Early Minnesota Legal History
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May 1, 2010
St. Paul, Minnesota

MINNESOTA UNDER FOUR FLAGS

The land comprising Minnesota is said to have been under four national flags, those of Spain, France, Britain, and the United States. Most of the state west of the Mississippi became territory of the United States upon the Louisiana Purchase of 1803, and prior to Minnesota's becoming a territory was part of the Iowa Territory. (The exception is a portion of northwestern Minnesota, which was part of Rupert's Land and was ceded by Britain under the Treaty of 1818). The portion east of the Mississippi formed a portion of the Northwest Territory, the Indiana Territory, the Illinois Territory, the Michigan Territory, and the Wisconsin Territory.

The first American organic law which could be said to address the region was the Northwest Ordinance of 1787. While rarely if ever cited, it could be argued that some privileges accorded under the Northwest Ordinance remain in effect. Indeed, the text of the Northwest Ordinance is contained within the first volume of Minnesota Statutes Annotated. The Northwest Ordinance, was adopted by the Continental Congress in 1787, and predates the U.S. Constitution. It was formally re-ratified (with slight modifications) in the Constitutional era by Congress in 1789. Northwest Ordinance of 1787, U.S. Rev. Stats. (1878), reprinted in 1 Minn. Stat. Ann. 39-45 (1976).

In some respects, the Northwest Ordinance purports to act in perpetuity. For example, Article II provides, ""[t]he inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus, and of the trial by jury." (Emphasis added.)

Unfortunately, on many occasions when the Northwest Ordinance (or another historical argument) is actually cited by a litigant, it seems to be done quite inartfully. For example, it probably doesn't bode well when a pro-se litigant receives an order from the court which begins with language such as: "A review of the complaint reveals that Plaintiff is attempting to bring this action under the Declaration of Independence and the Northwest Ordinance. However, neither provides Plaintiff with a cognizable basis for his suit."
Black v. Simpson, 2008 WL 544458 (W.D. Ky. 2008). It is sometimes cited, however, as an aid to construing subsequent statutes and constitutions. See, e.g., State v. Combs, 504 N.W.2d 248, 251 (Minn. 1993).

THE FORMATION OF THE MINNESOTA TERRITORY

Iowa was admitted to the Union as a state on December 28, 1846, and Wisconsin was admitted to the Union on May 29, 1848, each with its present boundaries. No provision was made for the governance of the portions of each territory that was not included in the respective state. This did cast the legal status of these lands into some considerable doubt, since they were presumably

territories with no government.

However, apparently territorial officers in St. Croix County continued to function in those portions of the territory not included within the State of Wisconsin. As Henry Sibley points out in his speech before Congress:

> For either the Territorial organization is perfect and complete, or it has been entirely abrogated and annulled. The same authority which provides for the election of a Delegate, gives the power to choose other officers. All must stand or fall together. If we have no organization, as is contended by the honorable gentleman from North Carolina, then have our judicial and ministerial officers rendered themselves liable to future punishment for a usurpation of power. If a malefactor has been apprehended, or a debtor arrested, the officers serving the writ will be visited hereafter with an action for false imprisonment.

Text available online at:

http://www.mnterritorialpioneers.org/info/hist/speech-sibley.htm

The speech quoted above was given by Henry Hastings Sibley during one of the most interesting chapters in Minnesota history. He had been elected by the citizens of the area as the delegate to Congress of the Wisconsin Territory, even though the State of Wisconsin had been admitted to the Union and was represented in its own right in Congress. Sibley made a strong case that the inhabitants of the territory cannot be left without any governance, and over some objections, was seated and worked toward establishment of the Minnesota Territory.

The first movement toward establishment of the territory took place at a convention held in Stillwater on August 26, 1848. The convention did not purport to have any legal standing, but petitioned Congress and the President for organization of the territory, and elected an unofficial delegate, Henry Hastings Sibley, to go to Washington to plead the case.

Sometime after the Stillwater Convention, a person who historian T.C. Blegen calls an "ingenious soul" put forth the idea that the Wisconsin Territory continued to exist, and was entitled to a delegate to Congress. John Caitlin, the Secretary of the (former) Wisconsin Territory came to Stillwater, and took the position that the office of Territorial Governor had lapsed into vacancy, since Governor Henry Dodge had been elected Senator. Thus, he assumed the position of acting governor, and called an election to be held on October 30.

This election was held. Indeed, the records of this election exist within the archives of St. Croix County, Wisconsin. Sibley won the election against Henry M. Rice, and went to Washington.

He made what Blegen rightly calls "a remarkable speech" (a portion of which is quoted above) on December 22, 1848, to the House Committee on Elections. Sibley was seated, and he set about securing territorial status for Minnesota, which was achieved on March 3, 1849.

See generally, T.C. Blegen, Minnesota: A History of the State at 161-62 (2d ed. 1975); W.W.

Folwell, A History of Minnesota, vol. 1, pp. 236-246 (Rev. ed. 1956).

One historical curiosity is that Sibley, even though seated as delegate from the Wisconsin Territory, was never a resident of the territory. His home, at Mendota, was west of the Mississippi, which would have made him a resident of Iowa Territory.

Blegen, one of the state's foremost historians, calls the continued existence of the Wisconsin Territory to be a "benign fiction", and notes that "[t]he truth is that the Minnesota country lacked territorial organization until Minnesota Territory was created in 1849."

Blegen wasn't a lawyer, and I'm not so sure I would be so quick to dismiss the continued existence of the "rump" Wisconsin and Iowa territories after their respective statehoods. As Sibley opined, a land cannot simply become without law overnight. Sibley was astute as both a merchant and lawyer, and he undoubtedly realized that some fundamental structure had to still exist. (It should be noted that Sibley was a very well educated man. His father, Solomon Sibley, served on the Michigan Supreme Court from 1824 to 1837, the last ten years as Chief Justice.)

Sibley went to Washington as the delegate from Wisconsin Territory in order for that structure to be recognized and codified. Largely due to his efforts, the Minnesota Territory was organized on March 3, 1849.

The organic act creating the new Minnesota Territory specified that the laws of the Territory of Wisconsin would remain in effect, presumably even in the portions of the territory west of the Mississippi which weren't part of the Wisconsin territory in the first place. And there is a similar "chain of title" by which the laws of the Northwest Territory became the law of the Indiana Territory, which became the law of the Illinois Territory, which became the law of the Michigan Territory, which became the law of the Wisconsin Territory. See generally, D. Heddin, "The Quicksands of Originalism: Interpreting Minnesota's Constitutional Past", 30 Wm. Mitchell L. Rev. 241 (2003).

The Organic Act which organized the Minnesota Territory on March 3, 1849, appears in the first volume of Minnesota Statutes Annotated. The Organic Acts of these predecessor territories do not, but could presumably have some application.

THE MINNESOTA CONSTITUTION

The story of the Minnesota Constitution is interesting in that there are two original documents, with some minor differences between them.

When the convention convened, there were two men on the platform purporting to chair it. The Democratic chairman took a motion to adjourn until the next day. Meanwhile, the Republican chairman continued to preside. The democrats then left the chamber, and upon their return the next day, they found the chamber occupied. Undaunted, they simply moved to the other chamber, and held their own convention. Each convention published its own journal of the proceedings.

Somehow, a small conference committee was able to produce a single document to which both sides could agree. However, the two conventions never met together, and two copies of the document were ratified, one subscribed by the republican delegates, and the other subscribed by the democratic delegates. One of these copies was officially transmitted to Congress. However, the other copy found its way to Washington as well, and it was this second copy that was attached to the bill admitting Minnesota to the Union.

Therefore, the conclusion is inescapable that both versions, with their minor differences, stand on equal footing.

The state constitution was most recently revised and re-codified in 1974. However, "the revision and restructuring of the state constitution in 1974 was never intended to change long-standing constitutional interpretations. As the comments by the Minnesota Constitutional Study Commission indicate, even if inadvertent changes were made in 1974, this court should 'revert to the meaning of the original document.'" State v. Hamm, 423 N.W.2d 379, 381, n. 1 (Minn. 1988)(citation omitted). See also, Butler Taconite v. Roemer, 282 N.W.2d 867, 868 n. 1 (Minn. 1979). Thus, for example, in State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777, 780 (Minn. 1986), the court, in construing a provision, also quotes the corresponding 1857 language.

The differences between the two original documents, while minor, are indeed there. If the placement of a comma might be important to the construction of a particular provision, then it's really worth the practitioner's while to consult the two original documents and see if it's really in the same place in both. It might not be!

EARLY LITIGATION

Browsing through the early volumes of Minnesota Reports gives an interesting perspective of life in the days of the Territory, and the early days of the State. As one progresses chronologically, it is quite evident that the area is becoming exponentially more and more prosperous.

For example, one interesting, but probably not particularly relevant to the practitioner, is The Dr. Franklin, 1 Minn. 73 (Gil. 51) (Minn. Terr. 1852), a rather nondescript case in which a steam boat ran into a boom at the upper landing in St. Paul, causing the loss of plaintiff's logs valued at $150.

The case hasn't been cited since 1906, and probably won't be again. However, this is the type of case that's just interesting reading. Among other things, the ship named in the case, The Doctor Franklin, is rather prominent in early Minnesota history, as it served as a major lifeline with the outposts of civilization at Prairie du Chien and Galena. Indeed, in 1849, it was the Doctor Franklin that first brought news of the formation of the Minnesota Territory.

The opinion in that case of Chief Justice Jerome Fuller seems to show an understanding of the problems of the district judge, especially on the frontier:

> A judge is not to be trapped by being called upon in the hurry of a trial to analyze a mass of legal maxims and solve a long series of problems and find the true result, on pain of having his decisions set aside if he errs. He is bound to look into them so far only as to see that they do not contain anything improper for a charge, and if they do, may refuse the whole. The counsel himself must put his finger on the precise point which he wishes decided, and take good care that his request is not too large, or his proposition too broad. And if the decision is against him, he must object to it specifically. When a general objection is made to the decision of a court, on the trial of a cause, and on a review thereof, it appears that the decision, if erroneous at all, is only in part, such objection will not be available, from the want of precision in its statement at the trial.

Interestingly, Justice Fuller, while appointed by President Fillmore, was not confirmed by the Senate. However, news of his rejection by the Senate did not reach St. Paul until after he had started work. Upon the arrival of the news, Fuller returned to New York, where he was elected a county judge.

The first volume of Minnesota Reports covers the territorial period. And since the organic Act specifically referenced the laws of the Wisconsin Territory as remaining in effect, there is possibly some precedential value in the decisions of the Supreme Court of the Wisconsin Territory. These cases can be found in the early volumes of Pinney's Wisconsin Reports (Pin.), with possible parallel cites in Burnett's Reports (Bur.) and Chandler's Reports (Chand.)

Volume 1 of Minnesota Reports contains 81 decisions of the territorial supreme court. In some cases, the decision was not available to the reporter, and in other instances, the arguments of counsel are summarized, but the court’s decision is missing.

But in most cases, the court’s full opinion is present, and here is a rough breakdown of the number of cases by subject:

Animals	1
Appellate procedure and jurisdiction of supreme court	6
Common carriers	2
Constitutional law	1
Criminal law and procedure	2
Depositions and Discovery, pretrial procedure	3
Interest	1
Judgments and Executions	9
Jurors	1
Liability under bond	1
Libel and slander	1
Liens	2
Navigable waters	1
Negotiable instruments	8
Parol Evidence	1
Partnership, Principal and agent	4

Real property, deeds, Public lands	5
Sale of Goods, Contracts, Damages	9
Statute of frauds	1
Trial court procedure, jurisdiction, and venue	14

In addition to being interesting curiosities of a bygone era, there are some instances in which these Territorial decisions might have special significance.

One area where territorial law has special significance is in the interpretation of the Constitution's recognition of the right to trial by jury.

Many state constitutions explicitly state that the right to trial by jury shall remain "as heretofore". For example, Article I, Section 13, of the Illinois Constitution states: "The right of trial by jury as heretofore enjoyed shall remain inviolate." Since the state constitution was adopted at the time of statehood, this type of provision essentially enshrines in the constitution the right of jury trial, as it existed under the territorial law.

Article I, Section 4, of the Minnesota Constitution states that the "right of trial by jury shall remain inviolate...." While the Minnesota Constitution does not, as in many states, include the words "as heretofore", this is strongly implied by the use of the verb "remain". Indeed, the Supreme Court has stated: "From the beginning it has been held that the effect of this provision is to recognize the right to a jury trial as it existed in the territory at the time of the adoption of the Constitution and to continue such right unimpaired." Hawley v. Wallace, 137 Minn. 183, 187, 163 N.W. 127 (Minn. 1917), citations omitted. See also, Abraham v. County of Hennepin, 639 N.W.2d 342, 348 (Minn. 2002).

So obviously, in a case involving the construction of the right to trial by jury, the decisions of the Territorial Supreme Court (and the territorial statutes) are of special relevance. And arguably, the same can be said for the territorial laws of Wisconsin, Illinois, Indiana, and the Northwest Territory, since those laws became effective in the new territories carved out when statehood was granted.

To the extent that any other provision of the constitution can be construed as memorializing existing practice, territorial law would similarly be relevant.

The subject of jurors is indeed addressed in a number of reported territorial decisions. For example, St. Martin v. Desnoyer, 1 Minn. 156 (Gil. 131) (Minn. Terr. 1854), holds that juror affidavits are not competent evidence to impeach a verdict.

Steele v. Maloney, 1 Minn. 347 (Gil. 257)(Minn. Terr. 1857) is interesting in that, at the time of trial, there was an insufficient number of jurors available. Undaunted, the trial judge sent the sheriff out (I would guess to a tavern, but the case doesn't say) to summon some more. The court approved of this practice, albeit with some reservations, noting that "it often happens--and especially in a new country, inhabited by a mixed and constantly changing population--that the original panel falls far short of the requisite number. To remedy

this deficiency, the legislature gave to courts the authority found in" a territorial statute.

Steele also upheld the verdict against an untimely challenge that one of the jurors had not lived in the territory the requisite length of time, noting that a different rule "would place verdicts upon a foundation so precarious, that parties would never know when they were to approach the end of a lawsuit."

The right to jury trial is one area where territorial law is of special significance. Perhaps there are others, where it can be argued that the constitution purports to guarantee the continuation of existing practice. If so, territorial law takes on special significance.

JUDGES OF THE TERRITORIAL SUPREME COURT

The territorial Supreme Court consisted of a chief justice and two associate justices. The territory was divided into three judicial districts, and each of these judges presided over one of the three district courts. Russel O. Gunderson, History of the Minnesota Supreme Court (1937), section II, available online at:

http://www.lawlibrary.state.mn.us/judges/gunderson.html

The chief justices of the territorial Supreme Court were:

Aaron Goodrich (1849-1851)
Jerome Fuller (1851-1852)
Henry Z. Hayner (1851-1852)
William H. Welch (1853-1858)

The associate justices were:

David Cooper (1849-1853)
Bradley B. Meeker (1849-1853)
Andrew G. Chatfield (1853-1857)
Moses Sherburne (1853-1857)
Rensselaer R. Nelson (1857-1858)
Charles Eugene Flandrau (1857-1858)

http://www.lawlibrary.state.mn.us/judges.html

All of these territorial judges were appointed by the President, with the advice and consent of the Senate.

BIOGRAPHIES OF EARLY LEGAL FIGURES

Henry Hastings Sibley

http://www.mnhs.org/people/governors/gov/gov_04.htm

Chief Justice James Gilfillan

http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9B04E5DB1231E033A25754C1A9649D94659ED7CF

http://www.lawlibrary.state.mn.us/judges/memorials/Mem59Gilfillan.pdf

Alexander Ramsey

http://www.mnhs.org/people/governors/gov/gov_01.htm

Chief Justice Aaron Goodrich

http://collections.mnhs.org/MNHistoryMagazine/articles/39/v39i04p141-152.pdf

Chief Justice Jerome Fuller

http://en.wikipedia.org/wiki/Jerome_Fuller
http://www.lawlibrary.state.mn.us/judges/Gunderson/5GundersonSecVp35-41.pdf

Chief Justice Henry Z. Hayner

http://www.lawlibrary.state.mn.us/judges/Gunderson/5GundersonSecVp35-41.pdf

Chief Justice William H. Welch

http://www.lawlibrary.state.mn.us/judgebio.html

Justice Bradley B. Meeker

http://www.minnesotalegalhistoryproject.org/assets/J.%20Williams%20on%20Meeker.pdf

Justice Moses Sherburne

http://www.lawlibrary.state.mn.us/judgebio.html

Justice Charles Eugene Flandrau

http://en.wikipedia.org/wiki/Charles_Eugene_Flandrau

Henry M. Rice

http://www.aoc.gov/cc/art/nsh/rice.cfm
http://www.mnterritorialpioneers.org/info/hist/rice.htm

QUESTION AND ANSWER SESSION