Chief Justice Jerome Fuller

(January 26, 1808 ▪ September 2, 1880)

(ca. 1867)

Minnesota Legal History Project

• July 2016 •

Table of Contents

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Early Years

Jerome Fuller, who would become the second Chief Justice of Minnesota Territory, was born in the village of Kent, Litchfield County, Connecticut, January 26, 1808. He was educated at Yale College, New Haven, but did not graduate. In 1830 he began reading law in the offices of Gen. Talmadge in New York city. After four years, he was admitted to the bar, and began practice in the village of Haverstraw on the Hudson River. He married Lucy Pratt in 1834, and the following year, moved to Brockport, the seat of Monroe County, New York, and resumed practice. [1]

He joined the Whig party, and became an ally of Millard Fillmore, a lawyer from western New York. Both were active in the "Silver Gray" wing of the party. In 1842 he was elected to the state Assembly from Brockport, and served one year. In 1847 he was elected State Senator from Monroe County, and served one term during which he was considered Fillmore's "chief spokesman in the state legislature."[2]

Millard Fillmore was elected Vice President in 1848; however, when patronage appointments in New York were made in the administration of Zachary Taylor, Fillmore's candidates, including Fuller, lost to those favored by New York Senator William Henry Seward and newspaper publisher Thurlow Weed, leaders of an opposing faction of New York Whigs.[3] To wrest control of the state Whig party, the "Silver Grays" launched the Albany *State Register* in March 1850, with Fuller at the helm.[4] Fuller not only supported Fillmore, who had become president upon Taylor's death on July 9, 1850, but also attacked his opponents,

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[1] Biographical data from obituary in the *Brockport Republic* (New York), September 9, 1880, at 3. The entire obituary is posted below at 37-42.

[2] Michael F. Holt, *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Outset of the Civil War* 430 (Oxford Univ. Press, 1999) (citing sources).

[3] Id, at 432.

William Henry Seward (1801-1872) served as governor of N. Y., 1839-1842; U. S. Senator (Whig/ Republican), 1849-1861; and Secretary of State under Presidents Lincoln and Johnson, 1861-1869.

Thurlow Weed (1787-1887) was the publisher of *Albany Evening Journal*, a leader of the Whig faction opposed to Fillmore and Fuller, and a political advisor to Senator Seward.

[4] Id. at 493 ("The new *Albany State Register*, which began publication in March 1850, and which was edited by Fillmore's friend Jerome Fuller, who constantly sought editorial cues from Fillmore and Nathan Hall, led this assault" [on the Sewardites' opposition to President Tayler's plan for California and New Mexico.]"

who included Hamilton Fish and Senator Seward.[5] Tensions reached a boiling point in January 1851, when Fuller rebuked supporters of Fish, who was seeking election as Senator from New York. Fillmore, who now realized that he must prevent complete rupture of the state Whig party, "blasted Fuller for misrepresenting him, and he forced Fuller to admit in his paper for the first time that [he] wanted Fish elected."[6] Fish was elected Senator in March with the aid of the President.

Recess Appointment

On October 21, 1851, Fillmore sacked Territorial Chief Justice Aaron Goodrich, an eccentric who was temperamentally unsuited to hold judicial office, by making a recess appointment of Fuller to fill that post.[7] A recess appointee holds office only until the last day the Senate is in session—for Fuller, that was August 31, 1852.[8] On December 9, 1851, the President nominated Fuller for a four year term on the territorial court, an office requiring Senate confirmation. The Senate did not vote on the nomination for nine months.

The appointment invites speculation on the motives of both men. The President was indebted to Fuller for his years of support (and had tried unsuccessfully to land a post for him earlier) but he also may have seen an opportunity to placate the Seward-Fish-Weed faction of the party by dispatching him to far off Minnesota Territory. For his part, Fuller may have tired running a partisan newspaper, and saw the offer of the judgeship as a chance to return to the law. He knew that his recess appointment would last less than a year, and may have hoped that his political opponents would forget him as he toiled on the Midwestern frontier — a sort of "out of sight, out of mind" wish.

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[5] Id. at 649-50.
Hamilton Fish (1808-1893) served as governor of New York, 1849-1850; U. S. Senator (Whig/ Republican), 1851-1857; and Secretary of State under President Grant, 1869-1877.

[6] Id. at 650.

[7] For Attorney General John J. Crittenden's opinion that the President had the power to remove Goodrich from office and a discussion of the antebellum rule that a federal officer could be removed simply by the president's appointment of his replacement, see Douglas A. Hedin, "Documents Regarding the Terms of the Justices of the Territorial Supreme Court: Part One: Introduction" 20-25 (MLHP, 2009-2014)(hereafter "Documents: Part___."). The Supreme Court's decision in *United States ex rel. Goodrich v. Guthrie*, 58 U. S. (17 How.) 284 (1854), dismissing his complaint is posted in the "U. S. Supreme Court" category in the MLHP archives.

[8] U. S. Constitution, Article II, § 2 (3).

Supreme Court Justice Samuel Nelson administered the oath of office to Fuller on October 25, 1851, in Albany, New York. Fuller apparently was unaware that the Organic Act, which created Minnesota Territory, required judges to take the oath while physically present in the Territory, and so took a second oath on November 24, 1851, in St. Paul. [9]

At the age of forty-three, with no previous judicial experience, he began work as the second Chief Justice of Minnesota Territory. He must have been surprised at the state of the judiciary. Goodrich still claimed to be chief justice, and would not release the small court library to his successors.[10] The court's decisions were not being compiled,[11] and its authority to adopt rules of practice had been repealed earlier that year.[12]

Fuller on the District Court

As Chief Justice he was assigned the First Judicial District which encompassed the counties of Ramsey, Chisago and Washington. In 1852, two district court sessions were scheduled for each county.[13] As a trial

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[9] Photocopies of Fuller's two handwritten oaths are posted in Douglas A. Hedin, "Documents: Part 3-A, 9-10 (MLHP, 2009-2014); see also "Documents: Part Two-C." (MLHP, 2009-2010).

[10] "The Goodrich Library" 1-2 (MLHP, 2016).

[11] According to Harvey Officer, a St. Paul lawyer, the territorial supreme court's opinions in 1851 and 1852 were collected by William Hollinshead and published in 1853; and all opinions of the court were later collected by Officer and published as the first volume of the *Minnesota Reports* in 1858. That volume is posted separately on the MLHP: "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." (MLHP, 2016) (published first, 1858).

[12] Discussed below, at 26-27.

[13] 1852 Laws, c. 19, §§ 1-4, at 33-4 (effective March 6, 1852), provides:

> That there shall be one Term of the Supreme Court, held annually, at the seat of government of said Territory, commencing on the first Monday of July next, and at the same time, every year thereafter. Provided, That the Judges of the said Court, shall have power at any time to order a special term thereof.
>
> Sec. 2. The terms of the District Court of the Territory shall be held at the times and places following, to wit: In the County of Washington, on the first Monday in April, and the first Monday in October, in each year; in the County of Ramsey, on the first Monday in May, and the first Monday of November, in each year; in the County of Chisago, on the first Monday of June, in each year; in the County of Benton, on the second Monday in June, and the second Monday in December, in each year; in the County of Pembina, on the first Monday in May in each year.
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> Sec. 3. The Counties of Chisago, Washington and Ramsey, shall constitute the first Judicial District, and the Hon. Jerome Fuller, is assigned to the same, as District Judge thereof. The County of Benton, shall constitute the second Judicial District, and the Hon. Bradley B. Meeker, is hereby assigned to the same as District Judge thereof. The

judge, he was decisive, self-confident, demanding and a stickler for conformity to courtroom decorum. Newspaper editors were impressed. This is the *Minnesota Democrat's* account of proceedings in Stillwater, Washington County, in April 1852:[14]

DISTRICT COURT—WASHINGTON COUNTY.

Stillwater, Tuesday,}
April 6, 1852. }

The court met this morning at the good early republican hour of 9 o'clock. The jurors who had been summoned were punctual in their attendance. The following named gentlemen were empannelled and sworn as grand jurors:

CORNELIUS LYMAN, Foreman.

James D. McComb,	Joseph Jackman,
Hiram P. Edwards,	Michael McHale,
John D. Trumble,	James B. Green,
Jesse Taylor,	Wm. H. Oliver,
James R. Moore,	Abram Click,
Alvin Wilmoth,	Seth M. Sawyer,
Wm. H. Johnson,	Joseph Haskel,
Theodore Cogswell,	Samuel L. Gleason,
James Shearer,	Robert Simpson,

George W. Campbell.

Judge Fuller delivered a charge remarkable for propriety, clearness and indeed eloquence.

His honor adopts the more imposing form of requiring the jurors to rise whilst he is addressing them. Standing himself he explains and enforces the duties and responsibilities of

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County of Pembina shall constitute the third Judicial District, and the Hon. David Cooper, is assigned to the same as District Judge thereof.

Sec. 4. For Judicial purposes, the County of Dakota, is hereby attached to the County of Ramsey, the County of Wabashaw, to the County of Washington; the Counties of Cass and Itasca, to the County of Benton.

Fuller was appointed too late to hold court in 1851.

[14] *Minnesota Democrat*, April 28, 1852, at 2. No changes to spelling or grammar have been made to this article, nor to newspaper accounts of other court sessions posted here.

grand jurors in an extemporaneous and highly oratorical manner.

This may do very well in charging *grand* jurors, but its propriety in charging *petit* jurors may well be questioned. Insensibly to himself a judge will become excited when indulging in declamation, and will give more effect to his views upon points arising in a cause than he intends or than is just. This is likely to be especially the case in commenting upon the testimony. A judge cannot avoid forming an opinion upon the merits of the cause he is trying the credibility of witnesses, &c., but it is an important part of his duty to conceal that opinion form the occupants of the jury box. Those who have indulged in extemporaneous public speaking will easily understand, how difficult it is to shun intemperate expressions, and will readily see how much more difficult it must be when so speaking to preserve the cool impartiality, and unimpassioned influence, so essential to the pure administration of justice.

The morning was consumed in calling the calendar and hearing applications for, and oppositions to continuances.

The statute changing the term from May to April, took effect on the 6th of March. Parties, attorneys and witnesses interested in litigation in this county, and temporarily absent from the Territory could not therefore be appraised of the change in time to enable them to be present.— Much injustice would have been done but for the relaxation of the strict rule by the judge.

Those seeking indulgence were, it is true, made to pay pretty well in the way of "costs of the term," but it will all come around right, and if they have good causes they will get their money back again.

Wednesday, April 14th, — The court was engaged for about ten days in jury trials, sometimes holding three sessions per day. A great deal of maudlin eloquence (?) was wasted and

considerable venom thrown by opposing counsel upon each other.

No case of public importance was tried except that of *James Middleton against John W. Cormack* and that was only interesting from the peculiarity of the circumstances which gave rise to it.

William Middleton a young Irishman arrived in what is now the Territory of Minnesota, sometime in the year 1844. By industry and frugality he accumulated a little money and having made a "claim" upon the delta about 12 miles above Point Douglass, he sent to Ireland for his family consisting of seven sisters and brothers. On the arrival of the family a house was constructed on the claim, and there for seven years in truly patriarchal style, they labored for the improvement and purchase of the beautiful farm now so well known to the citizens of the Territory. The land was entered in the name of William and the business was transacted by him but the possessions real and personal were understood to belong to the family, as they were the result of their mutual contributions.

In 1851, William married, but being unhappy in his domestic relations, he determined to leave home and go to California. Before leaving he called in two intelligent and respectable neighbors and secured to his parents and brothers and sisters a remuneration for their services, according to the arbitrament of their friends, in the form of a mortgage upon the land. He then sold the personal property to different members of his family in consideration partly in cash and partly of assumption of debts that he had contracted. Immediately, after his departure, proceedings in chancery were instituted at the instance of his wife making various charges of fraud, an injunction was laid upon all of the estate that had been held by him, and John W. Cormack the defendant in the action before alluded to was appointed in the first instance receiver to take charge of and manage the same.

Cormack the receiver went to the farm on Sunday and by force drove off a lot of cattle, that had been sold by William to his father James Middleton, the plaintiff. Cormack sold the cattle. This action was brought to recover from him the value of them.

The defence set up was that the cattle did not belong to the plaintiff, but were the property of William Middleton, and that as receiver of William's estate the defendant had the right to take them. It was further argued that the jurisdiction in equity having attached, a court of law could not properly take cognizance of the matter. It was also contended that as the bill of sale from William to James Middleton included property exempt from execution and was not signed by the wife of William it was therefore void under the provisions of the 10th subdivision of the 100th section of chapter 71 of the revised statutes.[15]

The following points were ruled by Judge Fuller in the progress of the trial:

1. That if the jury believe that Wm. Middleton did on the 11th November, 1851, sell to James Middleton the property in question for a valuable consideration and deliver to him possession of the same the sale was valid and vested the property in the plaintiff.

2. That the payment of the sum of $250, and the assumption of the debts of Wm. Middleton by James or either such payment or assumption was, in contemplation of law a valuable consideration.

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[15] Terr. Rev. Stat. c. 71, §100, subd. 10, at 364-65 (1851), provided:

> Sec. 100. The following named property shall be exempt from sale under any execution, writ of attachment, or any other final process of a court:
> . . .
> 10. A sufficient quantity of hay, grain, feed and vegetables necessary for keeping for six months the animals mentioned in the several subdivisions of this section exempted from execution, and any chattel mortgage, bill of sale, or other lien created on any part of the property, except such as is mentioned in the ninth subdivision of this section, shall be void, unless such mortgage, bill of sale, or lien, be signed by the wife of the party making such mortgage, bill of sale, or lien.

3. That a chattel mortgage, bill of sale or lien created on property exempted from execution and not within the exception contained in the statute, and not signed by the wife of the party making the same is void only as to the property so exempt and not as to any property not so exempt which may be described in or affected by it.

4. That a wife has no vested right whether legal or equitable in the property of her husband, not acquired through her, entitling her to the possession thereof during his life, and she cannot legally interfere with his disposition of it at such times—in such manner and for such prices as he may deem proper.

5. That every man has a legal right to his absolute control of the property acquired by his labor and that of his family consenting to work for him, and if he is free from debt, and the rights of creditors are not affected by his action he may (except as prohibited by statute) sell it or give it away to whomsoever he pleases.

6. That the question of interference of the jurisdiction of the court of chancery is not in this case, the issue being to determine whether the property in controversy belongs to James Middleton the plaintiff, or whether it belongs to William Middleton—and the court of chancery having in no respect determined the issue.

7. That a receiver appointed by a court of chancery will not be protected in taking property by violence from the possession of third persons who hold it under a claim of right—that he must bring suit for its recovery under the direction of the court, of which he is an officer, and if he forcibly takes property so held he is legally liable to return it with damages for its detention or, if he sells it, to pay the value of it.

8. That even if the property in question were the property of William Middleton and the jury believe that Ja's Middleton was lawfully in possession of it—that possession, would, in

itself be sufficient to sustain this action as against the defendant if he forcibly violated it in defiance of notice, and without other action on the part of the court of chancery than the mere appointment of him as receiver.

The trial occupied the court for two days and resulted in a verdict for the plaintiff. Lafayette Emmett and Wm. Hollinshead, Esqs., for plaintiff; E. K. Bartlett and M. E. Ames, Esqs., for defendant.

After hearing and determining some unimportant issues of law, the court adjourned for the term. Judge Fuller has fixed the first of June as the time when he will be in Washington county, for the purpose of hearing arguments upon which matters can be attended to in Chambers.

It is understood that a large number of persons were indicted by the grand jury for selling liquor, gambling, &c., but what has been done with the indictments has not transpired.

On May 3, 1852, Fuller began presiding over a session in Ramsey County. It was described in the weekly *St. Anthony Express*:

The District Court of the First Judicial District, convened at St. Paul on Monday, May 3d, Chief Justice Fuller presiding. —

A Grand Jury was empanneled, and several absentees, who did not answer to their names, fined ten dollars each. The list of petit jurors was also called, and a rule entered that the absentees show cause before the Court on Monday May 10th, at 10 A. M., why fines should not be imposed on them for non-attendance.

The Court then took up the calendar, and called through the same, numbering fifty-seven causes, *without finding one ready for trial*. The principal excuse rendered by attorneys was that it was an unheard of thing in Minnesota Courts, for causes to be tried on the first day of opening Court. His Honor remarked that he would, in the circumstances, show parties some indulgence on this occasion, and would not

subject them to costs, for want of preparation to try their causes. But he further remarked, that hereafter, whenever a cause was called, parties must be ready or suffer the consequences. Nothing was done on Monday except empannelling and charging the Grand Jury, and hearing motions to correct the Calendar.

On Tuesday the case of M'Lean *vs*. Charles J. Henniss and Henry M. Rice.— The suit was brought for the recovery of two promissory notes, of one thousand dollars each, of which Henniss was the maker, and Rice the security. The notes were payable to D. Olmsted, or order, and involved the facts in regard the sale of the Chronicle & Register press, materials &c., to Henniss. The jury was instructed by the judge to find for defendant on a point of law. Babcock & Wilkinson for plff., Rice, Hollinshead & Becker for defendants.

On Wednesday, the cases of Willoughby & Powers *vs*. Aaron R. Russell and Edward Russell; also the same parties plaintiffs against Urban Hanley, and another against Nathaniel R. Brown. In the first, a verdict for the plffs. of $79 damages, for cutting timber on plffs.' land. In the other cases, nominal damages for plaintiffs by the Court. Ames & Nelson for plff., Masterson for deft.

Also, the case of Richard L. Reilly *vs*. Joseph Mosher, George Douglass and Henry M. Rice. Judgment for plff. For full amount claimed.

His Honor, Judge Fuller presides to the general satisfaction of all parties — the bar as well as the parties litigant. Punctual at the hour, prompt in the transaction of business, and ready in the decision of legal questions, business is rapidly despatched, and parties remiss are made to suffer for their negligence. This is right. A Court conducted in this manner, will be a blessing instead of a curse to the Territory. [16]

[16] *St. Anthony Express*, Friday, May 7, 1852, at 2 (italics in original).

The *Minnesota Democrat's* account of these proceedings, while shorter, has more commentary on Fuller. Here are excerpts:

> The May term of the District and Federal Courts for this county and District, commenced on the 3d instant, at Mazourka Hall, Hon. Jerome Fuller, Chief Justice presiding.
>
> The impunity formerly allowed to jurors has induced much remission on the part of citizens summoned to attend upon the grand and petit panels. Consequently on calling the list there was not a quorum of grand jurors answered to their names. Judge Fuller is however not to be trifled with, and will see that the process of the court is obeyed or know the reason why it is disregarded. He fined the absent grand jurors $10 each, and ordered the petit jurors not in attendance to show cause on Monday next at 10'clock why they shall not also be fined.
>
> The morning was occupied in hearing motions for the correction of the calendar and some questions of practice interesting to the legal profession were passed upon.
>
> The Judge decided that causes could not be transferred from the former calendar which were not there pursuant to the notice of trial and note of issue require by the Revised Statutes— that the only way to get a case upon the calendar in the first instance is by giving notice of trial *at least ten days before the court*, and by filing with the clerk *at least four days before the court* a note of issue, as required by law — that after they have once been so placed upon the calendar, cases remain there and need not be subsequently noticed.
>
> The Judge also held that the word *before* in the statute did not exclude the first day of the term, but that the day of trial might be counted. This *let up* some sharp practitioners who had delayed their notices until the 22d or 23rd of April. — The Supreme Court will be called upon to decide the matter.
>
> . . . .

> Judge Fuller is a *working* judge and awakened considerable consternation among the members of the legal fraternity when he commenced calling the calendar on the first day of the term.
>
> It has been the lazy practice in the Territory to do nothing on Monday but call and charge the grand jury, and, indeed, under the former statutes petit jurors were summoned to attend on Tuesday.
>
> Under the present brisk arrangement attorneys will have to stand up to the rack, and suitors will have their cases disposed of and will not be kept dancing attendance upon court for weeks with no other result than further postponement. [17]

The following day, Fuller found himself in the unusual position of presiding over a lawsuit in which his predecessor was a party. The suit by Rodney Parker, proprietor of the American House hotel, against former Chief Justice Aaron Goodrich took four days and was the talk of the territory, fueled by gossip about Goodrich's relations with Elizabeth Parker.[18] Newspaper accounts of *Parker v. Goodrich* are posted in the Appendix.[19]

In the second week of the term, the *Minnesota Democrat* quoted the *Minnesotian*, a rival newspaper, in praise of Fuller:

> The District Court has been in session since Monday, Chief Justice Fuller honors the bench. The manner in which the Judge puts the business through is worthy of commendation. Lawyers have to be ready when their cases are called, or they go by default.—*Minnesotian*.
>
> We say with pleasure that Chief Justice Fuller honors the bench. He discharges the duties of his high office with dignity and ability, for which he receives the commendation of the whole community. He is a credit to this party, and

[17] *The Minnesota Democrat*, May 5, 1852, at 2 (italics in original; names of grand jurors omitted).
[18] Robert C. Voight, "Aaron Goodrich, Stormy Petrel of the Territorial Bench," 39 *Minnesota History* 141, 145 (1964).
[19] See Appendix, at 43-53.

> although opposed to us in politics, we hope he will continue on the bench so long as the whigs remain in power and have a right to the offices.
>
> As in this case, it is always the interest as well as the duty of a political party, to appoint its most worthy members to places of public trust.[20]

Two weeks later, the *Minnesota Democrat* published an account of later proceedings in Ramsey County District Court, including *West v. Northrup*, an example of frontier jury nullification:

> Tuesday, May 25.
>
> The term is fast drawing to a close. Nothing now remains to be done but to dispose of the case or two *in certiorari* and here motions for new trials. Scarcely an important case has been tried at this term, (and there have been several,) without a motion having been made by the unsuccessful party for a new trial, founded upon alleged misconduct of the jury or some one of them. Whether there has been any improper conduct in any one instance, remains to be seen, as none of the motions are yet disposed of.
>
> Thomas H. West vs. Anson Northrup. — This is an action on the federal side of the court, founded upon a note given by deft. in May, 1847, for about $4,600.00. The plaintiff had furnished the defendant, who at that time, was engaged in lumbering on the St. Croix, with supplies, and this note was given for the amount thus furnished. To secure payment for those supplies, an assignment was made to a trustee, of deft's. interest in the Osceola Mills, and of 1,600,000 feet of lumber then lying in the St. Croix and its tributaries. Afterwards, def't having disposed of his interest in the Mills to third persons, and there being others still claiming an interest in or lien on the lumber mentioned, another arrangement was entered into, between the parties to this suit, and those claiming an interest in the logs, by which the defendant's share of the logs was reduced to about 500,000 feet, and def't further agreed to place in plaintiff's hands, as

[20] *The Minnesota Democrat*, May 12, 1852, at 3.

collateral security for said note, three several notes of $1000 each received by him upon the sale of the mills to Kent & Mahoney after the trust deed was executed, and the plaintiff was a take the 500,000 feet of logs allotted to def't at $4.50 dollars per thousand. The plaintiff under this last agreement secured between four and five hundred thousand feet of the logs, and endorsed the amount on the note, but defendant refusing to place the notes, to be given as collateral security, in the plaintiff's hands, unless they were received as a payment *pro tanto*, the plaintiff refused to receive them, and falling back upon the original deed of trust, ordered the trustee to proceed and sell the mills and lumber according to the provisions of said deed. The trustee offered the mills and the lumber for sale and the plaintiff bid in the mills for $1000, and also bid in 11,000 feet of the lumber at one dollar per thousand. According to plaintiff's direction the amount of these several bids was endorsed upon the note. In the meantime those, to whom the defendant sold the mills, remained in possession, and the land on which they were situated being offered for sale by the general government, they obtained a patent therefor and have remained in possession ever since, to the exclusion of the plaintiff. About the time this action was commenced, the plaintiff, claiming that he had received no benefit from his purchase of the mills from the trustee, drew a line across the amount he had endorsed upon the note, as the price at which he bid them off, and sued for what appeared to be due, being about $3000 and $4000.

The trial was conducted by H. L. Moss and L. Emmett, Esqs., for the plaintiff, and M. E. Ames and E. Rice, Esqs., for the defendant.

The plaintiff offered the note in evidence and explained the nature of the $1000 endorsement, the object of the erasure and rested his case.

The defendant produced the deeds before mentioned, showed the sale by the trustee and claimed the benefit, the sum endorsed as the price bids for the mills, but afterwards

> erased as before stated. The case occupied about two days and was hotly contested from the beginning
>
> The court charged the jury that so far as the lumber was concerned, the second deed or agreement canceled, or was substituted for the deed of trust. The defendant was bound by the amount of lumber awarded to him by that agreement, and could not therefore claim a credit for more than the 500,000 feet therein mention. That as to the Osceola Mills, the trust deed was still in force, and the plaintiff having directed the sale under it, and bid them off, that he would bond by the act of the trustee, and must rely on his ability to recover their possession, the persons to whom the defendant had previously sold them. — He therefore directed the jury to allow the $1000 endorsement, give the defendant the benefit as much of 500,000 feet of logs, as the plaintiff had received, and rendered a verdict against the defendant for the balance due upon the note, after making these deductions.
>
> The jury remain in their rooms several hours, but finally, much to the surprise of the plaintiff's counsel, and as they claim, every one else, found a verdict for the "defendant for the sum of nineteen dollars and cost."
>
> A motion for a new trial is still pending. The causes alleged are, that the verdict is against the law, contrary to the charge of the Court, and for misconduct in the part of the jury.[21]

In June, Fuller presided over a two-day session in Chisago County, described in the *St. Anthony Express*:

> The first Court of Chisago county convened at Taylor's Falls, on Monday 7th inst., Judge Fuller presiding. One man was

[21] *Minnesota Democrat*, May 26, 1852, at 3. The following item appeared in *The Express* (St. Anthony Falls), May 21, 1852, at 2.

> Court is still in session at St. Paul. The jury this day [May 21] were dismissed after a three weeks of labor. A large amount of business has been dispatched — several old causes which have long cumbered the docket, have been disposed of, and all that were ready tried. Only two or three put over. We will commence with a fresh start next October.

> tried for violation of the liquor law and was convicted. The court adjourned on Wednesday, 9th.[22]

A Supreme Court justice presided not only over law suits in district court but also decided equity cases — sometimes called proceedings in Chancery Court— in his district. In 1851, Arnold Taylor agreed to sell to Franklin Steele, a St. Paul merchant, a parcel of real estate in St. Anthony Falls for $24,000, on the condition that the money be deposited in a certain bank in Boston. For various reasons, Steele deposited the money in another bank. Alleging that Steele violated their contract, Taylor refused to convey the property. Steele brought a bill in the Territorial Chancery Court for an order directing Taylor to convey the property to him; on his motion, the court enjoined the money from being released until the final hearing. In late May 1852, Taylor moved Fuller, now sitting on the equity side of the district court, to dissolve the injunction. Fuller denied the motion, and explained his reasoning in a lengthy opinion that was published on the first page of the *St. Anthony Express*. It is posted in the Appendix. [23]

Fuller did not preside over the September term in the First Judicial District because he no longer held office.

Fuller on the Supreme Court

The first territorial legislature passed a law authorizing a member of the supreme court to give it an advisory opinion on "a given subject."[24] On February 23, 1852, just three months after his arrival, the Territorial House of Representatives requested Fuller's advisory opinion on the

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[22] *St. Anthony Express*, June 18, 1852, at 2. The "liquor law" cited in this article is the law forbidding the sale of liquor to Indians, not the Minnesota version of the Maine Liquor Law.

[23] See Appendix, at 54-60. It was published on August 6, 1852. The Court of Chancery rules became obsolete when that court was abolished in 1853. See 1853 Laws, c. 1, §1, at 3 (effective March 5, 1853).

[24] Minn. Terr. Rev. Stat., c. 3, §19, at 38 (1851), provides.

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

constitutionality of a version of the Maine Liquor Law it was considering. Two days later, he refused:

> *To the Honorable, the House of Representatives of Minnesota Territory*:
>
> Your clerk has transmitted to me a copy of the following resolution, adopted by your honorable body on the 23d inst:
>
> "*Resolved*, That the Chief Justice of the Territory be requested to furnish this House, at as early a day as possible, his written opinion, as to the power of the Legislative Assembly enact any law prohibiting the sale and importation of intoxicating liquors in this Territory."
>
> In my judgment, there would be a manifest impropriety in my deciding extra-judicially and beforehand, a controverted question about which the public mind is deeply exercised, and which may probably come before me for future adjudication, in the course of my official duties.
>
> There is another obstacle in the way of my returning a definite answer in the form of an opinion, to the request contained in your resolution. You have transmitted to me no draft of any proposed law. While a statute to prohibit the sale of intoxicating liquors, not conflicting with the revenue laws of the U. S., might perhaps be so drawn as to be valid, yet, whether any particular statute is valid or not, must depend upon its own peculiar and special provisions. And without an inspection of them I could not well pass an opinion upon them in advance, which would be of any value.
>
> These reasons, I trust, will, be sufficient to excuse me from any, further reply to your resolution
>
> I have the honor to be with the highest respect,
> Your obedient servant,
> JEROME FULLER,
> *Chief Justice*.[25]

[25] Journal of the House of Representatives, 3rd Leg. Assembly, 126 (February 25, 1852).

Fuller's reluctance was not shared by other justices. On February 18, 1853, Chief Justice Henry Hayner advised the Territorial Council that a revised liquor law being under consideration was unconstitutional, and in 1854 Justices Andrew Chatfield and Moses Sherburne issued four advisory opinions.[26] After statehood, the legislature reenacted a law authorizing the Supreme Court to give it advisory opinions, but in 1865, the court declared it unconstitutional on separation of powers grounds.[27]

Under the Organic Act each member of the Supreme Court also presided over sessions of the district or trial courts and, when an appeal taken in a case over which he presided, he was joined by his colleagues to decide it—an unusual arrangement by later standards but one necessitated by frontier conditions (a population small, not enough appeals to warrant two sets of judges, etc.).[28] By statute, the Territorial Supreme Court convened twice a year, on the second Monday of January and the second Monday of July.[29] The Court did not meet in January 1852. At the July term that year, Fuller wrote the opinions of the Court in four appeals: *Pierce v. Smith*, 1 Minn. 83, *Cooper v. Brewster*, 1 Minn. 94, *Carlton and Patch v. Pierre Chouteau*, 1 Minn. 102, and *Chouteau v. Rice*, 1 Minn. 106, as well as a concurrence to Justice Meeker's opinion in *Castner v. Steamboat Dr. Franklin*, 1 Minn. 73,79-82.[30] Excerpts from three of Fuller's opinions follow (his authorities are omitted).

Pierce v. Smith. Allan Pierce sued Charles K. Smith, the Secretary of the Territory, for $262.50. In an affidavit in support of motion for a writ of

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[26] The advisory opinions of the territorial justices are collected and discussed in in Douglas A. Hedin, "Advisory Opinions of the Territorial Supreme Court, 1852-1854" (MLHP, 2009-2011).

[27] *In the Matter of the Application of the Senate*, 10 Minn. 78 (Gil. 56) (1865)(McMillan, C. J.).

[28] Section 9 of the 1849 Organic Act provided in part:

> The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said territory annually, and they shall hold their offices during the period of four years. The said territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such times and places as may be prescribed by law; …

[29] Minn. Rev. Stat., c. 69, Art. I, §2, at 285 (1851).

[30] 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." (MLHP, 2016).

attachment, which would authorize the seizure of Smith's property, Peirce claimed that Smith had not paid numerous creditors although over $24,000 was appropriated by Congress for territorial expenses, that petitions for his removal had been sent to the president, and that Smith is "about to depart from this Territory with intent to abscond." At its fall 1851 term, the district court quashed the writ on the ground that the vague allegations in the affidavit were insufficient. Pierce appealed, and Fuller, for the Supreme Court, affirmed the refusal to issue the writ:

> Proof, in the sense in which it is used in this act, means legal evidence, or such species of evidence as would be received in the ordinary course of judicial proceeding. . . . It is not sufficient for the affidavit to detail mere hearsay or belief. These are not "circumstances" within the meaning of the law, which are competent proof of the facts necessary to entitle the party to the writ. The circumstances upon which the belief of the plaintiff, or a "credible witness," are founded, must be proved otherwise than by swearing to information derived from others. . . . The application for an Attachment is not addressed to the whim or caprice of a Judge. In granting or refusing it, he acts judiciously, and is bound to exercise a sound discretion. He must have evidence before him upon which to exercise it. He has no right to be satisfied, unless circumstances are sworn to in the affidavit sufficient to prove the requisite facts, so as to satisfy a reasonable man in the exercise of a sound judgment, of their truth. . . . The proceeding by Attachment is an extraordinary remedy, highly beneficial when properly guarded, but not to be resorted to except in cases clearly within the provisions of the law. It is summary in its nature, granted in the first instance ex parte, and liable to abuse. Its effect may be disastrous to the defendant. It should not therefore be resorted to without good cause. It is proper that he should be protected against its improper use, and, to that end, the facts necessary to entitle a party to a writ of Attachment are required to be proved to the satisfaction of the Judge before it issues.

Cooper v. Brewster concerned a promissory note from John H. Brewster to Joseph Cooper for $380, of which $98.36 remained due. Brewster, however, claimed at trial that Cooper owed him $100 under a note payable to "one Buford, or bearer, when H. H. Sibley should be elected delegate to Congress." In the middle of the trial in Justice Court, Brewster's lawyer asked the Justice to recuse himself on account of prejudice against his client. The justice refused and awarded judgment to Cooper. On appeal, the district court judge (presumably Chief Justice Goodrich) reversed the judgment, and an appeal taken by Cooper to the Supreme Court. After discussing several procedural issues, Fuller turned to a matter apparently not argued in the courts below:

> The note offered in evidence by the defendant was not negotiable. It was payable only upon the happening of a contingency, and not absolutely. . . And had the note belonged to defendants, it was void, as being against public policy. It was, in effect, a wager upon an election. It was given for value received. If Sibley was defeated, then Cooper retained that value without compensation, and Buford lost it. If Sibley was elected, then Buford was to receive, and Cooper to part with, one hundred dollars. Each of the parties thus acquired a pecuniary interest in the event of the election, and a motive to cast his own vote, and procure others to cast theirs for his private benefit, without regard to the public good. Such a contract should not be upheld. It is against public morals, and tends directly to destroy the purity of elections. No man should be permitted to convert the elective franchise into a device for gambling. It is a sacred trust confided to him by his country, which he is bound to exercise in such a way only as in his judgment will contribute most to his country's welfare. Accordingly, all wagers on the result of an election are held to be illegal and void. . . . . The rule would have been established to little purpose, however, if contracts like the one under consideration should be adjudged valid. The evasion of the law would then be easy and secure. The Justice was right in excluding the evidence. The District Court erred in reversing the judgment rendered by him.

In a concurrence in *Castner v. Steamboat Dr. Franklin*, Fuller discussed the predicament of the judge who had to decide "in the hurry of a trial" whether to give a lengthy list of jury instructions proposed by a litigant:

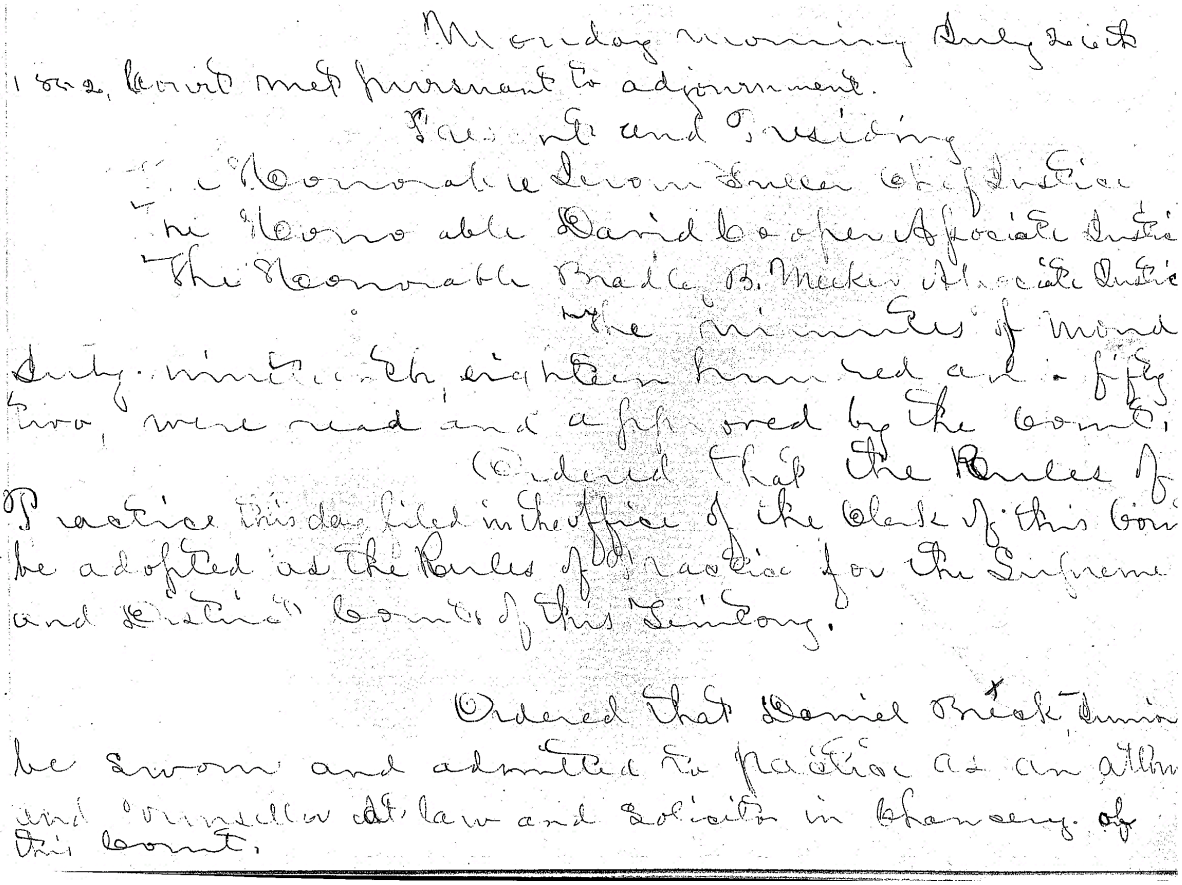
> The defendant's counsel submitted to the Judge, in a body, eight propositions numbered consecutively, some of them involving several subordinate propositions, and all together covering more than two sides of a sheet of foolscap, closely written, and containing abstract rules of law, as well as principles applicable to the case in hand; and asked to have the whole administered to the jury as a charge.
>
> If there was anything erroneous in any one of the propositions, the Judge did right to reject the whole. He was not bound to sift and hunt through such a mass to see whether he could find some proposition, or part of a proposition, which it would be proper to give as a rule of law for their guidance, to the jury; and his neglect or refusal to do so is not error, although it might have been if the same proposition or part of a proposition had been submitted to him separately, with a request that he should charge the jury in accordance with it; and his refusal had been specially excepted to. A Judge is not to be trapped by being called upon in the hurry of a trial, to analyze a mass of legal maxims and solve a long series of problems, and find the true result, on pain of having his decisions set aside if he errs.

Fuller could turn a memorable phrase, he saw the importance of articulating the public policies behind the legal rules relied upon in his opinions, and he was keenly sensitive to the role of the trial judge.

Adoption of Rules of Practice

On July 26, 1852, the Territorial Supreme Court adopted three sets of rules of practice: for the Supreme Court, and two for the district courts, one for use in cases at law, the other for cases in equity. Here are the Court's minutes that day regarding the rules, admitting a lawyer to

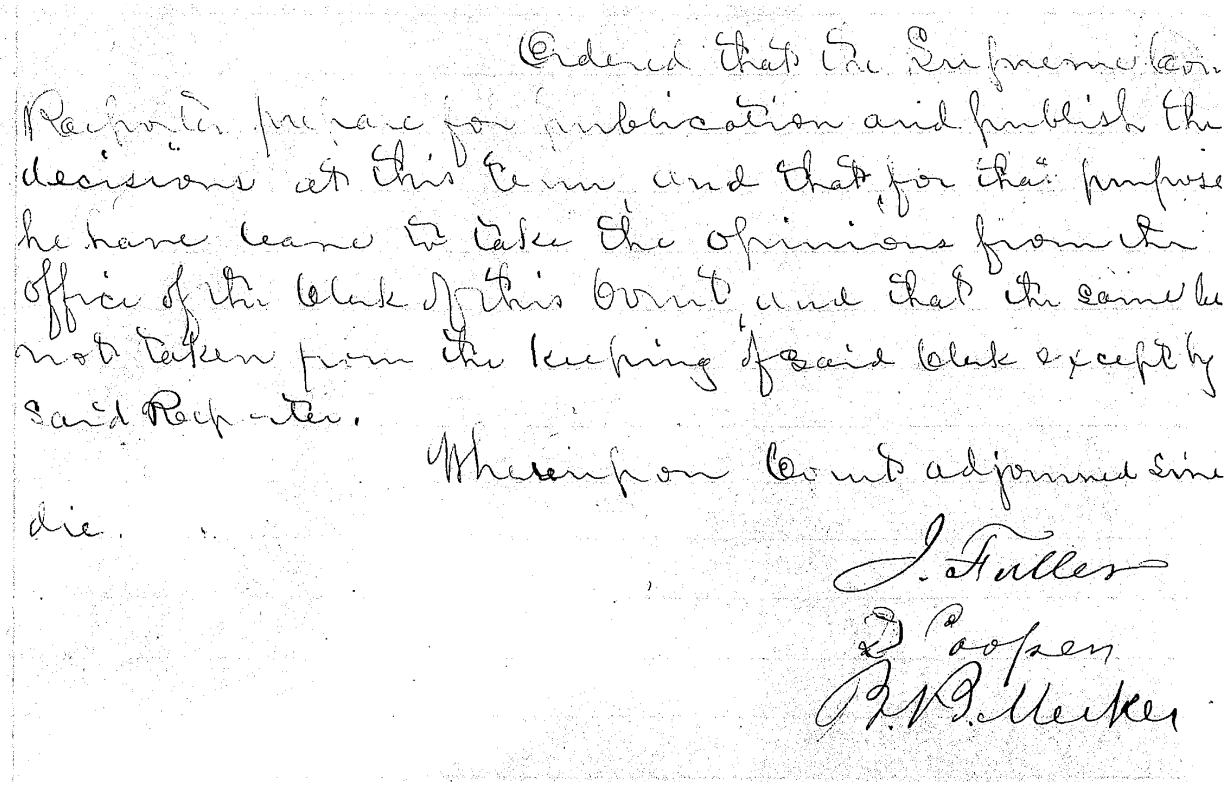
practice and ordering the Court Reporter to collect its opinions issued that term for later publication: [31]



Monday morning July 26th
1852, Court met pursuant to adjournment.
Present and Presiding
The Honorable Jerome Fuller Chief Justice
The Honorable David Cooper Associate Justice
The Honorable Bradley B. Meeker Associate Justice
The minutes of July eighteen, nineteen hundred and fifty-two, were read and approved by the Court.
Ordered that the Rules of Practice this day filed in the office of the Clerk of this Court be adopted as the Rules of Practice for the Supreme and District Courts of this Territory.
Ordered that Daniel Brickenridge be sworn and admitted to practice as an attorney and counsellor at law and solicitor in Chancery of this Court.

[31] Territorial Supreme Court, Minute Book A, 1850-1858, July 26, 1852,at 28-29. The first paragraph reads:

> Monday morning, July 26th, 1852, Court met pursuant to adjournment.
> Present and Presiding
> The Honorable Jerome Fuller, Chief Justice.
> The Honorable David Cooper, Associate Justice.
> The Honorable Bradley B. Meeker, Associate Justice.
> The minutes of July eighteen, nineteen hundred and fifty-two, were read and approved by the Court.
> Ordered that the Rules of Practice this day filed in the office of the Clerk of Court be adopted and the Rules of Practice for the Supreme Court and the District Courts of this Territory.



Ordered that the Supreme Court Reporter prepare for publication and publish the decisions at this Term and that for that purpose he have leave to take the opinions from the office of the Clerk of this Court and that the same be not taken from the keeping of said Clerk except by said Reporter.

Whereupon Court adjourned sine die.

T. Fuller
E. Cooper
R. P. Miller

These were the second rules adopted by the Supreme Court.[32] It is not difficult to trace their origins to Fuller. Sometime after arriving in Minnesota, he must have been given a 56 page pamphlet containing rules of practice adopted by the Supreme Court on January 16, 1850.[33] From subsequent events we may conclude, first, that he was disturbed by the repeal of the legislative authorization for those rules, and second, that he was not impressed with the rules themselves.

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[32] They are posted in the Appendix, at 60-80. The Court's order that the Court Reporter accumulate and publish its rulings seems a bit odd as four months earlier the Legislature authorized the Governor to appoint a Reporter for the Supreme Court to a two year term. One of his duties was to publish the opinions of the Court:

> That immediately after the passage of this act, and every two years thereafter, the governor of this territory, by and with the advice and consent of the Council, shall appoint a supreme court reporter.
>
> Sec. 2. It shall be the duty of said reporter to attend personally all the terms of the supreme court of this territory, and make true and correct report of their decisions, and publish the same annually.

1852 Laws, c. 38, §§ 1-2, at 57 (effective February 27, 1852); §6 repealed a law granting the appointment power to Supreme Court.

[33] See "The First Rules of Practice of Minnesota Courts" (MLHP, 2016) (published first, 1850). On August 13, 1849, Harvey Wilson, the clerk of the District Court in St. Croix County, handwrote eight pages of rules for the district court. They can be found at reflections.-mndigital.org. There is no evidence that Wilson's rules were ever followed by later courts.

At some point Fuller learned that two laws passed by the First Legislative Assembly in November 1849, granting rulemaking authority to the Supreme Court and the Chancery Court, had been repealed, perhaps inadvertently, by the 1851 Revised Statutes.[34] He set out to fill the void. When the Third Minnesota Legislative Assembly convened in St. Paul on January 7, 1852, he administered the oath of office to the Legislative Council.[35] On March 6th, the last day of the session, the Assembly passed an amendment to the Revised Statutes on the Supreme Court's powers authorizing it to adopt rules of practice:

> The supreme court shall be vested with full power and authority necessary for carrying into complete execution all its judgments, decrees and determinations in the matters aforesaid, and for the exercise of its jurisdiction, as the supreme judicial tribunal of the territory; *and may by order from time to time, make and prescribe such general rules of practice, both at law and in equity, and regulations for the said supreme court and the government of the several district courts, not inconsistent with the provisions of this act, as it may deem proper.*[36]

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[34] The 1849 laws provided:

> The judges of the said [supreme] court shall have power to make and record such rules and regulations respecting the conducting of business in the said court as they may think proper, not contravening the laws of the United States or of this Territory.
> . . . .
>
> The proceedings in said [chancery] court, where they are not regulated by statutes, shall be prescribed by the judges thereof; but shall in all matters of practice be made to conform to the known usages of courts of equity.

1849 Laws, c. 20, §9, at 56 (Supreme Court), and c. 20, ch. II, §3, at 59 (chancery court)(approved, November 1, 1849). They were repealed by Stat. c. 137, §3, at 578-79 (approved March 31, 1851) (listing 18 laws passed by the First Legislative Assembly in 1849 that "are not repealed" by the "act for revising and consolidating the general statutes of the territory." Chapter 20 is not named.

[35] Journal of the Council of Minnesota Territory, January 7, 1852, at 2. Justice Cooper swore members of the House. Journal of the House of Representatives, January 7, 1852, at 3.

[36] Amendments to the Revised Statutes of the Territory of Minnesota, §3, at 1 (effective May 1, 1852) (amending Territorial Statutes, c. 69, Art. I, §6, at 286 (1851) (1852 amendments in italics).

This discussion would not be complete without noting that the Fourth Territorial Legislature re-enacted this authorization a year later, absent a reference to rules on "equity." It was in session from January 5 to March 5, 1853. On the last day, it passed legislation abolishing the Court of Chancery, requiring that suits in equity proceed as civil actions and authorizing the Supreme Court to adopt general rules of practice before it and the district courts.

> Sec. 11. The Supreme Court shall have the power to provide general rules for its own

Recognizing how easily coincidence is confused with causation, certain facts suggest that Fuller was instrumental in the passage of this law. First, there is the timing: it was enacted a few months after his arrival and the new rules were adopted only four months later during his first and only term of the Supreme Court; second, his personality: he was strong-willed, believed in strict adherence to rules of procedure and was an experienced politician; and finally there is the reputation of the court in 1851-1852: Goodrich had left in disgrace, Cooper was often absent from the territory and Meeker known as a complainer, though both served adequately once on the bench. One can easily picture Fuller lobbying legislators in January and February 1852 that the Supreme Court needed explicit authorization from them to adopt new rules of practice that would replace the rules of the Goodrich Court.

A law empowering the Supreme Court to make rules was necessary because in the antebellum period the legislature was supreme. The judiciary was particularly subservient in a territory such as Minnesota where legislators were elected and judges appointed. Legal historian Francis R. Aumann describes this aspect of the political thought of the period:

> Another exceedingly important development of the period between 1775 and 1860 was the gradual readjustment which took place between the legislative and judicial branches. When our system began, the idea of the separation of powers was looked upon as a basic principle. . . . While this theory lies at the basis of our political organization, it has never been completely operative. At any rate, our first state

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conduct, and the conduct of the District Courts of the Territory, and the Judges thereof and other officers of said Courts, and to carry into effect legal rules and statutory provisions; and also to supply defects or omissions in practice, in respect to the commencement, prosecution and conducting all civil actions, special proceedings, appeals, writs of error and certiorari, and all other writs and statutory proceedings: *Provided, always*, That no legal rule or statutory provision is to be violated or abrogated thereby.

1853 Laws, c. 1, § 11, at 4 (effective March 5, 1853). The drafters likely believed that re-authorization was a necessary part of the legislation fusing law and equity and abolishing the Chancery Court.

Thus, in three of its first four sessions, the Territorial Legislative Assembly passed laws granting rulemaking power to the Supreme Court.

> governments were largely characterized by legislative supremacy. In that early period, the popular will was considered omnipotent and the legislature was looked upon as the chief organ of the popular will. [37]

Fuller could not possibly have drafted the new rules from scratch in the winter of 1851-1852. He probably approached this problem in the same way he had drafted documents and pleadings when in private practice—by referring to form books or other publications with examples written by other lawyers. He may have packed copies of the rules of practice of New York courts when he departed for Minnesota in late 1851 or he may have asked lawyer friends in New York to send him copies later.[38] The reactions of Justices Cooper and Meeker to the new rules are not known but it is safe to assume that he secured their approval of the rules before they were formally adopted on July 26th. He was in a hurry: that day, at the end of the court's term, was his last chance to have the rules adopted.

The 1852 rules did not incorporate, repeal or even mention the 1850 rules; indeed there is little resemblance between the two. If many of the new rules impose strict service and filing deadlines, one granted flexibility to the trial bar: Rule XX of the District Court rules provides: "In

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[37] Francis R. Aumann, *The Changing American Legal System: Some Selected Phases* 159-60 (Da Capo Press, 1969)(published first, 1940)(citing sources). See also Roscoe Pound, *Criminal Justice in America* 133 (Harvard Univ. Press, 1945) ("From colonial times down at least to the impeachment of Andrew Johnson, the legislative department claimed to be peculiarly the organ of the popular will.").

Section 9 of the Organic Act affirmed the primacy of the legislature in setting court rules:

> Writs of error, bills of exception and appeals, shall be allowed in all cases from the final decisions of said district courts to the supreme court, under such regulations as may be prescribed by law....

Looking ahead, Article 6, §14, of the 1857 Constitution affirmed the legislature's supremacy over the judiciary's rules:

> Legal pleadings and proceedings in the courts of this state shall be under the direction of the legislature. The style of all process shall be "The State of Minnesota," and all indictments shall conclude "against the peace and dignity of the state of Minnesota."

[38] This is the only reasonable explanation for the origin of the rules. It is improbable that either Justices Meeker and Cooper, who had served since the spring of 1849, drafted them. The rules of practice of the New York courts which Fuller likely consulted or copied have not been located—but the search continues. Until the rule models are located, it is not possible to determine whether Fuller altered or modified them.

cases where these rules or the statute do not apply, the practice shall be regulated by the former practice of the Court of King's Bench, in England, so far as the same is applicable—not as a positive rule, but as furnishing a just analogy and suitable guide to regulate the same." (Rule XLIV of the Chancery Court is similar). One wonders how many territorial lawyers were familiar with the "former practice of the Court of King's Bench."

It would be wrong to think that Fuller's rules were applicable to practice before an established bench in an urban area, and detached from the realities of lawyering on the frontier. He had lived through one Minnesota winter, and in *Steele v. Taylor*, he listed practical obstacles Steele encountered as he tried to comply with the terms of a contract to buy real estate in St. Anthony Falls: "Considering the distance between the place of deposit and the place of tender, the season of the year, the means of conveyance, the state of the roads and the period of the opening of navigation on the Mississippi, I do not think the time [Steele spent] unreasonable."[39] He was well aware of the difficult terrain and harsh climate of the new territory.

What, then, was his motivation? He seems offended by the laxity of the bar, and wanted to set a higher standard of practice. On the first day of the term in St. Paul on May 3rd, for example, he found no cases ready for trial, as that was the custom of the bar, and announced that henceforth any party not ready for trial that first day would "suffer the consequences." Insisting on punctuality, he fined tardy jurors $10 a day. He may have had a lofty ambition for the new rules: to bring more discipline and respect to the territorial judicial system.

The trial bar was small.[40] Some barristers were aware of the new rules but most were not. It is not possible to tell the extent to which lawyers practiced by the rules of the district courts over the next six years, but the minutes of the Supreme Court show clearly a pattern of technical

[39] His opinion can be found in the Appendix , at 54-60.

[40] This was noted in an article in the *St. Anthony Express* on the *Parker v. Goodrich* trial: "We understand St. Paul can boast of some forty "limbs" of the legal profession; yet the names of scarce a baker's dozen appear on the Court Calendar." May 21, 1852, at 2. The entire article is posted in the Appendix at 44-47.

violations of its rules. Many appeals were dismissed when the appellant did not comply with the filing requirement of Rule XI.[41]

Unlike the Court's 1850 rules of practice, only a few copies of the new were published. Over time they were forgotten. In an introduction to the collected decisions of the Territorial Supreme Court published in 1858, Harvey Officer makes a startling observation:

> The Appendix contains the Rules of the Supreme and District Courts of the Territory adopted at the July Term 1852. A few copies of these Rules were published, but they will be now read for the first time by many members of the Bar.[42]

One reason the new rules were not widely disseminated is that the term of Jerome Fuller, their inspiration and proponent, ended a month after they were adopted.

Senate Rejects Fuller's Nomination

On December 9, 1851, President Fillmore nominated Fuller to a four year term on the territorial court, which required Senate confirmation.

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[41] Rule XI provided in part:

> And unless a party appealing or bringing a writ of Error, shall procure the return of the clerk of the District Court and his certificate and transcript, to be filed with the clerk of this court, within ninety days after the service of the writ or of notice of the Appeal on the clerk below, or such further time as shall be allowed by a Judge, such writ of Error or Appeal shall be deemed abandned, and the opposite partyon filing an affidavit of the facts, may have au order of course entered with the clerk, dismissing the writ of Error or Appeal for want of prosecution, with costs; and the court below may thereupon proceed as if no writ of Error or Appeal had been brought.

When the appellant failed to file with the Clerk a certificate or transcript within ninety days of the service of the appeal, the opposing attorney filed an affidavit exposing that lapse, and the Court thereupon dismissed the appeal. For example, on January 7, 1854, the Court ruled that the appeal of *Pierre Chouteau v. Henry M. Rice* "be and the same is hereby dismissed for want of prosecution, with costs pursuant to Rule XI of this Court." Territorial Supreme Court, Minute Book A, 1850-1858, at 33. Three days later, it dismissed appeals in the cases of *Robert Waples v. Ephraim Zirkle* and *Enoch Gillman v. George Talman* on the same ground. (id. at 33-34). The next day, January 11th, it dismissed appeals in *Reuben Goodrich v. Rodney and Elizabeth Parke*r and *Moses Perrin v. William H. Oliver* on identical grounds (id. at 34-35). On January 12, the appeal of *Charles Gillman v. Henry Jackson* was dismissed for want of prosecution in violation of Rule XI. (id. at 34) On January 16, the Court cited Rule XI for dismissing the appeal in *Louis Elfelt v. George Smith*. (id.) As a practical matter, some of these appeals were revived, and eventually decided by Court on their merits.

[42] Officer, note 11. This paragraph is part of a section captioned "Advertisement" in the original. It is dated July 14, 1858. Curiously Officer make no reference in this introductory section to the 1850 Rules of Practice. He ignores them completely, although he surely knew of their existence.

The Senate demanded and received a copy of the Attorney General's confidential opinion on the propriety of the President's removal of Goodrich and delayed voting on Fuller's nomination, permitting opposition by Senators Fish and Seward to fester and grow.[43] Finally, on August 30, 1852, Fuller's nomination came to the Senate floor, and failed.[44] The account of the Senate in action in the *Minnesota Democrat* quotes the *New York Times*.

> The Senate went into executive session a few minutes before eleven o'clock, a strenuous, but vain effort having been made to give Mr. Yulee, the per diem and mileage of a Senator duly elected.
>
> Considerable executive business was done at this session, and that which was held last night. The nomination of Jerome Fuller, late of Albany to be Judge of Minnesota, was rejected for a variety of reasons. Mr. Fuller was editor of the *Register* (Silver Gray), and two years ago rendered himself famous for a desperate effort to organize a Whig bolt against the regular nominated State ticket, by telegraphing Whig papers over the State "to keep out the ticket at present." Mr. Fish made a very severe speech against the administration, and then Mr. Fuller was shelved by a decided majority.[45]

On September 10, 1852, the weekly *St. Anthony Express* criticized the Senate's action and praised the rejected nominee:

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[43] See authorities cited in note 7.

[44] *Executive Journal*, 32nd Congress, First Session, Monday, August 30, 1852, at 449. The President promptly nominated another New Yorker, Henry Z. Hayner, who was confirmed the next day.

[45] *Minnesota Democrat*, September 15, 1852, at 2. The late Kermit Hall has a more colorful description of the jubilation of Senator Fish at the outcome:

> The Senate, on August 30, 1852, administered Fillmore a bitter defeat by rejecting his old friend Jerome Fuller as chief justice of Minnesota. While Fuller had fulfilled his judicial duties under a recess commission, his nomination had languished in the Senate. New York Whig Senators Hamilton Fish and William H. Seward denounced the nomination as an act of political cronyism. They failed, with the same argument, to secure the rejection of Fillmore's friend Nathan K. Hall to be judge of the Northern District of New York, but they gained support of the Senate Democratic majority to table indefinitely Fuller's nomination. "Within five minutes," a triumphant Hamilton Fish gloated, "the business was concluded and Jerome was a 'dead cock in the pit.'

Kermit Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829-1861* 110 (Univ. of Nebraska Press, 1979) (citing sources).

For a view of Fuller's rejection within the larger political context of the era, see Douglas A. Hedin, "'Rotation in Office' and the Territorial Supreme Court" 12-14, 27-31 (MLHP, 2010-2011).

Rejection of Judge Fuller

> The appointment of Jerome Fuller for the office of Chief Justice of this Territory, has been rejected by the U. S. Senate. This act of a democratic Senate is a striking illustration of the extent to which party spirit is carried in our country. No man ever sat upon the bench of any court with more general acceptableness. His thorough knowledge of the law, his sound and ready judgment, his stern justice, and unyielding impartiality, on the bench, and his bland and urbane demeanor in social life, have won for him, during his brief career among us, the esteem and admiration of all parties, and made him universally popular.
>
> When will party feeling cease to be carried to infatuation, and no longer rob community of their best and ablest officials?
>
> Mr. Hogan, of Troy, N. Y., has been nominated to fill the vacancy. It seems strange to us, that at this late day, when we have such an abundance of excellent talent in our Territory, our officers cannot be chosen from our midst.[46]

In its next issue, the weekly *Express* corrected the name of Fuller's replacement,[47] and in an editorial identified Senators Fish and Seward as being responsible for Fuller's rejection:

> Rejection of Fuller
>
> From reliable information recently received, we find we were under a mistake in our last number, in regard to the cause of Judge Fuller's rejection. As an act of simple justice to our political opponents, we take pleasure in correcting the mistake, although mortified and pained to state the true reason as we now understand it. We are informed from an authentic source, that Judge Fuller was rejected solely on account of the opposition of Senator Fish, of New York. Judge Fuller was in the New York Senate, some years since, and was opposed to some project which Fish had in view hence

[46] *St. Anthony Express*, September 10, 1852, at 2.

[47] *St. Anthony Express*, September 17, 1852, at 2 ("The name of the gentleman who succeeds Judge Fuller, is Hayner, of Troy, N. Y., not Hogan, as was stated. He is represented by those who know him to be a good lawyer, and most estimable man in private. If he makes good the place of his predecessor in all the relations of life, the Territory will be well satisfied.").

> the present opposition of the Hon. Senator. We have always regarded Fish as a man of quite ordinary ability, but were not prepared to believe him capable of condescending to such illiberality and littleness. We look upon it as an exceedingly fishy, or rather "scaly" affair. We still have doubts whether Fish is at the bottom of the opposition. In this matter may be discerned some footprints of the New York "higher law" demagogue, of whom Fuller was no great admirer.[48]

And so ended the service of Jerome Fuller to the Territory of Minnesota — another entry in a long, ever expanding list of petty acts by members of the Senate of the United States of America.

Return to Brockport

Fuller returned to Brockport in 1853 and reopened his law practice. By 1856 the Whig party was dead, replaced in the North by the Republican Party. Fuller became a Republican. Early in the War, when President Lincoln called for an additional 300,000 volunteers, he responded with a memorable address in Brockport on July 12, 1862. [49] Both sons served in the war.

In 1867, he served as a delegate to the State Constitutional Convention.[50] And in October of that year he received the Republican nomination for county judge of Monroe County.[51] He defeated C. Rowley, the

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[48] Id. The "New York 'higher law' demagogue" was New York Senator William H. Seward, who on March 11, 1850, gave a famous address to the Senate opposed slavery, and invoked the "higher law" background of the constitution. Appendix to the *Congressional Globe*, 31st Cong., 1st Sess., March 11, 1850, at 265.

[49] It is posted in the Appendix , at 80-81.

[50] *Brockport Republic*, April 25, 1867 at 3 .

[51] It was close. At the county convention on October 9, 1867, Judge J. C. Chumasero was ahead after six ballots, 103 to Fuller's 66, and 1 blank. A motion to make his nomination unanimous was made but followed immediately by a motion for another vote. On the next ballot, Fuller pulled ahead, 92-75, and finally prevailed 101–63. *Brockport Republic*, October 17, 1867, at 2. The *Republic* applauded Fuller's nomination:

> The Republican County Convention yesterday nominated two candidates from this village, each ably qualified to discharge the duties of the office for which he is named. Jerome Fuller, County judge, is an able and experienced lawyer, and a Republican of clear party record.

Brockport Republic, October 10, 1867, at 5.

Democratic candidate, in the election on November 5.[52] He served four years, and ran for reelection on the Republican ticket in 1871, for a six year term. This time he defeated A. B. Butts, receiving 53.1% of the vote. [53] He retired in 1877, at age sixty-nine.

The annual salary for a county judge was $2,000, enough for him to maintain a fairly large home in the village. Here is a photograph of the Fuller home in Brockport, probably taken in the early 1900s: [54]

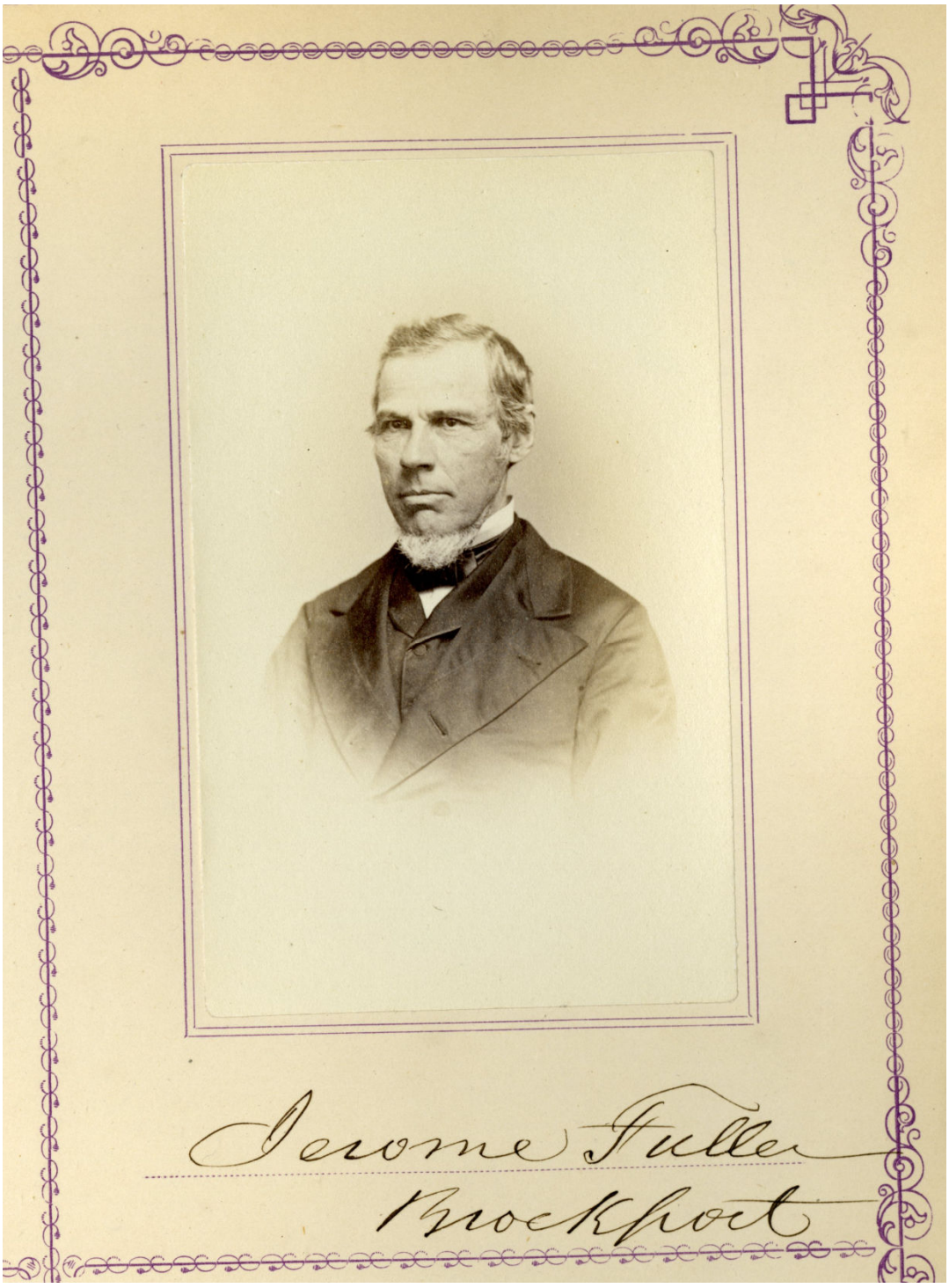
[52] Two days after the election, Fuller's majority was reported to exceed 1,000; however, a later count estimated it as 270. Compare *Brockport Republic*, November 7, 1867, at 3, with *Brockport Republic*, November 21, 1867, at 3.

[53] The results of the election on November 7, 1871, were:

Jerome Fuller (R).....9,847
A. P. Butts (D).....8,686

Brockport Republic, November 23, 1871, at 3.

[54] Photograph from Emily L. Knapp Museum & Library of Local History, Brockport, New York (date unknown). Because telephone wires rather than telegraph lines appear to be strung on the poles, the photo probably was taken in the twentieth century, decades after Fuller's death.



Date of photo, ca. 1867.
Photographic Album of the Constitutional Convention of the State of New York 36 (Churchill & Denison, Photographers, Albany, N.Y., *1867).*
(Experts believe the signature is Fuller's)

For a glimpse of Fuller's personality — what he was like in the flesh, so to speak — we turn to a profile by Daniel Holmes published in the *Medico-Legal Journal* in 1899. Holmes had known Fuller, appeared before him in the Monroe County Court, and admired him. It has a "first person" quality to it that is lacking in most profiles of judges in books or journals in this period.

> Jerome Fuller was born in Litchfield county, Conn., about the year 1807, and settled in Brockport, N. Y., in the year 1835. Of his early life, prior to his emigration to western New York, but little is known. As a young lawyer he at once reached the front rank in the bar of Monroe county, a position which he maintained through life. Outside of the duties of his profession, he first appears in the politics of the state by being elected to the State Senate, in the year 1847. In those days he was an ardent and enthusiastic politician and a prominent member of the Whig party. In the factional contests of the time he identified himself with what was then called the silver gray Whigs, and an organ of that wing of the party at Albany being considered desirable, he established and became the editor of the State Register, in the year 1850.
>
> Editorial duties, however, did not seem to be his forte, and in 1851 he accepted the office of chief justice of the state (sic) of Minnesota at the hands of his friend, President Fillmore. The United States Senate failed to confirm the appointment, and Judge Fuller returned to Brockport in 1853, where he remained during the rest of his life and was actively engaged thenceforth as a lawyer, except when called to the discharge of public duties. In 1867, he was selected as a member of the State Constitutional Convention, and in the fall of that year as county judge of Monroe county, to which office he was re-elected for a term of six years in 1871. Having reached the age limit he was retired in 1877, and died at Brockport, September 2, 1880.
>
> At his home and by those who knew him best, Judge Fuller was held in the highest esteem. He was always conscientious on the performance of every duty; he was kind and affable to

his daily associates, and was deservedly popular. He thoroughly identified himself with the interests of his town and especially with the educational interests of Brockport. In November, 1845, he became a member of the board of trustees of the Brockport Collegiate Institute, a flourishing academy, and, in 1846, the president of the board. Subsequently, in 1866, this institution was merged into the State Normal School at Brockport, and Judge Fuller was chosen as the first president of the local board of managers.

As a prominent characteristic of the man, one may mention the unbounded enthusiasm with which he advocated any cause which was near to his heart. No one ever doubted on which side he stood, and in no sense was he a trimmer. During our Civil War he was active in the raising of volunteers and sent his two sons to the war, one of whom died in the service, and the other was a captain in the 108th Volunteers. As a judge he was one of the best we ever had in Monroe county; as a lawyer he was among the first; as a neighbor and citizen he is affectionately remembered by all who ever came in contact with him. [55]

Obituary and Bar Memorial

Fuller died in Brockport on September 2, 1880, aged seventy-two. *The Bridgeport Republic* carried his obituary followed by an account of the memorial services and resolutions by the county bar association:

JEROME FULLER.

Hon. Jerome Fuller was born at Kent, Litchfield county, Conn., Jan, 26th, 1808, and died at this village on Thursday evening of last week, aged 72 years,

He was educated at Yale College, New Haven, where he studied until compelled to leave the school on account of poor health. He then spent a year in Naples, Ontario county,

[55] Daniel Holmes, "Hon. Jerome Fuller" in Clark Bell ed., "The Supreme Court of Minnesota" 15-16 (MLHP, 2010) (published first in 17 *Medco-Legal Journal*, 1899).

from which place he went to New York city in 1830 and entered the law office of Gen. Talmadge. With this distinguished lawyer he studied for four years, and then began to practice in the village of Haverstraw on the Hudson River. At this place he remained one year before removing to Brockport.

He was married in his native county Sept. 15, 1834 to Miss Lucy Pratt. In 1835 he came to Brockport, and engaged in the practice of law.

He did not remove to Texas, as has been stated by some of our exchanges, but spent a few months there for the benefit of his health.

In 1842 he was chosen Member of Assembly from this district, and served for one year.

In 1847 he was chosen State Senator from Monroe county, and served for two years. About the time he was a member of the Legislature ho was chosen a delegate to and served as a member of a State Constitutional, convention.

In 1850 he went to Albany to edit the Albany Register as a "Silver Grey" organ in the interest of President Fillmore, and where he remained about two years.

In 1851 he was appointed by President Fillmore Chief Judge of the territory of Minnesota. The United States Senate was controlled by the other school of Whigs, and his nomination was not confirmed. He remained in Minnesota about a year and a half, returning to Brockport in 1853.

In 1867 he was chosen a delegate to the Constitutional Convention—the second Constitutional Convention in which he served.

In the fall of 1867 he was chosen County Judge for four years, and at the expiration of his first term was elected for a second term of six years—the term having been lengthened by legislative enactment. His whole period of service as Judge

was ten years. His age debarred him of reflection at the close of the second term.

He served as a member of the Board of! Trustees of the old Brockport Collegiate Institute, and at the time of his death was President of the Local Board of the Brockport Normal School.

Judge Fuller had been ill for several weeks of Bright's disease of the kidneys, and though of strong constitution he kept gradually failing, and the announcement in our last issue that his death was expected had a speedy realization, for before our paper was fully issued his demise had occurred. His death caused general sadness in the community. Like other men occupying positions of similar prominence he has been the subject of criticism—usually laudatory, but sometimes the reverse. But few men, however, have merited so high a degree of public respect, or attained so full a place in public esteem.

He leaves a wife and one son, the latter a practicing lawyer at this village. He had two sons in the Union army, one of whom died several years ago, a result of suffering in a confederate prison.

The funeral of deceased was held at his late residence on Saturday afternoon, and was attended by a large concourse of citizens. Revs. Eddy, Barbour and Seibt took part in the funeral exercises. His pall bearers were Judges E. Darwin Smith, James L. Angle, W. C. Rowley and J. D. Husbands, of Rochester, and Messrs. D. S. Morgan, E. Whitney, G. B. Whiteside and Joseph Craig, of Brockport. Among the other well known persons attending the funeral from Rochester were Judges Hulett and Morgan, Sheriff Burlingame, ex-Sheriff Campbell, Hon. Freeman Clarke, — Hovey, D. C. Hyde, Angus McDonald, Geo. Raines and C. C. Davison, attorneys. The Judge's remains wore interred in the village cemetery.

BAR MEETING AT ROCHESTER.

The bar of Monroe county convened at the announcement of the death on September 2, 1880, of Hon. Jerome Fuller, late county judge of this county, desire to attest in this public manner their appreciation of the character and acquirements of their deceased associate and friend. Learned, laborious, upright and courteous in the discharge of every public duty; eminent as a counsellor, faithful in every trust, a kind and judicious friend, he has endeared himself to us by long years of intimate appreciation; his judicial career testifying to the fullest extent the choice of his constituents. To attest our sense of his merit, and of our own great loss, we desire this record to be transmitted to his family, and that a minute thereof be entered on the records of which he was so distinguished and honored an ornament.

BROCKPORT BAR MEETING.

A meeting of the members of the bar of the village was held on the 3rd inst., to take action on the death of Judge Fuller. Mr. H. P. Norton was made Chairman, and Delbert A. Adams, Secretary. Messrs, Norton, Butts and Decker were appointed a committee on resolutions. The committee after consultation presented the following:

Whereas, Death has again entered our midst, to our utter heaviness and discomfort, and removed from us that able, pure and high-minded jurist, Hon. Jerome Fuller. While his loss to the bench and bar throughout the state will be deeply mourned, yet of members of the bar who most keenly feel his loss are those residing with him in the same village, who were ever welcome to a share, when asked for, of that ripe judicial experience which he so eminently possessed.

Resolved, That with the wife and children in this their hour of sorrow and mourning over the loss of a kind and attentive and devoted husband and father, we deeply sympathize; and with neighbors and friends who so deeply feel his loss, we

can only say that we all stand as common mourners at the portals of his grave.

Resolved, That we attend his funeral in a body.

Resolved, That the secretary be authorized to present to the family of deceased copies of these resolutions, and that they be printed in the papers of the county.

The report of the committee was accepted after which short eulogistic addresses were made by Messrs. H. J. Thomas, J. D. Decker, A. P. Butts, R. Chickering, T. S. Dean, John D. Burns, Delbert A. Adams, and H. P. Norton.

LOCAL BOARD MEETING.

At a meeting of the Local Board of the State Normal School, held Monday evening Sept, 6th, the following resolutions were unanimously adopted:

Whereas, this Local Board, in the death of our valued President, the Hon. Jerome Fuller, keenly realize the great and irreparable loss which has been sustained by our body, by our Normal School and by our village; therefore

Resolved, That we desire to attest our personal affection and regard for him both as a man and a presiding officer and how profoundly conscious we are of his services in our Board.

Resolved, That it is the sense of this body that to his broad, comprehensive and enthusiastic intellect, to his culture, to his sagacity, to his judicious and temperate counsel and to his foresight and wisdom this school is largely indebted for its success and prosperity.

Resolved, That this village and community in the death or this man of noble mind, of exalted life, of honorable renown, and of large and generous spirit, have suffered a loss that cannot

be easily estimated, and it may be truly said of him that when a good man dies the nation mourns.[56]

Conclusion

Jerome Fuller served as Chief Justice of the Territorial Supreme Court for less than ten months. He did not render any rulings that altered the course of Minnesota law. The Rules of Practice adopted by the Supreme Court at his urging were unknown to much of the bar. He insisted that lawyers be prepared and jurors prompt; he brought a discipline to the courtroom that was lacking under his predecessor. It is through the lens of his life that we see how law was practiced and the courts functioned in the infancy of this state.

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Appendix

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[56] *Brockport Republic*, September 9, 1880, at 3. His estate was valued at $14,000. *Brockport Republic*, September 16, 1880, at 3.

His death was noted in the *St. Paul Pioneer Press*:

> Hon. Jerome Fuller, who was chief justice of the Territory of Minnesota during President Fillmore's administration, succeeding Hon. Aaron Goodrich, died recently in Maine, (sic) where he held many important offices, after leaving Minnesota.

St. Paul Pioneer Press, September 5, 1880, at 4.

Rodney Parker v. Aaron Goodrich

In June 1852, the case of *Rodney Parker vs. Aaron Goodrich* was tried to a jury in Ramsey County District Court. Chief Justice Fuller presided. The Parkers were the proprietors of the American House Hotel, where Goodrich stayed for parts of 1849-1851. Thomas Newson painted the following sketch of the American House and the Parkers in *Pen Pictures*, a collection of brief biographies of early residents of St. Paul, published in 1886:

THE OLD AMERICAN HOUSE.

One of the most conspicuous land-marks of the city in the past, was the old American House, a long, white wooden building with a portico running the whole length of it, which stood on the corner of Third and Exchange streets, where the brick building formerly used for street cars now stands. This house was opened by Rodney Parker in 1849, and was run by Mrs. Rodney Parker for several years. Here the stages left for St. Anthony; here politicians met and discussed questions of great public moment; here balls and dinner parties were given; here strangers and citizens gathered for social intercourse; here bargains in real estate were made; here men of means from the East were inveigled into various schemes of speculation in which they usually lost their money, and here ran rampant "a feast of reason and a flow of soul." Mr. Parker was succeeded by the Long Brothers, one of whom is dead.

THE ORIGINAL LANDLORD AND LANDLADY.

Of the original landlord, Parker, I can only say he was born in New Hampshire somewhere in the year 1814; came to St. Paul in 1849; kept the American House — (or rather his wife did) — secured a claim of 160 acres of land near Hamline University, costing him $10 per acre, or rather $2,000, worth now $160,000; farmed some, and died about 1874, close to sixty years. He was a tall, spare man, quite moderate in his

movement owing to ill-health, yet a quiet, unobtrusive citizen.

Mrs. Parker was a large, masculine looking woman, of fine business qualities; stirring and energetic; a lover of money, and through her industry and economy amassed quite a property. She was a woman of strong prejudices, and not having any children, adopted several, to one of whom she gave the bulk of her wealth. She died, I think, in 1883.[57]

The Parker-Goodrich trial lasted four days. Newspaper accounts of the trial will remind those who study nineteenth century law and politics how personalized journalism was in those days. The writer of the following article about the case in the *St. Anthony Express* seems to have become smitten with Elizabeth Parker:

Court Week in St. Paul.

Court week, or weeks, are to St. Paul what the Carnival is to Venice — a time of excitement, revelry, business and dissipation. The streets of our Territorial metropolis, always lively, are then ten-fold, busier than ever. Life is intense —active, city-a-fied, of all phases, angelic, (does he speak of women,) human, animal and vegetable. The rattle of coaches, the shouts of teamsters, the barking of dogs, the smiles of ladies, the squalling of babies, the clatter of lawyers, all mingled and blended, form a *tout easemble*, equal to any similar scene afforded by cities which have arrived at years of discretion.

Law business in Minnesota is rapidly increasing — nevertheless, not so rapidly as lawyers. The Court dispatches business as rapidly, almost, as any other with which we were ever acquainted, and yet between two and three weeks were required to finish the jury trials. We understand St. Paul can boast of some forty "limbs" of the legal profession; yet the names of scarce a baker's dozen appear on the Court

[57] Thomas McLean Newson, *Pen Pictures of St. Paul, Minnesota, and Biographical Sketches of Old Settlers: From the Earliest Settlement of the City, Up to and Including the Year, 1857* 112-113 (1886).

Calendar. — It is supposed that the balance do a heavy office business in Real Estate, Commercial Transactions and as Counsel, leaving no time for attendance on the courts.

The causes at issue have mostly had no particular interest except to parties immediately concerned. There was one exception, however: The case of Rodney Parker against Aaron Goodrich (former chief Justice of Minnesota) was rich and racy. Every body in and out of the Territory knows the parties. The plaintiff, or his wife, who we understand is the real plaintiff, is the world-renowned hostess of the American — renowned for furnishing good cheer, good rooms, good company. Mrs. P. and her sisters were both in attendance. They are both remarkable women. The former especially, in any company, would be the "observed of all observers." To a commanding figure, a trifle larger than the model of the Medician Venus, she unites such easy, self-possessed gait and carriage, that

> "Her grace of motion, and of look, the smooth,
> And swimming majesty of step and tread,
> The symmetry of form and feature, set
> The soul afloat, &c.,"

insomuch that the figure which at first struck you as being something too large, seems so perfectly symmetrical, so finely proportional, such *embonpoint* plumpness, and delicately rounded contour of figure and limb, that your criticism is at once disarmed, and censure changed to praise. She appears about thirty-five years of age, and young at that. As you gaze upon the finely chiseled, classic features of her countenance, the clear olive of her complexion blending so finely with the rosy hue which mantles her cheek, you exclaim involuntarily, with Pope, that

> "Though to her lot some female errors fall,
> Gaze on her face, and you forget them all."

Her raven tresses are still as thick and glossy as in days "lang syne," her eyes still flash as brilliant and deadly lightnings, whether of love or anger, as "sweet sixteen," and

as many saucy Cupids still hide in the dimples of her cheeks. As you gaze, the sweet memories of other days float around you, your first inamorta, and the dream of love breathed in her ear, are present to your fancy, and before you are aware, you break out singing those beautiful stanzas of Moore,

"O, what a pure and sacred thing,
Is Woman curtained from the sight
Of the base world illuminating
Our only mansion with her light."

The Officer hits you a rap, which reminds you that you are in "in the presence," and you pause for the evidence.

Four mortal days of taking testimony! — Witnesses swearing — lawyer quarreling —judge ruling — jury cursing, spectators laughing, don't ask us to describe it! Four days hard swearing — it were indeed hard to detail it. Minnesota, as well as surrounding States were scoured by the parties, for testimony. For a day or two it seemed as if the sole aim of the parties was to impeach each other's witnesses. Testimony direct and indirect, cumulative and accumulative, rebutting and sur-rebutting, rejoining and sur-rejoining, verbal and written, until both jury and spectators were wholly lost in the labyrinthine maze which counsel had contrived. When the evidence was all adduced, and counsel had closed their speeches, the jury were in a sad plight. Their minds were completely unhinged. Four of them were struck speechless, three days and nights, one of them took to whittling out a wooden ox chain, at which he has ever since continued, five have become confirmed maniacs, and the balance have left for California. Mr. Ames, for the defendant, was severe upon the ladies—ungallant, very. Is he a widower? If not, he ought to be, and if so, we would see him die by inches, rather than marry him. The ingrate! to attempt to invalidate the statements of a lady! As though the dear angels were capable of a falsehood! It is too absurd, too unreasonable! The counsel must be mistaken.

> Mr. Rice was equally savage on the defendant. The gist of his argument seemed to be, first, to demolish Goodrich, and second to get a verdict for his client. He did both, and acquitted himself to general satisfaction.
>
> The Chief Justice, stern and impartial an old Rhadamanthus,[58] sat ruling and deciding between belligerent, and constantly curbing their wayward fancies. The most lynx-eyed observer could not decide on which side the scales of justice, balanced in the impartial hand of the judicial officer, seemed to incline. We fear, too, he is a widower, or bachelor, without hopes of ever mating else, when so favorable an opportunity offered, he would have favored the fair plaintiff and directed the jury accordingly.
>
> But the jury needed no such instructions. Such a jolly, chivalrous, gallant set of fellows, would never permit a lady to appeal to them in vain. Bachelors, we will be bound, every man of them. They might have been a match for tender glances, and enchanting smiles — but for woman's tears, never. They were human — flesh and blood, like the rest of us. Expect their heads were right," ***b****ut are* certain their hearts were. And so, after consulting a couple of hours, out of a decent respect to four day's testimony, (though whether they ever referred to it, does not appear in the evidence,") they found unanimously for the plaintiff. We knew they would the minute we set eyes on them.
>
> But we forbear. Other cases of interest must be postponed for another occasion. — But it will be long ere another trial equally rich and racy will offer to be chronicled in our columns.[59]

The *Minnesota Pioneer* had a lengthier account, though difficult to follow at times:[60]

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[58] A character in *Don Quixote*.
[59] *The St. Anthony Express*, May 21, 1852, at 2.
[60] *The Minnesota Pioneer*, May 20, 1852, at 2.

Ramsey Co. District Court, May 14, '52.
Before Justice Fuller

Rodney Parker	}	Trespass on the case upon
vs.	}	promises.
Aaron Goodrich	}	

Counsel for plff. — Emmett & Rice.
Counsel for deft. —Ames, Nelson & Van Etten.

Case opened by Mr. Emmett. This is an action for board, lodging, &c, of defendant.

R. Parker sworn. —I have kept the American house, since August 1849, defendant commenced boarding with me when I came. I had a settlement with him in January 1850. After that defendant remained until last February. He was with me until 1st October 1851. The price agreed upon was $7.00 per week for himself. His wife and servant came 10th of June – charged no board for the servant; his wife stayed until 1st of October. There was no agreement with regard to the board of wife. The usual price for man and wife was $12.00 per week. From 1st of Jan. 1850, until Mrs. G. came, the price agreed upon was $7.00. Board afterwards of himself and wife, was worth $12 per week.

Cross Ex. I have kept the American house since 23rd of August, 1849; had a settlement with Goodrich to 1st January 1850. G. paid up to that time; he paid from 19th June to 1st Jan. He paid in full from the beginning. I rendered him a bill; I receipted it, as proprietor of the house.

Defendant did not cash the bill to me, but to Mrs. Parker; he settled the mall with Mrs. P; but I receipted the bill. Mrs. P. held his note for $50.00. I do not know of my own knowledge, that Judge G. ever paid her a dollar. The price was agreed between defendant and Mrs. P. before I arrived. I arrived here in August, 1849. We went in as proprietors of the house. I do not own the American House; I did not go in

as landlord in September, 1849, there was a lease taken, in writing. I do not know where the lease is – have not had it– do not know as my wife ever had the lease. The lease was taken by Judge Goodrich. I have seen it. The lease ran to Ruben Goodrich – in his name, for my benefit; I do not know of any other lease, except that my wife has a lease with Henry M. Rice. We did not come into the house and keep it under the employment of Ruben Goodrich. I swear that neither my wife or I, ever kept the House, under the employ of Ruben Goodrich. This is my signature (looking in the paper shown him) but I do not know whether the other is my wife's or not; I furnished the money for the rents, up to a year ago last winter. I do not know who has paid the rent since; the rents were paid quarterly. It was late a year ago last winter when I paid the last rent —in 1851, between January and March.

R. Parker. (examined again by plff't.) the lease was taken in the name of Ruben Goodrich, for my benefit; (objected to by defendant's counsel,) Mr. Ames. This lease is a sealed instrument, it cannot be explained away by parole evidence. By the court. It is competent to show this; the plff. may show an arrangement made before or at the time, between the lessee Goodrich and Parker. Mr. Emmett. (We propose showing, precisely, that Aaron Goodrich noted there as agent for Ruben Goodrich and as such took the lease for the benefit of Parker.) Parker, witness, says any talk with Ruben Goodrich was with my wife. After 1st Jan. 1850, the supplies of the house were furnished by me; I have never seen Reuben Goodrich as I know of, since the lease was taken; I've never accounted to him or anyone else for the proceeds of the house. I furnished the money to pay the rent, until a year ago last winter; I gave in order to Henry L. Tilden, on Judge Goodrich, for $200, to apply on the rent; that was the last rent I paid. Goodrich told me not to pay any more rent, until the question of damage by frost in the cellar, was adjusted by proprietors.

Cross Ex. —I have kept no record or account of receipts and expenses of the house; sometimes I have caused it to be

done; but I cannot tell when nor how much time. We kept any account, we endeavored to keep it correctly—did not do it all the time —sometimes, barkeeper would leave; it might be half the time we kept an account, the first year and a half. The only reason the account was not correct always, was the change or absence of barkeepers. I paid over the receipts to my creditors; never paid Aaron Goodrich. I paid the money for rent, to Judge Goodrich; I paid the money over to him, because he had the lease for his brother; that is the only reason I paid it to him. The only reason I kept the house, was to know whether it would pay. I never made an agreement, written or verbal, to keep the house for Ruben Goodrich on a salary of $500, each. I never told either of my bookkeepers, to keep a correct account, because I had to account for the proceeds of the house to Ruben Goodrich, nor did my wife, in my hearing or presence. Nobody ever demanded of me an account of the business of the American House, prior to the 1st October last, nor since. No one for Ruben Goodrich has ever requested any settlement about the receipts and expenses of the American House.

Plaintiff rests.

Defendant's counsel, Mr. Ames, opened the defense and read the following lease:

J. C. Ramsey, swears he executed the lease, as agent for the Land, Co., H. M. Rice, H. H. Sibley, John R. Irwin and J. C. Ramsey. (Plff. admits that Ramsey was the agent of said Co.).

Cross. Ex. by plff. — Court rules that defendant cannot ask witness, for whose benefit, he understood the lease to be made.

Mr. Ames for defendant, then offered to read in evidence, an agreement in writing, between Rodney Parker and Elizabeth Parker, and Ruben Goodrich. (Objected to by plaintiff, because the execution was not proved, nor the erasurs explained —and because it was not delivered.)

Judge Goodrich called. This instrument was signed by Mr. and Mrs. Parker; it is in my handwriting. I had full authority to sign it for Ruben Goodrich, and did so. I have no recollection about the reason, I think I furnished them in duplicate. I think they have two copies. About 18 months after the copy was delivered, Mrs. Parker asked for a copy of it —as the first had been lost. I gave her one afterward

Cross Ex. This paper was not drawn at the date named. It was drawn subsequent and related back to the beginning of the lease. I signed this as agent for Ruben Goodrich. I had authority to do this for my brother, before the lease was made, he authorized me to do with the American house, what best comported with his interest. The most of the instructions were verbal. Ruben was here in July and the lease was made in September. I understood the lease to be made for his benefit. I sent to my brother for an accountant to attend to the finances of the house. This instrument is as near my brother's views as before expressed to me, as I could make it.

I did not give this paper to Mrs. Parker and tell her it was not to be used but at her wish and pleasure. I did not tell her to put it in her bureau, where nobody could see it. (Read agreement.)

Mr. Ames then offered a receipt from Ruben Goodrich to Aaron Goodrich.

2 O'Clock P. M. resumed.

Ruben Goodrich called for deft. This lease was given to me by my attorney or agent, Aaron Goodrich. A. Goodrich is my agent authorized by me to take the lease, so far as I can as I can judge of agency. I think I have been paying rents under this lease, pretty much all the time – that is, I have considered it to be done. I heard the agreement read, between me and plff. (Q. Was A. Goodrich authorized to make this instrument for you?) Objected to by plff. on the ground that A. Goodrich's authority was in writing. Objection overruled. Aaron Goodrich was my agent and was ordered by me, if the

house was leased, to make such arrangement in regard to the matter, as would best comply with my interest. These instructions were with reference to employing help in the house and barn. I was informed of it afterwards, by him and another person. I recognized the lease and the contract made for me by Aaron Goodrich. I have never made or authorized the making of any other contract since, except it was to settle. Had always recognize the lease and the agreements since made. This (the receipt of A. Goodrich,) is my signature. Aaron Goodrich has paid me for board, washing and lodging of himself and family at the American House, the sum of six hundred and forty-three dollars. That sum included all bills A. Goodrich was liable for at the American House.

These payments were made by me made to me by Judge Goodrich, from two years ago, up to, say to last April. They were not made with reference to the exact amount due; but were sufficient to pay up to that date, for his board. His services as my agent, constituted the principal consideration. I have from time to time instructed my agent to keep the rents paid up. I furnished him money at different times, to pay rent. I have directed my agent to demand an account of receipts. I have instructed my agent to get the matter settled, if possible without litigation.

There was a writing, but I have it now but I have it not now. That writing (to H. M. Rice) did not concern all the authority I gave to A. Goodrich. I think I gave the writing to my brother. This was last July. I have not seen Aaron Goodrich since the month of July, until this spring. I saw Mr. Rice about buying some village lots and about buying the house. I asked Rice what the rent of the whole house was. The authority I delegated was not all confined to hiring the store. We have never actually fractioned upon the amount my brother was entitled to as agent. He paid some money for me. I paid some rent, considerable sums, at different times. I, or my attorney paid money before that time, I think; but am not certain; for I do not know what my brother did with the money I sent him before I directed my agent to demand a settlement with the

> Parkers, at several times. I demanded the premises. I cannot tell without reference to papers not here when I sent him money —I think soon after July 1849, say $200. I think to buy land; again I sent some soon after. Since the 1st of April, 1851, my impression is I have sent money for rent to the amount of $1000.00 or $1500.00 in July or June, 1851. I sent then, I think $300 or $400 for rent, say from $200 to $400. I sent part of it by mail and part two by my brother and part from the proceeds of the Amer. House.
>
> I sent money more money in September or October. I think I directed to him to pay the rent. My brother said in his letters to me, that the damage by frost would be recovered in some way. I was never informed by my brother that the lease was made for the benefit of Parker and wife.

The jury's verdict was reported in the *Democrat* on May 19:

> District Court.—The Court will continue in session till the close of this week at least. The last four days have been consumed in the case of Rodney Parker vs. Aaron Goodrich. The jury returned a verdict for the plaintiff. $712—the amount claimed for a board bill. The principal point in issue was, who kept the American House, the Parkers, or the Goodriches. The jury decided in favor of the former.[61]

Not surprisingly, the controversy did not end there. Reuben Goodrich sued the Parkers in Chancery Court. It was assigned to Chief Justice Hayner, whose opinion was appealed to the Supreme Court. It was dismissed on January 11, 1854, for noncompliance with the filing requirements of Rule XI.[62] Later, it was restored to the calendar, and Hayner's opinion was *a*dopted by the Supreme Court in *Reuben Goodrich v. Rodney and E. C. Parker*, 1 Minn. 195 (1854) (Sherburne, J.).

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[61] *Minnesota Democrat*, May 19, 1852, at 3.
[62] *Reuben Goodrich v. Rodney and Elizabeth Parke*r, Territorial Supreme Court, Minute Book A, 1850-1858, January 11, 1854, at 34-35.

Franklin Steele v. Arnold W. Taylor

Fuller's denial of Arnold Taylor's motion to dissolve an injunction was reprinted on the first page of the *St. Anthony Express* on August 2nd. On the second page, the editor had this comment:

> On our first page we published the decision of Judge Fuller in Chancery, on the Steele and Taylor difficulty. It is a clear, sound paper, and takes strong ground in favor Mr. Steele. No one cognizant of the facts ever doubted the equity of Mr. Steele's course in the premises, or that the ultimate issue at law would be his would be in his favor.

Court rulings were handwritten at this time. It is likely that Fuller issued his opinion in June or early July, and gave it to the editor of the *Express* for later publication. It is one of the few rulings we have of a district court judge sitting in chancery, and that is why it is posted here.

At the end of his opinion, Fuller writes:

> It does not appear that the defendant will be particularly prejudiced by such a course, and he has his remedy and damages for any injury he may have sustained by it, if it be finally dissolved...

He was wrong. Creditors of Taylor, led by St. Anthony lawyer David Secombe, got judgments against him, executed on the land that Steele claimed, and at the sheriff's sale bought the land to satisfy their judgments. The purchaser-creditors than moved to intervene in the *Steele v. Taylor* proceeding (it was no longer venued in chancery court which was abolished in early 1853). Their motion was granted, then denied, resulting in an appeal to the Supreme Court. It affirmed the lower court's denial of the creditors' motion. *Steele v. Taylor*, 1 Minn. 274 (1856) (Chatfield, J.).

In the meantime, Steele brought a quiet-title action against Secombe and 53 other purchaser-creditors to establish his title to the land. A ruling by the district court in his favor was affirmed by the Territorial Supreme Court, and affirmed on appeal by the U. S. Supreme Court. *Secombe v. Steele*, 61 U. S. (20 How.) 94 (1857) (Campbell, J.).

Reported for the Express.

DECISION OF JUDGE FULLER

STEELE }
vs. } *In Chancery*
TAYLOR. }

Decision on motion to dissolve an injunction

The Bill prays for a specific performance of a contract, on the part of the defendant, to convey to the plaintiff certain real estate at St. Anthony Falls. The plaintiff comes into this court on two grounds:— First, for a more complete remedy then he could have at law, and secondly, to be relieved from the legal consequences of a failure to perform the contract strictly on his part. Both are well known ground of Equity jurisdiction. The fact, however, that the plaintiff founds his title to relief, in a measure, upon statements to the fact that the defendant is seeking to take an unconscientious advantage of the plaintiff's inability to perform the contract in all respects, according to its terms, distinguishes this case from one where the aid of the Court is invoked, merely on the ground of its affording a more complete remedy than a court of Law. The remedy at Law is gone, and unless the plaintiff can relieved in Chancery he is without redress.

The defendant insists he is not relievable here, for want of mutuality in the contract for sale. That is a question more proper for the final hearing than for a motion. It was not argued, and accordingly reserved. The defendant insists that the plaintiff has not performed the contract on his part.— The payment of twenty-four thousand dollars by Steele, and the conveyance by Taylor thereupon, were to precede the performance of the other stipulations in the contract. The refusal of Taylor to execute the conveyances, would excuse Steele from the performance of the other stipulations on his part, until Taylor should perform that part of the agreement on his side.

But the defendant claims that the plaintiff has not paid the twenty-four thousand dollars as he was bound to. The payment was to be made by depositing the amount in one of two Banks specified, and the city of Boston within sixty days after the date of the contract, and afterwards furnishing a certificate of deposit to Taylor, at St. Anthony Falls. It is not pretended that Steele did not deposit that amount within the time, but he did not deposit in either of the Banks specified.

The bill alleges that the amount was tendered to each of the two Banks, and that they declined to receive it and give a certificate of deposit therefor. The answer, upon information and belief, denies that the money was actually tendered to the Banks, and sets up that the plaintiff applied to them for credit to that amount, which they severally declined to give. This last statement is not necessarily inconsistent with those of the Bill. For it may well have happened that the plaintiff applied for credit, and when he found out was not to be had, tendered or offered the money. —The denial of the tender, therefore, is all that is material in that part of the answer.

To entitle the defendant to a dissolution of the injunction, the denial should have been positive. The allegations of the Bill are positive, and the Court will not presume they were made merely on information and belief derived from others, though there is reason to suspect they were. The plaintiff may have been cognizant of it, notwithstanding the tender was made by others.

Again, it is not necessary there should have been a *legal tender* to sustain the allegations of the Bill in this case. Neither the Suffolk Bank nor the Merchants' Bank was constituted agent for the defendant to receive payment for him, nor was the plaintiff to pay the defendant in either of those Banks, but to deposit the money and one of them, and turn over the certificate of deposit to the defendant. The plaintiff alleges as an excuse for not doing so, that the Banks declined to receive the money and give a certificate. Whether they refused upon an application made with the money in hand, or refused an offer to bring it in, was immaterial.

It was enough if they refused upon an application to them to know if they would receive the money and enter into a contract to refund it. This being so, a denial of a tender to the Banks, in the strict legal sense of the term, is not a denial of Equity set up by the plaintiff. The alleged refusal of the Banks to receive the money when offered, whether in hand or otherwise, is a material point which defendant is called upon to meet, and that is not sufficiently denied. It is always nor often sufficient to repeat the language of the bill, verbatim, in a traverse, and a large part of the defendant's traverse of the allegations in question is a negative pregnant. [1 Barb. ch. pr. 136.]

Upon the refuel of the of the Banks specified in the contract receive the money, I think the plaintiff was right in depositing it in some other in Boston. The contract in substance required the deposit of twenty-four thousand dollars, so that the money would be secure and available in that locality. When the Suffolk Bank, and the Merchants' declined to take the money on deposit, had the plaintiff come back with it to the defendant at St. Anthony Falls, the latter may might well it said to him— I want this money in Boston, not here, and you must take it back there for me. If those Banks would not take it, you should have put it in some other.

The refusal of the defendant to receive a certificate of deposit in another Bank, which it is not pretended was not equally as safe and good as either of those specified, and to fulfill the contract on his part, because the money was not deposited in one of those Banks when they declined to receive it, was not equitable. The money was not to be placed in the defendant's credit in either of the Banks specified, and the only conceivable reason for naming them rather than others, is that they were known to be responsible, and safe, and secure places of deposit. There is no doubt that at the time the contract was made, the defendant would have consented to the substitution of any other bank in Boston, where it might be more convenient for the plaintiff to deposit the money. What he wanted was that amount deposited in a safe bank in that city, and available certificate of the deposit of it at St. Anthony Falls.

The money was so deposited, and the certificate furnished. For the purpose of realizing the money, and enabling the defendant to enter into business, and fulfill any contract he had entered into, for aught that appears or is pretended, the certificate of the Bank of Commerce was just as good and available as this certificate of the Suffolk or Merchants' Bank would have been. By tendering it to the defendant— tho' not literally, yet in substance complied with the contract to pay the $24,000; he could not comply strictly, if the Bill be true, but he did that which was equally beneficial to the defendant; he deposited the amount, not in the Banks named, but in the locality prescribed, and another Bank equally good. To sanction the refusal of the defendant to fulfill the contract on his part, because was not fulfilled to the letter on the part of the plaintiff under the circumstances, would be to gratify his whim and caprice rather than to protect his substantial rights. When advantage is taken of a circumstance that does not admit of a strict performance in the contract, if the failure is not in a matter of substance, courts of Equity will relieve. [2 Story, Eq. 747.] Were the terms of an agreement have not been strictly complied with, still if there is not been gross negligence in the party, and it is conscientious that the agreement should be performed, and of compensation be made for any injury occasioned by the non-compliance with the strict terms, in all such cases Courts of Equity will interfere, and to create a specific performance, [id. 775.] We dispense with that which would make a compliance with what the Law requires oppressive, and are in the constant habit of relieving a party was acted fairly, though negligently, [id. 748.] The plaintiff was to deposit the money within sixty days, and *afterwards* furnish a certificate or (sic) deposit to the defendant, at St. Anthony Falls.— This must be construed to mean within a reasonable time afterwards. The money was to be deposited on the 17th of March, the tender of the certificate was made on fifth of May. Considering the distance between the place of deposit and the place of tender, the season of the year, the means of conveyance, the state of the roads and the period of the opening of navigation on the Mississippi, I do not think the time unreasonable. It appears from the plaintiff's letter set up out in the answer that he was

hindered by sickness in his family from making the deposit at an earlier day, and that he would start for this Territory as soon as he could learn of the opening of the navigation, and the time of his arrival indicates that he did. When the defendant of rejected the certificate offered to him, the plaintiff did no act then, as perhaps he might have done with safety, but on 21st of May, he tendered to the defendant at St. Anthony Falls, the $24,000 in money, and also the difference in exchange between the place that place and Boston, and now brings the money into Court. The plaintiff certainly has not lain by without any effort to comply with the contract on his part. He has done what he could to compensate the defendant for a non-compliance with its strict terms. If the defendant would not have the certificate, he ought to have taken the specie. Had not the certificate been first offered, perhaps the specie should have been tendered earlier, but it was tendered within a reasonable time after the rejection of the certificate.— The plaintiff ought to have notified the defendant of the refusal of the specified Banks to take the money, and of its deposit in another at an earlier day, and asked for instructions; but his omission to do so is not a gross negligence or omission of duty as deprives him of his Equity. It does not appear he was in any way prejudiced thereby, still fair and open dealing required to be done.

The defendant asks for dissolution of injunction on the further ground that the plaintiff has willfully violated the contract of which he seeks a specific performance. This is not a denial of the matter of the bill, but new matter set up by the answer in avoidance of the case made by the Bill. The plaintiff has not had any opportunity to controvert it.

The dissolution of injunction is always a matter resting in the sound discretion of the Court. I think that the exercise of that discretion in this case, requires the retention of injunction till the final hearing. It does not appear that the defendant will be particularly prejudiced by such a course, and he has his remedy and damages for any injury he may have sustained by it, if it be finally dissolved, [1 Barb. ch. pr. 640.] It is irregular to apply for the court-appointed receiver on the answer. The proper course is to apply by a petition, showing a case calling for the

appointment to protect the rights of the defendant —*pendente lite*. The motion the defendant is denied with $10 cost of opposing. Order accordingly.

J. FULLER

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The Second Rules of Practice of Minnesota Courts [63]

RULES OF PRACTICE

IN THE SUPREME COURT OF THE TERRITORY OF MINNESOTA, ADOPTED AT THE JULY TERM, 1852.

RULE I. The clerk shall administer to each attorney and counsellor, on his admission, the following oath:

"You do swear that you will support the Constitution of the United States; that you will demean yourself, in the office of an attorney and counsellor in all the courts of this Territory, in an upright, courteous and gentlemanly manner, with fidelity to the court and to clients: So help you GOD."

RULE II. Alternate speaking will not be allowed. Counsel for the appellant or plaintiff in error, on bringing on any motion, shall open and be entitled to reply.

RULE III. The clerk shall keep his office at the seat of government, and may appoint a deputy, who, upon taking an oath to support the Constitution and faithfully perform the duties of the office, may do and perform all things appertaining to said office which the clerk himself might do.

RULE IV. 1. The clerk shall keep a general docket or register, in which he shall enter the titles of all suits, actions and proceedings at law and in equity, including the names of the parties and the attorneys or solicitors by whom they prosecute or defend; and he shall enter thereunder, from time to time, of the proper dates, brief notes of all papers filed and all proceedings had therein: the issuing of writs and other process, the teste and return thereof, the court or officer to whom directed: the return of any court, officer or other person thereto: the filing of any bond or other security, and the issuing of a certificate of *supersedeas:* and of all rules, orders, decrees and judgments in any action, suit or proceeding, whether of course or on motion: also, proper references to the number and term of all papers and proceedings.

2. The clerk shall also keep a judgment record, in which he shall

[63] These rules were published in the Appendix to "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." 449-468 (MLHP, 2016) (published first, 1858).

enter all judgments and decrees, the names of the parties thereto plaintiff and defendant: the date of the judgment or decree, its number and term, the amount thereof, if the recovery of money or damages is included therein, and the amount of costs—which record shall be properly indexed.

3. The clerk shall keep a court journal, in which he shall enter, from day to day, brief minutes of all proceedings in court.

RULE V. The clerk shall file all papers presented to him, endorse thereon the style of the suit, its number and term, the character of the paper and date of filing; and after filing, no paper shall be taken from the office unless by consent of parties, or order of the court or a judge thereof.

At the commencement of each term, the clerk shall furnish the court and bar with separate lists of all causes pending therein which have been noticed for argument and of which a note of issue has been filed four days before the commencement of the term. Causes shall be placed upon the list according to the date of the notice of the Appeal or writ of Error.

RULE VI. Motions, except for orders or rules of course, shall be brought on upon notice, accompanied with the papers upon which the same are founded, except when made upon the records or files of the court.

RULE VII. When any decision or order of a District Court other than a judgment or final decree is appealed from, the clerk of the District Court, along with a certified copy of the order or decision and notice of Appeal, shall certify and transmit to this court, with all convenient speed, copies of all pleadings, affidavits, depositions, papers and documents on which such order was founded, or used upon the motion for the same, or necessary to the explanation or understanding thereof, at the expense of the parties appealing.

RULE VIII. Upon an Appeal from a judgment, the clerk of the District Court, in addition to the copies of the notice of Appeal and judgment-roll, shall, upon the request of either party to such Appeal, and at the expense of the party applying, certify and transmit to this court copies of any papers, affidavits or documents on file in the District Court in the action in which the Appeal is taken which such party may deem necessary to or proper for the elucidation and determination of any question expected or intended to be raised on the hearing of the Appeal.

RULE IX. When a writ of Error shall issue from this court to bring up the record of any judgment or decision of a District Court, upon the service of the writ of Error on the clerk of the District

Court, he shall certify and return therewith, at the expense of the party bringing the writ of Error, a transcript of the record or judgment-roll.

RULE X. Upon an Appeal from a decree or final order in Chancery being perfected, the clerk of the District Court with whom the Appeal is entered shall, at the expense of the party bringing the Appeal, certify and transmit to this court copies of the bill, answer, and other pleadings if any—of all orders, proofs, depositions and reports, and verdict and case, if any, on which the decree was founded, or necessary to the understanding thereof, and also of the decree and of any subsequent order in relation thereto.

RULE XI. The clerk of a District Court shall in no case be bound to make a return to any writ of Error or Appeal, or certify or transmit any copy of a paper or record to this court, until his fees therefor are paid. And unless a party appealing or bringing a writ of Error shall procure the return of the clerk of the District Court and his certificate and transcript, to be filed with the clerk of this court, within ninety days after the service of the writ or of notice of the Appeal on the clerk below, or such further time as shall be allowed by a Judge, such writ of Error or Appeal shall be deemed abandoned, and the opposite party, on filing an affidavit of the facts, may have an order of course entered with the clerk, dismissing the writ of Error or Appeal for want of prosecution, with costs; and the court below may thereupon proceed as if no writ of Error or Appeal had been brought.

RULE XII. If the return made by the clerk of the court below shall be defective, or full copies of all the orders, papers or records necessary to the understanding or decision of the case in this court shall not be certified or transmitted, either party may, on an affidavit specifying the defect or omission, apply to one of the judges of this court for an order that such clerk make a further return and supply the omission or defect without delay.

RULE XIII. Whenever it shall be necessary or proper in the opinion of any Judge of this court that original papers of any kind should be inspected in this court on Appeal, such judge may make such rule or order for the transmission, safe-keeping and return of such original papers as to him may seem proper; and the court will receive and consider such original papers in connection with the transcript of the proceedings.

RULE XIV. The attorneys and guardians *ad litem* of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties respectively in this court, until

others shall be retained or appointed and notice thereof shall be served on the adverse party.

RULE XV. Causes shall be noticed for the first day of the term, and may be noticed for argument by either party. Criminal cases shall have a preference, and may be moved on behalf of the United States out of their order on the calendar.

RULE XVI. The appellant or plaintiff in error bringing on the argument of a cause shall, at the opening thereof, furnish each member of the court with a case or paper-book, which shall consist of copies of the transcript or papers certified and returned by the court below, and the reasons of that court for its decision, if any were filed. The folios of the case or paper-book shall be distinctly numbered in the margin, and the numbering of all the copies shall correspond. To the copies of the case furnished the members of the court, shall be appended a note of the points on which the party relies for a reversal of the order, judgment or decree of the court below, with a list of the authorities to be cited in support of the same. On the opening of the argument on his part, the other party shall furnish the members of the court with copies of his points and authorities.

RULE XVII. On or before the first day of the term at which a cause is noticed for argument, each party shall deliver to the other a copy of the points which he will make upon the argument, and of the authorities he intends to cite in support of the same. Each party shall also furnish the clerk with a copy of his points, who shall annex the same to the transcript or return of the clerk below, and no other assignment of errors or joinder in error shall be necessary.

RULE XVIII. In cases where it may be necessary for the court to go into an extended examination of evidence, each party shall add to the copies of his points furnished the court the leading facts which he deems established with reference to the portions of the evidence where he deems the proof of such facts may be found. And the court will not hear an extended discussion upon any mere question of fact.

RULE XIX. The party who has noticed and placed the cause on the calendar for argument may take judgment of affirmance or reversal, as the case may be, if the other party shall neglect to appear and argue the cause, or shall neglect to furnish and deliver cases and points as required by these rules.

RULE XX. Causes may be submitted on written briefs or arguments. Either party may submit a cause on his part on a written brief or argument.

RULE XXI. In all cases of the dismissal of any Appeal or writ of Error in this court, it shall be the duty of the clerk to issue a mandate or other proper process in the nature of a *procedendo* to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as if no writ of Error or Appeal had been brought.

RULE XXII. A *remittitur* shall contain a certified copy of the judgment of the court, signed by the clerk and sealed with the seal thereof, and shall be transmitted to the clerk of the court below as soon as may be after the final adjournment of this court.

RULE XXIII. On reversal of a judgment of the District Court rendered on a judgment removed into it from an inferior court, this court will render such judgment as ought to have been given in the court below, including the costs of that court and also for the costs of this court; and the plaintiff in error or appellant may have execution thereupon.

RULE XXIV. In all cases where a judgment of the District Court for the recovery of money only is affirmed, judgment may be entered in this court for the amount thereof, with interest and costs, and damages, if any are awarded, to be added thereto by the clerk; and the party in whose favor the same was rendered may have execution thereupon from this court.

RULE XXV. In case of a reversal of a judgment, order or decree of a District Court, rendered or made in a cause commenced therein, if there is no *remittitur*, the prevailing party shall have judgment in this court for the costs of reversal, and the costs of the court below, and execution therefor.

RULE XXVI. In all cases in which a *remittitur* is ordered, the party prevailing shall have judgment in this court for his costs, and execution thereon, notwithstanding the *remittitur*.

RULE XXVII. Costs, in all cases, shall be taxed in the first instance by the clerk and inserted in the judgment, subject to the review of the court or a judge thereof; and the clerk of the court below may tax the costs of the prevailing party in this, when the same are to be inserted in the judgment.

RULE XXVIII. In all cases, the clerk shall attach together the writ of Error, if any, the transcript and papers certified and returned by the clerk of the court below, and annex thereto a copy of the judgment or decree of this court, signed by him; and the papers thus annexed shall constitute the judgment-roll.

RULE XXIX. Executions to enforce any judgment of this court may issue to the sheriff of any county in which a transcript of the

judgment shall have been filed and docketed: such executions shall be returnable in sixty days from the receipt thereof by the officer. On the return of an execution satisfied, or acknowledgment of satisfaction, in due form of law, by the party who recovered the same, or his representatives or assigns, the clerk shall make an entry thereof upon the record.

RULE XXX. All other writs and process issuing from or out of the court shall be signed by the clerk, sealed with the seal of the court, tested of the day when the same is issued, and made returnable on any day in the next term, or in the same term when issued in term time; and a judge may, by an endorsement thereon, order process to be made returnable on any day in vacation when, in his opinion, the exigency of the case requires it.

RULE XXXI. Any of the foregoing rules may be relaxed, modified or suspended by the court in term time, or by a judge thereof in vacation, in particular cases, as justice may require.

RULE XXXII. The reporter shall be entitled, upon receipting to the clerk, to take from his office any papers on file, but not to retain them for a longer period than twenty days.

RULES OF PRACTICE

FOR THE DISTRICT COURTS IN ACTIONS AND PROCEEDINGS AT LAW ON THE TERRITORIAL SIDE.

SUPREME COURT, *July Term*, 1852.

Ordered, That the following rules be adopted for the government of the practice of the several District Courts of this Territory, in civil actions and proceedings at law not brought upon the federal side of those courts:—

RULE I. On the trial of causes, one counsel on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the cause to the jury, unless the justice who holds the court shall otherwise order; and he may limit counsel as to time.

At the hearing of causes at a general or special term, or in vacation, no more than one counsel shall be heard on each side, except by permission of the court.

RULE II. Where a party makes a case or bill of exceptions, he shall procure the same to be filed within ten days after the case shall be settled, or the same or the amendments thereto shall be adopted, or the bill of exceptions sealed, or it shall be deemed abandoned.

RULE III. Whenever a motion for a new trial is made on the minutes of the court, and a party desirous to appeal from an order granting or denying the same, a case shall be made and served, and adopted or amended and settled, after the entry of such order, within the same times and in the same manner as is allowed by law for preparing a statement of a case after trial. In cases reserved by the court, no case need be prepared unless directed by the judge.

RULE IV. Enumerated motions are motions arising on issues of law, case agreed between the parties without trial, case reserved,

motions for a new trial on a case or bill of exceptions, motions in arrest of judgment, for judgment notwithstanding the verdict, or to set aside a dismissal of the action ordered on the merits of the trial, when such motions are heard at a general or special term, and not at the same term in which the trial, if any, was had.

Non-enumerated motions include all other questions submitted to the court.

RULE V. Enumerated motions shall be noticed for the first day of term by either party. The papers to be furnished by the party bringing on such motion to the court and opposite party shall be: a copy of the pleadings, case, bill of exceptions, special verdict, or other papers on which the question arises; the copy to be furnished the opposite party shall accompany the notice. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party may move that the cause be stricken from the calendar. At the hearing, each party shall furnish the court and opposite party a statement in writing of the points on which he relies, with a note of the authorities to sustain the same.

RULE VI. Notices of non-enumerated motions shall be accompanied with copies of the affidavits and papers on which the same shall be made, except papers on file which shall be referred to in the notice. When noticed for the first or a subsequent day of the term, the motion may be heard on any day thereafter in the same term.

RULE VII. Notes of issue of all enumerated motions noticed for a general or a special term, shall be filed four days before the commencement of the court for which the same may be noticed. And the same shall be placed upon the calendar according to the date of the issue, case agreed on, or of the trial at which the question arose, immediately after the issues of fact on the same calendar.

RULE VIII. The attorney, or other officer of the court who draws any case, bill of exceptions, or report of referrees, shall distinctly number and mark each folio of one hundred words in the margin thereof; and all copies shall be numbered or marked in the margin so as to conform to the original.

RULE IX. Whenever a justice or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify.

RULE X. Where the service of the summons, and of the complaint accompanying the same, shall be made by any person other than the sheriff, it shall be necessary for such person to state in his affidavit of service, when, at what place, and in what manner

he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein.

RULE XI. Commissions to take testimony without the Territory may be issued on notice and application to a judge, or to the clerk of the county where the action is pending, either in term time or in vacation. Within five days after the entry of the order for a commission, the party applying therefor shall serve a copy of the interrogatories proposed by him on the opposite party, if he has appeared; within five days thereafter the opposite party may serve cross-interrogatories; after the expiration of the time for serving cross-interrogatories, either party may give five days notice of settlement before the clerk or judge: if no such notice be given within five days, the interrogatories and cross-interrogatories, if any, served, shall be considered adopted. Whenever a commission is applied for by one party and the other party wishes to join therein, interrogatories and cross-interrogatories to be administered to his witnesses, may be served and settled or adopted within the same times and in the same manner as those to the witnesses of the party applying. After the interrogatories are settled or adopted, they must be annexed to the commission, and the same forwarded to the commissioners.

RULE XII. Should any or either of the commissioners fail to attend at the time and place for taking testimony, after being notified thereof, any one or more commissioners named in the commission may proceed to execute the same.

RULE XIII. The witnesses shall severally subscribe their depositions; and the commissioner or commissioners taking the same shall certify at the bottom of each deposition that it was subscribed and sworn to before them, and date and sign such certificate: they shall also endorse upon the commission the time or times and place of executing it, and whether any commissioner not attending was notified. They shall annex the depositions to the commission, seal them up in an envolope, and direct to the clerk of the proper county: they may be transmitted by mail or private conveyance; the clerk, on the receipt of the same, shall open the envelope and file it with the commission and depositions, marking thereon the time: they cannot be taken from his custody without the order of the court, but he shall produce them in court to be used on the trial, at the request of either party.

RULE XIV. Process may be tested and made returnable on any day in term-time or vacation except in cases specially provided for by law. The judge ordering any process may direct when the same shall be returnable.

RULE XV. Whenever interlocutory costs are to be taxed the same shall be taxed in the first instance by the clerk. When a trial is put off on payment of costs, or a sum specified, the party shall have twenty-four hours to pay the same. If any dispute arise as to the amount, the same shall be immediately taxed by the clerk. In other cases where costs are ordered to be paid and no time is mentioned in the order, the party shall have ten days after notice of the order to pay the same: but where relief is granted on payment of costs, the payment is a condition precedent. If any person ordered to pay costs shall not do so within ten days after service of a certified copy of the order and a demand of the costs, if the amount is ascertained or has been taxed, on filing proof thereof, an execution to collect the same may be issued by the clerk, or the party entitled thereto may apply for an attachment.

RULE XVI. Whenever notice of a motion shall be given and no one shall appear to oppose, the party moving shall be entitled, on filing an affidavit of service, to the relief or order asked for in the notice. If the party giving such notice shall not appear, or shall not make the motion, the opposite party appearing shall be entitled to costs for opposing and an order dismissing the motion, on filing proof of service of the motion on him.

RULE XVII. When a plaintiff is ordered to file security for costs, if the same shall not be filed and notice thereof served within ninety days after notice of such order, the defendant may apply for a dismissal of the action.

RULE XVIII. When a demurrer is overruled, with leave to answer or reply, the party demurring shall have twenty days after notice of the order, if no time is specified therein, to file and serve an answer or replication, as the case may be.

RULE XIX. Judgments, and copies to annex to the judgment-rolls, shall in all cases be signed by the clerk, and no other signature thereto shall be required.

RULE XX. In cases where these rules or the statutes do not apply, the practice shall be regulated by the former practice of the Court of King's Bench, in England, so far as the same is applicable —not as a positive rule, but as furnishing a just analogy and suitable guide to regulate the same.

RULES OF PRACTICE

FOR THE DISTRICT COURT IN SUITS AND PROCEEDINGS IN EQUITY ON THE TERRITORIAL SIDE.

SUPREME COURT, *July Term*, 1852.

Ordered, That the following rules of practice be adopted for the government of the District Courts of this Territory, in equity suits and proceedings not brought upon the federal side of said courts :—

RULE I. The several clerks shall keep in their respective offices such registers and books, properly indexed, as may be necessary to enter the titles of causes, with minutes of the proceedings in such causes: to enter the minutes of the court, docket decrees: enter orders and decrees, and all other necessary matters and proceedings. They shall keep the proceedings in equity in books separate from those in which proceedings at law are entered, and shall also keep the pleadings and other papers separate.

RULE II. Bills in which the answers of the several defendants on oath are not waived shall be verified by the oath of the plaintiff, or, in case of his absence from the Territory or other sufficient cause shown, by the oath of his agent, attorney or solicitor; and all bills for discovery merely shall be verified in the same manner.

RULE III. In bills, answers and petitions which are to be verified by the oath of a party, the several matters stated, charged, averred, admitted or denied, shall be stated positively, or upon information and belief only according to the fact. The oath administered to the party shall be, in substance: that he has read the bill, answer or petition, or has heard it read and knows the contents thereof; and that the same is true, of his own knowledge, except as to matters which are therein stated to be on his information or belief, and as to those matters, he believes it to be true. And the substance of the oath administered shall be stated in the jurat.

RULE IV. The plaintiff in his bill shall be at libery to omit, at his option, the part which is usually called the "common confederacy" clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff: also what is commonly called the "charging" part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defence to the bill: also, what is commonly called the "jurisdiction" clause of the bill,—that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may in the narrative or stating part of the bill, state and avoid, by counter amendments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also may contain a prayer for general relief; and if an injunction, or writ of *ne exeat*, or any other special order, is required, it shall be specially asked for.

RULE V. Process of subpœna to appear and answer shall be substantially in the following form:—

To A B, Defendant:

You are hereby commanded, in the name of the United States, to appear before the District Court of the county of , in the judicial district of the Territory of Minnesota, at , in said county, on or before the day of , 185 , to answer a bill of complaint in chancery, exhibited against you by E F, complainant, and on file in the office of the clerk of said court for said county, and to do further what the said court may order or direct. And this you are not to omit under the penalty which may be imposed by law.

Witness the Hon. , Judge of said
[L. S.] court, at , in said county, the day
of , 185 .

J H K, Clerk.

RULE VI. Process may be in the same form, expressive of the intent, as that heretofore used in courts of chancery. It shall be tested in the name of the judge of the district, on the day it is issued, or, if his office be vacant, in the name of any other judge: and be made returnable, at the place where the clerk's office is kept in which the bill is filed or decree or order entered, on any day except Sunday, either in term or vacation, when no other time is fixed by law, or in the order granting the same. It shall be filed with the proper clerk, on or after the return day.

RULE VII. In every case where no special provision is made by law as to security, the judge who allows an injunction shall take from the plaintiff or his agent a bond to the party enjoined, in such sum as may be deemed sufficient, and not less than five hundred dollars, either with or without sureties, in his discretion, conditioned to pay to the party enjoined such damages as he may sustain by reason of the injunction, if the court shall eventually decide that the plaintiff was not entitled to such injunction, such damages to be ascertained by a reference, or otherwise, as the court having jurisdiction of the cause in which such injunction issues shall direct. But he shall not allow the injunction upon the plaintiff's own bond only, without security, unless the plaintiff himself justifies in an amount double the penalty of the bond.

RULE VIII. When an injunction bill is filed to stay proceedings in a suit at law, the plaintiff shall state in his bill the situation of such suit, and whether an issue is joined or a verdict or judgment obtained therein.

RULE IX. If a preliminary injunction or a *ne exeat* is prayed for in the bill, the defendant may put in his answer on oath, for the purpose of moving thereon for the dissolution of the injunction or a discharge of the *ne exeat*, although an answer on oath is not required by law, or is waived by the plaintiff in his bill. But such answer shall have no greater or other force as evidence than the bill.

RULE X. An injunction or *ne exeat* shall not be dissolved or discharged, although the whole equity of the bill is denied by the answer, unless such answer is duly verified by oath; and where the plaintiff waives an answer on oath, if, in addition to the usual oath of the party, the material facts in the bill on which the injunction or *ne exeat* rests are duly verified by the affidavit of a creditable and disinterested witness, annexed to and filed with the bill, it shall not be a matter of course to dissolve the injunction or discharge the *ne exeat* on the oath of the defendant: but the court, in its discretion, may retain it till the hearing.

RULE XI. If the plaintiff waive the necessity of the answer being made on the oath of the defendant, it must be distinctly stated in the bill.

RULE XII. A defendant shall be at liberty by answer, to decline answering any part of the bill, or any interrogatory or part of an interrogatory from answering which he might have protected himself by demurrer; and the defendant may by answer protect himself from answering further, in the same manner and to the same extent as he could by plea; and he shall be at liberty so to decline

or protect himself notwithstanding he shall answer other parts of the bill from which he might have protected himself by plea or demurrer.

RULE XIII. If the bill has not been sworn to, the plaintiff may amend it at any time before plea, answer, or demurrer put in, of course and without costs. He may also amend of course, after answer, at any time before he replies thereto, until the time for replying expires, and without costs if a new or further answer is not thereby rendered necessary; but if such amendment requires a new or further answer, then it shall be on payment of costs to be taxed. He may also amend sworn bills, except injunction bills, in the same manner, if the amendments are merely in addition to and not inconsistent with what is contained in the original bill, such amendment being verified by oath as the bill is required to be verified; but no amendment of an injunction bill shall be allowed without a special order of the court and upon due notice to the adverse party, if he has appeared in the suit. Amendments of course may be made without entering any rule or order for that purpose, but the clerk shall not permit any amendments to be made unless the same appear to be duly authorized; and in every case of an amendment of course, the plaintiff's solictor shall either file a new engrossment of the bill with the clerk where the original bill is filed or furnish him with an engrossed copy of the amendments, containing proper references to the places and lines in the original bill on file where such amendments are to be inserted or made. But no amendment shall be considered as made until the same is served upon the adverse party, if he has appeared in the cause; and in all cases where the plaintiff is permitted to amend his bill, if the answer has not been put in, or a further answer is necessary, the defendant shall have the same time to answer after such amendment as he originally had.

RULE XIV. If the defendant demurs to the bill for want of parties, or for any other defect which does not go to the equity of the whole bill, the plaintiff may amend of course on payment of costs, at any time before the demurrer is noticed for argument, or within ten days after notice of the demurrer.

RULE XV. If any persons other than those named as defendants in the bill shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to other parties; and as to persons who are without the jurisdiction, and may properly be made parties, the bill may

pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

RULE XVI. In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

RULE XVII. Orders to which, by the rules and practice of the court, a party is entitled of course, shall be entered by a brief minute thereof, to be made by the clerk under the title of the cause in the book kept for entering the titles of causes and memoranda of the proceedings in such causes, as prescribed in the first rule. The day on which such order is made shall be noted in the entry thereof.

RULE XVIII. Service of notices and other papers shall be made upon the solicitor of the adverse party, where one is employed. In case of absence from his office, service may be made by leaving the same with his clerk or law-partner in such office, or with a person having charge thereof: and, if no person be found in the office, by leaving the same, between six in the morning and nine in the evening, in a suitable and conspicuous place in such office: or if the office be not open so as to admit service therein, by leaving the same at the residence of the solicitor, with some person of suitable age and discretion.

In all cases where the solicitors of the adverse parties do not reside in the same town, service of papers may be made by putting them into the post-office, properly endorsed, and directed to the solicitor of the adverse party at the place of residence of such solicitor, and paying the postage thereon.

RULE XIX. No service of notices or papers in the ordinary proceedings in a cause need he made on a defendant who has not appeared therein, except in cases especially provided for. For the purpose of this rule, a defendant is deemed to have appeared when he has served notice of appearance in person, or by solicitors on the opposite party.

RULE XX. The time of all notices of hearing, or of special motions, or the presenting of petitions, shall be at least eight days. Copies of the papers on which any special application is founded

shall be served on the adverse party the same length of time previous to the application, except where copies have been already served or the papers are on file, and then they shall be referred to in the notice. Service by mail shall be double time. Notices shall be requisite of all motions not allowed to be made *ex parte* by the former practice of the courts of chancery in England.

RULE XXI. When the defendant pleads or demurs to a bill, the plaintiff shall have ten days to file a replication to his plea or amend his bill; and if he does not take issue on the plea or amend his bill within the time, either party may notice the plea or demurrer for argument. If the plea is allowed, the plaintiff may, within ten days after notice of such allowance, take issue upon the plea, upon payment of costs occasioned thereby.

RULE XXII. The defendant may amend his answer of course and without costs on the entry of an order therefor, if the same is not excepted to, at any time within twenty days after the same is filed and before the cause is noticed for hearing on bill and answer, or on bill, answer and replication, and before notice of an application for a reference to take proofs, or order that the testimony be taken in open court: but he shall not so amend more than once. And when the answer is excepted to, the defendant may, within five days thereafter, amend the same on payment of the costs of the exceptions answered. In case of amendment, the defendant shall file a new engrossment of the answer with the clerk, or an engrossed copy of the amendments with references to the place in the answer on file where the amendments are to be inserted or made. No amendment shall be considered as made until a copy of the amended answer, or of the amendments and references, is served on the adverse party; and in all cases, the plaintiff shall have the same time to reply or except to an amended answer which he originally had.

RULE XXIII. When the answer is to the whole bill, the plaintiff shall have ten days after such answer is put in and notice thereof given, to except to the same: or if the answer is to part of the bill only, he shall have ten days after the plea or demurrer to the residue of the bill has been allowed or overruled, to except to such answer; at the expiration of which time, if no exceptions are taken and no order for further time has been granted, the answer shall be deemed sufficient. Exceptions to an answer shall not prevent the dissolution of an injunction, or discharge of a *ne exeat*.

RULE XXIV. On excepting to an answer for insufficiency, if all

the exceptions are submitted to by the defendant, or a part are submitted to and the rest abandoned, the plaintiff may give notice that the defendant put in a further answer within twenty days after such notice, or that an attachment will issue, or the bill be taken as confessed, at the election of the plaintiff.

RULE XXV. If the defendant does not put in a further answer within the time prescribed, or within such further time as may be allowed by the court, the plaintiff, on filing an affidavit showing such default, may have an order of course to take the bill as confessed, or, on application to the court, may have an order that an attachment issue. When exceptions for insufficiency are allowed by the court, the defendant shall put in a further answer within ten days after notice of the order, or the bill may be taken as confessed, or an attachment be issued.

RULE XXVI. If the plaintiff does not reply to the defendant's answer within ten days after it is deemed sufficient, he shall be precluded from replying, unless further time is granted. No special replication shall be filed but by leave of the court on cause shown.

RULE XXVII. Where the cause stands for hearing on bill and answer against part of the defendants, if the plaintiff does not use due diligence in proceeding against the other defendants, any of those who have perfected their answer may apply to dismiss the bill for want of prosecution; and on such application further time shall not be allowed to the plaintiff of course, without any excuse shown for the delay.

RULE XXVIII. Within thirty days after the filing and service of a replication, either party may give notice of an application to the court for a reference to take testimony, or that the proofs and evidence in the cause be taken in open court in term-time or in vacation. If no such notice be given within that time, nor further time allowed, the cause shall be brought to a hearing upon the pleadings without proofs.

RULE XXIX. Upon a reference to take testimony, either party may, within twenty days thereafter, give notice of the time and place of taking testimony before the referee, which notice shall not be less than six days. The referee shall proceed in the taking of testimony from day to day until the witnesses on both sides are examined, and the documentary and written evidence on each side is produced, proved and marked: and shall not adjourn, except by consent of the parties or counsel, or for good cause shown, or to procure the attendance of a witness who is absent, after due dili-

gence to procure him, for any longer period at one time than three days. Testimony may also be taken by deposition, in the cases and manner provided by statute, at any time before the testimony in the cause is closed.

RULE XXX. The referee shall mark all the written and documentary evidence produced and proved, or offered before him as exhibits, and annex the same to the depositions, if any, and his return. He shall take down the testimony as nearly as may be in the language of the witnesses, omitting such parts as are clearly immaterial. If any witness, evidence, question or answer is objected to, he shall note the objection, and then receive or take down the evidence. He shall return the depositions and exhibits, after the testimony shall be closed, with all convenient speed to the office of the clerk with whom the bill of complaint is filed. When the witnesses produced before the referree are all examined and the exhibits marked, and no further adjournment shall be allowed as provided in the preceding rule, the testimony shall be considered closed; and no further proofs shall be taken within the Territory, except by leave of the court, on a special application after notice. If objectionable testimony be received, it may be stricken out on the hearing. When both parties appear before the referee, the proofs of the party holding the affirmative shall be taken first: then those in answer thereto: and then those in reply, unless the referee otherwise direct.

RULE XXXI. The witnesses shall subscribe their depositions respectively after the same are read over to them. No alteration shall be made in testimony after it is written down. If a witness wishes to correct or explain any statement in his deposition, the correction shall be noted at the bottom before signing. The party producing a witness shall examine him first: then the other party may cross-examine him: and then the party calling him may re-examine him as to the matter of the cross-examination, and no further examination shall be had; but this shall not prevent the other party from calling him as a witness to prove his own case. The referee shall certify at the bottom of each deposition that the same was subscribed and sworn to before him.

RULE XXXII. Process of subpœna to compel the attendance of witnesses before the court, or a referee, or master, shall issue of course, and the time and place of attendance shall be specified in the writ.

RULE XXXIII. Where the testimony in a cause shall have been taken in open court, any party intending to appeal from an order or

decree entered therein shall, within twenty days after notice of said order or decree, prepare and serve a case containing the evidence and proceedings on the hearing only, which shall be amended and adopted, or settled in the same manner as cases in actions at law, and within the same times.

RULE XXXIV. Causes shall be noticed for hearing for the first day of term when heard in term-time. A note of issue, specifying the date of the issue, shall be delivered to the clerk who is to make up the calendar, at least four days previous to the commencement of the term; and the clerk shall thereupon place the causes upon the calendar according to their date, immediately after enumerated motions in actions at law. Each party shall deliver to the court and opposite party, at the hearing, a copy of the points and authorities on which he relies.

RULE XXXV. Costs shall in all cases be taxed by the clerk, subject to review by the court on appeal. When relief is granted on payment of costs, the payment is a condition precedent. When costs are ordered to be paid and no time of payment is fixed in the order, the party whose duty it is to pay the same shall have ten days after notice of the order and until the amount is ascertained by taxation, if not specified in the order.

RULE XXXVI. Whenever notice of a motion shall be given and no one shall appear to oppose, the party moving shall be entitled, on filing an affidavit of service, to the relief or order asked for in the notice. If the party giving such notice shall not appear, or shall not make the motion, the opposite party appearing shall be entitled to costs for opposing and an order dismissing the motion, on filing proof of service of the notice on him.

RULE XXXVII. Whenever a Justice or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify.

RULE XXXVIII. No re-hearing shall be granted after the term at which a final decree of the court shall have been entered, if an Appeal lies to the Supreme Court, except upon the ground of irregularity in the first hearing, or newly discovered evidence.

RULE XXXIX. The same notice of the sale of mortgaged premises under a decree shall be given as is required by law of sales of real estate on execution.

RULE XL. It shall be the duty of every solicitor or other officer of this court to act as the guardian *ad litem* of an infant defendant in any suit or proceeding, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian

to examine into the circumstances of the case so far as to enable him to make the proper defence when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable.

RULE XLI. It shall not be necessary to recite the substance or any portion of a bill, petition or affidavit in any decree or order founded in whole or in part thereon, but shall be sufficient merely to refer to the same, when necessary to render the decree or order intelligible.

RULE XLII. One counsel on a side only shall examine or cross-examine a witness; on the hearing of a cause or motion, no more than one counsel shall be heard on each side, except by permission of the court.

RULE XLIII. The eleventh, twelfth and thirteenth rules of practice in actions and proceedings at law on the Territorial side of the court, relating to the issuing and return of commissions and the taking of testimony without the Territory, shall apply to suits and proceedings in equity.

RULE XLIV. In cases where these rules or the statutes do not apply, the practice shall be regulated by the former practice of the Court of Chancery in England—not as a positive rule, but as furnishing an outline and guide to regulate the same.

TERRITORY OF MINNESOTA,
ss.

I, George W. Prescott, Clerk of the Supreme Court of said Territory, do hereby certify that the foregoing are true copies of the Rules of Practice in the Supreme Court aforesaid and for the District Courts in said Territory, as adopted by the said Supreme Court at the July Term, 1852, as appears from the originals on file in my office.

Witness my hand and official seal, at the Capitol in
[L. S.] the City of St. Paul, this first day of May, A. D. 1858.

GEO. W. PRESCOTT,
Clerk of Supreme Court.

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Speech about Civil War Volunteers

In early July 1862, the War Department called for 300,000 volunteers from the states.[64] On July 12th, Fuller spoke to an audience at the local Baptist Church to discuss conscription and the status of the war. His address was paraphrased in the *Brockport Republic*, and is one of the few times we can read his words off the bench.

The War Meeting.

Meeting in This Village.

> Pursuant to a call issued in posters, a large though not crowded audience convened at the Baptist Church on Saturday evening last. The meeting was organized by the election of Thos. Comes, President; N. P. Pond and J. W. Adams, Secretaries. Hon. E. B. Holmes, we are informed, addressed the meeting ably and patriotically.
>
> Jerome Fuller, Esq., next addressed the meeting. We did not hear his opening remarks. He said our farms will be worth, nothing if we do not preserve our country—our stores will be worth nothing, and if we would maintain the blessings with which we are surrounded, we must make sacrifices for them the same as all other countries have made sacrifices to maintain their rights, and blessing. — Our rights alone can be maintained by making great sacrifices. If this 300,000 men are not forthcoming we cannot put down this rebellion and maintain our laws. If this rebellion is put down, it must be put down by the white men of the North. The negroes should be used as auxiliaries so far as they can be and maintain the laws. I should like to see all the slaves free; but they cannot be made free until this rebellion is put down. (The speaker next proceeded to speak of what the Republicans, Democrats and Abolitionists had done in sustaining the federal government. Believing the speaker's remarks inopportune, we did

[64] James McPherson, *Battle Cry of Freedom: The Civil War Era* 492 (Oxford Univ. Press, 1988) ("On August 4 [1862} the War Department imposed on the states a levy of 300,000 nine-month militia *in addition to* the 300,000 three year volunteers called for a month earlier.")(emphasis in original).

not note them. He was very severe on the Abolitionists, as he styled those who favor using the slaves in behalf of the federal causes). He proceeded to say that the gun and bayonet not are the only effectual arguments against slavery. This rebellion requires our united aid to put it down. Men of all parties should come forward and co-operate for the suppression of the rebellion. The country has a right to the services of the young men. They are indebted to it for their birth, education, and all the blessings that surround them. In conclusion he said that the object of this meeting was not so much to get recruits as to talk over matters. [65] •

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Acknowledgments

The photograph of Fuller on the title page and page 35 was provided the MLHP by Samantha Mahoski, Curatorial Assistant/Outreach Coordinator, and Elsa Prigozy, a volunteer librarian, at the Hart Cluett Museum formerly called the Rensselaer County Historical Society, in Troy, New York. It is Ms. Mahosli's opinion based on her examination of the book of portraits of delegates to the State Constitutional Convention of 1867 that the signature under the portrait of Jerome Fuller is his.

The photograph of Fuller's former home in Brockport is from the Emily L. Knapp Museum & Library of Local History, Brockport, New York. For that photo and referral to his obituary in the *Brockport Republic*, the MLHP is indebted to Sarah Cedeño, Brockport Village Historian and Lecturer in the English Department College at Brockport, State University of New York.

We are indebted to Vicente Garces, Reference Administration and Web Services Librarian, University of Minnesota Law School, for locating the 3d Legislature's amendment in 1852 to the Revised Statutes of the Territory of Minnesota, granting authority to the Supreme Court to adopt rules of practice later that year.

[65] *Brockport Republic*, July 17, 1862, at 3.

This biographical sketch and most articles posted on the MLHP could not have been researched and written without access to the archives of the Minnesota Historical Society.

We also acknowledge our admiration for and reliance upon Michael F. Holt's *The Rise and Fall of the American Whig Party: Jacksonian Politics and the Onset of the Civil War* (Oxford Univ. Press, 1999). It is indispensable to students of Minnesota's territorial era.

Related Articles

"The Minnesota Supreme Court's First Rules of Practice." (MLHP, 2016) (published first, 1850).

"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." (MLHP, 2016) (published first, 1858).

For multiple examples of how Fuller's tenure on the court has been erroneously reported in histories published in Minnesota in the nineteenth and twentieth centuries, see Douglas A. Hedin, "Documents Regarding the Terms of the Justices of the Territorial Supreme Court: Part One: Introduction" 1-15 (MLHP, 2009-2010).

For the accurate dates of Fuller's service on the court, see "Documents Regarding the Terms of the Justices of the Territorial Supreme Court: Part Two-C: Chief Justices Jerome Fuller and Henry Z. Hayner" (MLHP, 2009-2010).

For Fuller's refusal to issue an advisory opinion on the constitutionality of the Maine Liquor Law to the Territorial House of Representatives, see Douglas A. Hedin, "Advisory Opinions of the Territorial Supreme Court, 1852-1854" 8-11, 36-37 (MLHP, 2009-2011).

For the politics behind Fuller's recess appointment by President Fillmore and failure to be confirmed by the United States Senate, see Douglas A. Hedin, "'Rotation in Office' and the Territorial Supreme Court" 12-14, 27-31 (MLHP, 2010-2011).

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Posted MLHP: July 31, 2016;
Photographs added on December 10, 2020..