Rules of Practice

of the

Supreme Court and District Courts

of the

TERRITORY OF MINNESOTA

(July 26, 1852)

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FOREWORD

BY

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Editor, MLHP

In 1858, after Minnesota became a state, the opinions of the Territorial Supreme Court were collected by Harvey Officer, a St. Paul lawyer, and published as the first volume of Minnesota Reports. In an advertisement at the beginning of his volume, Officer describes how he compiled the court's rulings. He re-published those previously published in Appendices to the 1853 Session Laws by court reporters William Hollinshead and Isaac Atwater as well as those subsequently reported by John B. Brisbin and Michael Ames, the last two court reporters. He also took pains to track down missing or lost opinions by speaking to retired justices and placing notices in the newspapers requesting their return. The advertisement also states:

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

ADVERTISEMENT.

This volume of Reports of the Supreme Court of Minnesota Territory is submitted to the criticism of the Bar with some reluctance by the Reporter, and he deems a few words of explanation necessary before presenting it. Upon entering upon the duties of the office, in December last, he determined to complete the publication of the volume which had been commenced by Mr. AMES as soon as practicable, and for that purpose obtained from the Clerk's office the record and file of every case which had not been reported. These files were carefully examined, and many of them found to be imperfect and incomplete—some for want of an Opinion, others lacking "points and authorities," and in some cases the whole judgment-roll could not be found. Diligent enquiry was made for the missing files throughout the different offices in the city, and a notice published in the public papers requesting that these files should be handed to the Clerk of the Court.

In July 1857, our State Capitol narrowly escaped destruction by fire, and in the confusion of the hour the papers in the Clerk's Office were necessarily scattered. Some few papers belonging to the Supreme Court files have been since found in the Office of the Secretary of the Territory. I am informed by Judge SHERBURNE that he filed written Opinions in all cases which were assigned to him by the Court, with a single exception; doubtless the other members of the Court were equally industrious, but their Opinions have been lost.

These facts, it is hoped, will satisfactorily explain the meagre state of some of the later reports. They have been reported as fully as the record in each case would allow. But it is confidently believed that the volume, with all its imperfections, contains reports of much interest and value to the Bar of the State. Wherever the record justifies it, the report of each case contains a short history of the cause, the points made and authorities cited by the respective counsel, the Opinion of the Court, and a syllabus or digest of the same. Much labor was bestowed upon the Index. No apology is needed for merging "HOLLINSHEAD'S" and "ATWATER'S Reports" in this, the first of Minnesota Reports. It is hoped that those having charge of the publication of the future Reports of the Supreme Court of the State will retain this title.

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.

In some few cases where Opinions were filed in the District Court and the judgment below affirmed, the same have been published *as* District Court Opinions. It was designed to add an appendix containing a number of the Opinions of the Judges of the several districts in cases of importance, but they could not be obtained.

HARVEY OFFICER.

ST. PAUL, July 14, 1858.

The Rules adopted by the Territorial Supreme Court in July 1852 were actually the second set of rules adopted by that Court. The first set was adopted on January 16, 1851. The Court was composed of Chief Justice Aaron Goodrich and Associate Justice David Cooper and Bradley B. Meeker.[1] President Fillmore cashiered Goodrich on October 21, 1851, and gave Jerome Fuller a recess appointment as Chief Justice. After he arrived in the Territory, 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.[2] Without statutory authorization, his court could not adopt rules of practice. He lobbied the Third Minnesota Legislative Assembly which convened in St. Paul on January 7, 1852. On March 6th, the last day of the session, the Assembly empowered the Supreme Court 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 govern-***

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[1] They were published as a 56 page pamphlet.in 1851. They are posted as "The Supreme Court's First Rules of Practice." (MLHP, 2016).

[2] 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.

> *ment of the several district courts, not inconsistent with the provisions of this act, as it may deem proper.*[3]

On July 26, 1852, the Chief Justice and Associate Justices David Cooper and Bradley B. Meeker adopted the second set of Rules of Practice for the Supreme Court, the District Courts and the Chancery Court. [4]

The Fuller Court's Rules are posted below. They can also be found in the Appendices to "The Minnesota Supreme Court's First Rules of Practice (MLHP, 2016), Douglas A. Hedin, "Chief Justice Jerome Fuller (1808-1880)" (MLHP, 2016), and Harvey Officer's "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).

The Rules of Practice of the Minnesota Supreme Court adopted in 1867, 1872, 1878, 1895, 1913 and 1915 are also posted on the MLHP. The revisions to the Rules over time are important because they reflect changes in appellate practice and also the practice of law in the Nineteenth and early Twentieth Centuries. ▪

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[3] 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 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.

[4] For the story of how legislation was enacted enabling the Territorial Supreme Court to adopt these Rules, see Douglas A. Hedin, "Chief Justice Jerome Fuller (1808-1880)" 22-29 (MLHP, 2016).

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

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 the City of St. Paul, this first day of May, A. D. 1858.

[L. S.]

GEO. W. PRESCOTT,
Clerk of Supreme Court.

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