



Calendar of Events

- January 20, 2017 - High School Essay Contest - Submissions Due
- March 2017 - High School Essay Contest - Winners Announced
- May 2017 - State History Day (University of Minnesota)
- Summer 2017 - Supreme Court Law Clerk Reunion (Town & Country Club - 12:00 p.m.)
- Summer 2017 - Grand Reopening of the Minnesota State Capitol
- November 2017 - Annual Meeting/ Reception



INSIDE THIS ISSUE:

Celebrating the 25th Anniversary of A Women Majority	2
Major Minnesota Decisions— Highlighting <i>Minneapolis & St. L. Ry. Co. v. Bombolis</i>	4
Memorials to Deceased Justices— Highlighting Charles E. Flandrau (1828-1903)	6
Gene Hennig: Life as a Law Clerk at the Minnesota Supreme Court in the 1970's	7
Committee Activities	9
Trivia Answers	9
Membership Info	9

Trivia Questions



On October 6, 2016, the Society held its Third Annual Justice Jeopardy, organized by Bill and Andrew Hart. Here are a few of the questions:

1. In the 1980s, this former Minnesota supreme court justice served as the Commissioner of the Minnesota Pollution Control Agency and the Department of Human Services, and chaired the Met Council.
2. In 2003, Pat Connelly wrote an article for the publication *Loquitur* showing that Louisa F. Goodwin was the first woman to hold this position in any state. Name this position that, in Minnesota, has also been held by Marvin R. Anderson and Elizabeth Reppe.
3. Two men with this same surname were elected to the Minnesota Supreme Court during the 1940s. Their first names were Thomas and Frank.
4. Name the following pioneering Native American judges in Minnesota:
 - a. In 2016, this former presiding judge of the Hennepin County Family Court became the first Native American Woman to serve on any state supreme court.
 - b. In 2010, this magistrate judge in the District of Minnesota became the second Native American to serve as magistrate judge in the U.S.

(Trivia Answers on page 10)

DID YOU KNOW?

Nine States Have Had Women Majority Supreme Courts:

- Minnesota - 1991, 2016
- Michigan - 1997
- Ohio - 2002, 2005, 2011
- New York - 2003, 2008, 2013
- Wisconsin - 2003
- North Carolina - 2009, 2011
- Tennessee - 2009
- New Jersey - 2011
- New Mexico - 2015

YOUR COMMENTS INVITED

We invite your comments or observations on the contents of this Newsletter. Please send to shanson@briggs.com

Celebrating the 25th Anniversary of a Women Majority on the Minnesota Supreme Court

By Thomas Boyd

On November 3, 2016, the Society dedicated its Annual Meeting to the Celebration of the 25th Anniversary of a Women Majority on the Minnesota Supreme Court.

In 1991, Minnesota had the distinct honor of being the first state in the Country to have a majority of women on its court of last resort. The four women who served on the Minnesota Supreme Court at that time came from widely varying personal and legal backgrounds. Each of these women have served as role models to inspire all of Minnesota's citizens—lawyers and non-lawyers alike.

The Honorable Rosalie E. Wahl was appointed to the Court by Governor Rudy Perpich in 1977. She had grown up in Kansas during the Great Depression. Her mother died when she was only three years old. At age seven, she saw her grandfather and little brother killed by a train. Her family could not afford an attorney to sue the railroad that was at fault. Rather than being crushed by these tragic experiences, Justice Wahl embraced the positive aspects of life—she had a love of reading, writing, and poetry; she pursued education; she gained inspiration in fellowship and singing; and she gathered strength through faith. Most of all, Rosalie Wahl had an unflinching, unswerving, unyielding dedication to the pursuit of justice and fairness for all.

As a student at the University of Kansas, she worked towards integrating campus housing. She continued to work for social change when she and her husband moved to Minnesota and started their family. But the male-dominated establishment imposed barriers. She grew “tired of sitting outside doors waiting for the men inside to make decisions.” In 1962, at age 38 and while raising her young children, she enrolled at the William Mitchell College of Law. Upon graduation, she went to work in the newly created Office of the State Public Defender. She would argue more than 100 cases before the Minnesota Supreme Court in the next ten years. During this time, she also founded and directed the Clinical Legal Education program at William Mitchell.

By 1977, Minnesota, like the vast majority of states, had never had a woman serve on its highest court. Governor Perpich rectified this by appointing Rosalie Wahl. He firmly believed that she was well-qualified to serve on the Minnesota Supreme Court. He also believed that she inspired such deep respect and sincere passion that she could fend off the certain challenge that she would encounter in the general election. Sure enough, Justice Wahl faced five opponents—all male. She campaigned hard and prevailed in the election based on her promise of “Justice for All.”

She fulfilled this promise throughout her 17 years on the Court. During her career and throughout her life, she was “guided by those ‘values which were sprouted by the hearth—a sense that every individual in the human family is a unique and precious being, a sense of justice and fair play, a sense of compassion where justice ends or fails.’” Her leadership as Chair of the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System reflected these values. She vowed “that we will not cease our efforts until this court system . . . treats every person equally before the law—and with dignity and respect—regardless of such irrelevancies as race or gender or class.”

Five years after Justice Wahl's appointment, Governor Al Quie selected Mary Jeanne Coyne to serve on the Minnesota Supreme Court. Prior to that time, she had practiced law for 25 years in

Minneapolis with the law firm now known as Meagher Geer.

Justice Coyne was born and raised in Minneapolis. She went on to be a distinguished student at the University of Minnesota, where she earned her undergraduate and law degrees. She served on the Minnesota Law Review and, following graduation, clerked for the Honorable Leroy E. Matson on the Minnesota Supreme Court.

In 1957, she entered private practice in Minneapolis and earned a well-deserved reputation for her expertise in the area of insurance law. She also became one of the state's finest appellate lawyers, arguing more than 100 cases before the Minnesota Supreme Court involving a wide variety of areas and issues. Former Chief Justice Douglas Amdahl said of Justice Coyne: “She was a very strong woman, a top legal mind. . . . She loved the law and studied it and examined it.”

Justice Coyne served on the Minnesota Supreme Court for 14 years—from 1982 to 1996. Her keen intellect and wealth of experience in private practice combined to make hers an authoritative voice on the Court. Retired Chief Justice Sandy Keith said that “[s]he didn't always agree with me, but we had some wonderful discussions.” While gracious with her colleagues, staff, friends, she could also be quite demanding of counsel. In an article describing an oral argument before the Court, the *New York Times* wrote “[t]he most barbed questions came from Justice Coyne, who proved that in an increasingly egalitarian age, women judges, too, can be called ‘crusty.’”

Although only the second woman to serve on the Minnesota Supreme Court, Justice Coyne preferred to downplay the role of gender among the justices. She was known to say that in her view, “[a] wise old man and a wise old woman often reach the same conclusion.”

The Honorable Esther Tomljanovich grew up in northern Minnesota in a small town near the Iron Range. Her family lived in a modest home that had no electricity and no running water, and she was educated in a one-room school house. This hardscrabble beginning did not dampen her ambition. She read every one of the books in the local library. She was also a devoted listener to the radio show “Portia Faces Life,” which told the story of a young attorney who fought for justice in her small town. Justice Tomljanovich was determined to become a lawyer.

After attending the local college, she took a bus to St. Paul where she got a room at the YWCA and a clerical job with a local insurance company. She then enrolled at the St. Paul College of Law where she was the only woman in her class. Following graduation in 1955, she was hired as Assistant Revisor of Statutes for the Minnesota Legislature. She was later appointed the first woman in Minnesota history to serve as the State Revisor of Statutes.

In 1977, Governor Perpich appointed her to the District Court in the Tenth District. She served on the trial court for thirteen years, during which time she earned a reputation as an erudite, fair-minded, and compassionate judge. The respect she garnered from her colleagues was evidenced when they elected her the first woman Assistant Chief Judge in Minnesota.

In 1990, Governor Perpich appointed Justice Tomljanovich to the Minnesota Supreme Court where she served for eight years. In addition to her decision-making responsibilities, she served as

(Continued on page 3)

Celebrating the 25th Anniversary

Continued from page 2

Chair of the Implementation Committee of the Minnesota Supreme Court Task Force on Gender Fairness in the Courts. She was a founder of Minnesota Women Lawyers and a stalwart supporter of William Mitchell where she has been mentor to countless law students.

On January 4, 1991, the Honorable Sandra Gardebring was sworn in as an Associate Justice of the Minnesota Supreme Court. This marked the first time in American history that any state had a majority of women serving on its highest court.

Justice Gardebring had been born and raised in North Dakota, and had earned her undergraduate degree from Luther College before enrolling at the Minnesota Law School. She was an excellent student and an editor on the Law Review. Following graduation, she began her career as a Special Assistant Attorney General where her abilities and talents were quickly recognized.

In 1977, Governor Perpich appointed her Commissioner of the Minnesota Pollution Control Agency. She then served as a director in the United States Environmental Protection Agency. She was thereafter reappointed to serve as Commissioner for the MPCA, then Chair of the Metropolitan Council, and finally, as Commissioner of the Minnesota Department of Human Services. Governor Perpich appointed her to the Minnesota Court of Appeals in 1989, and thereafter to the Supreme Court in 1991. The

Honorable Alan Page described her as “a star,” and said “[i]t’s not likely that anyone soon will be able to accomplish all the things she did in the short time she was here.”

Justice Gardebring served on the Minnesota Supreme Court until 1998, when she stepped down to serve this State in yet another capacity as a vice president of the University of Minnesota. Her colleague the Honorable Paul Anderson has said: “She very much believed that government has a proper role to make things better for people. . . . She was a consummate public servant.”

The four women who served on the Court in 1991 were very different in many ways. Justice Wahl had been a public defender and law professor before her appointment; Justice Coyne had been a partner in a large law firm; Justice Tomljanovich had been a trial judge; and Justice Gardebring had been a government administrator and then a judge on the court of appeals. While their professional and personal backgrounds varied, all four of these women provided distinguished service to this State and all Minnesotans, and have made great contributions through their deep commitment to justice and fairness in the United States.

Biographical Sketches of the 1991 Women Majority on the Minnesota Supreme Court

Honorable Rosalie E. Wahl.

Born: August 27, 1924, in Gordon, Kansas. Education: B.A. University of Kansas, 1946; J.D. William Mitchell College of Law, 1967. Employment: Assistant Public Defender, 1967-1973; Clinical Professor, William Mitchell College of Law, 1972-1977. Judicial Service: Associate Justice, Minnesota Supreme Court, 1977-1994. Other Service: Chair, Gender Fairness Task Force; Supreme Court Commission on the Mentally Disabled; Co-Chair, Racial Bias Task Force; Chair, ABA Law School Accreditation Committee. Died: July 22, 2013.

Honorable M. Jeanne Coyne.

Born: December 7, 1926, in Minneapolis, Minnesota. Education: B.S.L. University of Minnesota, 1955; J.D. University of Minnesota Law School, 1957; Member, Board of Editors and Associate Editor, Minnesota Law Review. Employment: Law Clerk to Justice Leroy E. Matson, Minnesota Supreme Court, 1956-1957; Private Practice, Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan, 1957-1982; Adjunct Instructor in Appellate Advocacy, University of Minnesota Law School, 1964-1968. Judicial Service: Associate Justice, Minnesota Supreme Court, 1982-1996. Other Service: Editor, Women Lawyers Journal; Advisory Committee on the Rules of Civil Appellate Procedure. Died: August 6, 1998.

Honorable Esther M. Tomljanovich.

Born: November 1, 1931, in Galt, Iowa. Education: Itasca Junior College, 1951; J.D. St. Paul College of Law, 1955. Em-

ployment: Minnesota Mutual Life Insurance Co., 1951-1957; Assistant Revisor of Statutes, 1957-1966; County Attorneys Association, 1972-1974; Revisor of Statutes, 1974-1977. Judicial Service: District Judge, Tenth Judicial District, 1977-1990; Associate Justice, Minnesota Supreme Court, 1990-1998; Other Service: Constitutional Study Commission; Commission on Status of Women; Chair, Judicial Selection Committee; Chair, Criminal Jury Instruction Guide Committee; Chair, Supreme Court Judicial Evaluation Committee.

Honorable Sandra S. Gardebring.

Born: June 15, 1947, in Bismarck, North Dakota. Education: B.A. Luther College, 1969; J.D. University of Minnesota Law School, 1973; Minnesota Law Review. Employment: Reporter, Bismarck Tribune, 1969-1970; Special Assistant, Minnesota Attorney General, 1973-1977; Commissioner, Minnesota Pollution Control Agency, 1977-1979 and 1982-1984; Director, U.S. Environmental Protection Agency’s Region 5 Enforcement Division, 1979-1982; Chair, Metropolitan Council, 1984-1986; Commissioner, Minnesota Department of Human Services, 1986-1989. Judicial Service: Judge, Minnesota Court of Appeals, 1989-1991; Associate Justice, Minnesota Supreme Court, 1991-1998. Other Service: Vice President of University Relations, University of Minnesota, 1998-2004; Vice President for Advancement, California Polytechnic State University, 2004-2010. Died: July 20, 2010.

Major Minnesota Decisions—Highlighting *Minneapolis & St. L. Ry. Co. v. Bombolis* By Marshall H. Tanick

This year marks the 225th anniversary of the ratification of the Bill of Rights, which occurred on December 15, 1791, when the requisite 10 of the 14 states, (the original 13 plus Vermont, which was added after the Revolution), approved the first ten amendments to the Constitution, which had been approved by Congress and submitted to them three months earlier. Another milestone occurs this year, the centenary of a significant decision of the U.S. Supreme Court of a case from Minnesota that highlights some key considerations under the Bill of Rights. Although discredited over the years, the ruling remains a bedrock of the principle of federalism underlying the nation's Constitutional form of government.

The case celebrating its 100th anniversary is *Minneapolis & St. L. Ry. Co. v. Bombolis*, 241 U.S. 211 (1916). Decided near the close of the High Court's 1915-16 Term, the ruling affirmed a decision 17 months earlier by the Minnesota Supreme Court, 128 Minn. 112, 150 N.W.2d 385 (1914).

Written by Chief Justice Edward White, the *Bombolis* ruling held that the Seventh Amendment right to a jury trial in civil cases, which embraces common law principles, does not apply to the states. That proposition might be, and actually is, seriously questioned if it were made today. But, for its time, it was an unexceptional decision that seemed to be a no-brainer for the High Court, which rather cavalierly deemed the issue to be "completely and conclusively ... and so thoroughly settled" as to barely cause a ripple in the sea of jurisprudence. Since then, the tide has turned, accompanied by a sea change in constitutional jurisprudence, and *Bombolis* may have been the turning point in that progression.

But before seeing how the *Bombolis* doctrine came about – and what happened to it later – a look at the background case is warranted. The underlying lawsuit was a wrongful death action brought in Hennepin County under the recently enacted Federal Employers' Liability Act (FELA), a form of workers' compensation for injured workers in the railroad industry and other interstate transportation modes.

Although a Federal statute, FELA authorizes concurrent jurisdiction, either Federal or state courts, similar to a small number of other federal statutes, such as the Family Medical & Leave Act (FMLA), for example. FELA also allows jury trials, contrary to conventional workers' compensation laws in Minnesota and most other states, which have specialized administrative or judicial bodies that handle these cases for injured workers without juries. Those laws were the product of the Progressive era enacted during the early part of the 20th century, as was FELA.

The *Bombolis* case was brought by the estate of a deceased railroad worker who was struck and killed by a train while he was repairing a truck in the Kenwood rail yards on the outskirts of downtown Minneapolis. The lawsuit was tried to a 12-person jury. Under Minnesota state law enacted in 1913, a unanimous jury verdict was required for a jury decision in civil cases, although the unanimity requirement was reduced to 5/6ths after 12 hours of deliberations without reaching a result. This is similar to the current law, Minn. Stat. § 546.17, which allows departure from unanimity after six hours of deliberation, as authorized by amendment to Article 1, § 4 of the State Constitution. The stat-

ute was amended in 1986 to allow that deviation from unanimity after six hours of deliberation and also provides for other fractional jury decisions. Unanimity, however, is mandated in criminal cases, pursuant to the state Constitution, statute, and Rules of Criminal Procedure.

After impasse upon the end of the 12 hour period, the *Bombolis* jury returned a 5-6 verdict for the princely sum of \$3,750 in favor of the estate of the injured claimant. The railroad appealed to the Minnesota Supreme Court, long before the existence of the intermediate court of appeals. It argued that the 5/6 verdict was allowing less than a unanimous jury verdict and was repugnant to the common law requirement of unanimity, which was embedded in the Seventh Amendment. Fidelity to that mandate, the railroad argued, dictates application of the principle of unanimity to a right created by Federal law and requires reversal and a new trial.

But its argument was rejected by the state Supreme Court, which affirmed the verdict. Most of its analysis focused on pleading, proof, and jurisdictional issues, and reached the jury's finding in the last passage of its

ruling, citing an earlier Minnesota case, that "the five-six jury law" applies in FELA cases in state court. 128 Minn. at 118, 150 N.W.2d at 387.

The case reached the High Court for its 1915-16 Term, the 125th anniversary of the Bill of Rights. The justices in the nation's Capitol, too, affirmed unanimously with a pungent explanation that it had by Chief Justice White that the tribunal had "conclusively determined ... that the first ten amendments, including of course the seventh, are not concerned with state action and only with Federal action." 241 U.S. at 217. The Court had little problem in reaching its decision, stating that its conclusion was "now not open in the slightest to question" and its determination "may not be doubted." *Id.* 217-218.

In so doing, the Court rejected the nascent concept of incorporation, the doctrine under which federal constitutional rights are deemed applicable to the states, through the vehicle of the Due Process clause of the post Civil War 14th Amendment. Applying the Seventh Amendment to the states, Chief Justice White warned, would "create a confusion," causing the Seventh Amendment to be "obscured" and, even more ominously, would "distort and destroy the historical intent of the limited scope of the Bill of Rights, only to federal court proceedings." *Id.* 220. The federal – state dichotomy, the Court instructed, was an "essential principle upon which our dual constitutional system of government rests." *Id.*, 221.

The rejection of the incorporation theory by the *Bombolis* Court was not surprising, or even unprecedented. Nearly a century earlier, in the formative years of constitutional jurisprudence, the High Court rejected the incorporation claim in a case seeking to apply the "takings" clause of the Fifth Amendment to the state to a local municipality. *Baron v. Baltimore*, 32 U.S. (Peters 7) 243 (1833). After the Civil War, the High Court again refused to apply the incorporation doctrine. In a Seventh amendment jury requirement to states in a Seventh Amendment case, no less, in *Pearson v. Yewdall*, 95 U.S. 294 (1877).

(Continued on page 5)



Major Minnesota Decisions

Continued from page 4

While not unusual for its time, there were a few features of the *Bombolis* litigation that were notable. The case was one of six consolidated cases, coming from five states, although the Minnesota case was given marquee treatment. The case was argued over a 2-day span before the High Court, in the spring of the year, and a decision was rather rapidly forthcoming within barely a month.

But the rejection of the incorporation theory by the *Bombolis* Court did not last long. Within a decade, in *Gitlow v. New York*, 268 U.S. 652 (1925), the High Court applied exception in a post-World War I objector's freedom of speech case. Then, in another case from Minnesota, *Near v. Minnesota*, 283 U.S. 697 (1931) any lingering uncertainty was dispelled. That classic "prior restraint" case proscribing censorship of a "scandalous" Minneapolis muck-raking newspaper, imbued heavily with racist and anti-Semitic themes, and other outrageous commentary, was ably chronicled by Steven Aggergaard in the Society's most recent newsletter, "Major Minnesota Decisions – Highlighting *Near v. Minnesota*," Summer 2016, pp. 3-4. Departing from the reasoning of the *Bombolis* case, the court in *Near* reasoned that it is "no longer open to doubt that the freedom of expression provisions of the First Amendment applies to the states. 283 U.S. at 707.

Unlike the *Bombolis* ruling rejecting "incorporation," *Near's* acceptance of it was far from unanimous. The *Near* ruling was a 5-4 decision, with Pierce Butler the first High Court justice from Minnesota, one of the quartet of dissenters.

Subsequent rulings have extended the incorporation principle to most, but not all of the Bill of Rights. About the only ones that are outside are not subject incorporation include the Sixth Amendment requirement of grand juries in criminal cases, *Hurtado v. California*, 110 U.S. 516 (1984); the presence of jurors in criminal cases in the same locality as where the offense was committed in the same amendment, *E.g. Caudell v. Scott*, 857 F.2d 344 (6th Cir. 1988); and the "excessive" fines clause of the Eighth Amendment, *McDonnell v. City of Chicago*, 561 U.S. 742 (2010).

However, these provisions generally are covered by state law, either constitution or statutes, or otherwise. For instance, in Minnesota, Article I, § 7 of the State Constitution requires grand jury proceedings in all criminal cases, although it is often dispensed with, through stipulation by the parties, and generally limited to first degree murder and other homicide cases. See also Rule 18, Minnesota Rules of Criminal Procedure. The provision is likewise in the state constitution, Article I, § 6 addresses the locality of jurors in criminal cases, while Article I, § 5, prohibits excessive fines.

Even the Seventh Amendment requirement resistance to incorporation of *Bombolis* is on shaky grounds. A federal district court in Puerto Rico two years ago rejected the *Bombolis* reasoning in holding the federal common law jury trial requirements apply in non-federal proceedings. *Gonzales-Oyarzum v. Caribbean City Builders, Inc.* 2014 WL 285027 (D.P.R. 2014)(unpublished). Decisions like this have led commentators to question "whether the *Bombolis* decision has any continuing authoritativeness beyond its particular facts." Wright & Kane's Law of Federal Courts, 7th Ed. (2011), p. 292.

An inroad into the *Bombolis* doctrine requires that states follow federal law in a few of the cases, such as submitting the invalidity of a release due to fraud to a jury, even if state, pursuant to the dictative Seventh Amendment, even if state law does not allow

that issue to be resolved by a jury. *Nice v. Akron C&Y Ry. Co.*, 342 U.S. 359 (1952). In contrast, when state law issues are heard in federal courts, as in diversity of citizenship and claims founded on supplemental jurisdiction, Seventh Amendment jury requirements apply even if the underlying state law does not permit juries for those claims. *Kampa v. White Consolidated Industries, Inc.*, 115 F.3d 585 (8th Cir. 1997) (Minnesota Department of Human Rights Act); *Gipsan v. KAS Snacktime Co.*, 83 F.3d 225, 230 (8th Cir. 1996); *Pickens v. Soo Line Ry. Co.*, 264 F.3d 773, 779 (8th Cir. 2001).

But it is a long way from the Caribbean to the Capital. Given the High Court's affection for federalism, particularly pronounced over the past three decades, coupled with the power of precedent and stare decisis, it is unlikely, but not assured, that *Bombolis* will survive and state courts will be immune from Fourth Amendment jury requirements.

But the continued vitality of *Bombolis* on its centenary and beyond does not impinge upon jury trial requirements in state court proceedings. State constitution requirements like Article 1, § 4, of the state Constitution apply, along with statutory jury rights, such as the amendment in 2014 allowing jury trials and actions under the Human Rights Act in Minnesota, Minn. Stat. § 363.A.33. Even without explicit constitutional or statutory grounds, jury rights can be established by judicial interpretation of silent statutes. *E.g., Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002) (jury trials allowed under whistleblower law; *Schmitz v. U.S. Steel Corp.*, 852 N.W.2d 660 (Minn. 2004) (jury trials permitted for workers compensation retaliation claims). Parties can also opt for advisory juries under Rule 39.02 of the Minnesota Rules of Civil Procedure.

This year's double anniversary of the 225th birthday of the Bill of Rights and the centenary of one of its offspring, the *Bombolis* case from Minnesota, reflects the vibrancy of the U.S. Constitution and the role of Minnesota jurisprudence in its development over the years.

Testimony-Memorials to Deceased Justices—Charles E. Flandrau (1828-1903)*

By: Sam Hanson

On the afternoon of October 6, 1903, in the Supreme Court courtroom at the State Capitol, Hon. Martin J. Severance, speaking on behalf of the Minnesota State Bar Association, addressed a session of the Supreme Court by presenting the memorial to Justice Charles E. Flandrau (1828-1903). Justice Flandrau had two major distinctions in Supreme Court history – he was the only justice to also serve on the Territorial Supreme Court before statehood (at the age of 30), and he was one of the three inaugural justices to be elected to the Supreme Court when Minnesota became a state in 1858.

This year marks the 160th anniversary of his appointment in 1856 by the President to the Territorial Supreme Court.

The official memorial, written in the flowery language of its time, included the following:

On the ninth day of September last Charles Eugene Flandrau closed his book of life at the city of Saint Paul and now he rests with his fathers. Though three quarters of a century spanned his life, yet the wheels of time in their ceaseless roll had left no visible trace on his body or mind. An angry shaft from the quiver of death smote him whilst he had the tread of a giant, and he fell to rise no more forever. With his death a star fell from the firmament of Minnesota's history, but its lingering luster will continue to illumine the memory of those who lived or admired him.

Charles Eugene Flandrau was born on the fifteenth day of July 1828, in the city of New York, and his ancestral line runs back to the Hugenots of France, expatriated by the revocation of the Edict of Nantes. At the age of thirteen, attracted by the mysteries of the sea, he went before the mast on different revenue cutters in the United States service, and on these and some merchant vessels he performed the duties of a common sailor for the period of three years. After the expiration of that period and before he was nineteen years of age he attended private schools in Georgetown and Washington in the District of Columbia for two or three years, where he received his chief preparatory education. At the age of nineteen he went to Whiteboro in Oneida county, in the state of New York, the residence of his father, who was a lawyer of high repute, and, after studying law in his office, was admitted to the bar in 1851 and remained in practice with his father until he came to Saint Paul in November 1853, where he entered upon the practice of the law with Horace R. Bigelow, under the firm name of Bigelow & Flandrau.

On the sixteenth day of August 1856, President Pierce appointed him United States Indian Agent for the Sioux of the Mississippi. In 1857 he was a member of the Constitutional Convention that reared the fabric of our organic law. In July 1856, he was appointed by President Buchanan as Associate Justice of the Supreme Court of the Territory of Minnesota, which office he held until the territorial government was superseded by that of the state. On the thirteenth day of November 1857, he was elected Associate Justice of the Supreme Court of the State of Minnesota for the term of seven years.

He stood at the helm of our judiciary in the formative period of our legal practice, and with a discernment and maturity of judgment phenomenal in one of his age, he played a conspicuous part in laying the foundation of a system on which has been reared our stately judicial fabric. A view of his written opinions spread on the records of our courts, perspicuous in phrase, correct to the enunciation of legal principles, and toler-

ating no compromise with partial justice, will place his name high on the tablet of Minnesota's judicial fame.

Comments were also made by Hon. Isaac Atwater, another of the three justices of the first Supreme Court after statehood, describing the conditions under which they adjudicated the law:



At the election in 1857 Judge Flandrau together with Lafayette Emmet and myself were elected justices of the first Supreme Court of the state of Minnesota. At this election politics were largely in a transition state. The Whig party was about being dissolved; new parties were being formed; the new Republican party was rapidly coming to the front; but the old Demo-

cratic party was the most coherent and best organized. The Democratic party was generally successful in this contest, although long years elapsed before it again succeeded in electing many of its candidates at a state election.

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 that 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, that were of first impression, and we were obliged to struggle with the questions presented with practically no aid from the text-books or prior precedents. The court, however, was assisted by a bar, the abilities of which I cannot but feel were the equal of any that have followed it, and perhaps their ingenuity and logical acumen in presenting a case were heightened by the lack of those precedents, the mass of which often seems to overwhelm a modern lawyer in the argument of a legal question.

At that time the salary of the Justices of the Supreme Court was \$2,000 each per year, and this was rarely, if ever, paid in cash. We had at that time no consultation rooms, and most of the consultation work outside of the Court House was done either at Judge Emmett's house in Saint Paul or at my home in Minneapolis. In our mutual work upon the bench, which brought us very closely together, I have nothing but praise to say of Judge Flandrau. He was quick to grasp and analyze the legal points that were decisive of a litigation, but he always looked to the real equities involved and gave them full consideration in his final determination. He was patient in his weighing of a case, slow to come to a final decision and, when our opinions differed, was always ready to give full value to the arguments of his colleagues, and was open to conviction until the last moment.

Life as a Law Clerk at the Minnesota Supreme Court in the 1970s

By: Gene H. Hennig

Gene Hennig clerked for the Hon. Walter F. Rogosheske of the Minnesota Supreme Court from 1976 to 1977. He then returned to teach law at his alma mater, Valparaiso University. In 1978 Gene married his wife Kristie, who was an English professor at Valparaiso, and they moved to Minneapolis where Gene joined the Rider Bennett law firm. In 2007 he joined Gray Plant Mooty, where he completed his almost 40 year private practice career, focusing on mergers and acquisitions, and corporate finance. Gene was diagnosed with a brain tumor in 2013 and died 21 months later in 2015. He lived a wonderful life and was universally recognized as a man of great character, loyalty, compassion, faith and adventure.

The decade of the 1970s began with our country still very much embroiled in the Vietnam War. Those of us who lived during this time and were in law school remember well the national unrest caused by this conflict that ultimately reached its height, arguably,



at the time of the Kent State shootings in the spring of 1970. Ten years later national attention had shifted to the Iran hostage crisis that was yet another sad episode in our country's history. It was between these two "bookends" that our generation served as law clerks at the Minnesota Supreme Court.

My own year as a law clerk began in 1976, the Bicentennial year, which may have been the high point of what was otherwise an often disillusioning decade in our country. By then President Nixon

had resigned in disgrace in 1973, and the Vietnam War had finally come to an end leaving a bad taste in just about everyone's mouth. President Carter was elected in 1976 and often had to deal with gloomy economic conditions evidenced by high gas prices and wage and price controls. Compared to the 1960s, the decade of the 70s was not nearly as exciting, and in truth was often "dull."

Happily, however, life here in Minnesota was not nearly so dismal, and for those of us who clerked during this decade it was a most enjoyable experience. On the political scene, one of the most significant things that happened was the election of Walter Mondale as Vice President of the United States. This led to a chain of events that eventually helped place Rosalie Wahl on the Minnesota Supreme Court as the first woman to hold that office. As it so happened, Vice President Mondale was a close personal friend in law school with Harry MacLaughlin (both of these men had clerked at the Court during its 1955-56 term), who was at the time a member of the Minnesota Supreme Court. Thanks in part to this connection, Justice MacLaughlin was appointed as a federal judge to the United States District Court of Minnesota causing a vacancy to exist on the Minnesota Supreme Court. There was great curiosity among members of the Court as well as us law clerks over who Governor Perpich might appoint to fill the vacancy. At one point, if my memory is correct, then Chief Justice Robert Sheran went to see the Governor to get some clue concerning who he might appoint to the Court. The Chief returned from his fact-finding mission to the Governor's office and reported that "we would like **her** whoever **she** might be"!

So it was that Rosalie Wahl became the first woman to serve on the Minnesota Supreme Court. The justice who I clerked for, Walter Rogosheske, commented at the time that "Rosalie would comfortably fit into the Court like an old shoe." And indeed she did. For the next 17 years Justice Wahl served the Minnesota Supreme Court not only as its first female member but also as a distinguished jurist.

Justice Wahl was not the only female pacesetter in the legal profession during the 1970s. It was during this decade that the enrollment of women in law schools across the country mushroomed, and the situation here in Minnesota was no exception. In 1970, for example, there were only 11 women (8.0%) in the graduating class at the University of Minnesota's law school. By 1980, in contrast, that number had risen to 76 graduates (34.7%). The increase in female law students also predictably meant that there was to be an increase in the number of women law clerks at the Supreme Court. At the beginning of the decade there were almost no women serving as law clerks. By 1976 when I was clerking there were two women (Andrea Bond and Emily Seesel), and by 1980 that number had risen to eight. The world and the legal profession have never been the same since!

Life as a law clerk in the 1970s was exciting for us clerks in spite of the doldrums of the decade. At the time I clerked there were 10 law clerks, and all but one of us officed together in close proximity on the third floor of the Capitol in something of a "bullpen." (Eric Magnuson, as clerk to the Chief Justice, had his own office.) It was easy to communicate with anyone you wished since our cubicles were separated by only glass panes. All of this camaraderie led to an enjoyable clerking experience, even though it was at times a bit noisy and difficult to get work done.

In the days before computers and the electronic age, we still produced court memos and draft opinions the old-fashioned way, which is to say "by hand." For the most part, we had just one opportunity to write a draft of our clerk's memos and any draft opinions we were asked to prepare. This meant that we had but one chance to get the job done right, unlike today when reams of paper are spent producing multiple drafts of documents. Computerized research was also very much in its infancy. At the time my class clerked in 1976-77, West installed one of its earliest versions of Westlaw in the Supreme Court Law Library in the hope that some of us clerks might experiment with it. Several of us pattered with the new technology, but, in truth, the new Westlaw equipment largely collected dust while we were at the Court.

Our time at the Court was still before the establishment of the Minnesota Court of Appeals that did not happen until 1983. For many years the workload at the Court had been steadily increasing, and by the 1970s that load was heavy. To deal with the work, the Court still had nine regular members plus one visiting judge who were assisted by a total of 10 law clerks. On average, each justice was responsible for preparing 40 or more publishable opinions. Not included in this figure were cases decided more summarily on an administrative basis with help from the Court Commissioner's Office. Despite the workload, the work was for the most part enjoyable and challenging, thanks in large part to not only the judges but also the fine secretarial staff and court reporter's office.

(Continued on page 8)

Life as a Law Clerk at the Minnesota Supreme Court in the 1970s

(Continued from page 7)

One of the lasting impressions that most of us had of our clerking experience was observing the prevailing collegial relationship that existed among the judges and their clerks. For young recent graduates of various law schools, we had the unique opportunity to work with a group of judges who truly valued what we did and respected our opinions. I shall never forget how often Justice Rogosheske wanted to know what I thought about a case and how it should be decided. Indeed, clerks at the time and undoubtedly still to this day were asked to indicate in their clerk's memoranda recommended dispositions of how appeals should be decided. That was truly "heavy stuff" for us recently minted lawyers and made a great impression on us.

There was also a healthy relationship, as far as we could observe, among the justices themselves. To be sure, all of the judges had come up and out of some political background before becoming a member of the Supreme Court, and often, of course, these political perspectives could be quite varied. Nevertheless, there was always as far as we could tell a measure of professional respect that prevailed at all levels within the Court that was wonderful to behold.

The word "justice" was often used at the Court, and it was apparent that everyone, judges and clerks alike, took this concept seriously. Relatively few debates occurred along strictly political lines; instead, the goal was to do justice as best it could be perceived by members of the Court. While this did not mean that everyone was of one mind, it did mean that members of the Court were united in trying to do what was best for the people of Minnesota in resolving their legal problems.

One of the experiences I remember vividly is a conversation the clerks had one day in our bullpen when we tried to figure out just what it was that, as a matter of jurisprudence, led members of the Court to reach the decisions they did. All of us had just recently graduated from law school and had taken courses in jurisprudence where there was a lot of talk about various legal theories like "legal realism" that academics thought were important in reaching judicial decisions. But it was Steve Carlson, who was at the time clerking for Justice Otis, who really hit the nail on the head when he surmised that what really motivated a justice to reach a particular decision was the fear of "looking like an ass." Judges, after all, are human wishing to do the right thing regardless of whether or not they knew everything there was to know about legal philosophy. Doing the right thing most of the time just meant trying to honestly follow legal precedent as shaped and tailored by the particular facts before the Court. And that in their own way is what we observed members of the Court trying to do most of the time.

Many other experiences could fill these pages, including memories we had of oral arguments. One in particular was an oral argument where one of the lawyers drew a response from Justice Rogosheske who chided him by saying "Counsel, your argument appears to be 'unfettered by both the facts and the law'." That was Judge Rogosheske's way of gently chiding the lawyer without coming right out and calling him a prevaricator. And then there was the time in another oral argument when retired Justice Martin Nelson leaned over and in a loud voice commented to retired Chief Justice Oscar Knutsen that "they were listening to just about the dumbest argument they had ever heard." Both of these two senior justices were hard of hearing, which accounted for the loud commentary from the bench!

It would be impossible in these few pages to recap all of the significant decisions rendered by the Court in the decade of the 1970s. Here are two of the most interesting opinions rendered in 1976-77:

(1) Reserve Mining Company, et al vs. Herbst, et al, 256 N.W. 2d 808 (1977). This case involved highly complex issues of both administrative procedure and environmental law that pertained to the operations of the Reserve Mining Company and other steel corporations on the North Shore. At issue was how best to dispose of taconite tailings that contained asbestos fibers injurious to human health.

(2) Sherlock vs. Stillwater Clinic, 260 N.W. 2d 169 (1977). At issue in this appeal was whether damages could be awarded for the birth of a normal, healthy child proximately caused by a negligently performed vasectomy. The Court found that the parents of the child had a case for "wrongful conception" and were entitled to pursue money damages consisting of all costs likely to be incurred in caring for the child until adulthood. The Court concluded its opinion by observing that "the result we reached today is at best a mortal attempt to do justice in an imperfect world." *Id.* at 176.

While it is always dangerous to speak for others, I do believe that for most of us the year we clerked at the Court during the 1970s was one of the best professional years of our lives. What a marvelous experience it was!

Minnesota Supreme Court Historical Society

P.O. Box 25
Chisago City, MN 55013-0025

Email: director.mschs@gmail.com

Board of Directors

2016 Officers

Justice Paul H. Anderson (Ret.),
Chair
Justice G. Barry Anderson,
Vice Chair
Annamarie Daley, Secretary
Kevin Curry, Treasurer
Robin Wolpert, Past-Chair

2016 Board Members

Samuel Aintablian
Tony Atwal
Rebecca Baertsch
Judge Timothy J. Baland (Ret.)
Brian Bell
Robin Benson
Thomas Boyd
Judge Diane B. Bratvold
Stephen F. Buterin
Carol Chomsky
Gary Debele
Sue Dosal (Ret.)
Judge Jill Flaskamp Halbrooks
William M. Hart
David F. Herr
Anna Horning Nygren
Bruce Jones
Christine R.M. Kain
Chief Justice Lorie Skjerven Gildea
(Ex Officio Member)
Patrick J. Kelly
Peter Knapp
Judge Harriet Lansing (Ret.)
Cathryn Middlebrook
Judith L. Oakes
Judge Tammy Pust
Elizabeth Reppe
Allen I. Saeks
Amie Penny Saylor
Judge Martha M. Simonett
James S. Simonson
William R. Stoeri
Justice David R. Stras
Justice Esther M. Tomljanovich
(Ret.)
Kenneth R. White
Nancy Zalusky Berg

Committee Activities

The Society has several active Committees. If you are not now engaged with one of them, please consider joining any of the following:

Preservation Committee (Contact Gary Debele at gary.debele@wbdlaw.com)

The mission of the Preservation Committee of the MSCHS is to oversee the preservation, organization and dissemination of important history, documents, and memorabilia of the Minnesota Supreme Court, and by extension, the judicial branch of the state of Minnesota. In the first few years, the Committee's primary task has been to reach out to current justices to advise them of the Committee's work and its interest in their documents and memorabilia, and to retired justices in order to assist in organizing their papers and artifacts and making sure these important items get to a proper repository for preservation and future access. This work includes facilitating contact between the retired justice and the Minnesota Historical Society to preserve and catalogue important documents and memorabilia from the retiring justice's career. The Committee also facilitates the preparation of judicial career books which for many years have been prepared for each retiring justice by the staff at the Minnesota State Law Library. Finally, the Committee plans to undertake oral interviews of each retired justice, to be recorded and transcribed and stored with the Minnesota Historical Society and the Minnesota State Law Library. The Committee is also beginning to put together a plan for preserving the history of the Minnesota Court of Appeals. The Committee is always looking for additional volunteer members to work on this active, dynamic Committee.

Events Committee (Contact Jill Halbrooks at Jill.Halbrooks@courts.state.mn.us)

The Events Committee is responsible for planning and executing the annual meeting of the MSCHS, Justice Jeopardy, and periodic reunions of the law clerks from the Minnesota Supreme Court and Court of Appeals as well as other less regularly scheduled activities with the goal of attracting new members. In 2017, it is anticipated that Justice Jeopardy will take place in October and the annual meeting will be held in November. We stagger the law clerk reunions. A reunion for the Minnesota Court of Appeals occurred in 2015; a reunion for the Minnesota Supreme Court will be scheduled for the summer of 2017.

Education Committee (Contact Anna Horning Nygren at amhorningnygren@locklaw.com)

The Education Committee works to assist members of the public—particularly teachers and students—in gaining a better understanding of the judiciary and history of Minnesota's laws and courts. The Committee sponsors a yearly essay contest which asks high school juniors and seniors to answer certain questions about how various areas of law may impact their lives. This year's topic will be the search of cell phones in schools. Committee members also serve as topical prize judges at Minnesota History Day where they award prizes to students whose work best analyzes the history of Minnesota's laws and courts. Additional past projects of the Education Committee include civic education lesson plans for use by teachers.

Membership Committee (Contact Christine Kain at Christine.Kain@faegrebd.com)

The Membership Committee is working on ways to introduce the Society to a broad audience and increase membership. The Committee has held information events for former judicial clerks and works with law school chapters of the Society.

Newsletter Committee (Contact Sam Hanson at shanson@briggs.com)

The Newsletter Committee is gathering stories and photos to be included in two issues each year, in July and December.

Trivia Answers

1. Answer: Hon. Sandra Gardebring Ogren
2. Answer: State Law Librarian
3. Answer: Gallagher (not to be confused with the multiple Andersons in the 2000s).
- 4a. Answer: Hon. Anne K. McKeig
- 4b. Answer: Hon. Leo I. Brisbois

Membership

Membership renewal for 2017 will be emailed in December 2016. Please watch for your renewal notice. Also, please forward this to any colleagues who are not members, with the invitation to join at www.mncourthistory.org.

Attorney in Private Practice, 6 years or longer — \$50.00
Attorney in Private Practice, first 5 years — \$25.00
Faculty and Teachers — \$25.00
General Public — \$50.00
Judicial Clerks — Free
Public Sector Attorneys and Related Personnel — \$25.00
Students — Free

* Photographs were obtained from and are reproduced with permission of the Minnesota Historical Society.