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# THE LAW, COURTS, AND LAWYERS IN THE FRONTIER DAYS OF MINNESOTA: AN INFORMAL LEGAL HISTORY OF THE YEARS 1835 TO 1865\*

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and Timothy J. Baland††

*In this article Chief Justice Sheran and Mr. Baland trace the early history of the legal system in Minnesota. The formative years of the Minnesota court system and the individuals and events which shaped them are discussed with an eye towards the lasting contributions which they made to the system of today in this, our Bicentennial year.*

## I. INTRODUCTION

We often lose sight of the “olden days.” This is true in many disciplines, including law, where today change occurs so rapidly on so wide a front that it takes a special effort on the part of individual attorneys to stay current in even a handful of areas.<sup>1</sup> When so much occurs in the present, it is often hard to find time to reflect on events other than those immediately past. Yet valuable lessons are to be learned from a study of history. This article represents an effort to gain some understanding of our legal origins here in Minnesota, an effort which seems particularly appropriate in this Bicentennial year.<sup>2</sup>

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\*The cut-off dates of 1835 and 1865 which mark the basic perimeters of this article’s discussion coincide with Henry Hastings Sibley’s first arrival in Minnesota (he came in late October, 1834) and with the expiration of the term of office of the Minnesota’s first state supreme court. The period from 1835 to 1849 might well be thought of as Minnesota’s “Fort Snelling Days” (the fort of course was established in 1819), while the years from 1849 to 1858 mark the “Territorial Period.” For our purposes, the period between 1858 and 1865 constitutes Minnesota’s “Early Statehood Days.”

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1. Minnesota has adopted mandatory continuing legal education as a means of helping to insure the continued competence of its attorneys. See 27B MINN. STAT. ANN. 64 (Supp. 1976); Sheran & Harmon, *Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges as a Condition for the Maintaining of Professional Licensing*, 44 FORDHAM L. REV. 1081 (1976).

## II. MINNESOTA'S JUDICIAL SYSTEM AS IT EXISTS TODAY

The Minnesota Constitution contains some magnificent language. Section 1 of Article I reads:

Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform such government, whenever the public good may require it.

And in § 8 of Article I we find:<sup>3</sup>

Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws.

The judicial system in Minnesota exists to meet these constitutional directives. It consists of a supreme court with nine justices,<sup>4</sup> a district court with 10 districts and 72 judges,<sup>5</sup> and a county court with 129 judges serving our 87 counties.<sup>6</sup> In Hennepin and Ramsey Counties there is a separate probate court.<sup>7</sup> Viewed broadly, our state judicial system also includes over 7,500 attorneys who have been admitted to practice by the supreme court.<sup>8</sup> These men and women, as "officers of the court,"<sup>9</sup> and as professionals whose conduct is guided by their own

2. One important facet of the Nation's Bicentennial is the occasion it provides for becoming more familiar with our past. This article, for example, grew out of a speech which Chief Justice Sheran was asked to deliver in November, 1975, as part of a Bicentennial lecture series sponsored by the St. Paul and Ramsey County Historical Society.

3. See also MINN. CONST. art. 1, § 16, which opens with this sentence: "The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people."

4. The constitution provides for "one chief judge and not less than six nor more than eight associate judges as the legislature may establish." MINN. CONST. art. 6, § 2. The legislature has provided for eight associate justices. MINN. STAT. § 480.01 (1974).

5. See MINN. STAT. § 2.722 (1974). See also MINN. STAT. §§ 484.09-.18 (1974). Nineteen district court judges serve Hennepin County; Ramsey County has twelve district court judges. In both Ramsey and Hennepin Counties there is also a juvenile division of district court.

6. See MINN. STAT. § 487.01 (1974). Hennepin and Ramsey Counties have county-wide municipal courts rather than county courts. See MINN. STAT. §§ 487.01, subd. 4, 488A.01 (1974). Hennepin County has 17 municipal court judges. MINN. STAT. § 488A.021, subd. 1 (1974). Ramsey County has 11 municipal court judges. MINN. STAT. § 488A.19, subd. 1 (1974).

7. In the other 85 counties the county court serves as a probate court. MINN. STAT. § 487.01 (1974).

8. Information of Minnesota Supreme Court, Office of Admissions and Registrations. The law students, some 2,000 in number, now being educated by our state's three ABA-approved law schools to assume the responsibilities of the profession, might also be fairly included as part of the state's judicial system.

9. See RULES FOR UNIFORM DECORUM IN THE DISTRICT COURTS OF MINNESOTA 12 (adopted June 24, 1954) reproduced in 27B MINN. STAT. ANN. 81, 83 (1968).

Code of Professional Responsibility, shoulder much of the burden which accompanies our judicial system's effort to carry out the responsibilities mandated by the Constitution.

Although far from perfect, our judicial system compares favorably with any to be found in the nation today. All of our judges are or soon will be "learned in the law."<sup>10</sup> All are committed to and bound by the demanding standards of the Code of Judicial Conduct.<sup>11</sup> Our judges are elected on a non-partisan ballot and abjure partisan political activity.<sup>12</sup> Our calendars are kept reasonably current.<sup>13</sup> The disputes which arise between citizens in this state are resolved acceptably and "freely, without purchase." All persons accused of criminal offenses subject to punishment by imprisonment are provided with legal counsel, at public expense if necessary.<sup>14</sup> The professional conduct of lawyers is subject to supervision and challenge by a Board of Professional Responsibility, which includes both lawyers and non-lawyers.<sup>15</sup> A Commission on Judicial Standards acts on criticisms and complaints against the judiciary.<sup>16</sup> Both lawyers and judges are required to keep abreast of developments in the law under a mandatory program of continuing legal education.<sup>17</sup>

This brief description of our judicial system as it exists today of course provides but a sketch of a system with which all those involved in the administration of justice in the state are perfectly familiar. Indeed, their familiarity with our judicial system, and that of many lay people as well, is far more detailed than anything we have suggested here. But the focus of this article is not on our judicial system as it exists.

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10. See MINN. CONST. art. 6, § 7 (1857) (now art. 6, § 5) (supreme court justices and district court judges); MINN. STAT. § 487.03, subd. 1 (1974) (county court judges); MINN. STAT. § 488A.021, subd. 2 (1974) (Hennepin County municipal court judges); MINN. STAT. § 488A.19, subd. 2 (1974) (Ramsey County municipal court judges).

11. The House of Delegates of the American Bar Association adopted the Code of Judicial Conduct on August 16, 1972. See 58 A.B.A.J. 1207 (1972). The Code was approved by the Minnesota Supreme Court and made binding on all judges in the state on February 20, 1974. See Code of Judicial Conduct, 297 Minn. xi, xxiii (1974).

12. MINN. STAT. § 202.03, subd. 1 (1974). See note 216 *infra* and accompanying text.

13. In the five-county metropolitan area, non-jury civil district court cases are disposed of within six months, on the average. In outstate areas, even less time is required. Information based on statistics provided by the Office of Court Administrator, Supreme Court of Minnesota.

14. MINN. STAT. § 611.07, subd. 1 (1974).

15. Amendments to Rules of Supreme Court on Professional Responsibility, 289 Minn. ix (1971). The Board of Professional Responsibility was created by order of the Minnesota Supreme Court on December 16, 1970. Order Adopting Rules on Professional Responsibility, 288 Minn. ix, x (1970).

16. See MINN. STAT. § 490.16 (1974). The Commission was first established June 7, 1971. Act of June 7, 1971, ch. 909, § 1, [1971] Minn. Sess. Laws 1862-64.

17. See note 1 *supra*.

Rather, the focus is historical: what are the origins of the present system? who were the people, what were the events, that shaped the past and foreshadowed the present? what was the character of those persons and those times? what influences, forces, and trends account for the present state of things? which of the concerns that pre-occupied lawyers, judges, and lawmakers in frontier days still concern us today? what are our links with the past?

### III. PRE-TERRITORIAL DAYS

A simple answer to one of the foregoing questions would be that the legal system of the state had its beginning either in 1849, when the Territory of Minnesota was established by Congress,<sup>18</sup> or in 1858, when Minnesota became the 32nd state of the union.<sup>19</sup> This simple answer is attractive but incomplete and misleading, for the origin of our state's legal system can actually be traced back to the founding of the 13 original colonies and beyond.<sup>20</sup>

#### A. *The General Setting*

What is now Minnesota first began to emerge from the wilderness in 1819, when Fort Snelling was established.<sup>21</sup> The emergence was slow and painful, however, and even thirty years later, as the territorial

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18. See notes 93-94 *infra* and accompanying text. See also W. ANDERSON, A HISTORY OF THE CONSTITUTION OF MINNESOTA 30 (1921).

19. See notes 196-205 *infra* and accompanying text. See also W. ANDERSON, *supra* note 18, at 136-38.

20. Minnesota's constitution was, as Anderson writes, "the result of historical development." W. ANDERSON, *supra* note 18, at 4. The constitution of the federal union and of the various states were, of course, influential in shaping the form and content of Minnesota's document. See note 207 *infra*. The Federal Constitution, and Minnesota's too, is an interesting amalgam of principles which derive mainly from English and French sources. From England, with its tradition of evolutionary pragmatics, comes much of the down-to-earth, how-to-do-it language in the constitution. See, e.g., art. 1, § 11, which prohibits ex post facto laws, or art. 1, § 10, which prohibits searches and seizures except upon the probable cause. The "poetry" or language of idealism which can be found in the United States Constitution, and also in Minnesota's (see, e.g., the preamble, art. 1, § 1), seems to have come as much from France, via the French Revolution's emphasis on liberty, equality, and brotherhood, as from England. Jefferson, for one, was influenced by French thinkers such as Rousseau and Montesquieu. Among English authorities, Locke and Blackstone were among those most influential in the shaping of the documents of our country's constitutional form of government.

21. See 1 W. FOLWELL, A HISTORY OF MINNESOTA 137 (1921). See also Johnson, *Fort Snelling from Its Foundation to the Present Time*, in 8 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 427, 428 (1898). The main objectives behind the establishment of Fort Snelling were protection of the fur trade, and control of the Indians. 1 W. FOLWELL, *supra*, at 140. The establishment of Lord Selkirk's colony at the confluence of the Red and Assiniboine Rivers on the northern border of United States Territory also suggested the need for a military outpost in the vicinity as a means of keeping that border secure from attack. Johnson, *supra*, at 427; see 1 W. FOLWELL, *supra*, at 135.

period began, the area now constituting the State remained in a most primitive condition.<sup>22</sup> The population numbered less than 5,000 persons who lived principally near Stillwater, St. Paul, St. Anthony, and Pembina.<sup>23</sup> Fur trading with the Indians, which had been the principal form of economic activity, was becoming unprofitable,<sup>24</sup> but agriculture had not yet been initiated in any significant degree.<sup>25</sup> Lumbering was still an industry in its infancy, with its growth inhibited by contests with the Chippewa and the Sioux over rights to the timber lands.<sup>26</sup> The movement of goods and of people was, for the most part, dependent upon the flow of the rivers and such access to them as could be had by oxen, horses, and the feet of men.<sup>27</sup>

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22. Williams described the territory as late as 1849 as being "but little more than a wilderness. . . . From the southern line of the state to St. Paul, there were not more than two or three white man's habitations along the river. . . ." J. WILLIAMS, A HISTORY OF THE CITY OF ST. PAUL, AND OF THE COUNTY OF RAMSEY, MINNESOTA 207 (1876). Murray observes that the area "was little more than a wilderness." Murray, *Recollections of Early Territorial Days and Legislation*, in 12 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 103 (1908).

23. In 1840, there were fewer than 750 whites living in what is now Minnesota. See I W. FOLWELL, *supra* note 21, at 351. The first territorial census, taken in 1849, showed somewhere between 4,780 and 4,852 white inhabitants, of which over 300 were soldiers in the forts. Approximately 700 lived in what are now the Dakotas. Compare *id.* at 352 with J. WILLIAMS, *supra* note 22, at 228. Williams reports St. Paul's population at 840. *Id.* Folwell has it at 910. W. FOLWELL, *supra* note 21, at 352. Pembina had over 600 inhabitants; Stillwater 609; and St. Anthony 248. *Id.* Little Canada was credited with 322 inhabitants. *Id.* Winona was also by then beginning to show signs of growth. The federal decennial census, taken in 1850, showed that the state's white population had grown to 6,077. *Id.*

24. See Shortridge, *Henry Hastings Sibley and the Minnesota Frontier*, 3 MINNESOTA HISTORY BULLETIN 115, 118-19 (1919). 1837 was the last year of growth in the fur trade. See *id.*

25. See *id.*, at 121. Agriculture did not come into existence as an independent occupation in Minnesota until between 1840 and 1850. See *id.* See also Hill, *History of Agriculture in Minnesota*, in 8 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 275 (1898). Murray writes: "There were only a few acres of land under cultivation, and these in garden patches, around St. Paul, St. Anthony Falls, Stillwater, Marine, Mendota, and Fort Snelling; and at Cottage Grove some half a dozen farms had been opened up by pioneer farmers from Maine." Murray, *supra* note 22, at 104.

26. Shortridge, *supra* note 24, at 120; see Folsom, *History of Lumbering in the St. Croix Valley, with Biographic Sketches*, in 9 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 291, 292 (1901). The first organized lumbering occurred in 1837. That same year Sibley and two partners contracted with the St. Croix and Sauk River bands of Chippewa Indians for permission to cut pine for 10 years. The Indians agreed not to molest the contractors or their lumbermen and not to permit anyone else to cut timber in the region. Shortridge, *supra*. In general, it has been observed that "As the decade of the thirties was the heyday of the fur trade in Minnesota, so the decade of the forties brought lumbering to the front as the predominant industry, and that of the fifties marked the transition to agriculture." *Id.* at 121. See also Folsom, *supra*. Murray writes that to procure employment at St. Anthony Falls, the scene of much early lumbering activity, "you had to show a certificate signed by the pastor of the church that you had attended, or by a justice of the peace, to the effect that you were born and grew up to manhood in Maine,—without this you need not have applied." Murray, *supra* note 22, at 104.

27. See Shortridge, *supra* note 24, at 121. Murray writes: "Everything in the way of food, except what few vegetables were raised in the Territory and wild game, was brought up the

In 1849 there were no law libraries, or law schools; but a single court house had been erected.<sup>28</sup> Only a few claimed even minimal competence in the complexities of the law.<sup>29</sup> Court was conducted in warehouses, churches, private homes, and hotels—wherever the judge, the parties, the lawyers and the jury, if needed, could conveniently gather.<sup>30</sup>

### B. The First Judges and Their Jurisdictions

The law came to Minnesota literally embodied in two men: Henry Hastings Sibley, and Joseph R. Brown.<sup>31</sup> Sibley was the first lawyer in the state, hanging out his shingle at Mendota in 1835.<sup>32</sup> In 1838, both men were made Justices of the Peace.<sup>33</sup> Sibley's commission came from the Governor of the Territory of Iowa; Brown was appointed by Governor Dodge of Wisconsin Territory.<sup>34</sup> Brown held "court" at his trading posts in Stillwater and on Grey Cloud Island in the Mississippi; Sibley was not far away, at Mendota.<sup>35</sup>

To understand how two J.P.'s could be located so close to each other in such a sparsely settled region,<sup>36</sup> and how they could both have been appointed in the same year by the Governors of two completely

Mississippi River from Galena. Not a newspaper was published north of Dubuque; not a railroad had been built west of Chicago. . . ." Murray, *supra* note 22, at 104-05. See also Baker, *History of Transportation in Minnesota*, in 9 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 1 (1901).

28. See note 69 *infra* and accompanying text.

29. With the exception of Sibley, who hung out his shingle in 1835 but who never really practiced (remember there were no courts until 1847), the first regularly licensed practicing attorney to locate in Minnesota was Morton S. Wilkinson, who came to Stillwater in the autumn of 1847. During 1848, four more lawyers came into the state: David Lambert and William Phillips located in St. Paul; Henry L. Moss and Bushrod Lott settled at Stillwater. 1 H. STEVENS, *HISTORY OF THE BENCH AND BAR OF MINNESOTA* 15-16 (1904).

30. R. GUNDERSON, *HISTORY OF THE MINNESOTA SUPREME COURT*, at § I, at 6 (1937). The text and notes which follow will refer to specific places—other than in courthouses—where court was held.

31. Brown came into the state with the first contingent of troops sent to establish Fort Snelling in 1819. Brown was 14 at the time. B. PHILLIPS, *JOSEPH RENSCHAW BROWN—MINNESOTA'S GREAT PIONEER* 3 (circa 1937).

Sibley arrived in 1834. He was 23 and had come to establish a new trading post at Mendota for the American Fur Company. Williams, *Henry Hastings Sibley: A Memoir*, in 6 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 257, 263 (1894).

32. 1 H. STEVENS, *supra* note 29, at 15.

33. Sibley apparently was appointed in 1836, two years before Brown. 1 H. STEVENS, *supra* note 29, at 4. Both men were definitely serving with authority by 1838. Compare B. PHILLIPS, *supra* note 31, at 12 with Shortridge, *supra* note 24, at 122 & n.19. Another justice of the peace, for St. Croix County, Henry Jackson of St. Paul, was appointed in 1843. 1 H. STEVENS, *supra* note 29, at 4.

34. Compare 1 H. STEVENS, *supra* note 29, at 3 with Shortridge, *supra* note 24, at 121-22.

35. See B. PHILLIPS, *supra* note 31, at 12-13; 1 H. STEVENS, *supra* note 29, at 3.

36. See notes 23 & 27 *supra*.

different territories, it is necessary to recall a bit of history. The part of Minnesota which lies *east* of the Mississippi River originally became part of the territorial United States by virtue of the Treaty of 1783 and the Northwest Ordinance of 1787.<sup>37</sup> This land east of the Mississippi later became part of Ohio, Indiana, Michigan, and finally Wisconsin Territory.<sup>38</sup> Minnesota *west* of the Mississippi was originally part of the Louisiana Purchase, and subsequently became part of Missouri, Michigan, Wisconsin, and Iowa Territories.<sup>39</sup>

In 1838, therefore, St. Croix County, Wisconsin Territory, included the town of Stillwater (founded by Brown and then called "Dakota") as well as the rest of Minnesota east of the Mississippi.<sup>40</sup> Iowa Territory's Clayton County, on the other hand, extended northward from south of the present Iowa-Minnesota line to Canada, and from the Mississippi River in the east to the Missouri River in the west, a vast area over which Sibley, sitting in Mendota, was the only magistrate.<sup>41</sup> The map in Figure 1 illustrates these boundaries.<sup>42</sup>

### C. Pre-Territorial Justice

The magistrate's power in those early days was at least as vast as the territory of his jurisdiction. Sibley remarked how he had matters pretty much under his own control, "there being little chance of an appeal" from his decisions.<sup>43</sup> Brown became literally a one-man government for St. Croix County in 1838 when he was elected county clerk, county commissioner, and clerk of district court.<sup>44</sup> For all their authority and power,<sup>45</sup> both Brown and Sibley seemed to have exer-

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37. By the Treaty of 1783, England transferred to this country the Northwest Territory. W. ANDERSON, *supra* note 18, at 6; Davis, *The Dual Origins of Minnesota*, in 9 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 519, 520-21 (1901). The Northwest Ordinance of 1787 was the document through which the states of Massachusetts, Connecticut, Georgia, Virginia, both Carolinas, and New York gave up their claims to portions of the Northwest Territory in favor of federal domain. See W. ANDERSON, *supra*, at 9; Davis, *supra*, at 524-25. The exact boundaries of the Northwest Territory, particularly along the Canadian line, were made more definite by the Treaty of Paris in 1790 and John Jay's Treaty with England in 1794. See Davis, *supra*, at 520-23.

38. See W. ANDERSON, *supra* note 18, at 12-14; Davis, *supra* note 37, at 542.

39. See Davis, *supra* note 37, at 543.

40. See B. PHILLIPS, *supra* note 31, at 12.

41. See W. ANDERSON, *supra* note 18, at 14; Sibley, *Reminiscences of the Early Days of Minnesota*, in 3 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 242, 265-66 (1880).

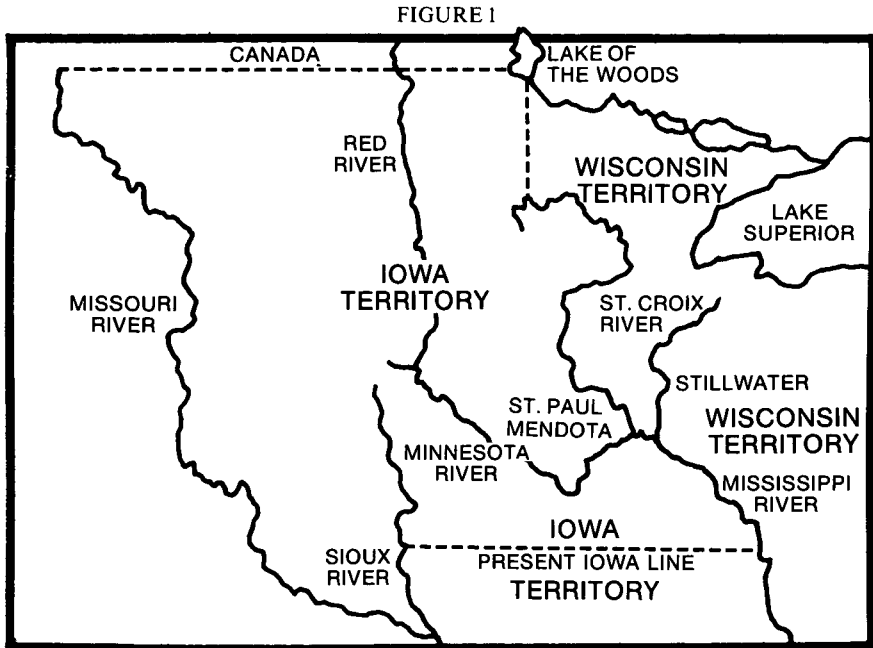
42. For a series of maps showing development of Minnesota's various boundaries up to the time of statehood, see W. ANDERSON, *supra* note 18, at 7, 15, 18, 20, 48, 76.

43. Sibley, *supra* note 41, at 266.

44. B. PHILLIPS, *supra* note 31, at 12; 1 H. STEVENS, *supra* note 29, at 9. Brown apparently also held the office of register of deeds. *Id.*

45. Sibley once remarked that "some of the simple-minded people around me firmly believed that I had the power of life and death." Sibley, *supra* note 41, at 266.





IOWA AND WISCONSIN TERRITORIES ABOUT 1838

cised it in exemplary fashion. No tales have come down of either unjustly abusing his discretion,<sup>46</sup> and both men retained the esteem of their peers.<sup>47</sup>

The flavor of those pre-territorial days and of the kind of justice dispensed by Brown and Sibley, is perhaps best captured by reference to some early events and cases.

*The Phelan Case.* In September, 1839, Edward Phelan murdered his land-claim partner, John Hays. Both men were discharged soldiers from Fort Snelling. Hays was known to have some money, which, together with his share of the land claim, was supposed as the motive

46. So far as history discloses, when either man exercised jurisdiction over matters technically beyond his power, it was to further, not circumvent, justice. See, e.g., *The Phelan Case*, *infra*.

47. Sibley was chosen to represent the prospective state when it sought territorial status from the United States Congress in 1848-49. Ten years later he was elected the state's first governor. Williams, *supra* note 31, at 278, 283. Brown was given the nickname "Jo the Juggler" by his critics and political enemies. Phillips and Goodrich both indicate that this epithet was not deserved, and that it was in fact a reflection of Brown's superior talents. See B. PHILLIPS, *supra* note 31, at 20; Goodrich, *In Pleasant Memory of Joseph R. Brown*, St. Paul Pioneer, November 15, 1870, at 1, col. 2, reprinted in *Memoir of Joseph R. Brown*, 3 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 201, 207 (1880).

for the murder. The murder occurred on the pair's land claim, which was east and north of the Mississippi River, in Wisconsin Territory.

There was little doubt of Phelan's guilt. Justice Sibley, at Mendota, in Iowa Territory, issued a warrant for Phelan's arrest, and he was taken into custody. At a preliminary examination held September 28th before Sibley, the evidence was sufficient to justify Phelan's commitment on the charge of first degree murder. He was held in the guard house at Fort Snelling until the next steamboat could take him to Prairie du Chien, Wisconsin Territory, the nearest county seat with adequate facilities, where he was to be held pending action by the grand jury.

Sibley's action in committing Phelan was plainly illegal. He was an Iowa magistrate and technically had no jurisdiction over offenses committed on the eastern (Wisconsin Territory) side of the Mississippi. But neither Sibley nor the authorities at Prairie du Chien were apparently troubled by this point, and Phelan never petitioned for a writ of habeas corpus. Phelan was held over until spring, but was released when the long winter and the long distance between Prairie du Chien and the scene of the crime made the attendance of witnesses before the grand jury impossible.

Phelan came straight back to St. Paul. With a nerve perhaps more common in those days than now, he demanded his claim from Vetat Guerin, who had taken possession. Guerin refused, and the matter was brought before Justice Brown on Grey Cloud Island for resolution. Brown ruled in Guerin's favor, holding that under the law Phelan had lost all claim to the land because he had been absent from his claim for more than six months. After Justice Brown's ruling, Phelan caused Guerin no more trouble, although he did go on to stake several more claims in and around what is now St. Paul. One of these was on the shores of the St. Paul lake which now bears his name.<sup>48</sup>

In 1850, Phelan was indicted for perjury by the first Ramsey County grand jury. Before he could be arrested he started west with a wagon train heading for California. Along the way, however, he was lynched by his fellow travelers for some misdeed.<sup>49</sup> Thus was "justice" finally done! Ironically, one of Phelan's claims, subsequently taken by Guerin, later became the site of the original Ramsey County Courthouse.<sup>50</sup>

The Phelan story illustrates the laissez-faire attitude toward juris-

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48. This description of the Phelan case relies heavily on the account preserved by I. H. STEVENS, *supra* note 29, at 5-6. See also J. WILLIAMS, *supra* note 22, at 90-93, 102-03. The lake is spelled Phalen.

49. E. NEILL, *THE HISTORY OF RAMSEY COUNTY AND THE CITY OF ST. PAUL*, 182-83 (1881).

50. See text accompanying notes 122-23 *infra*.

dictional technicalities which was not uncommon in Sibley's day. This approach contrasts sharply with today's much more rigorous attention to jurisdictional detail. Yet neither Sibley nor the authorities in Prairie du Chien can really be faulted for their actions. As the next story will illustrate, jurisdictional prerequisites were generally ignored only in cases of pressing urgency—a case of murder surely qualifies. In addition, the action of those who sought the warrant from Sibley was common-sensical. A capital crime had been committed in what is now St. Paul; the perpetrator was known, but at large. Unless an arrest warrant was obtained promptly, it was possible Phelan would flee. Sibley, though in Iowa Territory at Mendota, was by far the nearest judicial officer: Mendota is but five miles down river from St. Paul. Magistrate Brown, on the other hand, was at either Grey Cloud Island, 12 miles away, or Stillwater, some 20 miles distant. Travel conditions being what they were in those days, the difference was rather more substantial than it is today. Sibley's decision to issue the arrest warrant no doubt reflected his common sense perception of the situation's practicalities. At least in extraordinary cases, one concludes that a J.P.'s jurisdiction in those early days reached as far as justice required.

*The Foot Race Case.* Another interesting early case was Justice Brown's decision in a land title action. Pierre "Pig's Eye" Parrant and Michel Le Claire both claimed the same tract, east of St. Paul. They first brought their conflicting claims before Sibley, but he informed them that their case was outside his jurisdiction and referred them to Brown.<sup>51</sup> Brown, in turn, entertained some doubts about his authority to decide land title questions. Brown kept these doubts to himself, however, and heard the case because he was "unwilling to allow the dignity of his official station to be lowered in the estimation of the simple people."<sup>52</sup> After hearing the evidence pro and con, Brown determined that neither Parrant nor Le Claire had a valid claim because neither of them had actually staked out the claim as required by law and in accordance with custom.

From a strictly legal point of view, that was the end of the case. But to leave things that way would probably have offended a frontiersman's sense of "justice" in that it would have left unresolved the primary bone of contention between the parties: who was entitled to the claim. Brown remedied that uncertainty by deciding that the land would

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51. B. PHILLIPS, *supra* note 31, at 13. According to Phillips, Sibley informed the claimants that he could not take the case because his jurisdiction only extended from the west side of the Mississippi to the Rocky Mountains! *Id.*

52. Sibley, *supra* note 41, at 268.

53. *Id.*

belong to the first party to reach it and stake it out. Both men accepted the decision, and neither "being the owner of a horse, a foot race of more than eight miles ensued between them."<sup>53</sup> Le Claire won, and Parrant moved off, making no further contest.<sup>54</sup> Years later, Parrant's heirs sued to set title aside, but on appeal the supreme court affirmed the district court decision, upholding Le Claire's title on the ground that the original contestants had accepted as binding Justice Brown's proposal for a determining race.<sup>55</sup>

Sibley later remarked about this case that though it was "by no means the only instance in which superior rapidity of movement was the means of securing a valuable pre-emption, but it is believed to be the sole case in the history of the Northwest in which speed of foot was made to decide a legal question in obedience to the fiat of a magistrate."<sup>56</sup> The case illustrates the kind of "right and ready" justice which the early Minnesota settlers seemed to expect from their courts, and that Brown and Sibley were fortunately most often able to provide. Had they been less skillful at arriving at *judicial* decisions which struck their contemporaries as both *right*, and ready, there undoubtedly would have been much greater resort to rough and ready justice such as that which resulted in Edward Phelan's demise.<sup>57</sup>

*First Jury Trial.* The first jury trial held within the present boundaries of Minnesota occurred in 1840. The jury was impaneled at Marine-on-the-St. Croix and the case presided over by Justice Brown. At issue was plaintiff Philander Prescott's charge that the defendant, Charles Foote, had jumped Prescott's claim to a tract of land at the mouth of the St. Croix River. The jurors insisted on visiting the premises, and judge, jury, and litigants started down the St. Croix in boats. At Lake St. Croix the channel was so obstructed with ice that they had to continue by foot. After the premises were finally reached and viewed, the party started back, only to find that their boats had been burned. The entire return trip thus had to be made on foot. Even after all these exertions the jury could still not agree. Justice Brown suggested a division of the land; the claimants agreed, and the case was settled.<sup>58</sup>

*The First Attempted Term of Court.* The first attempt at holding an official term of court in what is now Minnesota occurred in 1842. The peripatetic Joseph R. Brown was naturally involved.

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54. See also 1 H. STEVENS, *supra* note 29, at 17; J. WILLIAMS, *supra* note 22, at 147; Sibley, *supra* note 41, at 268.

55. See B. PHILLIPS, *supra* note 31, at 14.

56. Sibley, *supra* note 41, at 268.

57. See text accompanying note 49 *supra*.

58. B. PHILLIPS, *supra* note 31, at 13, is the source for this story.

Brown was elected to the Wisconsin Territorial legislature in 1839.<sup>59</sup> Early in 1840, and largely due to Brown's efforts, Crawford County, Wisconsin Territory, was reduced in size and St. Croix County formed, with "Brown's warehouse" in the town of Dakota, now Stillwater, designated as the county seat.<sup>60</sup> Brown, who was also clerk of district court<sup>61</sup> and still in the legislature, soon persuaded the lawmakers in Madison to schedule a term of district court in St. Croix County.<sup>62</sup> Wisconsin Territorial Judge Irwin came up from Madison to hold that term of court in the spring of 1842. Irwin landed at Fort Snelling and inquired as to the location of Brown's warehouse. This caused great surprise, for no one had heard of a term of court being scheduled. There was some difficulty even finding a person who knew the location of Brown's warehouse. Norman Kittson, a trader, came to Judge Irwin's rescue, fitting him out with a horse and putting him upon the St. Croix trail. Stillwater, though, was still some 35 miles distant. After a "tire-some ride" across the country, Irwin finally reached Brown's big log house on the shores of Lake St. Croix.<sup>63</sup> Brown, unfortunately, had either not been informed of the contemplated term of court, or had forgotten it. In any event, no preparations had been made. The disgusted judge—his whole long journey a waste of time and trouble—took the first opportunity to get out of the country, swearing it was the last time he would ever answer a summons to St. Croix County.<sup>64</sup>

*First Real Term of Court; First Criminal Trial.* The first term of court actually to be held in Minnesota occurred in June, 1847, at Stillwater. Chief Justice Charles Dunn of the Wisconsin Territorial Supreme Court presided, and court was convened in John McKusick's store.<sup>65</sup> The session stirred considerable interest, much of it on account of the trial of an Indian chief named Wyn ("Wind"), who was indicted for murder. The chief was acquitted. His case was the first criminal jury trial in Minnesota's history.<sup>66</sup> The Wyn case is additionally impor-

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59. See *id.*, at 12.

60. 1 H. STEVENS, *supra* note 31, at 9.

61. See text accompanying note 44 *supra*.

62. See B. PHILLIPS, *supra* note 31, at 12; 1 H. STEVENS, *supra* note 29, at 9.

63. This story is based upon accounts preserved by E. NEILL, *supra* note 49, at 236; 1 H. STEVENS, *supra* note 28, at 10. For a slightly varying account, see Moss, *Last Days of Wisconsin Territory and Early Days of Minnesota Territory*, in 8 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 67, 73 (1898).

64. Moss, *supra* note 63. Neill suggests that Brown pushed for the aborted term of court as a means of advertising the Stillwater region and luring immigrants to the town which he had founded. E. NEILL, *supra* note 49, at 236.

65. 1 H. STEVENS, *supra* note 28, at 10-11. See Moss, *supra* note 63, at 74.

66. See E. NEILL, *supra* note 49, at 236; 1 H. STEVENS, *supra* note 29, at 11; Moss, *supra* note 63, at 74.

tant for the suggestion, implicit in its outcome, that there existed in those early days a definite potential and capability among the settlers for the fair and equitable treatment of the Indians. Interestingly, Sibley and Brown were among those who most strongly called for harmonious relations with the Indians.<sup>67</sup> Both advocated the adoption of even-handed policies which stressed intergration of the native Americans into the increasingly dominant white culture. Despite the urging of Brown, Sibley, and others, this early promise for even-handedness in the handling of Indian matters did not develop sufficiently to prevent later out-breaks and recriminations.<sup>68</sup>

*The First Court House.* Stillwater was the first community in Minnesota to have a court house. In the fall of 1847, after Chief Justice Dunn had held court in McKusick's store, a subscription paper calling for the erection of a court house proper was circulated. Twelve hundred dollars was pledged, on condition that the county would appropriate whatever additional funds were needed.<sup>69</sup> This was done and construction of the new court house was completed in 1848. The first term of court in territorial Minnesota was held there in 1849.<sup>70</sup> Thus, even before Minnesota became a territory, leading early settlers saw to it that the rule of law became the cornerstone upon which the state's institutions were established.

#### D. The Pre-Territorial Period in Perspective

Several commentators have remarked how the settlement of Minne-

67. For information about Brown's attitudes on this topic, see B. PHILLIPS, *supra* note 31, at 22-29. Sibley's attitudes towards the Indians are discussed in R. KENNEDY, *MEN ON THE MOVING FRONTIER* 42, 45-47, 49-57 (1969); Shortridge, *supra* note 24, at 123-24. Sibley's own writings reflect his regard for the Indians. See Sibley, *supra* note 41, *passim*.

68. See discussion of related matters in text accompanying notes 254-76 *infra*.

69. See 1 H. STEVENS, *supra* note 29, at 11-12. The text of the subscription paper ran as follows:

We, the undersigned, hereby agree to pay the amount set opposite to our several names, to be invested in a court house and jail in the town of Stillwater, to be built according to a plan submitted by Jacob Fisher. Provided, That the county of St. Croix will pay the balance of the cost of said building after deducting \$1,200 (which amount we propose to raise by this subscription) and pay the same to the holder of this paper, as may be required for the progress of the building.

Stillwater, Dec. 18th, 1847.

John McKusick .....	\$400.00	Wm. Stanchfield (paid) .....	50.00
Jacob Fisher .....	50.00	A. Harris .....	25.00
Churchill & Nelson .....	200.00	Jesse Taylor .....	25.00
Orange Walker, for .....		Wm. William .....	25.00
Marine L. Co. ....	100.00	C. Carli .....	25.00
Wm. Holcombe .....	50.00	Anson Northrup .....	100.00
John H. Brewster .....	50.00	Nelson McCarty .....	15.00
John Morgan .....	20.00	M.S. Wilkinson .....	15.00
Wm. Cove .....	25.00		

*Id.*

70. *Id.* at 12.

sota was singularly free from the disorders and deeds of violence which seemed to characterize or at least accompany the process in other frontier areas of the nation.<sup>71</sup> Sibley attributed this to the fact that Minnesota, California, and Oregon were settled simultaneously, with the latter two states, because of the gold discoveries, tending to attract a more reckless type of settler, leaving the bulk of Minnesota's immigrants "men who had it in view to gain a subsistence by honest labor" for themselves and their families.<sup>72</sup> Many of the early settlers came because they thought they had found in Minnesota the perfect wilderness—a country free of society's more vexing restraints, a place where life could be lived nobly in the Romantic tradition.<sup>73</sup> While the possibility of such a lifestyle diminished as westward expansion quickly caught up with Minnesota,<sup>74</sup> it nonetheless remains true that during the formative pre-territorial period, the atmosphere in which Minnesota's legal system began to take shape was one simultaneously imbued with Puritan notions of the need for honesty, hard work, and restraint *and* with the Romantic impulse to live free while being open and fair to all.<sup>75</sup>

These somewhat contradictory elements were strikingly embodied in the life and character of Henry Hastings Sibley.<sup>76</sup> Sibley came from a family which first settled in Massachusetts during early colonial times. His parents moved westward in 1795, and were among the first Easterners to settle in Detroit. Sibley's father was mayor of the city, later a congressman, and eventually chief justice of Michigan's Supreme Court. Sibley was tutored in the classics and studied law in his

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71. See J. WILLIAMS, *supra* note 22, at 201; Sibley, *supra* note 41, at 272-73. Crimes involving the destruction of human life were especially rare. *Id.*

72. See Sibley, *supra* note 41, at 273. Williams expresses similar views. See J. WILLIAMS, *supra* note 22, at 201.

73. Sibley and Brown are representative of this group. See R. KENNEDY, *supra* note 67, at 41, 44-47; Goodrich, *supra* note 47, at 205-06. Philosophically, the content of the Romantic tradition is suggested by Jefferson's democratic ideals, and Rousseau's "noble savage." Both espoused the doctrine of the goodness of natural man.

74. Immigration to Minnesota increased markedly after the 1851 treaties with the Sioux. See Shortridge, *supra* note 24, at 123.

75. R. KENNEDY, *supra* note 67, at 39-57 stresses this theme. Williams writes of the pre-territorial settlers:

[T]hey were contented and unambitious, and pursued the 'even tenor of their way' along the 'cool, sequestered vale of life,' unagitated by the exciting events that stirred other communities. Their worldly means was [*sic*] small and their income limited, it is true, but their wants were few and simple. They were honest, forbearing, generous and charitable. Crime was unknown.

J. WILLIAMS, *supra* note 22, at 201.

76. The observations about Sibley which follow are based on accounts of his life in R. KENNEDY, *supra* note 67, at 39-57; J. WILLIAMS, *supra* note 22, at 49-54; Williams, *supra* note 31, at 257; and on Sibley's own reminiscences, Sibley, *supra* note 41, at 242.

father's office, but despite the schooling and his Yankee background, he grew increasingly impatient with the "New England" that the pioneers of his parents' generation had re-created in Michigan and Ohio.<sup>77</sup> When the chance came to go to Minnesota, he took it. For him it was an opportunity to live a life of excitement and adventure. Excitement and adventure he had, especially in the early years, where he regularly went on hunting expeditions with the Indians for months at a time.<sup>78</sup> In those early years he lived the Romantic ideal, surrounded by the wilderness he found so inviting and by whatever compliments of civilization he wanted to import. For example, Sibley had an extensive library and the first permanent stone house in Minnesota. To his contemporaries he was a kind of upper class hero, the Romantic Yankee and frontier gentleman who sought and found a situation where it was possible, at least for a time, to have the best of both worlds.

Out of this milieu, with Sibley and Brown<sup>79</sup> at the helm, the legal system in pre-territorial Minnesota marked itself as fair and commonsensical, reluctant to intervene or act except when matters of substance were presented, yet not at all unable or unwilling to assert itself authoritatively when the cause of justice required.<sup>80</sup> All in all it was an

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77. One of the chief motivations for the establishment of this country's 13 original colonies was a desire to escape restraints. The westward push of settlers from New England was in turn caused, at least in part, by their desire to escape from some of the same constraints which had, in the course of things, been recreated. As Kennedy writes:

It is one of the extraordinary aspects of this escape that it had to be remade in each generation, as parents who had gone to the frontier were joined by Yankee compere and in their middle age reinstituted some of the same constrictions from which they had fled in their youth. Thus Henry Sibley, the son of Yankee pioneers escaped from the new New England those pioneers had recreated in Ohio and Michigan. He rebelled against the newly imposed constraints of which his father, Judge Solomon Sibley, was the chief guardian.

R. KENNEDY, *supra* note 67, at 44. The Spanish philosopher Ortega y Gasset has also discussed the need for generational conflict. See J. ORTEGA Y GASSETT, *THE MODERN THEME* (Torchbook ed. 1961), especially chapter 1, "The Concept of the Generation." For an interesting discussion of our Puritan origins, see S. BERCOVITCH, *THE PURITAN ORIGINS OF THE AMERICAN SELF* (1976).

78. Sibley was also described as the best bareknuckle fighter in Wisconsin Territory. R. KENNEDY, *supra* note 67, at 49.

79. Sibley and Brown were alike in their attitudes towards the Indians and in their love for a life of wilderness adventure, but were rather different from each other in terms of educational attainments and certain other proclivities. Brown was probably the more innovative of the two and the better businessman. B. PHILLIPS, *supra* note 31, at 8; Brown was said to have planted the first successful wheat crop in Minnesota in 1831, and along with Franklin Steele he was one of the first to see the prospects for lumbering in the state. *Id.* at 7, 10. Brown was also the first to open a tavern (then called a "groggery") opposite Fort Snelling, where liquor was outlawed. *Id.* at 11.

80. Sibley recounts this story, which supports the point made in the text and underscores the almost feudal power which he possessed in those early days:



auspicious beginning.<sup>81</sup>

#### IV. MINNESOTA BECOMES A TERRITORY

When Wisconsin was admitted to the Union in 1848, its western boundary was fixed as it presently exists, along the Mississippi and St. Croix Rivers.<sup>82</sup> Since Iowa had been admitted two years earlier,<sup>83</sup> the creation of the State of Wisconsin meant that all the territory west of the St. Croix and the Mississippi and north of the Iowa line became a kind of political no man's land, without organization or government of any kind.<sup>84</sup> This situation quickly led to demands that a new territory be organized, and on August 4, 1848, a call for a convention to be held at Stillwater was issued.<sup>85</sup> The so-called "Stillwater Convention" met on August 26, 1848. The 62 participants unanimously elected Sibley as the disenfranchised Territory's delegate to Washington, where he was

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On one occasion I issued a warrant for a Canadian, who had committed a gross outrage, and then fled from justice. I despatched [*sic*] a trusty constable in pursuit, and he overtook the man below Lake Pepin, and brought him back in irons. The friends of the culprit begged hard that he should not be severely punished, and after keeping him in durance vile for several days, I agreed to release him if he would leave the country, threatening him with dire vengeance if he should ever return. He left in great haste and I never saw him afterwards.

Sibley, *supra* note 41, at 266. It is interesting that this anecdote appears immediately after Sibley's observation that some people believed he had the power of life and death. *Id.* See note 45 *supra*.

81. Note this comment by Williams:

Every new community, and, to a great extent, every new State, receives from its first pioneers and prominent organizers, the impress which decides much of its future tone and spirit. Hence, the value of having society in every new State *started* in the right direction by men who can mold the 'plastic elements' for good. Minnesota was peculiarly fortunate in having for its leading pioneers men of broad views, liberal culture and elevated character; and the effect of their influence is plainly traceable in the future successful course of our State. . . .

J. WILLIAMS, *supra* note 22, at 49. This comment introduces Williams' remarks about H. H. Sibley.

82. See W. ANDERSON, *supra* note 18, at 17.

83. Iowa's northern boundary had become fixed as it presently exists when that state was admitted to the Union in 1846. See *id.* at 16.

84. See W. ANDERSON, *supra* note 18, at 21-24; 1 H. STEVENS, *supra* note 29, at 12. The situation was so confused that after Wisconsin's admission on May 29, 1848, no justice of the peace courts were held in the remnant portion of Wisconsin Territory for the balance of the year, on the theory that the offices of the justices had been legislated out of existence by the creation of the State of Wisconsin. See *id.*

85. The language of the call to Convention read as follows:

We, the undersigned, citizens of Minnesota Territory, impressed with the necessity of taking measures to secure an early Territorial organization, and that those measures shall be taken by the people with unity of action, respectfully recommend that the people of the several settlements in the proposed Territory appoint delegates to meet in convention at Stillwater, on the 26th day of August next, to adopt the necessary steps for that purpose.

W. ANDERSON, *supra* note 18, at 22. Sibley and Brown were among those who signed this document. *Id.*

to present the convention's memorial to President Polk. The memorial asked that the President "call the attention of Congress to their situation . . . and recommend the early organization of the Territory of Minnesota."<sup>86</sup>

A few weeks after the Stillwater Convention, a somewhat different idea of the basis for a petition to Congress for territorial status began to gain currency among residents of the St. Paul-Mendota-Stillwater area. This idea, which was first espoused by James Catlin, the last secretary of Wisconsin Territory, held that the territorial organization and government of Wisconsin was still effective in the remnant part of St. Croix County even after Wisconsin's admission into statehood.<sup>87</sup> In Catlin's view, he had become acting governor of the remnant Territory.<sup>88</sup> Since the last delegate to Congress from Wisconsin Territory was about to resign, Catlin concluded that the best procedure for those interested in establishing Minnesota Territory to follow would be to hold a special election to name a bona fide delegate to Congress who could then work within that body to secure the goals expressed in the memorial drafted by the Stillwater convention.<sup>89</sup> The special election called for by Catlin was held October 30, 1848. Sibley emerged the clear winner<sup>90</sup> and he left for Washington almost immediately.<sup>91</sup> By

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86. *Id.* at 23. The heart of the memorial to President Polk read as follows:

Your memorialists, citizens of the Territory north of the northwestern boundary of Wisconsin and of the northern boundary of Iowa, ask leave respectfully to represent:

That the region of country which they inhabit formed, formerly, a portion of the Territories of Iowa and Wisconsin, subject to the laws and government of those Territories . . . .

That this region of country is settled by a population of nearly 5,000 persons, who are engaged in various industrial pursuits . . . .

That by the admission of Wisconsin into the Union, with the boundaries as prescribed by Congress, and the omission by that body to pass a law for the organization of a new Territory, embracing the portion of country inhabited by your memorialists, they and all their fellow citizens are left without officers to administer and execute the laws. That, having once enjoyed the rights and privileges of citizens of a Territory of the United States, they are now without fault or blame of their own, virtually disenfranchised.

They have no securities for their lives or property but those which exist in mutual good understanding. Meanwhile all proceedings in criminal cases, and all process for the collection of debts, are suspended; credit exists only so far as a perfect confidence in mutual good faith extends, and all the operations of business are embarrassed.

*Id.*

87. *Id.* at 24; 1 H. STEVENS, *supra* note 29, at 14. Catlin's views were contained in a letter to William Holcombe, one of the participants in the Stillwater convention. The letter was read to the full convention. *Id.*

88. Territorial Governor Dodge had been elected Senator from Wisconsin. 1 H. STEVENS, *supra* note 29, at 15.

89. See W. ANDERSON, *supra* note 18, at 24.

90. *Id.* Anderson has some interesting observations about the peculiarities of Sibley's position as an elected delegate to Congress from Wisconsin Territory:

From whatever standpoint it is considered, however, Sibley's position presents an unusual number of inconsistencies. He represented in the first place the Stillwater Con-

January 15, 1849, he had persuaded a somewhat doubtful House Committee on Elections to seat him as a delegate to Congress.<sup>92</sup> Less than three months later, Minnesota was a Territory.<sup>93</sup>

## V. LAW, COURTS, AND LAWYERS IN TERRITORIAL DAYS

### A. *The Territorial Court System*

The act establishing the Territory of Minnesota provided for a supreme court consisting of a chief justice and two associate justices; three district courts, each to be presided over by one of the supreme court justices; and for probate and justice of the peace courts.<sup>94</sup> President Zachary Taylor, who had succeeded Polk, appointed Aaron Goodrich of Tennessee as chief justice, and David Cooper of Pennsylvania, and Bradley Meeker of Kentucky as associate justices. Each received a salary of \$1800.<sup>95</sup> One of the first acts of the newly appointed Governor, Alexander Ramsey, was to divide the Territory into three judicial districts and assign a Justice to each.<sup>96</sup> These assignments were

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vention, which was entirely outside the law, and in the second place the 'people of Minnesota,' a place which did not exist, and a people who had not elected him to be their delegate, since only the residents east of the Mississippi seem to have voted. He claimed at the same time to be the delegate of the territory of Wisconsin, a hypothetical region consisting of about one third of the old Wisconsin territory and containing certainly not over one-thirtieth of its population, a region without a legislature and probably without legal organization. From this portion of the Minnesota country he had been duly elected, and from this alone. Though he claimed to represent this so-called territory of Wisconsin, he himself had not even a constructive residence within its limits. He lived on the other side of the Mississippi in the remnant of the old Iowa territory. But if Wisconsin territory still existed east of the Mississippi, so too did Iowa territory west of that river, a claim which Sibley himself and the handful of people on his side of the river seem never to have put forward. Happily the Wisconsin organic act did not require delegates to have local residence and though he lived in the remnant of Iowa, it was not strictly illegal for Sibley to represent Wisconsin, if such a territory existed.

*Id.* at 25.

91. *Id.* Congress was due to convene the first Monday in December. *Id.*

92. *Id.* at 26. Anderson reports that the committee decision turned on the personality and abilities of Sibley the man, rather than the logic of his case. See *id.* See also 1 H. STEVENS, *supra* note 29, at 15.

93. The bill was passed and signed on March 3, 1849. It went into effect immediately, although it took until April 9th for the news to reach Stillwater and until June 1, 1849, for the government to come into existence. W. ANDERSON, *supra* note 18, at 30-31; 1 H. STEVENS, *supra* note 29, at 19; J. WILLIAMS, *supra* note 22, at 205-06.

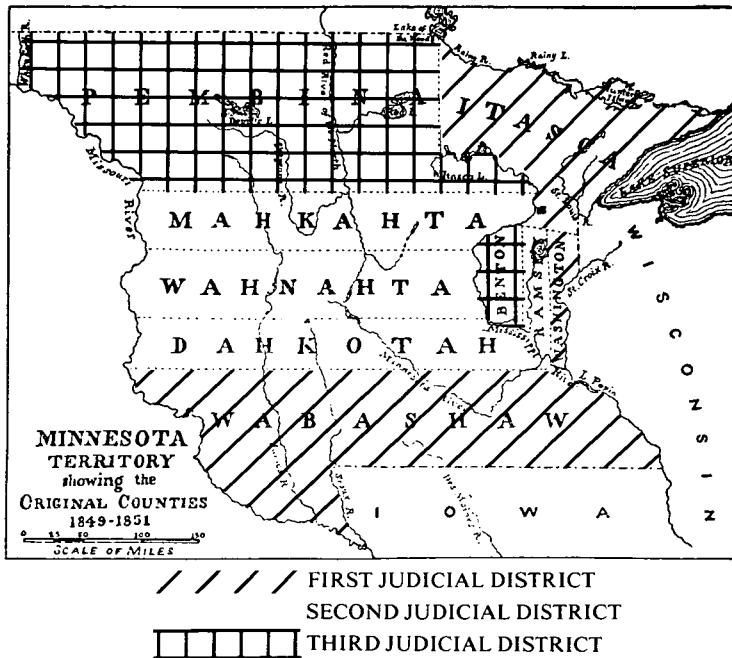
94. Act of Mar. 3, 1849, ch. 121, § 9, 9 Stat. 403. See Loring, *Historical Review of the Judicial System of Minnesota*, 27 MINN. STAT. ANN. 53, 58-59 (1947).

95. See Loring, *supra* note 94, at 59. See also R. GUNDERSON, *supra* note 30, at § II, at 1.

96. R. GUNDERSON, *supra* note 30, at § III, at 2-3. See Moss, *supra* note 63, at 69. Ramsey's proclamation of June 11, 1849, designated St. Croix County as the First Judicial District and assigned it to Chief Justice Goodrich. The rest of the territory was divided into two districts: Justice Meeker was assigned to the Second (his court house was an old sawmill at St. Anthony Falls); Justice Cooper presided in the Third District, holding court in the trading company's warehouse at Mendota. R. GUNDERSON, *supra*, at § III, at 2-3. See also Moss, *supra*, at 69.

soon altered by the territorial legislature, which divided the Territory into counties, re-drew the judicial districts, and re-assigned the justices.<sup>97</sup> The judicial map of Minnesota which resulted is illustrated in Figure 2.<sup>98</sup>

FIGURE 2



Regardless of who sat where, the most interesting (by today's standards, perverse) feature of the territorial court system as originally structured was the arrangement whereby the supreme court justices held trials and heard motions individually as district court judges and then re-assembled "en banc" to sit as a supreme court.<sup>99</sup> Each justice was thus regularly called upon to review his own decisions, and even perhaps to write the appellate opinion.<sup>100</sup>

97. R. GUNDERSON, *supra* note 30, at § III, at 3; I H. STEVENS, *supra* note 29, at 112. As a result of the legislative changes, the First District was re-drawn to include Washington, Wabasha and Itasca Counties, and Justice Cooper was assigned to preside from Stillwater. Chief Justice Goodrich was assigned District Two, which had its seat in St. Paul and included Ramsey, Dakota, Mahkahta, and Wahnahtha Counties. Justice Meeker was now assigned District Three. Sitting at St. Anthony he had jurisdiction over Benton and Pembina Counties.

98. Reproduced from I W. FOLWELL, *supra* note 21, at 247.

99. R. GUNDERSON, *supra* note 30, at § III, at 3.

100. See Flandrau, *Lawyers and Courts of Minnesota Prior to and During its Territorial Period*, in 8 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 89, 98 (1898). This practice was abandoned when separate district court judges were elected in 1858. See note 216 *infra*.

## B. *The First Terms of District Court in Territorial Minnesota*

### 1. *Facts and Figures*

The first term of district court within the new territory began on Monday, August 13, 1849, at Stillwater.<sup>101</sup> Chief Justice Goodrich presided,<sup>102</sup> assisted by Judge Cooper.<sup>103</sup> The term of court lasted one week. Thirty-five cases were on the calendar. This was considerably more business than had been anticipated. A certain amount of confusion was present at the outset, largely because the attorneys present came from many different states. Each was in favor of rules of practice identical to those of the jurisdiction from which he had so recently departed and against those from "all other places in Christendom."<sup>104</sup> These difficulties were soon ironed out and by the end of the week things were running smoothly.<sup>105</sup> The large number of attorneys present, 19 the first day, was a result of the requirement, common in those days, that attorneys be sworn in before each term of court.<sup>106</sup> Goodhue<sup>107</sup> described the scene as follows: "The roll of attorneys is large for a new country. About 20 of the lankest and hungriest description were in attendance."<sup>108</sup>

### 2. *The First Trial in Minnesota Territory*

A grand jury was impaneled for the first term of court, and returned ten indictments.<sup>109</sup> One of these indictments, for assault and battery, was brought to trial; the rest were put over until the next term.<sup>110</sup> The case which went to trial is worth reporting in some detail,

101. E. NEILL, *supra* note 49, at 239.

102. *Id.* See 1 H. STEVENS, *supra* note 29, at 112. Recall that Chief Justice Goodrich was originally assigned to the First District with its seat at Stillwater. See note 96 *supra*.

103. 1 H. STEVENS, *supra* note 29, at 112. Justice Meeker had not yet arrived in the Territory, otherwise he undoubtedly would have been present. R. GUNDERSON, *supra* note 30, at § II, at 4.

104. E. NEILL, *supra* note 49, at 239.

105. Williams writes:

"The proceedings," says the *Chronicle and Register*, 'were for the first two or three days somewhat crude, owing to the assembling of a bar composed of persons from nearly every State. But, by the urbanity, conciliatory firmness, and harmonious course taken by the Court, matters were in a great measure systematized.'

J. WILLIAMS, *supra* note 22, at 234.

106. Nineteen attorneys were admitted the first day of court; six more were admitted before the court adjourned. As for the original nineteen, a kind of historic protocol was followed: the first to be admitted and made of record was Morton Wilkinson, the first regularly licensed attorney to settle permanently in Minnesota. See note 29 *supra*. After Wilkinson, the next to be admitted was Henry L. Moss, who had come to the state in 1848; Moss was also the first United States District Attorney for the Territory of Minnesota. E. NEILL, *supra* note 49, at 239; see Flandrau, *supra* note 100, at 92.

107. James Goodhue was the founder and editor of the St. Paul Pioneer.

108. J. WILLIAMS, *supra* note 22, at 234.

109. E. NEILL, *supra* note 49, at 239. The ten indictments included one for assault and battery with intent to maim (this was the case tried), one for perjury, four for selling liquor to Indians, and four for keeping gaming houses. Flandrau, *supra* note 100, at 92.

110. E. NEILL, *supra* note 49, at 239. See note 114 *infra* and accompanying text.

especially since the accused was an attorney, William D. Phillips. Phillips was charged with assault with intent to maim. In an altercation with a man, he had drawn a pistol on him. The defense was that the pistol was not loaded. The complaining witness swore, however, that it was loaded, and that he in fact had seen the load. Phillips did not testify in his own defense,<sup>111</sup> and was convicted by the jury and fined \$25. Phillips was quite indignant at this outcome. As he explained it, the complaining witness was mistaken. Phillips said he had been out electioneering for H. M. Rice<sup>112</sup> and because of the unsettled state of the country he found it difficult to get his meals regularly. To solve this, he got into the habit of carrying crackers and cheese in the same pocket with his pistol. In the altercation incident, according to Phillips, some cracker crumbs had gotten jammed into the muzzle of the gun. When he drew the pistol out, the complaining witness became terrified because he thought it was loaded to the brim!<sup>113</sup>

### 3. *The Second Term of District Court and the First Murder Trial*

The second term of territorial district court was held at Stillwater in February, 1850. Judge Cooper presided.<sup>114</sup> The first murder trial under the new territorial laws occurred during this term. The case involved a 13 year-old boy named Snow, who had been killed by a companion of about the same age on a street in St. Paul. The boys had been facing each other across the street, and a "single small bird shot" from the shotgun blast "penetrated the eye and brain of the Snow boy."<sup>115</sup> The jury convicted the accused youth of manslaughter, on the principle that even in the absence of malicious intent, the firing of a gun across a public street where people were passing was an unlawful act. Judge Cooper sentenced the boy to 90 days in the Fort Snelling guard house.<sup>116</sup> He was to be kept in close confinement and fed only bread

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111. Both accounts of this story state that Phillips did not testify in his own defense because the law at the time prohibited it. See E. NEILL, *supra* note 49, at 239; Flandrau, *supra* note 100, at 93.

112. Rice ran against Sibley in the special October 29, 1848, election to determine who would go to Washington as a delegate from the remnant Wisconsin Territory to seek territorial status for Minnesota. As noted, Sibley won the election. See note 47 *supra* and accompanying text.

113. Given Phillips' story, it is perhaps just as well that he did not take the stand in his own defense!

114. 1 H. STEVENS, *supra* note 29, at 112; Moss, *supra* note 63, at 83. Judge Cooper was reassigned to the First Judicial District by the legislature in 1849. See note 97 *supra*.

115. This quote, and this story, are taken from Moss, *supra* note 63, at 83. See 1 H. STEVENS, *supra* note 29, at 112.

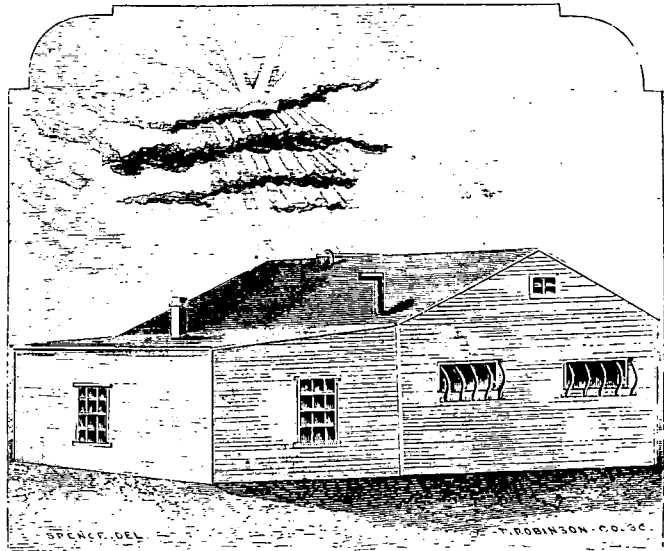
116. There was no penitentiary in the territory at the time. In fact, no prison of any kind existed until the St. Paul-Ramsey County jail was constructed in 1851. See J. WILLIAMS, *supra* note 22, at 280-81. The jail has been described by Williams as "a small log building, weather-boarded, and about as secure as if made of pasteboard." *Id.* at 281. The jail is reproduced in Figure 3.

and water on the first two and the last two days of his sentence. The local newspaper commented that Judge Cooper's sentence represented the dispensation of justice in "homeopathic doses."<sup>117</sup>

FIGURE 3

THE OLD JAIL

Reproduced  
from J. WILLIAMS,  
*supra* note 22, at 281.



#### 4. First Law Firm and Other Miscellaneous Points

The first law firm in the state was that of Henry Masterson and Orlando Simmons in St. Paul. They arrived in June, 1849, from New York where they had practiced together. The partnership ended in 1875 when Simmons was appointed judge of the Ramsey County Court of Common Pleas.<sup>118</sup> On April 8, 1850, Chief Justice Goodrich presided over the opening of the first term of court in Ramsey County.<sup>119</sup> The court convened in a public room adjoining the bar in the American Hotel which stood on the corner of Third and Exchange Streets.<sup>120</sup> Forty-nine cases were on the calendar; 13 indictments were returned.<sup>121</sup>

117. Moss, *supra* note 63, at 83.

118. E. NEILL, *supra* note 49, at 241. Simmons was later a district court judge. The state's second law firm was also started in St. Paul, by Edmund Rice and Ellis Whitall. *Id.* at 242.

119. J. WILLIAMS, *supra* note 22, at 258.

120. Moss, *supra* note 63, at 83. Recall that Chief Justice Goodrich had been reassigned from District One to District Two. See notes 96 & 97 *supra*.

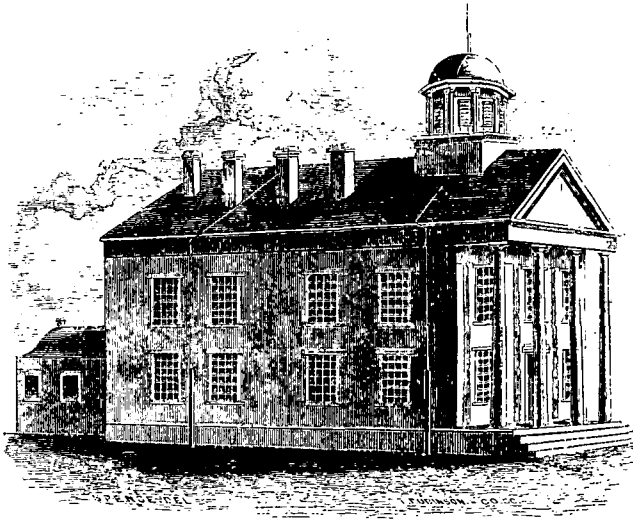
121. J. WILLIAMS, *supra* note 22, at 258. Williams writes, somewhat tongue in cheek:

The Saint Paul people must have a very litigious community then, as it is now. The *Pioneer* says: 'We have now 25 lawyers in Saint Paul.' What sins could this young and feeble population have committed, that such a punishment was sent on them?

*Id.*

The second court house in the new territory was the county court house built in 1850-51 in St. Paul. Vital Guerin, who figured in the Phelan case,<sup>122</sup> donated this site<sup>123</sup> and the architect whose plan was accepted was paid \$10 for his services.<sup>124</sup> Construction costs for the new courthouse were estimated at \$5,000, and this money was raised by issuing county bonds. Two of the county commissioners could not write their names, and the bonds, which had been sent to New York for negotiation with "x" marks, were returned as improperly signed. One William Pitt Murray undertook to teach the commissioners how to sign their names, and the next day properly executed bonds were once again on their way to New York. The handwriting on the two newly obtained signatures was said so strongly to have resembled that of Mr. Murray's that his reputation as "a lightning instructor in penmanship" was never again questioned.<sup>125</sup>

FIGURE 4



THE OLD COURT HOUSE

Reproduced from J. WILLIAMS, *supra* note 22, at 280.

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122. See note 48 *supra* and accompanying text.

123. The site was the block in St. Paul bounded by Wabasha, Cedar, Fourth, and Fifth Streets. 2 H. STEVENS, *supra* note 29, at 246. The old court house appears in Figure 4.

124. 2 H. STEVENS, *supra* note 29, at 246. See J. WILLIAMS, *supra* note 22, at 279. The term architect is a little misleading. Various plans were submitted, and that of Dr. David Day, the register of deeds and clerk of the county board, was accepted. He was paid \$10. *Id.*

125. This episode became known as the *X Bond* case. The account given here draws heavily on that preserved by 2 H. STEVENS, *supra* note 29, at 246.



*C. Hazards and Difficulty of Early Practice; Character of Early Bar*

The practice of law in the early days of Minnesota led to some strange and improbable occurrences. A few of those are recounted here.

Once Judge Goodrich was presiding over district court at Mazurka Hall in St. Paul. The roof of the building was fireproof, but not water proof, it seems, for a heavy rain deluged the court one day while it was in session, making umbrellas necessary.<sup>126</sup>

Young lawyers living in Stillwater with legal business to transact in St. Paul used to walk back and forth between the two towns, partly for the fun they would have en route, but mainly to save the \$1.50 fare charged by the stage company.<sup>127</sup> Legal business then was neither large in volume nor especially profitable in character. The sums at stake in most controversies were small, and lawyers in the pioneer period thought of themselves as doing quite well if their fees ran \$2 a day.<sup>128</sup>

Judge Flandrau was fond of two stories from his own experience. He writes:<sup>129</sup>

[I was called] down from Traverse des Sioux, where I was then residing, to . . . the county seat of Goodhue county, to respond to a motion before Judge Chatfield. I paddled a canoe down the tortuous course of the Minnesota River for about 150 miles, attended to the business, sold the canoe for \$3, and walked back to my home, a distance, straight across the county, of ninety miles.

On another occasion a large party of suitors, witnesses and myself started, in December, from Traverse des Sioux for the land office at Winona. There were no roads, and not more than two or three houses on the route, which, in a straight line, is about 150 miles. We started with a wagon and two horses, made about fifteen miles the first day, and camped. When morning came we found about fifteen inches of snow on the ground. We could not turn a wheel, so we cached the wagon, packed the horses with our baggage and blankets, drove them ahead of us and footed it to Winona. On the return we built a small sled at Stockton some twenty miles on this side of Winona, sufficient to carry our traps, and footed it home again—a distance, in all, of 300 miles through an uninhabited country, in mid-winter, and with deep snow. I used to think that sort of thing was fun, but with the growth of railroads I have naturally changed my views on that as on many another point.

Flandrau was offered forty acres of land as a fee for the Winona trip,

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126. J. WILLIAMS, *supra* note 22, at 293. As stated earlier, court was held in those days wherever facilities could be found. Mazurka Hall, a frame building on Third Street in St. Paul, was a favorite early "court" house. 2 H. STEVENS, *supra* note 29, at 241; see J. WILLIAMS, *supra*.

127. 1 H. STEVENS, *supra* note 29, at 52.

128. *Id.* at 51-52.

129. *Id.* at 52.

but he rejected it and accepted a twenty dollar gold piece instead. The forty acres is now the heart of downtown Mankato!<sup>130</sup>

With the potential for confusion as to proper practice inherent in a situation where the judiciary was composed of judges from six different states and the bar made up of attorneys from almost every jurisdiction,<sup>131</sup> and with additional complications traceable to the weather and the wild state of the country, one could readily excuse Minnesota's early lawyers if in their practice they had simply muddled through. To their credit, though, it appears that Minnesota's early lawyers practiced law close to the law's ideals. Judge Flandrau, with 43 years of experience, both at the bar and on the bench,<sup>132</sup> wrote as follows:<sup>133</sup>

The bar of Minnesota in its early days was especially a fraternal and agreeable body among its members. I recall no incidents that reflect any discredit upon it. There was no jealousy within its ranks, but a generous courtesy existed. What is termed sharp practice has been so universally discountenanced that it never gained a footing, and the profession was characterized by a reciprocal accommodation among its members, which has made it a graceful fellowship of gentlemen. . . .

#### *D. Laws and Lawmaking in Territorial Minnesota*

##### *1. The Ideals of the Times*

The notion that laws should be practiced close to the law's ideals came to be a tradition in Minnesota because it was insisted upon by the early leaders.<sup>134</sup> Perhaps no better statement of the ideal has come down to us than Governor Alexander Ramsey's message to the first territorial legislature:<sup>135</sup>

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130. Flandrau, *supra* note 100, at 101.

131. See notes 104-05 *supra* and accompanying text.

132. Flandrau, *supra* note 100, at 98.

133. *Id.*

134. For example, see Judge Cooper's charge to the grand jury, given on the opening day of district court at Mendota. August 27, 1849. The charge is preserved by I H. STEVEN'S, *supra* note 29, at 20-28. The same day Cooper also addressed the attorneys present. To quote part of his remarks:

It will be my object to see that those rules [of 'courtesy and gentlemanly bearing'] esteemed and respected, and painful indeed would it be to me to be under necessity of punishing their willful infractions. It shall likewise be my object never to be harsh, petulant, or oppressive but to observe towards you a strict impartiality, a kind and courteous manner. This is due from the court, as well as from the bar. . . . That I shall frequently err, I doubt not; that is but human, and older, more experienced men than I am have often erred in the construction of laws. But whenever I do err, I shall not hesitate to retrace my steps, if possible, or to give to those who feel themselves aggrieved every facility in my power to have a hearing before a higher tribunal. (bracketed material in original)

*Id.* at 29.

135. Murray, *supra* note 22, at 110.

I would advise, therefore, that your legislation should be such as will guard equally the rights of labor and the rights of property, without running into ultraisms on either hand; as will recognize no social distinctions, except those which merit and knowledge, religion and morals, unavoidably create; as will repress crime, encourage virtue, give free scope to enterprise and industry; as will promptly, and without delay, administer to and supply all the legitimate wants of the people,—laws, in a word, in the formation of which will be kept steadily in view the truth, that this Territory is destined to be a great State.... Thus you will see, gentlemen, that yours is a most interesting and responsible position, and that in your hands, more than in that of any future Legislative Assembly, will be the destinies of Minnesota.

Ramsey's appeal embodied the earnest hopes of his contemporaries. They sought to establish a state whose greatness was to be anchored in laws fairly drawn and justly applied. Much of what Ramsey called for—laws to repress crime and create virtue, to guard equally the rights of all, to be administered promptly and without delay—was elevated to constitutional status when the territory became a state and Minnesota's constitution adopted.<sup>138</sup> Ramsey's 1849 call for principled men to create principled laws was timely then, and it seems timely now.

## 2. *Legislative Facts and Figures from the Territorial Period*

The first session of the territorial legislature met on September 3, 1849, at the Central House Hotel in St. Paul.<sup>137</sup> Among the first laws passed were ones reorganizing the court system, establishing counties, laying out territorial roads, granting ferry charters and licensing "groceries" (saloons).<sup>138</sup> The Historical Society was also established at that first session,<sup>139</sup> and \$5,000 was appropriated for the establishment of a state library.<sup>140</sup> The hours at which that first session met were dictated by the hotel's dining schedule. After breakfast, the room was cleared of its table and dishes, the desks of the members brought in, and the business of the day begun. About 11:30, notice was given for dinner—the desks were stacked up, and the tables and dishes again arrayed, with the legislators usually tucking their papers in their pockets. After dinner the room was again cleared and the desks again displayed until supper, when the described process repeated itself. At night the council chamber was converted to a sleeping room, with straw ticks and Indian

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136. See notes 3-4 *supra* and accompanying text.

137. Murray, *supra* note 22, at 110.

138. *Id.* at 112.

139. *Id.*

140. 1 H. STEVENS, *supra* note 29, at 88. The Organic Act provided specifically for this appropriation. Act of Mar. 3, 1849, ch. 121, § 17.9 Stat. 403. The present state law library is the direct descendant of the territorial legislature's first \$5,000 appropriation.

blankets often used for beds.<sup>141</sup>

### 3. *Laws on Liquor, Divorce, Imprisonment for Debt*

In 1852, the legislature passed a liquor prohibition law, which was by its terms to be voted upon by the electorate before taking effect.<sup>142</sup> Many were surprised when the voters approved the measure,<sup>143</sup> but this experiment with temperance did not last long. The courts found the law to be in violation of the terms of the Organic Act of the Territory and it was therefore declared null and void.<sup>144</sup>

A divorce in territorial days was obtained by application to the Legislative Assembly.<sup>145</sup> Applicants were usually referred to a committee that took testimony and then reported to the full Assembly. Meritorious applications were usually granted.<sup>146</sup>

An act permitting imprisonment for debt was passed at the first session of the territorial legislature.<sup>147</sup> Under it, all the judgment creditor had to do was satisfy the magistrate that the debt was based on contract, that the debtor had non-exempt, non-leviable property sufficient to satisfy the claim, and that the debtor had not paid. This was all easily accomplished in an age of reckless swearing, and since the law made no provision for the discharge of the debtor unless the debt was paid, successful invocation of the statute meant that debtors went to prison until they paid or died.<sup>148</sup>

An amendment passed in 1851 permitted a kind of habeas corpus petition and hearing,<sup>149</sup> but even if the debtor received a discharge the judgment remained in force against his estate.<sup>150</sup> At least one man died while imprisoned for debt. It was thought he committed suicide, but whether it was from the disgrace of being imprisoned for a debt of \$28

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141. This account is taken from Murray's description. Murray, *supra* note 22, at 110.

142. Act of Mar. 6, 1852, ch. VIII, § 19, [1852] Minn. Terr. Sess. Laws 18. See J. WILLIAMS, *supra* note 22, at 323; Murray, *supra* note 22, at 121.

143. See Murray, *supra* note 22, at 121.

144. *Id.* See also J. WILLIAMS, *supra* note 22, at 323-24.

145. See J. WILLIAMS, *supra* note 22, at 334.

146. *Id.*

147. Act of Nov. 1, 1849, ch. XVI, [1849] Minn. Terr. Sess. Laws 49-50.

148. This account draws heavily upon the observations of J. WILLIAMS, *supra* note 22, at 335-36; and Murray, *supra* note 22, at 127-28.

149. Under MINN. REV. STAT. ch. 90 (1851), the debtor could petition for release after 10 days in prison. It was his burden to show that he had neither real estate nor property exceeding \$20 in value, and that he had not committed any fraud upon his creditor. Murray, *supra* note 22, at 127. If the debtor undertook to discharge the debt after his release he was liable for the cost of his support while in jail in addition to the revived debt itself. J. WILLIAMS, *supra* note 22, at 335.

150. Murray, *supra* note 22, at 127.

or from being confined to Ramsey County's miserable jail,<sup>151</sup> no one was ever quite certain.<sup>152</sup>

The law was regarded even then as a "relic of barbarism."<sup>153</sup> Public sentiment was soon aroused against it, at least in part because it seemed to be discouraging settlers who might otherwise have come to Minnesota.<sup>154</sup> A bill to repeal the measure was introduced in 1854. The committee report on the matter observed:<sup>155</sup>

That an American may, in the nineteenth century, be incarcerated within the four walls of a prison, cut off from the light of heaven, and communication with his fellow men, and this for the inconvenient crime of being poor, is to your committee a source of astonishment and regret, especially when they think upon the various mutations which daily transpire in our midst. The man of wealth today is the beggar of tomorrow.

Technicalities kept the repealer bill from being enacted that session,<sup>156</sup> but the imprisonment for debt statute was repealed by the unanimous vote of the Assembly at the next meeting of the legislature.<sup>157</sup>

Another legislative oddity from those early days was the plank road company. Any number of bills to incorporate such companies were introduced in the legislature, and some passed into law. The sponsors of the bills, though, had something other than passage in mind. The territorial printer was paid at a rate geared to the number of lines of type he had to set.<sup>158</sup> All bills introduced had to be printed. The plank road bills were often introduced by the printer's friends as a means of swelling his account.<sup>159</sup>

### *E. The Territorial Supreme Court*

#### *1. Facts and Figures*

The first term of the territorial supreme court was held on January 14, 1850, at the American House Hotel in St. Paul.<sup>160</sup> Goodrich,

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151. Both Murray and Williams describe the jail in perjorative terms. See J. WILLIAMS, *supra* note 22, at 336; Murray, *supra* note 22, at 127. See note 116 *supra*.

152. Murray, *supra* note 22, at 127.

153. *Id.*

154. *Id.*

155. *Id.* at 127-28.

156. The original bill to repeal the law was drafted by then Chief Justice Goodrich, who was not a member of the Assembly. Also, the Goodrich bill attempted to repeal about one-half of the civil code. *Id.* at 128.

157. *Id.*

158. Actually, the rate was \$1 per each 1000 characters of type printed. See *id.* at 123.

159. *Id.*

160. R. GUNDERSON, *supra* note 30, at § II, at 1. See *The Supreme Court of the Territory of Minnesota*, 1 Minn. v. vi. (1858).

Cooper, and Meeker were the justices. No cases were heard at this first term, which was devoted to administrative matters.<sup>161</sup> The first case—which involved the trespass of a cow, appropriately enough—was not heard until the second day of the court's second term, which was held at the Methodist Episcopal Church in St. Paul on July 7, 1851.<sup>162</sup> The third term was held at the same location. In 1853, the court moved into quarters reserved for its use in the north wing of the first territorial capitol.<sup>163</sup>

FIGURE 5



THE CAPITOL

Reproduced from J. WILLIAMS, *supra* note 22, at 339.

Appointments to Minnesota's territorial supreme court were made by the President and thus were somewhat political in character.<sup>164</sup> During the nine-year territorial period (1849-1858), ten men were ap-

161. On January 14, James Humphrey was appointed as clerk and nine attorneys were admitted to practice. Ten more attorneys were admitted the next day. On January 16, the court promulgated rules of practice. R. GUNDERSON, *supra* note 30, at § II, at 7.

162. *Id.* See also *The Supreme Court of the Territory of Minnesota*, 1 Minn. v, vi (1858). The trespass action involved a defendant who had driven from the plaintiff's premises a cow which the latter had been keeping as a stray for about six weeks. A justice of the peace had awarded the plaintiff \$2 a week pasturage charges for the time he had kept the cow. This judgment was reversed by the district court and the reversal was affirmed on appeal. See *Gervais v. Powers*, 1 Minn. 46 (Gil. 30) (1851). Though the first case argued, *Gervais* was not the first opinion filed. That distinction went to *Desnoyer v. Hereux*, 1 Minn. 17 (Gil. 1) (1851), an appeal from one of Goodrich's decisions as district judge. It was reversed on appeal, with Goodrich dissenting. See generally R. GUNDERSON, *supra* note 30, at § V, at 2.

163. J. WILLIAMS, *supra* note 22, at 321, 340. The old capitol appears in Figure 5.

164. R. GUNDERSON, *supra* note 30, at § III, at 1. See Murray, *supra* note 22, at 107.

pointed to the court.<sup>165</sup> One appointment, however, was never confirmed by the United States Senate even though the judge involved, Chief Justice Fuller, actually came to Minnesota and served on both the district and supreme court benches for over half a year.<sup>166</sup> After Fuller's rejection by the Senate, President Fillmore nominated Henry Hayner, who was quickly confirmed by the Senate.<sup>167</sup> Hayner never actually presided at any term, however,<sup>168</sup> and was replaced about three months after his appointment by William Welch, who served as Chief Justice until statehood.<sup>169</sup> All told, the territorial supreme court considered 161 filed matters, of which 119 were decided by opinion, 58 of them written.<sup>170</sup> At first the decisions were not published, but in August, 1851, the reporter, William Hollinshead made arrangements through C.K. Smith, the Secretary of the Territory, to have the court's opinions printed by James Goodhue, editor of the St. Paul *Pioneer*, who had been appointed public printer by the second territorial legislature.<sup>171</sup> Goodhue printed the reports, but was not always paid promptly. The delay in payment was apparently Smith's fault<sup>172</sup> and Goodhue

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165. The ten were: Aaron Goodrich, David Cooper, B.B. Meeker, Jerome Fuller, Henry Hayner, William Welch, Moses Sherburne, Andrew Chatfield, R.R. Nelson, and Charles Flandrau. Of these, Goodrich, Fuller, Hayner, and Welch were chief justices, the rest associates. See 1 Minn. ix. (1851).

166. See R. GUNDERSON, *supra* note 30, at § V, at 2-3. After Chief Justice Goodrich's removal in January, 1852, see text accompanying notes 175-78 *infra*, Fuller was appointed chief justice. He arrived in St. Paul in time to open the spring term of district court and to hear the cases at the July term of the supreme court. Moss, *supra* note 63, at 86. Gunderson reports that at the opening of district court, Fuller found 57 cases on the calendar and not one ready for trial. "The attorneys offered as [an] excuse for postponement that it was unheard of in Minnesota courts for cases to be tried on the first day" of the term. Fuller told them that from then on when cases were called the parties were to be prepared to have them tried or suffer the consequences. R. GUNDERSON, *supra*, at 3. The Senate's failure to confirm Fuller was a loss to the state, for in his brief tenure he had shown himself to be one of the young territory's most able jurists. See *id.* at 4.

167. R. GUNDERSON, *supra* note 30, at § V, at 4-5; Moss, *supra* note 63, at 86.

168. Moss, *supra* note 63, at 86-87. Hayner arrived in St. Paul in September, 1852, too late for the fall term of district court. No term of the supreme court was held that winter. He did issue an opinion, however, in the case striking down the early prohibition law as unconstitutional. *Id.* See note 144 *supra* and accompanying text.

169. The Territorial Organic Act provided for four-year terms for supreme court justices. Hayner's appointment in 1852 was to the unexpired portion of Chief Justice Goodrich's 1849-1853 appointment. When President Pierce was elected to succeed Fillmore, he naturally wanted to appoint men of his own choosing to the Minnesota court. As a result William Welch was named chief justice, succeeding the brief-tenured Hayner, with Moses Sherburne and A.G. Chatfield replacing Cooper and Meeker. See R. GUNDERSON, *supra* note 30, at § V, at 4-5; Moss, *supra* note 63, at 87. Welch was reappointed by President Buchanan in 1857. Buchanan's other two appointments were R.R. Nelson and Charles Flandrau as associate justices. R. GUNDERSON, *supra*, at § VII, at 1-2.

170. R. GUNDERSON, *supra* note 30, at § VII, at 6.

171. See *id.* at § IV, at 1; Murray, *supra* note 22, at 113.

172. See R. GUNDERSON, *supra* note 30, at § IV, at 1. Smith's "defense" was that no law

took him to task in the *Pioneer* for his tardiness.<sup>173</sup> Smith was later removed from his post, and Goodhue printed this parting shot: "He [Smith] stole into the territory, he stole in the territory, and then he stole out of the territory."<sup>174</sup>

## 2. Territorial Justices Under Fire

Chief Justice Aaron Goodrich came under attack from virtually the outset of his term.<sup>175</sup> As early as the spring of 1851, a group of disgruntled settlers formed a committee which called on Secretary of State Daniel Webster to secure Goodrich's removal from office.<sup>176</sup> This effort failed, but efforts to remove Goodrich continued.<sup>177</sup> In January, 1852, a letter, signed by several prominent attorneys, which contained specific charges against Goodrich of incompetency, unfitness and improprieties committed on and off the bench, was communicated to President Fillmore in Washington. Shortly thereafter Goodrich was removed.<sup>178</sup>

Justice Cooper also came under fire. Unlike Goodrich, Cooper was not attacked for lack of legal ability. Rather, he was so certain and set in his views that he could not endure opposition to them.<sup>179</sup> His dress and mannerisms also brought him ridicule.<sup>180</sup> In addition, he was attacked by Goodhue for absenteeism. One article in the *Pioneer* led to an infamous and violent encounter.<sup>181</sup> Goodhue's article, entitled

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per se authorized publication of the reports and that their cost would have to come out of future federal appropriations to the territory. Goodhue was late in receiving payment for other territorial printing besides the supreme court reports. *Id.*

173. *Id.*

174. *Id.* (brackets in original).

175. *See id.* § III, at 4.

176. *See id.*; Moss, *supra* note 63, at 84. The committee simultaneously sought the removal of Franklin Steele as postmaster at Fort Snelling. *Id.*

177. R. GUNDERSON, *supra* note 30, at § III, at 4; Moss, *supra* note 63, at 87.

178. Moss, *supra* note 63, at 85. Goodrich was apparently just too eccentric or contrary for his own good. Murray writes that Goodrich had such a low opinion of his associates on the bench, that he would wait to hear their view of a case and then take the opposite position. Murray, *supra* note 22, at 108. Flandrau pointed to Goodrich's attempted refusal to yield his office after his removal (on the grounds that his term lasted during good behavior!) as an illustration of his eccentricity and contrariness. Flandrau, *supra* note 100, at 99.

179. Moss, *supra* note 63, at 85. Moss writes that Cooper often exhibited irritation and sometimes anger to those who differed with him, in court or out. *Id.* *See also* R. GUNDERSON, *supra* note 30, at § III, at 5.

180. Flandrau remarked that Cooper always wore shirts with cambric frills down the front and lace on each cuff and that the more exhilarated he became the more punctilious and ceremonious he became in his deportment. *See* Flandrau, *supra* note 100, at 99. Such habits brought him ridicule from the more robust and hardy settlers with whom he came in contact. *See* R. GUNDERSON, *supra* note 30, at § III, at 5; E. NEILL, *supra* note 49, at 241; Moss, *supra* note 63, at 285.

181. Goodhue's barrage (he called Cooper "a profligate vagabond," among other things)



"Absentee Office Holders," attacked Cooper for his continual absences from the territory and accused him of owing bills to washerwomen, laundresses, barbers, and tailors, among others.<sup>182</sup> The article concluded:<sup>183</sup>

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.

This kind of language added up to fighting words in those days. Cooper was out of town the day the attack was published, but his brother Joseph Cooper was ready to fight in his stead. Joseph and Goodhue met on a street. Verbal taunts were exchanged and some shots were fired. The sheriff soon arrived and took revolvers from each of them, thinking the affair ended, but Cooper still had a knife, Goodhue a small pistol. When someone grabbed Goodhue from behind, Cooper rushed up and gashed him. Goodhue broke away, fired the pistol, and hit Cooper in the groin. Although wounded, Cooper again rushed upon Goodhue and stabbed him several times in the abdomen. The lives of both men hung in the balance for several days. Cooper was left an invalid by the encounter. Ironically the tragedy took place outside the building where the territorial legislature was then in session.<sup>184</sup>

The Goodrich and Cooper affairs, while unfortunate, are nonetheless revealing, for they illustrate the degree to which the early settlers were willing to demand integrity from their judges. The settlers seemed to be guided by the principle that the character of the judge had a direct bearing on the quality of justice he administered, and they therefore set high standards for their judiciary. These high standards continue to apply today.

One story about Moses Sherburne, territorial associate justice from 1853 to 1857, will suggest the kind of character and integrity early Minnesotans came to expect from their judges. Once when Sherburne, sitting as district judge, was about to pass sentence on a person convicted of a criminal offense, the prisoner, who was a Mason, handed Sherburne a letter from a brother Mason. Sherburne construed this as an attempt to influence him. He indignantly tore the letter to shreds

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came in part because Cooper's friends made the mistake of trying to make him chief justice. R. GUNDERSON, *supra* note 30, at § III, at 5. See J. WILLIAMS, *supra* note 22, at 285.

182. R. GUNDERSON, *supra* note 30, at § III, at 5-6.

183. J. WILLIAMS, *supra* note 22, at 285.

184. This account draws upon versions of the encounter preserved by R. GUNDERSON, *supra* note 30, at § III, at 6; J. WILLIAMS, *supra* note 22, at 285-86; Moss, *supra* note 63, at 85-86; Murray, *supra* note 22, at 113-14.

and sentenced the offender to the full extent of the law.<sup>185</sup>

### 3. *The Territorial Supreme Court in Perspective*

In general, it has been observed that Minnesota's territorial courts were "of greater average ability than those of most western states in their territorial days."<sup>186</sup> The story about Justice Sherburne, just related, is one example of the caliber of justice administered in those days. Another example involves soldiers at Fort Snelling. Certain soldiers came to desire a release from service prior to the expiration of their period of enlistment. They hit upon the idea of applying for writs of habeas corpus granting their discharge. Ramsey County Probate Judge Henry Lambert granted the first few requests. The idea soon became the most popular one at the fort. Colonel Francis Lee, commander of the fort, speedily petitioned the supreme court for a writ of prohibition restraining Judge Lambert from granting such relief. The petition was granted,<sup>187</sup> and life at the fort returned to its usual routine.<sup>188</sup>

Judge Atwater<sup>189</sup> recalled this incident from the territorial days of the supreme court:<sup>190</sup>

At one term the writer had four cases in all of which his opponent was Mr. John W. North. Three of them were, to my mind, fairly doubtful cases, but one I felt perfectly [*sic*] sure, as the authorities were unanimous in favor of my client. In due time the three questionable cases were decided in my favor. Some time later the other was decided, and, to my astonishment, for my opponent. Meeting the chief justice shortly afterwards, I ventured to ask him the grounds of the decision, as no reasons for it were on file, and I also desired to know how the court had got around and disposed of the authorities I had cited. He had utterly forgotten the case, nor could I refresh his memory in regard to it. Finally he said: 'Well, perhaps a mistake might have been made, but, as Mr. North had lost every case that term, we thought we would give him one, as it did not seem to be of much importance anyway.'

Atwater quickly went on to add that such cases were, of course, exceptional.<sup>191</sup>

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185. This account is based on the one preserved by R. GUNDERSON, *supra* note 30, at § VI, at 2.

186. This comment was made by Issac Atwater, one of the first *state* supreme court justices. 1 H. STEVENS, *supra* note 29, at 51.

187. *In re Lee*, 1 Minn. 60 (Gil. 44) (1851). The opinion in the case was written by Justice Cooper.

188. This account is based on the version preserved by R. GUNDERSON, *supra* note 30, at § V, at 5-6.

189. See note 186 *supra*.

190. 1 H. STEVENS, *supra* note 29, at 51.

191. *Id.* Atwater is also the gentleman who made the observation with which this section of the text begins. See note 186 *supra*.

In assessing the work of the territorial supreme court, it is important to remember what those early justices were up against. They had no law library on which to fall back; they had no accumulation of their own precedent to steer them in the right direction. With the practicing bar made up of attorneys from almost every jurisdiction in the country, it was to be expected that many of the early decisions would be devoted to questions of proper pleading and practice. Again, it was a new and developing country, and rules had to be fashioned to govern fairly the increasing numbers of commercial transactions and other ventures being entered into by pioneer men. Many of the cases presented questions of first impression. Because of the lack of precedent,<sup>192</sup> decisions often rested on principle rather than authority.<sup>193</sup> Fortunately, the early justices were themselves by and large men of principle.<sup>194</sup> The record made by the territorial supreme court was, as a result, "eminently respectable."<sup>195</sup>

## VI. TRANSITION TO STATEHOOD: MINNESOTA FRAMES A CONSTITUTION

Efforts to secure Minnesota's admission into the Union began in earnest during 1856.<sup>196</sup> In February, 1857, a bill authorizing the people of Minnesota to form a constitution and state government "preparatory to their admission into the Union"<sup>197</sup> was passed by Congress and signed by President Pierce.<sup>198</sup> Pursuant to the Enabling Act, an

192. Often the early opinions were handed down without the citation of a single authority. See R. GUNDERSON, *supra* note 30, at § VII, at 4.

193. *Id.* See I H. STEVENS, *supra* note 29, at 50.

194. Note again the integrity displayed by Moses Sherburne in the story recounted in the text accompanying note 185 *supra*.

195. The words are those of Associate Justice Charles Elliott, who served from 1905 to 1909. See I H. STEVENS, *supra* note 29, at 50, for the full text of Justice Elliott's remarks about the territorial supreme court. Among Elliott's observations leading to his "eminently respectable" conclusion was the fact that few of the territorial supreme court's decisions were later overturned by the state supreme court. *Id.* Elliott was the first person to earn a Doctor of Philosophy degree from the University of Minnesota. R. GUNDERSON, *supra* note 30, at § XVI, at 2.

196. See W. ANDERSON, *supra* note 18, at 43-68. A bill to enable the formation of the State of Minnesota was introduced in Congress on December 24, 1856. *Id.* at 54.

Several good accounts of the events leading up to statehood, including the Constitutional Convention, exist. See, e.g., W. ANDERSON, *supra* note 18, at chs. III-VI, at 42-132; Anderson, *Minnesota Frames a Constitution*, 36 MINNESOTA HISTORY 1 (1958); Anderson, *The Constitution of Minnesota*, 5 MINN. L. REV. 407 (1921); Schochet, *Minnesota's First State Supreme Court*, 11 MINN. L. REV. 93 (1927). Anderson's article in 5 MINN. L. REV. is a condensation of portions of the book cited in note 18 *supra*. Citations here will be to the longer work, but the same basic information is contained in the law review article. The article by Schochet deals especially with provisions in the constitution as they relate to the judiciary.

197. Act of Feb. 26, 1857, ch. 60, 11 Stat. 166.

198. See W. ANDERSON, *supra* note 18, at 59-60, 63.

election of delegates to the state constitutional convention was held on June 1, 1857. A nearly equal number of Republican and Democratic delegates were chosen.<sup>199</sup> Political antipathy and mutual mistrust<sup>200</sup> caused both parties to caucus separately at the Constitutional Convention, which convened the second Monday in July at St. Paul.<sup>201</sup> Both groups proceeded independently to draft proposed state constitutions. After a conference committee resolved the differences between the two drafts, the constitution was officially adopted.<sup>202</sup> The new constitution was ratified by popular vote at a special election on October 13, 1857.<sup>203</sup> The new state's officers and representatives were also chosen at this election.<sup>204</sup> The state was officially admitted to the Union on May 11, 1858.<sup>205</sup>

The constitution upon which Minnesota's statehood was established was peculiar in the sense that it was the compromise product of a constitutional convention so badly split that the opposing parties refused even to recognize each others' existence for most of the convention. In the final analysis, however, the differences in the two drafts were not substantively all that great.<sup>206</sup> The "compromise" constitution was mainly a distillation of various constitutional provisions already

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199. *Id.* at 71, 75. Fifty-eight Republicans received certificates of election, as against 50 Democrats. The Democrats then lost one, but added six to their number who had not received official election credentials. The map in Figure 6 shows the results of the June 1, 1857 election on a county by county basis. *Id.* at 75.

200. The antipathy and mistrust was engendered largely by the bitterness and enmity felt on the part of southern Minnesota Republicans (especially those in the state's southeast quadrant) toward the way things were run in St. Paul by the Democrats. Among the Republicans' specific grievances were the facts that St. Peter had lost out in the battle for the location of the capital, and that recent population gains in the southeastern part of the state had not been fairly reflected in the 1857 apportionment of delegates to the Minnesota legislature. See generally W. ANDERSON, *supra* note 18, at 45-47, 58-59, 70-71. For the story of the fight over the location of the capital, see the account in J. WILLIAMS, *supra* note 22, at 370-72. The anger of the proponents of the St. Peter location can readily be understood. Following passage of a bill effecting removal, the chairman of the Committee on Enrolled Bills secreted himself in a St. Paul hotel, and could not be found until the end of the session. This prevented the enactment of the bill, and St. Paul remained the capitol. *Id.*

201. See W. ANDERSON, *supra* note 18, at 79-80.

202. *Id.* at 87-109.

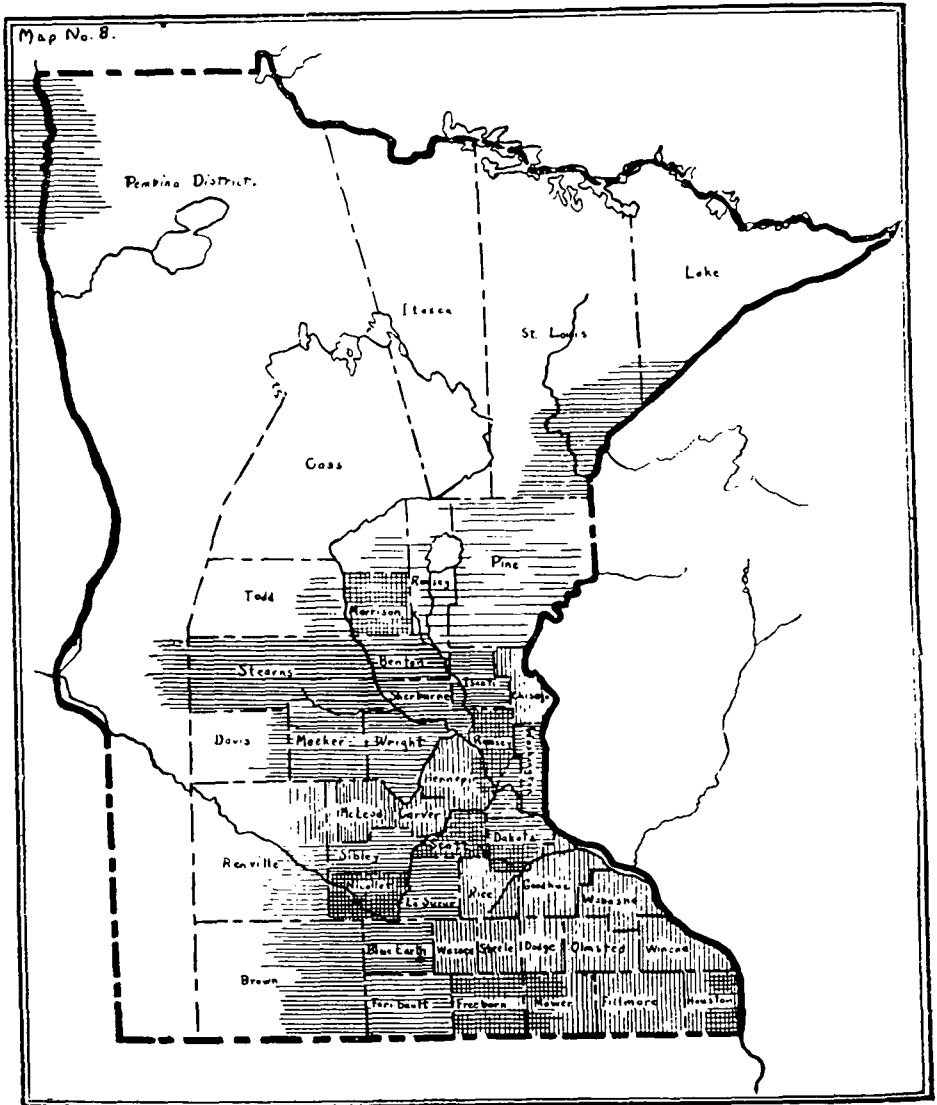
203. *Id.* at 133-34. The vote was 36,240 in favor to 700 against, according to precinct returns, and 30,055 in favor to 571 opposed according to canvassers' returns. *Id.* at 133.

204. Henry Hastings Sibley was elected governor; Charles Berry, attorney general. Lafayette Emmett was elected chief justice, Issac Atwater and Charles Flandrau were elected as associate justices of the court. Six district court judges were also elected, including Thomas Wilson and S.J.R. McMillan, both of whom later served on the supreme court. Good biographical sketches of Emmett, Atwater, and Flandrau appear in Schochet, *supra* note 196.

205. Act of May 11, 1858, ch. 31, 11 Stat. 285. See W. ANDERSON, *supra* note 18, at 136-38.

206. See *id.* at 121.

FIGURE 6



RESULTS OF THE ELECTION, JUNE 1, 1857. Vertical shading indicates counties carried by the Republicans, horizontal shading counties carried by the Democrats, and both together indicate counties from which were sent divided delegations.

existing in the constitutions of the states previously admitted to the Union.<sup>207</sup> This is as one would expect, for the waves of migration which carried freedom-loving people from the old England to the New was a process re-enacted as the descendants of the colonial settlers moved westward to Ohio, Michigan, and Minnesota. As these people moved westward, they brought with them their historic allegiance to the fundamental principle of freedom under law.<sup>208</sup> In essence, Minnesota's constitution is that principle indelibly printed upon the law.

## VII. LAW, COURTS AND LAWYERS IN THE EARLY YEARS OF STATEHOOD

### A. Facts and Figures

Prior to the admission of Minnesota into the Union, elections had been held to determine the first state officers.<sup>209</sup> Sibley, the state's first lawyer, was elected governor. Lafayette Emmett was elected Chief Justice. He was joined on the state's high court by Issac Atwater and Charles Flandrau.<sup>210</sup> Their salaries were set at \$2,000 each, but this amount was rarely paid in cash. Instead, pay warrants were issued, and these were usually discounted 10 or 20 percent.<sup>211</sup> Even in the "good old days," judicial appointment or election often involved financial sacrifice for the judges.<sup>212</sup>

The new state constitution provided for a supreme court, district courts, probate courts, and justice courts.<sup>213</sup> Additional courts could be formed by legislative enactment.<sup>214</sup> District judges and supreme court justices, who were to be "men learned in the law,"<sup>215</sup> were elected to

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207. Anderson, *Minnesota Frames a Constitution*, *supra* note 196, at 10. Minnesota's constitution seems to be patterned especially after those of New York, Ohio, Michigan, Illinois, Wisconsin, and Iowa. *Id.*

208. Sibley's biography is an especially apt illustration of this point; the same could be said of Judge Flandrau (his father was a lawyer), or of almost any of the other pioneer leaders. See note 20 *supra*.

209. See note 206 *supra* and accompanying text.

210. Schochet, *supra* note 196, at 99. Sibley's margin over Alexander Ramsey was but 240 votes, out of 35,340 cast. Emmett defeated Horace Bigelow (Flandrau's St. Paul law partner) by 996 votes. Atwater, with 18,199 votes, and Flandrau, with 18,110 defeated the Republican candidates Berry and Billings, who polled 17,052 and 17,026 votes respectively. *Id.*

211. R. GUNDERSON, *supra* note 30, at § X, at 4.

212. Justice Atwater's retirement from the court in 1864 was prompted largely by financial considerations. Schochet, *supra* note 196, at 102-03. See note 218 *infra*.

213. MINN. CONST. art. 6, § 1. See also Schochet, *supra* note 196, at 98.

214. Schochet, *supra* note 196, at 98. The legislative authority extended only to the creation of courts "inferior" to the supreme court. See MINN. CONST. art. 6, § 1.

215. MINN. CONST. art. 6, § 7 (now art. 6, § 5).

seven-year terms.<sup>216</sup> Chief Justice Emmett served out his full term;<sup>217</sup> Atwater and Flandrau, 39 and 29, respectively when appointed, resigned shortly before their terms expired.<sup>218</sup>

One of the first acts of the new supreme court was to establish an

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216. The seven-year terms were later reduced to six. At the constitutional convention there was considerable discussion as to whether the judiciary should be elected or appointed. Moses Sherburne, a territorial supreme court justice and a Democratic delegate to the convention, argued against an elected court: "I contend the judges who are elected . . . are but the mere buglemen of caucuses; the best tricksters or the best managers of caucuses are just as likely to be the nominees of the party as the most learned men in the nation." R. GUNDERSON, *supra* note 30, at § VIII, at 1. B.B. Meeker supported Sherburne's position, but Lafayette Emmett spoke in favor of an elected judiciary:

We hear a great deal of talk about an independent judiciary; the phrase is in everybody's mouth. What does it mean? Independent of whom? Independent of what? Independent of the people? Sir, I say to the gentleman who was last up [Meeker] that out of his own mouth I propose to condemn him. . . . If the people are incapable of selecting their judges, they are also incapable of selecting the man who is to appoint the judges. I think the facts will show that the people are much better qualified to select your judges than is the governor. The governor usually selects men belonging to his own political party, while the people very often select them regardless of parties. [ellipsis in source].

*Id.* at 2. Although Emmet's position prevailed then and prevails today, quite an outcry against the election of judges was raised at the turn of the century when Justice William Mitchell, Minnesota's pre-eminent jurist, failed to receive the Republican party's nomination for a place on the court (after having served since 1881), and thus was defeated in the election of 1898. R. GUNDERSON, *supra* note 30, at § XII, at 3. Until the 1898 election, judges had previously run on non-partisan tickets, as they do today. Some estimate of Justice Mitchell's reputation can be gleaned from this excerpt from a letter by Professor Thayer of Harvard Law School to a friend in Minnesota:

I am astonished to hear that there is doubt of the re-election of Judge Mitchell to your supreme court. I wish the people of Minnesota knew the estimate that is put upon him in other parts of the country, and there could be no doubt about it then. I never saw him, and have no personal acquaintance with him. I have long recognized Judge Mitchell as one of the best judges in this country, and have come to know also the opinion held of him by lawyers competent to pass an opinion on such a question. There is no occasion for making an exception of the supreme court of the United States. On no court in the country to-day is there a judge who would not find his peer in Judge Mitchell. . . . Pray do not allow your state to lose the services of such a man. To keep him on the bench is a service not merely to Minnesota, but to the whole country and to the law. [ellipsis in source].

Quoted in 1 H. STEVENS, *supra* note 29, at 71. See also Lees, *William Mitchell*, 4 MINN. L. REV. 377, 387 (1920).

217. See Schochet, *supra* note 196, at 100.

218. *Id.* at 102-03, 105. Schochet describes the events leading up to the resignations of Atwater and Flandrau as follows:

Before he [Atwater] was elected to the supreme bench, he had in the course of business loaned many thousands of dollars for eastern parties on landed security in Minnesota. The 1857 financial panic destroyed all real estate values, and rendered the payment of these loans an impossibility. As Atwater had not guaranteed the loans, he was in no way responsible to the creditors. The latter clamored for their money, and rather have his judgment criticised, the judge offered to allow them to select from his private securities amounts equal to their claims, or to give them his notes. They all accepted his notes, which left him with very large outstanding obligations. At that time Nevada Territory was in bad need of experienced lawyers, and promised especially large returns for professional services. Friends of Atwater's informed him of conditions there, and asked him to move. With the purpose of making money to meet his self-assumed obligations, Atwater resigned from the state supreme court in 1865, and moved

"Attorneys Roll," which was a register kept at the court of all attorneys admitted to practice in the state.<sup>219</sup> Eighty-nine attorneys enrolled as members of the bar during the first year of statehood.<sup>220</sup> One Thomas Cowan was the first to sign his name.<sup>221</sup> This same Tom Cowan is the subject of a marvelous anecdote by Judge Flandrau:<sup>222</sup>

"In the beginning of the settlement of the Minnesota valley, in the early fifties, a man named Tom Cowan located at Traverse des Sioux. His name will be at once recognized by all old settlers. He was a very well read and companionable man, exceedingly bright by nature, and at once became very popular with the people. There being no lawyer but one at Traverse des Sioux, and I having been elected to the supreme bench, Mr. Cowan decided to study law and open an office for the practice of that profession. He accordingly proposed that he should study with me, which idea I strongly encouraged, and after about six weeks of diligent reading, principally devoted to the statutes, I admitted him to the bar and he fearlessly announced himself as an attorney and counselor at law. In this venture he was phenomenally successful. He was a fine speaker, made an excellent argument on facts, and stood high in his profession. He took a leading part in politics, was made register of deeds of his county, went to the legislature, and was nominated for lieutenant governor of the state after its admission to the union; but of course, in all his practice he was never quite certain about the law of his cases. This deficiency was made up by dash and brilliancy and he got along swimmingly. One day he came to my office and said: 'Judgey, I am going to try a suit at Le Sueur tomorrow that involves \$2,500. It is the biggest suit we have ever had in the valley, and I think it ought to have some Latin in it; and I want you to furnish me with that ingredient.' I said: 'Tom, what is it all about? I must know what kind of a suit it is before I can supply the Latin appropriately, especially as I am not very much up in Latin myself.' He said the suit was on an insurance policy; that he was defending on the

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to Carson City, Nevada. Meeting with immediate success, he wrote to Flandrau, asking the latter to join him in Nevada, and Flandrau also resigned and moved there.

*Id.* at 102-03. Other versions of this story have Atwater and Flandrau resigning simultaneously. Also, it appears that Atwater and Flandrau resigned in 1864, not 1865. R. GUNDERSON, *supra* note 30, at § X, at 4. After about a year in Nevada, Flandrau relocated in St. Louis; by 1867 both Atwater (who had made enough practicing in Nevada to pay off his self-assumed obligations) and Flandrau again joined forces, opening a law partnership in Minneapolis. Schochet, *supra* note 196, at 105.

219. R. GUNDERSON, *supra* note 30, at § VIII, at 6.

220. 1 H. STEVENS, *supra* note 29, at 87.

221. R. GUNDERSON, *supra* note 30, at § VIII, at 6.

222. 2 H. STEVENS, *supra* note 29, at 247-48.



ground of misrepresentations made by the insured on the making of the policy, and he must have some Latin to illustrate and strengthen his point. I mulled over the proposition, looked up some books on maxims, and finally gave him this: '*Non haec in federe veni*,' which I translated to mean 'I did not enter into this contract.' He was delighted and said there ought to be no doubt of success with the aid of this formidable weapon, and made me promise to ride down with him to hear him get it off. So the next day we started, and in crossing the Le Sueur prairie, Cowan was hailed by a man who said he was under arrest for having kicked a man out of his house for insulting his family, and he wanted Tom to defend him. The justice court was about a mile from the road, in a carpenter shop, the proprietor of which was the justice. Tom told him to demand a jury and he would stop on his way back and help him out. When we arrived at Le Sueur we found that the insurance case could not be heard that day, and, starting homeward, about four o'clock, we reached the carpenter shop. There we found the jury awaiting us. We hitched the team and I spread myself comfortably on a pile of shavings, to witness the legal encounter. The complaining party proved his case. Cowan put his client on the witness stand, and showed provocation. Then he addressed the jury. His defense was want of criminal intent. He dwelt eloquently on the point that the gist of the offense was the intent with which the act was committed, and when it appeared that the act was justified there could be no crime. Then, casting a quizzical glance at me he struck a tragic attitude and thundered: 'Gentlemen of the jury, it is indelibly recorded in all the works of Roman jurisprudence, '*Non haec in federe veni*,' which means there can be no crime without criminal intent.' The effect was electrical; the jury acquitted the prisoner, and we drove home fully convinced that the law was not an exact science."

Judge Flandrau was not only a diligent judge; he was also quite a story-teller!

## *B. The Work of Minnesota's First State Supreme Court*

### *1. Case Load and Approach to Decision Making*

Minnesota's first supreme court produced 504 majority opinions over approximately a seven-year period (1858-1865).<sup>223</sup> Flandrau, who was the son of a prominent New York attorney,<sup>224</sup> wrote 218 of the

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223. Schochet, *supra* note 196, at 106.

224. Flandrau's father practiced for many years with Aaron Burr. *Id.* at 104. Atwater, like Flandrau, was from New York. He attended Yale Law School and practiced in New York City before coming to Minnesota in 1850, where he was associated for a while with John North before opening his own office. *Id.* at 101-02. Lafayette Emmett was from Ohio, where he was admitted

opinions, or 43 percent.<sup>225</sup> Twenty-five percent of the opinions were handed down without citations or references of any kind.<sup>226</sup> Flandrau explained this circumstance as follows:<sup>227</sup>

The state was new; the administration of justice was in rather a chaotic condition, and many of the important constitutional questions that came before the court for decision had to be determined upon first impression and without guiding precedent, which rendered the duties of the judges difficult and unusually important.

Thus, during the tenure of Minnesota's first supreme court, as in the territorial period, it was often impossible to do more than resolve a case and definitely settle the law in accordance with good principle. Precedent could not be cited where precedent did not exist.<sup>228</sup> Actually, this state of affairs was not without its benefits. The court's approach to the many novel problems which came before it is suggested by this passage from an early opinion:<sup>229</sup>

In a new state like our own, we enjoy the advantage of all the light which has been thrown upon questions, without being tied down by precedents which are admitted to be founded in error; and, therefore, we are free to select, as the basis of our decisions, whatever may appear to be founded on principle and reason, rejecting what is spurious and unsound, even if dignified by age, and the forced recognition of more learned and able judges.

## 2. Typical Cases

Besides cases involving questions of pleading and practice, commercial cases of various stripes were regularly before the court in the early

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to the bar in 1843. He came to Minnesota in 1851, practiced with Henry L. Moss, and served as the territorial attorney general from 1853 to statehood. *Id.* at 99-100.

225. *Id.* at 106.

226. *Id.* Jurisdictions most frequently cited in the remaining opinions were New York, Minnesota, England, and the United States federal courts. *See id.* at 111-12.

227. *Id.* at 109.

228. While the state law library had been funded since the start of the territorial period, many of the volumes in the collection were not law books, and the room they were kept in was so haphazardly organized that one could not fairly claim, back in those early days, that a law library really existed. As Judge Atwater recalled:

The early sessions of the first Supreme Court were held in a room in the north wing of the old Capitol building. There was at that time no law library for the use of the judges and we were necessarily much hampered in our work by the lack of that facility. Often we would have brief references to decisions which might be of controlling weight upon a case under consideration, but it was impossible for us to obtain any full report of these decisions. Many cases came before us, especially in real estate and railroad law, which were of first impression, and we were obliged to struggle with the questions presented with practically no aid from the textbooks or prior precedents.

Address of Hon. Issac T. Atwater, Proceedings in Memory of Justice Flandrau, Oct. 6, 1903, in 89 Minn. xxi, xxviii, xxix (1903). *See also* Schochet, *supra* note 196, at 125.

229. Selby v. Stanley, 4 Minn. 65 (Gil. 34) (1860). *See* Lightner, *Judge Flandrau as a Citizen and Jurist*, in 10 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 819, 824 (1905).

statehood period.<sup>230</sup> Logging cases were quite common. The Rum River area was the scene of much logging activity, and disputes often arose when spring floods carried logs over the falls of St. Anthony. The resultant confusion of ownership rights engendered much litigation which wound up in the supreme court.<sup>231</sup> Cases involving promissory notes and other negotiable instruments were also frequently before the court, as were insurance and real estate cases.<sup>232</sup> Problems of county and municipal organization and administration were also common.<sup>233</sup> For all the cases, the court had to reach its decisions not only without the aid of a law library and most reference materials, but also without the benefit of a consultation room. Conferences on the cases were typically held either at Judge Emmett's home in St. Paul or at Judge Atwater's residence in Minneapolis.<sup>234</sup> In one respect, however, things were the same then as today: certain people took all their troubles to court. One William Banning had ten cases reach the supreme court in the first three years of statehood!<sup>235</sup>

Details from a few early cases will suggest the inventiveness with which arguments were pressed upon the state's first supreme court and the way in which the court responded. *Parker v. Board of Supervisors*,<sup>236</sup> involved a claim by Ed Parker that he had been elected district attorney of Dakota County for 1858 and 1859. One Seagrave Smith also claimed to have been elected to the same office and backed his claim up with a certificate of election. Smith performed the duties of the office and was paid its salary; but Parker claimed that he had acted as district attorney whenever called upon to do so during 1858-59 and that he was therefore entitled to compensation. The Board rejected his claim for salary; this decision was affirmed by the district court.

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230. See Schochet, *supra* note 196, at 126.

231. R. GUNDERSON, *supra* note 30, at §§ IX, at 2, X, at 1. Short v. McRea & Register, 4 Minn. 119 (Gil. 78) (1860) is typical. The plaintiff was rafting logs on Lake St. Croix under a contract with the owners. The defendants' logs had become intermingled with logs belonging to the plaintiff's employer. The plaintiff alleged that the defendants had agreed that if he would collect and raft their logs along with his employer's, they would pay him, taking out their proportion of the logs later rather than trying to identify, separate, and gather their own particular logs now. The defendants denied this story, asserting instead that they had warned the plaintiff not to meddle with their logs unless he was prepared to buy them, at \$8 per 1000 feet. The plaintiff sued for the promised compensation; the defendants counterclaimed for damages. The plaintiff obtained a jury verdict, but the trial court granted the defendants' motion for a new trial. On appeal, the supreme court reversed.

232. R. GUNDERSON, *supra* note 30, at §§ IX, at 3, X, at 4.

233. *Id.* at § X, at 3-4.

234. Address of Hon. Issac T. Atwater, Proceedings in Memory of Justice Flandrau, Oct. 6, 1903, in 89 Minn. xxi, xxviii, xxx (1903).

235. R. GUNDERSON, *supra* note 30, at § IX, at 7.

236. 4 Minn. 59 (Gil. 30) (1860).

The supreme court also affirmed, noting that when there is but one office but one person can be in possession of it. Smith had been de facto district attorney. The Board's payment of the salary to him was proper, even if Parker was the officer de jure, for Parker's acting as district attorney whenever called upon to do so did not establish that the board had ever asked him to act in that capacity.<sup>237</sup>

Another case reaching the supreme court involved the fairly common practice by trial courts of accepting majority verdicts in civil cases after the jury had remained split for so long that unanimous agreement appeared impossible. The supreme court held that such verdicts could not be accepted, even when the defeated party consented if the party who obtained the majority verdict knew beforehand that the majority was in his favor but the other (losing) party did not.<sup>238</sup>

A third interesting case was *State v. Bilansky*.<sup>239</sup> Mrs. Bilansky was charged with murder; her defense was the ancient privilege, benefit of clergy.<sup>240</sup> In addition she contended that a provision of the Revised Statutes was intended to abolish capital punishment in the case of female offenders. In an opinion by Judge Flandrau, the court rejected both of Mrs. Bilansky's contentions.<sup>241</sup>

237. This case is discussed by R. GUNDERSON, *supra* note 30, at § X, at 2. The opinion was written by Justice Flandrau.

238. See *Snow v. Hardy*, 3 Minn. 77 (Gil. 35) (1859). This case is discussed in R. GUNDERSON, *supra* note 30, at § IX, at 6.

239. 3 Minn. 246 (Gil. 169) (1859).

240. The privilege of benefit of clergy had its development in England beginning with the murder of Thomas à Becket in 1170 and continued to its abolition in 1827. For more complete discussion of the nature and history of this privilege, see 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 293-302 (5th ed. 1942 reprinted 1966); T. PLUNCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 439-41 (5th ed. 1956).

241. Gunderson discusses this case in some detail. R. GUNDERSON, *supra* note 30, at § IX, at 4-6. For a much more lengthy discussion of the events and personalities in this case, see W. TRENNERY, *MURDER IN MINNESOTA* 25-41 (1962).

Excerpts from Justice Flandrau's opinion follow:

It is quite remarkable that a court in this country at this day should be called upon to investigate and decide questions of the benefit of clergy and petit treason; yet the peculiar provisions of our statute render it necessary. These subjects have so long been looked upon by lawyers and courts as practically obsolete, that we enter upon an examination of them more in the spirit of curious research than of useful application. . . .

'The *privilegium clericale*, or the benefit of clergy, had its origin in the pious regard paid by Christian princes to the church in its infant state, and the ill use which the popish ecclesiastics soon made of that pious regard.' 4 Black. Com. 364. At first it was confined in its operation to those persons who were actually in the service of the church, and had taken orders; but it was gradually extended until it comprehended all persons who could read, that being, in those days of ignorance and superstition, a mark of great learning, and the person enjoying this accomplishment was called a clerk, or *clericus*. The probable reason for this exemption being accorded to learned persons, was their supposed beneficial influence upon the progress of the realm in civilization and religion, as much as any sanctity with which the persons of the clergy were invested. As might well have been expected, the privilege was soon perverted to the worst purposes, and the arrogance of the privileged class soon led them to claim what had its origin in a

### 3. *Minnesota's First Supreme Court in Perspective*

When Minnesota achieved statehood, it was immediately confronted by all the difficulties which accompany the organization of government. In addition, the territory was large and sparsely settled, with settlers split into many factions.<sup>242</sup> Geography and differing political persuasions caused the development of conflicting local interests.<sup>243</sup> In these circumstances, commercial growth and political maturity were bound to be greatly affected by the determination of legal issues. How the state would develop would in large measure depend on what practices would legally be permitted. As a result, "[e]very opinion handed down by the [first] Supreme Court was eagerly awaited; it meant the clarification of some new point arising out of the early activities of the state, or some question, entirely new, which would establish, by the decision, a safe course to be followed in the future."<sup>244</sup>

Minnesota's first supreme court blazed a trail with almost every opinion. Its work was to enunciate fundamental doctrines of law to govern commercial affairs and to build up, by its decisions, a consistent body of law and practice to secure for all individuals the rights accorded by the new state constitution. This task fell to Emmett, Atwater, and Flandrau, and it had to be accomplished when the state of the law (and almost everything else in those formative days) was in an embryonic condition. As Minnesota's first three supreme court justices, Emmett, Atwater, and Flandrau did make substantial contributions to the process whereby an orderly and constructive system of justice was brought to the Minnesota frontier.<sup>245</sup>

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favor extended by the crown, to be theirs by a right of the highest nature, indefeasible, and *jure divino*.

This privilege was curtailed in England by legislation from time to time. . . . And, in the reign of George the Fourth, the absurd provision was abolished entirely. [citations omitted] So it seems that as the science of jurisprudence advanced, and it came to be understood that the possession of knowledge, instead of being the reason for exculpating a criminal, tended rather to aggravate the offense, this privilege of clergy was diminished from being a full acquittal of the offender to a mitigation merely of the punishment, and by this means, what was originally an instrument of fraud upon society, was rendered a salutary check in administering the otherwise too rigorous criminal code of England; and when the punishment of crimes was made to correspond with, and depend more upon, the degree of their enormity, it was abrogated entirely.

3 Minn. at 252-54, (Gil. at 171-73).

242. See Murray, *supra* note 22, at 112-13.

243. See note 200 *supra* and accompanying text.

244. R. GUNDERSON, *supra* note 30, at § IX, at 1.

245. Substantial contributions were made to Minnesota jurisprudence later in the nineteenth century by justices such as James Gilfillan and William Mitchell. For a reflection on Justice Mitchell see note 216 *supra*.

James Gilfillan was appointed chief justice in July of 1869 and he served until January, 1870,

## VIII. EARLY STATEHOOD EFFORTS TO ACHIEVE A RULE OF LAW: THE INDIAN UPRISING OF 1862 AND OTHER DEVELOPMENTS

Of the men who played important roles in shaping Minnesota's legal system during frontier days, two stand out among the rest: Henry Hastings Sibley and Charles E. Flandrau.<sup>246</sup> Especially during the first few years of statehood, their role in certain key developments proved essential to the firm establishment of the rule of law in Minnesota.<sup>247</sup> A few examples seem appropriate.

### A. *The Railroad Bond Case*

One of Sibley's first decisions as Governor, and one of Flandrau's first opinions (albeit in dissent), centered on the railroad bond controversy.<sup>248</sup> The controversy, and the roles of Sibley and Flandrau, have been described as follows:<sup>249</sup>

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when Christopher Riley unexpectedly won the Republican nomination for chief justice and subsequently the general election. Ill health forced Ripley's resignation in 1874, and Gilfillan was again appointed chief justice, a position he held until his death in 1894. Gilfillan and Mitchell thus served together on the court for 13 years, and upon Gilfillan's death Mitchell was among those who paid him special tribute. *See generally In Memoriam Chief Justice James Gilfillan*, 59 Minn. 539 (1895); Address of Associate Justice William Mitchell, Jan. 7, 1895, *id.* at 558-60.

246. This process was begun, of course, by Sibley and Joseph R. Brown during their years as justices of the peace prior to the establishment of Minnesota Territory. *See* notes 31-57 *supra* and accompanying text.

247. Stevens is among those who share this view. *See* H. STEVENS, *supra* note 29, at 92. Sibley and Flandrau shared similar world views. *See* Clark, *The Life and Influence of Judge Flandrau*, in 10 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY, 771, 772 (1905), where he writes of Flandrau's restless spirit of adventure: "It was the same spirit that took Henry M. Rice and Henry H. Sibley to the wilds of Minnesota." Sibley and Flandrau were also alike in their fondness for tramping and traveling through the prairies and forests of Minnesota and in their high estimation of the capabilities of Minnesota's Indians. *Id.* at 772-73.

248. *See Minnesota & Pac. R.R. v. Sibley*, 2 Minn. 13 (Gil. 1) (1858); *id.* at 22 (Gil. 11) (Flandrau, J. dissenting).

249. Lightner, *supra* note 229, at 823-24. The state bonds issued pursuant to the majority opinion in *Minnesota & Pacific* soon became a financial albatross around the state's neck. Sanborn, *The Work of the Second State Legislature*, in 10 COLLECTIONS OF THE MINNESOTA HISTORICAL SOCIETY 619 (1905). Sanborn described the situation at the end of 1859 as follows:

There was a well nigh universal demand that all further aid to the railroads already projected be withheld and refused. The Legislature was compelled to act. The State had issued to the railroad companies its seven per cent bonds to the amount of \$2,275,000, and less than fifty miles of grading had been done. The situation was intolerable . . .

The land grant railroad companies, as security for the State bonds which they had received, had issued to the State *their* bonds, which were secured by deeds of trust on the lands donated them. Default had been made in the payment of interest on these bonds, and the trustees under the trust deeds had failed to foreclose on them, as they were directed to do. The Legislature, therefore, empowered the governor to foreclose them and to bid them in for the State upon their sale. Subsequently this action was taken by the chief executive in many instances.

*Id.* at 621.

"By an amendment to the State Constitution adopted April 15th, 1858, provision was made for the issue of bonds of the state, in an amount not exceeding \$5,000,000, to several railroad companies to aid in the construction of their roads. It was provided that, before the bonds were issued, the railroad companies should give to the state certain securities, including 'an amount of first mortgage bonds on the roads, lands and franchises of the respective companies corresponding to the State bonds issued.' The Minnesota & Pacific Railroad Company, claiming to have complied with the amendment of the Constitution, demanded of Governor Sibley that he issue to it certain State bonds. He refused to do so for the reason that the bonds of the railroad company tendered as security were not such 'first mortgage bonds' as the Constitution contemplated. Thereupon the company applied to the Supreme Court for a writ of mandamus requiring the governor to issue the State bonds, and the writ was issued, two of the judges holding with the railroad company and Judge Flandrau dissenting and sustaining the position taken by Governor Sibley. When the amendment to the Constitution was adopted, the railroad company had not issued any 'first mortgage bonds.' Subsequently it made a first mortgage upon its property to secure an issue of \$23,000,000 of bonds, and the bonds which it tendered to the State were a small part of this issue. The State contended that it was entitled to first mortgage bonds which should be a prior lien upon the railroad superior to that of all other bonds, and Judge Flandrau forcibly demonstrated the soundness of his position.

At this date it seems clear that Judge Flandrau was correct.... It is certainly a very inadequate protection to the State to provide that its debtor shall give it first mortgage bonds, and then leave it to the debtor to determine how large the total issue shall be of which such first mortgage bonds are to be part. It is possible that if Judge Flandrau's views [which were identical to Sibley's] had been followed, the State bonds might not have been issued, or, if issued, they might have been adequately secured, in either of which events the credit of the State would doubtless have remained unimpaired."

### *B. The Wright County War*

Another interesting episode was the so-called "Wright County War." In 1858, a man named Rinehart, who had been arrested in Le Sueur County for murder, was taken out of jail by a mob of disguised men and hung. One or two other cases of "lynch law" had occurred, and law-abiding citizens began to insist that efforts be made to prevent similar occurrences. Then in the spring of 1859, a man named Oscar

Jackson, of Wright County, who had been regularly tried for the murder of a neighbor and acquitted, was seized by a mob at Rockford and hung. Immediately on learning of this outrage, Governor Sibley issued a proclamation warning that such "deeds of violence must cease" and that if necessary "the whole power of the state" would be "called into action to punish the perpetrators of such crimes."<sup>250</sup> A \$500 reward was offered for the arrest or conviction of those responsible for the Rockford hanging.

Not long after this, Mrs. Jackson recognized at Minnehaha Falls a man named Moore, who had been involved in the lynching of her husband. He was arrested and taken to Wright County for trial. On August 2, an armed mob broke into the building where Moore was confined and released him. The civil authorities of Wright County declared that they were powerless to stop such abuses of legal process and justice. With this, Sibley took action. He ordered the state militia to Monticello to arrest the rioters and enforce the law. Eleven people were arrested, order restored, and the Wright County War ended without further bloodshed. At the time, Sibley was attacked for the high cost of the expedition,<sup>251</sup> but on hindsight, what seems more significant is the fact that such an episode occurred at all in Minnesota.

The Wright County War suggests that the task of establishing the primacy of a rule of law in early Minnesota was not an easy one.<sup>252</sup> Sibley and the other early leaders were aware that the growth and prosperity of the new state in large measure depended on the degree to which they were successful in getting the "house of state" in order.<sup>253</sup> The primacy of the rule of law was essential to that endeavor. In the

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250. Williams, *supra* note 31, at 287. This account of the Wright County War draws heavily from Williams' version. *Id.* at 286-88.

251. *Id.* at 287.

252. The physical hardships of early practice have already been referred to. See text accompanying notes 126-33 *supra*.

253. Sanborn described the situation at the end of 1859 as follows:

The situation was, as I have said, most unhappy for the people and the State; and retrenchment and reform in public, as well as in private, affairs were vitally essential. In his message to us the retiring governor, General Sibley, presented the situation and said, 'The embarrassed condition of the State finances and impoverished situation of the people imperatively demand retrenchment in expenditures.' He knew that the State had afloat nearly \$184,000 in scrip and about \$250,000 in eight per cent bonds, while there was in the treasury, December 1st, but \$1,014.16 in cash. He knew that large sums in taxes were delinquent and could not be collected; that the people were poor, with small resources and smaller incomes. But he also knew that certain expenditures must be made, and that the State, already in favor with home-seekers, must not be allowed to take one backward step in her progress, but must push steadily onward. When, on January 2, 1860, Alexander Ramsey became governor he said in his inaugural: 'A thorough revision of all laws whereby the expenses of town, county, or State governments can be reduced is imperative.'

Sanborn, *supra* note 249, at 621-22.



railroad bond case we saw Sibley, and also Flandrau, take a position which the plain language of the law seemed to require.<sup>254</sup> In the Wright County War episode, we see Sibley taking action (rather drastic action) to *enforce* the law. Slowly, but surely, the aspirational goals of the new state constitution were being put into practice.

### C. *The Sioux Uprising of 1812*

Along with Joseph Brown, Sibley and Flandrau felt that the settlers could live in harmony with the Indians.<sup>255</sup> Sibley was one of the state's first Indian traders and lived and worked with the Indians for over 15 years.<sup>256</sup> Flandrau served as Indian agent for the Sioux.<sup>257</sup> Both men came to know the Indians well; this knowledge bred respect for the Indians, as individuals and as a race,<sup>258</sup> and concern for what would happen if humane, enlightened policies toward them were not adopted. As early as 1850, Sibley warned Congress:<sup>259</sup>

The busy hum of civilized communities is already heard beyond the mighty Mississippi. . . . Your pioneers are encircling the last home of the red man, as with a wall of fire. Their encroachments are perceptible in the restlessness and belligerent demonstrations of the powerful bands who inhabit your remote Western Plains. You must approach these with terms of conciliation and friendship, or you must suffer the consequences of a bloody and remorseless Indian war. Sir, what is to become of the fifty or sixty thousand savage warriors and their families who line your frontier when the buffalo and other game upon which they now depend for subsistence are exhausted? Think you they will lie down and die without a struggle? No, sir; no! The time is not far distant when, pent in on all sides, and suffering from want, a Philip, or a Tecumseh, will arise to band themselves together for a last and desperate onset upon their white foes.

His warnings of course went tragically unheeded,<sup>260</sup> and the even greater tragedy of the 1862 Sioux outbreak was the direct result.

As Greenleaf Clark has written: "The Indian massacres are all traceable, in the last analysis, to the encroachments upon their hunting

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254. See notes 248-49 *supra* and accompanying text.

255. See R. KENNEDY, *supra* note 67, at 49; B. PHILLIPS, *supra* note 31, at 25-26.

256. R. KENNEDY, *supra* note 67, at 61; Shortridge, *supra* note 24, at 123.

257. Clark, *supra* note 247, at 773.

258. Flandrau wrote of the Sioux and Ojibway as "splendid races of aboriginal men." *Id.* at 774. Sibley's views are well captioned in his 1850 appeal to Congress. See text accompanying note 259 *infra*. See also note 68 *supra* and accompanying text.

259. This quotation appears in R. KENNEDY, *supra* note 67, at 51-52, and in Shortridge, *supra* note 24, at 124.

260. R. KENNEDY, *supra* note 67, at 52. At the time, Kennedy writes, Congress was "pre-occupied with the problems of the black man . . . it regarded a plea for the red race as a distraction." *Id.*

grounds, their birthright, as they considered them, and to the means by which they were deprived of them, or forced to give them up. . . ."<sup>261</sup> This was not because the "Government or its agents meant to be unjust, but because such compensation as they got for these lands, by a treaty system of questionable wisdom, was dissipated by their own improvidence, or filched from them by the selfish greed and cupidity of white men, from both of which they should have been protected."<sup>262</sup> United States policy toward the Indians was "cruel at best" and their wrongs committed in the process of that policy's administration "added to the cruelty."<sup>263</sup>

What Sibley, Brown, and Flandrau and many others hoped to achieve was the slow but patient integration of the Indians into the white man's way of life.<sup>264</sup> Brown and other early Indian agents had made good progress in this respect.<sup>265</sup> If their work had been supported by Washington and followed through upon, the unfortunate convulsions of 1862 might have been avoided.<sup>266</sup>

261. Clark, *supra* note 247, at 774.

262. *Id.*

263. *Id.*

264. 2 W. FOLWELL, *supra* note 21, at 219; see Clark, *supra* note 247, at 773-74. Folwell calls the proposed integration "a noble scheme of Indian civilization." 2 W. FOLWELL, *supra*.

265. See 2 W. FOLWELL, *supra* note 21, at 220-21 for a description of Brown's efforts to create "farmer Indians." See also B. PHILLIPS, *supra* note 31, at 25-28. Another agent who advanced similar ideas and who worked to make them happen was Jonathan E. Fletcher. According to Folwell,

Fletcher 'induced many of the Indians to plant crops, to build houses . . . to have some of their children in school. . . . [H]e did not succeed in getting any considerable number converted to the white man's religion, chiefly because it was so little commended to them by the white man's example. . . . They imported their farming; gambled less, and many of them abandoned whiskey. They framed and adopted a code of laws for their government. There is reason to believe that, could they have been allowed to remain on this reserve, within a lifetime they would have become nearly if not as civilized as the Indians of New York and New England.' But the storm of wild rage which rose among the whites after the 'Sioux Outbreak' drove them out of Minnesota. 'Thus they pass beyond our horizon.'

R. KENNEDY, *supra* note 67, at 52. Of Joseph Brown's efforts, Folwell wrote:

The exigencies of party politics caused the retirement of Major Brown . . . early in 1861; a calamity, this, for the Sioux nation and for the United States. . . . Had he been left in office there would have been enough trouble awaiting them, but he might have succeeded. He might have induced many thousands, as he had many hundreds, of the Sioux . . . slowly to assume the ways of civilized men. Had he not succeeded it would have been for lack of intelligent and consistent support and because of diabolical interference by white men without bowels and conscience. What Joseph R. Brown could not do with and for the Sioux Indians could not be done.

2 W. FOLWELL, *supra* note 21, at 221. It is also interesting that the agent Brown replaced when he took over in 1857 was Flandrau, who had resigned because of his appointment to the territorial supreme court. Clark, *supra* note 247 at 773.

266. Folwell devotes a whole chapter to the causes of the Sioux outbreak. 2 W. FOLWELL, *supra* note 21, ch. VIII, at 213-41. Among the more glaring inequities were the following: farcical treaties—the disparity of bargaining power meant that the Indians "got" whatever we gave them, which was usually a promise (soon broken) of reservations where they would be protected from

Sibley and Flandrau played leading roles in quelling the Sioux outbreak, which flared up on August 18, 1862.<sup>267</sup> Governor Ramsey prevailed upon Sibley to take command of the state's forces.<sup>268</sup> He thereafter directed the entire campaign. Flandrau, then on the state supreme court, was at his home near Traverse des Sioux when the outbreak occurred. A courier arrived at his house about 4 o'clock in the morning of August 19th and told him "that the Indians were killing people in all directions, and that New Ulm was threatened."<sup>269</sup> By about noon that same day, Flandrau was on the move toward New Ulm at the head of an improvised company of over 100 men. New Ulm was reached some 8 hours later, after a march through a drenching rain. Flandrau took over the defense of New Ulm, where he organized the defenders, held off attacks by Indians in superior numbers, and then successfully engineered the town's evacuation.<sup>270</sup>

Following Flandrau's rescue of New Ulm, troops under Sibley defeated the Indians in several encounters.<sup>271</sup> By late September the Sioux outbreak was over.<sup>272</sup> A military commission was established to try the Indians involved in the massacres. Of the 425 enrolled for trial, 321 were found guilty of which 303 were sentenced to be hung.<sup>273</sup>

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the intrusions of white men, along with certain "annuities." The annuities themselves became a major source of discord, especially once it was decided to pay them in cash, for "substantially all of the money paid out for annuities went immediately into the pockets of the traders in payment for past "credits." . . . *Id.* at 214. Annuities payments, even when received by the Indians, whether in goods or cash, were also notoriously late in arriving, often because payment was continually deferred by Congress. K. VAUGHN, A SHORT BIOGRAPHY OF GENERAL HENRY HASTINGS SIBLEY 28 (1970).

Other causes of the outbreak included the seduction of Indian women by whites, which, together with the "multiplication of half-breeds [...] contributed to the [Indians'] general demoralization", 2 W. FOLWELL, *supra* note 21, at 215, and the penchant of some traders to provide the Indians with arms and liquor rather than the essentials which they needed to live in a state of something less than open rancor in the midst of the ever-increasing white population. *See generally id.* The net effect of the agency-annuity policy with respect to the Indians was to reduce them to the status of dependents. *Id.* at 214. Agents like Brown, Flandrau, and Fletcher were able to show the Indians ways of regaining some self-respect and dignity, but by and large the agents were political hacks, and it was "not to be expected that political agents at \$1500 a year should be men of high character devoted to the welfare of the Indian." *Id.* The most infamous of these agents was Andrew J. Myrick, who refused Little Crow's women and children their rations in the summer of 1862. When told of the Indians' hunger, it was Myrick who replied "let them eat grass." Myrick was one of the first to be shot on the morning of the outbreak, and he was found with his mouth stuffed full of grass. *Id.* at 233; R. KENNEDY, *supra* note 67, at 53.

267. 2 W. FOLWELL, *supra* note 21, at 109.

268. *Id.* at 147.

269. Clark, *supra* note 247, at 777; *see* 2 W. FOLWELL, *supra* note 21, at 135.

270. 2 W. FOLWELL, *supra* note 21, at 136-45; Clark, *supra* note 247, at 777-78.

271. Chief among these were the battles of Birch Coolie and Wood Lake.

272. *See* 2 W. FOLWELL, *supra* note 21, at 185.

President Lincoln reviewed all the cases,<sup>274</sup> with the end result that all but 38 had their sentences reduced.<sup>275</sup>

While it is true that many innocent people were killed by the Sioux during the 1862 outbreak, it is equally true that the uprising was caused by the harsh treatment imposed on the Indians.<sup>276</sup> As Sibley himself wrote, "the history of the treatment of the various tribes of Indians by the United States government constitutes one of the foulest blots on our national escutcheon."<sup>277</sup> Things might have been different in 1862. The fact that Sibley, Brown, and others were able to deal in an honorable way with the Indians for over 20 years prior to the outbreak suggests possibilities of a harmonious relationship never achieved. In terms of the themes of this article, the treatment accorded the Indian tribes of Minnesota in those early days is difficult to reconcile with the implicit commitment to a belief in the worth and dignity of all mankind which forms the philosophical basis for our Constitution, particularly its Bill of Rights.

#### IX. CONCLUSION

The years between 1835 and 1865 constitute the critical formative period in the history of Minnesota's legal institutions. During those years our first laws were framed and a system of government put into operation. Our courts and judges often with little to go on but their own sense of justice, endeavored to resolve disputes fairly and to forge our state's principles of common law. In all of these efforts, Sibley and Flandrau and our other legal "founding fathers" were ultimately guided by the high idealism of our state and federal constitutions. Yet as this article has shown, mere devotion to high ideals, and even their expression in official documents, does not guarantee results. Hard work, moral conviction, and a willingness to acknowledge error are some of the ingredients essential to the realization of expressed ideals. And even then there will be failures, shortcomings, and room for improvement.

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273. The figures used here are taken from K. VAUGHN, *supra* note 265, at 36. Folwell reported that 392 prisoners were tried, with 307 sentenced to death, 16 to imprisonment. 2 W. FOLWELL, *supra* note 21, at 196.

274. K. VAUGHN, *supra* note 265, at 39. See also 2 W. FOLWELL, *supra* note 21, at 209.

275. 2 W. FOLWELL, *supra* note 21, at 209. Folwell's number is 39, but only 38 were actually hung. *Id.* at 210.

276. See note 266 *supra*.

277. This quotation appears in K. VAUGHN, *supra* note 266, at 40A. See also 2 W. FOLWELL, *supra* note 21, at 210 n.36, which quotes another author on Sibley as follows:

Even in the hour of execution, he felt that the Indian, though guilty, and righteously punished, . . . died the victim of the white man's avarice, injustice, and wrong.

Looking back at the events and developments recounted in this article, one comes to realize that adherence to high principles and acknowledgment of instances of failure does not necessarily involve hypocrisy. Rather it is simply a recognition that to state an ideal is not to achieve it. The struggle to conform social behavior to high standards is a constant one. The faith is that the people and their governmental institutions will in time approximate the goal to which they are committed.

In this, our Bicentennial Year as a nation and our 12th decade as a state, we have reason to believe that we are coming closer than before to achieving the ideals that form the common heritage of our state and federal constitutions. The progress we have made must and will move us in the years ahead to guard with care the inalienable rights of *each* person to the end that *all* people may live in a self-disciplined and socially constructive way to achieve their personal goals and to further the common good.