Chief Justice Henry Z. Hayner

• September 18, 1802 • April 1, 1874 •

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1. College and Practicing Law.

Henry Zachariah Hayner was born in the town of Brunswick, New York, on September 18, 1802.[1] His boyhood was spent helping his father on their farm, attending school in town and preparing for College at the Hopkins Academy in Hadley, Massachusetts.[2]

In 1823 he entered Yale College in New Haven as a sophomore. He was admitted to "The Bully Club" which existed from 1803 to 1843. Bullies thought they had a "duty to rally the college boys whenever the city boys showed themselves ready for battle."[3] He graduated in 1826.[4]

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[1] The Hayner family tree is posted online: See "Descendants of Johannes Hoerner in the New World and the Families with Variations of the Haner/Hayner name, Including Haynor, Hanor, and Others Who are not yet linked to the Johannes."

[2] "Henry Z. Haynar, Brunswick, N.Y." is listed in a Catalogue of the Trustees, Instructors and Students at the Hopkins Academy" in November 1821 (T.W. Shepard Printer, 1821).

[3] Lyman H. Bagg, "The Bully Club" in William Lathrop Kingsley, 2 *Yale College, A Sketch of its History* 460-472 (1879).

[4] This sketch of Hayner was published in Selden Haines, *A Biographical Sketch of the Class of 1826* 48-49 (1866):

> HENRY ZACHARIAH HAYNER,
>
> Son of Zachariah and Eve (Olum) Hayner, was born in the town of Brunswick, Rensselaer county, N. Y., September 18,1802. His parents were of German descent.
>
> Hayner received his early education in the schools of his native town while assisting his father in cultivating his farm. He prepared for college at the Academy in Hadley, Mass., and entered the Sophomore class, in the fall of 1823. After graduating, he commenced the study of the law, under the instruction of the Hon. David Buel of Troy, and was admitted in the year 1830.
>
> He commenced business as a lawyer, in the city of Troy, and continued in successful practice until 1851. In 1852 he received from President Fillmore the appointment of Chief Justice of the then Territory of Minnesota, and removed to St. Paul. He continued to fill this high office with great ability, until by a change in the National Administration, he was superceded. He then returned to the bar and located in the city of New York,where he continued in practice until the breaking out of the rebellion. Soon after the commencement of hostilies, he tendered his services to his country, and was immediately appointed a member of the staff of Major General John E. Wool, with the rank of Major.

He studied under David Buel, a lawyer in Troy, for three years and was admitted to the bar in Rensellaer County as an "attorney and counsellor at law" in 1829.[5] He later served as city attorney of Troy in 1836-1837.[6] In 1839 he was appointed "Master of Chancery."[7] For 22 years after his admission to the bar he practiced law in Troy, usually in a partnership. Several stray commments in local newspapers declare that he was

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> Remaining in active service at Fortress Monroe, until General Wool was assigned to another post, he was subsequently made a Provost Marshal, and stationed at Baltimore, and afterwards in the city of New York, where he remained until the close of the war, when he left the service. He has recently accepted a very important agency from certain large capitalists in the city of New York and has engaged in their behalf in securing titles to large tracts of mineral lands, and in organizing mining operations for them, in the mineral regions of the States and Territories of the west.
>
> He has been three times married. First, to Miss Mary Herrick, of Sheffield, Mass., by whom he had one son, Herrick Hayner, a young man of high mental qualities and great promise, and had received an excellent education. On the breaking out of the rebellion, he entered the service of the United States,and received a comission as Lieutenant in the Volunteers.
>
> He was attached to the army of the Potomac under McClellan. At the battle of Williamsburgh in the camoaign of 1862, his captain having fallen, the command of the company having devolved on him, he took his position, at the head of his company and led his men over a strong abatis of logs which the enemy had thrown up in front, and rallying his men, he waived his sword, and ordered them to charge on the foe, when instantly his heart was pierced by a bullet and he fell. His body was recovered and, interred with the honor of war in Greenwood Cemetery. After the death of his first wife, Mr. Hayner married Miss Catherine Wheeler, by whom he had two sons and one daughter. One of the sons has since deceased. After the death of his second wife he married Mrs.-----with whom he is now living. He has no children by his present wife.
>
> (D. L. S.)

[5] Roger Sherman Skinner, *The New York State Register for the Year of Our Lord 1830* 242 (1830) (available online). At this time he was not admitted as a "solicitor" or "Counsellor" to practice before the Chancery Court. That would come later

[6] Arthur James Weise, *Troy's One Hundred Years, 1789-1889* 338 (1891).

[7] He replaced John Koon, whose "term in office had expired." 7 *The New Yorker* 302 (1839)(this was a weekly journal published by Horace Greeley). Masters were assistants to the Chancellor of Chancery. The Rules of the Chancery Court state in part:

> The masters are very important officers of the court, and are appointed by the governor and senate; they hold their office for the period three years, unless sooner removed by the recommendation of the governor.

Dominick T. Blake, ed., *Rules of the Court of Chancery of the State of New York* 26 (2d ed., 1824).

regarded as an exceptional lawyer. [8] In addition two stories about him are part of Troy lore.

But first it is necessary to describe the physical appearance of this man. He was over 6 feet tall and weighed over 240 lbs. The editors of the *Troy Daily Whig* described him in an article about the Koon case in 1848: "We know Hayner well. He is a man of tremendous physical power—we should as soon think of striking a locomotive—but he is so good natured and unassuming that it must have been an extreme provocation to rouse him to a physical conflict."[9] Recall also that he had been a member of "The Bully Club" in college.

An incident in May 1836 demonstrates Hayner's physical strength and *bona fides* on the issue of slavery. At that time most residents of Troy opposed abolition of slavery and considered those favoring abolition rabble-rousers. That month Timothy D. Weld began lecturing at "Bethel" Church on the issue of slavery which roused a nasty counter attack in the local newspaper. A city historian describes what happened next:

> The strongly-worded article was highly inflammatory, and no doubt expressed the opinions of some of the pro-slavery people, who, on the afternoon of June 2d, mobbed the fearless lecturer in the Bethany Church while addressing a large audience of men and women. In the noise and confusion attending the attempt to suppress the speaker's freedom of speech, Henry Z. Hayner, a prominent lawyer, seized the leader of the mob, at the foot of the pulpit, and held him by the throat until he was black in the face. He then

[8] From the *New York Herald*, September 19, 1845, at 1: "The anti-renters are in town in great numbers, some of their most distinguished and leading men in attendance, *viz*: Mr. Hayner of Troy."

A comparison of candidates for congress in the *Rensselaer County Gazette*, September 5, 1846, at 2: "That Mr. Hayner, a man of acknowledged brilliant attainments, would make a better congressman than Reynolds."

[9] *Troy Daily Whig*, February 2, 1848 (np).

> took the unarmed philanthropist from the circle of his defenders and conducted him to a place to escape.[10]

Twelve years later he was involved in an altercation that would have destroyed the professional lives of other lawyers.[11] On December 24 1847, Hayner and John Koon, a lawyer from Albany, argued a motion before Judge Charles C. Parmelee in his chambers in the county courthouse in Troy. Their argument became heated over a case that had come before Judge Bull. Hayner told Koon, "You lie." When the latter protested and stood up, Hayner struck him in the face. They exchanged blows, clinched and fell to the floor, where Koon may have hit his head on a screen. Hayner left and Koon sought medical care. Koon died on January 14, 1848. A coroner's inquest was held, at which five doctors who had conducted a post mortem reported that Koon died of "inflammation of the brain," a conclusion the jury adopted, with four dissenters. [12]

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[10] Arthur James Weise, *Troy's One Hundred Years*, note 6, at 149. Four years after this book was published, Weld died, and the anecdote was retold in *The Columbia Republican*, February 21, 1895, at 4:

> Was Once Mobbed in Troy
>
> Timothy Dwight Weld, one of the last of the anti-slavery agitators, died at Hyde Park, Mass., February 8. In 1834 (sic) he was mobbed in Troy by a crowd of pro-slavery politicians. He had come to Troy to deliver an address on abolitionism, and the church was that afternoon unusually crowded with men and women. While addressing the audience he was disturbed in different ways, and finally assaulted with missiles, the affair culminating in a fearful struggle which at one time was attended with great danger to all the persons assembled in the building. In the midst of the fray Henry Z. Hayner, Esq., a man of splendid physique and great strength, seized the ringleader of the mob at the foot of the pulpit and held them by throat until he was black in the face. He then took Timothy D. Weld by the arm and led him through the excited, blaspheming rabble to a place of safety and escape.

[11] The Koon-Hayner fight was the subject of many newspaper articles. E.g., *Evening Journal* (Albany, N.Y.), January 17, 1848 (coroner's report of the inquest); *Albany Argus*, January 17, 1848 (excerpts from coroner's inquest); *Troy Daily Whig*, January 18, 1848 (excerpts from coroner's inquest); *Northern Budget* (Troy), January 25, 1848, at 1(excerpts from coroner's inquest); *New York Herald*, January 18, 1848, at 1. The front page description of the fight in the *Herald* is posted in the Appendix, at 36-38.

[12] The coroner's jury concluded:

2. The Anti-Rent Movement.

Besides practicing law Hayner was active in Whig politics. In 1846 he was on the Whig Central Committee.[13] He also became a leader in the anti-rent movement in Rensselaer County in the mid-1840s. Law Professor Eric Kades provides a superb introduction to the causes of this movement:

> The New York anti-rent movement, running from 1839 until after the Civil War, pitted large-scale landlords against their tenants and a struggle over lease terms that led to violence, political infighting, and judicial battles. At the core of the movement directed against New York's huge manorial estates along the Hudson River and in the Catskills foothills, surprisingly, was rent. Not just any rent but *perpetual* rent. Perpetual rent under perpetual leases, and such leases truly were the root problem. These leases went by the oxymoronic name "leases in fee," reflecting the bizarre combination of leasehold on the one hand (periodic rent) and fee simple possession on the other (an open-ended inheritable term). Although leases in fee contained other features that made them appear feudal, a historian of the early history of the region concluded that "the landlord-tenant relationship was more capitalistic and modern in character than feudal." . . .
>
> Thus it was not the feudal nature of the leases that perplexed contemporary lawmen, lawyers, judges and legislators; it was the combination of a fee simple term with tenancy-for-years payments.
>
> . . . .

> In our opinion the medical testimony given at the inquest shows that in all human probability Judge Koon's death was solely the result of disease, and was neither directly or indirectly produced by violence.

Troy Daily Whig, January 18, 1848 (np). Not all agreed. From the *Albany Argus*. January 15, 1848:

> His death is regarded as the immediate or proximate effect of injuries received in a personal encounter with Mr. Hayner, of the Rensselaer bar, in the course of a hearing on a motion before a Rensselaer county judge.

[13] Charles W. McCurdy, *The Anti-Rent Era in New York Politics, 1839-1865* 264 (2001)

> Lawsuits against tenants filed by Stephen Van Rensselaer IV in 1839 were the spark that ignited the anti-rent conflagration. Stephen had refused to deal with the tenants as a group, dismissing their representatives from his manor without a word. The first sign of fire was a tenant rally in Berne, New York, on July 4, 1839. Tenant anger quickly grew, and focused on their landlords' jugular: they wanted to prove that the titles of the Rensselaers and other landlords were fatally flawed.[14]

He defended several anti-rent tenants in court including the controversial Smith Boughton.[15]

One tactic of the anti-renters was to form an alliance with a major political party to elect legislators.[16] Hayner was nominated at the Whig convention in Albany on October 17, 1844, for the Third Senate District. [17] He

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[14] Eric Kades,"The End of the Hudson Valley's Peculiar Institution: The Anti-Rent Movement's Politics, Social Relations, & Economics," 27 *Law & Social Inquiry* 941, 942 (Fall, 2002)(citations omitted) (book review of Reeve Huston, *Land and Freedom, Rural Society, Popular Protest, and Party Power in Antebellum New York* (2000), and Charles W. McCurdy, *The Anti-Rent Era in New York Politics, 1839-1865* (2001). Kades's review is available online: https:/ /scholarship.law.wm.edu / tacpubs/`199

[15] Reeve Huston, *Land and Freedom, Rural Society, Popular Protest, and Party Power in Antebellum New York* 83 (2000)(citing sources)("In embarking on these new forms of resistance, tenants got a taste of the limits and the possibilities of their influence in the new political order. Young lawyer-politicians like the Rensselaer County Anti-Mason and Whig Henry Hayner proved willing to take their cases against the landlords, thus offering them allies in the parties. . . . But for the most part, the leaders of every party met the tenants' growing movement with silence. . . Nor did the legislature act on the demands of the Albany and Rensselaer petitioners.").

[16] Eric Kades, note 14, at 945 ("Anti-renters organized their efforts around three groups: First and foremost, they formed anti-rent associations on each manor. . . . Second, anti-renters eventually formed a political party that elected a number of state legislators, sometimes in alliance with the major parties, sometimes on its own. Finally, and most famously, militant anti-renters (largely younger, poorer landless men) organized a vigilante force dubbed *the Indians*."); Michael F. Holt, *The Rise and Fall of the American Whig Party, Jacksonian Politics and the Outset of the Civil War* 241 (1999).

[17] *New York Herald*, October 20, 1844, at 2. The *Tribune* ran this squib:

> HENRY Z. HAYNER of Rensselaer Co. is the Whig candidate for Senator in the Third District—an able and popular man, who will poll a full party vote. We do not despair of his election.

New York Daily Tribune, October 19, 1844, at 2.
The Whig state ticket was printed in the *New York Daily Tribune*, October 23, 1844, at 2. It is posted in the Appendix, at 39.

was well known as an anti-renter. He lost to John P. Beekman. The vote was:

> John Beekman (Dem).....39,100
> Henry Z. Hayner (Whig).....28,776
> Street Dutton.....636 [18]

The next year he ran as an anti-renter to represent Rensselaer County in the House of Assembly and was elected, receiving 59% of the vote.[19] There were four blocks in the House in the 69th Legislature in 1846: Democrat (67 members), Whig (51), Anti-Renter (9), and an Irregular Democrats (1).[20] He was assigned to the Banks and Insurance Companies committee.[21]

Using his skills as an advocate, he drafted and delivered a memorable address on the "Anti-Rent Question" to the Assembly on Saturday, January 17, 1846 (he must have spent several weeks writing it). It was published later as an 18 page pamphlet by the *Freeholder*, an Albany newspaper started in 1845.[22] The *Troy Daily Whig* gave him a glowing review:[23]

> Mr. Hayner's Speech. The speech delivered by Henry Z. Hayner, in the Assembly, on the anti-rent question, is one of the most powerful and convincing legal arguments on the subject, we have seen in print. Mr. Hayner proves, beyond all cavil, that the conditions of the leases and covenants under which the manor tenants hold their lands are arbitrary, oppressive and anti-republican. He shows that the quarter sales, in other words, *fines for alienation*, are contrary to the just construction of an existing statute – the statute of tenures,

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[18] New York State Archives, NYSA_B0019_78_Reel_1_pg__257-258 PDF
[19] *New York Daily Tribune*, November 14, 1845, at 2. He defeated Davis, a Loco-Foco, by 1,134 votes (3,874 to 2,740).
[20] *New York Daily Tribune*, November 10, 1845, at 1.
[21] *New York Daily Tribune*, January 15, 1846, at 3.
[22] It is available online. Enter "Albany Freeholder Extra." It was also published on the first page of *New York Tribune*, March 5, 1846; continued on the second page of the *Tribune* on March 6; and concluded on the first page of the *Tribune*, March 7.
[23] *Troy Daily Whig*, February 28, 1846.

> passed in the year 1787. He also points out the way in which, without any violation of the Constitution, the other grievances complained of by the tenantry may be redressed. The speech is a candid and temperate exposition of the whole subject without any pretension to rhetorical ornament, but ably reasoned, logical and convincing. . . . No one can quarrel with its tone – and we believe that no one can confute its arguments. [24]

The anti-rent movement did not end well for the tenants. Professor McCurdy concludes his history, "For two decades, legislators and litigants explored solutions under the power to divest landlord remedies, the eminent domain power, the tax power, the power to regulate inheritance, the power to contest the validity of land titles and the legality of the lease in fee in a real estate regime bottomed on statute Quia Emptores. Some proposals failed in the legislature. Others failed to achieve the intended objective or failed to pass judicial muster. The Anti-Rent era did not come to an end, however, until every possible means of extinguishing manorial tenures by force of law had been exhausted."[25] By 1865 the movement had expired.

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[24] One small example of how arbitrary William P. Van Rensselaer treated his tenants was revealed in a brief exchange during a hearing before a joint Senate-Assembly Committee in March 1846:

> Mr. Hayner, of Troy, showed the evil tendency of the perpetual rents in the subdivision of estates. The law was such that a man could not get a receipt in full for his proportion of the rent upon his subdivision of a large lot, because such a receipt would operate as a discharge of the rent upon the whole. No matter into how many parts a lot had been divided, each occupant is held responsible for the rent of the whole under a distress warrant; but after the time to distrain has passed, he is only responsible for the part he occupies. Still the landlord cannot give him a receipt for his proportion, but only a receipt on account of rent for the whole lot.
>
> Mr. Buel [counsel for Mr. P. Van Rensselaer] agreed with Mr. Hayner, and confessed that a remedy ought to be provided for these evils by legislation.

New York Daily Tribune, March 28, 1846, at 2.

[25] Charles W. McCurdy, *The Anti-Rent Era in New York Politics,* note 13, at 331.

Hayner continued practicing law until August 31, 1852, when his nomination to the Minnesota Territorial Supreme Court was confirmed by the U. S. Senate.

3. The Chief Justiceship of Henry Z. Hayner.

a. Nomination by President Fillmore.

Long before he became President, Millard Fillmore knew Henry Hayner from his work for the Whig Party, his candidacy for the state senate as a progressive Whig in 1844, when Fillmore was running for governor, as an eloquent anti-rent member of the House in 1846 and as a fellow lawyer with a large reputation. On becoming president after Zachary Tayler's death on July 9, 1859, Fillmore saw the need to reunite the Whig Party, not inflict retribution for past differences.[26] After the Senate refused to confirm Jerome Fuller, Fillmore must have secured the approval of New York Whig Senators Hamilton Fish and William H. Seward, who had torpedoed the confirmation of Fuller, of Hayner's nomination.[27]

President Fillmore nominated Hayner on August 30, 1852; he was confirmed by the Senate on August 31 and issued his presidential commission that day.[28] He was the third chief justice of Minnesota Territory in three years. He knew that in ten weeks a new president would be elected and might remove many officeholders under a "rotation in office" policy.[29] Why then did he accept President Fillmore's offer of the chief judgeship? He knew that the policy of "rotation in office" had not been applied to the territorial judiciary by previous

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[26] Michael F. Holt, *The Rise and Fall of the American Whig Party,* note 16, at 526-529, 547-548.
[27] For an account of the Senate's refusal to confirm Fuller, see "Douglas A. Hedin, "Chief Justice Jerome Fuller (1808-1880)" 30-33 (MLHP, 2016-2020). See also Douglas A. Hedin, "'Rotation of Office' and the Territorial Supreme Court" 28-29 (MLHP, 2010-2011).
[28] Douglas A. Hedin, "Documents Regarding the Terms of the Justices of the Territorial Supreme Court: Part 2-C: Chief Justices Jerome Fuller and Henry Z. Hayner" 10-13 (MLHP, 2009-2010). A copy of his commission is posted in the Appendix, at 40.
[29] See generally Douglas A. Hedin, "'Rotation in Office' and the Territorial Supreme Court," note 27.

presidents (Franklin Pierce, who took office on March 4, 1853, was the first). Probably more important was a family tragedy a year and a half earlier—his wife, Mary Catherine, committed suicide on February 9, 1851. [30] He may have wanted to leave Troy to start a new life on the frontier. That he was confident his position was secure can be read in a letter to his colleagues in the Rensselaer County Bar who wanted to give him a farewell dinner. He declined because he was busy making "preparations for a permanent change of residence."[31]

The reaction of the press to his selection was surprise and praise. From the *Troy Post*:

> Judge of Minnesota. The President has appointed and the Senate has confirmed Henry Z. Hayner as Chief Justice of Minnesota. We were somewhat taken by surprise by this announcement, since we knew that he was not an applicant for the place, and would not have asked it while Jerome Fuller held it with a prospect of confirmation.
>
> The appointment is a good one. Mr. Hayner is one of the best lawyers in the State, and well-qualified by his legal acquirements, sound judgment, and courteous demeanor, to make a most able and competent judge. He was our law partner for six years, and we can speak knowingly of his qualifications. He is well read and deeply versed in the fundamental principles of law, as set forth in the works of the great masters and teachers, and his clients always found him a safe and judicious counsellor. A man of his learning and

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[30] He married Mary Catherine Wheeler in Brunswick, New York, on November 15, 1838. *The Budget*, November 23, 1838, at 2. She was his second wife. Her suicide was reported in the *New York Daily Tribune*, February 11, 1851, at 4 ("Troy. Monday, Feb. 10. A melancholy suicide occurred here yesterday afternoon. The wife of Henry Z. Hayner, one of our most respectable lawyers, was found hanging in the garret of her house, quite dead. She leaves five children. The cause of the act was temporary derangement."); *New York Evangelist*, February 20, 1851, at 31 (same story); other local newspapers did not attribute her death to suicide. *The Budget*, February 11, 1851, at 2; *Troy Daily Whig*, February 11, 1851, at 1.

His first wife was Mary Herrick, whom he married on June 1, 1831, in Whitestown, New York. *The Budget*, June 14, 1831, at 2. She died on January 3, 1837, at age 27.

[31] Letter from Hayner dated September 23, 1852, infra at 15-17.

intellect will be a valuable acquisition to the new territory. – *Troy Post*. [32]

b. Hayner's arrival in Minnesota Territory.

In Minnesota Territory judges served in two capacities: on the district court presiding over trials and on the Supreme Court hearing appeals.[33] Thus an order of a trial judge that was appealed might be reviewed by him as a member of the Supreme Court (Hayner's one decision for the Supreme Court will be discussed in a moment).

Confusion exists among a few chroniclers about the dates of Hayner's service, and even whether he ever came to the Territory. [34] Between the

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[32] Reprinted in the *New York Evening Mirror*, September 4, 1852. These comments were widely circulated. E.g., *Georgetown Advocate* (District of Columbia), September 16, 1852.

[33] The Fourth Legislature assigned him (by name) to the First Judicial District, which covered Ramsey, Washington and Chisago Counties. 1853 Terr. Laws, c. 3, §3, at 8 (March 5, 1853).

[34] In his unpublished history of the Minnesota Supreme Court, Russell Gunderson, Clerk of the Supreme Court from 1937-1941, writes, "Hayner was officially chief justice from December 16, 1851, to April 7, 1852, but, never having presided at a regular session, he wrote no opinions." Gunderson was off by one year. He goes on:

> No information is available about Hayner and none could be acquired even by those with whom he associated. The result, as is the case with so many of these figures, is that in later years a tinge of mystery came to envelope Hayner. One authority even questioned that he ever came to Minnesota. However, some incidents are recorded which may be taken as authentic, and they shed some light on the points in question.
>
> It will help to recall that after Aaron Goodrich, the first chief justice, was removed by President Fillmore, Jerome Fuller was appointed chief justice, came to Minnesota and served from November 13, 1851 to December 16, 1852. In the meantime, and while Fuller sat on the bench serving as chief justice, the debate was going on in the United States senate over his appointment, the one which finally culminated in his rejection by that body. Then Hayner was appointed and confirmed. But he arrived in St. Paul too late to hold the fall term of court. There being no winter term Justice Hayner's duties were limited to such matters and actions as came before him at chambers.
>
> Before the next regular session of the supreme court was held the Pierce administration came into power and removed all Federal officers then in the territory, so Hayner never presided at a regular session, and from this undoubtedly arises the doubt that he ever came to Minnesota. Yet there can be no doubt that Hayner was in St. Paul that winter, and even though there was no regular session of the court, he must have acted in the full capacity of chief justice in other matters, such as anyone in his position might be called upon to fulfill in those early days.

date he was commissioned, August 31, 1852, and his arrival in St. Paul, the office of Chief Justice was empty. He took the oath of office in Ramsey County, Minnesota Territory on October 6, 1852.[35] Two days later the weekly *St. Anthony Express* greeted his arrival: [36]

> We were happy to meet the Hon. H. Z. Hayner, Chief Justice of Minnesota, in town a few days since. We were gratified to learn that he was very favorably prepossessed with the Territory, from his brief acquaintance with it thus far. Judge Hayner had been anxiously expected, and will meet a warm welcome from all parties. The next session of the District Court for this District commences the first of Nov. next.

Two weeks later, on October 22, the *Express* reprinted an exchange of letters between the Rensselaer Bar and Hayner that had first appeared in the *Troy Budget*.[37] Almost certainly the new jurist brought this flattering correspondence with him and offered it to the editor of the *Express*. The territorial bar was now on notice that its new chief justice was highly qualified.

Judge Hayner and the Rensselaer County (N.Y.) Bar.

Russell Gunderson, *History of the Minnesota Supreme Court* (np, 193). It is posted on the website of the State Law Library. Copies of Gunderson's manuscript are filed in the rare book room of the University of Minnesota Law Library, the Minnesota Historical Society and the Minnesota Legal History Project. The State Law Library has posted it online.

Gunderson mentions "one authority" that doubts Hayner ever came to the Territory. He refers to the entry in Warren Upham & Rose Barteau Dunlap, *Minnesota Biographies, 1655-1912* 313, 14 *Collections of the Minnesota Historical Society* (1912), which reads:

> HAYNER, HENRY Z., was chief justice of Minnesota, 1852-3, but never presided, and was probably never in the territory.

Surprisingly, even the late Kermit L. Hall, a noted legal historian, accepted the myth that Hayner never visited the new territory. Kermit L. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829-61* 220 n. 68 (Lincoln: University of Nebraska Press, 1979) ("Fillmore nominated and the Senate confirmed Henry Z. Hayner of Troy, New York. He was removed by Franklin Pierce before he ever reached Minnesota.").

[35] It is posted in Appendix, at 39; see also Douglas A. Hedin, "Documents Regarding the Terms of the Justices of the Territorial Supreme Court, Part Three – A: Oaths of Office" 11 (2009-2014).

[36] *St. Anthony Express*, October 8, 1852, at 2. The *Express* does not mention Hayner's children. He must have arranged with a relative to care for them.

[37] *St. Anthony Express*, October 22, 1852, at 2.

The following correspondence between Judge Hayner and his fellow-practitioners of the Bar of Rensselaer co., N. Y., is from the Troy *Budget*. We should have published it before but for want of room. The proffer of a public dinner by his legal friends, those who know him best, afford a flattering index to the Judge's social as well as professional character, and we have no doubt he will acquire as enviable a reputation among our citizens for urbanity and ability as his predecessor:

Troy, September 13, 1852.

Hon. H. Z. Hayner—

Dear Sir: While we individually and as members of the Rensselaer County Bar, would tender to you our cordial congratulations on occasion of your honorable appointment as Chief Justice of Minnesota, and we also sincerely regret that the duties of that office will require your removal from our city and sever the ties which have so long bound us together professionally and socially

That we may have an opportunity more fully to express our appreciation of yourself and of the loss we shall thus sustain, permit us to ask the pleasure of meeting you at dinner which we invite you to accept at such time as may best suit your convenience.

Very respectfully and truly your friends,

(Lists of the names of 57 lawyers are omitted)

———

Troy, Sept. 23, 1852.

Hon. D. Buel, Jr., and others, Members of the Rens. County, Bar,

Gents—Having need upon Saturday next, to leave for Minnesota, I regret that the numerous demands on my time attendant on the preparations for a permanent change of residence precludes my acceptance of your kind tender of a dinner in honor of myself before my departure.

Permit me therefore respectfully to decline this meeting which under less pressing necessities would have been most gladly accepted. And in declining it I cannot forbear expressing to you how deeply I feel this manifestation of your

regard. — Your countenances and esteem – next to my own self-respect — it has always been my highest ambition to: cultivate and merit.

All your kind regards as well as your regret said separation I heartily reciprocate. — And let me say to each and all of you that I shall ever rejoice to hear of your prosperity — your elevation to distinction in the profession to which we belong, and your attainment of honorable fame among man.

I subscribe myself your

sincere friend, H. Z. HAYNER.

c. The Trial of Yu-ha-zy.

The next month he presided over the murder trial of Yu-ha-zèe and after a guilty verdict was returned, sentenced him to death. Edward Duffield Neill has vividly described the trial and sentencing:

> At the November Term of the United States District Court, for Ramsey county, a Dahkotah, named Yu-ha-zèe, was tried for the murder of a German woman. With others she was travelling above Shokpay, when a party of Indians, of which the prisoner was one, met them; and, gathering about the wagon, were much excited. The prisoner punched the woman first with his gun, and, being threatened by one of the party, loaded and fired, killing the woman and wounding one of the men.
>
> On the day of his trial he was escorted from Fort Snelling by a company of mounted dragoons in full dress. It was an impressive scene to witness the poor Indian half hid in his blanket, in a buggy with the civil officer, surrounded with all the pomp and circumstance of war. The jury found him guilty. On being asked if he had anything to say why sentence should not be passed, he replied, through the interpreter, that the band to which he belonged would remit annuities if he could be released. To this Judge Hayner replied, that he had no authority to release him; and, ordering him to rise,

> after some appropriate and impressive remarks, he pronounced the only death ever pronounced by a judicial officer in Minnesota. The prisoner trembled while the judge spoke, and was a piteous spectacle. By the statute of Minnesota, one convicted of murder cannot be executed until twelve months have elapsed, and he was confined until the governor of the territory should by warrant order his execution. [38]

After Hayner was replaced, Yu-ha-zy was hanged on Friday, December 29, 1854, in a spectacle that resembled raucous public executions in novels by Hugo and Dickens.[39]

d. Judge Hayner on the District Court Bench.

He heard other civil matters. He ordered the summons be published in local newspapers when the defendant was "out of this Territory."[40] His entire order granting the defendant's motion for a new trial in *John B. Page v. William O. Mahoney*, a case in Washington County District Court, was reprinted on the front page of the *Weekly Minnesotian* on February 5, 1853. The case was tried before Judge David Cooper on October 8, 1852. (Why did Hayner hear this motion? The most plausible explana-

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[38] Edward Duffield Neill, *The History of Minnesota From the Earliest French Explorations to the Present Time* 577-79 (4th ed. 1882). This was reprinted in Edward Duffield Neill, *History of Washington County and the St. Croix Valley: Including the Explorers and Pioneers of Minnesota* 125 (1881).

[39] *Minnesota Pioneer*, January 1, 1855, at 2 ("It was not enough for the fiends incarnate who attended the execution, that the poor fellow should expiate his crime upon the scaffold, but his expiring moments were disturbed by laughs and jeers of the debauched in the crowd, and with words of jest and scoffing, uttered in his own language by persons in the shape of men, who were spectators of the awful scene."); see also J. Fletcher Williams, *A History of the City of Saint Paul and of the County of Ramsey, Minnesota* 355 ("The First Execution in Ramsey County took place on December 29 [1854]. Ya-ha-zee, the Sioux Indian…was after much delays of law, hung in public, on a gallows erected on Saint Anthony Hill. The execution was witnessed by a large crowd, who, according to the journals of the day, looked on it more as a joke than as a solemn act of justice.").

[40] *Minnesota Pioneer*, March 24, 1853, at 3 (Hone v. Woodruff); *Weekly Minnesotian*, April 16, 1853, at 3 (Titus v. Craig, How, Claflin & Cook). Ironically Hayner himself was a co-defendant in a case in Montana Territory where the summons was published. *Montana Post* (Virginia City, Montana), July 6, 1867, at 5.

tion is that Cooper was absent from the Territory[41]). In an order dated December 8, 1852, he granted the defendant's motion on the ground that the jury instructions mislead the jury. He concluded with harsh words about Judge Cooper:

> I am also of the opinion that the Charge of the Judge who tried the cause, if not in terms erroneous, was calculated to mislead the Jury.
>
> He was requested by defendant's counsel to charge the Jury that the conditions in the agreement were not to be complied with until the 15th November (then next,) and that until the expiration of that time, the plaintiff could not maintain his action. The Judge refused so to charge; on the contrary, he says to the Jury that the plaintiff having proven the agreement, must be governed by it, and the whole agreement must be taken by the Jury as it appears upon the face of the agreement itself: that if the conditions thereof were not to be performed until the 15th day of November (then next,) then the plaintiff could not recover.
>
> The Judge does not say to the Jury what the effect of the conditions in the contract are, provided they do not find them contradicted, varied or modified by other evidence, aliened (sic) the contract, but leaves them to judge or determine what the conditions of the contract are, and the effect to be given to them. In other words, he has submitted it to the Jury to determine the legal effect and construction of a written contract.—This is a misdirection, by implication, and it must have misled the Jury as to their duty; and either a mis-direction in, or a misleading by the Judge's Charge, is a sufficient ground for granting a new trial on a case made.—...
>
> And this is so though the party moving took no exceptions

[41] Stat. c. 69, Art. 2, §8, at 288 (1852), provides:

> In case any judge of the district court from ill sickness, or any other cause, shall be unable to hold any of his courts, or in case any vacancy shall occur in the districts, the clerk thereof shall in due time give notice of such fact to the governor, who shall assign to one of the other district judges to hold court or courts, in such district, until the inability of the judge shall be removed, or the vacancy filed.

to the Charge of the Judge.—

The legal effect or construction of a written contract is always a question of law and not question of fact for the Jury....It is so in every case when the facts are undisputed....

The verdict of the Jury must be set aside as against law and evidence, and the costs are to abide the event of the suit.

H. Z. HAYNER [42]

These are strong words to describe the conduct of a colleague. In 1853 Hayner was 51, a former "Master of Chancery," who had over two decades of experience in the trial courts of New York. He may have had little respect for David Cooper, 32, who was frequently absent from the Territory.

Meanwhile he had not received his salary, leading to a dispute with Elisha Whittlesey, the First Comptroller of the Treasury, who demanded a copy of his oath of office. This resulted in a long complaint from Hayner to Whittlesey on January 14, 1853. [43] He must have had access to other funds because he was one of the named incorporators of the Minnesota Western Rail Road Company authorized by the Fourth Legislature on March 3, 1853. It was required to complete a railway from St. Croix Lake or St. Croix River to St. Paul within six years. [44]

Hayner had other problems. He could not use the court library, which consisted of several volumes of statutes and *Howard's Reports*, because it was in the possession of former Chief Justice Aaron Goodrich. He reported to Secretary of State Everett that he even dispatched the Deputy Marshall to retrieve the books but Goodrich refused to release them, claiming that he was the rightful Chief Justice of the Territory. [45]

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[42] *The Weekly Minnesotian*, February 5, 1853, at 1 (case citations omitted). The complete opinion is posted in the Appendix, at 52-55.

[43] Hayner's letter is posted in the Appendix, at 45-48. It is not known whether he received his salary before he was removed in early April.

[44] 1853 Territorial Laws, c. 10, at 27-32 (§20 was the six year condition). The law was also included in a list of "Private Laws." c. 66, at 143-148.

[45] Hayner to Secretary of State Edward Everett dated January 14, 1853. Posted in the Appendix, at 44. In 1854 Goodrich lost his suit for back pay (in effect a challenge to the

In April 1853 he presided over a meeting celebrating the voyage of the Clarion boat up the Mississippi river. Boosterism by pubic officials was not unusual.[46] The *Weekly Minnesotian* described the meeting:

> The Clarion up the Mississippi. – We publish with pleasure the following proceedings and by the passengers of the Clarion, during her first trip up the Mississippi last week. Capt. Humberstone, his boat and crew are highly complemented by all who had the fortune to be on board. The Clarion is precisely adapted to the trade – so is her energetic and accommodating Captain; and if we are going to support that indispensable commercial necessity, a Minnesota river packet, why not all concentrate at once upon the Clarion, and keep her in the trade?
>
> The meeting was organized by calling Chief Justice Hayner to the chair, H. M. Fling, of Philadelphia, Secretary, and Messrs. Ames, Stewart and Dr. Mann, a committee to draft resolutions expressive of the sense of the meeting. Before the reading of the resolutions Mr. Mann spoke of the country, soil, climate and salularity of the atmosphere. Judge Hayner followed with some very pertinent remarks, and showed the great advantage of immigrants settling in the country, before the government survey is made. That now speculators have no hold nor chance to operate with Land Warrants. That the entire country is open to choose from.
>
> . . . (Four resolutions omitted) . . .
>
> *Ordered* that the resolutions be signed by the officer of the meeting, and published all the papers of the Territory.
>
> H. Z. Hayner, Chairman.
> H. M. Fling, Secretary.[47]

President Fillmore's removal of him). *United States ex rel Goodrich v. Guthrie*, 58 U. S. (17 How.) 284 (1854).

[46] See generally Douglas A. Hedin, "Lawyers and 'Booster Literature' in the Early Territorial Period" (MLHP, 2008).

[47] *Weekly Minnesotian*, April 30, 1853, at 2; *The Minnesota Pioneer*, April 28, 1853, at 2.

e. The Chief Justice Invalidates the "Liquor Law."

On March 6, 1852, the Third Legislative Assembly passed a liquor law with a provision that it would go into effect only if approved in a special election.[48] On April 5, voters approved it, 853 to 662.[49] It went into effect on May 5 and prosecutions soon followed.[50] Alex Cloutier was convicted in Justice Court in Ramsey County of violating the law and fined $25. He appealed to the district court where it was heard by Hayner, who had been in office only six weeks. He heard Cloutier's appeal on November 23 and 24, 1852. [51] Three days later he held the liquor law was void because the ratification process was not authorized by the Organic Act, which formed the Territory (*not* the U.S. Constitution). The Organic Act did not authorize the Assembly to delegate power to approve laws to the voters and consequently the Liquor Law was null and void.[52] His decision was reported in the *Minnesota Democrat*:

> The Minnesota Maine Liquor Law
> Declared Void.
>
> 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.

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[48] 1852 Territorial Laws, c. 8, at 12-18 (approved March 6, 1852).

[49] Edward Duffield Neill, *The History of Minnesota: From the Earliest French Explorations to the Present Time* 572 (1858).

[50] In June Chief Justice Fuller presided over a trial in district court in Chisago County in which a man was convicted of violating the liquor law. *St. Anthony Express*, June 18, 1852, at 2. See also Douglas A, Hedin, "Advisory Opinions of the Territorial Supreme Court, 1852-1854)" 17-18 (MLHP, 2009– 2011).

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

[52] The plebiscite was authorized by 1852 Territorial Laws, c. 8, §19, at 18. Accounts of this litigation and Hayner's advisory opinion on the liquor law, infra at 43-45, are taken from Douglas A. Hedin. "Advisory Opinions of the Territorial Supreme Court." note 50, at 11-17.

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. [53]

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

Hayner was criticized by the *New York Daily Tribune* because he had struck down a law approved by popular vote. *New York Daily Tribune*, April 4, 1853, at 4 ("Minnesota.— We see that the new Legislative Assembly of this Territory has allowed the Maine Law to be defeated by *one* majority. The preceding Legislature passed, the People voted upon and ratified it, and then the Territorial Judge (H. Z. Hayner, formerly of Troy, N.Y.) decided it unconstitutional because the people had opposed it! Now an attempt to renew its vitality by

His ruling invigorated the temperance movement, according to Agnes Ellingsen, a scholar of the temperance movement:

> Judge Hayner's decision was the signal for renewed activity among the temperance advocates in Minnesota. The success

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passing it without submitting it to the people has been defeated as above. All well! there are several more years to come, and Rum will always be supplying us with arguments for Prohibition. We can wait."). Jacob Noah, a reader, immediately wrote a lengthy letter to the editor that concluded.

> During the excitement on this question in St. Paul, I have heard the strongest friends of the Liquor Law speak of Judge Hayner in the highest terms and, though opposed to him in political faith, I can only add, he has had the respect of the whole bar of Minnesota, as well as your ob't. serv't.
>
> Jacob J. Noah New York, April 4, 1853

Horace Greeley, the editor of the *Tribune*, had the last word, printed just below Noah's:

> Judge Hayner is welcome to all he can make by the foregoing, which does not modify our impression of the facts one iota. The Territorial Legislature passed the bill, subject to the approval of the People; the People approved it, and it thereupon went into operation; but Judge Hayner overruled and nullified it on the legal quibble that the Legislature had *delegated* certain power to the People, when in fact they had but *restored* it. We are quite familiar with this quibble in our own State, where it was employed to overthrow our Free School Law; but it does not improve on acquaintance. Pity a man cannot become a Judge without ceasing to be a Republican. [*ED*.]

New York Daily Tribune, April 5, 1853, at 4.

Curiously in 1861 Charles Flandrau, now a member of the state supreme court, cited Hayner's ruling when he held that a law authorizing a change in the county seat by vote of the county voters violated a provision of the state constitution that required the legislature to first approve such a change. Flandrau spoke for a divided supreme court:

> 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)(Atwater, J. dissenting).

> 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.[54]

His reputation was enhanced. Less than three months later, in the midst of the fourth legislative session, the Council asked for his advice on another temperance bill.

f. Chief Justice Hayner's Advisory Opinion on the "Liquor Law."

Early in the fourth legislative session in 1853, a Liquor Law was reintroduced in both houses, 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." [55] Two days later he issued a short advisory opinion. He knew 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: "There probably are other unconstitutional provisions, in the

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[54] Agnes 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). 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. at 65.

[55] Learning from the Fuller fiasco (the Council did not give Fuller a copy of the law), 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).

bill that have escaped me from the necessarily hasty perusal I have been compelled to give it."[56]

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. [57] 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.[58]

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":

> 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

[56] Hayner's complete Advisory Opinion is posted in the Appendix, at 49-51.

[57] *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.

[58] 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). These paragraphs are based on Douglas A. Hedin, "Advisory Opinions of the Territorial Supreme Court," note 50, at 18-21.

present. If a lawyer, he would scarcely venture to base his legal reputation on such a production. [59]

g. Chief Justice Hayner on the Territorial Supreme Court.

While it is true that Chief Justice Hayner never presided over a term of the Territorial Supreme Court, less than a year after his removal one of his opinions was, in the words of Moses Sherburne, "approved by this Court, and has been adopted as our opinion." *Reuben Goodrich vs. Rodney and E. C. Parker*, 1 Minn.195-202 (1854), was an appeal from Ramsey County Court, where Hayner was sitting as a district court judge. It was assigned to Justice Moses Sherburne, who in turn adopted Hayner's ruling as the opinion of the Territorial Supreme Court. [60]

h. The Removal of Chief Justice Hayner.

In the antebellum period, a president removed a federal employee simply by nominating someone else for that post.[61] This is what happened to Hayner. He did not foresee—indeed he may have been shocked—that he would be "removed" by President Pierce's nomination of William Welch as Territorial Chief Justice on April 5, 1853 (he had two or three days advance notice). [62] After all he had been confirmed in

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[59] *St. Anthony Express*, March 11, 1853, at 2.

[60] The Territorial Supreme Court's opinions were later collected by Harvey Officer, a St. Paul lawyer, and published as the first volume of the *Minnesota Reports* in 1858. See "Reports of Cases Argued and Determined in the Supreme Court of the Territory of Minnesota, from the Organization of the Territory until its Admission into the Union in 1858."195-202 (MLHP, 2016). *Goodrich v. Parker* is posted in the Appendix, at 56-64.

[61] See generally, Douglas A. Hedin, "Documents Regarding the Terms of the Justices on the Territorial Supreme Court: Introduction" 22- 26 (MLHP, 2009-2014).

[62] The *Weekly Minnesotian* was unaware of Hayner's removal when published this commentary about his abilities:

> The District Court of Washington County, Hon. H. Z. Hayner, presiding, has been in session at Stillwater this week. This is Judge Hayner's first term in that County, and we are pleased to learn the people there are highly complimentary of his abilities as a Judge and his easy and social manners as a

one day by the U. S. Senate without a dissenting vote,[63] and his commission was for four years. But under Franklin Pierce, the policy of "rotation in office" was extended to the territorial judiciary.

Pierce used patronage to unite the fractious Democratic party, not by rewarding centrists who stood by the Compromise of 1850, but by favoring "former Free-Soilers from the North and disunionist Southern States Democrats with the juiciest plums." [64] On a national level, the tactic was "an unmitigated disaster." [65] In Minnesota Territory, however, Pierce succeeded in unifying Democrats, though more by inadvertence than design. In 1853, Minnesota Democrats were badly split, not by ideology but by personalities. Henry Hastings Sibley, the territorial congressional delegate and a prominent Democrat, was opposed by Daniel A. Robertson, the editor of the *Minnesota Democrat*. Their intra-party feud forced Pierce to look outside the territory for supporters to reward with an appointment. On April 5, the President nominated Willis A. Gorman of Indiana to be governor, and dismembered the territorial supreme court by removing two sitting jurists, Hayner and Meeker, and nominating three new members: William H. Welch to be Chief Justice, and Moses Sherburne and Andrew G. Chatfield to be associate justices.[66] The *Albany Register* was disgusted with Hayner's removal:

> gentleman.—If Frank Pierce should conclude to remove Judge Hayner, he will have hard work to find his superior.

Weekly Minnesotian, April 9, 1853, at 2.

[63] *Executive Journal*, 32nd Congress, First Session, Tuesday, August 31, 1852, at p. 452. It is posted in Douglas A. Hedin, note 28, at 10.

[64] Michael H. Holt, *Franklin Pierce* 66 (2010). This paragraph is based on Douglas A. Hedin, "'Rotation in Office' and the Territorial Supreme Court," note 27, at 32-34.

[65] Michael H. Holt, note 64, at 67 ("In hindsight, it is clear that Pierce's attempts to distribute the loaves and fishes among all elements of the party proved an unmitigated disaster. Politicians who considered themselves worthy of selection fumed when members of rival factions instead got the jobs.").

[66] Douglas A. Hedin, "Documents Regarding the Terms of the Justices of the Territorial Supreme Court: Part Two-D: Chief Justice Welch and Andrew G. Chatfield" (MLHP, 2009-2012); "Documents Regarding the Terms of the Justices of the Territorial Supreme Court: Part Two-E: Associate Justices Moses Sherburne and Rensselaer R. Nelson" (MLHP, 2009-2010).

> Proscription. The *Troy Whig* says an appointment has been made to superced Henry Z. Hayner, late of this city, as Chief Justice of Minnesota. This is unprecedented in the records of party proscription. Mr. Hayner was appointed for four years, and there is no other reason for his removal than this, that some locofoco wanted the office. The removal of Judges without cause, is for the first time practiced by this administration; and while the policy is not only unjust and personally injurious to the Judges proscribed, it brings the bench directly into the arena of politics. If it has become right to remove a Judge purely on political grounds, it will soon become right for a judge in order to keep his place to carry politics on to the bench and sink the character of impartial Judge in the paltry politician. We are sure the proscription of Judge Hayner will be generally regretted by all parties. [67]

His removal also infuriated the editor of the *St. Anthony Express*, who issued a blistering editorial on April 29, 1853, criticizing the policy of "rotation in office" on several grounds, including the disruption it caused in the administration of the local court system:

> System in Removals from Office.
>
> ———
>
> A great Reform is imperatively demanded in the present system of removal from office, under the general government—The extent to which removals from office is now carried, makes this subject a branch of political science, and as such, it deserves profound consideration of statesmen and philosophers. The question is not whether a change of administration should produce a complete change of public

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Cooper's commission had expired and that was why he was not "removed." Meeker was removed because he disingenuously claimed that his four year commission still had over a year to go. For an explanation of Meeker's allegations, see Douglas A. Hedin, "Introduction: Documents Regarding the Terms of the Justices on the Territorial Supreme Court" note 61, at 17-18, 26-29.

[67] *Watchman and State Journal* (Vermont), April 21, 1853, at 2, reprinting editorial in *Albany Register*, April 1853.

officers. In the primitive ages of the republic down to the time of Madison and Monroe, the negative of this proposition was universally admitted. But ever since the 'Sage of Lindenwald,' fathered the doctrine that 'to the victors belong the spoils of the vanquished,' the reverse of this proposition has been acted upon as the settled policy, at least of the democratic party. The only question therefore at present to be considered is how and when these spoils should be divided.

It must be obvious to the most casual observer that the present method or rather manner (for there is a total absence of method) of dividing the spoils, or in other words, removing incumbents from office, is managed in the most bungling unscientific way possible. Nay worse, it is done at a tremendous sacrifice to the public interest.—Take for example the course pursued in regard to incumbents in this Territory. The (official) head of Justice Hayner, was severed from his body, the first part of April. The District Court of Ramsey County, was appointed for the 18th inst. His Honor learned that he was a dead man, two or three days previous. His successor had not been appointed, at least had not received his commission. Consequently, no Court could be held. All business connected therewith, must lie over till next November, or else a special Term be held, which would subject the County to great and unnecessary expense. Honest men in the mean time, must be deprived of the use of their money. Villains go 'unwhipt of justice.' The whole public business is retarded and deranged. This is but a single stance. [68]

[68] *St. Anthony Express*, April 29, 1853, at 2. Reaffirming the contention in the *Express* that Pierce's removal of judges disrupted the judicial system, the *Minnesota Democrat* reported that Hayner cancelled an upcoming district court session after learning of his successor's nomination:

> The District Court of Ramsey County, which was to have commenced its session on Monday last, was yesterday adjourned by the clerk, and the jury dismissed, because of the non-appearance of a Judge to hold the term. Judge Hayner having received what he considers sufficient notice of his removal, was unwilling to preside; and Judge Welch, his successor, not having official notice of his appointment, is of course unable as yet to assume the duties of

In closing this chapter in Henry Hayner's life a few conclusions may be drawn. He was a middle-aged lawyer who suddenly became a judge on the frontier. There he thrived for six months. He was older and had more courtroom experience than the lawyers who appeared before him. He possessed an abundance of confidence in his own judgment that is obvious from his scathing opinion in the *Page v. Mahoney* case and his swift opinions on the Liquor Law. His opinion for the Territorial Supreme Court in *Goodrich v. Parker* is replete with case and treatise citations leading one to wonder whether he took his personal law library when he moved to St. Paul. The new territory suffered a major loss when he was replaced.

4. Henry Hayner After the Court.

Hayner spent a few months in Minnesota after being removed, probably mulling whether to stay permanently; by autumn he had relocated to New York City, where he formed the Thompson & Hayner firm. He placed their business card in the *Weekly Minnesotian* in November 1853:[69]


THOMPSON & HAYNER,
Attorneys at Law,
No. 25 Nassau street, New York City.
ANDREW THOMPSON, HENRY Z. HAYNER.

For the next four years the firm's business card was published in the *Weekly Minnesotian*. From the December 19, 1857, issue: [70]

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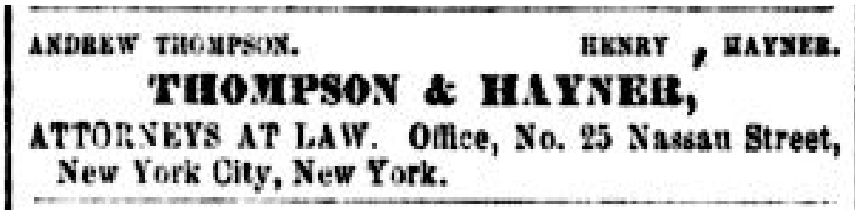
the office. The probability is that Judge Welch will remedy the difficulty by appointing a special term as provided by statute.

Minnesota Democrat, April 20, 1853, at 2.

[69] *Weekly Minnesotian*, November 12, 1853, at 3 (enlarged).

[70] *Weekly Minnesotian*, December 19, 1857, at 2 (enlarged).


ANDREW THOMPSON. HENRY , HAYNER.

THOMPSON & HAYNER,

ATTORNEYS AT LAW. Office, No. 25 Nassau Street, New York City, New York.

The firm would not have run this ad unless it was getting referrals from lawyer friends of Hayner in Minnesota (he must also have had fond memories of his time there).

Hayner was restless in his new firm. He seemed to seek outlets for his considerable energy that were far from the courtroom. In 1855 he was listed as a "reference" for the Bergen Heights Institute in Jersey City, New Jersey.[71] Another "reference" was Henry Wadsworth Longfellow, who had just retired from Harvard to have more time to write poetry. The next year he married for the third time. Around 1857 he became president of the Mamakating Mining Company for a year. It was listed in the *New York City Directory, 1857-1858*: [72]

MINING COMPANIES.

MAMAKATING, 45 William.—H. Z. Hayner, Pres.; David W. Price, Sec.

In 1861 the War came. At age 59 he enlisted and was assigned to the staff of Major General John E. Wool, with the rank of Major. Wool was the oldest general on either side of the War.[73] In early September 1863

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[71] *New York Dispatch*, May 22, 1855. The list of "references" is posted in the Appendix, at 65.

[72] H. Wilson, compiler, *New York City Directory, 1857-1858, Appendix*, at 30. A search of City Directories before 1857-1858 and after did not turn up any listing of this mining company. Mamakating is a town in Sullivan County, New York, which has the remains of a lead mine that produced bullets for Union soldiers during the Civil War.

[73] Shelby Foote describes Wool's response to President Lincoln's decision to advance on Fort Monroe in 1861:

> Wool was 78, two years older than Winfield Scott, and though he was more active physically than his fellow veterans of the War of 1812 —he could still mount a horse, for instance —he had other infirmities all of his own. After

he gave President Abraham Lincoln a verbal report on affairs at Northampton, Virginia. The report concerned the refusal of local residents to swear allegiance to the United States and Hayner's belief that they had a part in destroying a light house. On September 10, 1863, the ever confident Major handwrote a 33 page report to his Commander in Chief. It was endorsed by General Robert C. Schenck on the 17th. [74] That day the President ordered Major "Haynor" to meet with him (he surely complied though details of their meeting have not been located).[75]

Hayner was later transferred to be Provost Marshal at Baltimore, and later to New York City, where he served until the end of the War. He was discharged at age of 63.

After the War the West beckoned. He did not find wealth in the various mining enterprises he pursued in the Montana and Wyoming Territories. In politics he came to the attention of President Andrew Johnson, who nominated him to be Chief Justice of Wyoming Territory on January 23, 1869.[76] However, on March 3, 1869, the day before Ulysses S. Grant was inaugurated, Senator Lyman Trumbell of Illinois "reported the [nomination] wirh the recommendation that [it] lie on the table." [77] The 40th Congress then adjourned. A month later, April 3, 1869, President

---

> twenty-five years as Inspector General, his hands trembled, he repeated things he had said a short while back, and he had to ask his aid if he had put his hat on straight. However, there was no deficiency of the courage. . . . He said he would gladly undertake the movement his Commander in Chief proposed.

Shelby Foote, *The Civil War, A Narrative from Fort Sumter to Perryville* 414 (1958).

[74] A transcription of Hayner's handwritten report is posted in the Appendix, at 64-79. A copy of the original is online in the Lincoln papers at the Library of Congress. http://hdl.loc.gov/loc.mss/ms000001.mss30189a.2618300.

[75] Telegram from President Lincoln to Major General Schenck on September 17, 1863. This telegram and the General's reply are posted in the Appendix, at 80.

[76] *Journal of the Executive Proceedings of the Senate of the United States of America*, Congress, 40th Congress, Third Session, January 28, 1869, at 454.

[77] *Journal of the Executive Proceedings of the Senate of the United States of America*, Congress, 40th Congress, Third Session, March 3, 1869, at 505.

Grant nominated John H. Howe to be Chief Justice of Wyoming Territory.[78] He was confirmed on April 8, 1869.[79]

5. The Death of Henry Hayner.

Hayner's death on April 1, 1874, at age 71, received little notice in newspapers. His service as Chief Justice of the Supreme Court of Minnesota Territory was not mentioned. From the *Hudson Weekly Star*:[80]

> Henry Z. Hayner, once a prominent lawyer and citizen of Troy, was buried in that city Friday last. Deceased graduated from Yale College in the same class with the lamented Judge Hogeboom, of this city.

From the *Troy Daily Whig*:[81]

> Death Notice for Henry Z. Hayner.
> 72 years old.
> Interred in Mt. Ida Cemetery.
> Law Partners: George Gould
> Alex G. Johnson
> A. K. Hadley
> Last 12 years lived in New York City.

In 1856 he married Charlotte Green Learn, the widow of William R. Learn, Sr.[82] It was his third marriage. After his death she had to sue the American Popular Insurance Company to collect his life insurance. She won.[83]

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[78] *Journal of the Executive Proceedings of the Senate of the United States of America*, Congress, 41st Congress, First Session, April 3, 1869, at 75.
[79] *Journal of the Executive Proceedings of the Senate of the United States of America*, Congress, 41st Congress, First Session, April 8, 1869, at 115-116.
[80] *Hudson Weekly Star*, April 9, 1874.
[81] *Troy Daily Whig*, April 4, 1874, at 3.
[82] *New York Herald*, May 7, 1856, at 5.
[83] *Hayner v. American Popular Life Insurance Company*, 69 N.Y. 435 (1877).

6. Summing Up.

Henry Z. Hayner led an active, even adventurous life at times, with failures and a few triumphs. He was transformed by his brief service at the helm of the Supreme Court of Minnesota Territory. He left a cloistered life in Troy for the hardships and challenges of the frontier. His bold opinions on the Liquor Law tempered the Temperance Movement. He was on active duty throughout the War when others his age had retired. Afterward he went West seeking riches in mining ventures but failed. He became forgotten. ■

. . . . .

APPENDIX

Article Pages

A. The Koon Case.

From the front page of the *New York Herald*, January 18, 1848.

Death of Judge Koon.

The Albany papers have long accounts of the proceedings on the occasion of the coroner's inquest in the case of the late John Koon, Esq. From the *Argus* we learn that the result was a verdict of death from inflammation of the brain; four of the jury, who believed the injuries to have caused his death, dissenting.

Judge Parmelee, of Troy, testified that on the 24th Dec. last, Mr. Koon and Mr. Hayner, of Troy, were engaged in the argument of a motion before him at his chambers, Mr. Town, of Troy, being the only other person present. A dispute commenced on Mr. Hayner's referring to a case in 3d or 4th Hill, Mr. H. saying, that on a former hearing he had referred to the same case. Mr. Koon denied this to have been the fact. Mr. Hayner repeated the assertion, and Mr. Koon again contradicted him. Mr. Hayner again repeated the assertion, adding, that if Judge Bull was present, he would confirm it, and also that he would step into the Surrogate's office and get the books. As Mr. H. was passing to the door of the Surrogate's office, Mr. Koon again reiterated his contradiction that any such case had been cited. Mr. H. said to him, as he passed, "You lie." Mr. K. immediately arose and made a step towards Mr. H., saying, "Why, here, Mr. Hayner, I shall not allow you to use this language to me." Mr. H. immediately struck him with his fist, a violent blow in the face, witness thought near one of his eyes. One or two blows were then exchanged between them, Mr. K. receiving another blow, he thought, before the parties clinched. Hayner's blow knocked Koon back a little. In the scuffle, Koon was thrown upon the floor, Hayner falling with him, Mr. K. being under. Witness did not notice that Koon's had struck with violence as they fell. Witness stepped into the hall for assistance, and was quite certain that before he left, Koon received another blow in some part of the head or face, no more violent than any of the other. The

blows were all given with great violence; Hayner struck Koon, so far as witness recollection, no where but on the head or face. Finding no one in the hall, witness returned, and after some trouble, succeeded in separating them. He was certain that there were three blows struck—two before Koon was down, and one after. At first, Mr. Koon appeared very much exhausted, sitting down and covering his face with his hands, but was not at any time insensible.

Mr. Hayner is a very stout man, and his blows were very violent. Witness saw no evidence of sickness at the stomach in Mr. Koon. He remained in the office after the affray, from five to ten minutes. Witness took him into the side room where there was water and towels, and he cleansed himself. Mr. Koon went out with the intention of going to a physician. The affray lasted about half a minute. Mr. K. was apparently exhausted. He bled but little. When he was seating himself, he said, "I didn't think he would strike me." After his return from the side room, Mr. K. said he had never been so abused in his life time. Hayner went away immediately after the affray. Koon did not return after he went out to go to the doctor's.

Hayner was in a passion. After the first blew, they both struck blows. When he returned from the hall, K. had Hayner by the hair, and Hayner had hold of Koon's cravat by the side of the neck; Koon's face was somewhat flushed.

When the affray commenced, witness was sitting. Benjamin F. Town testified, that when he came into the room Mr. Hayner was blowing up Mr. Koon about coming to Troy and talking to Judge Bull, so that he dared not do his duty. Mr. K. denied this, and Mr. Hayner said he lied, that he had done so. Some words passed, and Hayner stepped towards Koon and again told him that he lied. Mr. K. rose from where he was sitting as Mr. H. was passing by; as he rose Mr. Hayner struck him with his fist, witness thought in the left eye. Koon then struck Hayner in the breast or neck. Hayner again struck Koon, and Koon struck Hayner a second time, when they clinched and fell. Mr. H. on top and Mr. K. under. About that time Judge P. went out for help, and witness remained in the room Mr. Hayner struck Mr. Koon two or three times while Judge

P. was absent. Mr. H. lay on Koon in such a manner that Mr. K. had no opportunity to strike him. Witness did not see Koon strike Hayner while he was down. Hayner had his left thumb in Koon's right eye. Witness took his arm away, and asked him, "if he meant to kill a man in that way?" Hayner did not reply. Should think Hayner weighed about 250.

Thought Mr. Koon was pretty badly hurt; there was a bruise on his temple. Don't know how he got that bruise, unless he fell against a screen which was there. When Judge P. returned, witness went out, and when he returned, Mr. Hayner was getting up. Koon lay on his back upon the floor. Hayner went out, and Koon got up and sat on the chair and covered his face with his hands. He then washed his face in the aide room. While he was thus engaged, Judge Bull came in, and Koon asked him where Dr. Christie lived; Witness replied in Congress street, and Mr. K. wrapped his cloak about his face and went out; do not know whether Mr. K. went to Dr. C's or not; has not seen him since. Koon fell nearly upon his back. The bruise was on the right side of his cheek. The screen was about four feet square, and had a foot to it. Witness thinks he fell with the side of his face against the foot of the screen. As they fell they touched the stove and turned it a little. They fell with their feet to the stove and heads to the screen. Does not think Hayner could have made such a bruise with his right hand. Thought Koon was pretty badly hurt about the face. When he went into the aide room, he didn't walk as though he needed assistance. When Mr. Koon rose up from the chair he did not put himself in a posture of defence.

From the *New York Herald*, January 17, 1848, at page 2

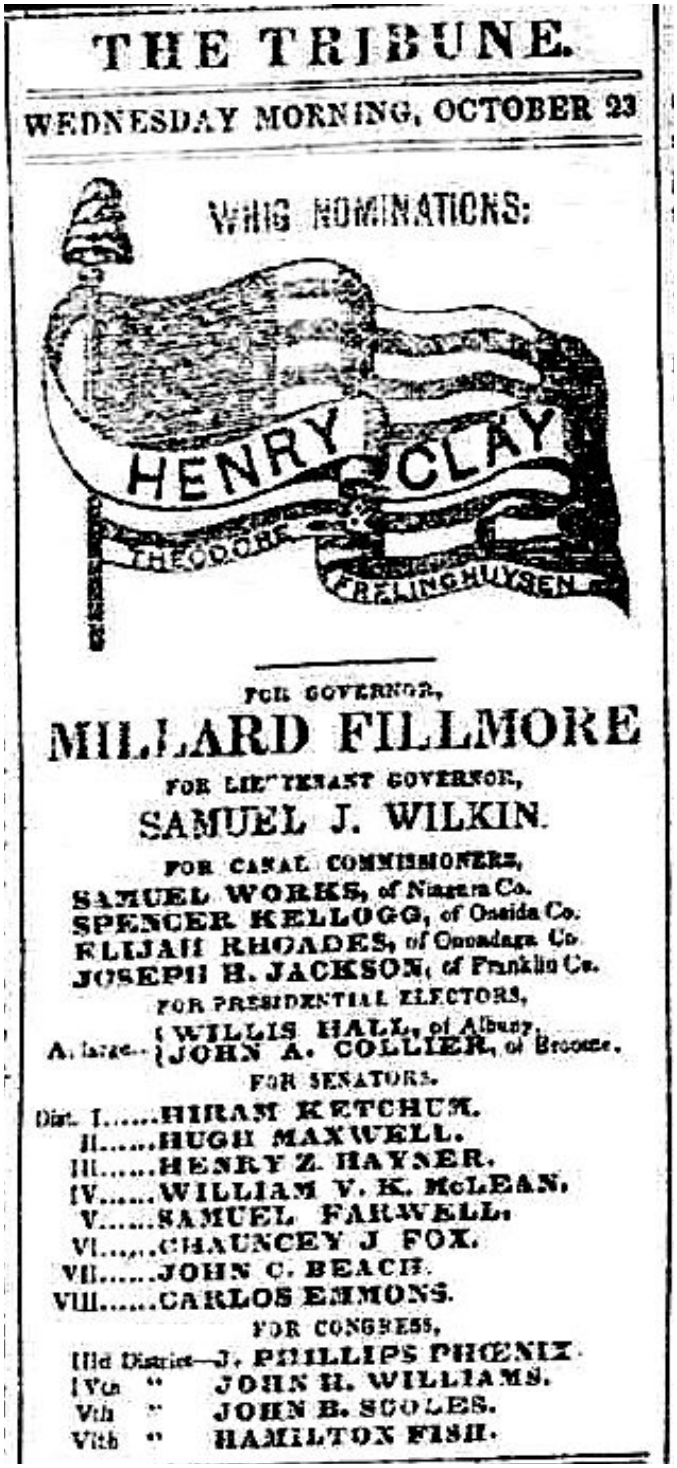
Final Effects of a Fight.

Albany, Jan. 16, 1848.

Mr. John Koon, who had a fracus with Mr. Hayner, at the Troy Court House, 24th December last, died on Friday. The Coroner held an inquest on Saturday. Verdict—Died of inflammation of the brain. He had as insurance on his life in the National Loan Fund, for $6,000.

B. The Whig State Ticket in 1844.

From the *New York Tribune*, October 23, 1844, at 2:



THE TRIBUNE.

WEDNESDAY MORNING, OCTOBER 23

WHIG NOMINATIONS:

HENRY CLAY

THEODORE FRELINGHUYSEN

FOR GOVERNOR,

MILLARD FILLMORE

FOR LIEUTENANT GOVERNOR,

SAMUEL J. WILKIN.

FOR CANAL COMMISSIONERS,

SAMUEL WORKS, of Niagara Co.
SPENCER KELLOGG, of Oneida Co.
ELIJAH RHOADES, of Onondaga Co.
JOSEPH H. JACKSON, of Franklin Co.

FOR PRESIDENTIAL ELECTORS,

At large—{WILLIS HALL, of Albany.
{JOHN A. COLLIER, of Broome.

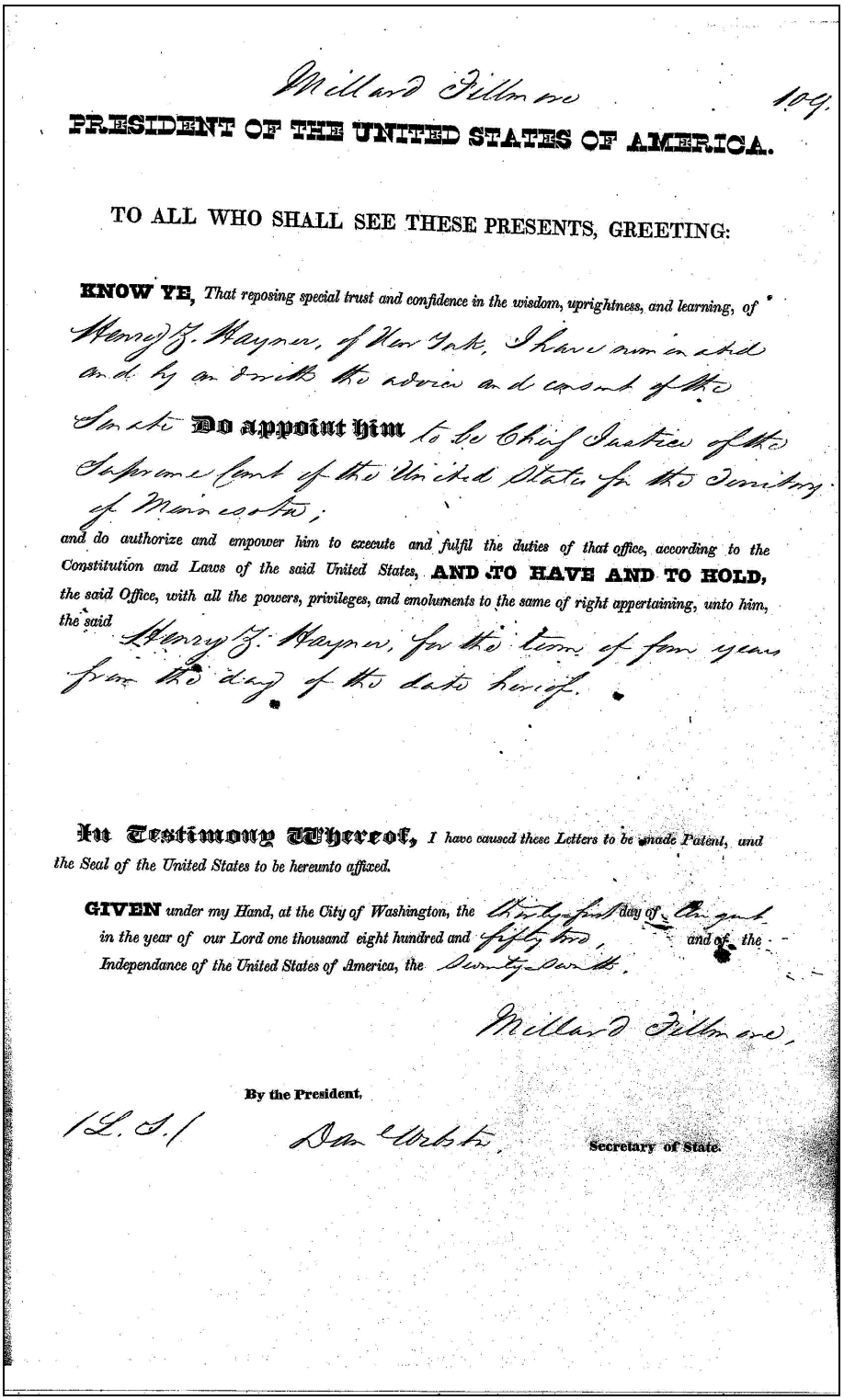
FOR SENATORS.

Dist. I.....HIRAM KETCHUM.
II.....HUGH MAXWELL.
III.....HENRY Z. HAYNER.
IV.....WILLIAM V. K. McLEAN.
V.....SAMUEL FARWELL.
VI.....CHAUNCEY J FOX.
VII.....JOHN C. BEACH.
VIII.....CARLOS EMMONS.

FOR CONGRESS,

IIId District—J. PHILLIPS PHŒNIX.
IVth " JOHN H. WILLIAMS.
Vth " JOHN B. SCOLES.
VIth " HAMILTON FISH.

C. Hayner's commission signed by President Fillmore on August 31, 1852.



Millard Fillmore 109.

PRESIDENT OF THE UNITED STATES OF AMERICA.

TO ALL WHO SHALL SEE THESE PRESENTS, GREETING:

KNOW YE, *That reposing special trust and confidence in the wisdom, uprightness, and learning, of* Henry J. Hayner, of New York, I have nominated and by and with the advice and consent of the Senate **Do appoint him** to be Chief Justice of the Supreme Court of the United States for the Territory of Minnesota;

and do authorize and empower him to execute and fulfil the duties of that office, according to the Constitution and Laws of the said United States, **AND TO HAVE AND TO HOLD,** *the said Office, with all the powers, privileges, and emoluments to the same of right appertaining, unto him, the said* Henry J. Hayner, for the term of four years from the day of the date hereof.

In Testimony Whereof, *I have caused these Letters to be made Patent, and the Seal of the United States to be hereunto affixed.*

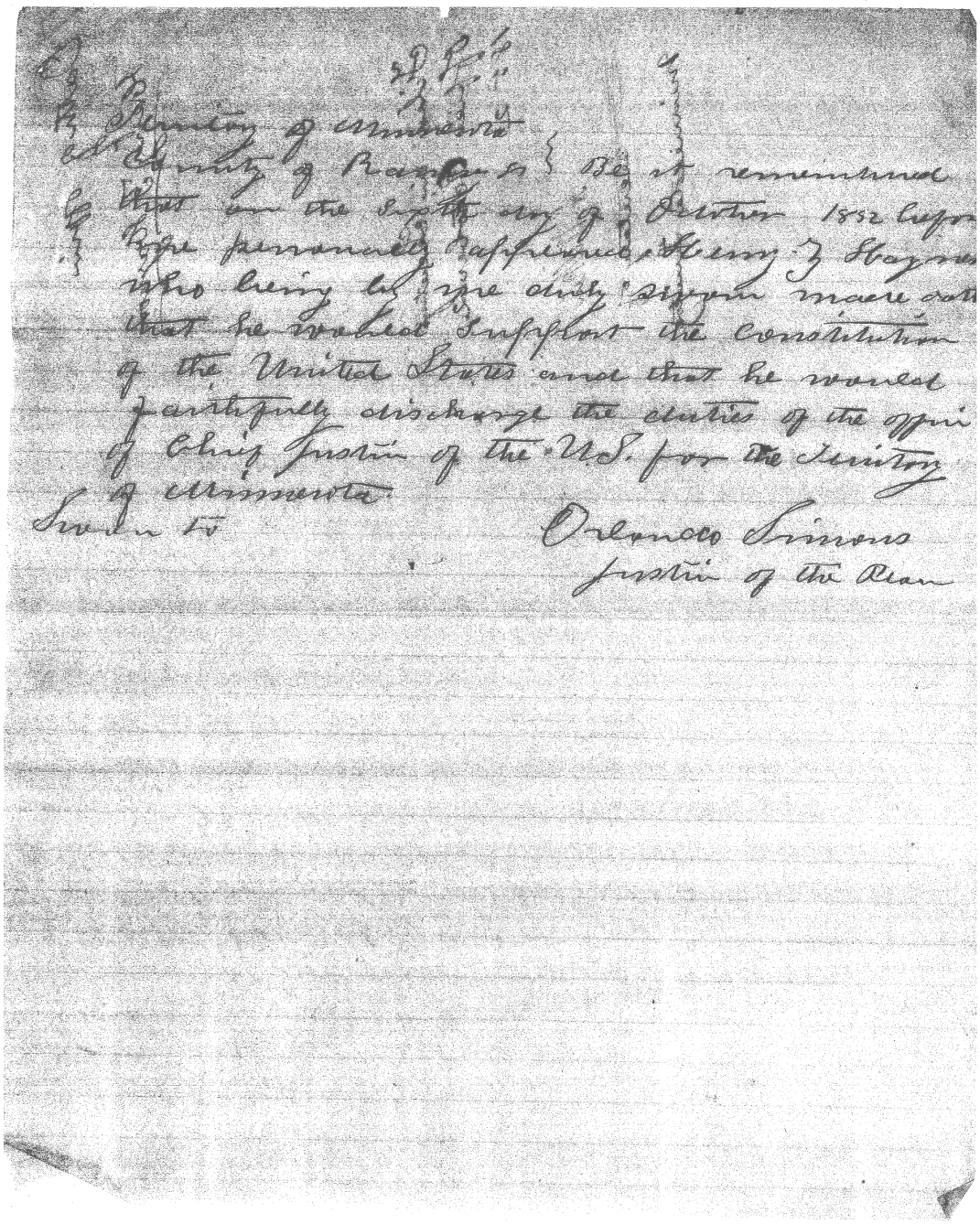
GIVEN *under my Hand, at the City of Washington, the* thirty first *day of* August *in the year of our Lord one thousand eight hundred and* fifty two, *and of the Independance of the United States of America, the* seventy sixth.

Millard Fillmore.

By the President.

L. S. Daniel Webster. **Secretary of State.**

D. Oath of office of Chief Justice Henry Z. Hayner
before Orlando Simons, Justice of the Peace, October 6, 1852.



Territory of Minnesota
County of Ramsey } Be it remembered
that on the 6th day of October 1852 before
me personally appeared Henry Z Hayner
who being by me duly sworn made oath
that he would support the Constitution
of the United States and that he would
faithfully discharge the duties of the office
of Chief Justice of the U.S. for the Territory
of Minnesota.
Sworn to Orlando Simons
Justice of the Peace

E. Judge Rensselaer R. Nelson on Hayner's Service on the Ramsey County District Court in 1852.

On Sunday, March 2, 1902, the *St. Paul Globe* devoted an entire page to the Minnesota Supreme Court; it was based on previously published recollections of the territorial court by Henry L. Moss and Charles Flandrau, who dismissed Chief Justice Hayner as follows: "There seems to be no record of his ever presiding at any court. He may have done so, but I have been unable to find anything that shows it, and tradition has never affirmed it to my knowledge." That "tradition" did not include the recollections of retired Federal District Court Judge Rensselaer R. Nelson, who promptly sent the following "Letter to the Editor" of the *Globe*, correcting Flandrau's error.

The St. Paul Globe

Tuesday, March 4, 1902 Page 4

AN ERROR CORRECTED.

To the Editor of the Globe.

I am surprised at an intimation, or qualified statement, in the "Review of the Supreme Court of Minnesota," published in your issue of March 2, 1902, that the Hon. Henry Z. Hayner, third chief justice of the supreme court of the territory of Minnesota, never presided at any court during his term of office.

This is an error. Chief Justice Hayner presided at the November term, 1852, of the Ramsey county district court and tried the celebrated murder case of U.S. vs. Yue-ah-hase, a Sioux Indian, indicted and convicted of shooting Mrs. Keatnor. At that time, by the law, twelve months' imprisonment was imposed before execution. The Indian was fattened

during his term in jail, and at the appointed time was dragged to the gallows with a rope around him by the sheriff and a posse and almost tortured before he was hung up.

Among other cases heard by Judge Hayner at this term was an appeal in the prohibitory "Maine Liquor" law, so called. The previous legislature had submitted the enactment of a prohibitory liquor law to the people of the territory and the vote was in favor of prohibition by a small majority. It caused great excitement and the attempted enforcement of the law in St. Paul resulted in breaches of the peace and broken heads. In the case before the court the validity of the law was the question presented. I was employed in the case, and contended that an attempt had been made to confer legislative power upon the people contrary to the terms of the act organizing the territory. Judge Hayner in a lucid opinion sustained this view and upset the law.

Chief Justice Hayner resided in Troy, N. Y., when appointed. His predecessor, Fuller, also was a native of New York, and a politician of influence, and affiliated with that faction of the old Whig party denominated "Silver Grays" in opposition to the Radicals led by Gov. Seward.

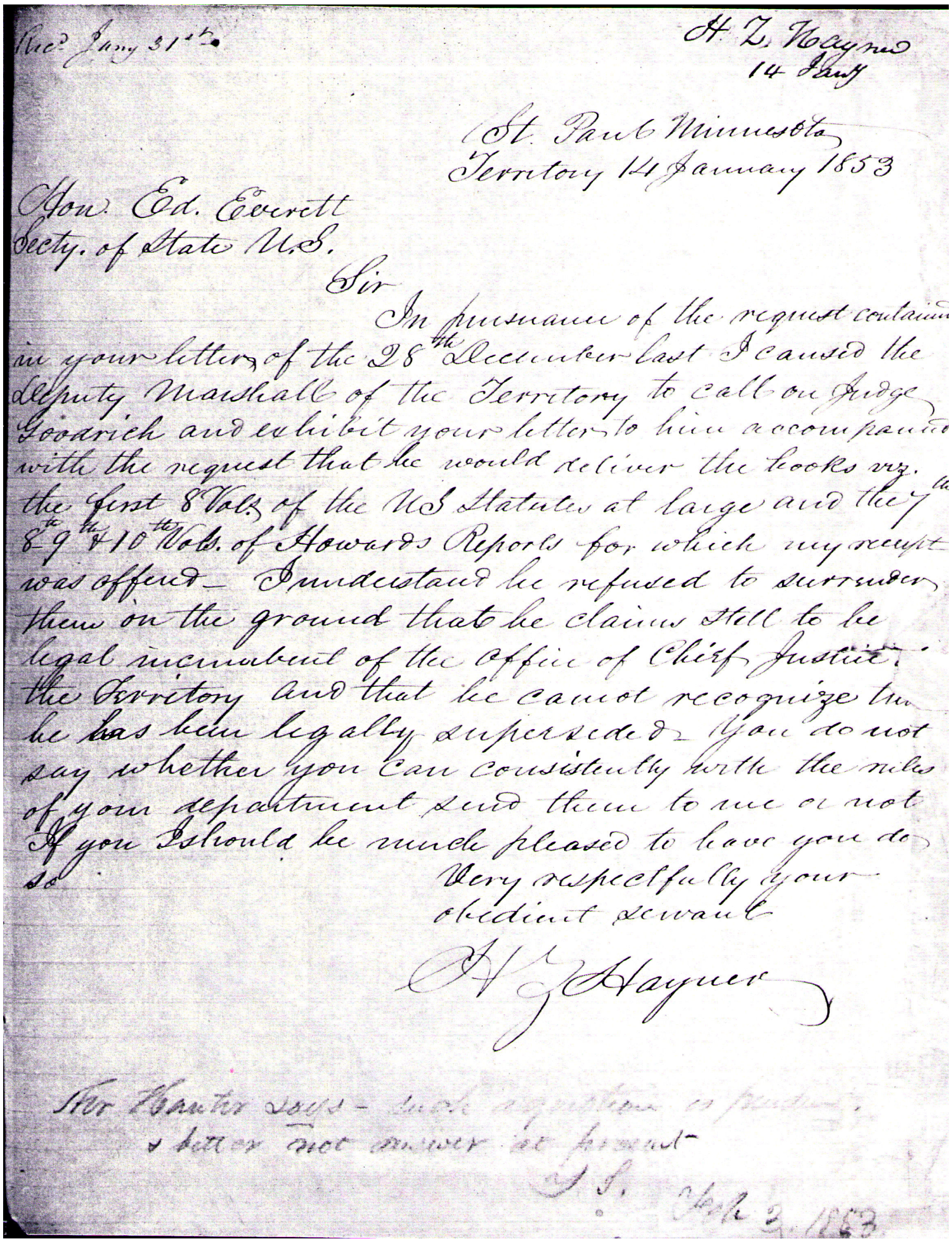
Mr. Fillmore was president of the United States in 1851 and, recognized in New York as a "Silver Gray," Judge Fuller was appointed by him, but Mr. Seward, who was in the senate, opposed and defeated his confirmation, and Hayner succeeded him. He was a good lawyer, somewhat opinionated and irascible, but gave satisfaction during his official term. He practiced law after leaving the bench a short time in St. Paul and returned to New York.

The "review" published by you being a part of the "History of Minnesota," is my only excuse for this intrusion.

—R. R. Nelson.

St. Paul, March 3, 1902.

F. Chief Justice's report to the Secretary of State his futile attempt to retrieve the Court library.



Rec^d Jany 31st.

H. L. Hayner
14 Jany

St. Paul Minnesota
Territory 14 January 1853

Hon. Ed. Everett
Secty. of State U.S.

Sir

In pursuance of the request contain[ed] in your letter of the 28th December last I caused the Deputy Marshall of the Territory to call on Judge Goodrich and exhibit your letter to him accompanied with the request that he would deliver the books viz. the first 8 Vols. of the U.S. Statutes at large and the 7th 8th 9th & 10th Vols. of Howards Reports for which my receipt was offered. I understand he refused to surrender them on the ground that he claims still to be legal incumbent of the Office of Chief Justice of the Territory and that he cannot recognize that he has been legally superseded. You do not say whether you can consistently with the rules of your department send them to me or not. If you should I should be much pleased to have you do so.

Very respectfully your
obedient servant

H. L. Hayner

Mr Hunter says - such a question is pending, & better not answer at present -
J. S. Feb 2. 1853

Microfilm M499, Roll 8, image 196,
Ronald M. Hubbs Microfilm Room, Minnesota Historical Society.

G. Chief Justice Hayner Pleads for His Salary. [84]
(January 14, 1853).

In January 1853, three months after he arrived in Minnesota Territory, Chief Justice Hayner still had not received his salary because First Comptroller Whittlesey in Washington demanded a copy of his oath of office, which supposedly would prove that he resided in the territory and was performing his judicial duties. Hayner had been nominated, confirmed and issued a four year commission on August 31, 1852. It took him five weeks to wind up his affairs in New York and travel to Minnesota. He was sworn on October 6, 1852, in St. Paul. But the Comptroller withheld his salary under the law barring payments of salaries to an absentee jurist until he produced a copy of his oath, something he could not satisfy from the distance of Minnesota Territory.

Hayner responded in the following letter, which displays not only frustration over his unpaid salary but also his sensitivity to the condescending attitude of Washington officials who were oblivious of the sacrifices he has made, something other territorial jurists may have experienced as well. [85]

Saint Paul, Minnesota Territory
14th January 1853

Hon. Elisha Whittlesey
1st Comptroller U. S. Treasury

Sir

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[84] This section is taken from Douglas A. Hedin, "Introduction: Documents Regarding the Terms of the Justices on the Territorial Supreme Court" 40-43 (MLHP, 2009-2014).

[85] Image 341, Roll 9 of the microfilm copies of U. S. Territorial Papers. Territory of Minnesota Records: Secretary of the Interior, Appointments Division, in the Ronald M. Hubbs Microfilm Room of the Minnesota Historical Society.

Folwell erroneously cites Hayner's letter as "relative to [his] removal." I *A History of Minnesota* 378 n.32 (1956)(published first in 1921). Folwell was misled by a handwritten note on the back of this letter: "H. Z. Hayner 1853 to Whittlesey about his removal from office."

Allow me to express my surprise at the contents of your letter of the 24th instant. I received my commission on the 4th of Sept. dated the 31st of August last and waiting a day or two thereafter accepted the office as can be seen in the State Department of the U. S. Government.

I ascertained that it was necessary to hold court in the Territory in early October last. Accordingly I broke away from the solace of my former residence (Troy, N.Y.) neglecting business of considerable importance both to myself and others to arrive in time to attend to my official duties. I left Troy about the 20th Sept, and arrived St. Paul, the 3rd October last, where I have remained ever since—On the 6th October last, I took Oath of Office (to which I suppose you refer in your letter) which I ascertain was filed on the 12th of the same month with the Secretary of the Territory to be recorded.

I know of no legal provision nor do I now that require the Oath of a copy to be transmitted to the Treasury Department or another Department at Washington, consequently it can not be a matter of surprise that I did not do it or that it was omitted to be done at all—The Organic Act requires the Oath to be taken and duly certified by a proper officer and filed with the Secretary of the Territory and by him to be recorded —This was done as before stated. But if the Oath or a copy thereof is to be trans-mitted to any of the United States departments at Washington let those see to it whose business it is. It is not within the range of my duties, and I cannot with any propriety be requested to perform it, and I do not comprehend why the payment of my salary should be delayed on that accord—If you have the right to withhold it either because you require an act to be done that no officer of the Territory is bound to perform—or compel me to do acts or comply with conditions that are not within the scope of my duties, you undoubtedly have the power of refusing to pay it altogether, which I presume you will not abrogate to yourself.

The significant manner in which you call my attention to the proviso in the appropriations bill of the 31st August last is still more a matter of surprise to me — I have examined the proviso you refer to and the statute to which it refers and amends—and all that I can make of it is this—that if an officer of the Territory absents himself from it more than 60 days his salary is not to be paid him until the President certifies that he may be absent for good and sufficient cause—no one surely can have been guilty of the gratuitous mischief of interpreting obligations with your department so the payment of my salary on the ground of my absence, inasmuch as I have had constantly, and I will add most diligently attending to the duties of my office ever since my arrival in this Territory. By the provision of the act you refer to, the President is alone authorized to make certificates upon such absence. I cannot call on him as I have not been absent—still you require me to send a certificate. Whose? I ask—the President's, I cannot obtain as I do not come within the reach of the exigency of the Act, and I do not find that the act referred to, or any other requires any other certificates—nor can I divine whose, or what kind will be satisfactory to you—For if you have a right to require these without legal authority, you unquestionably may determine also the quality and degree of proof that will entitle an officer to draw his salary—In both these respects your letter leaves me in the profoundest ignorance. For you do not direct whether the testimony of any competent legal witness will suffice or whether the statement of the official dignitaries of the territory will alone answer—whether it must be made more the sanctity, or an oath, or taken under a simple parol of honor. In law the presumption is that I am, and have been engaged in the performance of my duty ever since I accepted the place unless the contrary appears as well in respect to my having taken the oath and my having remained in the territory as in respect to all the duties and requirements incident to the office. And you have as good a right to demand as a condition of the payment of my salary, proof that I have appointed a clerk—that I reside in the District to which I am assigned.—that I have held the required regular

terms of the court—and that I have performed all and singular my duties as a judge in detail;—as to make the requirements contained in your letter, I cannot therefore believe that you might be guilty of the official impertinence to require certificates of my having performed my duties without complaint as to my absence. If such complaint has been made inform me as to the particulars and I will forthwith answer and furnish you with the requisite proof to show that I have not ever been absent. If not, I shall expect my salary transmitted at your earliest convenience; and from time to time as it becomes due—Aside from the presumed delinquency your requirement implies, and the utter humiliation it demands—conditions that no right minded or honorable man can or will submit to, I do not desire to twice earn my salary before it shall be paid me once by the performance of labors legally attached to the office—And again by being illegally compelled to get up certificates and prepare documents unknown to the law to satisfy assuming and impertinent treasury officials that I have preformed my duty — or by begging for an indefinite period at the doors of the treasury for my legal dues before its every watchful guardians can be induced to account them to me.

I have enclosed a copy of this and of my former letter to the Secretary of the Treasury calling his attention to your letter and requesting an explanation.

Very truly your obedient servant,
H. Z. Hayner

Missing from most documents that demarcate a territorial justice's term is the man behind them — his personality and temperament, attitude toward his office, legal acumen, relations with his colleagues, the bar and the federal bureaucracy, and so on. But occasionally a document is found that reveals a sliver of the man. Hayner's letter is such a document.

H. Advisory Opinion of Chief Justice Hayner on the "Liquor Law" (February 18, 1853) [86]

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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. [87]

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.] [88]

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.

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[86] 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.

[87] 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 spiritous 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).

[88] The correct cite is §19 not §18 of the Revised Statutes.
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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

I. *Page v. Mahoney*

Weekly Minnesotian

Saint Paul, Minnesota Territory, Saturday, February 5, 1853

District Court First Judicial District, Washington County.

14th Dec. 1852.

John B. Page ag't William O. Mahoney. } *Motion for a new trial on a case made.*

Wilkinson for Deft,
Ames for Plaintiff.

This was an issue tried on the 8th day of October, 1852, before the Hon. David Cooper at the Washington County District Court. A verdict was rendered by the Jury for $815 25.—The action was for the recovery of $600, as the balance due for goods, wares and merchandize, sold and delivered by the Plaintiff to Defendant, and interest thereon from the 22d August, 1847.

The cause was on the issue formed by the supplemental answer, setting up a settlement of the action upon certain conditions embodied in a certain special contract of settlement, and setting forth other and different conditions, annexed to the agreement, and denying the performance of the conditions thus set forth.

The following is a copy of the contract introduced in evidence on the part of the Plaintiff, viz:

John B. Page ag't William O. Mahoney. } District Court; First Judicial District, Washington County.

Action for the recovery of money.

Received of William O. Mahoney, defendant in the above entitled case, the following draft, copied as follows, to wit:

STILLWATER, Sept. 10, 1852.

Messrs. B. H. CAMPBELL & Co.:

GENTS:—Please pay, at sight, One Hundred Dollars to William O. Mahoney, or order, value received, and place the same to our account, and much oblige

Yours &c.,
SAWYER & HEATON.

The same being endorsed "William O. Mahoney;"

Also, received a promissory note of which the following is a copy:

"110 12

On the 15th day of November next, for value received, I promise to pay to the order of F. K. Bartlett, One Hundred and Ten Dollars and Twelve Cents.

WILLIAM O. MAHONEY.

STILLWATER, Sept. 10, 1852."

The above draft to be received by the said John B. Page in account with the said Daniel Mears.

And now if the above note of $110 12 *shall be paid when the same shall become due*, the *whole* of the above is *received in full discharge and acquittance of all demands and claims* of the said Page against the said Mahoney existing at the time of the commencement of the said suit, and the said suit is to be released, discharged and satisfied in full, upon the payment of all costs by said defendant.

F. K. BARTLETT.
Attorney for John B. Page, and holding said claims.

STILLWATER, Sept. 11, 1852."

Among other things, the plaintiff's reply asserts that the Attorney had no authority to receive the draft of Mears, accepted as described in the above agreement; that after some conversation, the Attorney agreed to sign the receipt or agreement, and to consider the drafts and note received as a full settlement of the suit, provided the *plaintiff would accept and receive the draft* so drawn and accepted by *Mears*, and defendant would pay all the costs in the suit and would pay the notes; and provided the *plaintiff refused to accept the Mears draft*, the receipt and agreement was to be *null*."

That the Attorney signed the receipt and agreement upon these conditions, and that such understanding and agreement was a part of such receipt or agreement.

That plaintiff declined and refused to accept the Mears draft, and it was offered and tendered back to defendant's attorney, together with Mahoney's note and $100 cash, which defendant's attorney refused to accept.

And the concluding allegation in the reply is in substance, that the acceptance of the Mears draft by the plaintiff, and the payment of all costs in the suit and the Mahoney note by the defendant, were each and every of them conditions precedent, before any effects or power should have been had or given by the receipt or agreement, and that neither, nor any of said conditions have been performed.

What is the legal effect of the agreement for the settlement of the suit, or receipt so called in and of itself?

The instrument purports to have been executed by F. K. Bartlett, "*Attorney for John B. Page, and holding the claim.*" Non constat he was the attorney in fact as well as at law, for he does not sign or subscribe it as attorney at law, but as "attorney" only. The addition, also, of "and holding the claim," affixed to his signature, appears to indicate he was the owner, or part owner, of the claim settled. This view is also much strengthened by the fact that the note of Mahoney, named in the settlement, was made payable to the order of F. K. Bartlett.

If the attorney at law was likewise attorney in fact, and if he had authority, even by parol, he might execute such a writing. An attorney in fact is only an agent, and the authority of such an agent is usually granted by parol.—(*Story on Agency*, pp. 25, 55.) And such agents may make, execute and deliver written instruments, not under seal which will bind their principals.—(*Story's Agency*, §55, 56.)

But if Bartlett was the equitable owner, or part owner, he was attorney in fact coupled with an interest, and this gives him unquestionable authority to make, execute and deliver the instrument in writing in question.

Suppose, however, he was only attorney at law, and this seems to be contravened by strong presumptions; the taking a note payable to his own order has been referred to the verification of the supplementary reply, and the addition to his name of "holding the claims;" but suppose he was only the attorney at law of the plaintiff, the plaintiff is bound by the contract. Although an attorney at law has no right to make a compromise as between himself and client, yet a court will be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed upon.—(Holker vs. Parker, 7 *Church*, 436.

If the attorney transcends his authority he becomes liable to his client, but he binds his client to the opposite party.—(8, *Peters* 18, 6 *J. R.* 34; *do.* 296.)

The plaintiff, in his supplementary reply, does not wholly repudiate the right of making the contract or agreement, but alleges that other and further stipulations and conditions were annexed to it and agreed to by defendant.

And inasmuch as the plaintiff introduced it in evidence, if he was not thereby estopped from denying the attorney's authority to execute and deliver it, he should be held to full and clear proof that the attorney acted without authority.

Plaintiff's counsel proved the execution of the instrument, and read it in evidence to the Jury, without any qualifications as to the use he intended to make of it, and upon the examination of the testimony, I find no intimation that F. K. Bartlett was not fully authorized to execute and deliver the contract of settlement, and it must, therefore, be considered under the circumstances to have been satisfied by the plaintiff or adopted as an act done by one having authority.—(*Story on Agency*, §242, *et sequente.*) Assuming then that the instrument was binding and obligatory upon the plaintiff, what was the effect of it upon this action, unexplained or uncontradicted?

It was clearly a suspension of the action until the Mahoney note became due—the 15th of November, 1852. And if the note was paid when payable, and the costs of the action paid at the same time, it was to be a full discharge, release and satisfaction in equity of the entire cause of action, or more correctly speaking, it was a receipt of certain obligations, with a contract stipulating that if Mahoney's note and the costs of the action were paid when the note became due, the action should be released, discharged and satisfied in full. This court has but little to do with what transpired in the attempt made to explain (as it was called) the agreement of settlement. But it is a matter of curiosity to see what was offered to be proved by the plaintiff's agent or attorney. The written instrument shows the receipt of the Campbell draft, the Mahoney note, and the draft of Kent and Mahoney, accepted by Daniel Mears, which acceptance is described in terms to be received by John B. Page (the plaintiff) in account with the said Daniel Mears. Now when the instrument in writing, says this in terms that the plaintiff received it for such a purpose and in such a way, can either the law give it the construction or permit the terms of it to be so explained or abrogated by parol testimony, that the plaintiff only received it to hold and counsel with himself whether he would take or receive it or not? This would be the effect of the testimony offered on the part of the plaintiff. The testimony was offered, objected to and overruled.

Whether this ruling was correct or not, it is not now my province to decide; on the contrary, I can only legitimately consider the testimony actually admitted unobjected to, and ascertain how far the terms of the written contract were modified by such testimony, and whether after giving it its full legal force and effect, the action could be maintained, and this verdict be supported.

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Bartlett says on the direct examination, that he holds the Mahoney note, the draft accepted by Mears, and that he collected the Campbell draft, and that he offered and tendered the same to Theodore Parker, the defendant's attorney in this action. This shows most clearly that Bartlett actually received the very things or choses in action specified and described in the receipt. And I have before decided that the witness receiving them as the attorney and agent of the plaintiff, bound the plaintiff, and, therefore, in legal effect the plaintiff received them. The testimony in detail shows that every provision of the written agreement of settlement was complied with on the part of the defendant. Yet the witness, Bartlett, in general terms testifies that "the conditions of the agreement were not complied with by (the def't.) himself, or his attorney or anybody in his behalf." It is very questionable whether any effect whatever ought to be given, or attention paid, to such a wholesale, sweeping declaration of a witness.

When in detail both on the direct and cross-examination, he flatly and wholly contradicts himself. When in particularizing, he proves the most entire opposite, or rather when he is questioned specially, his testimony directly conflicts with his broad, unqualified assertion, and on the contrary perfectly harmonizes with the receipt or agreement in question. I think it would be inequitable and unsafe to suffer a verdict to rest upon such testimony, so contradicted by itself and so completely at war with a solemnly executed written instrument, made and executed by the witness himself. The verdict is not only against the weight of evidence, but is without anything worthy of the name of evidence to sustain it.—(Hart vs. Hosack, 1 *Cain's Rep's.* 25; Jackson vs. Sternbergh, 1 *Cain's Rep's.* 162; Cohen vs. Cupont. 1 *Sandford* 260; Conrod vs. Williams, 6 *Hill* 444.)

Again, a party to a contract cannot rescind it though he may have sufficient cause, unless he return or offer to return to the other all the subject matters of the contract delivered to the former as the consideration of the contract. A party attempting to rescind, must as far as he is able restore the other to the position in which he was before he made the contract.—(*Story on Contracts* §844,) He must put the other in *statu quo* by an entire surrender of *possession* and of *everything* he had obtained under the contract.—(Vorhes vs. Earl, 2 *Hill* 288, 293; Masson vs. Boret, 1 *Denio R.* 69.

This general principle the plaintiff or his attorney appeared to be aware of, and consequently attempted to offer back the defendant's note and the Mears acceptance, and to make a tender of the money collected on the Campbell draft. Though I do not perceive the slightest ground to authorize a rescinding of the contract in this case, for it cannot be done usually if at all without the commission of a fraud by the party against whom it is sought to be rescinded; yet without the offer and tender there is no disaffirmance of the contract, and it remains unrescinded.—(*See authorities last above quoted*; *Story on Contracts*, §844, 6.)

This disaffirmance the plaintiff tried to accomplish by making such offer and tender to Mr. Parker, the attorney at law in the action agreed by the contract to be settled, and not to the defendant himself.

As attorney at law, Mr. Parker had a right to defend the action; but he had no right as such to consent or agree for the defendant to disaffirm or break up a contract that if carried out would determine both the action and the agency he had in it. Without the proof of a general agency on behalf of the defendant being vested in Mr. Parker, or a special agency for this purpose, he had no power or authority to act in this behalf for the defendant, and the offer and tender to him was a perfect nullity. Mr. Parker's refusal to accept of the offer or tender was not the refusal of the defendant. and the plaintiff had no right to proceed with the action. In this respect there is no evidence to sustain the verdict.

I am also of the opinion that the Charge of the Judge who tried the cause, if not in terms erroneous, was calculated to mislead the Jury.

He was requested by defendant's counsel to charge the Jury that the conditions in the agreement were not to be complied with until the 15th November (then next,) and that until the expiration of that time, the plaintiff could not maintain his action. The Judge refused so to charge; on the contrary, he says to the Jury that the plaintiff having proven the agreement, must be governed by it, and the whole agreement must be taken by the Jury as it appears upon the face of the agreement itself; that if the conditions thereof were not to be performed until the 15th day of November (then next,) then the plaintiff could not recover. The Judge does not say to the Jury what the effect of the conditions in the contract are, provided they do not find them contradicted, varied or modified by other evidence, aliende the contract, but leaves them to judge or determine what the conditions of the contract are, and the effect to be given to them. In other words, he has submitted it to the Jury to determine the legal effect and construction of a written contract.—This is a misdirection, by implication, and it must have misled the Jury as to their duty; and either a misdirection in, or a misleading by the Judge's Charge, is a sufficient ground for granting a new trial on a case made.—(Wardell vs. Hughes, 3 *Wendell* 418.) And this is so though the party moving took no exceptions to the Charge of the Judge.—(Anher vs. Hubbell, 4 *Wendell* 517 :—*see note in this case.*)

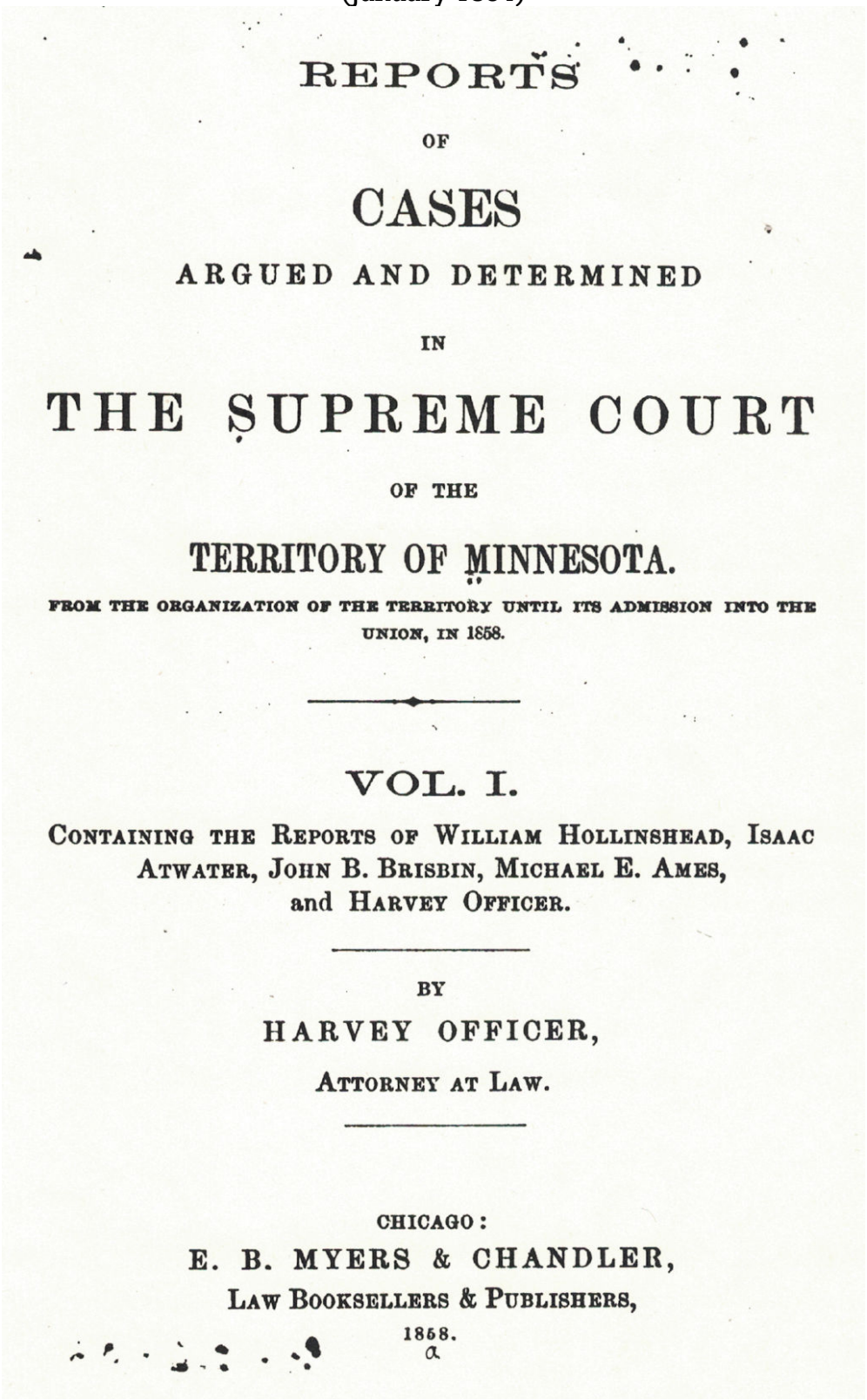
The legal effect or construction of a written contract is always a question of law and not a question of fact for the Jury.—(Pasly vs. Dipon, 1 *Mason* 315.)

It is so in every case when the facts are undisputed.—(Healy vs. Ulty, 1 *Cowen* 316; 1 *Starkie Ev.* part III. pp. 429.)

The verdict of the Jury must be set aside as against law and evidence, and the costs are to abide the event of the suit.

H. Z. HAYNER.

J. *Goodrich v. Parker*
(January 1854)



REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF THE

TERRITORY OF MINNESOTA.

FROM THE ORGANIZATION OF THE TERRITORY UNTIL ITS ADMISSION INTO THE UNION, IN 1858.

VOL. I.

CONTAINING THE REPORTS OF WILLIAM HOLLINSHEAD, ISAAC ATWATER, JOHN B. BRISBIN, MICHAEL E. AMES, and HARVEY OFFICER.

BY

HARVEY OFFICER,

ATTORNEY AT LAW.

CHICAGO:

E. B. MYERS & CHANDLER,

LAW BOOKSELLERS & PUBLISHERS,

1858.

signated as United States Courts, and when the meaning of the term is properly understood no confusion or misunderstanding can arise from its use. They are United States Courts because they are created by authority of the United States, and for no other reasons.

In my opinion, the most proper designation of these Courts is, simply District Courts of the Territory of Minnesota, for the proper district, &c. but I do not consider it a fatal error for a party to give a more full description of the Court if that description is correct. A Court undoubtedly must be designated by its proper name, and when a particular name is given that name must be used.

The Organic Act declares that the judicial power of the Territory shall be vested in a Supreme Court, District Court, &c. but it does not prescribe a specific name and style, except the general one of District Court, by which these Courts shall be designated, to the exclusion of any additional description.

The Courts held by the Justices of the Supreme Court in the Districts, must unquestionably be designated as District Courts; but the additional description of United States District Courts, such description being in accordance with the fact, I cannot regard as erroneous.

Order reversed.

REUBEN GOODRICH, Appellant, *vs.* RODNEY and E. C. PARKER, Respondents.

It is not Error for the Chancellor to hear and allow or disallow exceptions to a bill in Chancery, without referring the same to a Master.

The Pleader may insert in a bill in Chancery, not merely issuable facts, but any matter of evidence or collateral facts which, if admitted, may establish, or tend to establish, the material allegations in the bill, or which may bear upon the relief sought. Other matter is impertinent.

Matter inserted in a Pleading must be impertinent to be scandalous, and it must be clearly irrelevant, or the Court will not strike it out.

Goodrich v. Rodney and E. C. Parker.

Deeds, records and writings set forth in *haec verba* will be stricken out as impertinent. An exception for impertinence must be sustained *in toto*, and if it include any passage which is not impertinent, it must fall altogether.

Complainant, on the 2d day of April, 1853, filed his bill in the District Court for the County of Ramsey, to which Defendants filed sundry exceptions.

These exceptions were heard, and a portion of them allowed by the Court below, from which order Complainant appeals to this Court.

All of which, (in view of the following extract from Chapter 1 of the Acts of our Legislature, approved March 5th, 1853: "The Court of Chancery, and the right to commence or institute Chancery suits and proceedings, and all statutes and statutory provisions inconsistent with this act, shall be, and are hereby abrogated and abolished:") are more fully and, for all practical purposes, sufficiently set forth in the following Opinion.

AMES & VAN ETTEN, for Appellant.

RICE, HOLLINSHEAD & BECKER, for Respondents.

By the Court—SHERBURNE, J. This cause is brought into this Court by Appeal from an order of the District Court allowing exceptions to the bill.

It is objected by the Complainant's Counsel, that the proceedings in the Court were irregular, inasmuch as the exceptions were not referred to a Master. The objection, in the opinion of the Court, cannot be sustained. The duties of a Master in Chancery are not separate and distinct from those of the Chancellor, but in aid of him. Masters in Chancery were considered in England as "assistants to the Lord Chancellor," and Tomlin says: "some sit in Court every day, and have referred to them interlocutory orders for stating accounts, computing damages," &c. "and they also examine, *on reference*, the propriety of bills in Chancery," &c. But, I am not aware of any rule making it imperative on the Chancellor to refer the question of propriety of the bill to a Master, if he should choose to hear it himself. I do not find that the question

has ever been raised: but, in practice, it has been common in the States for Courts sitting in Chancery to examine and determine questions of a character similar to the present case of exceptions, without the intervention of a Master; and the very section of our Statutes which is relied on by the Complainant's Counsel as supporting his objection, goes very far to avoid it. The language is, that "whenever it shall be deemed *necessary*, pending any suit or proceeding, the Court *may* appoint a special Master," &c. See *Statutes*, Sec. 73, p. 470. Who but the Chancellor is to determine when he needs asssistance? and, when he does not need it, what anthority has he under the Statute for appointing an assistant? I apprehend, that we have only to look to the reason for the appointment of a Master, to arrive at the conclusion that the whole matter lies within the choice of the Chancellor. To examine exceptions is one of his duties, which he may, or may not, as he deems necessary, refer to a Master, who acts in some respects in the character of a referee in a Court of law.

Upon the question of allowing exceptions, the following Opinion of Chief-Justice HAYNE, in the District Court, is approved by this Court, and has been adopted as our opinion:—

In examining the question whether allegations or statements in a bill are relevant or pertinent, it must be recollected that a bill in Chancery is not only a pleading for putting in issue the material allegations and charges upon which the Complainant's right to relief rests, but, in most cases, it is also an examination of the Defendant on oath, for the purpose of obtaining evidence to establish, or tending to establish, the Complainant's case, or to countervale the allegations contained in the Defendant's answer. 5 *Paige*, 522, 523; 3 *Paige*, 606; *Story's Eq. Pl.* Sec. 268.

The Complainant may therefore state any issuable fact, and also any matter of evidence in the bill, or any collateral fact the admission of which by the Defendant may be material in establishing the general allegations of the bill, as a pleading, or in ascertaining or determining the *nature* or extent of the relief to which the Complainant may be entitled consistently with the case made by the bill. 5 *Paige*, 523; 3 *Ib.* 606;

Story's Eq. Pl. Sec. 268. And where the allegations or statements contained in the bill may thus affect the decision of the cause, if proved or admitted by the Defendant, it is relevant, and cannot be excepted to as impertinent. 5 *Paige*, 523; 3 *Ib.* 606; *Story's Eq. Pl.* Sec. 268.

To ascertain whether an allegation or statement in a bill is pertinent as a matter of pleading, it is proper to see if an issue can be framed out of it which will be material, if proved or admitted, to aid in obtaining the relief to which Complainant would be entitled by the bill. And a good test of relevancy as to the discoveries of facts sought of the Defendant in the bill, as evidence or proof for the Complainant, is, to examine and ascertain whether if the facts admitted or proved would establish, or have a tendency to establish, the issuable matter contained in the bill. *Story's Eq. Pl.* Sec. 853.

Matters alleged, not material for the above purposes, are impertinent, and if reproachful, are scandalous. 1 *J.* (*Ch.*) *R.* 103; 5 *Paige*, 522; *Story's Eq. Pl.* Sec. 270. But a matter must be impertinent in order to be scandalous, for however scandalous in its nature it may be, if relevant it cannot be expunged as scandalous. 15 *Vesay*, 477.

Before expunging the matter alleged to be impertinent, it should be fully and clearly made out that it is impertinent: for if it be erroneously struck out, the injury will be irreparable. *Story's Eq. Pl.* Sec. 207; 6 *Beavan's Rep.* 444; 2 *Young & Coll. N. R.* 444. On the other hand, care must be taken not to overload bills by superfluous allegations and redundant and unnecessary statements, or by scandalous and impertinent matter, when tested by the foregoing rules. *Story's Eq. Pl.* Sec. 266.

It is perfectly consistent with the principles suggested in many cases to strike out deeds, writings and records recited in a bill in *haec verba* as impertinent. *Story's Eq. Pldgs Sec.* 266 and *note* 1, and authorities there quoted, 4 *J. Ch. R.* 437; 17 *Peters* 65, 66 *Appendix*, 1 *Howard Rep. Int.*, 49, 50.

The Defendants' first exception seeks to expunge the reference to the schedule, (incorrectly called exhibit A.,) the prayer that the schedule be taken as a part of the bill, and the schedule itself, containing a copy of lease of the American House to the complaint.

This exception is well taken and must be allowed. The lease is sufficiently and properly pleaded, without setting forth a copy of it in the bill. The Complainant seeks no discovery respecting it, of the Defendants, and from the fact that he has been enabled to furnish a copy of it in his bill, it clearly appears to be in his possession or under his control: nor does he, on the other hand, allege that Defendants have any knowledge respecting it, is material to him as evidence or otherwise. The copy of the lease can only be taken as a part of the bill as a pleading, and as the lean was already sufficiently pleaded, it must be expunged. It is not admissable to insert the same matter twice in a pleading. 6 *Paige* 247. At a proper time the complainant may prove the allegation in the bill by the evidence in his possesion, to wit: the original lease. It is only matter of evidence to be shown at large at the hearing. *Hood vs. Inman*, 4 *J. Ch'y Reps.* 438; *Alsager vs. Johnson*, 4 *Vesay* 217.

The remarks made as to the first exception, may, with great propriety, be applied to the second exception; also further, if the Defendants should, in their answer, admit that the schedule B. contains copies of the receipts, the admission would not be competent evidence of the payment of the rent by the Complainant. *Whereas*, if the Defendants admit the general allegation that the Complainant has paid the rent, as alleged in the bill, the admission will be good evidence of payment. The second exception must therefore also be allowed.

The 14th, 15th, 16th, 18th, 36th and 40th exceptions may all be included in the same category, and must be allowed for the same or similar reasons.

As to the 3rd exception, it must appear very obvious that it can make no possible difference with this cause, whether the Defendants resided in Massachusetts, or not, before 1849, or that their business had become nearly or quite broken up there, or that their pecuniary affairs were much embarrassed, inasmuch as the statement contains a charge of their utter insolvency. The allegation of utter insolvency may, perhaps, be material in the event that Complainant establishes the right to call the Defendants to account for the avails of the business of the American House, in order to raise the presumption that

all the property the Defendants now have in their possession was made out of said business, and therefore belonging to Complainant, unless Defendants show that they obtained it from some other source.

An exception for impertinence must be supported *in toto*, and if it include any passage which is not impertinent, it must fail altogether. *Van Rensalaer vs. Bine*, 4 *Paige* 174, 176; *Wagstaff vs. Bryan*, 1 *Paige* and *Myln Reps.* 30. The 3rd exception cannot therefore be allowed, but is overruled.

The 4th, 5th, and 6th exceptions relate to allegations, that, if admitted by the Defendants' answer, would have a tendency to show the insolvency of Defendants at the time alleged, and might, therefore, have a tendency to raise the presumption named in respect to the 3rd exception, that all the property now in the possession of Defendants, they had accumulated from the business of the American House. These exceptions are not allowed but overruled.

The allegations to which the 7th, 8th, 9th and 10th exceptions relate, can, it appears to me, in no point of view be material, and if admitted to be true by the answer, can prove nothing pertinent or issuable in the bill. These exceptions are therefore allowed.

The 11th exception is, to matter clearly impertinent, and a part of the allegation to which it relates, is grossly scandalous. There is not a fact contained in the allegations or statements upon which a material issue could be raised, nor if admitted by the answer, would it prove or have a tendency to prove a legitimate matter that could be raised by the bill. It must be allowed.

As to the 12th exception, I am some what doubtful whether the allegation that the four months' intervening between the opening of the House, (the American House,) and the close of navigation were rendered nearly or quite unproductive and thus continued during the following winter, might not possibly have some slight materiality, but stuffed as the allegation is with reasons and causes that are impertinent and improper and even scandalous, I shall allow the exception.

The 13th exception cannot be allowed. The allegation that

a letter of credit was given to the house of Wm. Rogers or Wm. and Geo. Rogers, cannot be material as it is not accompanied with any averment or allegation that Complainant paid it, or any part of it, or was or became responsible for it or any part of it. Had it, therefore, been separately excepted, it would have been held impertinent. The other allegation to which this exception relates does not, certainly, in direct terms, state that the Defendants have seized upon the bills, receipts, books and accounts, but it does make an averment argumentatively that I think material. As before stated, an exception that fails in part must be disallowed *in toto*.

The remarks I made in respect to the allegations covered by exception 11th, apply with greater force to the allegations and statements comprehended within the 17th exception, which is also allowed.

If the whole of the allegations contained in the 19th and 20th exceptions, were admitted by the Defendants' answer, they could prove nothing material contained in the bill. The allegation was made in a previous part of the bill that Complainant paid the whole rent of said American House, and it cannot strengthen it any that the Defendants did not contribute any to the payment of $750 of the same, nor would the admission of the fact amount to anything toward proving the allegation true; nor does he show that Defendants have any knowledge of the fact that he paid it. Exceptions 19 and 20 are therefore well taken, and must be allowed.

The exceptions 21 and 22 are justly interposed, and must be allowed. There is not a pertinent fact, either issuable, or if admitted by answer as evidence, perceivable within their entire scope.

The 23d, 24th, 25th, 26th, 27th, 28th, 29th, and 33d exceptions cover ground that may be material, and must be disallowed and overruled. There are some matters within th purview of these exceptions clearly impertinent, but as each includes matters that may be pertinent, the exceptions mus fall.

Exceptions 30, 31, and 32 must be allowed. The allegations are only repetitions, and are unimportant.

In relation to the allegations embraced within the 34th

exception, it may be observed that the proposal made to the agent of the lessors was too absurd, if admitted, to derive any inference of fraud from it. How could the agent of the lessors repudiate the lease or set it up in Defendants, if the lease was executed and delivered to Complainant as lessee, as alleged in the bill? Or how could the Defendants release the lessors from liabilities for repairs to be made for the benefit of Complainant? This exception is rightly interposed, and must be allowed.

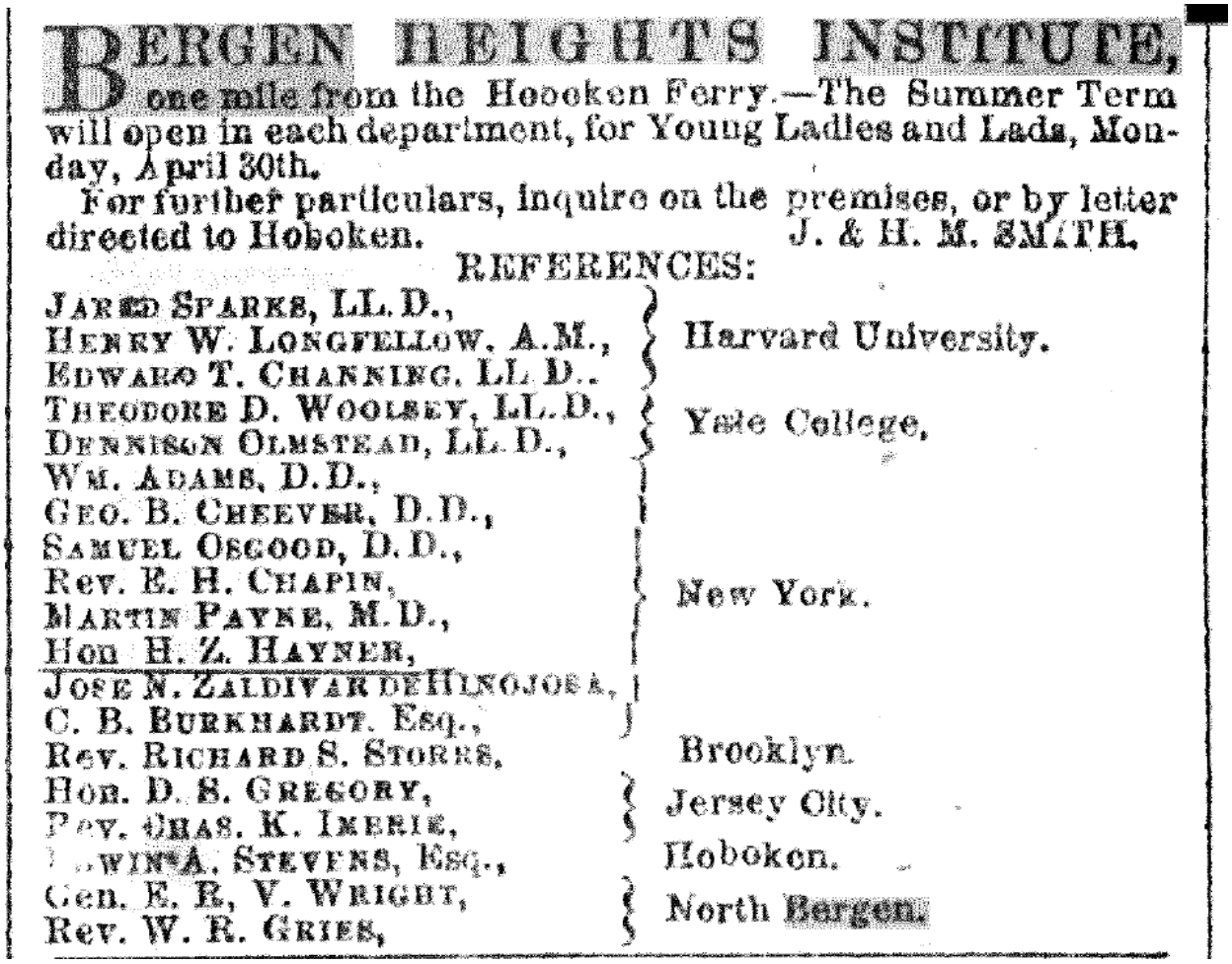
The grounds alleged for damage in the allegations comprehended within the 35th exception are not legitimate, and the exception must be allowed for their impertinency.

Upon the most casual observation, it will also be clearly perceived that on no recognized principle can any of the statements or allegations contained in the parts of the bill to which the exceptions 37, 38, and 39, by any possibility be, or be rendered, material to the relief sought by the bill. They are impertinent, wholly so, and the exceptions must be allowed.

All the exceptions allowed must be expunged from the bill; and more than two-thirds of the exceptions having been allowed, the Complainant must pay to the Defendants two-thirds of the costs that would have been allowable had all the exceptions been sustained.

K. "References" for the Bergen Heights Institute.

New York Dispatch
April 22, 1855



BERGEN HEIGHTS INSTITUTE,
one mile from the Hoboken Ferry.—The Summer Term will open in each department, for Young Ladies and Lads, Monday, April 30th.

For further particulars, inquire on the premises, or by letter directed to Hoboken.

J. & H. M. SMITH.

REFERENCES:

JARED SPARKS, LL.D., HENRY W. LONGFELLOW, A.M., EDWARD T. CHANNING, LL.D.,	Harvard University.
THEODORE D. WOOLSEY, LL.D., DENNISON OLMSTEAD, LL.D.,	Yale College.
WM. ADAMS, D.D., GEO. B. CHEEVER, D.D., SAMUEL OSGOOD, D.D., Rev. E. H. CHAPIN, MARTIN PAYNE, M.D., Hon H. Z. HAYNER,	New York.
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Hon. D. S. GREGORY, Rev. CHAS. K. IMERIE,	Jersey City.
EDWIN A. STEVENS, Esq.,	Hoboken.
Gen. E. R. V. WRIGHT, Rev. W. R. GRIES,	North Bergen.

L. Major Henry Z. Hayner to President Abraham Lincoln
September 10, 1863.

From Henry Z. Hayner to Abraham Lincoln 1, September 10, 1863

Head Quarters Middle Departmt

8th Army Corps

Baltimore Md. 10th Septr. 1863.

In pursuance of the request of your Excellency that I should reduce to writing the facts and incidents I had ascertained and observed in my visits to the Eastern Shore Va. to execute certain orders from this Department to aid in testing the propriety of such orders now suspended. [2]

I respectfully submit the following, viz:

I. As to the special orders requiring the members of the 39th Rebel Regt. organized in the Counties of Accomac and North-Hampton to take the oath of allegiance to the Govt. of the United States, or be taken as prisoners of war and exchanged as such, or sent beyond the Union lines.

1. The number belonging to this regiment from North Hampton county as near as could be ascertained was about 225, about 25 of whom have left and joined the Rebel Army.

2. The number from Accomac I have not so fully learned — probably however about the same number — About 400 in the whole still resident in the two counties. Some fifty of the entire number on the last day, after resorting to every argument against or objection to taking the oath, took it.

[Footnotes have been added by the Library of Congress]

1 Major Hayner was a member of General Robert C. Schenck's staff.

2 On September 1, Lincoln suspended two orders concerning residents on the Eastern Shore of Virginia. One order required four hundred people to take a loyalty oath and the other assessed a fine of $20,000 upon 212 residents for the destruction of a lighthouse. For correspondence pertaining to the situation, see Lincoln to Edwin M. Stanton, August 21, 1863; Francis H. Pierpoint to Lincoln, September 3, 1863; Joseph E. Segar to Lincoln, September 6 and September 7, 1863; Robert C. Schenck to Lincoln, September 8, 1863; and **Collected Works**, VI, 427 and 434.

The position the residue of these men occupy towards the United States Government is this:

They took the oath of allegiance to the so-called Southern Confederacy and enlisted into the Rebel Army and now obtain the same protection and all the immunities accorded to the most unswerving loyalty without abjuring their allegiance to the Confederacy — refusing to take the oath to the Government of the United States when amnesty is offered them by their taking the oath. And for the simple reason that they have no longer, arms in their hands against the U. S. — not that they are any more loyal or at least any more ready to manifest that loyalty than when actually under arms.

Some of the objections to their taking the oath were the following, viz:

1 Obj. that Gen Dix[3] in his proclamation when he sent an armed force to the Eastern shore, promised them "if they would lay down their arms amnesty for the past, and for the future all the protection and all the immunities which could be awarded to the most loyal citizens"[4] (as Mr Segar[5] expresses it) That having laid down their arms under that pledge they were exempt from taking the oath.

In the examination of the proclamation I find no such promise or pledge — not even by implication— All Gen. Dix says about being in arms is that "on all who are found in arms the severest punishment warranted by the laws of war will be visited".

And how Mr. Segar fell into the error of making such a manifest over statement in his memorials to the President on behalf of these men I will not attempt to suggest. That it is an overstatement the perusal of the proclamation will at once verify.

Segar, to be sure, endeavors to force such a construction upon the proclamation by introducing into his memorial two letters of Gen. Dix — the first written to induce the President to except Accomac and North

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3 John A. Dix
4 For the text of Dix's proclamation, see Official Records, Series I, Volume 5, 431-32.
5 Joseph E. Segar, a Virginia politician and lawyer, served as a Unionist in the U. S. House of Representatives (1862-63).

Hampton Counties from the effects of his proclamation against the disloyal States and to recognize them as parts of States loyal. Upon any fair rule of construction General Dix could not have intended to have had in contemplation the members of the 39th Regt.

The people at large had probably not taken the oath of allegiance to the Confederacy nor belonged to the Army To the people at large he referred — not to the exceptional few of the 39th Regt — when he wrote this letter.

In the other letter of Gen. Dix of 31st May 1863 (according to Segar's own account written to show that they could not be considered by the Confederacy as prisoners of war) the General says:

"All who were in arms and laid them down submitting to the authority of the Government I consider fully entitled to the protection and the immunities held out to them by the proclamation as inducements".

Certainly no inducements were held out even by implication and certainly not in terms, to the 39th Rebel Regiment in the proclamation, and certainly not to such as even now under the waning fortunes of the Rebellion are willing in their reprobate contumacy to leave their homes, firesides and property and join the insurgents rather than take an oath of fealty to the only Government that affords them protection, and it appears to me that a fair construction cannot torture any part of the letter into such a purport. The residue of his remarks to enforce such a construction upon the proclamation I deem unworthy of notice.

2nd. Obj. That having taken the oath of allegiance to the Rebel Government they had conscientious scruples to abjure it by taking the oath to the U. S. Government.

The absurdity and criminality of this assumption I only attempted to meet by showing that all emigrants to this Country did it in order to secure the rights of citizenship, abjuring the natural fealty due to the government under which they were born and nurtured. That it was a universally admitted right for any one to transfer his allegiance from our Government to another— And that they having in an evil moment wickedly renounced their natural allegiance to the Government under which they were born and nurtured and were now receiving protection,

by pledging on oath their fealty to the rebel government, it was not only most absurd but outrageously criminal to refuse to abjure it.

3d. Obj'n. They objected to the form of the oath, specifying that even Mr. Chase the Secretary of the Treasury alleged "he couldn't take it, (a la Chandler) Also that it prohibited them from communicating or corresponding with friends in the South.

I replied that the laws of war as well as the ordinary oath in a simpler form, prohibited such communication or correspondence unless it passed under the proper official cognizance, and was sent under the flag of truce. And that without taking the oath they were in no respect in a preferable condition in that regard.

4th. Obj. They also appeared to apprehend that the U. S. Government would enforce the draft in that County as the inquiry was often put to me whether the taking of the oath of allegiance would not subject them to it. Whereas they seemed to have the impression that in the posture they then held they would be exempt.

I assured them they were no less liable then, than if they took the oath and that I thought the Government would long hesitate to come among them to recruit the army Some knowingly smiling said they were of the same opinion.

It was also distinctly pointed out to them that having taken the oath of allegiance to the Confederacy and now refusing to abjure it by an oath to the United States Government they now assume the position of standing by the treason they originally committed and made themselves liable to be tried and convicted of that offence.

The admonition they seemed utterly to disregard.

Groundless as their objections were they were not only persistently urged but seemed words put in their mouths to be repeated without the intelligence ingenuity or skill to enforce them, with the slightest support, by way of reason or argumentation— And as it seemed to me only manifesting a deeply nourished hostility to the Government of the United States and a strong, blind and maddened devotion to the bogus Southern Confederacy. The whole appeared but an attempt to avoid the

necessity of acknowledging any regard or obligation to the only Government that afforded them any security or protection.

Henry B. Schroeder, the very man who volunteered last Sunday with his own conveyance to transport Mr. Segar from Eastville, eight miles, to Cherry Stone wharf, reported himself as a prisoner of war rather than take the oath — alleging the excuse to myself of conscientious scruples — having previously taken the oath to the Southern Confederacy.

Mr. J. S. Bowdoin, a merchant of Eastville, claiming to be a Union man, came and urged with great zeal the propriety of not enforcing the order on the ground of the men having pledged themselves by oath to the Southern Confederacy.

Three of the members of the Regt. — Schroeder being one — had give themselves up as prisoners of war to be exchanged rather than submit to the taking of the oath, and were in the custody of the guard when the suspension of the further execution of the order arrived. They being at once set at liberty, were met at various points along the way from Camp to the public house (whither they were proceeding and where they were most joyously received by many, judging from appearances) and stopped by many persons and congratulated. Passing a house near which they and others were standing and conversing, I myself heard one lady say to another, from one window to another, that they must feel much better than those who had taken the oath. That they manifested the most triumphant bearing in manner (words I did not hear expressed) I cannot be mistaken.

And Mr. Birch the keeper of the hotel in Eastville informed me that Jno T. W. Custis — one who had at the last moment taken the oath, stated that had he known that the suspension of the order would be granted, he would not have taken the oath for a thousand Dollars.

A number who had taken the oath expressed their regret and more manifested it after it became known that the further execution of this order was suspended.

I am to submit my opinion as to the propriety of enforcing this order in respect to the members of the 39th Rebel Regiment, they should under no pretence, be let off without abjuring the oath of allegiance to the

bogus Confederacy by taking the oath to the Government of the United States, or be exchanged as prisoners of war or sent beyond the Union lines.

It is not only just and proper, so far to assert the dignity of the Government that affords them protection and thus to make them respect its authority; but I deem it highly treasonable and contumacious on their part to hesitate or object to this course.

And further that they will deem this suspension the result of doubt or hesitancy or caused by the influence they have brought to bear through their Congressional representations and others or any other unworthy motive, rather than attribute it to its true cause — an act of grace or clemency on the part of the Executive. They well know that their just deserts require at the hands of a firm and righteous government all — nay more, than was required of them by the order.

II. Is the levy and collection of the tax for the destruction of the lighthouse, a measure that will be productive of good or otherwise, among the people of North Hampton County?

1. This county constitutes a part of Gov. Wise's[6] (now General Wise's) enlightened Congressional district where he congratulated the people and himself that they are not subject to the baleful and benighting influences of a public Newspaper and that an organ of so much mischief cannot find support in a community so eminently virtuous — so transcendently cultivated.

Though many may not be conscious of having been actively privy to or participants in the outrage upon the government property,
the punitive effect of the infliction of the tax may nevertheless have a subduing humbling influence upon the people though the fine be somewhat vicarious in its character. Such an imposition may do good among such a people — among others it might not.

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6 Henry A. Wise

It is in the nature of the laws of King Alfred where the Hundred was made responsible for every crime outrage or offence committed within its precincts and the people made to pay the fine thereby incurred, by a tax

That the mass of the people of the county were ignorant of the intended raid until after its commission I will not attempt to gainsay or controvert.

That they would have been at heart delighted with its success so far as the Government was concerned, had they themselves not thereby been pecuniarily affected, I have not much reason to doubt from any spirit I have seen or heard of being exhibited in the country.

Very few citizens are to be found who are openly and avowedly Union Men without qualification.

When urging upon some who professed to be so, the propriety of being more open, unqualified and demonstrative, and thereby to endeavor to effect a change in public opinion and create a more definitive and generally pervading Union feeling, the answer uniformly given for not taking this stand was that they would thereby lose caste and all social standing among their friend and neighbors: and some went so far as to assert they feared that neither they nor their property would be assured of safety from outrage should they do so.

A Mr. Costen, a professed Union man of great wealth, desired to be taxed as a disloyalist rather than endanger his social position by being numbered among the exempts.

Even Dr. Yerba when he returned from Washington, was much annoyed that he was not taxed (I presume for the same reason) alleging that he desired no different treatment from his neighbors, or language of that import.

Of 212 assessed, (constituting a large proportion of the property holders — almost the whole in the county,) 161 paid their assessments, and at least two thirds that number settled with myself personally, and strange to say that of that large number, only one man to my recollection, a Mr. Mearse objected to pay on the ground that he was not disloyal, and he placed his claims of loyalty on the fact that he had acted as a public officer — constable and Deputy, of the Sheriff and as such had

necessarily taken the oath of allegiance, not that he had openly asserted his loyalty.

In making the necessary preparation to get up the assessment list of the disloyal property holders I assembled the officers in command — among others Captain Duvall who had been stationed there most of the time since Genl. Lockwood[7] was first ordered there by Genl. Dix — together with such Union Citizens near at hand as could be summoned, for the purpose of ascertaining who were men suspected of fidelity to the Union cause, and on calling over the names of the last County Assessment List, not twenty men were found, who were even suspected of having the least proclivity to Union sentiments, and it was a common remark among those in consultation "if you take them as they come you will be in no danger of hitting a Union man".

Forthwith after Genl. Lockwood was ordered to join Genl. Mead's Army in Pennsylvania as Capt. Lord (who was left on the Eastern Shore with only one company of less than one hundred men) informed me, the hostility and deadly hatred to the Government became open and rampant so as to cause him much fear of open revolt they believing that Lee's success in prospect was certain. This enmity was manifested by looks, actions, and sometimes words, but having no arms it did not result in open rebellion.

Then it was that a man by the name of Clark residing at Eastville, having previously been somewhat suspected of indulging Union proclivities, perceiving the strong and all pervading rebel feelings in the community against such as had exhibited any manifestations or suffered any professions of loyalty to escape them, took the precaution, in order to purge himself of the suspicion, publicly to announce at Tully Wise's (who claims kindred to General Wise, and proclaims that all the power of the United States Government cannot make him take the oath of allegiance but who nevertheless induced his wife to take it in order to get supplies for his house) — at Tully Wise's Tavern — a common resort for all the treason in that region — that he would prosecute any man for slander who called him a Union man, and him laboring under the suspicion of Unionism I exempted from taxation.

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7 Henry H. Lockwood

General Lockwood who had been almost constantly among that people Since the war began, when consulted about the propriety of taxing for the light house advised the levy of $20.000, and named only nine persons who in his opinion were not sufficiently disloyal to be subjected to the tax, and the persons I before named as having been consulted as to the infidelity of the persons on the Tax list claimed some of those excepted by the General as infidels, and Dr. Yerba was included among that number I think.

The General however in his letter after naming the nine says: "Doubtless there are some others but their names are not now present to my mind. I would also recommend a thorough disarming of all classes" &c.

This is the opinion and these are the recommendations of a very intelligent, correct judging man — long in command as General, among the people in question.

I submit his opinions and recommendations should have great weight in the decision of this subject

A farmer in the lower part of the county, whose name I have forgotten, informed me that he had no doubt that the Light House destroyers were the same or a part of the same gang that had just previously [wire?] cut the telegraph wire and attempted to sever the telegraph cable He did not see them cut it but was within a few rods when and where it was cut. Also that he saw them at two or three different days and discovered marks or evidence of having been on the main for some time. I asked him if he knew who they were. He stated he did not — that they were in the woods and upon discovery at once fled. I asked him if they could well have been prowling about the neighborhood for such a length of time without being discovered by others. He answered he thought not. Also if they had been entire strangers whether it would not have become a subject of conversation in the neighborhood? His reply was he thought it would when I asked him further whether he communicated the fact of their having cut the telegraph wires, to the guard. He was considerably taken aback but in a moment recovering himself he stated that he thought the guard was so near them that the guards must have seen them, and being only four in number and eleven of the marauders the guards could not have captured them.

To this man and many others I put the question whether they though it probable the destruction of the light house had been effected by entire strangers, and whether it was not more probable that former residents of the County (now at Richmond) and perhaps aided and assisted by persons residing in the vicinity, accomplished the act? All with one accord seemed to think that the way it was brought about, and one named the former Light house keeper — dismissed for engaging in contraband trade and who deserted in consequence to the enemy, and has friends and connections in the neighborhood — as the probable leader of the gang.

These suggestions also derive great plausibility and force from the fact that had strangers from the Richmond side of Virginia undertaken such an enterprise without any assistance or knowledge of the localities, they would naturally have attacked the nearer — the Cape Henry Light House. This however remained untouched.

Blockade running is unremittingly carried on from almost every island, creek and bay on the Eastern Shore as Capt. Lord, Mr. Groot, who is purchasing wood there, and some others, inform me. And several have told me that regular mails run from Pongoteage to Richmond constantly, and that there was no difficulty in any one going backward and forward, whenever so disposed, stating that a wounded Confederate Officer had just arrived from Richmond.

The counties of Accomac and North Hampton have furnished hundreds if not thousands of recruits for the rebel army — probably not ten — even home guards — for our army. I have heard of but one although our forces were stationed there and the government afforded them protection

The inhabitants are persistently bickering with and complaining of the Union soldiers — of coming to their kitchens and asking for something to eat or of their picking a few ears of green corn or digging a few potatoes. A proper Union sentiment would dictate a different course of conduct and as it would seem — induce them to volunteer with open heart and hand to supply the soldiers, subject to scurvy and other diseases — without vegetables — such comparitively cheap necessaries.

While I was attending to my duties many such trifling charges were preferred against the soldiers and among the rest, [P?]. S. Bowdoin, the merchant already named, presented such a complaint on behalf of Dr. Yerba.

I deemed it so contemptible that I told him if the Doctor would make out a bill for the injury and present it to me I would pay it. The bill was not presented and consequently not paid.

Another complaint was made of the loss of two watermelons and compensation asked, and though the soldiers were not seen or known to have taken them, yet as the soldiers were in the County they alone were charged with the offence.

A few of the Cavalry on their Collecting Tour were invited to partake of the hospitality of a farmer, who also fed their horses: the next day he presented me with a bill of charges for more than Seven Dollars for the entertainment.

After landing the troops and while Encamped at Cherry Stone a citizen told Capt. Maginnus in command that the soldiers if they would commit no other trespass might take as much green corn and potatoes as they needed for use which they accordingly did for two days. A bill was afterwards presented requiring payment for this gratuity.

Robert Taylor owning large estates in the County, (who and two of his sons are officers in the rebel army,) among them the premises occupied by Tully Wise (above named) as a tavern — and several others which he lets to different persons — has the rents collected and transmitted regularly to Richmond. He also carries on a large plantation, the slaves performing the labor and has the products regularly transmitted to Norfolk where he also owns a valuable and his wife resides superintending all his business affairs and probably forwarding the proceeds to her husband and sons to aid them in fighting the rebel war.

In conversing with a very intelligent lady whose husband desires the restoration of affairs as existing before the rebellion — though asserting the same wish, severely denounced the administration for dragging the Government (as she expressed it) into the situation by the President's proclamation when that is impossible — thereby rendering slave

property everywhere insecure and almost valueless — since (said she) "if slavery is to be abolished in the States in rebellion it will be next to worthless in those States or portions excepted".

On my former visit to the Eastern shore, casually meeting a resident Methodist minister claiming to be a Union man, who I think stated he suffered loss in consequence by having his property destroyed, told me he was compelled to succumb to public opinion but could he be assured of the protection of the Government and that that same care would be exercised by it over slave property as before the war, he would at once be more open and unqualified in his support of it and endeavor to cultivate a more general Union feeling among those he could influence.

A Mr Jarvis — a large slave owner, came to Capt. Maginnis's tent and asserted that one had taken refuge in Camp. The Captain told him if he was a loyal man and would take the oath of allegiance and make it appear he was the owner he might take away the slave without molestation. In reply he stated he would not take the oath for every negro he owned. He then came to myself and on specifying the same conditions he again refused compliance

A man by the name of Wescott came to me on board of the steamer desiring to ascertain whether one of his slaves was not on board On being asked whether he was a loyal man he said he did not know about that. I told him however he might look over the vessel and if he found him and would take the oath of allegiance he might take him away unmolested. He also declining, went away "sorrowful".

On the Sabbath at Eastville Lieut. Evans (commanding a section of Alexander's Battery under my command) attended the Episcopal church and told me he observed with surprise that the settled rector omitted the prayer for "the President and all those in authority": on my mentioning it I ascertained that formerly the same minister of the Gospel read the prayer interpolating Jefferson Davis's name as President and that Genl. Lockwood had a severe contest to make him discontinue the practice in which conflict most of the people — women especially — took sides with the preacher and against the General who found it useless or thought it unwise to continue the fight to the extent of making the contumacious priest repeat the prayer according to the true Episcopal form.

And permit me here to remark that during about two weeks sojourn on the Eastern Shore and frequent conversations with the people I have never heard a favorable expression from either in respect to the Government or the administration except that some of them thought the President a good natured man.

These are some of the facts and incidents casually caught up from recollection by being among them only a few days — not expecting to be called upon to remember or relate them, and at the same time engaged in the performance of most arduous duties. Though slight and perhaps trivial in themselves they yet, I submit, strongly characterize the people as indulging sentiments deadly hostile to the Government and especially this administration.

And inasmuch as the telegraph wire and cable have frequently been cut on the shore and no discovery or detection of the culprit effected, it does seem as if the great body of the community were not very adverse to the commission of the offence or combined in screening the offenders as it unfrequently happens that crime so often escapes detection.

And again I see no incongruity in the assumption that in a community where telegraph wires and cables may be destroyed with impunity; and that so persistently as almost to compel the inference that many in that community were privy to and aided in it; that in such a community so affected by a settled hatred to the lawful government under which they live; so madly devoted to the insane, rebellious war waged against it, should have some among them who could commit the offence of the destruction of the Light House.

And these are the people to whom it is a standing imputation upon their good name — a standing reflection upon their honor (as Segar expresses it) to keep among them a small Military force as a guard for the protection of the telegraph, so often — and the Light House so lately destroyed. And among whom he would have you believe it was impossible to find men sufficiently infamous to commit the acts or be privy to or aid therein

It is well to recollect that the telegraph wire was last cut and the Light House destroyed, immediately after a large part of the forces under Genl. Lockwood stationed there had been withdrawn, and that Capt.

Lord had the telegraph to guard for more than 100 miles with less than a hundred men. This must have been known only to few, if any, except the inhabitants of the Eastern shore. If done by strangers without their privity or knowledge it seems an unusual concurrence of circumstances.

No one having been found who knows the gang of prowlers who probably committed the Light House outrage it cannot help but raise the suspicion of complicity against some or all of those residing near the place of their resort.

Even on the slight, superficial and unskilful examination had of the old keeper he discovered the fact that he thought he recognized the countenances of two of the gang, but could not tell their names — I quote from memory.

Now in looking over the whole subject in the light of unprejudiced common sense, I deem it most probable that the destruction of the Light House may have been and — probably was accomplished by former residents of the Eastern Shore in complicity with citizens now residing there. That inasmuch as the assessment was ordered and nearly consummated it would be impolitic to arrest it without the full and most conclusive proof that others effected it without the connivance, privity or consent of the parties suspected. And that a wise policy would dictate the further collection till the entire amount of the tax be obtained; and no repayment until perfect innocence was fully ascertained and established.

And I most firmly believe that such a course will ensure the perfect safety of all the Light Houses along that Coast from like aggression and at least produce the conviction among a people that scarcely seem to know they have a government ruling over them — enjoying all its wide spread and all comprehending benefits, with scarcely any of its burdens incident to a war of overwhelming magnitude — that they have at least a Government to fear if not inclined to respect.

I had almost omitted an incident hardly worth relating except that it adds another tint to the portraiture of the character of the people already partially drawn:

After paying his tax a farmer — one of the "F. F. V's"[8] — met another who inquired when and to whom he paid it, pointed out myself — "there — to that son of a b—-h with straps and brass buttons".

And may it not be easily conceived or rather is it not a necessary effect that among such a people, so ignorant, so prejudiced and narrow minded that when the news arrived of the President's interposition on their behalf, they should express both in looks and actions mingled feelings of hate and triumph — hate towards the instrument executing the order — triumph over their success in foiling its execution.

In deeming them jubilant I cannot be mistaken — that it was somewhat suppressed because the order of suspension did not arrive and the collections progressing was most manifest and palpable.

In concluding this statement I am deeply impressed with the consciousness how very far short I have come from communicating anything like the truth in its full strength — of the uncompromising hatred these people with very few exceptions (alas, how few!) indulge towards the Government and especially towards the administration — and the blind, insane devotion for the Southern Confederacy longing for its success in a much higher degree than did the Israelites "for the flesh pots of Egypt".

Most Respectfully Submitted

H Z Hayner

Major & A. D. C.

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8 An abbreviation for "First Families of Virginia."

P. S. Dr. Yerba a strong applicant for the suspension when going to Washington for that purpose on the boat to Fort. Monroe (apparently very anxiously inquired of a gentleman, my informant,) whether he thought it would be required of him to take the oath of allegiance at the Fort to obtain a pass to Washington.

H Z Hayner

Major & A. D. C.

[Endorsed by Robert C. Schenck:]

Head Quarters Mid. Dept

8th Army Corps.

Baltimore Sept. 17, 1863

Respectfully forwarded to the President of the United States, with the expression of my decided opinion that the two measures, the collection of damages for the destruction of the light house, from disloyal tax payers, and the requiring of the oath of allegiance from those who were in the rebel service, as prescribed by Genl. Lockwood, were just in themselves, and were having a good and wholesome effect on that community; and my equal belief that the suspension of these orders by the President has only tended to embolden disaffection to the Government

Robt. C. Schenck

Major Genl. Com'dg.

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[Footnotes have been added by the Library of Congress]

Hayner's report is dated September 10, 1863 but it was not delivered to President Lincoln that day. It first had to be approved by Major General Schenck, which happened on September 17th. That day, the 17th, President Lincoln ordered "Major Haynor" to meet with him.

M. President Lincoln to Major General Schenck, September 17, 1863.

From *Collected Works of Abraham Lincoln*. Volume 6, at 462:

To Robert C. Schenck [1]

Major General Schenck Executive Mansion,
Baltimore, Md. Washington, Sep. 17, 1863.

Major Haynor left here several days ago, under a promise to put down in writing, in detail, the facts in relation to the misconduct of the people on the Eastern Shore of Virginia. He has not returned. Please send him over. A. LINCOLN

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[1] Schenck replied at 2 P.M., ``Major Hayner has prepared the writing you requested & will go to you with it tomorrow.''

The following day General Schenck telegraphed, ``Maj Hayner was accidentally prevented from going to Washington in this mornings train Will be there in the early train tomorrow morning.''

Acknowledgment

We are indebted to Emily Allen, Archivist, New York State Archives, who gave us the results of the election in 1844 in which Henry Hayner ran for the state senate.

Authors

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Douglas A. Hedin founded the Minnesota Legal History Project in 2008.

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Douglas A. Hedin, "'Rotation in Office' and the Territorial Supreme Court." (MLHP, 2010- 2011).

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