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HISTORY OF THE MINNESOTA SUPREME COURT BY Russell O. Gunderson Clerk of Supreme Court

On February 26, 1857, Congress passed an act authorizing the then territory of Minnesota to hold a constitutional convention. The election of members for that convention, held June 1, 1857, resulted in so close a division of the votes between the Republican and Democratic parties that the delegates of each party held separate conventions. By means of conference committees, however, they succeeded in uniting on one document.

The constitution as drawn and proposed by this committee was submitted to a vote of the people October 13, 1857, and was adopted almost unanimously. On May 11, 1858, the constitution thus adopted was approved by the Federal Congress.

At this time the controversy as to whether the judiciary should be elective or appointive had reached white heat. The report of the committee on the Judicial department provided that the Governor should nominate and, with the advice and consent of the senate, appoint the supreme court judges. In opposition to this Lafayette Emmett, later to be elected one of the first members of the state supreme court bench, moved a substitute which would provide for the election of the supreme court judges by the electors of the state for a term of seven years.

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Sherburne, who had served as an appointive territorial court judge, actively opposed the elective judiciary, and was given strong support by Bradley B. Meeker, who, it will be recalled, also served on the territorial bench. During the debate which followed, Meeker said, "I contend the judges who are elected, are elected by parties, and are 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". [-1-]

It was in reply to this, that Emmett quickly arose and gave an impassioned and eloquent reply which, given more publicity at the time, undoubtedly would have gone down in history among the great sayings of great men. He said:

"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". ... So logical was this plea that the principle of his proposed amendment was immediately adopted.

On May 24, 1858, all state officers elected the previous October entered upon their duties as the first officers of the state of Minnesota.

The first supreme court for the new state consisted of Lafayette Emmett, chief justice, and Charles Eugene Flandrau and Isaac Atwater, associate justices. Jacob Noah was clerk.

Lafayette Emmett was a man of high character, good education, possessed engaging manners, and his judicial opinions are said to show more than ordinary ability. The only adverse comment ever made about Emmett was that he was indolent. As a lawyer Emmett was pointed out by his contemporaries as excelling as a counselor rather than as a trial lawyer.

He was much given over to hospitality, and his old home, still standing on West Seventh street, St. Paul, was one of the [-2-] mansions of the territorial days where free and easy hospitality was enjoyed by all callers. On Monday of each alternate week, during the winter sessions while he was chief justice, Emmett and his family opened the doors of their home to all their friends without the formality of invitation.

At the time the people of the territory voted upon the adoption of the state constitution, they also voted upon the election of all state officers. Emmett was the logical candidate of the Democratic party for chief justice. He had served as

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attorney general of the territory from 1853 to 1858, and often had appeared in the interests of St. Paul and the territory. Also an important factor was the active part he had taken in the Democratic wing of the constitutional convention. It was during this time that Emmett fought so stubbornly for an elective judiciary as opposed to an appointive one.

Emmett sat as chief justice from May 24, 1858 until January 10, 1865, when he was succeeded by Chief Justice Thomas Wilson. For a few years after leaving the bench Emmett led a rather retiring life. In 1872 he moved to Faribault, in 1878 to Ortonville, then in 1885 to New Mexico where he resided until his death.

In the seven years that Lafayette Emmett served as chief justice he wrote 125 opinions and dissented 34 times. These occur in volumes 2 to 9 of the Minnesota reports.

Some mention has already been made of Isaac Atwater. As publisher of the St. Anthony Express, one of the first newspapers in the territory, and through his service on the bench as one of the first justices of the state supreme court, he exerted a powerful influence upon the moulding and shaping of the territory and state. And his influence upon the jurisprudence of the state is immeasurable.

Judge Atwater was born at Homer, New York, May 3, 1818, [-3-] and died nearly ninety years later, December 22, 1906. He attended the rural schools of a farming neighborhood until

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sixteen, then a seminary at Cazenovia, and later the academy at Homer. He entered Yale at twenty-two and four years later, in 1844, was graduated. He taught for a year, and then after eighteen months' study in the Yale Law School he went to New York where he was admitted to the bar in 1848. The following year he married and with his wife moved to St. Anthony, now Minneapolis.

Soon after arriving in St. Anthony he took over the publishing of the first newspaper to be issued in the territory outside St. Paul, the St. Anthony Express. He served as member and secretary of the first board of regents of the University of Minnesota, lectured in the early courses given by the Library Association, and was the first initiate member of the Minneapolis Masonic Lodge. He was an incorporator of the company that erected the first bridge to span the Mississippi between Minneapolis and St. Paul. Later he aided in the formation of the Minneapolis and St. Louis Railroad Company.

Among the various offices he held were alderman of Minneapolis (one of the first), member of the first board of education, and prosecuting attorney of Hennepin county. In 1852 he reported the decisions of the territorial supreme court. He became president of the local board of trade, and in many other ways took a leading part in all the activities of those early formative days.

Atwater served on the bench of the first state supreme court from May 24, 1858 to July 6, 1864, at which date he and Flandrau resigned. Both removed to Carson City, Territory of

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Nevada, where, for a short time, they practiced law together. In the fall of 1866 Judge Atwater returned to Minneapolis and again joined Flandrau, who, after leaving Carson City, had gone to St. Louis and thence to Minneapolis. The partnership continued until Flandrau moved to St. Paul, with Atwater continuing to practice, sometimes alone and sometimes with associates. [-4-] Later he retired in time to spend the last years of his life in pursuit of personal interests.

During the six years that Judge Atwater sat on the bench he wrote 161 opinions and four dissents. They appear in volumes 2 to 9 of the Minnesota Reports.

At the time Emmett, Atwater, and Flandrau took their seats, after being elected to the first supreme court of the state, it was said that rarely if ever had three such distinguished men been found serving together at the same time.

The seal of the supreme court was established when the first court convened in 1858. The design, a Goddess of Liberty holding scales of justice in one hand and a sword in the other, was inscribed with the trite and hackneyed motto "Fiat justitia ruat caelum" -- let justice be done if the heavens fall. Soon after its appearance some one asked one of the judges what the motto meant. Jocularly the judge answered: "Those who fie at justice will rue it when we seal 'em!"

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Soon after the seal was changed to conform with that of the state seal, with the same motto and the words "Seal of the Supreme Court, State of Minnesota".

About this first seal it is said that even Jacob J. Noah, the first clerk, wasn't above poking fun at it. But then, Noah had the reputation among his friends of being a ready punster. An incident bearing this out is recounted, which happened just prior to his taking over the clerkship of the supreme court.

Noah lived at Mendota and there practiced law. At this time, as has been mentioned, a good many cases were tried in justice of the peace courts. On one occasion a lawyer by name of Brisbin of St. Paul was called to Mendota to defend a client charged with trespass.

Major, as Noah was called, appeared for the plaintiff. [-5-] Brisbin, acting for defendant, demurred to the complaint, making an eloquent and exhaustive argument in support of his position.

The justice of the peace, a venerable old Frenchman, appeared to be listening attentively, and occasionally bowed when Brisbin drove his clenched fist into the palm of his hand in punctuating some remark. Again from time to time the justice nodded in seeming approbation.

Then Major arose and began to address the court in French. Brisbin objected. He could understand no French, he said, and, what was more, all judicial proceedings must be in English.

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The Major explained that he had been merely interpreting Brisbin's remarks to the court as the judge couldn't understand a word of English!

No record seems to have been preserved on the verdict, but it is recounted that as Brisbin hurriedly departed the Major and justice were still conversing earnestly in French.

One of the first acts of the supreme court following Minnesota's admittance was the establishment of the "Attorney Roll", a register wherein all attorneys admitted to practice before the supreme court sign their names. The court order was dated July 5, 1858, and on that day Thomas Cowan was the first to so sign his name in the roll. In regard to this first attorney admitted by the supreme court, no other information is recorded.

Soon after this, December 30, 1858, the first naturalization was granted by the court to August Matthews, who as a former "native of the kingdom of Prussia" was declared to be a citizen. [-6-]