

“FIRSTS” IN THE HISTORY
OF THE BENCH AND BAR OF
DULUTH AND ST. LOUIS COUNTY
(1921)

FOREWORD

By

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One of the more glaring characteristics of the men and women who wrote chapters on segments of community life for the dozens of Minnesota county histories published in the late nineteenth and early twentieth centuries was their compulsion to record “first” events. In fact, “firsts” are inevitable. At some point in the history of any county, the first grand jury is convened, for instance, the first trial held, the first murder committed. Unaware that a “first” may also be trivial, early writers gave it special attention simply because it happened before subsequent similar events. Lacking professional training, they described these events in isolation of larger cultural, political or economic forces in the region or nation.

Worse, many amateur county historians could not resist the urge to repeat colorful stories that were false, exaggerated or warranted closer examination. Historical accuracy was sacrificed for amusement.

An example of this genre appears in the first two of a three volume history of the City of Duluth and St. Louis County published in 1921. The set’s subtitle touts it as “An a Authentic Narrative of the Past, with Particular Attention to the Modern Era in the Commercial, Industrial, Educational, Civic and Social Development,” but it really is a collection of anecdotes, stories, and quotes from previous speeches and writings about the region.¹ The sections on the bar and bench have no footnotes and are littered with “firsts.” Not every reader can place them in a larger historical context because their author does not. Some anecdotes which should have been prefaced with at least a sentence of skepticism are retold to amuse the

¹ The third volume contains biographical sketches of subscribers of the set.

reader. It is probable, for instance, that Judge Stearns correctly recalled the quip of “Mr. Comstock” about the limitations of the bar in northern Minnesota in the late 1800’s—“Mr. Comstock used to say that there was no lawyer among us who knew enough to take an appeal and therefore ours was a court of last resort”—but that observation surely was a self-deprecatory jest, not meant to be taken literally.² And the story about the unnamed “pioneer” lawyer who called for a recess during a trial so he could have a drink is just another tall tale about the frontier bar.³

The following article is comprised of excerpts from the first volume of *Duluth and St. Louis County, Minnesota*, edited by Walter Van Brunt, and published by The American Historical Society in 1921. The part beginning with “First Session of Court” appeared on pages 145-148, and the second, beginning with “Judiciary and Bar,” on pages 217-221. The excerpts are complete, though reformatted. The title of this article has been added by the MLHP.

It may be read together with two other articles posted on the MLHP: First, Consul Willshire Butterfield’s “Bench and Bar of Duluth,” 9 *Magazine of Western History* 634-653 (March 1889), which contains biographical sketches of Judges Ozora Stearns and Josiah Ensign, and a lawyer, Daniel Cash. Second, Judge Ensign’s “Bench and Bar of Duluth and St. Louis County,” which was a chapter in the second volume of *History of Duluth and St. Louis County*, edited by Dwight E. Woodridge & John S. Pardee, and published by the C. F. Cooper & Co., in 1910.

Some viewers may be interested in the review of Professor Roy O. Hoover’s *A Lake Superior Lawyer: A Biography of Chester Adgate Congdon* (Duluth, Superior Partners, 1997), which is also posted separately on the MLHP. □

² See below at 7. The quotation is taken from Consul Willshire Butterfield’s “Bench and Bar of Duluth,” posted separately on the MLHP.

“Mr. Comstock” likely was Solomon Gilman Comstock (1842-1933), a Moorhead lawyer, state representative and congressman, who served one-term, 1889 to 1891.

³ See below at 7-8.

Duluth and St. Louis County Minnesota

Their Story and People

An Authentic Narrative of the Past, with Particular
Attention to the Modern Era in the Commercial,
Industrial, Educational, Civic and
Social Development

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WALTER VAN BRUNT

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“Firsts” in the History of the Bench and Bar of Duluth and St. Louis County

First Session of Court—It is believed that the first session of court held in St. Louis County was in 1859, Judge S. J. R. McMillan officiating. The “History of St. Louis County” (1910) states that:

The first court in Duluth was held in a little unfinished room. Then court was held for two or three terms in a schoolhouse; then a brick building was rented, known as the Ray Block, in the east portion of the city, the lower part being used for offices, and the upper-part for a court room. * * * The first entry in the journal of the First District Court of Duluth is as follows: “Monday, August 1, 1859, 9 o’clock A. M. In the absence of the honorable judge, S. J. McMillan, the court was adjourned by the clerk to Tuesday, August 2, at 9 o’clock A. M. Tuesday, August 2, 1859, 9 o’clock A. M. [146] Court met pursuant to adjournment. Present, Judge S. J. R. McMillan. There being no business ready, adjourned until 2 o’clock P. M. Two o’clock P. M. Court met pursuant to adjournment Present, Judge S. J. R. McMillan. Ordered by the court that the Hon. Samuel Badger, Jr., for the time being, perform the duties of district attorney. The United States vs. Louis Droz. The defendant, Louis Droz, and his bail, Nirber and Posey, each being called three times and not appearing, their recognizance was forfeited. Ordered that the forfeiture of the recognizance of the defendant and his bail be taken off upon the defendant entering into a new recognizance with one or more sureties, to be approved by the clerk of the court, in the sum of \$500, condition upon appearance at the next term of this court. Court adjourned sine die.”

Three days after the adjournment of the court, Judge McMillan ordered that a scrawl, with the words: “Seal District Court, St. Louis Co., Minn.,” included therein, “be used as the seal of the District Court for St. Louis County, Minnesota, for the time being and until a seal shall be furnished and provided according to law.” The clerk of the court at this time was J. B. Culver; the sheriff was Andrew J.

Ellis. The first suit begun in the court, so far as appears from any papers on file, was that of Lewis M. Dickens against William G. Cowell. It was an action on a promissory note; and as the plaintiff was inclined to believe the defendant was then a non-resident of the state an attachment was issued against "all the property of the said defendant" in St. Louis County. Duluth, and of course St. Louis County, was first in the First Judicial District of Minnesota.

The First Duluth Lawyer; and the First Lawsuit.—Samuel Badger is believed to have been the first lawyer who practiced in Duluth, although, in 1857 and 1858, Dorus Martin "was brought in to assist George W. Didlake, attorney," in arguments before the land commissioners at Buchanan, from which association Mr. Didlake promptly withdrew, "for this Mr. Martin," explained the register of the land office, "is a boisterous, ignorant man, without legal learning or even the forms of practice, but makes up in noise and insolence what he lacks in knowledge." Indeed the officials at the land office went so far as to decide "not to tolerate him further unless required by the department."

In all probability therefore Samuel Badger's place as the first Duluth lawyer cannot be challenged by records available of Dorus Martin, who evidently had no legal training. But Judge Ensign has seen fit to bring into county history the claim of Henry W. Wheeler to place as "the first lawyer that ever tried a jury case in St. Louis County." On September 2, 1911, Judge Ensign wrote to Bert N. Wheeler as follows:

In looking over some old papers today, I found among them a pencil memorandum that I made years ago. The circumstance was in relation to Samuel Badger, the first lawyer in Duluth, and in the conversation your father stated the facts below; and thinking it might be of interest to you, I have had it copied, just as it was written.

Your father was a man whose friendship I was proud of. I wish a sketch of his life could be written and preserved in our historical records.

The memorandum Judge Ensign referred to reads:

One day, Henry W. Wheeler was in my office, and in talking of Badger he said he didn't know that he had ever practiced here much,

but said: "Do you know that I was the first lawyer that ever tried a jury case in St. Louis County?" I told him I did not. He said W. E. Wright sued John R. Carey, E. G. Swanstrom and Michael Hule, sheriff of St. Louis County. The case came up before Judge McMillan. H. N. Setzer, of Taylors Falls, appeared for the plaintiff, and there was no one to appear for the defendants. Mr. Wheeler took their case and tried it. It was tried in a little shanty on the bank of Buffalo Creek (that was Clark's Creek, which is now covered up, and ran through lot No. 27, West Superior Street, and lot No. 28, block 5, Central Division, Duluth). It was difficult to get a jury, and the parties agreed that it should be tried before William Nettleton, Sidney Luce, and one other person whose name Mr. Wheeler had forgotten. The verdict was for the defendants. [148] and Mr. Wheeler congratulated himself upon trying the first lawsuit in St. Louis County, and being successful in the trial.

First Journal of District Court.—The first journal of the District Court for St. Loins County contained records that did not all pertain to the court. Part of it was used to record the establishment, or organization, of the local Masonic lodge. And it was used for the sittings of court in other counties also. In one section of the book the clerk recorded the issuance of several certificates of marriage, the first entry reading:

Grand Portage, 8 Mo., 4th, 1858. Has been married by myself at Grand Portage, on the 5th of August last, Abraham Bonneau and Elizabeth Nadau, both of Monroe, Michigan.
D. D. Rarquet, missionary.

This, probably, was the first marriage solemnized on the North Shore after white settlement began. But the first wedding in Duluth was of William Epler and Abigail Woodman, a sister of Mrs. J. B. Culver, in whose house the ceremony was held on April 12, 1859.



Judiciary and Bar.—The first court held in St. Louis County has been referred to in an earlier chapter. For two or three terms after that; the court was held in a schoolhouse, but when Duluth had advanced so far in metropolitan dignity as to have "a brick building," court sessions were transferred to that structure.

Following the pioneer judge S. J. R. McMillan, who first held court in Duluth in 1859, when St. Louis county was in the First Judicial District of Minnesota, Judge James M. McCelvey presided over the local sessions until August, 1874, when Col. O. P. Stearns was appointed, Duluth became part of the Seventh Judicial District March, 1870, the district embracing the counties of Stearns, Sherburne, Benton, Morrison, Crow Wing, Aitkin, Cass, Douglas, Todd, Mill Lacs, Polk, Stevens, Traverse, Pembina, Clay, Wilkins, Grant, Otter Tail, Wadena, Becker, Pope, St. Louis; Canton, Itasca, and Lake counties, a vast territory for one justice to cover. On March 5, 1874, the Eleventh District was organized, and embraced the counties Crow Wing, Aitkin, Cass, Polk, Pembina, Clay, Wadena, Becker; St. Louis, Carlton, Itasca, Beltrami, Lake, and Traverse, a territory sufficiently extensive to make it possible to appreciate Judge Steam's description of some of the difficulties he experienced in carrying out the functions of his office. He said:

When I went on the bench of the Eleventh District there was not a full set of "Minnesota Reports" west of Duluth, and there was not a court house in the district. We held court where we could—in churches, in stores, [218] schoolhouses and sometimes in places not so respected. I remember, at Detroit, once we used a saloon, a sort of double-barreled saloon that had liquors in the front room and another room back. We took hold and moved the liquors into the back room and held court in the front—close by—a very convenient arrangement for some of the attorneys. As we had no libraries or books, only what we carried in our hands, it was a rough kind of justice we dispensed, but I am glad to say, looking back over the short space that has shown so marvelous a development, that it was, I believe, a fair justice that we administered. When we had no law, we simply did the best we could and relied on our hearts and our heads to do the right and just thing, and to reach just equity between man and man. Mr. Comstock used to say that there was no lawyer among us who knew enough to take an appeal and therefore ours was a court of last resort.

Judge Stearns' conviction that the close proximity to a saloon was "a very convenient arrangement for some of the attorneys" brings to mind an anecdote regarding one of the pioneer members of the Duluth bar (not Judge Stearns, by the way) who was so methodical that, although entrusted with the adjudication of an important case, found that he could not, during

the hearing of the case, suspend his regular and frequent bibulous habits. On the contrary, as the clock struck the hour he found it necessary to postpone the processes of law by making the following announcement:

Gentlemen, the court will now take a recess, to enable it to take a drink, and the defendant will foot the bill.

The report has it that the case was “somewhat extended,” and that the referee found many recessions necessary.

Judge Stearns came to Duluth in, 1871, and in 1872 became a law-partner of J. D. Ensign, whose subsequent connection with the judiciary was destined to be of such long duration, and so honorable. Both were professionally prominent in the litigation that developed because of the construction of the Duluth Canal.

First Lawyer in St. Louis County.—Of the pioneer attorneys, it may be permissible here to introduce a paper read by Judge Ensign several years ago at a meeting of the local bar association. He then said:

It may be a matter of interest to the many attorneys of our bar to know something of the first attorney in this county. His name was Samuel Badger. He was a member of a North Carolina family, a very wealthy and influential family in that state. One of the family was once governor of that state; another represented the state in the Senate of the United States, and held other offices under the Government. * * *

Samuel was sent early in his life to Philadelphia. He was there educated; there he read law and was admitted to the bar, commencing his practice in that city. His father died about the time that he commenced his practice, and he received a very large fortune from the estate.

He was quite a society man, was well received everywhere by the best people of Philadelphia, and was married there to a very refined, beautiful and intelligent woman, who also possessed great wealth.

Soon after the marriage, the habits of Mr. Badger changed. He began to drink and gamble. He drank and gambled until his fortune, and

that of his wife, dissipated, and on account of his habits his wife left him.

This was in 1849 or 1850, when the excitement of the discovery of gold in California affected the whole east, Badger, reduced to poverty, abandoned by his wife, went to California to revive his fortune.

As to what he did in California I can only give his own statements, made to the old citizens of our county. He went across the isthmus and landed in San Francisco with 17 cents in his pocket. He invested the 17 cents in peanuts and sold them in the streets. He invested the proceeds and became a peddler of peanuts upon the streets of San Francisco, until he had accumulated about \$100.

During that time he got acquainted with a lawyer of San Francisco, who finally gave him a clerkship in his office. This was in 1852. He continued [219] for some time in that office, and was finally taken in as a partner. The firm prosecuted some large and very profitable cases. Within two years after he was a member of the firm his share of the proceeds was about \$10,000. He then sold out his interests in the firm and received \$10,000 therefor, and departed for some place in Nevada, where he bought a mine which he soon after sold and realized quite a profit. He then went to Montana and afterwards to Omaha. * * * He went from Omaha to St. Paul.

During all this time he had abstained from drink and gambling and had quite a large sum of money to again start life with.

While in St. Paul he heard that his wife had got a divorce from him; from that time he commenced anew his drinking habits. Soon after, he came to Superior, but I cannot give the date when he arrived. He still had considerable money, but it was soon dissipated in gambling. He commenced again to practice there.

It is said by some who knew him, and had seen him in court, that he was a very brilliant man, a fine speaker, and, when sober, a man of fine address and appearance.

In 1857 or 1858 he came to Duluth. It is difficult to understand why

he came here, as there were not more than fifty or a hundred residents in the county. There were no courts here. He had to struggle to make a living. How he did it I do not know. It is said that he fished, and sold his fish to eke out a miserable livelihood.

I find in the old records of the court nothing in relation to his appearance in court, except at the term held by Judge S. J. R. McMillan, on the 2nd of August 1859. At that time he was appointed county attorney of the County of St. Louis. There was no business done at that term, and his duties could not have been onerous, and his pay must have been very small.

During the time that he was in Duluth, he boarded with Zack Brown, who was afterwards sheriff of St. Louis County. Brown's wife was a full-blooded Chippewa Indian, and she had a sister living with them. Badger married that sister and continued to live in Brown's family.

Of that marriage two children were born, two girls. No one had been able to inform me in relation to his life at that time, except that he associated largely with Indians.

All attorneys will remember the deed from Chief Buffalo to Armstrong, in which there was a recitation, in relation to all the papers and correspondence in regard to the Buffalo tract on file in the land office at Washington. In 1871 the contest over the Buffalo tract was threatened and I wrote to the department, asking for certified copies of all of the, papers, et cetera, referred to in that deed. Among these papers I found a brief but very logical argument of Samuel Badger. I have now forgotten whether he appeared for Armstrong or the later grantees of Chief Buffalo; at all events, as I read it, I felt that the man who wrote it was a lawyer of no mean ability.

Badger lived on here until about 1864, when he returned to Superior, and about a month after that time he died there. His friends in Superior buried him.

Mention has been made of his wife. I have been unable to find what her maiden name was, but she was a leader in Philadelphia society. Prior to 1867 she was married to W. G. Moorhead, who was a very rich and influential Philadelphian, a partner of Jay Cooke in all of his banking history.

In 1869, Cooke and Moorhead became very much interested in Duluth and in the building of the Lake Superior and Mississippi Railroad. A large party, of which Cooke, Mr. and Mrs. Moorhead, were members, came to Duluth and St. Paul. While in Duluth, Mrs. Moorhead was informed that her former husband had lived here and that he had left two girls. She went and visited the girls at an Indian camp down on Rice's Point. She offered to take the two girls to Philadelphia and educate them. One of the girls was willing to go; the other refused, and Mrs. Moorhead took the one girl with her. This girl remained in Philadelphia for some time, but was dissatisfied and Mrs. Moorhead finally sent her back to Duluth. These two girls have lived in Duluth and on the Indian Reservation at Cloquet ever since.

Many references to Samuel Badger are encountered in the reading of reminiscences of the settlers of the first period, the last reference being in August, 1861, when Sidney Luce, in writing to his friend and colleague, Luke Marvin, then at St. Paul, stated that "Sammy Badger has gone to Vermilion Lake and taken his child with him, left his Indian housekeeper here." The only place at which he could live there was the Vermilion Lake Indian reservation. He had evidently given up all endeavor to recover his former standing among white people of good family and education.

St. Louis County Bar in 1869.—Judge (but then merely attorney, or at most ex-representative) J. J. Egan took up residence in Duluth in May, 1869, and in 1870, soon after the incorporation of Duluth as a city, became city attorney. Almost twenty years later, in reviewing pioneer conditions at Duluth, he said regarding the local bar:

The great lawyers of the place—because there were only two—in 1869 were Edward F. Parker and myself. We had no law business or books, and when the waves dashed high on Minnesota Point, the halfbreeds and newcomers gambled as to who was the best lawyer. One day it would be Parker, and the next day Egan.

In a short time, however, greater selection was possible. Judge Ensign has a list which shows the names of the early members of the legal bar of St. Louis County. For the year 1869, said list gives the names of Albert N. Seip, James. J. Egan, Edward F. Parker, W. W. Billson, and James G. Hussey.

The last-named was, presumably, the “J. German Hussey” who taught the Duluth public school in the winter of 1869-70, so that he probably did not practice at the local bar in 1869. W. W. Billson became the law partner of J. J. Egan, the latter eventually going to St. Paul, where he was elected to the judiciary. Billson had a long and honorable association with Duluth and the local bar, but Seip went to Washington “about 1888,” and for the almost twenty years of Duluth residence had given “more attention to real estate and insurance than to the law,” and had “accumulated about \$300,000 while here.”

Regarding Billson and Seip, Judge Egan wrote:

The politics of 1869-1874 were peculiar and bitter. W. W. Billson and Major Seip ran against each other for the nomination to the Senate. Seip caused a circular, in Scandinavian, to be circulated that Billson had not subscribed to some Swedish church, and also that Billson was seen drinking a glass of beer, once, at the Northern Pacific Junction while attending caucus. The two charges almost proved fatal to Billson.

Under the classification, 1870, the list before referred to, reads as follows:

August —, Walter J. Hayward; August —, J. Vance Lewis; August 9, J. D. Ensign; August 9, Austin S. Cushman (here about one year and went to Switzerland); August 10, Samuel L. Southard (never lived here); August 17, Hiram Hayes.

Walter J. Hayward came from Ontario in 1870, and was admitted August 8, 1870, becoming partner of Daniel G. Cash then, or soon afterwards. He returned to Ontario, after “about one year.” In 1870, J. D. Ensign and W. W. Billson “had their cards” in the local Tribune, as attorneys-at-law, and Ensign, Mendenhall and Graves “conducted an abstract business,” stated Robert C. Mitchell, referring to the first years of the Tribune, which he founded and edited in 1870. Regarding Judge Ensign, he further wrote:

In taking this kaleidoscopic view of those old times, I remember that the first time I ever saw J. D. Ensign, now our honored senior judge, was one May morning, while my printers were at work setting time out on the sidewalk. * * * He was introduced to me by the late James D. Ray as a young lawyer from Ashtabula who had just come to

town. I can remember to this day how he looked and that he wore a light-colored coat and a low-crowned, broad-rimmed Leghorn hat.

The Morning Call, which was still another of the Duluth newspapers of the early, seventies, included, under the classification [221] "Attorneys," the following names in its list of "Business Men of Duluth," published in issue of Saturday, February 11, 1871: J. D. Ensign, Egan and Billson, Edward F. Parker, and Robert G. Terry. The list before quoted, that in possession of Judge Ensign, shows that in 1871 Theodore F. Knappen and Daniel G. Cash came, the former on February 2, and Cash on August 8; that F. G. Burgess and O. P. Stearns were of record in 1872; that M. S. Stewart ("partner of Egan") came on February 24, 1874; that Wm. A. Gulick, of Minneapolis, was admitted on May 21, 1875, but "never practiced"; the same comment being penciled opposite the name A. G. Simonds, July 12, 1876.

Reference should, be made, in this review of the pioneer period, to Judge John R. Carey, who was first elected judge of probate in St. Louis County in 1859, and was four times re-elected, going out of office in 1871. Having studied law during the sixties he was elected clerk of the District Court in 1869, and held the office until 1882. After Judge Carey's death, Judge Ensign said of him:

He was one among others who believed in the greatness of Duluth while it was yet a wilderness, and he never wavered in that belief. He, with Luce, Marvin, Nettleton and others * * * had the power to look down upon the coming years and foretell that upon this spot, their wilderness home, a great city was to be built; and he loved the band of men in Superior and Duluth who suffered the discomforts and privations of pioneer life with him, who had been instrumental in changing the wilderness into beautiful cities. * * * When I look back upon thirty years of acquaintance with him, I find much to admire—nothing to condemn. He had his peculiarities, as we all have. He was a good citizen, a kind, loving father and husband, a staunch friend, a man whose great aim in life was to do right and be right—a man of unswerving integrity.

No member of the St. Louis County Bar, however, has a record of service as honorable as that of Judge Ensign himself. For five decades a member of the bar, and for three a capable and respected member of the judiciary, and

during the whole time whole-heartedly interested in the advancement of Duluth, he is almost without exception, and ungrudgingly, given the supreme place of honor in the history of bench and bar of St. Louis County. And seeing that limitations of space curtail this review, the compiler will perhaps be pardoned for having made reference to only Judge Ensign of the several brilliant and esteemed members of the local bar who have, in recent decades, given distinguished service as members of the judiciary. ■

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