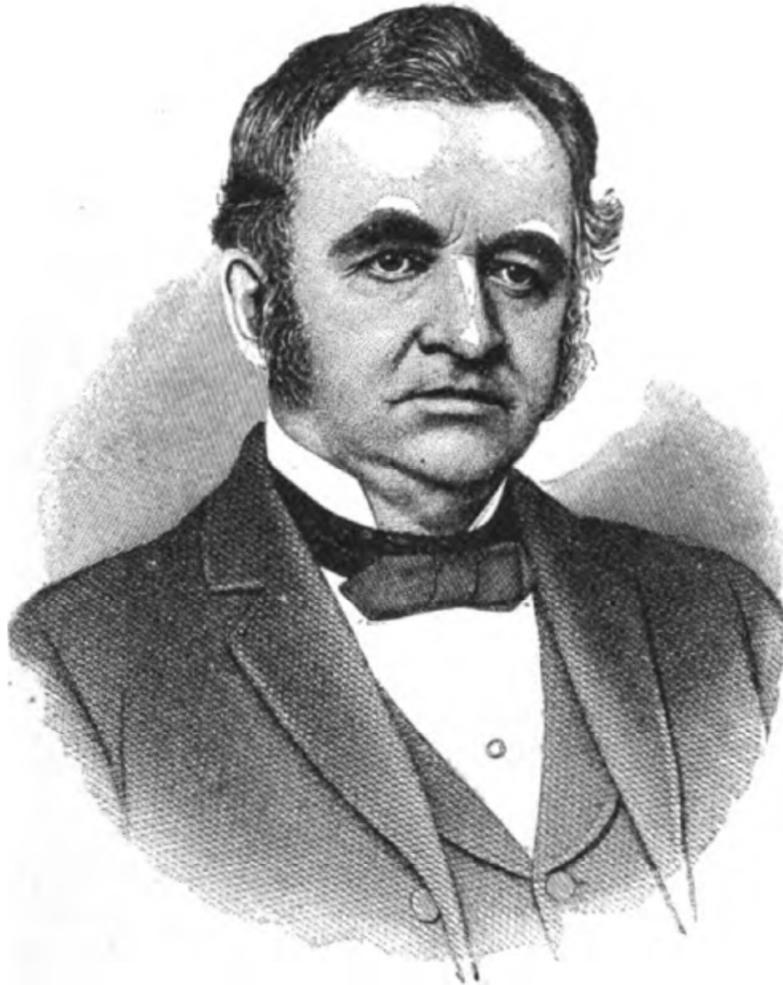


**MINNESOTA COURTS AND LAWYERS
IN THE DAYS OF THE TERRITORY
(1879)**

BY

ISAAC ATWATER



ISAAC ATWATER.

(1892)

FOREWORD

By

Douglas A. Hedin
Editor, MLHP

The monthly meeting of the Department of American History of the Minnesota Historical Society was held in the library of Rev. Edward D. Neill at Macalester College in St. Paul on the evening of December 1, 1879. Isaac Atwater, who served on the Minnesota Supreme Court from 1858 to 1864, read a paper on the courts and lawyers of the territorial period, 1849-1858. It consisted of a series of brief recollections of the ten men who served on the Territorial Supreme Court, as well as lawyers William Hollinshead, Edmund Rice, George Becker, Michael Ames, John W. North and Tom Cowan. To amuse his audience, he inserted a few apocryphal stories.

Atwater's reminiscences were reported in the *St. Paul Pioneer Press* the next day,¹ and published that year with other articles in a book titled *Transactions of the Department of American History of the Minnesota Historical Society*. Atwater's paper follows. It has been reformatted. Footnotes have been added by the MLHP. The engraving of Atwater on the previous page is from Charles B. Elliott, "The Minnesota Supreme Court: Part II" 4 *The Green Bag* 163 (1892).

¹ *St. Paul Pioneer Press*, December 2, 1879, at 6 (because of time constraints, parts of the paper were condensed or omitted).

J. F. Williams, Esq.

TRANSACTIONS

OF THE

Department of American History

OF THE

MINNESOTA HISTORICAL SOCIETY.

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- "Truth is the daughter of Time."
"Read histories, lest a history you become."
"The history of the world is the judgment of the world."
"The more I learn, the less I think I know."
"Nescire quid antea quam natus sis acciderit, id semper esse puerum."
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MINNEAPOLIS:
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1879.

MINNESOTA COURTS AND LAWYERS IN THE DAYS OF THE TERRITORY

BY HON. ISAAC ATWATER

Judge Atwater, of the first State Supreme Court, read an interesting paper on the Courts and Lawyers of the Territory of Minnesota, of which only an abstract can be given. He commenced by alluding to the laws governing this region before the act of March 3d, 1849, organizing the Territory of Minnesota.²

Virginia ceded the large tract subsequently known as the Northwest Territory. The ordinance governing this Territory, passed July 13 1787, provided there should be not less than three no more than five States.³ The great difference between the organic acts of 1787 and 1849 was dwelt upon; the latter act ignoring the residence in the district and property qualification of the Governor and also the property qualification of legislators.

TERRITORIAL COURTS.

He then proceeded to notice the courts established under the act of 1849. Three judicial districts were designated, and Zachary Taylor, then President, appointed Aaron Goodrich, David Cooper and Bradley B. Meeker, judges.⁴

² "Organic Act (1849)." (MLHP, 2009).

³ "Northwest Ordinance (1787)." (MLHP, 2009).

⁴ "Governor Ramsey's proclamation establishing judicial districts (1849)." (MLHP, 2011).

JUDGE GOODRICH.

the first named, was Chief Justice, is still living, and a resident St. Paul. His ability and talents are so widely known that further mention thereof, during his lifetime, would seem unnecessary.⁵

JUDGE COOPER.

Judge Cooper, now deceased, was from Pennsylvania, a thorough lawyer of the old school, who took no stock in the code and fangled theories of law. His dress was in keeping with his views. He used to appear in court with plaited or ruffled shirt bosom and wristbands, and believed in, even if he did not assume, the judicial as appropriate to the bench. He went to the Pacific coast in 1864; and was not successful, and a few years ago died in Salt Lake City.⁶

JUDGE MEEKER.

Judge Meeker, the other Associate Justice, was appointed from Kentucky, where he was residing. He was born in Connecticut. Possessed of considerable intellectual power, he yet lacked the discipline of a close legal education, and, above all, of practice before he was appointed judge. We find in the reported cases, seven opinions by him, the most important of which, and on which he spent the most labor, was that of *Castner vs. Steamboat Dr. Franklin* [1 Minn. (Gil. 51) 73 (1852)] , in which he had occasion to discuss the rights of parties navigating the Mississippi. That opinion shows research, and may be mined with profit to-day.⁷

⁵ Goodrich died on June 24, 1887, aged seventy-nine. For his obituary in the *St. Paul Daily Globe*, see "Chief Justice Aaron Goodrich, 1807-1887." (MLHP, 2016).

⁶ John Fletcher Williams, "Memoir of Judge David Cooper." (MLHP, 2009-2012).

⁷ It can be found in "Decisions of the Minnesota Territorial Supreme Court, 1851-1858." 73-82 (MLHP, 2015) (published first, 1858).

Judge Meeker made his home in Minneapolis some years before his death, and always had the most enthusiastic ideas in regard to future.⁸

JUDGE FULLER.

In 1852, Jerome Fuller, of New York, was appointed Chief Justice in place of Hon. Aaron Goodrich. This occurred through certain political complications in the Territory, into the history of which it does not fall within the province of this paper to enter.

Judge Fuller was a remarkably good lawyer, and as a judge a fair, candid, impartial man, very modest and unassuming, but who made many firm friends during his brief residence in the Territory. In 1854, Judge Fuller returned to New York, and has since been elected one of the county judges of Monroe county in that State.

JUDGE HAYNER.

Judge Hayner, having been appointed Chief Justice in the place of Fuller, whose nomination was not confirmed by the United States Senate, on an appeal of Alex. Cloutier, who had been fined twenty-dollars for violating the prohibitory liquor law of the Territory, decided that the legislative power was vested by the organic act, in the Governor and Legislature, and that they had no power to delegate their authority to the people, and that the act, having attempted to transfer this power, was null and void.⁹

JUDGE WELCH.

His place was filled by the appointment of Hon. Wm. B. Welch as Chief Justice, who took his seat at the fifth term of the Supreme Court, in January, 1854, and his associates were Sherburne Chatfield.

⁸ John Fletcher Williams, "Memoir of Judge B. B. Meeker." (MLHP, 2009-2012).

⁹ Hayner's opinion can be found in Douglas A. Hedin, "Advisory Opinions of the Territorial Supreme Court, 1852-1854." 18-21, 38-40 (MLHP, 2009-2011).

In regard to the court composed of Welch, Sherburne and Chatfield, it may be said, without invidious comparisons, that it commanded the entire respect of the community. Justice Welch was a man of sound common sense, and seldom erred.

JUDGES SHERBURNE AND CHATFIELD.

Judges Sherburne and Chatfield were both able and thorough lawyers and jurists, and would have taken a high stand at any in the land. The last named, although a Democrat, had a judicial district carved out for him by the Republican Legislature of 1870, which he held with universal acceptance, until October 3, 1875, when he died, much lamented.¹⁰ Judge Sherburne entered practice after his term expired, and continued therein until death.¹¹

JUDGES NELSON AND FLANDRAU.

In 1857, Hon. R. R. Nelson and Charles E. Flandrau were appointed in the places of Sherburne and Chatfield, and the last term of the Territorial Supreme Court was held in St. Paul on the second Monday in January, 1858.

EARLY LAWS.

At first, the code of Wisconsin was in force—a confused jumble. In 1851 Governor Ramsey recommended a revision of the laws. M S. Wilkinson, L. A. Babcock and W. Holcombe were appointed by the legislature commissioners to report a code. With remarkable speed, in about sixty days, a code was reported, which served the purpose.

The legislature of 1858 appointed W. Hollinshead, Aaron Goodrich and Moses Sherburne to make a compilation of laws then force. The report, signed by Hollinshead and Sherburne,

¹⁰ John Fletcher Williams, "Memoir of Judge Andrew G. Chatfield." (MLHP, 2009-2012).

¹¹ Sherburne died on March 29, 1868, aged sixty.

was presented to the judges of the supreme court on the 15th of January 1859, and continued in force until the revision of 1868.

This latter commission differed as to the scope of their powers. Judge Goodrich, differing from the majority, and taking the position that they were authorized to revise as well as compile.

FIRST COURT IN HENNEPIN COUNTY.

The first district court of the Territory, held in Hennepin County, was in the old mill erected by the United States for the use of Fort Snelling. It convened in July, 1849, and was presided over by Judge Meeker. It is unfortunate that there are no written records of the same preserved. Franklin Steele was foreman of the grand jury.

The next court was held in in 1853, in a building erected by Anson Northrup, and thereafter until the erection of the present court house, in a frame building on Bridge Square.¹²

In addition to the supreme and district courts, the organic act provided for probate and justice courts.

JUSTICE'S COURTS.

In the latter, at an early day, post important interests were determined; among others, the rights to the possession of Hennepin Island, and claims on the west side with the exception of that of John H. Stevens. Though the justices were not highly educated, and the juries chiefly plain farmers, justice and equity were evenly meted.

CLAIM ASSOCIATIONS.

These were associations with written articles of agreement, whose subscribers agreed to protect each other's claims. When a

¹² Judge Meeker presided over this court session after his term of office had expired. See "Judge Meeker's District Court Session in Hennepin County in 1853." (MLHP, 2012-2016).

claim was jumped, the president called the association together, and a jury was sworn and evidence introduced. When the verdict was rendered the trespasser was given a few hours to remove his shanty, which, if not complied with the association proceeded to do it. It was a rude way to administer justice, but the effect was to diminish litigation and to promote peace.

FREE AND EASY.

In the midst of an important argument, in early days, counsel would sometimes move an adjournment of the court for fifteen minutes, which was usually granted, when bench and bar would cross the street to a hotel, and after imbibing certain refreshments, could go back to work.¹³ A juryman did not scruple to talk with any one in court.

EARLY LAWYERS.

Courts cannot run without lawyers. As early as 1850-51 we find the names of Edmund Rice, Hollinshead, Becker, Wilkinson, Michael Ames, Babcock, [Alexander] Wilkin, Emmett, Nelson, J. W. North, H. L. Moss and D. A. Secombe. The most of these are still living and it does not become me to speak save of a few who occupied prominent positions and have retired from active practice.

WILLIAM HOLLINSHEAD.

William Hollinshead in person was large and of commanding presence, impressing the casual observer with his intellectual force. He was a close student, although occasionally he would go hunting. A logical reasoner, his cases were well prepared. He

¹³ An apocryphal story. For a similar tale---also likely tall---see “‘Firsts’ in the History of the Bench and Bar of Duluth and St. Louis County.” 7-8 (MLHP, 2011) (published first, 1921).

was cut off in [the] prime of life, and the bar of the State suffered a great loss.¹⁴

EDMUND RICE AND GEORGE L. BECKER

are still living and too widely known to be spoken of in this connection. They have an enviable reputation as lawyers, well known to the early settlers. Mr. Rice attended principally to the jury trials. His social qualities and genial manners made him a universal favorite with jurymen. In addition, he was a fluent speaker with anecdotes to illustrate his points, and could make the jury or laugh. He was a dangerous opponent, to which the writer can sorrowfully testify. He left his profession to engage in the railroad enterprises of the State, and in this connection he will be remembered by the future historian of Minnesota.

Mr. Becker has also taken a prominent part in the same direction, and occupied a seat in the constitutional convention, and several legislative assemblies.

MICHAEL E. AMES.

was a well read lawyer, at good special pleader, with power of sarcasm. He was strong in the examination of a witness, and when one was refractory a favorite device was to make him angry, and then he generally managed him as he wished.¹⁵

JOHN W. NORTH.

In August, 1850, when the writer first arrived in the Territory, John W. North was located at the Falls of St. Anthony. Having enjoyed considerable legal practice in Syracuse, N. Y., before coming West, and having acquired reputation as a public speaker in other fields, he naturally at once assumed position as

¹⁴ Hollinshead died on December 25, 1860, aged forty.

¹⁵ "Michael E. Ames (1822-1862)." (MLHP, 2010-2012).

the leading lawyer of the county. He was particularly strong in the examination of a witness, and in presenting a case, in a terse, and forcible form before a jury, and was always a dangerous opponent in jury trials. And had he chosen to devote himself entirely to the profession, there is no doubt but that to-day he would have been one of the most prominent lawyers in the State. But Mr. North was by nature and education a reformer, and a radical one at that. He had a courage equal to his convictions, and never hesitated to follow them to their logical sequence, irrespective of popular sentiment. He always stood by what he believed to be right without counting the cost, and consequently, retained the regard of his friends and the respect of his enemies.

He was the founder of Northfield, in Rice county, now a flourishing village; and if not a pecuniary success to the founder, was not owing to want of foresight on his part, but to the financial tornado which struck Minnesota in 1857, and which overwhelmed in ruin nearly every prominent business man of the State at that time. Subsequently he was appointed Associate Justice for the Territory of Nevada and discharged the duties of the office for two or three years. Since he has been engaged in various business and is now a resident of Santa Barbara county, California.¹⁶

During the last three or four years of territorial existence, the number of lawyers began rapidly to multiply, and time would not suffice to more than mention the names of some of the more prominent. In our county, we recall such names of C. E. Vanderburg, E. M. Wilson,¹⁷ Wm. Lochren, James R. Lawrence, W. W. McNair, F. R. E. Cornell, J. B. Gilfillan, F. Beebe, R. J. Baldwin, and Geo. Nourse, the most of whom are still in the prime of life,

¹⁶ For North's biography, see Merlin Stonehouse, *John Wesley North and the Reform Frontier* (Univ. of Minn. Press, 1965).

¹⁷ "Eugene M. Wilson (1833-1890)." (MLHP, 2008).

and are recognized as Nestors of the bar and bench, and from whose lives the historian of twenty years hence will reap a rich harvest of legal reminiscence, fully equal to that which the records of the older States can furnish on the same topic. In our neighboring county of Ramsey, too, will be found such names as Masterson, Simonds, Wilkin, Bigelow, Gilman, Heard, Smith, Flandrau, Allis, Palmer, Van Etten, Murray, Horn, Emmett, Gorman, McMillan, Cooley, Otis, Sanborn and French, and several others whose names are not now recalled. The most of these are still in active practice, and yearly adding to the distinguished reputations which many of whom have already attained.

Time would fail me, even if I had the requisite information, to speak of names in other counties, who obtained reputation at the bar in territorial time. This duty must be performed by historians of their respective counties.

TOM COWEN.

Cowen was the type of a frontier lawyer, and lived at Traverse de Sioux. He was no scholar, but brimful of humor, a quick reader of human nature and a vast amount of assurance. Judge Flandrau told me an incident which illustrates his character. In 1855 before Flandrau was judge, he was in Tom's office and the latter remarked that he had an important case and would like to use a little Latin. Flandrau gave him these words, "Non in hœc feders veni," which was entirely satisfactory. Then they both started for Belle Plaine. On their way they passed the office of a justice the peace, from which walked one of Cowen's clients, and told him he was being tried for assault and battery and needed his services.

Cowen was equal to the emergency and said "Certainly." The evidence proved that his client had committed an outrageous assault resulting in the loss of one of the complainant's eyes. Cowen introduced no witnesses, but said that the complainant

had insinuated that his client was not to be believed on oath. He then eloquently expatiated on the enormity of the crime of accusing an American citizen of not speaking the truth, and asked the jury if one of them would think the trifling loss of an eye would be adequate penalty for so great an offense. Then turning to the justice in a solemn voice, said, "You, sir! have a solemn duty to perform. You know what Blackstone says, 'Non in hæc feders veni,' which means, sir, that there can be no crime without the intent."

The justice then charged the jury that though the evidence seemed strong against the defendant, yet in view of the law which had been stated by the learned counsel, he must be acquitted.

Without leaving their seats the jury returned a verdict of "Not guilty."

In this brief review of the early bench and bar, it may seem that the same would not favorably compare with that of the eastern, or even that of surrounding States. A moment's reflection will suffice to show that such comparison would be unjust to the territorial judges.

It must be remembered, that in those days, the common impression was, that Minnesota was, and always would be, on the extreme verge of civilization—a barren, frozen region, which might furnish lumber, but could not produce cereals, to support the inhabitants; that it always would be sparsely settled, that the salary of a judge was barely sufficient for a decent support, without any, or slight, opportunities for political advancement, almost without the hope of acquiring fame as a lawyer or jurist. Hence, no man of eminence in the profession, could be induced to accept the position of District Judge, and the matter of surprise is, not that the territory did not secure a bench equal to that of some of the States, but that it did enjoy one, equal at

least, on the whole, to any, and superior to many of that of any of the territories before or since organized.

In regard to a comparison of the Territorial bar with that of the States, the same considerations apply, though not to the same extent. It will be found, in an examination of the settlements of territories formed out of the northwestern, and also of still more western territories, that the most energetic, enterprising, intellectual and vigorous men from the old States, have settled and occupied them, from all classes of community. Minnesota was not an exception. And she has furnished her full quota of able lawyers. And if the Territory, or subsequent State, cannot to-day show the names of lawyers, of national reputation, it is due to two main causes, to wit: that some of the most eminent were cut off by death in the prime of life, and others seduced to leave or at least, partially abandon the profession for political life. And politics have been the bane of the profession, not only in the Territory but the State. The law is jealous of her votaries, and will brook no interference any source—much less from that of politics. The two professions are entirely antagonistic, and he who desires eminence in the one, must ordinarily abandon all hope of a distinguished position in the other.

But neither in this respect would it be fair to compare the early bar of Minnesota with that of the States. For in territorial days, pressure was so great to obtain competent men to fill legislative and other political offices, and for which lawyers were generally considered most eligible and best fitted, that it was almost impossible for a lawyer, without giving grave offense to his friends and clients, to refuse a nomination. In addition to this is to be considered, that legal services were then of small pecuniary value, and those of a political character frequently brought a high price.¹⁸ And hence, while we may reasonably

¹⁸ Two years later George E. Warner & Charles M. Foote borrowed from and paraphrased this passage in “The Territorial Courts and Bar of Hennepin County” 14-15 (MLHP, 2013-

conclude that the territorial bar embraced as much average ability as that of any of the States, the reason it has not produced as many distinguished lawyers proportioned to its numbers, is readily accounted for. But considering the history of the Territory and State, in its political, educational, religious, and material aspects, the territorial bar will have no occasion to be ashamed of its record in regard thereto. •

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Related Articles.

Charles E. Flandrau, “Judge Isaac Atwater.” (MLHP, 2008) (published first, 1888).

“Isaac Atwater.” (MLHP, 2008) (obituaries & memorials).

Penny A. Peterson, “Isaac Atwater.” (MLHP, 2014).

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Posted MLHP: February 27, 2016.

2016) (published first as a chapter in Edward D. Neill, ed., 1 *History of Hennepin County and the City of Minneapolis* in 1881) (“[I]t must be remembered that no man of ability could come to Minnesota at an early day and confine himself exclusively to the practice of law. For in territorial days the pressure was so great to obtain competent men to fill legislative and other political offices, and for which lawyers were considered most eligible and best fitted, that it was almost impossible for a lawyer, without giving grave offense to his friends and clients, to refuse a nomination. In addition to this is to be considered that legal services were then of small pecuniary value, and the same talent employed in politics or in real estate operations, ordinarily received a much larger remuneration.”).