

ADVISORY OPINIONS
OF THE
TERRITORIAL SUPREME COURT,
1852-1854

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I. Foreword

A. The Advisory Opinion Law.

On April 22, 1793, President George Washington issued a Proclamation of Neutrality, which was designed to steer a middle course in a war between Britain and France. A few months later, he was confronted by a crisis precipitated by the new French minister Edmond Genêt's recruitment of privateers in U. S. ports to prey upon British ships. The success of the privateers led the British minister to protest that they violated Washington's Proclamation as well as several treaties. On July 18, 1793, Washington had a list of twenty-nine questions delivered to the Supreme Court, the answers to which required it to interpret the treaties. The justices firmly rejected the President's request for an advisory opinion:

The Lines of Separation drawn by the Constitution between the three Departments of government—their being in certain Respects checks on each other—and our being Judges of a Court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been purposely as well as expressly limited to the executive Departments.¹

Sixty years later, houses of the Minnesota Territorial Legislative Assembly requested and received five advisory opinions from justices on the territorial Supreme Court. Between 1852 and 1854, the House of Representatives passed three resolutions seeking advisory opinions about pending

¹ Reply of the Justices to Thomas Jefferson (August 8, 1793), quoted in William R. Castro, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 79 (Columbia: Univ. of South Carolina Press, 1995). Professor Castro goes on to note that, notwithstanding this ruling, individual justices gave advisory opinions to the Washington administration. *Id.* at 178-9. The most thorough account of these activities is Stewart Jay's *Most Humble Servants: The Advisory Role of Early Judges* (New Haven: Yale Univ. Press, 1997).

legislation, and the Council, known after statehood as the Senate, passed one. The authority for these requests was §19 of the Revised Statutes:

Sec. 19. Either house may, by resolution, request the opinion of the supreme court, or any one or more of the judges thereof upon a given subject, and it shall be the duty of such court or judges when so requested, respectively, to give such opinion in writing.²

Minnesota Territory did not have a territorial constitution. It was created by the Organic Act, effective March 3, 1849. In an advisory opinion, a territorial justice measured the proposed law against the Organic Act and the federal constitution—the document that Chief Justice Jay and his associates said forbade them from giving advisory opinions—as well as federal statutes and common law principles.

The territorial court’s advisory opinions do not appear in the *Minnesota Reports*. They have never been collected and published as a body of judicial rulings (although in 1854, the House ordered 250 copies of opinions of Justices Chatfield and Sherburne published in pamphlet form). Instead, each was printed in the daily Journal of the house that made the request. They have not been cited as precedent by a later court.³

Advisory opinions were requested in the midst of a legislative session, which lasted roughly ninety days, from January through March of each year. When it passed a resolution for an advisory opinion, the House or

² Minn. Terr. Rev. Stat., ch. 3, §19 (1851).

³ In 1854, Justice Chatfield described the limits of an advisory opinion:

Therefore, the opinion which I shall give in answer to this inquiry of the House must not be regarded as rendering the subjects, involved in the question *res adjudicata*, even with myself, nor must there be applied to it, in any future adjudication of the subjects, before me or elsewhere, the rigid rule of *stare decisis*.

Section II C, below at 51. However, in his refusal to provide an advisory opinion to the Senate in 1863, Chief Justice Emmett cited Associate Justice Flandrau’s refusal in 1858 as precedent. Section III B, below at 61.

Council wanted immediate advice on a specific law. There was little time to lose. Chief Justice Hayner noted this in his opinion on the Liquor Law:

Knowing, as I do, that your labors are drawing to a close, from the limitations prescribed by law, as to the time you are authorized to continue your sessions, I am warned thereby that whatever communications I have to make must be hastened with all convenient speed.⁴

Every advisory opinion was issued a few days or weeks after a legislative request was made. Having served their purpose, they were quickly forgotten.

B. The Origins of §19.

The origins of §19 can be traced to provisions of the constitutions of four New England states. As James Bradley Thayer noted in his 1885 essay on advisory opinions, the constitutions of Massachusetts (1780), New Hampshire (1784), Maine (1890), and Rhode Island (1842) authorized their state supreme courts to issue advisory opinions at the request of either houses of their legislatures or their governors.⁵ Massachusetts, New Hampshire and Maine permitted opinions on “important questions of law, and upon other solemn occasions,” while Rhode Island’s required a written opinion on “any question of law.” Section 19 permitted either house of the territorial legislature, but not the governor, to ask for an advisory opinion “upon a given subject.”

A justice who gave an advisory opinion usually professed a distaste for the task. Justice Chatfield spent the first third of an 1854 opinion agonizing over its propriety, finally concluding, “Notwithstanding my serious doubts or the propriety of answering the inquiry made by the said Resolution, I shall not refuse to do it.” Why, then, if they had such qualms about the process, did they comply? Besides the advisory opinion practices in older, established New England states, which the justices surely were aware of,

⁴ Section II B, below at 39.

⁵ James Bradley Thayer, “Advisory Opinions” in *Legal Essays* 42, 43-4 (Boston: Boston Book Company, 1908), posted in Section IV, below at 66-81.

there are three other explanations for their behavior, and each involves the intellectual climate of the 1850s.

The antebellum era was one of legislative supremacy. Roscoe Pound has written, "From colonial times down at least to the impeachment of Andrew Johnson, the legislative department claimed to be peculiarly the organ of the popular will."⁶ In these times, courts deferred to the legislature. Legal historian Francis R. Aumann has described this aspect of the political thought of the period:

Another exceedingly important development of the period between 1775 and 1860 was the gradual readjustment which took place between the legislative and judicial branches. When our system began, the idea of the separation of powers was looked upon as a basic principle. This theory, as enumerated by Montesquieu, assumed three departments of government; the division of governmental powers among three departments in such a manner that each department would act as a check upon the other and the existence of certain functions that were particularly "legislative," "executive," and "judicial." While this theory lies at the basis of our political organization, it has never been completely operative. At any rate, our first state governments were largely characterized by legislative supremacy. In that early period, the popular will was considered omnipotent and the legislature was looked upon as the chief organ of the popular will. Constitutional theories could not cope with the legislature which, in the words of James Madison, drew "all powers into its voracious vortex." On the other hand, the philosophy of the day demanded checks and limitations upon governmental power. The courts, as time passed, became the custodians of these limitations, which at the outset were confined to our legislative bodies.

The doctrines of legislative sovereignty which obtained when

⁶ Roscoe Pound, *Criminal Justice in America* 133 (Harvard Univ. Press, 1945).

our first state constitutions were established were influenced in part by Blackstone. In the view of Blackstone, virtually all the powers of government should be placed at the disposal of the legislature. Moreover, all categories of “law” except positive law were to be ignored and the only real law was that which had the express or implied sanction of the sovereign legislative power. This theory reduced concepts of “higher law” and “law of nature” to a very meager role. This conception of law gave little basis for judicial interference with legislative acts. When legislatures came to exercise their powers, not wisely but too well, a different view upon some of these matters developed.⁷

During this period, the judiciary acted less as a check on the other branches and more as their partner working for the advancement of the territory.⁸ In an 1854 opinion, Justice Chatfield advised:

I am, and at all times shall be, willing and even anxious to assist the Legislature, to the extent of my limited capacity and knowledge, in their efforts to perfect a salutary measure of public policy, whenever I can do so consistently with the judicial duties imposed upon me.⁹

Section 19 was a legislative mandate, which the judges would not oppose. As Chief Justice Hayner wrote in 1853, “Whatever may be my private views of the propriety or impropriety of such a legal requirement, I shall not claim an exemption from the duty imposed upon me by the resolution.”¹⁰

⁷ Francis R. Aumann, *The Changing American Legal System: Some Selected Phases 159-60* (New York: Da Capo Press, 1969)(published first in 1940).

⁸ An example of how the judiciary was enlisted to take on assignments to advance the economic interests of the territory, the chief justice was a member of the territorial building commission. In late 1852, after the presidential election, Chief Justice Hayner resigned from the Board of Commissioners of the Public Buildings of the Territory of Minnesota “which I hold in virtue of my office as Chief Justice.” *Journal of the House of Representatives, 4th Leg. Assem., 185* (March 3, 1853).

⁹ Section II E, below at 51.

¹⁰ Section II B, below at 38.

The late antebellum period was also one of legal reform. In several states, the division between law and equity was abolished and old common law pleadings and forms of action jettisoned in favor of codes drafted by the legislature. In Minnesota most of the Field Code was adopted in 1851.¹¹ In an advisory opinion in 1854, Justice Chatfield noted this spirit of reform:

In these days of codification and legal reform, these Legislative powers are brought into frequent, active sometimes almost violent exercise. Whenever the Legislature become satisfied that the modification or abolition of any rule of the common law or of evidence will be most conducive to the advancement, prosperity and best interests of the Territory, they should not hesitate or fail to act accordingly, nor suffer them-selves to be paralyzed by the magic influence of the “wizard wand of hoary error.”¹²

Territorial judges would not stand in the way of procedural innovation such as a statute authorizing them to advise the legislature on pending bills.

The legal status of Minnesota Territory is a third explanation of why the justices gave advisory opinions, albeit reluctantly. The territory was in continuous transition. As soon as it had enough residents and the political influence, it would become a state. But statehood lay in the future. In the meantime, its government was staffed by men holding temporary appointments. Due to the prevailing Jacksonian practice of rotation in office, there was high turnover on the territorial supreme court. In this climate, the territorial justices, excepting Chief Justice Fuller, were not inclined to stake out a claim of judicial independence by defying §19. In contrast, after statehood, the self-confidence of the justices, who had been elected by the people, was evident. When the Minnesota Senate passed resolutions requesting advisory opinions in 1858 and 1863, individual justices declined, and in 1865 the full court declared the advisory opinion law unconstitutional.

¹¹ The Court of Chancery heard equitable actions from 1849 to 1853, when it was abolished; thereafter there was only one form of action, a civil action.

¹² Section II E, below at 52-3.

C. Chief Justice Fuller's Refusal

In the late 1840s and 1850s a powerful temperance movement swept the nation. Minnesota Territory was not spared.¹³ In 1851, Maine passed legislation banning the possession, production, and distribution of liquor that became known as the "Maine Law." It was subjected to numerous court challenges in the states that adopted it. In 1852, a liquor law modeled after Maine's was introduced in Minnesota's Legislative Assembly.

On February 23, 1852, the House requested an advisory opinion from Chief Justice Jerome Fuller on whether the legislature had power to enact this law. Fuller had received a recess appointment from President Millard Fillmore in October 1851, and he took the oath of office in St. Paul on November 24. Thus he had been Chief Justice only three months when asked for his opinion on what he called "a controverted question about which the public mind is deeply exercised." He declined on two grounds: first, it would be improper to give his views on a question that may come before him later in an appeal to the supreme court; and two, the House had not given him a copy of the bill. As to the first, Fuller seemed unaware that in the territorial judicial scheme, a justice also served as a trial judge and, when an appeal was taken in a case over which he had presided or decided, he then joined the other two members of the supreme court to review it. As Charles Flandrau recalled many years later, "This allowed a judge to sit in review of his own decision, which is not to be commended, but did not produce any noticeable disturbance in the administration of justice that I remember."¹⁴ It may also be noted that the "manifest impropriety" in giving "extra-judicial" decisions that Fuller saw did not prevent Chief Justice Hayner and Justices Chatfield and Sherburne from giving advisory opinions in later years.¹⁵

¹³ See generally, Agnes E. Ellingsen, "A History of the Temperance Movement in Minnesota to 1865" (1933)(unpublished M. A. thesis, University of Minnesota)(on file at the Minnesota Historical Society).

¹⁴ Charles E. Flandrau, "Lawyers and Courts of Minnesota Prior to and During Its Territorial Period," 8 *Minn. Hist. Soc. Coll.* 89, 98 (St. Paul: Minn. Hist. Soc., 1898).

¹⁵ In a 1854 opinion, Justice Chatfield wrote that a justice might pass judgment on legislation *three* times: first, in an advisory opinion; next, as a district court judge; and, finally, while on the supreme court:

Should any of these cases come to trial, (as they probably will,) this

As to the second, Fuller's reasoning is irrefutable: he could not review a bill he could not see and read. One reason he was not furnished with a copy of the bill was that it was being amended. The House passed a resolution asking for his opinion on February 23, 1852. On February 25, he refused. On February 24, the House passed an amendment requiring a special election, essentially a referendum, on the bill before it could become effective.¹⁶ Fuller might have asked for a copy of the complete bill and

question must necessarily be submitted to the District Judge holding the Court, for his decision, and he will then be obliged to pass upon it in the only proper way. Should either party be dissatisfied with the decision there made, he could take his appeal to the Supreme Court of the Territory, where all the Justices of that Court, in the proper exercise of their appellate jurisdiction, would, *in banc*, review and determine the question.

¹⁶ The following is the amendment passed by the House on February 24, 1852:

Mr. Day offered the following amendment to come in at the conclusion of, and as a proviso to the 19th section:

“Provided, That a special election be held throughout the Territory on the first Monday of April next, at which election the provisions of this act shall be submitted to the voters of the Territory; which election shall be held at the places, and by the officers now provided for by law for holding general elections. The voters at said election shall vote by ballot, and all the ballots at said election having the word “yes” written or printed thereon, shall be counted as voting for the adoption of this act; and those having written or printed thereon the word no,” shall be counted as voting against the adoption of this act. The returns of said election shall be made to the Register of Deeds of the several counties, in the manner now required for making election returns, who shall proceed to canvass the votes in the manner that they are now required to canvass the votes of a general election, and immediately make and transmit to the Secretary of the Territory a certified statement of the number of votes cast for and against the adoption of this act. The Governor and Secretary of the territory shall immediately upon the receipt of the returns from the several organized counties, proceed to canvass the returns, and on or before the first, Monday in May next, the Governor shall make proclamation of the result. If the returns of said election shall show that a majority of the votes cast were for the provisions of this act, then and in that case this act shall fully, and to all intents and purposes, take effect, and be enforced according to the provisions of the same; but if a majority of the votes cast shall be against the provisions of this act, then the same shall be null and void and of no effect.”

Mr. Murray moved that said amendment be adopted.

delayed a few days, but he seems to have been in a hurry to avoid giving an opinion on this highly contentious social issue.

On March 6, 1852, the assembly passed the liquor law with a proviso that it would go into effect only if approved in a special election. On April 5, voters approved it, 853 to 662.¹⁷ It went into effect on May 5. Prosecutions followed. In June, the Chief Justice presided over a trial in district court in Chisago County in which a man was convicted of violating the liquor law.¹⁸

Opponents of the liquor law in Ramsey County took advantage of the one month interlude between the referendum and the law's effective date. On April 29, two county commissioners granted a one year "license" to distribute liquor to Alex Cloutier, the proprietor of a "bowling saloon and grog-shop." This set the stage for a test case. On June 21, on the basis of a complaint by "three legal voters," Justice of the Peace Isaac I. Lewis issued a warrant to Sheriff George Brott to search Cloutier's shop.¹⁹ There Brott

Mr. Black called for the ayes and noes, which were taken and there were yeas 12, nays 6.

Journal of the House of Representatives, 3rd Leg. Assem., 122 (Feb. 24, 1852).

¹⁷ Edward Duffield Neill, *The History of Minnesota: From the Earliest French Explorations to the Present Time* 572 (Philadelphia: J. B. Lippincott & Co., 1858). Its supporters naively assumed the battle over temperance was won. The *St. Anthony Express* editorialized:

The Liquor Law has been ratified by a vote of some two hundred majority through the Territory. Now that it has been approved by the people, whatever differences of opinion may exist as to its expediency or legality, we trust there will be a cheerful and ready obedience to its requirements on the part of all. Let the reputation we have acquired as a law-abiding people, be fully maintained.

St. Anthony Express, April 16, 1852, at 2.

¹⁸ *St. Anthony Express*, June 18, 1852, at 2 ("The first Court of Chisago county convened at Taylor's Falls, on Monday 7th inst., Judge Fuller presiding. One man was tried for violation of the liquor law, and was convicted. The court adjourned on Wednesday, 9th.").

¹⁹ Law professor Wesley M. Oliver has written that the Maine Law's requirement that a magistrate could issue a search warrant only if three voters alleged that they had probable cause to believe liquor was located on the premises was a "step toward the

found and seized three barrels of intoxicating liquors. Cloutier was arraigned in Justice Court, charged with violating the liquor law, pled not guilty, tried, found guilty, and fined. Justice Lewis ordered the liquor forfeited and destroyed. Cloutier appealed to the district court.²⁰

In mid-August, while Cloutier's appeal was pending, Sheriff Brott, acting under a search warrant issued in response to a complaint by a local temperance organization, raided a warehouse of William Constans, a St. Paul merchant. There he found casks of liquor which Constans held as bailee. When Brott attempted to seize the liquor, Constans's allies intervened. A near riot ensued after Brott returned with a posse and tried to break down the door to the building. A compromise likely was reached: Constans would not distribute the liquor pending a court ruling on the law's validity.²¹ The *Minnesota Democrat*, which had carried a colorful account

modern probable cause standard in expressly requiring consideration of the facts supporting a complainant's accusations." Wesley M. Oliver, "Portland, Prohibition, and Probable Cause: Maine's Role in Shaping Modern Criminal Procedure." 23 *Maine Bar Journal* 210, 216 (2008)(an electronic copy is available at ssrn.com/abstract=1341349).

²⁰ The foregoing account of the Cloutier case is based on a lengthy article headlined "The New Liquor Law. First Case in St. Anthony" in the *St. Anthony Express*, June 25, 1852, at 2. The article related the oral arguments of E. L. Hall, who represented Cloutier, and John W. North, who appeared for the complainants. Hall rested entirely on Cloutier's eleventh hour license. North countered that the license was void because the county commissioners did not have power to issue it after May 5, the law's effective date; he also "mentioned a fact notoriously public, that the only one of the Commissioners who could write his name, or read and understand the Law, protested against the giving of this and other licenses." Hall replied, "*Here is the license!* There is no dodg-ing it, no getting behind it, nor before it. Moreover, it is impossible that the Law should *nullify a contract* between the Legislature and a citizen, such contract being made before the Law took effect." North rejoined that the legislature "had prescribed that no contract should be made" and that the commissioners and Cloutier had "entered upon a *forbidden* contract." In the end, Lewis found Cloutier guilty, fined him \$20, and ordered the liquor be forfeited and destroyed. *St. Anthony Express*, June 25, 1852, at 2 (italics in original). Later accounts record the fine as \$25. Cloutier's lawyer did not refer to the referendum, a feature that would prove fatal to the law five months later.

²¹ The foregoing account of the Constans case is based on an article headlined "The Maine Liquor Law in Minnesota" in the *Minnesota Democrat*, August 25, 1852, at 2. Several histories confuse and conflate the Cloutier and Constans cases, and they serve as warnings that early histories of territorial legal proceedings must be viewed skeptically and confirming sources hunted down.

The earliest account of the prosecutions under the Liquor Law appeared in Edward

Duffield Neill's history of the state published in 1858. Neill, *supra* note 17, at 578-9. Neill summarized Hayner's ruling in the Cloutier appeal but does not mention William Constans at all. Writing a quarter century after the events, Fletcher Williams relied on the article in the *Minnesota Democrat* on August 25, 1852, for his description of Brott's raid on Constans's warehouse; confusingly he wrote that the "Saint Anthony case soon came before Judge H. Z. Hayner" but does not mention Alex Cloutier by name. J. Fletcher Williams, *A History of the City of Saint Paul, and of the County of Ramsey, Minnesota* 323-4 (St. Paul: Minnesota Historical Society, 1878). A turn-of-the-century history compiled by Return I. Holcombe tracked the account of the Constans case in the *Minnesota Democrat* and Fletcher Williams's history; it added that Hayner issued his ruling in the Constans case and, "He also delivered the same opinion in an appeal of Alexis Cloutier, who had been fined twenty-five dollars for violating the liquor law." Return I. Holcombe, *2 Minnesota in Three Centuries* 465 (Mankato: Pub. Soc. of Minn., 1908).

Agnes Ellingsen, a conscientious student of the temperance movement, gave separate accounts of the Cloutier and Constans cases, citing contemporary newspaper accounts. Interestingly, she noted that the compromise in the Brott-Constans confrontation was achieved "by the aid of Reverend Edward D. Neill." According to her, "Both the Cloutier and the Constans case were appealed to the District Court of the First Judicial District for Ramsey County and came up at the November session, 1852. Cloutier's case was brought before Judge H. Z. Hayner, November 23 and 24." She summarized Hayner's ruling, adding that after he ruled, "Cloutier's fine was remitted, and the liquor that had been held in custody was returned to Constans." She did not state that Hayner ever ruled in Constans's case. Ellingsen, *supra* note 13, at 61-2.

Over fifty years after the events, reminiscences of Sheriff Brott were published in the *St. Cloud Daily Journal Press*. He described the confrontation between the Constans supporters and his forces—"red shirted lumbermen from the Falls"—over the casks of liquors he found in a warehouse. Passions subsided after addresses by "D. A. Robertson and a Mr. Beck from Kentucky," and a truce was reached according to which "the liquors were surrendered and bonded to wait the decision of the district court." Brott continued:

A suit was brought against the sheriff claiming \$1,000 damages, and Judge Hayner of the United States district court decided the law unconstitutional. I had to pay the judgment and costs. I appealed to the legislature to be reimbursed. The committee to whom the matter was referred reported that I was a county officer and that I must seek my remedy from the county. The county refused, stating that I was executing a territorial law to which they were opposed. So between the two I got nothing. About the time of the Constance [sic] seizure a writ was given me to seize a quantity of liquor in Cloutier's saloon at St. Anthony Falls. I was threatened with formidable resistance but the St. Paul affair caused them to restrain any efforts in that line....The liquors were in casks which I stored in a building on the bank of the mill pond....After Heyner's [sic] decision was made I went to return the liquors but found that some one had gotten under the building and bored a hole through the floor and casks and drawn off all the liquors; consequently

I had to pay the value of what I seized. I was not sorry when I had no more seizures to make in that line.

“Early Days in Minnesota,” *The Daily Journal Press*, July 11, 1908, at 2 (I am indebted to Agnes Ellingsen for this source). Brott’s reference to a judgment which the legislature refused to reimburse, was in a case brought by Alex Cloutier. It was described by the *St. Anthony Express*, fifteen months after Chief Justice Hayner invalidated the Liquor Law:

A. Cloutier, vs. G. F. Brott et al.—Action for seizure of plff’s liquors, at his saloon in St. Anthony, in June 1852.

Justification of taking, by the defendants, by virtue of a process issued under the provisions of the Maine Liquor Law. Verdict for the plaintiff for \$73.00 damages.

Several questions of law, among others, the constitutionality of the Maine Liquor Law were reserved by agreement of Counsel for decision by the Supreme Court.

For Plaintiff, Rice, Dodge & Atwater. For defendant, Secombe & Wilkinson.

St. Anthony Express, March 25, 1854, at 2. The minutes of the court for March 23, 1854, record the jury verdict in the case captioned *Alexis Cloutier against Ralph P. Hamilton et. als.*:

We the jury empanelled to try this cause wherein Alex Cloutier is plaintiff and Geo. J. Brott and others are defendants do hereby find the value of the liquors and articles taken by the Defendants on the 21st day of June 1852 amounts to \$264.35. With interest on the same amount from 21st June to the 8th day of December 1852 \$8.48. We also find the value of the goods & -- taken by the Defendants and not returned to the plaintiff amounts to \$60.00. With interest therein from the 8th day December 1852 to the present time \$5.75. Making in the whole \$74.23 verdict in favor of the Plaintiff.—All points of law preserved.

Ramsey County District Court, Territorial Minutes, March 23, 1854, at 26-7.

Curiously, North’s biographer describes the Brott-Constans melee, and Hayner’s ruling, but does not mention North’s participation in the Cloutier case. Merlin Stonehouse, *John Wesley North and the Reform Frontier* 66 (Minneapolis: Univ. of Minn. Press, 1965).

So which of these accounts is historically accurate—or mostly accurate? The most accurate, not surprisingly, is the one written nearest to the events themselves—Edward D. Neill’s. There is one significant omission in each of these accounts: a description of the *trial* of William Constans. A detailed account of Cloutier’s trial in Justice Court, the arguments of counsel, and the court’s sentence of him appeared in the *St. Anthony Express* on June 25, 1852, and even a letter to the editor of that newspaper from “T” appeared the following week defending the authority of the county commissioners to have granted Cloutier a license. *St. Anthony Express*, July 2, 1852, at 2. There is also a detailed summary of Hayner’s ruling in the appeal of “Alexis Cloutier of St. Anthony” in the *Minnesota Democrat* on December 1, 1852, republished in the *St. Anthony Express* on December 10.

of the Constans-Brott standoff, lamented the economic loss to the territory:

It is bad enough for the enlightened world to know that the Maine liquor law is on our statute book; it is far worse to add that our citizens countenance its violent resistance, and that a military company is “absolutely necessary to maintain law and order in this town.”

In such a state of affairs we may abandon all hope of making Minnesota a summer resort for the wealthy classes of the South. They will have no disposition to spend their time and money in any such watering place as that.²²

Before Cloutier’s appeal was argued, there had been a change at the helm of the territorial court. As Jerome Fuller’s recess appointment expired, President Fillmore nominated his replacement, Henry Z. Hayner. He was confirmed by the Senate on August 31, and took the oath of office in St. Paul on October 6.²³ Thus, Hayner had been in office only six weeks before he heard Cloutier’s appeal on November 23 and 24, 1852.²⁴ He announced his decision on November 27. It was reported in the *Minnesota Democrat*:

The Minnesota Maine Liquor Law Declared Void.

However there is no newspaper account of a *trial* of William Constans. He likely was never tried for violating the Liquor Law and, therefore, he never appealed his “case” to the district court. Instead, it is more probable that a stipulation was reached between Constans and the sheriff according to which he agreed to hold the liquor and not sell it pending the outcome of the Cloutier appeal. The actual chronology of the events was: Cloutier was tried first, Brott’s confrontation with Constans followed, and Hayner’s ruling in Cloutier’s appeal came last.

²² *Minnesota Democrat*, August 25, 1852, at 2.

²³ Under Art. II, §2, of the Constitution, a recess appointment expires on the last day of the Senate’s next session. After his recess appointment of Fuller in October 1851, President Fillmore formally nominated him on December 19, 1851, but the Senate delayed acting on it. On August 30, the Senate voted not to confirm Fuller; and that very day Fillmore nominated Henry Z. Hayner, who was confirmed the next day, which also was the last day the Senate was in session. See “Documents regarding the terms of the justices of Minnesota Territory, 1849-1858. Part Two-C.” (MLHP, 2009).

²⁴ Cloutier retained new counsel for his appeal—William Hollinshead and Rensselaer R. Nelson. North was now aided by Morton S. Wilkinson.

A proceeding under the 11th section of the Maine Liquor Law, so called, was instituted before a justice of the peace, whereby a search warrant was issued against Alexis Cloutier, of St. Anthony, and a quantity of liquor in his possession was seized and ordered by the justice to be destroyed and the defendant fined \$25. An appeal was made from that decision, to the Dist. Court of the 1st Judicial District, for Ramsey county.

A motion was thereupon made before Hon. H. Z. Hayner, Chief Justice of the Territory, to quash the proceedings, on the ground that the law was unconstitutional and invalid. W. Hollinshead and R. R. Nelson, Esqs., counsel for the appellant, appeared in support of the motion; and J. W. North and M. S. Wilkinson Esq. for the respondents, opposed the motion. The case was argued with great ability by the counsel for both sides, at the court house in this city, on the 23d and 24th ult.

Judge Hayner announced his decision on Saturday last, in which he thoroughly reviewed, and investigated every point involved in the case.

We regret that we are not able this week to publish the Judge's opinion entire. The following is a brief of the points decided:

1. That the legislative power being vested by the Organic Act in the legislative assembly and Governor, they had no right or authority to delegate it to any body of persons—not even to the people of the Territory.

2. That in the enactment in question, the legislature in effect attempted to transfer this power to the people.

3. That in doing so they acted beyond their authority and conferred no power upon the people, and consequently their acts were void.

4. That the people of the Territory could not in their eminent dominion reserve and exercise the power, inasmuch as the Territories belong to the people of the whole Union, and under the Constitution of the U. S. the ultimate sovereignty is granted to Congress. If it could be reserved it would have to be done by Congress, and not by the people of the Territory, who therefore derived no right from this source to pass this

enactment, and therefore it never became a law, and cannot be enforced as such.²⁵

Though he overturned the result of a popular vote, Hayner was not criticized.²⁶ If anything, his stature rose. Less than three months later, in

²⁵ *Minnesota Democrat*, December 1, 1852, at 2. The *Democrat's* account was reprinted in the *St. Anthony Express* on December 10, 1852, at 2.

Curiously, in 1861, Justice Charles Flandrau, then on the supreme court, mentioned Hayner's ruling—though he got the year wrong, and could not recall Hayner as being its author nor the circumstances in which he issued it—when holding that a law authorizing a change in the county seat by vote of the county voters violated a provision of the state constitution, which required the legislature to first approve such a change. Flandrau spoke for a divided supreme court, the dissenter being Isaac Atwater:

Previous to the adoption of our constitution, the legislative power of the territory was vested in the governor and the legislative assembly; Organic Act, §4; and no law could be passed by any other authority. In the year 1853, a law was passed by the legislature of the territory, on the subject of the manufacture and traffic in spirituous liquors, the validity of which was left to be determined by a vote of the people. Laws 1853, pp 7-13, §19. The people in their primary assemblies adopted or ratified the law by a majority vote, and the courts of the territory subsequently declared it void, as having been in effect passed by the people and not the legislature. I am unable, however, to find any record or report of the decision, and am not certain that the question was passed upon by the court of last resort. The rule is a familiar one, however, and has thus received the sanction of the courts of other states. *Parker v. The Commonwealth*, 6 Penn. St. 515-16.

Roos v. State ex rel. Swenson, 6 Minn. 428, 434, (Gil. 291, 293) (1861).

²⁶ The *Minnesota Pioneer*, however, noted the experience of Massachusetts:

We learn that Judge Hayner has decided that this enactment of the last Legislature is unconstitutional because passed by the Legislature under a provision that it should become a law, if the voters at the next election should approve it by voting *aye*. The Judge says that this method of enacting laws is wrong because the Legislature undertake to delegate a part of the legislative power to the people. We are not disposed to discuss this question of law. We only know that the Legislature of Massachusetts have this last year done the same thing, but whether they have authority in their constitution which our Organic act does not impart, we are unable to say.

the midst of the hurly burly of the fourth legislative session, the Council sought his views on another temperance bill.

D. Chief Justice Hayner's Advisory Opinion.

Anyone interested in public affairs soon learns that highly controversial social issues, particularly those that concern matters of morality and are taken up by organized religion, do not fade quickly from the arena of politics. And so it was that Hayner's ruling invigorated the Liquor Law's proponents. Agnes Ellingsen has described the increased fervor of the temperance movement:

Judge's Hayner's decision was the signal for renewed activity among the temperance advocates in Minnesota. The success they had achieved by the passage of the Maine Law in the legislature and by its approval in the referendum had been encouraging. The nullification by court action seemed to them merely a temporary defeat and they set themselves to the task of reenacting the law. The church organizations gave promise of increased support.²⁷

In late December, on the eve of the fourth legislative session, the St. Anthony Temperance Society passed several resolutions, including the following, which reveal the determination of the movement:

Resolved, That we earnestly desire that our legislation [sic] may give us back in substance the Law of last winter, in such form that there may be no legal impediment to its universal and efficient enforcement.

Resolved, That another year's experience of the evils growing out of the Liquor traffic, only serves to convince us more deeply of the necessity of a thorough, prohibitory Law.

Resolved, That we will never give up until we have that Law, and have it in earnest.

Minnesota Pioneer, December 2, 1858, at 2 (italics in original).

²⁷ Ellingsen, *supra* note 13, at 65. She went on to note that the Catholic Temperance Society, a Baptist convention, an annual conference of the Methodists, and a Convention of Congregational Clergymen passed resolutions supporting the law. *Id.*

Resolved, That we will do our best by all proper measures to secure its enactment this winter.²⁸

This stridency and self righteousness hardened the resolve of its opponents, who not only believed the law ineffective and ruinous to the economy of the territory, but were infuriated by the proponent's tactics as well. During a debate on the bill, Representative James Wells declared, "I am opposed to this law, sir: first upon account of the manner in which it is advocated by its friends—mainly by force, and threats and fanaticism—and I appeal for the proof of this to the universal experience elsewhere, in regard to similar laws."²⁹

A Liquor Law was reintroduced in both house, but doubts about its legality persisted. On February 16, 1853, the Council sought Hayner's opinion on the constitutionality of the law, "as the Council does not wish to act unadvisedly on a subject of such grave importance."³⁰ For the second time,

²⁸ *St. Anthony Express*, December 24, 1852, at 2 (italics in original).

²⁹ *Minnesota Pioneer*, March 3, 1853, at 2. Earlier in his speech, Wells complained that the law had become, for the proponents, the sole issue in the legislature and in elections:

Those who are advocating the passage of this bill, well understand the sensitiveness of office holders and office seekers. We saw a resolution proposed by which the friends of this bill pledged themselves to vote for no man for any office, who was not pledged to support this law; making their fanaticism in this question paramount to all other considerations, and the best interests of the Territory. Acting upon this principle, fanaticism and the Clergy have besieged these Halls, with the ballot box for their battle cry, with which, like Banquo's ghost to push the Representative from his stool.

³⁰ Learning from the Fuller fiasco, the Council directed that a copy of the proposed bill be submitted to Hayner. The following is the Council's resolution:

Resolved, That the Secretary of the Council be instructed to present to his Honor, the Chief Justice of the Territory, a copy of the "bill for the restriction of the sale of spirituous liquors," and request of him for this body, an opinion on the Constitutionality of such a law if passed, as the Council does not wish to act unadvisedly on a subject of such grave importance.

C. R., Journal of the Council of Minnesota, 4th Leg. Assem., 65 (February 16, 1853).

Hayner was thrown into the fray. He did not flinch. He responded two days later in an opinion that was short and blunt. It resembled the bold headings in the “argument” section of a lawyer’s appellate brief, not the argument itself. He understood that the legislators wanted his judgment quickly, not an elaboration of how he reached that result. He declared that one section violated the constitutional guarantee against self-incrimination, another the right against excessive bail, and a third violated six separate guarantees of the federal constitution. He concluded on a note the bill’s proponents may have found ominous: “There probably are other unconstitutional provisions, in the bill that have escaped me from the necessarily hasty perusal I have been compelled to give it.”³¹

The Chief Justice’s advice was heeded. Immediately after the Council received his opinion, amendments to the liquor law were offered that aimed to avoid the constitutional problems he identified.³² In this respect, the purpose of §19 was accomplished. But the Liquor Law was not to be. The House voted down the bill on February 28, 11 to 6; and three days later, it rejected a new version passed by the Council, 9 to 7.³³

Even after this defeat, the *St. Anthony Express* was optimistic about the future of the “cause of temperance.” It predicted that the “legality and constitutionality” of the Maine Law would be “examined and adjudicated” in other states; and it went on to suggest that Hayner’s opinion prevented the “evil...of hastily enacted laws, which cannot stand the test of judicial examination”:

³¹ Section II B, below at 40. When he rendered this opinion, Hayner must have been aware that he was something of a “lame duck.” Franklin Pierce was elected president in November 1852. Immediately after his inauguration on March 5, 1853, Pierce began replacing his predecessor’s appointees. He removed Hayner on April 5, 1853, by nominating William H. Welch to be Chief Justice. The Senate confirmed Welch the next day.

³² E.g., Journal of the Council of Minnesota, 4th Leg. Assem., 76-7 (February 23, 1853)(nine amendments approved). At the end of the session, the *Minnesota Pioneer* recalled the Council’s acceptance of Hayner’s opinion: “The friends of the measure in the Council having applied for and received the opinion of the Chief Justice as to the constitutionality of the bill then before that body, made the necessary amendments to conform to the opinion of the Chief Justice.” *Minnesota Pioneer*, March 3, 1853, at 2.

³³ Journal of the House of Representatives, 4th Leg. Assem., 169 (February 28, 1853); Journal of the House of Representatives, 4th Leg. Assem., 187 (March 3, 1853).

The law as it passed last session, contained a number of provisions, any one of which, if judicially passed upon, would have been fatal to the bill.—Several of the most objectionable features, on advising with the Chief Justice, were stricken out of the bill, as it passed the Council the present session. Still, as intimated by his Honor, a more careful examination that he had time to devote to the matter, might disclose other serious objections. We have some curiosity to know who originally drafted the bill, pregnant with so many objections, as Judge Hayner discovered in the present. If a lawyer, he would scarcely venture to base his legal reputation on such a production.³⁴

Here the newspaper identified the occasional shortcomings of laws passed by the territorial legislative assembly—there was at times a deficiency in draftsmanship.³⁵ It is doubtful, however, that more frequent use of the advisory opinion law would have alleviated these occasional inadequacies.

E. Opinions of Justices Chatfield and Sherburne

On April 5, 1853, one month after his inauguration, President Franklin Pierce nominated Andrew G. Chatfield and Moses Sherburne to serve on the Territorial Supreme Court, and they were confirmed by the Senate the next day. Each served four years.³⁶

The fifth legislative session commenced on January 4, 1854, and adjourned two months later, having passed few laws of significance.³⁷ However, it

³⁴ *St. Anthony Express*, March 11, 1853, at 2.

³⁵ This problem did not end with statehood. For much of the rest of the century, the legislature occasionally enacted laws that were poorly drafted, imprecise, or incomplete. This raised the ire of judges—Justice William Mitchell is an example—who had to interpret them.

³⁶ On April 21, 1857, newly inaugurated President James Buchanan made a recess appointment of Rensselaer R. Nelson to fill Sherburne's slot, and on July 17, 1857, appointed Charles E. Flandrau to fill Chatfield's slot (which John Petitt had declined).

³⁷ Return I. Welcome, *supra* note 21, at 477 (“The Legislature adjourned March 4, 1854. There was little important legislation passed.”).

was during this otherwise lethargic session that the advisory opinion law was employed twice, eliciting four responses from the justices. On January 24 and 25, 1854, the House passed two resolutions for the advisory opinions. Justices Chatfield and Sherburne issued separate replies to each request.

i. The “School Lands” Question

By the first resolution, passed on January 24, the House requested advisory opinions from “the Supreme Judges” on “the authority of the Legislative Assembly to sell or lease the School Lands,” which had been set aside in §18 of the Organic Act of 1849.³⁸ This broad subject was not the subject of a pending bill. Even Chatfield seemed surprised, beginning his lengthy reply with the disclaimer, “waiving all exception to the language of the resolution...” In an opinion dated February 3, 1854, he concluded that the legislature did not have the power to sell school lands but it could lease them if this was the most expedient means of “protecting” them from “injury and waste.” On February 11, 1854, Sherburne concluded otherwise: “My answer must therefore be that the Legislative Assembly has no authority to either sell or lease the ‘School Lands’ in this Territory.”³⁹

Although §19 authorized either house to request “the opinion of the supreme court, or any one or more of the judges thereof upon a given subject,” a danger in requesting opinions from more than one justice is that they will disagree. By asking Justices Chatfield and Sherburne for their opinions, the House risked receiving conflicting advice, and this is exactly what it got. Their disagreement, however, did not cause confusion in the House because a bill implicitly permitting the leasing of school lands was

³⁸ The Organic Act provided:

Sec. 18. And be it further enacted, That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same.

³⁹ Section II D, below at 48.

introduced before either advisory opinion was received. It later was passed by the House, but died in the Senate.⁴⁰

⁴⁰ This bill warrants a few paragraphs. The initial House resolution seeking an advisory opinion of the justices on “the authority of the Legislative Assembly to sell or lease the School Lands” was introduced by Representative William McKusick of Stillwater on January 24, 1854. Six days later, on January 30, 1854, he introduced House Bill No. 7, “A bill for the protection of School Lands, and for other purposes,” which permitted the renting of school lands. *Journal of the House. 5th Leg. Assem.*, 89 (January 30, 1854). In an act of prescience, McKusick gave a title to his bill that tracked the conclusion announced four days later by Justice Chatfield. On February 3, 1854, Chatfield advised that the legislature could lease the school lands if this was the most expedient means of “protecting” them from “injury and waste.”

William McKusick was 29 years old in 1854 when he served in the House. He was a lumberman by trade, and worked for several years with his brother John, who built the first sawmill on Lake St. Croix. John also started the Stillwater Lumber Company in 1843, and even gave the town of Stillwater its name. Willard E. Rosenfelt & Maynard H. Johnson, *Washington: A History of the Minnesota County* 128, 226 (Stillwater: Croixside Pres, 1979). When William died on May 8, 1908, his obituary noted his background in the timber industry: “In the early fifties, he became associated with the late F. R. Delano in the manufacture of lumber, and later was one of the active members of the firm of McKusick, Anderson & Co., which firm organized the establishment on the Wisconsin side, now known as the East Side mill.” “A Pioneer Dead,” *The Stillwater Daily Gazette*, May 9, 1908, at 2.

At first glance, it seems odd that William McKusick would seek judicial advice about selling or leasing school lands because at this time there was an abundance of land and a scarcity of settlers. His request becomes more understandable when it is recalled that it was made in the midst of the economic boom of the mid-1850s. Theodore Blegen has described the speculative fever of period: “Business expanded, speculation was rampant, the currency of the time was of the wildcat variety issued by banks in distant states, and the prices of land and property went skyward.” Theodore C. Blegen, *Minnesota: A History of the State* 208 (Minneapolis: Univ. of Minn. Press, 1963). The boom would explode in the Panic of 1857. Moreover, this was a period when timber interests openly plundered public lands, resulting in what one historian of the West called “the Timber War of the 1850s.” Everett Dick, *The Lure of the Land: A Social History of the Public Lands from the Articles of Confederation to the New Deal* 186 (Lincoln: Univ. of Nebraska Press, 1970). Though it is difficult to discern the motives of individual legislators, it is probable that settlers who had occupied school lands and fellow lumbermen pressured McKusick and his colleagues to sell the school lands, which were in choice locations, or to lease them so their timber could be harvested *legally*; and, to be on the safe side, the House asked the justices for advice. In his opinion, Moses Sherburne warned that deforestation would result from leasing the school lands. Section II D, below at 47.

But there is more. There have been no charges that McKusick used his official

position—and he held many public offices during his life—to advance his private business interests. His obituary noted, “Mr. McKusick was a man of sterling worth, and the community in which he lived for so many years appreciating this, early promoted him to various positions of honor and great responsibility, and with the purest hand, he faithfully discharge his public duties.” “A Pioneer Dead,” *The Stillwater Daily Gazette*, May 9, 1908, at 2.

Moreover, McKusick’s bill covered much more than the lease of school lands. It created in every county a new public corporation known as the Trustees of the School Lands, which would be composed of the County Commissioners, County Treasurer, Register of Deeds, and District Attorney. They would administer the school lands, collect “all rents and profits of school lands,” prosecute trespassers and those who cut timber on the lands, hire a school superintendent, and so on. The compensation of the Trustees would be the same as that which the county commissioners received. See H. R. 7, Territorial Records, House Bills 1849-1857 (on file at the Minnesota Historical Society). In fact, the Trustees’s compensation, rather than the implied grant of power to rent the school lands, seems to have doomed McKusick’s bill. House Bill No. 7 was passed on February 7, 1854, but it died when the Council “indefinitely postponed” it on February 16. Journal of the House, 5th Leg. Assem., 162 (February 7, 1854); Journal of the Council, 5th Leg. Assem., 162 (February 16, 1854); Journal of the House, 5th Leg. Assem., 197 (February 18, 1854). When it voted to indefinitely table the bill, the Council relied upon the following committee report:

No. 7, (H. of R.) A bill for the protection of School Lands, and for other purposes,

Have had the same under consideration, and would recommend its indefinite postponement.

The reasons for this recommendation are so apparent upon the face of the bill, that the committee deem it useless to go into details.

The paramount objection, however, in regard to the bill, with the committee, is that it creates an additional tax in each of the counties of this Territory, of from five hundred to one thousand dollars. But aside from this, the Legislative Assembly of this Territory, at its session in 1852, by an act approved March 6, 1852, has made ample provision in regard to the protection of School Lands in this Territory.

All of which is respectfully submitted,

WM. P. MURRAY,
WM. FREEBORN,
L. VAN ETTEN,

Committee.

Journal of the Council, 5th Leg. Assem., 150 (February 14, 1854). The “tax” the committee referred to is the amount of the Trustees’ salaries. The 1852 law the committee cited is titled, “An act to punish trespassers on School Lands in Minnesota Territory,” and it already criminalized acts of trespassers on school lands. 1852 Minn. Terr. Sess. Laws, Ch 33.

What conclusions can we reach from this? We are left, as usual when interpreting the legislative process, with suspicions but no confirming evidence, uncomfortable speculation about character but plenty of contrary testimonials. The only firm

An interesting footnote to these advisory opinions was written sometime later by Justice Sherburne. Notwithstanding their protected status under the Organic Act, the school lands were irresistible to settlers, who occupied them, and timber interests, who cut the forests.⁴¹ In response, county commissioners directed their county attorney to recover the value of illegally harvested timber, and one such suit came before Justice Sherburne. Though the precise date is not known (other than it came before the end of his term on April 5, 1857), Sherburne recognized the authority of the Ramsey County Attorney “to recover the value of certain pine timber cut by the defendants upon school lands in Ramsey County.” About this time, however, the timber interests in Minnesota Nebraska and Kansas Territories succeeded in lobbying Congress for relief; and on March 3, 1857, Congress passed a resolution which recognized the preemption rights of settlers on previously protected school lands.⁴² On April 23, 1857, the *Minnesota Republican* reported both Sherburne’s undated ruling and Congress’s resolution in one lengthy story:

School Land---Trespassers---Honest
Settlers.

As the Commissioners of Hennepin County have adopted an order directing the District Attorney to prosecute all trespasses upon School Lands within the County, and an order directing him to contest the pre-emption of said land, some parties will feel a peculiar interest in the publication of the following documents. We give first Judge Sherburne’s Decision in the case of a similar prosecution in Ramsey County.

CUTTING TIMBER ON SCHOOL LANDS.

Ramsey County District Court.

knowledge we have is that Justices Chatfield and Sherburne reached contrary conclusions about the Legislative Assembly’s authority to lease school lands, and a curiously-timed bill that would have created a separate government entity to manage the lands, and implicitly permit their rental, was not enacted in 1854.

⁴¹ See generally Dick, *supra* note 39, at 182-86.

⁴² *Journal of the Executive Proceedings*, 34th Con., March 2, 1857, at 301.

The Board of Commissioners, versus Whitney & Stiles.

This action came on to be heard on the demurrer of the Defendants to the complaint of the Plaintiffs. The action was brought to recover the value of certain pine lumber cut by the defendants upon school lands in Ramsey County. By the organic act, sections 16 and 36 of each township are reserved for school purposes in the Territory of Minnesota and the State and Territories to be erected out of the same. In 1851 Congress authorized the Legislature to pass all needful laws and regulations for the protection of school lands. In 1852 the Legislature made cutting timber thereon a penal offence, punishable by fine and imprisonment. In 1854 the law was amended, and it was made the duty of the Commissioners of the respective counties—and they were authorized to recover the value of any timber cut on School Lands.

This action was funded on the Amended Statute. The Defendants demurred, assigning as their ground of objection that the Legislature was not authorized to pass any law allowing the recovery of the value of the timber cut—that the law of Congress contemplated penal laws, not actions of trespass, and that the amended act of the Legislature could not be construed as a law for the protection of school lands. The Court over-ruled the demurer, deciding that the amended act was sanctioned by the law of Congress, that it was an act for the protection of School Lands, allowing the recovery of the value of the timber as in the nature of a penalty—that the previous law authorizing imprisonment and fine had proved totally inadequate to suppress depredation on these lands, and if the Legislature thought the lands would be better protected by giving the value of the timber thereon, as reward for prosecuting offenders, it was within the scope of their authority so to do.

AN ACT FOR THE RELIEF OF SETTLERS ON SCHOOL LANDS.

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That where any settlements, by the erection of a dwelling house,—or the cultivation of any portion of the land, shall have been, or shall be made upon the sixteenth or thirty-sixth sections, (which sections have been preserved bylaw for the purpose of being applied to the support of schools in the Territories of Minnesota, Kansas and Nebraska, and in the States or Territories hereafter to be erected out of the same,) before the said sections shall have been, or shall be surveyed; or when such sections have been, or maybe selected or occupied as town sites, under and by virtue of the act of congress, approved twenty-third of May, eighteen hundred and forty-four, or reserved for public uses before the survey, then other lands shall be selected by the proper authorities in lieu therof, agreeably to the provisions of the act of Congress approved twentieth of May, eighteen hundred and twenty-six, entitled “An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for.”

And if each settler can bring himself, or herself, within the provisions of the act of fourth of September, eighteen hundred and forty-one, or the occupants of the town site be enabled to show a compliance with the provisions of the law of twenty-third May, eighteen hundred and forty-four, then the right of preference granted by the said acts, in the purchase of such portions of the sixteenth or thirty-sixth sections, so settled and occupied, shall be in them, respectively, as if such sections had not been previously reserved for school purposes.

Approved March 3, 1857.⁴³

Moses Sherburne, unlike others it seems, never lost sight of the value to the public of the school lands.

⁴³ *Minnesota Republican*, April 23, 1857, at 2.

ii. The “Settler’s Recover Act” Question

The second resolution for an advisory opinion was passed January 25, 1854, and concerned a bill titled “Of Actions by Persons holding Claims on United States Lands.” It authorized a settler on a plot of public land to sue anyone who injured or encroached on that land or to recover possession of the land itself. To have standing to sue, the claimant had to have made at least \$50 in improvements to the land, which could not be subject to federal pre-emption laws.⁴⁴ Chatfield and Sherburne concluded that the law did not violate either the constitution or the Organic Act. To Sherburne, “It merely affirms a well-known principle of common law, and neither

⁴⁴ The following is the bill entitled “Of Actions by Persons holding Claims on United States Lands” in Chapter 88 of the Revised Statutes:

Sec. 1. Any person settled upon any of the public lands belonging to the United States, on which settlement is not expressly prohibited by Congress or some department of the General Government, may maintain an action for injuries done to the possession thereof, or to recover the possession thereof.

Sec. 2. On the trial of any such cause, the possession, or possessory right of the plaintiff, shall be considered as extending to the boundaries embraced by the claim of such plaintiff, so as to enable him to have and maintain either of the aforesaid actions, without being compelled to prove a natural inclosure: *Provided*, That such claim shall not exceed, in any case, one hundred and sixty acres; and the same may be located in two different parcels, to suit the convenience of the holder.

Sec 3. Every such claim, to entitle the holder to maintain either of the aforesaid actions, shall be marked out so that the boundaries thereof may be easily traced, and the extent of such claim easily known; and no person shall be entitled to maintain either of said actions for possession of, or any injury done to any claim unless he be an actual settler, or cause the land to be constantly occupied, and improvement made thereon, to the amount of fifty dollars.

Sec. 4. A neglect to occupy or cultivate such claim, for the period of six months, shall be considered such an abandonment as to preclude the claimant from maintaining either of the aforesaid actions.

This bill was reprinted with the opinions of Justices Chatfield and Sherburne in the Appendix to the House Journal, 5th Leg. Assem., at 102 (1854). The House later ordered 250 copies of the four opinions of the justices published as a pamphlet. A copy is on file at the Minnesota Historical Society.

enlarges nor abridges the common right to occupy public lands. It is a well established rule of law, that a party in actual possession of real estate may protect such possession against every one except the rightful owner, or some one claiming under such owner.”⁴⁵ Chatfield, whose opinion is almost five times longer than Sherburne’s, saw that the law went a bit farther: “[The act] modifies and extends the rules of the common law defining actual occupancy, and very materially changes the rule of evidence by which such occupancy may be proved.”⁴⁶ If these were the limited effects of the law, what purpose did it serve? What problem did it address? To state the obvious: it had nothing to do with Indian tribes or the actions of individual Tribal members. Instead, the law seems aimed at the most reviled figure on the frontier—the claim jumper. In his opinion, Chatfield noted that the common law afforded a claimant “slender protections against intruders” (a euphemism for jumpers). He stated that the bill was an exercise of the territorial government’s police power to preserve peace among the inhabitants:

It is an act peculiarly applicable to the circumstances and condition of this Territory so long as the public lands therein shall remain unsurveyed, or otherwise outside of the pre-emption laws of the United States, and of great value in the preservation of peace among the inhabitants settled on such lands. As such it may be appropriately deemed to belong to the internal police of the Territory.⁴⁷

In territorial days, it seemed that nothing riled a community more than a claim jumper. Early local histories repeat tales about claim disputes, some of which turned violent. “Claims associations” were formed in some counties to ensure that their members kept title to their land and to combat jumpers.⁴⁸ When these organizations were called by a member to oust a

⁴⁵ Section II F, below at 56.

⁴⁶ Section II E, below at 53.

⁴⁷ *Id.*

⁴⁸ A territorial newspaper described the troubles that arise when a jumper is confronted:

The jumper is the man who, taking advantage of the ignorance or carelessness of the squatter, puts up *his* shanty on the same subdivision, and declares himself the rightful and real claimant.

jumper, violence or threats frequently resulted. This legislation likely was designed to encourage a claimant to resolve his dispute with a jumper through a lawsuit rather than violence.

While Chatfield's discussion helps those of us in the early years of the twenty-first century understand the possible purposes of the act, it is doubtful that Representatives in the House who were debating it in the winter of 1854 had much interest in his views of their intentions. Unlike Hayner, Chatfield could not write a terse opinion; he felt compelled to expound on other matters, including the legislature's power to alter the common law:

The rules which have been established by the operations of the common law, are held to be within the control of the Legislative power of the country where they exist. The Legislature may modify any mere rule of the common law—may extend or restrict it in its operations, or abolish it altogether. The Legislature also possesses the like power over the rules or law of evidence.⁴⁹

This pronouncement and his earlier assurance that “at all times [he is] willing and even anxious to assist the Legislature” raised the ire of a Select Committee of the House. In a report that other House members tried unsuccessfully to expunge, the Select Committee vilified Chatfield in a brief passage, though not by name:

This jumping business frequently gives rise to arm (sic) controversy. Sometimes the matter goes to law, sometimes voluntary associations of the settlers arbitrate, and once in a while, when two men of brutal tendencies meet there is a resort to pummeling or powder.

The Minnesota Republican, July 26, 1855, at 2 (this article is posted separately on the MLHP).

To date, the only scholarly study of claims associations in Minnesota is Charles J. Ritchey's “Claim Associations and Pioneer Democracy in Early Minnesota,” 9 *Minnesota History* 85-95 (1928), written under the heavy influence of Frederick Jackson Turner. Theodore Blegen contended that claims associations exemplified an “American tendency” to act collectively to protect their interests without government intervention. Theodore C. Belgen, “On the Stir!,” in *Grass Roots History* 166, 171 (Minneapolis: Univ. of Minn. Press, 1947).

⁴⁹ Section II E, below at 52.

[I]f there ever was a time or place in which sound legislation, was indispensable to the safety of the citizen, this is the time and place. To establish the truth of this proposition, it is only necessary to call attention to an extra-judicial opinion, dated February 6, 1854, which was kindly furnished the House, a copy of which is before your Committee, in which we are advised that the legislative power of this Territory is very great; that it extends to the abrogation of the common law, as well as to the laws of evidence; to the unsurveyed lands of the United States, and to their management and control in all things save the “primary disposal” thereof; in all else the Legislature is said to be supreme And this opinion is accompanied with an offer, on the part of the Judiciary to aid the Legislature—in other words, that he is “willing and even anxious” to do so. Your Committee fear that the prospective vote of some “bona fide settler” obscured the mental vision of his Honor at the time he drew this opinion. They are amazed! Has our code repealed the common law? Has it repealed the ordinance of 1787? Does it override the decision of the Supreme Court of the United States? Does it repeal the Constitution, and above all, has, or will, the Supreme Court recognize this right, or power? Your Committee regret to say that a portion of that Court has recognized this right...⁵⁰

This assault may be termed an unintended consequence of Chatfield’s obiter dictum. To the Select Committee, Chatfield’s pronouncement about the power of the legislature to change the common law sanctified its earlier adoption of the Field Code. The Committee did not object to court-issued advisory opinions per se, or to the particular law that authorized suits by certain claimants to federal lands, but it abhorred the code, which displaced

⁵⁰ “Report of the Select Committee to whom was Referred a Bill for an Act to Abolish Imprisonment for Debt” in Appendix to the Journal of the House, 5th Leg. Assem., at 155, 159 (1854)(italics in original). A resolution by Representative William McKusick to expunge this report from the House Journal was tabled. The complete report of this Select Committee will appear in an appendix to an article on the introduction of the Field Code in Minnesota Territory, that will be posted in the near future on the MLHP.

common law practices and procedures. Its members wanted to return to the former way of practice.

The House had requested an advisory opinion on whether this law was “consistent” with the constitution and the Organic Act. Chatfield’s lengthy response, replete with dictum, invited legislators to dispute his reasoning and triggered a scorching ad hominem attack that he could not have foreseen.

The wording of §19, the resolutions passed pursuant to it by the House and Council between 1852 and 1854, and the different responses of the justices suggest that during the territorial era the legislature and judiciary had not fully thought through how the advisory opinion law should be used. It seems to have been invoked on an ad hoc basis, sporadically, and not at all after January 1854. Yet it also seems clear that the legislative assembly benefited from the advisory opinions it received from the justices. In that respect, the advisory opinion law worked just as it was intended.

F. Advisory Opinions after Statehood.

After statehood, the statutes were revised and the advisory opinion law now appeared as §15 of chapter 4, which defined the rights, powers, duties and exemptions of the legislature.

Sec. 15. Either house may, by resolution, request the opinion of the supreme court, or any one or more of the judges thereof, upon a given subject, and it shall be the duty of such court or judges, when so requested, respectively, to give such opinion in writing.⁵¹

Thereafter the Senate on three occasions requested advisory opinions from the Supreme Court. To each request, an individual justice refused to provide the advice sought, albeit on increasingly broader grounds.

In 1858, Justice Flandrau refused because the Senate’s request did not raise a constitutional question about its “power or jurisdiction” to act. Section 15, he said, “is intended to apply only to such questions as shall be pending

⁵¹ Minn. Rev. Stat., ch. 4, §15 (1858).

before the Legislature or either house thereof, about which there may exist some doubt as to the constitutional power or jurisdiction of the Legislature to act, making the ‘Supreme Court or any one or more of the Judges thereof’ the constitutional advisor of the Legislature.”⁵² There is nothing deferential about Flandrau’s reply. His interpretation of the phrase “upon a given subject” in §15 inched away from that of the territorial judiciary.

In 1863, Chief Justice Emmett also refused, citing Flandrau’s earlier opinion: “[H]eretofore, in response to a similar request, made by one branch of the legislative assembly, the judges of the Supreme Court, after mature deliberation, came to the conclusion that they could not, with propriety, give an opinion as to the constitutionality of any measure pending before the legislature.”⁵³ By now, the court was galloping away from the practices of the territorial judges.

Finally, in 1865, Justice McMillan, speaking for the full court, declined, this time holding the advisory opinion law unconstitutional. The court might have asked the attorney general for his views on the constitutionality of the law, but it did not; it received no briefs, and heard no oral argument before issuing the decision *sua sponte*. It may be the finest advisory opinion of them all.

Each of these refusals was dutifully reprinted in the Senate Journal.

The court subsequently published its ruling voiding the advisory opinion law in the Minnesota Reports under the caption *In the Matter of the Application of the Senate*.⁵⁴ The court has cited it several times when it has

⁵² Section III A, below at 58-9.

⁵³ Section III B, below at 60-1

⁵⁴ *In the Matter of the Application of the Senate*, 10 Minn. 78 (Gil. 56) (1865)(McMillan, J.). See Section III C, below at 62-65. The format of the opinion published in the Senate Journal differs slightly from decision published in the *Minnesota Reports*. In the latter, several paragraphs have been combined into one.

Notably the Court did not assert that an advisory opinion would violate the constitutional requirement that it decide only “cases.” The 1857 Constitution, Art. 6, §2, provided: “[The supreme court] shall have original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases, both in law and equity, but there shall be no trial by jury in said court.”

declined jurisdiction over appeals which call for advisory opinions.⁵⁵

G. Conclusion.

This article throws some light on an obscure, cobweb-covered corner of Minnesota's legal past. It shows the supreme court working in the thick of territorial politics, being called upon for advice on one of the most divisive political-cultural issues of the day, and issuing sweeping but controversial pronouncements on the powers of the legislature.

Each of the advisory opinions of the territorial justices appears in Section II below.⁵⁶ The three "refusals" of the court after statehood appear in Section III. The heading on each opinion, identifying the justice who wrote it, did not appear in the Journal of the House or Council in which that opinion was first published; they have been added by the MLHP. In each advisory opinion, the MLHP has quoted in a footnote the resolution of the legislative chamber requesting that opinion. Though reformatted, each advisory opinion is complete. The justice's spelling and punctuation have not been changed.

An essay on "Advisory Opinions" by James Bradley Thayer, a famous professor at Harvard Law School in the late nineteenth century, appears in Section IV.⁵⁷ It was first published in 1885, and was included in a posthumously collection of his essays published in 1908. It too has been reformatted.

The libraries of the Minnesota Historical Society and the Minnesota Supreme Court are indispensable to anyone pursuing an interest in the legal history of this state. This Foreword could not have been written and the

⁵⁵ The court held that it not have jurisdiction to give advisory opinions in *Rice v. Austin*, 19 Minn. 103 (19 Gil. 74) (1872)(Berry, J.), and *State v. Dike*, 20 Minn. 363 (Gil. 314) (1874)(Young, J.), both citing *In the Matter of the Application of the Senate*.

⁵⁶ These are the advisory opinions of the territorial court found so far. Others found at a later date will be added to Section II below.

⁵⁷ For a biographical sketch, see Jay G. Hook, "James Bradley Thayer" in Roger K. Newman, ed., *The Yale Biographical Dictionary of American law* 540-1 (New Haven: Yale Univ. Press, 2009).

advisory opinions that follow could not have been compiled without use of the records in these great research facilities. ■

II. Advisory Opinions of the Justices of the Territorial Supreme Court, 1852 - 1854



A. Opinion of Chief Justice Jerome Fuller ⁵⁸ (February 25, 1852)



To the Honorable, the House of Representatives of .Minnesota Territory:

Your clerk has transmitted to me a copy of the following resolution, adopted by your honorable body on the 23d inst:

“*Resolved*, That the Chief Justice of the Territory be requested to furnish this House, at as early a day as possible, his written opinion, as to the power of the Legislative Assembly enact any law prohibiting the sale and importation of intoxicating liquors in this Territory.” ⁵⁹

In my judgment, there would be a manifest impropriety in my deciding extrajudicially and beforehand, a controverted question about which the public mind is deeply exercised, and which may probably come before me for future

⁵⁸ Journal of the House of Representatives, 3rd Leg. Assem., 126 (February 25, 1852). The opinion is not dated.

⁵⁹ The following is resolution of the House adopted on February 23, 1852:

Mr. Murray offered the following resolution:

Resolved, That the Chief Justice of this Territory be requested to furnish this House, at as early a day as possible, his written opinion, as to the power of the Legislative Assembly to enact any law prohibiting the sale and importation of intoxicating liquors in this Territory.

On motion of Mr. Randall,
The 33d rule of the House was suspended, and said resolution adopted.

H. R., Journal of the House of Representatives, 3rd Leg. Assem. 120 (February 23, 1852).

adjudication, in the course of my official duties.

There is another obstacle in the way of my returning a definite answer in the form of an opinion, to the request contained in your resolution. You have transmitted to me no draft of any proposed law. While a statute to prohibit the sale of intoxicating liquors, not conflicting with the revenue laws of the U. S., might perhaps be so drawn as to be valid, yet, whether any particular statute is valid or not, must depend upon its own peculiar and special provisions. And without an inspection of them I could not well pass an opinion upon them in advance, which would be of any value.

These reasons, I trust, will, be sufficient to excuse me from any, further reply to your resolution

I have the honor to be with the highest respect,
Your obedient servant,
JEROME FULLER,
Chief Justice.

B. Opinion of Chief Justice Henry Z. Hayner
on the “Maine Liquor Law”⁶⁰
(February 18, 1853)



AT CHAMBERS, ST. PAUL }
18th February, 1853 }

To the Hon., the Legislative Council of the Territory, of Minnesota:

I am apprised by your Secretary that a resolution was adopted by your honorable body the 16th instant, a copy whereof accompanying a copy of “a bill for the restriction of the sale of intoxicating liquors within the Territory of Minnesota,” was enclosed to me by him, requiring my opinion on the constitutionality of such a law if passed.⁶¹

Upon the examination of the Revised Statutes of the Territory, I find that you have the full right and authority to call upon me for, such opinion. [R. S., § 18, p. 38.]⁶²

Whatever may be my private views of the propriety or impropriety of such a legal requirement, I shall not claim an exemption from the duty imposed upon me by the resolution.

⁶⁰ Journal of the Council, 4th Leg. Assem., 75-6 (February 23, 1853). Immediately after the opinion was read to the Council, a motion of Councilman William Henry Forbes to print 250 copies was approved. *Id.*

⁶¹ The following is the Council’s resolution adopted on February 16, 1853:

Mr. Forbes, on leave, introduced the following resolution, which was read and adopted by the Council:

Resolved, That the Secretary of the Council be instructed to present to his Honor, the Chief Justice of the Territory, a copy of the “bill for the restriction of the sale of spirituous liquors,” and request of him for this body, an opinion on the Constitutionality of such a law if passed, as the Council does not wish to act unadvisedly on a subject of such grave importance.

C. R., Journal of the Council, 4th Leg. Assem. 65 (February 16, 1853).

⁶² The correct cite is §19 not §18 of the Revised Statutes.

Knowing, as I do, that your labors are drawing to a close, from the limitations prescribed by law, as to the time you are authorized to continue your sessions, I am warned thereby that whatever communications I have to make must be hastened with all convenient speed.

Agreeable to your request, I will state that I have examined the bill referred to, to the extent that time and opportunity have permitted since the same has come to hand, and I perceive the bill has been drawn with a view to avoid the constitutional objections that have heretofore been deemed to be valid in respect to enactments in some of the States, having the same end in view.

The limited time afforded me for the consideration of the various cases that may be fairly supposed will arise under such a law, and the manifest design of those who drew the bill to have all its provisions in the full stringency of other and similar enactments, avoiding those provisions heretofore held unconstitutional, and no others; intending to travel as closely as possible to the utmost constitutional limits, in the framing of the bill, will prevent me from traversing the boundary between what may or may not be constitutional, so thoroughly as to ascertain whenever it is approached by the bill, whether it trenches upon it or not, even satisfactory to myself; and I must promise that in any suggestion or intimation I may make to your honorable body, I shall hold myself free of any blame, provided the bill becomes a law, and the same or like questions are raised before me judicially, if after argument by counsel and more mature deliberation, I shall arrive at different conclusions from what I shall express in this communication. With these qualifications I make the following suggestions as probably correct:

First. The 9th section violates the United States constitutional provision that a man shall not be, compelled, in a criminal case, to be a witness against himself.

Second. The 11th section violates the provisions of the constitution of the United States in these respects, viz:

1st. That a man shall not be deprived of his liberty or property, without due process of law.

2nd. That the people have the right to be secure in their persons, houses and effects against unreasonable searches and seizures.

3d. That no warrants shall issue but upon probable cause, &c.

4th. That the defendant shall have compulsory process for obtaining witnesses in his favor.

5th. That he shall have the assistance of counsel for defence.

6th. That there is no provision made, for the adjournment of a cause, but it must proceed immediately.

Third. The 8th section is in violation of the provision of the constitution of the United States that excessive bail shall not be required.

Fourth. There probably are other unconstitutional provisions, in the bill that have escaped me from the necessarily hasty perusal I have been compelled to give it.

All which is most respectfully submitted.

H. Z. HAYNER

C. Opinion of Justice Andrew G. Chatfield
On the Power of the Legislature to Dispose of School Lands ⁶³
(February 3, 1854)

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Mendota, February 3d, 1854.

*To the Honorable, the Speaker of the House of Representatives :*

Sir:—I have received an authenticated copy of a resolution adopted by the House of Representatives in the following language:

“Resolved, That the Supreme Judges of this Territory be requested to give their opinion as to the authority of the Legislative Assembly to sell or lease the school lands.”<sup>64</sup>

Waiving all exception to the language of the resolution, I, as one of the Justices of the Supreme Court of this Territory, will proceed to comply with the request therein made.

By the term “the school lands,” used in the said resolution, I understand the House of Representatives to refer to the lands, which, by the eighteenth section of the act of Congress entitled, “an act to establish the territorial government of Minnesota,” are “reserved for the purpose of being applied to schools in said Territory and in the States and Territories hereafter to be

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<sup>63</sup> Journal of the House of Representatives, 5th Leg. Assem., 164-5 (February 8, 1854). It later was reprinted in the House Journal Appendix, at 107-9 (1854).

<sup>64</sup> The following is the resolution adopted by the House on January 24, 1854:

Mr. McKusick offered the following resolution:

*Resolved*, That the Supreme Judges of this Territory be requested to give their opinion as to the authority of the Legislative Assembly to sell or lease the School Lands,

Which was adopted.

Journal of the House of Representatives, 5th Leg. Assem., 74 (January 24, 1854).

erected out of the same.”

That act of Congress does not convey the title to the said lands to the Territory. They are only reserved “for the purpose of being applied to schools.” The title still remains in the United States, and some further legislation by Congress must be had before the application of the said lands to schools, can be actually made. The effect of the said eighteenth section, seems to be this. It operates as a pledge given by the United States that the lands mentioned in and reserved by that section shall be applied to schools in the county in which they are situate, and as a solemn declaration of trust on the part of the United States by which they acknowledge that they hold the same sacred to that purpose.

If I am right in this view of the position of the title to said lands, it follows as a direct and inevitable result, that the Legislative Assembly of the Territory does not possess the power or authority to sell or convey the same. The United States cannot be divested of the title thereto, except by the action of Congress in some form.

It is a general legal principle that the right to lease lands depends upon the right to possess or occupy the same. As to these school lands that right rests with the title, in the United States. Consequently, I am of the opinion that the Legislative Assembly of the Territory does not possess the power to grant to any person the privilege of occupying any of the said lands, unless such power can be derived from some law of Congress other than the organic act of the Territory.

By section 1 of chapter 10, of the laws passed at the second session of the thirty-first Congress, approved February 19th, 1851, (9 Stat. at large 568,) it is enacted “that the Governors and Legislative Assemblies of the Territories of Oregon and Minnesota be and they are hereby authorized to make such laws and needful regulations as they shall deem most expedient to protect from injury and waste, sections numbered sixteen and thirty-six in said Territories, reserved in each township for the support of schools therein!”

The power over these lands, conferred upon the Governor and Legislative Assembly by that section is very broad and extensive for the purposes of protection—much more so than that given by the general grant of Executive and Legislative powers contained in the organic act of the Territory.

I have no doubt but that the Legislative Assembly of the Territory possesses ample authority, under the grant of powers contained in the Organic Act, to protect, by penal or criminal laws, the School Lands against injury and waste.— That would be in common with the protection of all property in the Territory, a “rightful subject of legislation, consistent with the Constitution” and the Organic Act. That power, however, would not, in my judgment, include the authority to possess or occupy the said lands, or to create a leasehold estate therein, even for the purposes of protection.

I think that the powers of protection over the said lands, conferred upon the Legislative Assembly by the Organic Act, are very much enlarged by the terms of the said act of February 19th, 1851.

The power “to make *such laws and needful regulations*” as may be deemed “*most expedient to protect from injury and waste*” would appear to cover any and every measure of protection which the Governor and Legislative Assembly may, in the exercise of their discretion and judgment, within constitutional limits, believe to be effectual for that purpose. In case the Governor and Legislative Assembly shall deem the occupation of the said lands or any portion of them by tenants, under proper terms, safe restrictions, and the control of Territorial authority, to be an effectual measure “to protect” the same “from injury and waste,” I am unable to perceive any good reason why they are not fully authorized by the said act of Feb. 19th, 1851, “to make such laws and needful regulations” as may be necessary to provide for and regulate such occupation. The power is one purely of protection, and any and every measure taken or adopted under the said act of February 19th, 1851, must have that end in view. Every other benefit to be derived therefrom must be incidental. Whether the leasing of the said lands and the use and occupation thereof by a tenant can be deemed and used as a means of protecting the same “from injury and waste,” the members of the Legislative Assembly are much more competent than I am to determine. Such of said lands as can be protected in that manner, may be.

I hope it will not be deemed improper or impertinent in me, if, in conclusion I submit a remark outside of the inquiry contained in the said resolution. I entertain a desire bordering upon a feeling, that every proper power possessed by the Territorial Government, and the exercise of which may be necessary to the full and complete protection and preservation of this foundation of a

School Fund, ample for the education of all the generations that are to follow us in this Territory, should be brought into active requisition for that purpose. This fund, so important and essential to the intellectual culture and moral welfare of the people of this country for all future time, should, above all others, be preserved inviolate. I trust it will be.

With a request that you will communicate this answer to the said resolution to the House of Representatives over which you preside,

I have the honor to be,

Very Respectfully,

Your obedient servant.

AND'W G. CHATFIELD.

D. Opinion of Justice Moses Sherburne  
on the Power of the Legislature to Dispose of School Lands <sup>65</sup>  
(February 11, 1854)



*To the Hon. House of Representatives of the Territory of Minnesota :*

The following resolution, adopted by your Honorable Body, has been received:

“Resolved, That the Supreme Judges of this Territory be requested to give their opinion as to the authority of the Legislative Assembly to sell or lease the School Lands.”<sup>66</sup>

Whatever authority the Legislature has over these “School Lands,” is derived from Section 18 of the Act organizing this Territory, approved March 3, 1849, and from the first section of an act of Congress, approved Feb. 19, 1851.

The section of the Organic Act referred to is as follows:

“Sec. 18. And be it further enacted, That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same.”

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<sup>65</sup> Journal of the House of Representatives, 5th Leg. Assem., 181-83 (February 13, 1854). It was reprinted in the House Journal Appendix, at 112-14 (1854).

<sup>66</sup> The following is the resolution adopted by the House on January 24, 1854:

Mr. McKusick offered the following resolution:

*Resolved*, That the Supreme Judges of this Territory be requested to give their opinion as to the authority of the Legislative Assembly to sell or lease the School Lands,

Which was adopted.

Journal of the House of Representatives, 5th Leg. Assem., 74 (January 24, 1854).

There are no words in this law importing a *grant* to the Territory, nor does it seem to me that any intention on the part of Congress to make a grant can be inferred or implied from the whole section, taken together. I think the substance of the provision is, according to its plain and palpable meaning, a promise on the part of the United States to hold these lands for the use of schools in this Territory and the Territories and States which may grow out of it, reserving to itself the fee of the soil and the right to determine the time and manner of the appropriation. That the Congress of 1851 considered the fee and control of these lands in the United States, is evident from the law passed that year and above cited, which reads as follows:

“Be it enacted, &c., That the governors and legislative assemblies of the Territories of Oregon and Minnesota be, and they are hereby authorized to make such laws and needful regulations as they deem most expedient, to protect from injury and waste, sections numbered sixteen and thirty-six in said territories, reserved in each township, for the support of schools therein.”

Now, if either house of Congress, or the President of the United States, had understood the reservation of these lands, by the Organic Act, to have been a grant of the same lands to the territory, or its legislature, they would not have assented to an act so useless and absurd as the one last quoted. If the “reservation” is construed to imply a “grant,” then the act of 1851 was passed for the purpose of conferring authority upon the legislature to protect lands, the absolute fee of which had been vested in the same legislature, or the inhabitants of the territory, nearly two years before.

The last mentioned act cannot, of course, invalidate or modify any title which the people or the government of this territory acquired by the Organic Act; but it does show the construction which was put upon the reservation in the Organic Act, by the authority which enacted it.

In a brief examination of the history of these reservations and grants, as applicable to the states and former territorial governments, I have found no instance in which language similar to that of the 18th section of the Organic Act of this territory, has been construed, by either party, to imply a grant; but in every such case which I have examined, Congress has, by an act subsequent to the “reservation,” couched in apt and appropriate language, made an absolute conveyance to the people or government for whose benefit it was originally reserved.

The reservation was made for the benefit of schools in this territory “and in *the states and territories hereafter to be erected out of the same.*” It is very easy to see that an absolute grant of the fee of these lands to the government or the people of this territory, at the time the reservation was made, might have been totally inconsistent with their reservation for states and territories hereafter to be erected.

If the two acts referred to, confer no power upon the governor and legislature to “sell,” and I have very little hesitation in saying they do not, it follows, as it seems to me, very clearly that they have no power to “lease.”

It may be contended that this power is implied, and results from the authority conferred by Congress upon the governor and legislature to protect the school lands from waste and injury. A rule, however, which will justify such a construction must be very different from any such courts of law have ever adopted in ascertaining and determining the rights and powers of individuals.

If the power to lease at all exists by virtue of the act under which it is claimed, it cannot be contended that there is any other limit to the power than that which lies within the discretion and consciences of the Governor and Legislature. They may lease them for such consideration as they choose, limited only by what the lands will command; and the lease may be for one, nine, or ninety-nine years, or any other term which they may “deem” best. They may also stipulate that the rents and profits for the entire term shall be paid by the lessee in advance. This is certainly in its effects in authority nearly if not quite equal to that of conveying an absolute fee. If the power exists at all, and there is a limitation to it, where is that limitation to be found? Certainly not in the language of the law.

It may indeed be said that the whole matter will be perfectly safe in the hands of the Governor and Legislature, and that they will limit their acts to what may be consistent with the best interests of the Territory. I do not doubt this; but the question is not what they will do, but what they have a lawful right to do.

The power to lease lands and the power to protect them from waste, are, to a certain extent, inconsistent with each other. In reference to the lands in question, the inconsistency is more palpable than it would be in the case of worn-

out lands, or lands the principal value of which consisted in the buildings upon them.

I can conceive of only two instances in which these school lands need be, or can be, protected from injury and waste. The one is in the case of excessive cropping, whereby the virgin richness of the soil is abstracted, and the other in the destruction of valuable timber standing upon them. To provide against these means by which the value of the lands might be reduced, must have been the only objects which Congress had in view in the passage of the law in question.—But to lease them, if they are to be cultivated after the manner of cultivating a great majority of lands in all new territories, is, as it seems to me, the direct means to produce that deterioration in value which it was the object of Congress to provide against.

Whether it might or might not be good policy on the part of the Legislature to make an effort to realize something from them by way of rents and profits, if the right existed, is not for me to inquire. But I am clearly of the opinion that Congress has not yet conferred that right.

I cannot think that the simple and unimportant right to protect from “waste and injury,” clothes an agent with the power to convey real estate in fee, nor for a term of years, unlimited or limited.

My answer must therefore be that the Legislative Assembly has no authority to either sell or lease the “School Lands” in this Territory.

M. SHERBURNE.

St. Paul, February 11, 1854.



E. Opinion of Justice Andrew Chatfield  
on Chapter 88, Revised Statutes.<sup>67</sup>  
(February 6, 1854)

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Mendota, Feb. 6, 1854.

To the Honorable the Speaker of the House of Representatives :

Sir—I have received an authenticated copy of a Resolution “adopted by the House of Representatives in the following language:

Resolved, That the Judges of the Supreme Court of the Territory are hereby requested to inform this House whether, in their opinion; the provisions of Chap. 88, page 444, of the Revised Statutes, entitled, “Of actions by persons holding claims on United States Lands,” are consistent with the Constitution and Laws of the United States, and an act entitled, “An act to establish the Territorial Government of Minnesota,” and whether the same is binding in its provisions upon the Courts and inhabitants of this Territory.⁶⁸

⁶⁷ Journal of the House of Representatives, 5th Leg. Assem., 150-153 (February 6, 1854)(italics in original). It was reprinted in the House Journal Appendix, at 103-106 (1854).

⁶⁸ The following are the resolutions adopted by the House on January 25, 1854:

Mr. Nobles, on leave, offered the following resolution:

Resolved, That the Judges of the Supreme Court of this Territory are hereby requested to inform this House whether, in their opinion, the provisions of Chapter 88, page 444, of the Revised Statutes, entitled, “Of actions by persons holding claims on. United States lands,” are consistent with the Constitution and Laws of the United States, and an act entitled, “An Act to establish the Territorial Government of Minnesota,” and whether the same is in force and binding in its provisions upon the Courts and inhabitants of this Territory.

Resolved, That the Chief Clerk is hereby instructed to forward certified copies of the above resolution to each of the Judges of the Supreme Court.

On Motion of Mr. Noot,
The resolutions were adopted.

H. R., Journal of the House of Representatives, 5th Leg. Assem., 77 (January 25, 1854).

I do not suppose or believe that the House of Representatives entertain the slightest design or desire to ask the Justices of the Supreme Court to do any act of questionable propriety; yet a few words will plainly show, that an answer by them, to the inquiry contained in the said Resolution, must, of necessity, be that character.

Every party litigant in the Courts, is entitled to have his case heard upon the proofs and allegations, without any pre-judgment of the law thereof by the Court in which it is to be adjudicated. I know of some cases, (and there may be many,) now pending in the District Courts, involving the question of the validity of the Statute referred to in the said Resolution. Should any of these cases come to trial, (as they probably will,) this question must necessarily be submitted to the District Judge holding the Court, for his decision, and he will then be obliged to pass upon it in the only proper way. Should either party be dissatisfied with the decision there made, he could take his appeal to the Supreme Court of the Territory, where all the Justices of that Court, in the proper exercise of their appellate jurisdiction, would, *in banc*, review and determine the question.

The House of Representatives will, therefore, perceive that it is impossible for the Justices of the Supreme Court to answer the inquiry contained in the said Resolution, without passing an opinion upon an important question of law, upon the determination of which, depend valuable rights and interests of parties litigant in the Courts over which they preside; and I must be permitted to say that I deem the expression and promulgation of such opinion by the Justices of the Supreme Court, at this time and in this manner, of very questionable propriety.

Were it not for the provisions of section 19, of chapter 3, of the Revised Statutes, (page 38) I should deem it incumbent upon me as a high and imperative duty to decline and withhold any expression of opinion upon the subject of inquiry contained in the said Resolution. The section in direct terms authorizes the House of Representatives to make this request of the Justices, and doubtless it has been made in view of that authority, for justifiable purposes and without any design to involve the Justices in any improper expression or refusal of opinion. The same section imposes it upon the Justices, as an absolute duty, to comply with any such request, when made by either House of the Legislative Assembly—a duty which in this case, as it would in many others, places the Justices in a very unpleasant dilemma. They

cannot answer without committing a breach of judicial propriety—they cannot refuse to answer without subjecting themselves to the liability of being doomed contumelious. I hope I may not be deemed impertinent in saying that, in my judgment, the duty imposed by that section of the Statutes, upon the Justices of the Supreme Court, properly appertains to the office of Attorney General of the Territory.

I am, and at all times shall be, willing and even anxious to assist the Legislature, to the extent of my limited capacity and knowledge, in their efforts to perfect a salutary measure of public policy, whenever I can do so consistently with the judicial duties imposed upon me; and I assure the House of Representatives, that the only restraint which I feel in this case, is the effect of a deep and, I hope, a proper sense of the responsibilities and proprieties of the delicate trust reposed in the incumbent of a judicial station

Notwithstanding my serious doubts or the propriety of answering the inquiry made by the said Resolution, I shall not refuse to do it, but in doing so, I shall rest, for my justification, upon the Statute which imposes the duty upon me, and requires the House of Representatives, which adopted the Resolution, to bear all the responsibility or impropriety involved in my compliance.

Before giving my answer, I must insist that it shall be received with this qualification: That it be applied only to the state of facts described in, and contemplated by, the terms of the chapter of the Revised Statutes referred to in the said Resolution. What I shall say must necessarily be based upon general legal principles applied to such state of facts, and must be said without the benefit of any of the suggestions that might, and probably would be adduced upon an argument in Court. Legal opinions thus formed are not always correct or mature. Therefore, the opinion which I shall give in answer to this inquiry of the House must not be regarded as rendering the subjects, involved in the question *res adjudicata*, even with myself, nor must there be applied to it, in any future adjudication of the subjects, before me or elsewhere, the rigid rule of *stare decisis*.

With these views and qualifications, I will submit to the House of Representatives my present opinion upon the question contained in the said Resolution.

The terms of the first section of chapter 88 of the Revised Statutes, are, in my

opinion, such as to avoid any conflict between that act and any *express* law of Congress, or any order or rule of any Department of the Government of the United States, nor do I now perceive that it is in any manner inconsistent with any provision of the Constitution of the United States, or of the organic act of this Territory.

It is a general principle of the common law, that the *actual* occupant of land, though he be a trespasser in acquiring and continuing such occupancy, may maintain a proper action at law against any person other than the rightful owner or those claiming title under him, for any violation of or trespass upon the land so occupied. The fact that the plaintiff in such a case is not the owner does not defeat the action against a stranger to the title, though it may perhaps affect the amount of the recovery.

It is not always easy to determine whether the facts in a case constitute an actual occupancy of land, and in some cases in which an actual occupancy is clearly established, it is extremely difficult to determine the extent or limits of it. These difficulties are felt with peculiar force in cases of occupancy without color of title. Occupancy, especially in such cases, is composed of overt acts and intent, and cannot exist at common law without an actual *user* in some form.

Whenever the question of actual occupation is involved in a legal controversy it has been settled, as a question of fact, by the evidence in the case, applied (in the absence of any statutory regulations upon the subject) by the rules of the common law—rules founded upon general customs and experience, and defined and established by the adjudication of competent legal tribunals.

The rules which have been established by the operations of the common law, are held to be within the control of the Legislative power of the country where they exist. The Legislature may modify any mere rule of the common law—may extend or restrict it in its operations, or abolish it altogether. The Legislature also possesses the like power over the rules or law of evidence. What is by the general rules of evidence deemed competent, may be declared incompetent, and vice versa. What is by the same general rules merely evidence may be declared to conclusive proof. In these days of codification and legal reform, these Legislative powers are brought into frequent, active sometimes almost violent exercise. Whenever the Legislature become satisfied that the modification or abolition of any rule of the common law or

of evidence will be most conducive to the advancement, prosperity and best interests of the Territory, they should not hesitate or fail to act accordingly, nor suffer themselves to be paralyzed by the magic influence of the “wizard wand of hoary error.”

A “person settled upon any of the public lands belonging to the United States,” is an actual occupant of the land upon which he is settled—an occupant without color of title so long as he, from necessity or choice, fails to take any step authorized by Congress to secure to himself the title. Though he makes his claim and becomes such actual occupant in entire good faith and for the laudable and valuable purpose of making for himself a farm and a home for life, and with the firm intention of acquiring the title by purchase at the earliest possible opportunity, still the rules of the common law applied by the usual rules of evidence in such cases, would afford him but a slender protection against intruders, and that protection would be confined to a very limited quantity—to only so much as he in the usual straitened circumstances of a pioneer, could bring into actual use and occupation.

It seems to me that the object or purpose of chapter 88 of the Revised Statutes was to afford thereby a better and more effective protection to the actual, *bona fide* settler upon the public lands, than he had under the rules of the common law. It modifies and extends the rules of the common law defining actual occupancy, and very materially changes the rule of evidence by which such occupancy may be proved. It makes an actual settlement upon a parcel of land within the limited quantity of one hundred and sixty acres, accompanied with the *intent* to appropriate the whole of such parcel to his own use, and the expenditure of fifty dollars in improvements thereon, tantamount, to an actual occupation of the whole, and substitutes such marked boundaries thereof as may be easily traced for evidence of actual *user* of the whole. Such it appears to me was the intent of that chapter of the statutes, and such must be the effect of it, provided its enactment was within the power conferred, upon the Legislative Assembly of the Territory by the organic act.

It is an act peculiarly applicable to the circumstances and condition of this Territory so long as the public lands therein shall remain unsurveyed, or otherwise outside of the pre-emption laws of the United States, and of great value in the preservation of peace among the inhabitants settled on such lands. As such it may be appropriately deemed to belong to the internal police of the Territory. As a mere change of the rules of the common law and evidence, as

a means of determining conflicts between possessory claims to lands, and as a conservatory measure of peace, I feel great confidence in my present opinion that it was, within the terms of the sixth section of the organic act, a “rightful subject of legislation” to which “the legislative power of the territory” was by that section extended. The only restraint imposed by that act upon the legislative power of the Territory over the lands thereon is this:—that “no law, shall be passed interfering with the primary disposal of the soil”—the statute in question does not, that I can perceive, in any manner “interfere with the primary disposal of the *soil*”—the disposition of the title by the Government of the United States; but leaves all the laws of Congress providing for surveys, pre-emptions and sales, a free and unobstructed application.

If I am right in this opinion, it follows that the said chapter 88 of the Revised Statutes is, to the extent above indicated, and as a modification and extension of the rules of the common law defining actual occupancy without color of title, and as a change of the rules of evidence by which such occupancy is to be proved, of binding force upon the court and upon all persons who may litigate upon the subject in the courts of this Territory.

Be pleased to communicate this, my, answer to the said resolution to the House over which you preside, and believe me, very Respectfully,

Your obedient serv't.,

A. G. CHATFIELD

F. Opinion of Justice Moses Sherburne
on Chapter 88, Revised Statutes ⁶⁹
(February 9, 1854)

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*To the Hon. House of Representatives of the Territory of Minnesota:*

The following resolution, adopted by your Honorable Body, has been received:

“Resolved, That the Judges of the Supreme Court of the Territory are hereby requested to inform this House whether, in their opinion, the provisions of Chapter 88, page 444, of the Revised Statutes, entitled ‘of actions by persons holding claims on United States lands,’ are consistent with the Constitution and Laws of the United States, and an act entitled ‘An act to establish the Territorial Government of Minnesota;’ and whether the same is binding in its provisions upon the Courts and inhabitants of this Territory.” <sup>70</sup>

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<sup>69</sup> Journal of the House of Representatives, 5th Leg. Assem., 180 (February 13, 1854). It was published in the House Journal Appendix, at 110-11 (1854).

<sup>70</sup> The following are the resolutions adopted by the House:

Mr. Nobles, on leave, offered the following resolution:

*Resolved*, That the Judges of the Supreme Court of this Territory are hereby requested to inform this House whether, in their opinion, the provisions of Chapter 88, page 444, of the Revised Statutes, entitled, “Of actions by persons holding claims on. United States lands,” are consistent with the Constitution and Laws of the United States, and an act entitled, “An Act to establish the Territorial Government of Minnesota,” and whether the same is in force and binding in its provisions upon the Courts and inhabitants of this Territory.

*Resolved*, That the Chief Clerk is hereby instructed to forward certified copies of the above resolution to each of the Judges of the Supreme Court.

On Motion of Mr. Noot,  
The resolutions were adopted.

Journal of the House of Representatives, 5th Leg. Assem., 77 (January 25, 1854).

Having delayed an answer to the above resolution longer than may seem respectful to the Legislature, in the expectation of an opportunity to consult with the other members of the Court, I proceed at once, in reply, to state such conclusions as seem to me to be just, without elaborating the reasons which have led to them.

That Section one of the Statute referred to is not inconsistent with the Constitution or any law of the United States, is apparent upon the face of it. It merely affirms a well-known principle of common law, and neither enlarges nor abridges the common right to occupy public lands. It is a well established rule of law, that a party in actual possession of real estate may protect such possession against every one except the rightful owner, or some one claiming under such owner.

In Sections two, three, and four, the Legislature established certain rules of law and evidence by which parties shall be governed in determining the extent, boundaries, and character of their pos-sessions or claims, and their right to retain and recover the same.

This, to the extent designed by the act in question, the Legislature had, in my opinion, a right to do. It is a power incident to all Legislative authority, and one frequently exercised. I am unable to perceive wherein these rules are inconsistent with the Constitution and Laws of the United States, or “An act to establish the Territorial Government of Minnesota;” and if not, they are binding upon the Courts and inhabitants of this Territory.

In coming to the foregoing conclusion I have considered the provisions of the Territorial Law as intended to apply only to those lands which are not subject to preemption, and to questions in respect to other lands in which the rights of the parties do not depend upon the United States pre-emption laws; for the Legislature does not need to be informed, that a Territorial Law cannot be used to change or modify the rights of parties to the before mentioned lands arising under a law of the United States.

M. SHERBURNE

St. Paul, Feb. 9, 1854.



### III. Opinions of the Minnesota Supreme Court in Reply to the Legislature's Request for Advisory Opinions after Statehood



#### A. Opinion of Justice Charles E. Flandrau <sup>71</sup> (August 11, 1858)



*Hon. William Holcombe, President of the Senate:*

Sir:—A copy of the Resolution of the Senate passed Aug. 6th, inst. requesting an expression of the opinion of the Supreme Court upon the construction to be given to that part of section ten, article nine of the Constitution of this State, which is in the following words: “And as further security, an amount of first mortgage bonds on the roads, lands aid franchises of the respective companies corresponding to the state bonds issued shall be transferred to the Treasurer of the State at the time of the issue of state bonds,”—was received by me yesterday. <sup>72</sup>

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<sup>71</sup> Journal of the Senate, 1st Leg. Sess. 718-19 (August 11, 1858). The opinion is not dated.

<sup>72</sup> The following is the resolution adopted by the Senate on August 6, 1858:

Mr. Van Etten offered the following resolution:

*Whereas*, Section 10 of Article 9 of the Constitution, as amended, contains the following provision: “And as further security, an amount of first mortgage bonds, on the roads, lands, and franchises, of the respective companies, correspond-ing to the State bonds issued, shall be transferred to the treasurer of the State at the time of the issue of State bonds.”

*And Whereas*, The Governor has ruled that a priority of lien shall be given to the bonds from the companies, to be delivered to this State in exchange for State Bonds, contrary to the construction placed by the companies upon the terms of this amendment to the Constitution author-izing a loan of State credit to the said Companies.

*And whereas*, The interests of the State and of said Railroad companies desirous of availing themselves of the benefits of said loan of State credit, require that all questions as to the construction of said provisions of the Constitution, should be settled as speedily as possible. Therefore,

After consultation with the Chief-Justice upon the matter involved therein, I find that I am the only member of the Court who has been officially notified of the passage of your Resolution, and that Justice Atwater is absent from the state. Without expressing any opinion upon the applicability of the statute upon which your Resolution is based to the present organization of the Supreme Court, we concur in the view that the provision of that statute which authorizes either house of the Legislature to “request the opinion of the Supreme Court or any one or more of the Judges thereof upon a given subject,” is intended to apply only to such questions as shall be pending

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*Resolved*, That the Judges of the Supreme Court be and they are respectfully requested to communicate to the Senate, at as early a day as possible, their opinion, in writing, upon the following question:

1. Does the foregoing provision of the Constitution, or any other provision of said Amendment to the Constitution, restrict the whole amount of First Mortgage Bonds, which Companies may issue, to the amount specified in the provision quoted?

2. May not the Companies in accordance with the provision quoted issue an amount of First Mortgage Bonds larger than the amount specified in such provision, and appropriating the necessary portion for the required security, negotiate the balance to third parties, so that in respect to order and priority of lien the State and such third parties shall stand upon an equal footing and possess the same rights?

*Resolved*, That a true copy of these resolutions be transmitted to each of the Judges of the Supreme Court as soon as possible, and that said Judges be requested to communicate their opinions to the Senate, and if not in session, to the Governor.

Mr. Ridpath moved to amend the resolution by striking out all after the word “Senate” in the last resolution.

Which was agreed to.

Mr. Van Etten moved the adoption of the resolution.

Mr. Folsom moved as an amendment, that 150 copies of the resolution be printed for use of the Senate.

Which motion was lost.

The question recurring upon the motion to adopt the resolutions,

And the yeas and nays being called for and ordered, there were yeas 16, and nays 7, as follows:

Those who voted in the affirmative were,  
Messrs. Banfil, Bates, Cave, Chase, Cook, Day, Dunwell, Hall, Jones, M’Kune, Moreland, Northrup, Ridpath, Skinner, Thomas, and Van Etten.

Those who voted in the negative were,  
Messrs. Folsom, Hodges, Hudson, Mixer, Phelps, Reiner, and Somers.

So the resolutions were adopted.

S. R., Journal of the Senate, 1st Leg. Sess., 669-70 (August 6, 1858).

before the Legislature or either house thereof, about which there may exist some doubt as to the constitutional power or jurisdiction of the Legislature to act, making the “Supreme Court or any one or more of the Judges thereof” the constitutional advisor of the Legislature,—as the Attorney-General is of that and other branches and officers of the Government; but in no case is it intended that the Court or its members shall be required to express opinions upon matters except with a view to aid the Legislature in the exercise of some of its legitimate functions, by clearing up doubts which may obstruct them. The expression of opinion by Courts or Judges out of the regular course of judicial proceedings is to be deprecated in all instances upon principle, and should never be resorted to unless made clearly a duty by statutory enactment. We think that, in the present instance, the Resolution and the subject-matter of the inquiry clearly indicate that the opinion desired is—not to aid the Legislature or either house thereof in the performance of any duty devolving upon them requiring a construction of the provision of the Constitution referred to, but is to influence a question which may arise between the Governor of the state and certain railroad companies, involving private rights which may become the subject of judicial inquiry and decision, and that, as such, does not fall within the class of questions contemplated by the statute. Entertaining these views, it becomes our duty respectfully to decline the expression of our opinion upon the subject of embraced in your Resolution.

Appreciating the importance of the interests involved in settling the construction to be placed upon this provision of the Constitution, we arrive at this result with less reluctance than we otherwise should, from a knowledge of the facilities which exist for speedily bringing it regularly before the Courts for judicial determination.

With much respect, I am  
Your most obedient servant,  
CHAS. E. FLANDRAU,  
Associate Justice Sup. C’rt Minn.

## B. Opinion of Chief Justice Lafayette Emmett<sup>73</sup> (January 28, 1863)



*Honorable, The President and members of the Senate:*

Gentlemen:—The resolution of your Honorable Body,<sup>74</sup> requesting the written opinions of the judges of the Supreme Court, concerning the power of the legislature to enact laws of a certain character, has been communicated to me by our Secretary, but not until after the members of the court had separated. No opportunity has since been afforded for consultation on the subject of your resolution, nor, indeed, can there be full consultation, inasmuch as Justice Flandrau is absent from the State, and will not return before the adjournment of the legislature.

It may be sufficient, however, to inform the Senate, that, heretofore, in

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<sup>73</sup> Journal of the Senate, 5th Leg. Sess., 74-5 (January 29, 1863).

<sup>74</sup> The following is the resolution adopted by the Senate on January 22, 1863:

Mr. Smith offered the following resolution, which was adopted:

*Resolved*, That the Hon. Judges of the Supreme Court of this State, be, and they are hereby requested to furnish the Senate, at their earliest convenience, with their opinion in writing, as to whether the legislature have The power (in view of the provisions of section 2, article X, of the State Constitution,) to create by special act, private corporations or companies, or to confer special privileges upon an individual, for either of the following purposes, to wit:

1st.—Ferries.

2d.—Boom corporations; and

3d.—Academies or colleges.

And further, whether by either a general or special act, the legislature can confer upon a bridge, boom or ferry corporation, or upon any individual, the power and right to take private property for the purpose of carrying on the business of such corporation, without the consent or grant of the owner of such private property.

That the Secretary be instructed to furnish the Chief Justice and Associate Justices with a copy of this resolution.

S. R., Journal of the Senate, 5th Leg. Sess., 53-4 (January 22, 1863).

response to a similar request, made by one branch of the legislative assembly, the judges of the Supreme Court, after mature deliberation, came to the conclusion that they could not, with propriety, give an opinion as to the constitutionality of any measure pending before the legislature.

The propriety of the course, which the judges thought it their duty to pursue, on the occasion referred to, will be manifest to the Senate, when it is considered that the Supreme Court cannot authoritatively pass upon any question, unless it is presented in the regular course of judicial proceedings and that any opinion which either of the judges could give in response to your resolution, would be his individual conclusions—necessarily arrived at without argument—binding upon no one, not even upon the person who wrote it, and therefore entitled to no more consideration than the opinion of any other person of equal intelligence.

I have only to add, that, as a member of the Court, I feel bound by the precedent above referred to, and must therefore respectfully decline expressing any opinion on the matters specified in your resolution.

Very Respectfully,  
L. EMMETT.

ST. PAUL, January 28, 1868.

C. Opinion of Justice Samuel J. R. McMillan <sup>75</sup>  
(January 24, 1865)



*To the President of the Senate:*

A copy of the resolution of the senate requesting the supreme court to furnish the senate with their opinion upon certain questions stated in the resolution was communicated to the court yesterday.<sup>76</sup> We have had the matter under

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<sup>75</sup> The court's response to the Senate's request was published first in the Journal of the Senate, 7th Leg. Sess., 59-61 (January 26, 1865). It was later reprinted in the *Minnesota Reports*, under the title *In The Matter of the Application of the Senate*, 10 Minn. (Gil. 56) 78 (1865), with the following headnote citing the *Rice* and *Dike* cases which were decided years later:

Constitutional Law, Court Advising Legislature.—The statute (sec. 15, ch. 4, Comp. Stat.), authorizing either branch of the legislature to call for the opinion of the supreme court, or any one of the judges thereof, any subject, is unconstitutional.

Rice vs. Austin, vol. 19, 103. County Treasurer vs. Dike, vol. 20, 363.

At the session of the legislature in 1865, the senate adopted a resolution requesting the supreme court to furnish to the senate its opinion upon certain questions presented in the resolution. In answer to the resolution, the court returned the following opinion:— [the full opinion followed]

<sup>76</sup> The following is the resolution adopted by the Senate on January 20, 1865:

On motion of Mr. Nicols the resolutions introduced by Mr. Morrison calling upon the Attorney General for his opinion is [sic] relation to the Nebraska and Lake Superior Railroad Company, were taken from the table.

He then offered the following as a substitute for the first of said resolutions:

*Resolved*, That the Supreme Court be and they are hereby respectfully requested to furnish the Senate with their opinion upon the following questions together with those that follow it:

First, Whether the persons named in the act of the legislative assembly of the Territory of Minnesota entitled a bill for an act entitled an act to incorporate the Nebraska and Lake Superior Railroad

advisement, and given it that consideration which a communication from so high a source is entitled to receive.

The resolution, we presume, was passed in view of §15, ch. 4, Comp Stat, which provides that “either house may, by resolution, request the opinion of the supreme court, or any one or more of the judges thereof, upon a given subject, and it shall be the duty of such court or judges, when so requested, respectively, to give such opinion in writing.”

We are aware of but two instances under our state organization in which similar resolutions have been passed, and in both cases replies were made declining to express any opinion upon the points submitted. Journal of the Senate, 1858, p. 718; Laws 1863, p. 75.<sup>77</sup>

We might be justified in resting on these precedents. But we perceive that in neither case was the resolution considered by all the members of the court; nor does either of the opinions given by the judges cover the whole ground of the power of the legislature and the court under resolutions of this kind. We, therefore, deem it proper, out of respect to the senate, and in view of the important principles involved, to state briefly the reasons for the conclusions at which we have arrived.

By the constitution, the power of the state government is divided into three distinct departments, legislative, executive, and judicial. The powers and duties of each department are distinctly defined. The departments are independent of each other to the extent, at least, that neither can exercise any of the powers of the others not expressly provided for. Const., art. 3, §1.

This not only prevents an assumption by either department of power not properly belonging to it, but also prohibits the impositions, by one, of any duty upon either of the others not within the scope of its jurisdiction; and “it is

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Company, approved May 23rd, A. D. 1857, ever became a legally constituted corporation?  
Which was adopted.

S. R., Journal of the Senate, 7th Leg. Sess., 43-4 (January 20, 1865).

<sup>77</sup> The court’s cite to “Laws 1863, p. 75” is wrong. The court is referring to the 1863 response of Chief Justice Emmett; the correct cite to that document is: Journal of the Senate, 5th Leg. Sess., 74-5 (January 29, 1863).

the duty of each to abstain from and to oppose encroachments on either.” Any departure from these important principles must be attended with evil.

This question is well considered in a note to *Hayburn's* case, 2 Dali. 409, *et seq.*, in which the circuit court for the district of New York, *Jay*, Chief Justice, says: “That neither the legislative nor the executive branches can constitutionally assign to the judicial, a duties but such as are properly judicial and to be performed in judicial manner.”

The duty sought to be imposed by the section of act referred to, is, clearly, neither a judicial act, nor is, to be performed in a judicial manner. It constitutes the supreme court the advisers of the legislature, nothing more. This does not come within the provisions of the constitution, and, as the constitution now stands, would be, in our opinion, not only inconsistent with judicial duties, but a dangerous precedent. The impropriety of an unauthorized expression of opinion by a judge or court, especially one of last resort, upon a matter which may subsequently come before the court for adjudication will immediately suggest itself. If the statute under consideration is in conflict with the constitution it imposes no duty, and any opinion expressed in pursuance of action under it, is extra-judicial, and no official responsibility attaches to the judge or court voluntarily giving it. The evils which might result to the people from such a source will suggest themselves on a moment's reflection.

In all the instances to which we have had an opportunity of referring, where courts have responded to resolutions of this character in other states, provision has been made therefor in the state constitution. Mass. Const., ch. 3, §2; N. H. Const., §74; and of course in such case official responsibility attaches to the discharge of the duty, and thus one serious objection is removed. Although we confess that, for other reasons, such a constitutional provision does not address itself to our minds with any favor.

Whether under the territorial organization the statute referred to could have been sustained, we need not consider, since only such territorial laws as are not inconsistent with the constitution are preserved by the schedule to that instrument.

We are, therefore, unanimously of opinion that the section referred to, authorizing the action of the senate, is unconstitutional and void, and therefore imposes no duty on the court. And we are prevented from voluntarily



complying with the request, by the views we entertain of our judicial duty and the injurious tendency of such precedent.

We must, therefore, respectfully decline to comply with the request contained in the resolution.

S. J. R. McMILLAN,  
Associate Jus. Sup. Ct.

St Paul, January 24, 1865.

IV.

“ADVISORY OPINIONS”

IN

LEGAL ESSAYS

BY

JAMES BRADLEY THAYER, LL.D.

LATE WELD PROFESSOR OF LAW AT HARVARD UNIVERSITY

BOSTON

THE BOSTON BOOK COMPANY

1908

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[MLHP: The following essay appeared on pages 42-59 in a posthumously published volume of essays of James Bradley Thayer collected by his son, Ezra Ripley Thayer. This essay has been reformatted and page breaks added. Footnotes are numbered consecutively rather than begin anew on each page, as in the original; otherwise the spelling and punctuation of the author have not been changed.

The decision of the Minnesota Supreme court *In the Matter of the Application of the Senate* 10 Minn. (Gil. 56) 78 (1865), is mentioned in footnote 10]

## ADVISORY OPINIONS

[In 1883 the Senate of Rhode Island asked the opinion of the judges of the Supreme Court on the question whether the General Assembly had the power to call a constitutional convention. The judges answered in the negative, on the ground that the mode provided in the constitution for its amendment was the only method by which it could lawfully be changed. (*In re* Constitutional Convention, 14 R. I. 649.) This conclusion was criticised by Hon. Charles S. Bradley, formerly Chief Justice of Rhode Island, in a pamphlet entitled “The Methods of Changing the Constitutions of the States, especially that of Rhode Island. Boston. Alfred Mudge & Son. 1885.” The following article was prepared by Professor Thayer at the request of Chief Justice Bradley, who was his cousin, and appeared as an appendix to the pamphlet, with the title, “Memorandum on the Legal Effect of Opinions given by Judges to the Executive and the Legislative under Certain American Constitutions.”]

On the questions discussed by Chief Justice Bradley reference may be made to Professor Thayer’s note in his *Cases on Constitutional Law*, vol. i, p. 220.]

1. There are but four constitutions <sup>1</sup> in which any provision is made for taking

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<sup>1</sup> [Now increased to seven. “In this country the constitutions of seven states have provided for obtaining opinions from the judges of the highest court upon application by the executive or the legislature, viz., of Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado, and South Dakota. In one other State, Missouri, a similar clause was introduced in the Constitution of 1865, just after the war; but it continued only ten years, and was left out of the Constitution of 1875. It dates in Massachusetts from 1780, — Part II., c. iii. s. 2; in New Hampshire from 1784, — Part II., title, Judiciary Power; in Maine (formerly a part of Massachusetts) from 1820, — Art. VI., s. 3; in Rhode Island from 1842, — Art. X., s. 3; in Florida from 1868, — Art V., s. 16, amended in 1875, — Amendment XI.; In Colorado from 1886, — Amendment to Art. VI., s. 3; in South Dakota from 1889, — Art V., s. 13. In the first three States, the judges are to give their opinions ‘upon important questions of law and upon solemn occasions.’ In Rhode Island, ‘upon any question of law, whenever requested,’ etc. In Florida, at any time, upon the Governor’s request ‘as to the interpretation of any portion of this Constitution, or upon any point of law’ (the power of calling for opinions, it will be noticed, was given only to the Governor; on the other hand it was [43] a wide power, covering ‘any point of law’); this was amended by limiting the last alternative to any question affecting his executive powers and duties.’ As it now stands, the Florida clause may be compared with a peculiar one in the constitution of Virginia (Art. IV., s. 6), giving the governor power to require the ‘opinion in writing of the attorney-general upon any question of law connected with his official

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duties.’ Opinions rendered under this provision in its earlier and later form are found in 12 Florida, 651 and 660, both in 1868; *Ib.* 686 and 690, both in 1869; 13 Florida, 687 (1870); *Ib.* 700 (1871) 15 Florida, 736 and 739, both in 1875; and 16 Florida, 842 (1877). I observe nothing in them indicating any impression on the part of the judges that they are authoritative; while on the other hand in 12 Florida, at p. 664, one of the judges (the common practice here is that of separate opinions) hardly conceals his surprise, in quoting the Intimations of a Maine opinion in 7 Greenl. 482 (1830): ‘It will be perceived,’ he says, ‘that the justices in this case go so far as to say that the Senate, in making Its decision, must construe the constitution in accordance with the opinion of the Court; thus intimating that their opinion interpreting a clause in the constitution as to the manner of exercising a power vested exclusively in the Senate, was a law to the Senate itself in its action.’ Although the power of calling for opinions is given only to the governor, on one occasion the Legislature, by a concurrent resolution, requested the governor to ask the judges for an opinion; and upon his transmitting the resolution to them with a request for an answer, the judges gave it without any remark. 12 Florida, 686. In Colorado, the provision reads: ‘The Supreme Court shall give its opinion upon important questions upon solemn occasions, when required by the Governor, the Senate, or the House of Representatives: and all such opinions shall be published in connection with the reported decisions of the court.’ This has been held (In the Matter of Senate Bill No. 65, 12 Col. 466, in 1889) to be limited to questions of law and such as are questions *publici juris*, and to call not merely, as elsewhere generally held, for the opinions of the justices, but for authoritative judgments of the court. The resort to this power in Colorado was prompt and troublesome. See a group of opinions in 9 Colo. 620-642. In South Dakota, the Governor may ‘require the opinions of the judges of the Supreme Court upon important questions of law involved in the exercise of his executive powers, and upon solemn occasions.’ In Missouri, the provision only varied from that in Massachusetts by the insertion of a word,—‘upon important questions of *constitutional* law,’ etc.

“In the Federal Convention of 1787, it was proposed that ‘each branch of the legislature, as well as the supreme executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions.’ 5 Ell. Deb. 445. But nothing came of it. It is, however, interesting to see that the first President who had also presided over the Convention, asked for an opinion from the justices. [See *infra*, p. 53.]

“It may be added that the Constitution of the Hawaiian Islands of 1887, Art. 70 (5 Haw. Rep. 716), gives ‘the King, His Cabinet, and the Legislature ... authority to require the opinions of the justices of the Supreme upon important questions of law, and upon solemn occasions.’ This provision is said to run back through the Constitution of 1864 (art. 70) to that of 1852 (art. 88), where it seems to have been first introduced, in a slightly different form. A number of such opinions are presented in the Hawaiian Reports, beginning with one entitled ‘The Segregation of Lepers,’ 5 Haw. Rep. 162 (May, 1884),” 1 Thayer’s Const. Cas. 175, 176; also Supplementary Memorandum on Advisory Opinions, printed by Professor Thayer soon after original paper.

“It should have been stated in the Memorandum that the results there reached came from a personal examination of what relates to the judicial power, in all the American Constitutions with their amendments, included in Poor’s two volumes (1877), compiled by

the opinion of the judges by the [43] executive or legislative department,—those of Massachusetts, New Hampshire, Maine, and Rhode Island. They [44] are named in the order of their dates. The clause was put into the Constitution of Massachusetts (the only constitution that State has ever had) in 1780, in this form: “Each branch of the legislature, as well as the governor and council, shall have authority to require the Opinions of the justices of the Supreme Judicial Court upon important questions of law, and upon solemn occasions.” Const. Mass., Part II., c. iii. s. 2.

It was not in the brief Constitution of New Hampshire of 1776, but appeared first in the fuller document of 1784, thus: “Each branch of the legislature, as well as the president and council, shall have authority to require the Opinions of the justices of the Superior Court upon important questions of law and upon solemn occasions.” Const. N. H. (1784), Part 11., title, *Judiciary Power*. The clause is retained in the same part of the Constitution of 1792 (the existing one) in precisely the same form, substituting only the term “governor” as the later name of the chief magistrate.

In the Maine Constitution of 1820 (Maine has had but one) the provision is: “They (the justices of the Supreme Judicial Court) shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, Senate, or House of Representatives.” Const. Maine, Art. VI., s. 3.

In the Rhode Island Constitution of 1842 (the only one; there was nothing in the charter which touches this question) it is provided: “They (the judges of the Su-[45]-preme Court) shall also give their written opinion upon any question of law, whenever requested by the governor, or by either house of the General Assembly.” — Const. R. I., Art. X., s. 3. There is no council in Rhode Island.

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order of the Senate of the United States, There are one hundred and two constitutions, including that of the general government, Since finding that the Florida provision was put under the head of the executive department, I have added a personal examination of all the latest constitutions in these volumes, under the head of the executive and legislative departments. I have also examined such later constitutions as are known to me.” Thayer’s Supplem. Mem. on Adv. Opin.]

To make the statement complete, it should be added that in the second Constitution of Missouri, that of 1865, there was introduced, for the first time, a similar provision: “The judges of the Supreme Court shall give their opinion upon important questions of constitutional law, and upon solemn occasions, when required by the governor, the Senate, or the House of Representatives; and all such opinions shall be published in connection with the reported decisions of said Court.” — Const. Missouri (1865), Art. VI., s. 11. There was no council in Missouri. In the Constitution of 1875 (the existing one) no such provision is found.

And it has not been found, I believe, in any other constitution in the country, past or present.

2. The clause appears to have been copied into the other constitutions from that of Massachusetts. The identity or close similarity of the language points pretty plainly to that. In Rhode Island there is a peculiarity, in requiring a written opinion; but this is rather an apparent difference than a real one, the American usage having been uniform, it is believed, in favor of written opinions. The short-lived Missouri clause was limited to questions of constitutional law. And it may be added that in Rhode Island the qualification of “important” questions of law and that of “solemn” occasions are omitted.

3. Where did Massachusetts get it? That question is no doubt correctly answered, in one of the best of these opinions, by the justices of the Supreme Court of Massachusetts. After quoting the provision, they remark: “This article, as reported in the convention that framed the Constitution, limited the authority to the governor and council and the Senate, and was extended by the convention so as to include the House of Representatives; and, as may be [46] inferred from the form in which it was originally presented, evidently had in view the usage of the English Constitution, by which the king, as well as the House of Lords, whether acting in their judicial or their legislative capacity, had the right to demand the opinions of the twelve judges of England” (126 Mass. at p. 561). This opinion (an extremely learned and valuable consideration of the meaning of the term “money-bills,” which is understood to have been drawn by Chief Justice Gray) refers to English precedents, coming down as late as 1760, in which the king called for opinions from the judges; and also adverts to the well-known practice, still continuing, by which the House of Lords requires such opinions.<sup>2</sup> The latest

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<sup>2</sup> [“The giving of such opinions by judges is not an exercise of the judicial function. The

recorded instance in which such a response was rendered to the king was one of March, 1760, concerning the proposed trial of Lord George Sackville by court martial, reported in 2 Eden (Appendix), 371.

4. What is the legal quality of such opinions? Are they authoritative declarations or merely advisory?

(a) In England. The character of all these opinions is well indicated in the one just referred to, rendered by Lord Mansfield and other judges to the king in 1760. After briefly stating that an officer who had been dismissed from the service could nevertheless be tried by court martial, it is added: "But as the matter may several ways be brought, in due course of law, judicially before some of us by any party affected by that method of trial, if he thinks the court has no jurisdiction; or if the court should refuse to proceed, in case the party thinks they have jurisdiction; we shall be ready without difficulty, to change our opinion, if we see cause, upon objections that may [47] be then laid before us, though none have occurred to us at present which we think sufficient."

But the matter may be further illustrated by considering the opinions given to the House of Lords. (1) The case in which the Lords in their judicial capacity<sup>3</sup> call for the opinion of the judges, is a very familiar one.<sup>4</sup> No one supposes that in this instance the law Lords are bound by the opinions thus given. It is unnecessary to cite cases to show that the Lords use them simply as advice. O'Connell's Case (11 Clark & Fin. 155) is one where the decision of the Lords was against the opinion of a majority of the judges. (2) A well-known case where the judges were called on for an opinion in a matter of legislation is what is known as the Queen's Case. In that matter no litigation was pending. The Lords had in hand a legislative measure, a bill of pains and penalties touching Queen Caroline, and were making certain preliminary

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relation of the English judges to the king, in former days, and their ancient place as assistants to the House of Lords, led to a practice, on the part of that House, as well as the king, of calling on them for advisory or 'consultative' opinions. This may be traced very far back in our records, *e. g.*, in 1387 (2 Stat. Realm, 102-104), King Richard II. puts to his judges a long string of questions."

1 Thayer's Const. Cas. 175.]

<sup>3</sup> A body which Bagehot, after referring to the Judicial Committee of the Privy Council, characterized as "what is in fact, though not in name, the Judicial Committee of the House of Lords." Bagehot, English Constitution (3d ed.), 126.

<sup>4</sup> [A recent instance of this is the Trial of Earl Russell, [1901] A. C. 446.]

inquiries and examining witnesses. The judges were called in and kept at hand to answer questions of evidence from time to time. These answers, in several instances ill-considered, and hastily given, as appears in Hansard, are also reported in 2 Brod. & Bing. 284, from which they are often cited as if they had been given in the course of a regular trial. Their true character, as touching any supposed authoritative quality, appears to be correctly indicated by a valuable English writer, Best, in his work on Evidence, s. 474: "It may be doubted how far the proceedings in Queen Caroline's Case are binding on tribunals, the answers of the judges to the House of Lords having no binding force *per se*<sup>5</sup> and although in that case the House adopted and acted on [48] those answers, it was not sitting judicially, but with a view to legislation which finally proved abortive." (3) For an instance which brings out with the greatest plainness the purely advisory quality of these judicial responses, a very well-known precedent may be cited, M'Naghten's Case, 10 Clark & Fin. 200. Here not only was there no litigated question before the Lords, but not even any pending legislative question. The Lords, in the course of their debates, having fallen into a discussion about a case recently tried at the Central Criminal Court, but not in any way before them, — a case developing interesting questions in the law relating to insanity, — conceived that they would like to know a little more accurately what the law on these points was. They accordingly put a set of "abstract" questions to the judges, — questions not arising out of any business before them, actual or contemplated. One of the judges (Maule) protested against this proceeding, but, as the others answered, he also answered. The Lords took notice of this, and while courteously thanking the judges for their opinions, expressed a unanimous judgment that it was proper and in order for the Lords to call for opinions on "abstract questions of existing law." "For your lordships," said Lord Campbell, "may be called on, in your legislative capacity, to change the law."

It needs no argument to show that opinions so given are not binding upon any body, and should not be. If reasons were asked for such a view, it would be enough to refer to what Mr. Justice Maule suggested in his protest, when he objected that the questions put "do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of the terms"; that he had heard no argument;

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<sup>5</sup> [So Lord Eldon in *Head v. Head*, 1 T. & R. 138, 140 "The answers given by the judges, therefore, although entitled to the greatest respect, as being their opinions communicated to the highest tribunal in the Kingdom, are not to be considered as judicial decisions."]



and that he feared “that, as the questions relate to matters of criminal law of great importance, the answers to them by the judges might embarrass the administration of justice when they are cited in trials.”

So much for England.

[49] (b) To turn to this country. It might be anticipated that since the constitutional arrangement now under discussion was introduced into Massachusetts from England, it would be dealt with on similar principles. It has been so dealt with. The first recorded opinion given by the Massachusetts justices under the provision in question was only very lately reported, in 126 Mass. 546. The several judges, upon very short notice, came personally into the Senate on Feb. 22, 1781, and “delivered their several opinions in writing.” A joint order of the two legislative houses had called for opinions in writing. It is quite apparent, from the tone of these answers, that the judges conceived of their function as merely advisory. Mr. Justice Sargeant says that he has done as well as is possible “in the very short time allowed me. . . . Perhaps, if I had heard all the arguments that have been made use of (in the legislature), I might be of a different opinion.” Mr. Justice Sewall says: “I do not, therefore, at present see,” etc., etc. Mr. Justice Sullivan civilly remarks that he is “very sensible of the honor done to the bench by the command of the legislature in this instance; but am obliged to say, that in a question so complicated, and of such magnitude, I could have wished that a longer space than two days had been allowed me.” Other early opinions, of 1791 and 1807 may be found in 3 Mass. 567, and *ib.* 568.

The matter; however, has been expressly passed upon, both in opinions of the character now under consideration and in solemn judgments in litigated cases, and it is settled doctrine in Massachusetts that such opinions have no binding quality. Opinions of the justices in 7 Pick. 125, *note*, at p. 130; 5 Met. at p. 597; 9 Cush. 604; 122 Mass. at p. 603; 126 Mass. at p. 566. In the last citation the judges say: “In giving such opinions the justices do not act as a court, but as the constitutional advisers of the other departments of the government.”

But the best citation is *Com. v. Green*, 12 Allen, 155, 164. This is a decision in a capital case, where the court [50] were required to adjudicate a point on which they had previously given an opinion to the governor. The judges advert to this opinion, declare it to be not at all binding, and state that they

have sought to free their minds from all prepossessions resulting from their having given it. "The opinion," they declare, "thus given, like all others of a similar character, was formed without the aid of counsel learned in the law, or any statement of the reasons on which the regularity or validity of the proceedings had been called in question. Although it is well understood and has often been declared by this court, that an opinion formed and expressed under such circumstances cannot be considered in any sense as conclusive or binding on the rights of parties, but is regarded as being open to reconsideration and revision," yet it necessarily supposes that an opinion has been formed by the judges, and the court feel the duty of guarding against any bias from this fact, etc. So also in a precisely similar situation the court (Wilde, J.) said, in *Adams v. Bucklin*, 7 Pick. at p. 127: "We do not, however, consider that opinion binding upon us in this action."

Such is the doctrine in Massachusetts. In New Hampshire the same view appears to be taken. It is expressed in an opinion of the justices in 25 N. H. 537. The Senate had called for an opinion on the constitutionality of a certain legislative bill. The judges advert to several embarrassing circumstances, such as the lack of precise questions, the absence of any aid from counsel, etc., and it is then added: "Upon these considerations we feel it due to ourselves in justice to say, that whatever opinions we might express upon this bill must be regarded as impressions by which we should not feel ourselves bound, if the bill should become a law, and if the rights of a citizen should depend on its construction." And again in an opinion of June 10, 1881, a date not yet reached in the published volumes of New Hampshire reports,<sup>6</sup> the judges [51] in advising the Senate that the legislature had the power and right to proceed then to the election of a United States senator, quote the language of the judges of Massachusetts in 126 Mass. 566, partly cited above, and say: "In giving such an opinion, the justices do not act as a court, but as the constitutional advisers of either branch of the legislature requiring their opinion; and it has never been considered essential that the question proposed should be such as might come before them in their judicial capacity." It should be added that there are signs here and there in the New Hampshire opinions that their advisory quality is less distinctly apprehended than it is in Massachusetts; *e. g.*, in 58 N. H. at p. 622, one of the judges phrases a brief supplementary opinion of his own, thus: "For reasons peculiar to myself, I think I should be excused from sitting as a member of the court in the decision of this question." And he goes on to express the hope that "the

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<sup>6</sup> [Now 60 N. H. 585.]

question having now been three times decided by the court without any dissent and without any conflicting decision, it may be considered as finally settled and put at rest.” But such expressions weigh little as against the language of the opinions first cited.

The judges remark, in 4 N. H. at p. 552: “We have always to regret that when called upon by the legislature for our opinions upon questions of law, we have not the usual aid from the investigations of interested parties and their learned counsel.” But they sometimes call in their friends. In 53 N. H. 640, in an answer to the governor, the judges state that of their own motion they had written to two gentlemen, “requesting each as a friend of the court to furnish to the members of the court a brief upon the points raised by your inquiries. Accordingly we have received from each of those gentlemen an able brief, ‘which we have considered.’”<sup>7</sup>

[52] In Rhode Island the doctrine of the advisory character of such opinions is clearly laid down. In *Taylor v. Place*, 4 R. I. 324, the court, in a litigated case, had occasion to deal with a question which had formerly been the subject of an opinion given by the judges to the governor. On p. 362 the court (Ames, C. J.) says of a certain question then under discussion: “This is the first time since the adoption of the constitution that this question has been brought judicially to the attention of the court. The advice or opinion given by the judges of this court, when requested, to the governor or to either House of the Assembly, under the third section of the tenth article of the constitution, is not a decision of this court; and given, as it must be, without the aid which the court derives in adversary cases from able and experienced counsel, though it may afford much light from the reasonings or research displayed in it, can have no weight as a precedent.”<sup>8</sup> The italics are those of the

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<sup>7</sup> Something of the same sort was done in Massachusetts, in the case of an opinion given in 1825. 7 Pick, at p. 130, note. [In *Respub. v. De Longchamps*, 1 Dall. 111, 115 (1784), where the President and Executive Council asked the opinion of the judges on several questions arising out of an assault on the French consul, the judges heard arguments of counsel of both sides.]

<sup>8</sup> [Compare *Allen v. Danielson*, 15 R. I. 480, in which Knowles, Petitioner, 13 R. I. 90, was overruled, and the court said of that case (15 R. I. 482, 483): “The case was a petition for an opinion on a case stated, and it was doubtless submitted without full argument or presentation of authorities, so that the court, prepossessed in favor of the rule in bankruptcy on the score of equity and by familiarity with it, and wishing to avoid a diversity of rules, supposing that there were two lines of decision of about equal authority to choose between, naturally without the consideration which it might otherwise have bestowed, chose that

opinion.—A phrase occurs in one of the statements of the judges in the old Rhode Island case of *Trevett v. Weeden*, which may perhaps indicate practices before the Revolution that might throw light upon the question. When the Superior Court of Judicature for the County of Newport had rendered a decision in the case above named, in 1786, which in effect annulled [53] an act of the legislature, they were summoned before that body. Mr. Justice Howell, in the course of a long speech before the legislature, remarked that “the order by which the judges were before the house might be considered as calling upon them to assist in matters of legislation, or to render the reasons of their judicial determination.” While wholly declining to do the last, he remarked that as to the former, “the court were ever ready, as constituting the legal counsellors of the State, to render every kind of assistance to the legislature in framing new or repealing former laws.” 2 Chandler’s *Criminal Trials*, 327. I am not aware of any ante-Revolutionary usage of the sort referred to.

It is an interesting fact that Washington, in 1793, sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France. They declined, to respond. The President and Cabinet came to the conclusion to ask this opinion from the judges on July 12, 1793. Those who were at hand appear to have suggested delay until they could communicate with their absent associates. A letter of July 23, from the President to Chief Justice Jay and his brethren, is preserved, in which he assents to this delay, but expresses the pleasure that he shall have in receiving the opinion at a convenient time. (Sparks’s *Washington*, X. 359.) The date was but a little later, — not far from August 1, as it would seem, — of which Marshall speaks when he says (*Life of Washington*, Ed. Phil. 1807, V. 441): “About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the Executive.

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line of decision which was in accord with the rule of bankruptcy. The case is not without reasonable support. *Amory v. Francis*, 16 Mass. 308; *Farnum v. Boutelle*, 13 Metc. 159; *Wurtz, Austin & McVeigh v. Hart*, 13 Iowa 515. But we have no doubt that we should have decided the case differently, if we had had before us, when we decided it, the same array of authorities which we have before us now. The question then is, shall we adhere to it out of regard for the maxim *stare decisis*, or shall we adopt what we now consider the sounder rule? We have come to the conclusion that, considering how recently the case was decided, very little harm will come from overruling it.”]

Considering themselves merely as constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them.”<sup>9</sup> It was, perhaps, fortunate for the judges and [54] their successors that the questions then proposed came in so formidable a shape as they did. There were twenty-nine of them, and they fill three large octavo pages in the Appendix to the tenth volume of Sparks’s *Washington*. Had they been brief and easily answered the Court might, not improbably, have slipped into the adoption of a precedent that would have engrafted the English usage upon our national system. As it is, we may now read in 2 Story, *Const. s. 1571*, that while the President may require the written opinion of his Cabinet, “he does not possess a like authority in regard to the judicial department.”<sup>10</sup>

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<sup>9</sup> [See also Thayer’s *Marshall*, pp. 70, 71.]

<sup>10</sup> [“The case of the refusal to answer, of Jay and his associates, may be compared with the ‘Report of the Judges,’ 3 Binney, 595 (1808). A statute of Pennsylvania provided ‘That the judges of the Supreme Court are hereby required to examine and report to the next Legislature which of the English statutes are in force in this Commonwealth,’ etc. The judges answered, without remark, in an elaborate paper. The reporter (p. 595) has this note: ‘This important document is here inserted at the request of the judges of the Supreme Court. In many respects it deserves to be placed by the side of judicial decisions. . . It may not, perhaps, be considered as authoritative as judicial precedent, but,’ etc. But in an interesting Minnesota case, *In the Matter of the Application of the Senate*, 10 Minnesota, 78 (1865), the judges refused an answer to the Senate, and declared unconstitutional a statute which provided that ‘either house may by resolution require the opinion of the Supreme Court or any one or more of the judges thereof upon a given subject, and it shall be the duty of such court, or judges thereof, when so requested, respectively to give such opinion in writing.’” Thayer’s *Supplem. Mem. on Adv. Opins.*

“A statute similar to that declared unconstitutional in Minnesota, is found in Vermont (*Rev. St. Vt. (1880) 5. 795*): ‘The Governor, when the interests of the State demand it, may require the opinion of the judges of the Supreme Court or a majority of them upon questions of law connected with the discharge of his duties.’ So in New York, by a provision first introduced in 1829 (*2 Rev. St., ed. 1829, 658; Part iv. tit. 1, ss. 13, 14*), when a person was convicted and sentenced to death, the presiding judge was required to inform the Governor and to send to him the judge’s notes of the testimony whereupon the Governor might ‘require the opinion of the Chancellor, the justices of the Supreme Court, and of the Attorney-General, or of any of them, upon any statement so furnished.’ A case in which an opinion was given under this statute is *People v. Green*, 1 Denio, 614 (1845). By a statute of 1847, the judges of the Court of Appeals were substituted for the Chancellor; and the law so stands now. (*N. Y. Code Crim. Proc., ss. 493, 494.*)

“Without any such statute, and without any constitutional requirement, the judges have sometimes been called on for such extra-judicial advice and aid, and have given it. There are indications that this was done, more or less, during the colonial period, — as in the

[55] Reference has now been made to the principles adopted in all of the four States before mentioned, excepting Maine. As to Maine there is something different to say. The early procedure here showed small signs of any impression on the part of the judges that they were engaged, when handing in these responses, in a matter of binding operation. Early opinions are found in 2 Greenl. 431; 3 *ib.* 477; and 6 *ib.* 486. In 6 Greeril. 513, it appears from one of the communications of the judges to the council, “the members of the court proceeded to ascertain each other’s views by letter, not being able from their scattered situations to have a personal interview.” And, again, it is said, that “questions propounded in this manner are necessarily decided without argument, and we have not been able to meet for discussion among ourselves.” Indeed it appears (*ib.* p. 507) that the Chief Justice sent in his opinion without consulting his associates at all, and notified his scattered brethren of it, “requesting them, if [56] they think proper, to adopt a similar mode of proceeding.” Is it to be supposed that such opinions are binding

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expressions of Mr. Justice Howell (*ante*, p. 53) in the Rhode Island case of *Trevett v. Weeden* in 1786. On February 25, 1780, the Constitutional Convention of Massachusetts voted ‘to signify to the judges of the Superior Court in writing the request of this Convention that they would give their attendance this evening, as matters of importance are to be acted on.’ (Journal of Conv. of 1779-80, 142.) In Pennsylvania (Archives, vols. 8, 11, and 12) there are various instances of opinions given by the justices to the executive department between 1780 and 1790. An account of such an opinion is found in *Respublica v. De Longchamps*, 1 Dall. 111, 115-116 (1784); and an opinion or ‘report’ is found in 3 Binney, Appendix, 598 (1808). For other like opinions, given upon request, without any legal requirement, see Jameson, *Const. Conv.*, 4th ed., 663 (In New York), *In re Power of the Governor*, 79 Ky. 621 (1881), and 37 Neb. 425 (1893). In this last case, Norval, J., gives strong reasons for refusing to join with his brethren in giving the opinion. It seems to have been not an uncommon practice in Nebraska to give them.

“In England the judges are sometimes called upon to exercise what is there called a ‘consultative’ function; but its non-judicial quality is distinctly asserted. *Ex parte* County Council of Kent, [1891] 1 Q. B. 725; compare *Over-seers v. L. & N. W. R’y. Co.*, 4 App. Cas. 30.” 1 Thayer’s *Const. Cas.* 183, n.

A Delaware statute (Rev. St. 1852, c. xxvii, s. 4), authorizing the Governor to ask the opinion of the Chancellor and Judges “touching the proper construction of any provision in the Constitution of this State or of the United States or the constitutionality of any law enacted by the Legislature of this State,” may be compared with the Minnesota and Vermont statutes above referred to. In 1895 the Legislature by a joint resolution (Laws of 1895, c. 167) requested the Governor to submit to the judges a question as to the apportionment of delegates to a constitutional convention. The Executive Register, however, discloses no action taken by the Governor in the matter, and it may be inferred that the question was not submitted. (Compare 12 Florida, 686, cited *supra*, p. 43, n.)]

upon any body? And yet the justices of the Supreme Court of Maine, in January, 1880 (70 Maine, at p. 583), in an opinion answering certain questions put by the legislature, while adverting to one or two previous opinions then lately given, held the following remarkable language: "Various questions<sup>1</sup> involving the true construction of the constitution and statutes ... arose, and the governor called upon this Court for its opinion on the questions propounded. The Court was required by the constitution to expound and construe the provisions of the constitution and statutes involved. It gave full answers. The opinion of the Court was thus obtained in one of the modes provided in the constitution for an authoritative determination of 'important questions of law.' The law thus determined is the conclusive guide of the governor and council in the performance of their ministerial duties. Any action on their part...in violation of the provisions of the constitution and law thus declared is a usurpation of authority and must be held void?" This strange doctrine was laid down with no citation of authority, no reference to any line of reasoning upon which it could be supported, and no recognition of the history and the law bearing upon the topic in hand, which is herein set forth. It should also be said that it was laid down at a time of great political excitement as regards the questions discussed.

It may be confidently expected that the subject, in Maine, will not rest where it is thus left.<sup>11</sup>

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<sup>11</sup> [This prediction was fully verified in 1901, when the judges although differing on the propriety of answering the questions put to them by the House of Representatives, all expressly stated that their answers if given would not have the character of judicial decisions. Five of the judges said: "Another reason why it would be improper for the Justices to answer any question submitted, unless upon a solemn occasion, is, that such questions frequently affect the individual rights of citizens, and, unless the question is within the contemplation of the Constitution, the question should be submitted in a judicial proceedings where all persons interested may have an opportunity to appear and be heard in their behalf. An opinion given in answer to questions thus propounded, without notice, hearing or argument, although it has not the binding force of a judgment of court, is certainly prejudicial to the interests of those to whom it is adverse" (95 Maine, 566) The other three judges said: "It is now questioned that the opinion given under this constitutional provision are not adjudications, and are not within the principle of *stare decisis*. They are merely opinions in the way of advice, like those of counsel. The justices giving them are in no degree bound to adhere to them when the same questions arise again, should argument or further research and reflection change their prior views." (95 Maine, 573) See also note 2, p. 34 *supra*.]

[57] 5. It will be well, by way of completing this statement, to refer to the usage in Missouri under the Constitution of 1865. Here also the judges held that their function was not that of a court. In 55 Mo. 295 (in 1873), they had occasion to answer a call of the House of Representatives upon “the Supreme Court of this State to give their opinion to this House,” etc. The judges reply: “If the annexed resolution is to receive a literal interpretation, it appears to be a call on the Supreme Court for its opinion as to the constitutionality of the present township and organization law. This Court has no authority...to give opinions on abstract questions of law. Its office is to hear and determine real controversies....It was not the intention of Sec. 11 of Article VI. of the Constitution to allow the Supreme Court to give its opinion on questions of constitutional law, referred to in that section. The judges and not the court are required by that section, etc.;....but assuming that the intention of the resolution was that the judges should give their opinion as law officers *pro hac vice*, we will proceed,” etc. After this it is strange to find the reporter describing this as an “opinion of the Supreme Court.” The first instance of these opinions in Missouri is one of Nov. 27, 1865, reported in 37 Mo. 129. The second response (37 Mo. 135), on Dec. 9, 1865, declined to answer certain questions of the Senate, and defined in very narrow limits the power of the other departments to ask the opinion of the judges. In like manner they also declined to answer questions of the Senate in 51 Mo. 586, and said: “It is not contemplated by the Constitution that the judges are to give their opinion [58] on any questions which may afterwards come before them for adjudication.” Again, in February, 1874 (55 Mo. 497), they declined, “with the highest respect for the House of Representatives,” to answer certain questions. The next and last instance of these responses is given, as of “October term, 1874,” in 58 Mo. 369. The judges again declined to answer the questions put to them; and thereupon the Constitution of the next year wholly relieved them of this sort of duty.<sup>12</sup> It is pretty manifest that the judges

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<sup>12</sup> Instances of declining to answer may, perhaps, be found elsewhere, *e.g.* in 122 Mass. 600; but the refusals in Missouri in their ten years’ experience probably outnumber all in the four New England States from the beginning. Indeed, outside of Missouri, I do not recall a second case.

[See also, 148 Mass. 623, 608; 190 Mass. 611, 613; 56 N.H. 574, where in spite of the Governor’s statement in question put by him of his belief that it was a “solemn occasion,” the court replied that it was not, and declined to answer on this ground: and 95 Maine 564, where a similar result was reached by a majority of the court, although three of the judges took the view that they had no right to review the legislature’s conclusion on this point, and accordingly returned an answer to the questions which their five brethren had refused to answer.]



put upon the Constitution of 1865 a much narrower construction than it should have received, in view of the origin and history as herein traced of the function which they were exercising; but as regards the advisory nature of this function, they were in accord with almost all the precedents.

6. Upon the whole, it seems clear that the opinions herein referred to are purely advisory. There is, indeed, a popular impression that they are on the same footing as decisions in litigated cases; witness, *e. g.*, the language of leading newspapers, such as the “Boston Daily Advertiser” of Jan. 12, 1880.<sup>13</sup> But if such responses under any of our [59] constitutions are to hold their place (and it appears to me that they are useful), it is of grave importance that the notion of their binding quality should be dispelled.

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<sup>13</sup> This leading New England newspaper designated the opinion of the Maine judges above quoted as a “decision of the court,” and laid it down that there are two ways of exercising judicial power—one, the regular way of litigation, and the other, that of giving these opinions,—and that they are equally binding. “So far,” it added, “as Gov. Garcelon and his council are concerned, there can be no doubt of its binding force....The opinion of the court is supreme and binding upon all in authority as public officers, as much as a final judgment, entered up after a full hearing, is upon an individual. In the constitutional method...a decision has been reached, and it is no longer advice or counsel, but has the force of the constitution itself. The view of Gov. Garcelon would make a farce of all judicial appeals,” etc. Since I have criticised the Maine opinion, I take leave to add that I empathized with the side which that opinion supported, and greatly admired the political good sense which led all parties, under the circumstances of that time, to accept the conclusions of the judges.



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