

“BENCH AND BAR” *

IN

HISTORY

OF

DULUTH

AND

ST. LOUIS COUNTY

PAST AND PRESENT

EDITORS

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Mark H. Salt and Many Others

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* MLHP editor: This chapter ran from pages 567 to 575 of the second volume of this set. Though reformatted, it is complete. The original page breaks have been added. While the author is not listed, it undoubtedly was either written by or under the supervision of Judge Ensign. Much of the first four pages of this chapter were taken from Consul Willshire Butterfield's "Bench and Bar of Duluth" that appeared in the March, 1889, issue of the *Magazine of Western History*.

CHAPTER XXV.

BENCH AND BAR.

The first court in Duluth was held in a little unfinished room. Then court was held 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, the upper part for a court room. It was used as the court house for three or four years, when the upper part of the Banning block was hired for that purpose, where the courts were held until the year 1883, when the old court house was erected on Second street at a cost, in round numbers, of \$20,000. 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. R. 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. 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 in to a new recognizance with one or more sureties to be approved by the clerk of this court, in the sum of \$500, condition for 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 [568] 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 district, so far as appears from any papers on file, was that of Lewis M. Dickens against William U. 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; afterward in the Seventh, which was created on March 5, 1870, and took in the counties of Stearns, Sherburne, Benton, Morrison, Crow Wing, Aitkin, Cass, Douglas, Todd, Mille Lacs, Polk, Stevens, Traverse, Pembina, Clay, Wilkin, Grant, Otter Tail, Wadena, Becker, Pope, Saint Louis, Canton, Itasca and Lake, and then in the Eleventh, and later the district was again changed to the Seventh, which is its present number, and which embraces the counties of St. Louis, Lake, Cook and Carlton.

The second judge who sat upon the Duluth bench was James M. McKelvey. He held his last court in the place in the first half of August, 1874, the act creating the Eleventh district having been passed on March 5 preceding. It included the counties of Crow Wing, Aitkin, Cass, Polk, Pembina, Clay, Wadena, Becker, St. Louis, Canton, Itasca, Beltrami, Lake and Traverse, which territory constituted nearly half of the state—the north half. A district judge, O. P. Stearns, was appointed under this act to hold office until the next general election, when he was elected to succeed himself. Judge Stearns held annually three terms of court in St. Louis county and two in Carlton county.

The first journal of the district court for St. Louis county is a curiosity. It begins with a record of liens filed “for materials furnished and work done” by various individuals in the building of certain houses. Then appears a member of marriage certificates recorded by the clerk of St. Louis county. Of these the first one reads as follows: “Grand Portage, 8 Mo., 4th, 1858. Has been married by myself at Grand Portage, on the 5th of August last, Abraham Bonneau and Elisabeth Nadau, both of Monroe, Mich. D. D. Rarquet, missionary.” After this there follow two declarations of persons whose intentions were to become citizens of the United States. The journal proper then [569] begins, but occupies less than two pages of the book, and contains the record of the opening of the district court of the First district as before mentioned. Succeeding this is a “summons for relief” in the “district court, 1st judicial district, Manomin county.” Immediately after this entry is the finding of the judge in a case which went by default in the same county of “Manomin.” This record is signed by “S. J. R. McMillan, judge,” at Stillwater, January 19, 1860. There are other cases decided which appear here as a matter of record;

one in Washington county and another in Dakota county. Then follows in regular order certificates of intention to become citizens, until finally the “Court Record,” as it is called, is reached. But the “Record” is a small affair, although purporting to be that of the district court of the Seventh judicial district, of which James M. McKelvey was judge. There is but one finding by the court (November 5, 1869) and the “Record” terminates, to be supplanted by the naturalization of sundry persons whose names are given.

This is the next entry: “State of Minnesota, county of St. Louis. We, the undersigned, master and wardens of Palestine Lodge, No. 79, of Ancient, Free and Accepted Masons, in conformity with an act of the legislative assembly of the territory of Minnesota, entitled ‘An act to incorporate the Grand Lodge of Ancient, Free and Accepted Masons of Minnesota,’ approved March 5, 1853, do hereby certify that the name of said lodge is ‘Palestine Lodge, No. 79, of Ancient, Free and Accepted Masons’; that it is located at and meets in the village of Duluth, in the county of St. Louis and state of Minnesota. Given under our hands and the seal of said lodge, this 28th day of February, A. D. 1881.” Here follow the names of the officers of the lodge. To make the hotch-potch complete, the journal then contains a brief list of judgment debtors and creditors, with date of judgments rendered at various times, fates of docketing the causes and amount of judgments rendered, copies of marriage certificates, another record of causes that have been tried at various dates, intentions of various persons to become citizens of the United States. The “Record” ends with the statement that George B. Stuntz is the creditor, to the amount of \$150, of one Theodore Miller, on the 31st of August, 1863, “for surveying, exploring and examining a certain tract of land and exposing former knowledge of the same,” and demands judgment for the amount. The papers in the case show that he took judgment by default. There [570] is no light thrown upon the plaintiff’s words, “exposing former knowledge of the same,” so far as appears in the record of the case; however, it is fair to be presumed that they helped materially in making up his claim.

“When I went on the bench of the Eleventh district,” once said Judge Stearns, “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, school houses, and sometimes in places not so respected. I remember at Detroit once we used a saloon, a sort of

double-barreled saloon that had the 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.

“I remember once in trying a criminal case the jury was charged and sent out, occupying for its deliberations an old room that had a crack in it, through which we, waiting in the court, could overhear all of their discussions. Finally they struck a point in the charge, and we heard one juror proclaim, ‘The judge says so and so, and Comstock (one of the counsel) says so and so; now, how the devil are we to know who is right?’ Of course I had to recall them and impress on them that as between judge and counsel they had to take the judge for it. Once over in Becker county there was a juror who was determined to go to sleep. After awhile the clerk called my attention to the juror continuously asleep, and I called the counsel up and asked if we should stop and wake the jury. Counsel said no, let him sleep. When I came to charge the jury I charged the eleven and to the sleeper said: ‘You have slept all the while and haven’t heard the evidence. But you can go out with them, and if you can manage to find the same verdict as the other eleven, why well and good.’ This he managed to do.” [571]

On the spot where the city of Crookston, in Polk county, now flourishes, Judge Stearns organized the first court in 1874. There were present Judge Reynolds, Mr. Ball and himself. Scattered about were six houses, among logs, trees and stumps, but no room where court could be held. But as there was a motion to argue, Judge Stearns took a stump, Reynolds a log and Ball a stump, and there was held the first court in Polk county. This fact is only cited to show the tremendous development that has been going on in northern Minnesota in recent years. Today Crookston is one of the most prosperous cities of the state.

Judge Stearns filled so important a place in the legal history of Duluth that a brief sketch of the man is properly a part of any article that deals with the bench and bar of the city. He was born in 1831 at DeKalb, New York State, and was the tenth child in a family of eleven children. He was christened Ozora Pierson. In 1833 the elder Stearns moved with his family to Madison, Lake county, Ohio. The father was practically without means, but was recognized as an honest, industrious man, a great reader and a sound reasoner. Very little was thought in those days of any education beyond that furnished by the common schools. Hence Ozora's education was acquired in the district school, which he attended in the winter months, the summer being devoted to work on his father's farm. The boy, however, was determined to have a liberal education and become a lawyer. At the age of seventeen his father gave him his time and he started out for himself. He worked all summer on a farm, saving his money, and in the fall was able to take a term at the Madison Seminary, passed his examination and got a certificate as a teacher. In 1852 he got the California gold fever and started for the gold mines via New York and the Isthmus of Panama, arriving in California in January, 1853, when he was twenty-two years old. He worked a claim until August of that year, when he sold out and with about \$1,000 in his pocket returned to the East to finish his education, entering the Grand River Institute at Austinburg, Ohio, and in the spring of 1854 entered Oberlin College, and in January, 1856, entered Michigan University at Ann Arbor. He began the study of law in the office of James B. Gott at Ann Arbor, and graduated from the law department of the university in 1860. After graduating in the law, young Stearns started west to seek a location, and on May 1, 1860, found himself at Rochester, Minn., with 20 cents in his pocket, [572] and concluded that he might as well remain there. Times were dull, and but for one client who had quarreled with every other attorney in town, it is likely that the young lawyer would have been starved out. In the campaign of 1860 he took the stump for the Republican party, and in the fall of 1861 was nominated and elected county attorney of Olmsted county. He entered the army in 1862 as second lieutenant of Company F, Ninth Minnesota Volunteer Infantry, and in April, 1864, was commissioned colonel of the Thirty-ninth Regiment, United States colored troops. In December, 1865, he was mustered out and returned to Rochester, and was again elected county attorney of Olmsted county, and in 1866 was elected mayor of the city and served two years. In January, 1871, the legislature elected the colonel to the United States Senate to fill the unexpired term of D. S. Norton,

deceased, and during his short term he was successful in getting through several bills for the relief of Minnesota soldiers. In the spring of 1872 he formed a law partnership with J. D. Ensign and removed to Duluth. The firm soon had a large practice and was employed in much of the litigation that was brought about by the construction of the Duluth ship canal. In 1874 Colonel Stearns was appointed by Governor Davis judge of the Eleventh Judicial District of Minnesota, and in the fall of the same year was elected without opposition to the same office for a term of seven years. In the fall of 1881 Judge Stearns was again elected without opposition for a term of six years, and again in the fall of 1886, without opposition, for a term of six years, commencing January 1, 1888. No one ever questioned the honesty or ability with which Judge Stearns performed the duties imposed upon him. He was active, liberal and unselfish in the promotion of public interests. In religion he was a zealous Unitarian of the liberal kind, and took a lively interest in establishing and maintaining the First Unitarian society of Duluth. He was married to Miss Sarah Burger at Detroit, Mich., on February 18, 1863. From this union there were three children, of whom one, Victor, is a practicing attorney in Duluth. The other two children were girls, Susan M. and Stella.

Another of the notable figures in the legal history of Duluth was Judge John Richard Carey, who died in 1905, after a residence of fifty years at the head of the lakes. The house in which he died had been his home for thirty-three years. He was one of Duluth's most honored citizens, possessing a character which [573] was at once rugged and noble. Judge Carey was born at Bangor, Maine, March 3, 1830, and was educated in the public schools of that city and at the high school of New Bedford, Hartford county, Connecticut. He formed one of a New England colony of eighty-five persons which came West in 1853, and settled at St. Paul, where he remained until 1855, when he removed to Superior, then supposed to be the coming city of the Northwest. He only remained in Superior two years, when he was driven out by the business depression of 1857, and removed to Oneota, now a part of Duluth, where he engaged in the lumber business. In 1859 he was elected judge of the Probate Court of St. Louis county and was re-elected four successive terms, going out of office in 1871. During a part of those years he studied law and in 1869 he was elected clerk of the district court, holding this office in addition to the office of probate judge. He was clerk of court for twelve years and resigned during his last term in 1882 to accept the office of register of the

United States land office at Duluth. Among other honors conferred upon him was that of Federal Court commissioner, to which he was appointed by Judge Nelson. His connection with the land office ceased in 1885, the only office which the judge held after that being as alderman from the second ward in 1897-98. He was a member and one of the organizers of the Duluth Historical Society, and in an address which Judge J. D. Ensign delivered before that society shortly after the death of Judge Carey, he had the following to say of his old friend and next-door neighbor: "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, and with many who are here to-day, had the power in those early days 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 and 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 in life was to do right and be right—a man of unswerving integrity." [574]

Among the successors to Judge Stearns on the bench of the district court have been a number of men who ranked high in their profession. From time to time the number of judges has been increased owing to the growth in population of the territory over which the court has jurisdiction and the consequent increase in business that has come before the court. Among the judges may be mentioned Judge Reuben Reynolds, now deceased; Judge Charles L. Lewis, who is now a member of the Supreme Court of the State of Minnesota; Judge Samuel H. More, also deceased, and the present occupants of the bench, who number four. The present judges are Josiah D. Ensign, who has been on the bench over twenty years, and who was one of the most prominent members of the bar of the city before taking a judicial position; Homer B. Dibell, W. A. Cant and Martin Hughes. The term of office of the judges of the district court is six years, and terms of court are held not only in Duluth, but in many of the towns throughout St. Louis county and in the other counties which comprise the judicial district. The probate judge of St. Louis county is J. B. Middlecoff, and the Federal district judge is Page Morris, a native of Virginia, who came to Duluth several years ago, practiced law, was

elected to Congress, where he made a brilliant record, and was appointed to the Federal bench.

The character of the business that comes before these several courts is the same as comes before similar courts in other places, with the exception that the interests involved in many cases reach stupendous figures. The discovery of the great Mesaba and Vermilion Iron Ranges has been productive of much litigation between rival claimants, and the same may be said of the litigation over land titles in Duluth proper. The famous Prentice claim has been told of elsewhere in this history, but one of the most famous cases that has ever come before the courts of St. Louis county was the noted Section Thirty case, which has only recently been decided, and which languished through the courts for over twenty years before a final decision was rendered. This case involved property on the iron range, the estimated value of which today is \$25,000,000, and the litigation over it threatened to rival the noted case of Jarndyce and Jarndyce.

The legal profession in Duluth consists of an active, energetic force of men, who take a prominent part in the affairs of the city, and which has an organization—the Bar Association—of [575] which Howard Abbott is president. Among the members of the bar are the following

H. T. Abbott,
C. E. Adams,
A. L. Agatin,
E. F. Alford,
J. W. Hunt,
S. A. Anderson,
O. S. Andresen,
J. B. Arnold,
C. O. Baldwin,
Albert Baldwin,
Herbert A. Dancer,
L. A. Ball,
W. W. Billson,
Chester A. Congdon,
E. F. Blu,
Ljubo Bogicevich,
W. G. Bonham,

R. R. Briggs,
J. H. Brigham,
M. S. Bright,
John Brown,
J. G. Carter,
D. G. Cash,
R. N. Chaffee,
C. C. Colton,
L. H. Corcoran,
J. B. Cotton,
H. A. Courtney,
C. T. Crandall,
A. H. Crassweller,
Frank Crassweller,
J. Q. A. Crosby,
W. G. Crosby,
W. E. Culkin,

W. F. Dacey,
C. F. Davis,
George F. Davis,
Theo. Hollister,
F. H. DeGroat,
Joseph De LaMotte,
Hardaman B. Duff,
William A. Watts,
S. H. Eckman,
W. D. Edson,
William Elder,
F. C. Elston,
J. L. Ervin,
F. T. Everhard,
Bert Fesler,
M. M. Forbes,
H. B. Fryberger,
H. C. Fulton,
T. A. Gall,
H. G. Gearhart,
Benj. M. Goldberg,
David G. Classon,
H. J. Grannis,
H. F. Greene,
Ingebright Grettum,
W. H. Gurnee,
J. A. Hanks,
F. W. Hargreaves,
H. B. Haroldson,
L. C. Harris,
S. T. Harrison,
William Harrison,
W. P. Harrison,
J. W. Harter,
H. H. Hawkins,
John H. Heino,
Victor H. Gran,
John Heitmann,
Wm. B. Henderson,
Henry A. Courtney,

Theodore Hollister,
C. F. Hopkins,
H. H. Hoyt,
Edmond Ingalls,
Alfred Jacques,
P. T. Hudson,
John Jenswold, Jr.,
B. N. Johnson,
R. O. Kennedy,
E. J. Kenny,
J. A. Keyes,
E. L. Kimball,
H. W. Lanners,
O. J. Larson,
Austin Lathers,
M. E. Louisell,
L. E. Lum,
C. V. McCoy,
A. N. McGindley,
T. J. McKeon,
M. H. McMahan,
Andrew P. Rock,
A. E. McManus,
C. A. McPherrin,
C. R. Magney,
Alex. Marshall,
William Marx,
Clarence B. Miller,
Harvey S. Clapp,
W. B. Moer,
D. D. Morgan,
J. A. P. Neal,
Andrew Nelson,
J. H. Norton,
A. T. Park,
W. O. Pealer,
J. T. Pearson,
H. H. Phelps,
W. B. Phelps,
W. H. Pryor,

J. W. Reynolds,
Jos. W. Reynolds,
Hugh J. McClearn,
J. B. Richards,
W. E. Richardson,
Frank. A. Day,
J. J. Robinson,
B. C. Rogers,
Guy W. C. Ross,
Alex G. McKnight,
John Saari,
L. F. Samuelson,
P. C. Schmidt
S. J. Searls
P. H. Seymour
W. H. Smallwood
H. A. Smith,
S. L. Smith,
H. R. Spencer.
M. H. Stanford,
Victor Stearns,
Arthur W. Hunter,
W. J. Stevenson,
C. W. Stillson,

L. A. Sulcove,
Francis W. Sullivan
Richard F. Grant,
John Swinland,
C. C. Teare,
W. S. Telford,
N. B. Thayer,
E. A. Tinkham,
L. U. C. Titus,
E. P. Towne,
J. L. Washburn,
William D. Bailey,
Oscar Mitchell,
J. T. Watson,
J. A. Wharton,
W. E. Whipple,
S. F. White,
J. H. Whitley,
W. S. Whiton,
J. G. Williams,
N. H. Wilson,
Coryate S. Wilson,
Edmund M. Morgan,
T. S. Wood



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