"TERRITORIAL BENCH OF MINNESOTA"

PART I

by

Isaac Atwater

Magazine of Western History
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FOREWORD

by

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1.

From December 1887 to March 1889, *Magazine of Western History* carried several articles on the history of Minnesota courts and profiles of individual judges and lawyers. A three-part series titled "Territorial Bench of Minnesota" written primarily by Isaac Atwater was published in 1887-1888.[1] The first installment follows.

The roots of Atwater's historical sketches were planted almost a decade earlier. On December 1, 1879, he delivered a paper on "Minnesota Courts and Lawyers in the Days of the Territory" to the Department of American History of the Minnesota Historical Society. It was republished in the S*t. Paul Pioneer Press* the next day and included in *Transactions of the Department of American History of the Minnesota Historical Society* published later that year.[2] It took a few years but soon Atwater succumbed to an infliction that compelled him to write about his early days in Minnesota, one result of which was to cement his place

[1] He also wrote a biographical sketch of District Court Judge Charles Edwin Vanderburgh published in the June 1888 issue of *Magazine of Western History*. The editor of the *Magazine* mistakenly titled it "The Territorial Bench of Minnesota: Part IV." Vanderburgh, however, was elected to and served on the bench after statehood; Atwater's sketch of him is posted separately in the "Supreme Court" Category in the Archives of this website.

[2] His 1879 address is posted separately in the "Territorial Courts and Lawyers" Category of this website.

in the history of the state. His historical writings culminated in the publication in 1893 of the two volume *History of Minneapolis, Minnesota.*

Atwater's first article in the *Magazine of Western History* is based largely on memory not archival research. At times his recollections are hazy and selective. He makes several errors so obvious that historians should be reluctant to trust his accuracy in every respect. Nevertheless, he gives us insights into members of the territorial judiciary.

He begins his "brief sketch of the first territorial court" with some commentary and rather gloomy observations about life on the territorial bench — and a judge's life afterward. Without question these comments have an autobiographical component. Young lawyers who came to the territories, he recalls, were ambitious to "make their fortunes or build a reputation." But the lawyer who accepted an appointment to the bench was cut off "from the chance of future promotion." He "leaves hope behind." He will lead a monastic life—"there can be no dallying with politics or politicians." And it is precarious: "With every change of administration, the judge was liable to lose his position." When that happens, he may flounder, at least for a while. "For a man to leave the bench and take his place at the bar, is almost like commencing life anew. He is then probably at middle life—perhaps has had but little if any practice before, and it is rare that a man commences practice at that age and becomes a distinguished practitioner." [3]

These comments sum up the experience of Isaac Atwater

[3] For a biographical sketch of a district court judge who had a difficult if not dismal "life after the bench," as Atwater predicted, see Douglas A. Hedin, "Judge Lloyd Barber (1826-1915)" at 29-31 (MLHP, 2020).

himself. He served on the Minnesota Supreme Court from 1859 to 1864, when he resigned to make money to satisfy certain financial obligations.[4] At that time he was 46 years old—what he would call "middle life." He moved to Nevada and returned to Minneapolis several years later to practice law and to pursue other professional and civic interests. After he left the court, he did not become a "distinguished practitioner" on the order of, say, William Lochren or Cushman Kellogg Davis.

Atwater writes that in territorial days no administration could fill judicial posts with "the ablest lawyer" but he hastily adds, "Minnesota has no reason to be ashamed of her territorial bench." Here Atwater touches on an issue that has divided legal historians: how competent were territorial judges? Lawrence M. Friedman points to Washington politics and the hardships of life in the territories for producing "hacks, ill-paid, ill-prepared for their jobs, almost invariably nonresidents, their sole claim to office was strong political patronage." [5] Other historians have taken issue with Friedman, most notably the late Kermit Hall. After reviewing the social and educational backgrounds of territorial jurists, who served both before and after the Civil War, and recent biographies of some of these men, Hall concluded that "the collective back-

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[4] *See Charles E. Flandrau, "Judge Isaac Atwater," 8 Magazine of Western History* 254, 258-259 (July 1888), an article posted separately on the MLHP.

[5] Lawrence M. Friedman, *A History of American Law* 358 (4th Edition, Oxford Univ. Press, 2019). He adds, "Most territorial judges were probably neither incompetent nor eccentric. Their worst sin, perhaps, was political." *Id.* at 359. This description is a trifle less harsh than that in the first three editions of this standard work. Compare discussion on page 326 of the first edition (Simon & Schuster, 1973), repeated on page 282 of the revised third edition (Simon & Schuster, 2005).

For the influence of partisan politics behind each presidential appointment to the territorial court, see Douglas A. Hedin, "'Rotation in Office' and the Territorial Supreme Court" (MLHP, 2010).

grounds of the judges reveal that they were seldom the hacks and derelicts described by Friedman and that the political and legal cultures associated with the frontier environment of the territories produced a rich and complex judicial process." [6]

But when Hall turned from his composite portrait of territorial judges to the Minnesota judiciary in particular, he made a darker assessment. In a close examination of the politics behind the appointment of Minnesota's first bench, he concluded:

> [President Zachary] Taylor and [Secretary of State John M.] Clayton in nominating associate justices for Minnesota squandered an opportunity to strengthen the administration and party cohesion. Party united the chief executive, [Senator Truman] Smith, and the nominees in the selection process, but traditional kinship connections took precedence over national party interests and the candidates' professional preparedness. Cooper and Meeker were legal mediocrities at best; the subsequent furor over their selection confirmed that Taylor and Clayton were politically and administratively inept.[7]

Atwater does not mention the political skirmishing behind

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[6] Kermit L. Hall, "Hacks and Derelicts Revisited: American Territorial Judiciary, 1789-1959," 12 *The Western Historical Quarterly* 273, 289 (1981). An examination of the men appointed to the Minnesota Territorial Supreme Court will place all except Aaron Goodrich in the camp described by Hall—they were not "hacks" but political appointees working conscientiously as judges in a rough frontier environment.

[7] Kermit Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829-61* 85 (University of Nebraska Press, 1979). William P. Murray, who practiced law in St. Paul during the Territorial era, would concur with Hall's assessment.

the appointments of Justices Goodrich, Meeker, and Cooper. He glosses over their shortcomings. He writes that Meeker was removed from office by President Franklin Pierce and that he considered challenging his removal to the United States Supreme Court.[8] Atwater does not say that Chief Justice Aaron Goodrich did exactly that. Atwater wrote of Goodrich that "the duties of the office, however, were not entirely congenial to one of his active temperament, and he retired in 1851, after something less than three years' service." "Active temperament" is an understatement of Goodrich's eccentricities. Moreover, Goodrich did not "retire." He was cashiered by President Fillmore on October 21, 1851. Almost from the day of Goodrich's appointment by President Taylor, there had been a campaign by prominent citizens of the territory to oust him because he lacked judicial temperament.[9] After being sacked by President Fillmore, Goodrich challenged that action, unsuccessfully, in the Circuit Court in Washington, D.C., and in an appeal to the United States Supreme Court, which affirmed his discharge in 1855.[10]

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[8] Meeker actually filed an "application" in the Territorial Supreme Court disputing the legality of his removal and seeking reinstatement. At a hearing on August 15, 1854, Chief Justice Welch and Associate Justice Chatfield denied his claim while Justice Sherburne abstained. Minutes of the Territorial Supreme Court, August 5, `854, at 52-53. See also Douglas A. Hedin, "Introduction" to "Documents Regarding the Terms of the Justices of the Territorial Supreme Court, Part One" at 27-28 (MLHP, 2009-2014); and "Documents Regarding the Terms of the Justices of the Territorial Supreme Court, Part Two–B," at 12-13 (MLHP, 2009-2010).

[9] For account of the public campaign to remove Goodrich from the bench, see Robert C. Voight, "Aaron Goodrich: Stormy Petrel of the Territorial Bench," 39 *Minnesota History* 141-52 (1964). For an account of how the Justice Department dealt with the Goodrich problem, see Douglas A. Hedin, "Introduction," *id.* at 20-25; and Douglas A. Hedin, "Rotation in Office," note 3, at 12-13.

[10] On October 21, 1851, President Fillmore, who succeeded to the presidency upon the death of President Taylor, removed Goodrich from office when he made a recess appointment of Jerome Fuller to that post. Goodrich brought a mandamus action in the Circuit Court for the District of Columbia claiming that the United States Treasury owed him $2,343, which was his salary for the

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Aaron Goodrich died only five months before Atwater published the following article in *Magazine of Western History*. [11] Noting that Goodrich had accumulated what probably was "the most valuable private library in the state," [12] Atwater suggested that acquiring it would be an "unusual opportunity" for the Minnesota Historical Society, but, as he undoubtedly knew, this was highly unlikely because Goodrich had waged a highly charged, public feud with the Historical Society. In a speech delivered in 1896, Charles E. Mayo, a long-time member of the Historical Society, described the "unpleasantness" with Goodrich in words suggesting more than a slight degree of exasperation:

> November 13, 1876, Judge Goodrich offered a resolution providing that no permit for the occupation of grounds belonging to the society should be granted. Gen. Sanborn offered, as a substitute, a resolution requiring the officers of the society to so lease and manage the real

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balance of his term. The Supreme Court, per Justice Daniels, affirmed the denial of Goodrich's claim in *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284 (1855) (McLean J., dissenting); discussed in Carl B. Swisher, *History of the Supreme Court of the United States: The Taney Period, 1836-64* 169-171 (Macmillan, 1974). James Guthrie, the nominal defendant, was Secretary of the Treasury. The case is posted in the "U. S. Supreme Court" category in the Archives of the MLHP.

[11] He died on June 24, 1887, two weeks short of his eightieth year. For his obituaries, see "Chief Justice Aaron Goodrich (1807-1887)." (MLHP, 2016) (published first, 1887).

[12] His widow published an 86 page inventory of his library in preparation for its sale in 1887. See "Catalogue of the Private Library of the Late Hon. Aaron Goodrich." (MLHP, 2016). For a newspaper article on it see, "The Goodrich Library" (MLHP, 2016) (published first, 1887). Goodrich accumulated and used his library to compose his expose of Christopher Columbus published in 1874. See *A History of the Character and Achievements of the So-called Christopher Columbus*. (MLHP, 2015).

estate of the society as to secure the largest income to the society. The substitute was adopted by a vote of seven to three.

At the next meeting, December 11, 1876, Judge Goodrich offered the following resolution: "Resolved, that the resolution offered by Gen. Sanborn and adopted at the last meeting of this council, relative to the leasing of grounds belonging to this society, be expunged from the records, the same having been adopted in violation of the laws of this society." The resolution was voted down by a vote of ten to four. This was the beginning of the "unpleasantness" inaugurated by Judge Goodrich, which finally culminated in the complete vindication of the society as represented by the executive council, through a decision of the Supreme Court. Judge Goodrich manifested a belligerent spirit which soon ripened into open rebellion. Actuated either by disappointment at his failure to receive the highest honors at the bestowal of the society, or by a natural iconoclastic disposition which prompted him to pull down rather than build up, and in emulation of the arch fiend who drew after him the third part of Heaven's host in reckless and hopeless hostility, he plied his seductive wiles among the staid, conservative members of the executive council, in a determined effort to wrest the management of the affairs of the society from the control of the executive council, and to vest it in the original corporators and their successors elected by the survivors.

> Greatly to the surprise of the faithful, he succeeded in detaching from their allegiance some half dozen of the members of the council, most of whom thereafter discontinued their attendance at the monthly meetings. Judge Goodrich, however, was so vindictive and exasperating in his unprovoked attacks on the society, which were parried by Rev. Dr. Neill and Col. Robertson with equal earnestness and irascibility, that, notwithstanding the depletion in numbers, no danger of the lack of a quorum was experienced during this stormy period. [13]

The Supreme Court ruling that ended the "rebellion" was *State v Sibley*, 25 Minn. 387 (1879)(Cornell, J.). Atwater's suggestion that the Historical Society acquire Goodrich's library was a bit premature—seventy years would pass before it would acquire his personal papers. [14]

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Atwater seems to have had the most respect for David Cooper, the third member of the original territorial court. Unlike most former judges, according to Atwater, Cooper "enjoyed quite a large practice after leaving the bench." [15]

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[13] Charles E. Mayo, "Homes and Habitations of the Minnesota Historical Society," 8 *Minn. Hist. Soc. Coll.* 102, 108-109 (1898). Mayo served as the fourth secretary of the Historical Society from 1864 to 1867. For another account of the "controversy," see J. Fletcher Williams, "The Minnesota Historical Society," 9 *Magazine of Western History* 527, 533-34 (March 1889) (concluding that the Supreme Court's decision "was generally acquiesced in and the whole controversy was soon forgotten by both parties.").

[14] In 1956 Mrs. C. O. Kalman of St. Paul donated Goodrich's personal papers covering the period 1828 to 1890 to the Historical Society. 35 *Minnesota History* 204 (December 1956).

[15] Cooper was not reappointed by President Pierce when his term expired in 1853. He left Minnesota in 1864, and moved to Nevada where he died. See

To Atwater, Cooper also was somewhat of a technician, who was more interested in narrow legal points than broader principles. In one appeal, Cooper briefed forty "points and subdivisions" which led Atwater to lecture: "As a general rule, however, it may be stated that a great multiplication of minor points does not conduce to success." This is sound advice, but it raises questions about the briefs Cooper and other lawyers wrote. In cases which were "largely of minor importance," as Atwater described them, how long and in what form were the "paper books" as briefs were then called? [16] And what of oral argument? This was, after all, the age when lawyers tried cases not after exhaustive discovery and preparation but with a quick grasp of the facts, wit, cleverness, and oratory. We wonder how long oral argument was, and how well prepared the

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Charles E. Flandrau, "The Bench and Bar of Ramsey County, Minnesota," 7 *Magazine of Western History* 58, 59 (May, 1888), which is posted separately on the MLHP.

[16] Some briefs in those pre-typewriter days were handwritten. In his posthumously published autobiography, Loren W. Collins, who served on the supreme court from to 1887 to 1904, recalled his days as an apprentice in 1860 with Seagrave, Smith & Crosby in Hastings:

> In those days the records and briefs for the supreme court were written, not printed, and there had to be three copies for the judges, one for the respondent's counsel, one for the clerk and one for the appellant's counsel. It thus became necessary to make six copies, all written out by hand. My first experience in this line was in the case of North & Carll vs. Lowell, subsequently reported in Volume IV of the Minnesota Reports, page 32. It was very tedious work, but by hard work I finished it in almost four weeks, and received $35 as my compensation.

Loren Warren Collins, *The Story of a Minnesotan* 36-37 (N.P., 1913). The complete text is posted in the "Memoirs-Biographies" Category in the Archives of this website.

The case of *Lowell v. North*, 4 Minn. 32 (Gil. 15) (1860), concerned a mortgage foreclosure. The court held that "when a foreclosure by advertisement is made upon an illegal notice of sale, the mortgagor may have the sale set aside, or he may recover damages against the mortgagee for the injury he has suffered by the unauthorized sale."

justices and appellate lawyers were. These questions involve procedural matters which occasionally interest legal historians but which practicing lawyers know to be extra-ordinarily important.[17]

What is most striking about Atwater's sketch of Cooper, however, is his failure to mention the events of Wednesday, January 15, 1851. What took place in St. Paul about noon that day was one of the great scandals of the territory. It was precipitated by a series of editorials on Justice Cooper by James M. Goodhue, the editor of the *Minnesota Pioneer*. About Cooper, Goodhue wrote:

> As for Judge Cooper, besides lacking a residence at Stillwater, at least ever since last May, he has neither there nor any where else, any attachable property, that the officers can find. He has land claims, to be sure, which he has some way got in possession, on one of which he has obtained the construction of a cabin, for building which, he yet owes. He left Stillwater, owing a large amount for postage, owing stores, groceries and tradesmen of every description. He is not only a miserable drunkard, who habitually gets so drunk as to feel upward for the ground, but he also spends days and nights and Sundays playing cards in groceries. He is lost to all sense of decency and self respect. Off of the bench he is a beast and on the bench he is an ass, stuffed with arrogance, self-conceited and a ridiculous affect-tion of dignity. The law requires him to reside in

[17] For a rare article on this subject, see R. Kirkland Cozine, "The Emergence of Written Appellate Briefs in the Nineteenth-Century United States," 38 *Am. J. of Legal Hist.* 482 (1994).

> his own judicial district; but he not only does not reside there, but in Minnesota, he dates, his correspondence at St. Paul, and affects to belong there–an unspeakable indignity to our town. On his passage up the Minnesota river last summer, paying such attentions to a certain California widow on board, as a sot well could pay, he not only kept drunk, but when the boat returned to Fort Snelling, and the news there met him, of the death of his wife in Pennsylvania, he was so shamefully inebriated, that the awful intelligence scarcely aroused him.
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> We have had enough officers who are daily liable to arrest under the vagabond act; who never set a good example, perform an honest act, or pay an honest debt. We can endure much without complaint. It is less the need of a marshal and a judge we complain of, than of the infliction of such incumbents. Feeling some resentment for the wrongs our Territory has so long suffered by these men pressing upon us like a dispensation of wrath, a judgment, a curse, a plague, unequalled since the hour when Egypt went lousy, we sat down to write this article with some bitterness; but our very gall is honey to what they deserve.[18]

This did not sit well with Judge Cooper and his family. His younger brother Joseph was incensed. About noon on

[18] Mary Wheelhouse Bethel, *The Life and Times of James M. Goodhue* 63-66 (1948) (citations omitted). To Bethel, Goodhue's editorial was written "in language that for pure venom could hardly be matched." *Id.* at 63. In a footnote Bethel noted that in Goodhue's time, the term "groceries" was used for barrooms as well as intoxicating liquors. *Id.* at 65 n. 3.

January 15, 1851, Joseph Cooper confronted James Goodhue, and a duel of sorts ensued. An eye witness described their fight as follows:

> It was about twelve o'clock on Wednesday, January 15, the Legislature having adjourned for dinner, that the two combatants, in the presence of nearly one hundred and fifty witnesses, met on St. Anthony street (now Third street) in front of the lot where now stands the Metropolitan Hotel. The attack commenced by desultory pistol shooting, which was of more danger to the lives of the spectators congregated that of the participants. The principals were thereupon quickly disarmed by C. P. V. Lull, the sheriff of Ramsey County. At this time one of the crowd of spectators stole up behind Mr. Goodhue and threw his arms around him. Cooper then rushed forward, and with a dirk knife inflicted two wounds upon Mr. Goodhue, one in the abdomen and one in the side. The later, jerking himself free from the party holding him, drew from his pants pocket his Derringer pistol and fired, Cooper receiving the ball in his groin. The wounds inflicted were of a dangerous character. Cooper died some two or three months after the affray in Michigan, his death being hastened by the pistol wound he had received. Goodhue was confined to his bed for several weeks. [19]

George S. Hage, a historian of journalism on Minnesota's frontier, has a slightly different account:

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[19] Lucius F. Hubbard & Return I. Holcombe ed., 2 *Minnesota in Three Centuries* 450 (1908).

> Late the following wintry morning (January 15, 1851), as Goodhue and a friend were leaving a session of the legislature, Joseph Cooper, a younger brother of the judge, stopped them in the street. After demanding to know why Goodhue had written the article, Cooper attacked the editor with his fists. Goodhue drew a gun and so did Cooper. They were still threatening to blow each other's brains out when the sheriff—a man appropriately named Cornelius Lull—rushed up to enforce the peace. He had disarmed Cooper and was taking Goodhue's gun when Cooper again rushed at the editor. Goodhue drew a second pistol. Cooper threw a rock. By this time a crowd had gathered, some seeking to restrain Cooper, others shouting, "Let him kill the son of a bitch." When one would-be peacemaker succeeded in pinioning Goodhue's arms, Cooper rushed him with a knife and stabbed him in the stomach. Goodhue fired. Cooper cried out that he had been hit, and stabbed Goodhue again, this time in the back. Thus injured, the two combatants were finally restrained and led or carried away for medical attention.[20]

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In the following article Atwater published for the first time an anecdote about an appeal he lost in the Territorial

[20] George S. Hage, *Newspapers on the Minnesota Frontier, 1849-1860* 37 (1967) (citations omitted). For another account, see Thomas H. Boyd, "Cooper & Goodrich and the Famous Duel," 25 *Ramsey County History* 23 (Spring 1990). For an affidavit of an eyewitness describing the fight, see Daniel S. B. Johnston, *Minnesota Journalism in the Territorial Period*, 10 (Part I) *Collections of the Minn. Hist. Society* 247, 251-52 (1905).

Supreme Court. He claimed he had four appeals that term (the year is not given but it likely was 1854 or 1855), and won three but inexplicably lost the fourth to a lawyer he identifies by his initial, "Mr. N.—." According to Atwater, he later encountered and questioned one of the justices about this result and was told that because "N—" had lost every case that term, the panel felt he should have at least one victory. The judge then asked Atwater to "see a friend at the corner"—a euphemism for having a drink at the corner saloon.

Atwater published a slightly different version of this story in 1893 in the first volume of his massive *History of Minneapolis, Minnesota* and in a paper published in the *Yale Law Journal*.[21] In these later versions, he identifies "Mr. N—" as John Wesley North, with whom he practiced law in 1850-1851, and the judge as Chief Justice William H. Welch, who served from 1853 to 1858.

In his articles on the territorial court, Atwater generally painted the judges in a favorable light, an exception being his description of Chief Justice Welch:

> As a lawyer he perhaps would not rank as high as either of his associates. Although of more than average mental ability, he lacked the thorough legal training and subsequent practice needful for the able jurist. This, combined with the fact that he suffered much from ill health, made him less prominent than his associates.

[21] Isaac Atwater, 1 *History of Minneapolis, Minnesota* 426 (1893). A slim version was published in Atwater's "Practical Suggestions to Students and Young lawyers," 2 *Yale Law Journal* 131-138 (March 1893).

A more favorable appraisal of Welch was made by Justice William Mitchell in an address to the Winona County Old Settlers' Association on August 30, 1889, an opinion that should be kept in mind as Atwater's story is dissected:

> I ought not to close the subject of the Territorial District court without a word of tribute to Hon. Wm. H. Welch, our first and only judge of that court. While not a man of great learning or ability, he was eminently judicial in his temperament and manner, and commanded universal confidence in his integrity. The comparative good order and decorum which characterized our judicial affairs at that early day was largely due to Judge Welch. He died at his home in Red Wing some years after his retirement from the bench. [22]

One reason Atwater had little regard for Welch's abilities was the explanation Welch gave for why the court did not rule in his favor in the fourth case—because John Wesley North had lost every case that term, the judges felt he should have at least one victory. If true, this would be the height of judicial capriciousness, and would be proof of Atwater's observation that Welch "lacked the thorough legal training and subsequent practice needful for the able jurist." But there is a far more plausible explanation for the Chief Justice's reply: he was joking.

In his first version, which follows, Atwater describes his encounter with Welch on the street:

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[22] William Mitchell, "Reminiscences of the Establishment of the Territorial Courts, Judges, Justices and Members of the Bar of Winona County" 15-16 (MLHP, 2013) (delivered first 1889).

> Meeting one of the judges soon after, I ventured to call his attention to the matter and ask the reason of what appeared so extraordinary a decision. He had forgotten the case, but finally his memory was refreshed.

Almost certainly Welch knew exactly which case Atwater was questioning him about and feigned forgetfulness in hopes that Atwater would drop the subject. He likely was surprised and may even have been slightly offended by being confronted by Atwater and to escape an awkward situation, he replied with an absurd quip that Atwater took seriously. The tactic worked because, as Atwater solemnly writes, "The explanation was so frank and naive that it entirely disarmed criticism." Atwater never forgot this story, and published versions of it decades later to the detriment of the territorial court's reputation (it is the sort of story that has led some historians to call territorial judges "hacks"). It is so colorful that, not surprisingly, it has become part of the folklore of the territorial bench and bar.[23]

The foil of Atwater's story is John Wesley North and, in fairness, Merlin Stonehouse, North's biographer, shall have the last word: "North was a good lawyer: he beat Atwater in almost every case in which they opposed each other as attorneys (contrary to Atwater's recollections in his history of Minneapolis."[24]

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[23] The anecdote is quoted in Hiram F. Stevens, I *History of the Bench and Bar of Minnesota* 15-16 (1904), and in Marion Daniel Shutter ed., 1 *History of Minneapolis: Gateway to the Northwest* 482 (Chicago: S. J. Clarke Publishing Co., 1923). It was even retold in Robert J. Sheran and Timothy J. Baland, "The Law, Courts, and Lawyers in the Frontier Days of Minnesota: An Informal legal History of the Years 1835-1865," 2 *William Mitchell L. Rev.* 1, 33 (1976).

[24] Merlin Stonehouse, *John Wesley North and the Reform Frontier* 69 (1965).

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The following article appeared on pages 207 through 214 of the December 1887, issue of *Magazine of Western History*. It has been reformatted and the type size enlarged to make it more readable. Atwater's footnotes, punctuation, emphasis, and spelling have not been altered. Original page breaks have been added. ■

MAGAZINE OF WESTERN HISTORY

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TERRITORIAL BENCH OF MINNESOTA

I

The personnel of the bench of a territory rarely affords much scope for the pen of the historian. Of all the appointments in the gift of the administration for a territory, scarcely any are less desirable for a man of average ability than a seat on the territorial bench. This statement may seem strange to those who have not given the subject reflection, but the history of territories will prove it true. And the reasons for it are sufficiently obvious. The territories are on the frontiers of civilization. Society is largely in a crude state. Years must elapse before churches, schools, theatres, hospitals, hotels and the thousand comforts and conveniences of civilized life can be had to any large degree. A generation of pioneer life must be lived before what men usually consider most valuable can be enjoyed. Hence men of ability and standing in the profession in the states will rarely relinquish these advantages for the uncertain tenure of a seat on the territorial bench. The position is certainly an honorable one, but perhaps not more so, than a high standing at the bar in the east and south. The reputation of an honest and able lawyer is one which cannot be increased by any government appointment. Not for such reason, therefore, would such a lawyer seek or accept the office of territorial judge.

But perhaps a still stronger reason why able lawyers are averse to accepting such a position, is the fact that it almost

cuts them off from the chance of future promotion. He who takes that office "leaves hope behind." Not alone for official promotion, but for his profession as well. This, probably, is not the general idea entertained, and of course there are exceptions; but from a somewhat extensive acquaintance with the bench of several territories, I feel sure that it is true as a general rule. Indeed, from the nature of the case it must be so. If the law be a jealous mistress to the professional large, much more is she of him who assumes to embody her highest attributes. There can be no dallying with politics or politicians. Even a known intimate personal acquaintance with a noted politician will more or less smirch the ermine He can address no political meetings, and can scarcely discuss political topics with his neighbors, with bated breath, at his own fireside. When therefore, at the expiration of his term of service of four years, more or less, he finds himself at liberty to engage in politics, if so disposed he is an unknown quantity, with not even as good a show as yesterday's arrival. During all these years of seclusion, active politicians have been coming to the front, combinations have been made, and he has been left out in the cold. Instead of the office serving as a stepping-stone to future preferment, it has proved the strongest obstacle in the way, if he has faithfully discharged his judicial duties. The instance of Stephen A. Douglas may be [208] cited as a striking exception to this rule, as it may be said that he used his judicial office, effectively, to advance his political prospects. But he was an exception to all rules, judicial and political.

Nor does the position of territorial judge conduce to success in the practice of law when the incumbent retires. The cases coming before the court are largely of minor importance, and the inducements for close study are proportionally diminished. But in addition to this, it may well be

questioned whether the judicial habit of mind, long indulged in, is most conducive to successful practice at the bar. At least, such is my conclusion, from somewhat numerous instances which have fallen under my observation. There are exceptions, of course—perhaps one of the most notable in our state, that of Judge Cooper, one of the first territorial judges, and who enjoyed quite a large practice after leaving the bench. But the brilliant professional young men, who always flock to the territories to make their fortune or build a reputation, have largely preëmpted the ground. For a man to leave the bench and take his place at the bar, is almost like commencing life anew. He is then probably at middle life—perhaps has had but little if any practice before, and it is rare that a man commences practice at that age and becomes a distinguished practitioner. To this must be added, that the salary of a judge in those days, $2,500 per annum (if we recollect rightly), was barely sufficient to support a family. With every change of administration, the judge was liable to lose his position.

Under such disadvantage it is no wonder that an administration cannot always fill these positions with the ablest lawyers. Indeed, the wonder is that men of any average ability are found willing to take them. And Minnesota, certainly, has no reason to be ashamed of her territorial bench. With these preliminary remarks, we proceed to speak more in detail of the territorial judges.

Governor Ramsey's proclamation declaring the territory of Minnesota duly organized, was dated June 1, 1849. This was under the administration of President Z. Taylor, the last of the Whig Presidents, and the official appointments were of those holding the same political views. Aaron Goodrich was appointed chief-justice, David B. Cooper and Bradley B.

Meeker, associate justices of the supreme court. The territory was divided into three judicial districts, one being assigned to each justice. The justices met twice a year as a supreme court for review of cases appealed from the district courts.

These justices were all men of more than average ability, although of limited practice at the bar. But cases at that early day were not large in number or importance. Indeed, the extremely limited business of the courts at that time is shown from the fact that only sixteen opinions are reported from these justices during the nearly three years they held office. This circumstance alone, however, would not give a correct idea of the amount of legal business transacted, as a considerable number of decisions were rendered in which opinions were either not written or have been lost.

Honorable B. B. Meeker was a native of Connecticut, and the family name in that [209] state runs back to an early date. He was a man of very decided convictions and had the courage to maintain the same, whether popular or otherwise. He was a bachelor, and his residence was Minneapolis. He was averse to engaging in the practice of his profession, and after his retirement from the bench, which occurred in the year 1853, in consequence of the advent of a Democratic administration, under President Pierce, he never resumed the practice of law. He firmly believed that the new administration had no power to remove territorial judges, and proposed to carry the question to the United States supreme court, but finally abandoned the idea. He subsequently invested to some extent in real estate, and acquired property in Ramsey county, now adjoining the city limits of Minneapolis, and which has become very valuable. He was always most enthusiastic in regard to the future of Minneapolis, and

since his prophecies of its future have been far more than realized, it has always been a regret to his friends that he could not have been spared to see their fulfillment. He died February 20, 1873, and his remains were taken to Connecticut for burial.

Chief-Justice Aaron Goodrich was a native of Cayuga county, New York, and was born in 1807. He was a man of marked ability, and would have been a man of note in any community. Had his tastes naturally inclined to the law, there is no doubt but that he would have acquired a leading position in the profession. But his predilections were in the direction of politics and literature, and it is in those fields that he was best known. He studied law in New York. Later he moved to Stewart county, Tennessee, where he commenced practice. In 1847 he served in the legislature of Tennessee, and his abilities were recognized in the endorsement he received from that state for chief-justice of Minnesota, to which position he was appointed in May, 1849. The duties of the office, however, were not entirely congenial to one of his active temperament, and he retired in 1851, after something less than three years' service. His legal abilities, however, later received a fitting acknowledgment in his appointment, by a legislature opposed to him in politics, to the office of commissioner to revise the laws and prepare a code of practice and pleadings for the territory. To one educated under the old English system, which largely prevailed in New York at the time he studied for the profession, the radical changes introduced by the code were exceedingly repugnant to his conservative views. He submitted a vigorous minority report on the subject to the legislature. While he did not succeed in preventing the reform (so called), many of the older conservative members of the bar sympathized in his views, and even to-day it is an open question whether the adoption of the code system of

practice and pleading has not a tendency to diminish the number of eminent lawyers.

Having always been a pronounced Whig in politics the Whig party almost universally having gone over to the Republican party in 1860 under President Lincoln, Judge Goodrich received the appointment of secretary of legation at Brussels. He was eminently fitted for the position, inasmuch as the duties are merely nominal, and gave him ample scope for the exercise [210] of his literary tastes. This office he held for about eight years. Though the duties of the office were, as said, practically nominal, Judge Goodrich was by no means idle. He collected material for and then and afterwards wrote a book entitled 'A History of the Character and Achievements of the So-called Christopher Columbus.' It was an attempt to prove that Columbus was a pirate, whose real name was Griego, who stole the log-book of a mariner and sought to steal his discoveries. We have never heard that he succeeded in convincing any of the truth of his discovery. But the book is ingenious and shows much research and labor. A scarcely less distinguished lawyer and historian of Minnesota is now engaged in a similar work affecting the memory of the late lamented William Shakespeare. It may well be doubted, however, whether the result will be any more successful in this latter case than the former.

Judge Goodrich was a delegate to the convention which nominated Lincoln for President in 1860. He took some part in the campaign, and delivered a number of vigorous and effective speeches. During General Grant's administration he acted with the branch of the party known as Liberal Republicans, and was a delegate in 1872 to the Cincinnati convention. Subsequently he acted mostly with the Democratic party. He was an authority in Masonic literature, to

which he was himself a contributor, and attained a high rank in the order. He had the acquaintance and friendship of many men of national reputation, including such men as Lincoln, Seward, Taylor, Fillmore, Johnson and others of the Whig and Republican parties. His long residence in the state made him a prominent member of the Old Settlers' association, and their dinners were often enlivened by his oratory and wit.

Judge Goodrich had accumulated and owned at the time of his death probably the most valuable private library in the state. It was rich in historical and literary treasures, containing many rare works in Italian and Spanish, many of which are famous editions now out of print, and which are only reached by accident. It is especially rich in works and pamphlets relating to the discovery of the continent. An unusual opportunity is furnished to the historical society to enrich its shelves (already assuming much importance in its specialty) with works of permanent value, and which will largely tend to place it in the front rank of historical societies.

Judge Goodrich died, regretted by a large circle of friends, in St. Paul, June 24, 1887. His record is a part of the history of Minnesota.*

Judge David Cooper was undoubtedly the ablest lawyer of the first three appointees to the bench of the territory. He had the advantage of a more thorough legal training, and of a considerable amount of practice in Pennsylvania before his appointment as associate justice. He wrote more opinions than either of the other justices, and they will

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* For some of the facts of this sketch, the writer is indebted to *the Pioneer Press*, which contained an appreciative notice of the judge soon after his death.

compare favorably with those written by subsequent courts. But he was rather known as a case lawyer—to pay more at-[211]-tention to sharp technical points rather than for broad, comprehensive views of questions presented to him. This appeared as well in his practice at the bar as in the discharge of his duties on the bench. For instance, in one case before the state supreme court (and that not one of great importance), his points and subdivisions amounted to more than forty in number. This might be excusable in a young attorney, but hardly for one of experience, who had occupied a seat on the bench. In the particular instance cited he lost his case, but perhaps not in consequence of his prolixity. As a general rule, however, it may be stated that a great multiplication of minor points does not conduce to success. It weakens rather than strengthens a case.

That Judge Cooper had a greater taste for the profession and practice of the law than his associates on the bench, is shown by the fact that at the expiration of his judicial term he immediately engaged in the practice of law and soon acquired a large, if not lucrative, business. Senator McMillen was for some time in partnership with him. He was naturally allied in sympathy with the Republican party, but took no active part in politics. He was too fastidious, both intellectually and estethically, to resort to the arts which make a successful politician. In dress he aspired to be a disciple of Chesterfield. Many will remember his appearance in court, in lace ruffles, and wrist bands on his shirts, not unaccompanied with perfumes. This is a mere matter of taste, but we doubt whether at that day Boston or Philadelphia could have furnished many, if any, instances of the same kind.

But it would be a mistake to infer from this that Judge Cooper lacked either vigor of intellect or of expression in his

views on any subject that engaged his attention. He certainly had the courage of his convictions, and was so outspoken in their expression that no one could accuse him of being a time-or man-server.

For instance, on one occasion he had several cases in which he was employed at one term of the state supreme court. The court happened to disagree with him in the law of the case in three or four, in one of which the chief-justice had written a dissenting opinion. One was left, in which also the chief wrote a dissenting opinion, and on the morning on which the opinion was published the chief-justice, in going down town to his office, met Judge Cooper. The latter greeted him with a cordial good morning and genially remarked: "Well, judge, I see those other two d—n fools have beaten you again." The chief-justice appreciated the joke, especially where he got a chance to tell it on his associates.

In the early days of territorial history, courts were not always conducted with that dignity and decorum deemed essential in later times. A degree of intimacy and familiarity existed between the bench and bar, refreshingly primitive and which tended much to relieve the monotony of judicial proceeding. To one just arrived from the east, and accustomed to the proceedings, in the staid, solemn old courts, presided over by such men as Denio, Bronson, Oakley, and their compeers, where the slightest familiarity was never tolerated, the free and easy manners of [212] this western court seemed of questionable tendency. It was no uncommon thing while waiting for a witness, or while the counsel was addressing the jury, for the judge to descend from the bench, and taking his seat with the bar, with his legs elevated on the table, and a cigar in his mouth, join in the jokes and stories which were wont to relieve the tedium

of the court room. The first district court which the writer attended in the territory was in 1850, and the court was held in a hall of a saloon, kept by noted Frenchman, on the upper part of Third Street, opposite the American House. A case was being argued by Wm. Hollinshead, one of the ablest lawyers at the bar at that day, although even then there were men of mark in the profession. In the middle of his argument, at eleven o'clock, the counsel suspended his remarks, and looking at his watch moved that the court take a recess of fifteen minutes. The motion was granted nem con. What the object of a recess at that time could be was not apparent to a tenderfoot, but did not long remain a mystery. The bench, counsel, jury, indeed every person in the room, bolted for the door, crossed the street to the American, where extensive irrigation immediately occurred. The ceremony concluded, all persons returned to the court room, and business proceeded in regular order. Indeed, so far as I could judge, that was no interruption of the regular order of business.

It is not an unusual thing at the present day for attorneys to find fault with the decisions of the supreme court, when they do not happen to be in their favor. I have no doubt it would be far more agreeable to the feelings of the members of that court (if indeed, they can be supposed to have any feelings), to decide every case so as to give satisfaction to both parties. Unfortunately, under our present system of jurisprudence, that seems impossible. What the future may have in store for us, in this direction, when Socialists and Anarchists shall come to the front, and take charge of the judiciary, we can scarcely foresee. It has always seemed to me rather an unprofitable business to find fault with the decisions of the supreme court, inasmuch as that tribunal has "the last say" in the matter. Nevertheless, it may be a consolation to tyro's in the law to know

that thirty-five and forty years ago, complaints of the same kind were made by dissatisfied attorneys. But the reasons for such decisions, in the lapse of time, may have somewhat changed. For instance, at one of the early terms of the supreme court of the territory, the writer happened to have four cases on the docket. The first two were perhaps about average cases, which were liable to go either way. The third, I felt sure of losing, and had only appealed it on the peremptory demand of my client to gain time. The fourth, I felt absolutely sure of winning, as it was an appeal from a judgment, and no question was involved save the regularity of the record, and had carried it up, at my own expense, against the wishes of my client. The attorneys were the same in all the cases, Mr. N— being my opponent.

In due time, the first three cases were [213] decided in my favor. The fourth lingered, but a month later it appeared and I was lost. I immediately searched for the opinion, for what seemed an extraordinary decision, but none was on file—only the words "judgment reversed." Meeting one of the judges soon after, I ventured to call his attention to the matter and ask the reason of what appeared so extra-ordinary a decision. He had forgotten the case, but finally his memory was refreshed.

"Oh yes—I recollect—the case of so and so, in which Mr. N— was opposing attorney ? "

" The same."

"Well, I am not sure about the decision in that case, but my recollection is that it was not one of very much importance, and as Mr. N— had lost every case he had that term, we thought it would not make much difference to decide that case in his favor."

The explanation was so frank and naive that it entirely disarmed criticism, especially as it was accompanied by a genial invitation "to interview a friend," at the next corner.

Let no one infer, however, from these instances of the manner of conducting judicial affairs, in the early days of the territory, that on the whole justice was not obtained as nearly as in the older communities. And I think far more so than in some of the newer territories with which I have been acquainted. Charges of bribery and corruption of courts and juries were almost wholly unknown. Some methods were peculiar, and have become obsolete, but were not really as prejudicial as one at the present day might think.

The limits of this article are exhausted by this brief sketch of the first territorial bench. As population increased, and litigation became larger and more important, the standard of legal ability for a seat on the bench was correspondingly advanced. Before the state was admitted, in 1858, the Honorable Jerome Fuller, William H. Welch, Andrew Chatfield, Moses Sherburne, R. R. Nelson and Charles E. Flandrau had served for longer or shorter terms as supreme court justices. William Hollinshead, Isaac Atwater, John B. Brisbin and Harvey Officer served in the order named as reporters of supreme court

Some of the justices above named were able lawyers, and the last two named rose to higher positions on the state and United States bench. Occasion may serve hereafter to give some further sketch of their lives. There was an increase of dignity of the bench with the increase of business, but the novel, fascinating, indescribable flavor of territorial times was passing away. Churches, log school-houses, appendages to saloons, with floors covered with tanbark and saw-dust, where justice was first administered, gradually gave place

to more commodious structures. Clerks, who couldn't write the simplest record without instruction from the presiding judge, were superseded by others who could at least use the form book. The goddess of justice began to discard her homely and ragged robes, while she was supposed to retain the bandage on her [214] eyes. But with all these, too, went that royal bon-homie, that genial comradeship, that simple equality between bench and bar, that cordial delight in each other's early success, which gave a charm to practice in territorial times, for which all the successes in after life can poorly compensate.

Isaac Atwater.

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