

Minnesota Supreme Court Historical Society



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JULY 2016

Calendar of Events

- July 14, 2016 - Education Committee Meeting (Minnesota Judicial Center - 2:00 p.m.)
- October 6, 2016 - Justice Jeopardy (Kiernan's Pub - 5:00 p.m.)
- November 3, 2016 - Annual Meeting/ Reception (Minneapolis Club - 5:00 p.m.)
- 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.)



Trivia Questions

In 2014 and 2015, the Society hosted sessions of Justice Jeopardy, pitting two teams of judges and lawyers against each other in answering court trivia questions. The next session of Justice Jeopardy will be held on October 6, 2016. To warm up for that event, try your hand at these trivia questions.

1. Several Minnesota Supreme Court Justices resigned to take other positions in government. Which deceased justices left the court to:
 - a. Run for Governor;
 - b. Join the United States Justice Department; or
 - c. Become a federal judge.
2. Which Justice served the shortest term on the Minnesota Supreme Court?
3. Which Justice served the longest term on the Minnesota Supreme Court?
4. Which Justice(s) served two non-consecutive terms?

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DID YOU KNOW?

- Justice William B. Mitchell's son, William DeWitt Mitchell, served as U.S. Solicitor General (1925-29) and U.S. Attorney General (1929-33), and his grandson William Mitchell served as General Counsel of the U.S. Atomic Energy Commission.
- Hon. Rensselaer Nelson, who served as Associate Justice of the Supreme Court of Minnesota Territory (1857-58) was the son of U.S. Associate Justice Samuel Nelson and served as the first U.S. District Judge of the District of Minnesota (1858-96).

YOUR COMMENTS INVITED

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

Trivia answers on page 6

Testimony-Memorials to Deceased Justices—William Mitchell*

By Sam Hanson

Shortly after the establishment of the Minnesota Supreme Court Historical Society, an ambitious committee set out to revive a wonderful tradition that had been abandoned in the 1970s, when our state discontinued the publication of Minnesota Reports. That tradition, sponsored jointly by the Supreme Court and the Minnesota State Bar Association, was to present memorials for deceased justices, in open court before the entire Supreme Court. Those memorials were then published in Minnesota Reports. Inexplicably the tradition ended when the publication ended.

In 2008, the Society published "Testimony – Remembering Minnesota Supreme Court Justices." The Society collected all previously published memorials, going back to the 1800s, and assigned authors to update those memorials to include the many justices who had died after the practice of presenting memorials had been interrupted.

The Society's newsletter will from time to time feature excerpts from Testimony. For this edition, given the recent creation of the Mitchell-Hamline School of Law, the memorial to Justice William Mitchell seemed appropriate.

JUSTICE WILLIAM MITCHELL SERVED ON THE SUPREME COURT FOR 19 YEARS, FROM 1881-1900. HE WAS NOT A GRADUATE OF ANY LAW SCHOOL, BUT "READ THE LAW" IN THE OFFICE OF AN ATTORNEY FRIEND IN MORGANTOWN, VIRGINIA. FOLLOWING ADMISSION TO THE BAR, HE RELOCATED TO WINONA, MINNESOTA, AND SERVED VARIOUSLY AS A LEGISLATOR, COUNTY ATTORNEY, DISTRICT JUDGE AND THEN SUPREME COURT JUSTICE. DURING HIS TIME ON THE COURT, HE GAINED NATIONAL PROMINENCE FOR "CLEAR, LUMINOUS AND FORCEFUL" OPINIONS, OFTEN CITED BY OTHER COURTS AND LEGAL SCHOLARS ACROSS THE COUNTRY. HE WAS CALLED BY SOME SCHOLARS, ONE OF THE BEST JUDGES IN THE COUNTRY.

Judicial elections in those days were partisan. Justice Mitchell had been en-

dorsed by both parties until the election of 1898, when the Republican party failed to endorse him and, surprisingly, he lost re-election when the Republican endorsed candidates swept the election at nearly every level. This result is often cited as a major reason why Minnesota later made judicial elections non-partisan. In later years, Justice Mitchell agreed to become the dean of the St. Paul College of Law, but unfortunately died before the next school term began.

The official memorial was as follows:

On the afternoon of October 2, 1900, in the chamber of the house of representatives at the state capitol, Hon. James A. Tawney presented to the supreme court, then in session, in behalf of the Winona and State Bar Associations the following memorial of Associate Justice Mitchell, who died August 21, 1900, and moved that the same be spread upon the records of the court:

William Mitchell, who for forty-three years was a member of the Minnesota Bar, for seven years was judge of the Third judicial district, and for nineteen years was an Associate Justice of this court, having been called away by death, the members of the Winona and state Bar respectfully submit the following, as a testimonial of their esteem and affection for him while living and as a tribute to his memory now that he is gone.

We honored him for his noble and dignified character; we loved him for his fraternal spirit. In all the relations and duties of life he aimed at what was true and pure and good. His large intellectual gifts and liberal culture gave him prominence and power. His fine social qualities, uniform courtesy, and kindness won the favor of all who knew him. His spotless integrity and conscientious fidelity in the discharge of duty won their confidence. It falls to the lot of few men to be as universally respected as was Judge Mitchell.

That he was a great lawyer and a great jurist, great in legal learning and great in those qualities of mind and character essential to judicial eminence, is the uniform testimony of the Bar of the state. In his large and invaluable contribution to the judicial literature of the state and nation, he has shed undying lustre upon the Bar and the courts with which he was directly related. In losing

him Minnesota has lost one of her brightest ornaments – one of her most distinguished and valuable citizens.



We ask, therefore, that this brief memorial be preserved in the records of this court, together with such other proceedings as may occur in connection therewith.

Eleven other lawyers and justices added their comments to the memorial, including these comments from then retired Justice Charles Flandrau, who had been a member of the first Supreme Court of Minnesota after statehood in 1855:

It being my desire that the testimony of the oldest practitioner of the law in the state and a member of the first supreme court of the state to the excellencies of the late Judge Mitchell should go on record in these memorial proceedings, I have prepared a brief but none the less heartfelt tribute, which with the permission of your Honors I will present.

To be a good and just judge, a man must be endowed with many, if not with all, the virtues of mind and disposition. He must have good practical sense, experience, and understanding, a clear and quick perception of facts, with the power of logical arrangement and application of them to the matter in hand, aided and guided by a thorough knowledge of the law in point. He must be absolutely impartial and free from prejudice. He must be patient to listen and to learn. He must be courageous and firm without obstinacy but tempered with mercy. His life conduct must be so exemplary as to preclude the possibility of wrong doing or wrong thinking. Judge Mitchell possessed all these attributes in an eminent degree. In his death, Minnesota mourns the loss of one of her most beloved and distinguished citizens.

Major Minnesota Decisions—Highlighting *Near v. Minnesota*

By Steven Aggergaard

Of all the cases that Minnesota has sent to the United States Supreme Court, *Near v. Minnesota*, 283 U.S. 697 (1931), is among the most noteworthy. In *Near*, the court derailed an attempt to shut down a Minneapolis newspaper on grounds it was a “nuisance,” and in doing so used a Minnesota case to establish the rule of law that prior restraints of speech are unconstitutional.

ALTHOUGH THE CASE’S LEGAL PRINCIPLE IS NOW WELL-KNOWN, WHAT IS LESS-KNOWN BUT NO LESS IMPORTANT IS THE MINNESOTA SUPREME COURT’S ROLE IN THE CASE, WHAT LED OUR COURT TO BELIEVE IT HAD AUTHORITY TO HELP SHUT DOWN A NEWSPAPER IN THE FIRST PLACE, AND THE IMPORTANT PLACE *NEAR* HOLDS IN FIRST AND FOURTEENTH AMENDMENT JURISPRUDENCE.

That story begins not in Minneapolis but in St. Paul, in the basement of the Ramsey County Jail, with the botched execution of William Williams and the *St. Paul Pioneer Press*’ criminal prosecution for writing about Williams’ death.

Williams, 28, was convicted of a most scandalous and salacious crime. On April 12, 1905, he entered the St. Paul home of 14-year-old John Keller, tracked the boy down in his bed, and shot him execution-style in the head. Williams killed the boy’s mother too.

The motive for the double murder was the Keller family’s refusal to permit John to associate with Williams, who, in the words of the opinion by Minnesota Chief Justice Charles M. Start that affirmed the conviction, had developed a “strong and strange attachment” to the boy.

The means of and motive for Williams’ crime outraged St. Paul, where his trip to the gallows was eagerly anticipated. But his execution on February 13, 1906 ended up being as grisly as the murders themselves because the Ramsey County Sheriff used too much rope.

St. Paul’s newspapers reported specific details about what went awry—how “with a snap the body hung suspended,” how Williams’ feet touched the ground and his neck stretched four and half inches, how the “minutes dragged,” how it

took more than 14 minutes for Williams to die.

Although the newspaper accounts eventually were credited with prompting the Minnesota Legislature to eradicate the death penalty in 1911, at the time they violated the “Midnight Assassination Law of 1889,” which sought to mitigate the spectacle of executions by banishing



them to a time before sunrise and forbidding newspapers from publishing any other than their mere occurrence.

Because the *St. Paul Pioneer Press* had gone beyond what was permitted, the newspaper was indicted for violating the Midnight Assassination Law, the constitutionality of which reached the Minnesota Supreme Court on a certified question.

At the time, federal constitutional law was irrelevant to the question of whether a state’s speech-restrictive law was unconstitutional. The First Amendment applied only to federal laws. The idea that the Fourteenth Amendment prohibited state and local governments from restraining the “liberty” of speech would not come for another 18 years in *Gitlow v. New York*, 268 U.S. 652 (1925), where the Supreme Court scrutinized but ultimately affirmed socialist Benjamin Gitlow’s prosecution under New York’s Criminal Anarchy Law for publishing his “Left Wing Manifesto” during the Red Scare.

The only constitution at issue in *State v. Pioneer Press*, 100 Minn. 173, 110 N.W. 867 (1907), was the Minnesota Constitution. Article 1, Section 3 read then as it does today: “The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right.”

The Minnesota Supreme Court considered the *Pioneer Press*’ detailed description of Williams’ execution and, in a unanimous decision, held that although the accounts were true, the newspaper had abused its “inviolable” free-press right. As Justice Charles L. Lewis wrote, the *Pioneer Press* had no “constitutional right to publish every fact or statement which may be true” and the Legislature was within its police power to ban expression that was “detrimental to public morals.”

With *Gitlow* still undecided, the *Pioneer Press* had no grounds to file a petition for writ of certiorari. In coming years antiwar activists would cite the Fourteenth Amendment when challenging their prosecutions under laws that criminalized antiwar speech, but in 1907 World War I was still years away.

Among those activists was C.H. Holm, a member of the Nonpartisan League, who was prosecuted under a Minnesota law that criminalized speech that discouraged conscription. He sought relief under the Fourteenth Amendment, but the Minnesota Supreme Court rejected the attempt, holding in *State v. Holm*, 139 Minn. 267, 166 N.W. 181 (1918), that the Reconstruction Amendment did not prevent a state from punishing speech “inimical to the public welfare.” The court’s cited authority included *State v. Pioneer Press*.

A decade later, with memories of the war fading and graft and gambling proliferating on the streets of Minneapolis, the opinions in *Holm* and *Pioneer Press* provided the Minnesota Supreme Court with what it needed to help shut down the *Saturday Press*.

Its publishers, muckrakers Jay Near and Howard Guilford, pulled no punches with their articles that linked the Minneapolis police chief to gamblers, spewed hate of Jewish community leaders, and targeted Hennepin County Attorney Floyd B. Olson. It was Olson, destined to become Minnesota’s 22nd governor, who sought to enjoin the *Saturday Press* under the Public Nuisance Law of 1925, which stated that anyone who published, circulated, or possessed “a malicious, scandalous and defamatory newspaper” was “guilty of a nuisance.”

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Major Minnesota Decisions—*Near v. Minnesota*

(Continued from page 3)

The Minnesota Supreme Court affirmed Olson's effort in *State v. Guilford*, 174 Minn. 457, 219 N.W. 770 (1928). As Chief Justice Samuel B. Wilson explained, under the controlling precedent of *Holm* and *Pioneer Press*, the constitution did not protect "malice, scandal, and defamation" and there was "no constitutional right to publish a fact merely because it is true."

With the opinion in *Guilford*, publication of the *Saturday Press* was enjoined. But the injunction was not permanent, and when Olson sought to shut down the *Saturday Press* for good, word of the effort reached the upper floors of the Tribune Tower in Chicago, where *Chicago Tribune* publisher "Colonel" Robert R. McCormick feared the Minnesota case could eventually hurt his bottom line.

As explained in the 1981 book *Minnesota Rag*, a fascinating tale about *Near v. Minnesota*, former CBS News President Fred Friendly explains how McCormick retained noted Chicago attorney Weymouth Kirkland, who tried to make a federal case out of the Minnesota dispute by citing the Fourteenth Amendment.

The Minnesota Supreme Court rejected the Chicago interlopers' effort. In a terse, four-paragraph opinion, Chief Justice Wilson wrote that the Fourteenth Amendment simply did not prohibit Minnesota from requiring newspaper publishers to operate their businesses "in harmony with the public welfare." The short opinion, coupled with the United States Supreme Court's opinion in *Gitlow*, were all that was needed for the Chicagoans to win a trip to Washington.

By the time certiorari was granted, *Guilford* had sold his interest in the *Saturday Press* to Near, who became the sole captioned petitioner and appellant. And on June 1, 1931, he won. In *Near v. Minnesota*, the United States Supreme Court held for the first time that a state's prior restraint law was "an infringement of the liberty of the press guaranteed by the Fourteenth Amendment," reversing the Minnesota Supreme Court but affirming Minnesota's name in a landmark legal opinion.

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 2016, it is anticipated that Justice Jeopardy will take place in October at a location to be announced. The annual meeting is scheduled on Thursday, November 3 at the Minneapolis Club. 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 Nygren Horning at amhorningngren@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. 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 Rain at Christine.Rain@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.

Court Administration: Profiling Grace Kaercher Davis*

By: Steven Aggergaard



Until 1956, Minnesota voters selected the Clerk of the Minnesota Supreme Court on a partisan ballot. For 28 years their choice was Grace Kaercher Davis, who was the first woman in the country elected to such a position, and the first woman in Minnesota elected to a statewide office.

One of 10 children, Grace Kaercher was born on June 17, 1887 in Ortonville, Minnesota. She was exposed to the law and lawyers early on. Her father, Aaron Kaercher, served as Big Stone County Attorney for eight years and upon his death was lauded by the Minnesota State Bar Association for "assisting the unfortunate where he seldom sought or obtained remuneration."

Attorney Kaercher also spoke against World War I, in a way that resulted in his prosecution under a state law that criminalized speech that discouraged enlistment. Kaercher challenged the indictment, but in 1918, just four years before his daughter took on the Clerk's role, the Minnesota Supreme Court rejected the appeal.

In 1920, the right of women to vote was finally affirmed, and Grace Kaercher became involved not only in politics but in business, journalism, and her community. She chaired the Women's Republican Committee of Big Stone County, was secretary-treasurer of the Big Stone County Loan Association, and was associate editor of the *Ortonville Independent* newspaper.

Newspaper clippings provide hints that Grace Kaercher had an adventurous side. In 1921, the *Independent* reported that she accompanied the pilot of an airplane that had just been repaired after a mishap with a zephyr, with Kaercher describing what she had seen: "Big Stone Lake playing tag with the heavens and the sky became green."

Her father, Aaron, died suddenly on February 6, 1922 while at work. Just seven weeks later, Big Stone County Republicans rallied around Grace Kaercher and the state Republican Party awarded her the endorsement for the Minnesota Supreme Court Clerk position.

Kaercher was no shoo-in. As the *Independent* explained at the time: "The contest for this office was the only exciting and hard-fought one of the convention, all other contests being very much one-sided and without much vigor."

She prevailed in the general election, taking 41% of the vote, defeating Farmer-Labor candidate Harold T. Van Lear and Democrat Frank Kelb, and giving the Republicans control over all the statewide offices in Minnesota.

Kaercher's election was a turning point both for Minnesota women in politics and the state's political parties. As Millard L. Gieske explained in his 1979 book, *Minnesota Farmer-laborism, The Third-party Alternative*: "The election of 1922 firmly established a three-party state system in Minnesota, one which survived for two decades. ... The competitive performance of four women candidates—a Democrat, a Republican, and two Farmer-Laborites—likewise implied another important change in state politics was under way."

In 1927, she married Edward A. Davis, an insurance executive from Minneapolis. In 1934, she lost her seat to Farmer-Laborite Russell O. Gunderson, who during his tenure as Clerk wrote a book, *History of the Minnesota Supreme Court*. Four years later, with Gunderson not on the ballot, Kaercher Davis won back her seat, taking a decisive 47% of the vote in another three-party race.

The 1938 election again gave the Republicans control over all the statewide offices, led by Governor Harold Stassen and Lieutenant Governor C. Elmer Anderson. The party kept control of the executive branch despite the merger of the Farmer-Labor and Democratic Parties in 1944. Kaercher Davis won election after election.

In 1954, her retirement became mandatory pursuant to Minn. Stat. § 490.025, subd. 8 (1953), which required the Clerk to retire upon reaching the age of 65 or serving 25 years in the position. Kaercher Davis had done both. In an Order dated December 7, 1954, C. Elmer Anderson, then Governor of Minnesota, designated December 31, 1954 as the date of Kaercher Davis' retirement.

Grace Kaercher Davis died in 1965. She is buried among several family members at Mound Cemetery in Ortonville.



**Minnesota Supreme Court
Historical Society**

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Trivia Answers

1.a. Answer: Luther Youngdahl left the court in 1946 to become the Republican nominee for Governor after then Republican Governor Edward Thye announced his decision to run for United States Senate. Youngdahl became Minnesota's 27th Governor, but then resigned in 1951 to accept appointment from Democratic President Harry Truman to the federal bench in the District of Columbia, a move engineered by Sen. Hubert Humphrey to remove Youngdahl as a political rival.

b. Justice Lee Loevinger left the court for Washington, D.C. in 1961 to become Assistant Attorney General in charge of the antitrust division, and later Commissioner of the Federal Communications Commission.

c. Justice Harry MacLaughlin left the Supreme Court in 1977 to join the United States District Court in Minnesota, appointed by President Jimmy Carter. Justice MacLaughlin was a good friend and former law partner of Vice President Walter Mondale and practiced law for a time with Earl Larson, before he became a federal judge; Lee Loevinger, before he joined the Minnesota Supreme Court; Orville Freeman, before he became Governor of Minnesota and later United States Secretary of Agriculture; and Donald Fraser, who later was elected to Congress and as Mayor of Minneapolis. Of course, the question only asked for "deceased" Justices and therefore did not include former Justices Joan Erickson and Mimi Wright.

2. Answer: A good second best answer could have been Justice William Christensen, who served for 10 months to complete the term of Justice Luther Youngdahl, who resigned to run for governor. But the best answer is Justice Maynard Persig, a long-time professor at the University of Minnesota Law School and later William Mitchell College of Law, who served for only three months to fill out the remaining term of Justice Royal A. Stone, who died in office. Justice Persig agreed to take the interim position, but made it clear he would not seek another term.

3. Answer: Justice Andrew D. Holt served for 30 years, from 1912 to 1942. Justice Holt was re-elected five times and was 87 years old at the time of his retirement. Upon retirement as a Justice, he was appointed a Commissioner of the Courts for four years.

Others who served over 20 years were Justices John Berry (23), Alan Page (22), Thomas Gallagher (22), and James Otis (21).

4. Answer: Perhaps the best known was Justice Robert Sheran, who served as Associate Justice from 1963 to 1970, resigned to reenter law practice, and then returned to service as Chief Justice from 1973 to 1981. Lesser known was Justice Thomas Striessguth, who was called out of private practice twice to complete partial terms. In 1942, he was appointed by Governor Harold Stassen to complete the term of Justice Andrew Holt, and in 1944, he was appointed by Governor Edward Thye to complete the remaining term of Justice Charles Loring.

Referral for New Members

Please forward this to any colleagues who are not members, with the invitation to join at one of the following levels:

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