of the whole people.

When the territory was organized, its judicial power was vested in a Supreme Court, District Courts, Probate Courts, and Justices of the Peace. Three judges were allowed it, a Chief Justice and two associates. The judges held the trial courts individually, and assembled *in banc* to sit as a Supreme Court of Appeals. This allowed a judge to sit in review of his own decision, which is not to be commended, but did not produce any noticeable disturbance in the administration of justice that I remember.



The first chief justice was Aaron Goodrich. I think he came from Tennessee. He was quite an eccentric person, and not particularly eminent as a lawyer. He presided from June 1st, 1849, to November 13th, 1851. When his successor, Jerome Fuller, was appointed, he declined to yield, claiming that, as his office was judicial and Federal, his term lasted during good behavior; but his contention, of course, did not prevail. At one time Judge Goodrich, Judge Chatfield, and William Hollinshead, were appointed to compile the statutes from 1849 to 1858. Goodrich got up a code of his own, which was unique. It was not a compilation at all, but an original code. I remember one provision, which was a cure-all for matters unprovided for; it was about as follows: "If any question shall arise, civil or criminal, which is not provided for in this revision, the ancient statutes shall prevail in regard to it." It got into print, but no further.

David Cooper was one of the first two associate justices. He was from Pennsylvania, and a very peculiar man for the position. We always called him a gentleman of the old school. It was not on account of his age, because he was quite a young man, but arose from his manners and dress. He was a very social man, and liked good things, and, when exhilarated, the more punctilious and ceremonious he became in his deportment. He always wore shirts with cambric frills down the front, and lace dangling from each cuff, in the manner that French courtiers decorated their hands in the days of Louis Quatorze. He remained in St. Paul and practiced his profession until June, 1864, when he went to Nevada, and thence to Salt Lake City, where he died some years after.

Bradley B. Meeker was the other associate justice on the organization of the territory. He served from June 1st, 1849, to April 7th, 1853. He was born in Connecticut, but studied law in Kentucky and was appointed from that state. Meeker held the first court in Hennepin county. He was a queer genius in his way, and became the owner of a considerable tract of land between St. Paul and St. Anthony, which included the famous Meeker's island in the Mississippi, where so many dams and other improvements have been projected, and still remain, in the clouds instead of the water. Meeker died suddenly at a hotel in Milwaukee, having started on a journey to pass through that city.

The next territorial bench consisted of Jerome Fuller, Chief Justice, and Andrew G. Chatfield and Moses Sherburne, associates. Fuller only remained a short time, and I find no record of his making. Chatfield was from New York originally, but was appointed from Wisconsin. Sherburne was from Maine. These two latter gentlemen were good lawyers, and made good judges. They served from April 7th, 1853, to April 23d, 1857.

After these came Henry Z. Hayner, as Chief Justice. There seems to be no record of his ever presiding at any court. He may have done so, but I have been unable to find anything that shows it, and tradition has never affirmed it to my knowledge. He was succeeded as Chief Justice by William H. Welch, with whom were associated Rensselaer R. Nelson and myself. We all served from April 13th, 1857, to May 24th, 1858. The state was admitted on May 11th, 1858. Judge Welch was from Michigan, but was living in the Territory of Minnesota when appointed. Nelson and I were from New York, but both were appointed from the territory.

It can readily be seen that the practice in the courts in those days must have been just a little mixed. The New York code was invented in 1849, and being such a radical departure from the common law and chancery practice, the older lawyers were reluctant to learn its ways, even in its home in New York; but when administered by judges from Tennessee, Pennsylvania, Michigan, Maine, and Kentucky, all of whom were wedded to their own way of doing things and thought they could not be improved upon, the jumble was of course rather amusing. As in everything else, however, we all got through,—people usually do,—and the territory flourished.

I remember a remark which was made by a philosophical old gentleman to a party who thought everything was going to the dogs. He said: "Don't bother; you will get through the world; I never yet have known anybody to stick."

If you will indulge me, I will give you an instance or two of the physical labor involved in the early practice. In 1855 I walked from St. Peter to Winona in mid-winter, with the snow fifteen inches deep, a distance of a hundred and fifty miles, and back again, to try a lawsuit. On another occasion I paddled a canoe a hundred and fifty miles down the Minnesota, to oppose a motion, sold the canoe for three dollars, and footed it home. The home trip was, however, only a hundred miles. I



was offered forty acres of land as a fee for my Winona tramp, but declined it and accepted a twenty dollar gold piece instead. The rejected land has since become the heart of Mankato, worth a quarter of a million dollars.

The first visit I ever made to the Supreme Court was shortly after my arrival in 1853. A case was being argued in which a Sioux Indian had killed an immigrant woman in the neighborhood of Shakopee. He was convicted and had taken an appeal. Major Noah appeared for the prosecution, and ex-Chief Justice Goodrich for the prisoner. The Indian's name was "Zu-ai-za." His counsel could not pronounce it readily, and, being very familiar with Bible names, he called him all the way through the argument, "my client, Ahasuerus."

The Major in his brief had made some allusion to St. Paul, the Apostle, and Judge Goodrich responded by saying, "that his reference to St. Paul was the only authority he had cited that was in point, but he had such an intimate acquaintance with and high respect for the Apostle Paul, that he was assured he never would have recorded himself as the gentleman had quoted him had he not found himself in a very tight place." He used a much stronger term than "very." Zu-ai-za was hanged. It was our first execution which took place according to law. I have known of others, but I am happy to say that they were quite infrequent.

It is difficult to determine whether one was happier in those free and easy days than under the more advanced civilization of the present time. We cannot make a fair comparison between a period from which we looked at the world as a prospect, and one from which we take it in as a retrospect, since the environments of the observer are so very different; but my recollection is that we were all about as joyous and free from care as the larks we whistled with when tramping the prairies; and, if you will allow me to express a personal opinion, I would like very much to be transported back to those light-hearted times.











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