THE FIRST RULES OF PRACTICE

OF THE COURTS

OF THE

TERRITORY OF MINNESOTA

ADOPTED BY THE SUPREME COURT

JANUARY 16, 1850

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FOREWORD

BY

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Editor, MLHP

On Monday, January 14, 1850, the Supreme Court of Minnesota Territory convened for the first time.[1] Present were Chief Justice Aaron Goodrich and Associate Justice David Cooper. The third member, Bradley B. Meeker, was absent. On January 16, the third day of this initial term, the court adopted rules of practice.[2] Here are the minutes of the court:[3]

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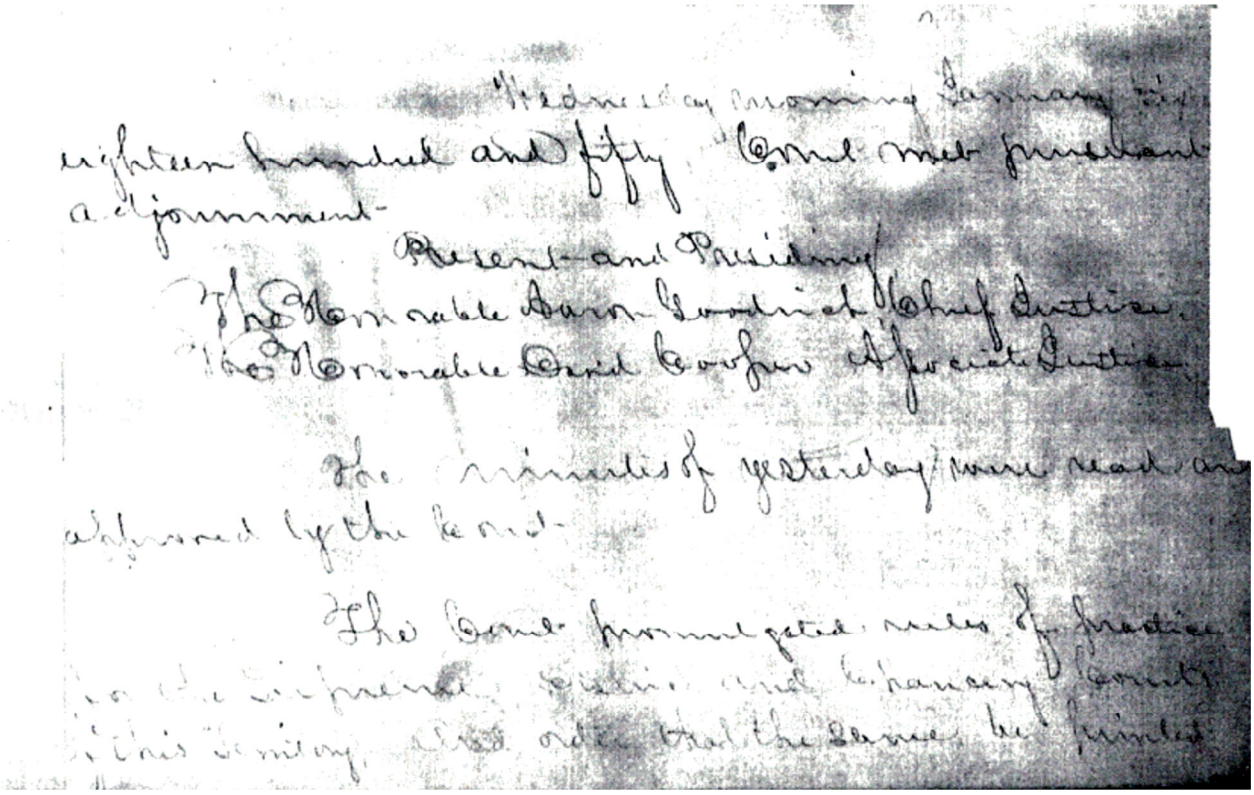
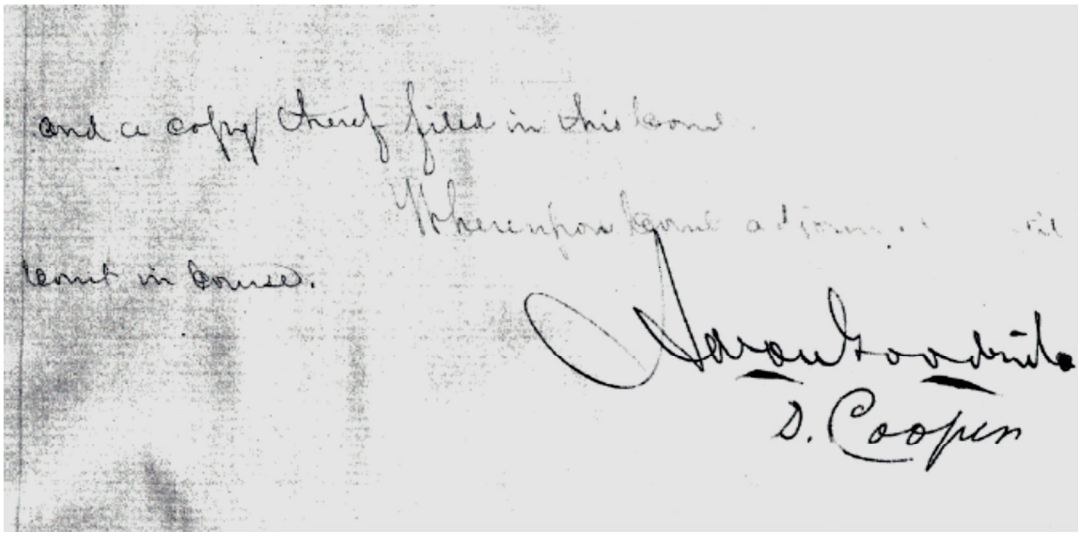
[1] With the passage of the Organic Act on March 3, 1849, Congress established Minnesota Territory. The First Legislative Assembly required that the "first session" of the court "shall commence on the second Monday of January in each year." Minn. Terr. Stat., c. 69, Art. I, §2, at 45 (1851).

[2] The rules are posted on pages 7-31 below. They were first published as "Rules of Practice for the Supreme, District, and Chancery Courts of the Territory of Minnesota" by McLean & Owens, a St. Paul printing company, in 1850.

[3] Territorial Supreme Court, Minute Book A. 1850-1858, at 2-3 (Minnesota Historical Society). The minutes start on the bottom of page 2 and continue to the top of page 3.





Wednesday morning, January 16
Eighteen hundred and fifty. Court met pursuant to adjournment.
Present and presiding,
The Honorable Aaron Goodrich, Chief Justice.
The Honorable David Cooper, Associate Justice.
The minutes of yesterday were read and approved by the Court.
The Court promulgated rules of practice for the Supreme, District and Chancery Courts of this Territory. And ordered that the same be printed and a copy thereof filed in this Court.
Whereupon Court adjourned until Court in course.
Aaron Goodrich
D. Cooper

The rules were published that year in a 56 page pamphlet by McLean & Owens, a St. Paul printing company.[4] They raise many questions, the answers to which require conjecture.

Initially, who wrote them? Professor Robert C. Voight, Goodrich's biographer, describes the Territorial Supreme Court's first term in January 1850 in the American House in St. Paul:

> **On the third day of the term Goodrich announced the rules of practice for the several courts of the territory. He read the rules with pride, for he had written them, probably working during the long night hours in his room at the America House.[5]**

That he spoke with pride cannot be doubted, as he had a high degree of self-regard. That he wrote them himself is doubtful. At that time (and now) lawyers drafted documents after examining previously published versions or examples of those documents in practice manuals, form books and so on. Most certainly Goodrich referred to, relied on, revised and copied court rules already in use in other jurisdictions—probably Tennessee, his home state, or New York, whose courts were very influential at the time. [6]

Second, by what authority did the Goodrich Court adopt the rules? This question has befuddled scholars. In fact, the First Territorial Legislative Assembly, meeting in late 1849, passed a law granting authority to the Supreme Court and the Chancery Court to make rules of practice:

> **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.**
>
> **. . .**

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[4] For some reason, blank pages outnumber pages of text in this pamphlet—32 blank to 24 with text.

[5] Robert C. Voight, "Aaron Goodrich, Stormy Petrel of the Territorial Bench," 39 *Minnesota History* 141, 146 (1964).

[6] Attempts to locate Goodrich's rule models have been unsuccessful —but the search continues.

> **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.** [7]

These sections have been overlooked by recent academic scholars.[8] **This may be due in part because they were repealed by the Revised Statutes, published in September 1851.**[9]

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[7] 1849 Laws, c. 20, §9, at 56 (pertaining to the Supreme Court); and c. 20, Ch. II, §3, at 59 (pertaining to the Court of Chancery) (effective November 1, 1849).
Section 9 of the Organic Act provided in part:

> 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....

[8] Dean Pirsig and his co-author overlooked them in an 1989 article where they sketch the background of the Goodrich court's adoption of rules of practice in 1850:

> Early in its first term, the new territorial supreme court of Minnesota promulgated its own rules of practice. It is uncertain though how authority for making such rules came about; there was no mention in the Organic Act of which branch of government should govern the rules of court. It is likely that the court believed it was their inherent power and a necessity that they promulgate rules. The lawyers and judges in the new territory came from various legal backgrounds and experiences. This was cause for a great deal of confusion over the proper rules of practice. The court's promulgated rules were probably just an attempt at uniformity by the justices. It is also possible that the court found support for their decision to promulgate rules in a 1836 statute passed by the legislative assembly of the Wisconsin Territory. This law, directing the Wisconsin territorial supreme court to promulgate rules for that Wisconsin's laws would remain in effect instead of Iowa's was that most of the inhabitants of the Minnesota territory resided east of the Mississippi at the time of the Organic Act. Because Wisconsin's laws had governed them before the creation of the Territory of Minnesota, it was only natural that they continue in effect both the supreme court and the district courts, was in force in Minnesota by virtue of the Organic Act.

Maynard E. Pirsig & Randall M. Tietjen, "Court Procedure and the Separation of Powers in Minnesota," 15 William Mitchell L. Rev.141, 148-9 (1989) (citing sources).

[9] They were repealed by Stat. c. 137, §3, at 578-79 (approved March 31, 1851). This section lists 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. However, many of the sections of Chapter 20 were recodified in Chapter 69 of the Revised Statutes pertaining to the powers of the Supreme Court and Chancery Court; but the two sections granting rule making authority to them, quoted above, were not included, probably inadvertently. Compare Statues, c. 69, Art. I, §§ 5-6, at 286 (Supreme and District Courts) and c. 94, at 461-471 (Chancery Court) (1851).
The 1851 Revised Statutes were prepared by Morton S. Wilkinson, Lorenzo A. Babcock and William Holcombe. In a Preface, Wilkinson writes: "Owing to the limited time the revisors had in which to accomplish the compilation and revision of the laws, it was found entirely impossible to review together the chapters they had severally prepared, previous to reporting." The 1851 Revised Statues can be found on the website of the Revisor of Statutes.

Finally, were the rules implemented? It is difficult to even speculate on whether they were followed by the bar and enforced by the courts. Newspaper accounts of trial court proceedings at that time did not mention court rules, nor did the justices in the decisions they issued in the July 1851 term—the first and only term of the Supreme Court under Chief Justice Goodrich.

On July 26, 1852, a second set of Rules of Practice for the Supreme Court, the District Court and the Chancery Court were adopted by the Supreme Court led by Chief Justice Jerome Fuller. Those rules did not repeal or even mention the 1850 rules. Curiously, when Harvey Officer, a St. Paul lawyer, published a volume of the Rulings of the Territorial Supreme Court in July 1858, he included the Fuller Court's rules in an Appendix, but ignored the rules adopted by the Goodrich Court in 1850. [10]

On March 6, 1852, the Third Legislature amended the Revised Statutes to empower the Supreme Court to adopt rules of practice. 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). The 1852 Amendments are tucked away in the Appendix to the 1851 Revised Statutes. See also discussion of the adoption of this amendment in "Chief Justice Jerome Fuller 1808-1880)" 22-29 (MLHP, 2016).

The story continues into the next legislative session. On March 5, 1853, the Fourth Territorial Legislature passed an act 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:

> 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).

Thus, in three of its first four sessions, the Territorial Legislature granted rule making authority to the Supreme Court.

[10] All opinions of the court were collected by Harvey Officer, a St. Paul lawyer, 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). The Fuller Court's rules of practice are published in the Appendix to the volume, at 449-468.

The Supreme Court's first Rules of Practice adopted on January 16, 1850, are posted here, followed by the second Rules adopted on July 26, 1852, in the Appendix. This will enable comparisons of the two.

There are very few extant copies of the pamphlet of first Rules of Practice published by McLean & Owens in 1850. The Minnesota Historical Society has one. And it is due to special efforts by several librarians at the Historical Society that the Minnesota Legal History Project acquired a photocopy of this pamphlet and is able to post it here for its viewers. The MLHP is grateful for their assistance.

Related Articles

"Chief Justice Jerome Fuller (1808-1880)" (MLHP, 2016).

"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).

RULES OF PRACTICE

IN THE

COURTS OF MINNESOTA.

RULES OF PRACTICE

FOR THE

SUPREME, DISTRICT,

AND

CHANCERY COURTS

OF THE

TERRITORY OF MINNESOTA.

Adopted by the Supreme Court of said Territory, at St. Paul, on the 16th day of January, 1850.

SAINT PAUL:

PRINTED BY M'LEAN & OWENS.

1850.

RULES

Regulating the Practice in the Supreme Court of the Territory of Minnesota.

CHAPTER I.

ATTORNEYS.

1. Attorneys will be admitted only upon satisfactory proof of good moral character and examination in open Court.

2. No Attorney will be permitted to appear in any cause in which either he, or his partner, if he have any, has acted as Judge of Probate, Justice of the Peace or other Judicial capacity.

3. All agreements between Attorneys touching any matter of business in Court, shall be in writing and filed; otherwise they will not be noticed by the Court.

4. Alternate speaking will not be allowed. The Counsel maintaining the affirmative side of the issue or question, shall have the conclusion; having previously given notice to his adversary, of the legal authorities and points of law upon which he intends to rely.

5. But two Counsel on each side, will be heard by the Court in any cause; and on hearing rules and motions, but one Counsel on a side will be permitted to address the Court.

6. Attorneys may be suspended from the practice, or dismissed from the Bar, or stricken from the roll, for any mal-practice, misdemeanor or other improper or unprofessional conduct, upon motion and cause shown in open Court; or may be summarily expelled for any contempt of Court.

7. Attorneys upon their admission, shall take an oath to support the Constitution of the United States, to demean themselves, in the office of Attorney within this Court, in a cautious and gentlemanly manner, and to act with all due fidelity as well to the Court as to the client.

CHAPTER II.

CLERK'S DUTIES.

1. The Clerk shall keep his office at the seat of Government, and may appoint a Deputy, who, upon taking an oath faithfully to perform the duties of the office, may do and perform all things appertaining to said office.

2. The Clerk shall provide and keep a "*General Docket*," in which he shall enter the names of all the officers of the Court; all suits, actions and proceedings at law and in equity; the names of the parties to the record; the number and term of all proceedings; the date of issuing writs or other process; the title of such process; the Court or officer to whom directed; the filing of bond and issuing certificate of supersedeas; together with all rules, motions, orders, decrees and judgments in each cause, and an exhibit of the fees of the several officers.

3. There shall also be provided and kept a "*Judgment Record*," in which shall be entered the names of the parties, debtor and creditor; the date of the judgment, its number and term, and the amount of such judgment or decree; and the amount of costs.

4. There shall be a "*Court Journal*" in which shall be entered by the Clerk, in brief, all proceeding in Courts upon any cause.

5. There shall also be kept by the Clerk a "*Special Motion Book*" and a "*Common Rule Book*," in which shall be entered by the several Attorneys making or asking them, all motions and rules, in each and every cause, whether made or asked in vacation or in term time.

6. The Clerk shall file all papers presented to him and shall 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 agreement of parties or permission of Court.

7. At the commencement of each term, the Clerk shall furnish the Court and Bar each with a list of all causes then pending.

8. The Clerk shall issue no process without a precipe signed by the party, his agent or Attorney.

CHAPTER III.

ORDER OF BUSINESS IN COURT.

1. All suits, actions and proceedings will be disposed of according to their number and term, in regular order; and where a suit or other proceeding is called up and the parties not ready to proceed, it may be placed at the foot of the list.

CHAPTER IV.

MOTIONS.

1. Either party may in vacation enter a motion for a rule to be asked for at the next term; and after notice has been given to the opposite party, either party may upon legal notice proceed to take testimony to be read on the final hearing of the rule.

2. *Ex parte affidavits* may be filed and read as the foundation for an original rule or motion.

3. All motions pending before the term shall be placed upon the trial list under proper heads.

CHAPTER V.

NOTICES.

1. All notices shall be in writing and signed by the party, his agent or Attorney; and served by delivering a true copy to the adverse party, his agent or Attorney; or by leaving it at his or her place of residence, office or usual place of business.

2. Where there is an Attorney of record, notice to the Attorney of the party will be sufficient.

3. Notices in pursuance of any rule, order, motion, decree, or other proceeding, shall have prefixed thereto, a true copy of such rule, order, motion, decree or other proceeding; together with the reason upon which such rule or motion is founded, and the affidavit, if any.

4. All notices upon motions for rules, or where rules or other proceedings are to be asked for, if in vacation shall be given ten days, and at least one day if in term time.

5. If a non-resident be entitled to notice in any case, such notice may be given by mailing the same directed to him, her or them, by their proper name at the nearest Post Office, to his, her or their place of residence, and pre-paying the postage.

6. Where notice is given by mail, in addition to the length of time which the party should have after service, shall be computed the time required for the mail to reach him and his reply return.

7. Notice can only be proved by producing a duplicate of the notice served, with a written endorsement thereon of the time and manner of service, verified by affidavit.

CHAPTER VI.

PAPER BOOK OR BRIEF.

1. Any party who shall take an appeal, certiorari, bill of exceptions, or writ of error to this Court, shall on or before the first day of the term to which the record is returnable, make up a "*Paper Book or Brief*" containing a fair, impartial and succinct history of the cause, its trial, the testimony and proceedings in the Court below, together with the exception, (if any) and a list of the authorities upon which such party intends to rely upon the trial; and shall furnish each member of the Court with a copy thereof; also one to the adverse Counsel.

2. Before delivering said "*Paper Books*," the plaintiff in error shall note to each point, the legal authorities upon which he intends to rely.

3. Within one day after the receipt of such copy, the Counsel for the defendant in error shall furnish to his adversary a list of the authorities, so far as he is able, upon which he will rely.

CHAPTER VII.

REPORTER.

1. The Reporter shall attend at any term of the Court, and shall keep a faithful record, and make a faithful report of any cause heard therein.

2. He shall keep a memorandum of the arguments made and the authorities cited upon the various points in each cause; and at the end of each term, shall have his report ready for publication if required by the Court.

3. He shall be entitled, upon receipting to the clerk, to take from his office all papers filed; but in no case, shall be permitted to retain them a longer period than twenty days.

CHAPTER VIII.

RULES.

1. Rules may be taken upon any offices of the court, of course, to return or perfect proceedings, to bring in the body or pay over money; and if the party ruled fail to comply, an attachment may issue returnable forthwith, and the matter be proceeded in as the merits of the case shall require.

CHAPTER IX.

WRITS AND OTHER PROCESS.

1. All writs or other 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 they issue, endorsed with the style of the suit, the name of the person ordering the same, together with the number and term of the suit.

2. All writs or other process shall be made returnable to the first day of the ensuing term; and process issuing during term time may he made returnable upon any day of such term. Yet the defendant shall at all times be entitled to the notice contemplated by the statutes, as fixed by the Court.

RULES OF PRACTICE

FOR THE

DISTRICT COURTS.

CHAPTER I.

ATTORNEYS.

1. Attorneys will only be admitted upon satisfactory proof of good moral character and examination in open Court.

2. No Attorney will be permitted to appear in any cause in which either he or his partner, if he have any, has acted as Judge of Probate, Justice of the Peace, or in other Judicial capacity.

3. No Attorney shall be permitted to be bail in any cause pending in any of the Courts in which he may practice.

4. All agreements touching any matter of business in Courts shall be in writing and filed; otherwise they will not be noticed by the Court.

5. Alternate speaking will not be allowed. The Counsel maintaining the affirmative of every issue or question shall have the conclusion, previously giving notice to his adversary, of the legal authorities and points of law upon which he intends to rely.

6. Ordinarily but two Counsel on a side will be heard by the Court or Jury; and in cases of appeal, rules, motions, and certioraris, but one on each side will be heard.

7. Attorneys may be dismissed and their names taken from the bar, or suspended from the practice, for any mal-practice,

misdemeanor, or other improper or unprofessional conduct, upon motion and cause shown in open Court.

8. Upon admission each Attorney shall have administered to him, by the Clerk, 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 Attorney within this Court, in a courteous and gentlemanly manner; and that you will act with all due fidelity as well to the Court as to the client. So help you God.*"

CHAPTER II.

CLERK'S DUTIES.

1. The Clerk shall file all papers presented to him in each cause, and shall endorse thereon the style of the suit, its number and term, the character of the paper, the date of filing; and the Court will take no notice of any paper, unless marked " filed " by the Clerk.

2. At the commencement of each term the Clerk shall furnish the Court and Bar each with a list of all civil causes pending, under distinct headings.

First, *Issues.*—Which shall embrace all causes pending from any previous term, and all causes returnable to the present term in which *issues in fact* have been joined.

Second, *Appearances.*—Which shall comprise all causes returnable to the present term, in which issues in fact have not been joined.

Third, *Arguments.*—Which shall include all issues of law, whether upon demurrer, plea, rule, motion, or otherwise.

Fourth, *Chancery.*—Which shall include all causes on the equity side of the Court.

Fifth, *Criminal.*—Which shall embrace all criminal cases.

3. Whenever the pleadings in any cause will warrant it, it shall be the duty of the Clerk to put such cause upon the trial docket.

CHAPTER III.

CONTINUANCES.

1. No continuance can be had in any cause after the same has been put at issue, and placed upon the list for trial, unless the party asking it will make and file with the papers in the Court, an affidavit showing, to the satisfaction of the Court, that

he has a good cause of action or meritorious defence—that he has material witness or witnesses absent, naming them and their place of residence, or that he has other important testimony absent without his procurement, and without which he cannot safely proceed to trial.

2. No second or subsequent continuance can be had, unless in addition to the foregoing reasons, he shall further show, that he has used due diligence to procure such testimony, since the last term; and that to the best of his knowledge and belief he cannot go safely to trial in the absence of such testimony; and that this continuance is asked for justice and not delay.

3. Continuances of motions, rules, and issues of law generally, can only be had upon good cause shown by affidavit, and under such conditions as the Court may see fit to impose.

CHAPTER IV.

ORDER OF BUSINESS IN COURT.

1. Business on the Federal side of the Court, will be first disposed of.

2. The *Argument List* will next be called over and disposed of.

3. The "*Issue Docket*" will then be taken up and causes disposed of according to their priority of number and term; and when causes are regularly reached, they will either be tried, continued, *non pros*, and judgment entered, or placed at the foot of the list.

4. On the morning of the third day of the term the *Appearance Docket* will be taken up and called over; and when the defendants have been duly served with process, and no declaration filed, judgment of *nonsuit* will be entered; and where declarations have been filed on or before the first day of the term, and no plea in, judgments of *default* will be entered against the defendants.

CHAPTER V.

COSTS.

1. It shall be the duty of the Clerk to tax the costs in each suit within ten days after trial or judgment.

2. And if the party entitled to costs, his agent or attorney, shall not, within the said ten days, make and file with the Clerk an affidavit, stating therein the number and names of his wit-

nesses, the number of days each was in attendance, the number of miles each witness had to travel within the Territory, and that their attendance was procured in good faith, believing them to be material, he shall be debarred from collecting such costs upon the judgment entered.

CHAPTER VI.

DOCKETS AND RECORDS.

1. There shall be a "*General Docket*" kept by the Clerk, in which shall be entered all suits and actions at law and in equity; the names of the parties contained in each precipe or writ; the character of such suit; its number and term; the sum or thing demanded; the date of issuing process; the date of filing declaration, plea, the Sheriff or other officer's return, with the date of service; together with all rules, motions, orders, and decrees in each cause; the names of the jurors, if any, who try the cause, and their verdict; the judgment of the Court, and an exhibit of the fees of the several offices.

2. There shall be also kept by the Clerk a "*Court Journal*," and entered therein all the proceedings had in Court in every cause.

3. Also a "*General Judgment Record*," in which shall be entered by the Clerk, in brief, the names of the judgment debtor and creditor; the date, amount, number, and term of such judgment or decree; the issuing of execution, if any; the date and character of such execution; the Sheriff's or other officer's return; together with a brief history of the cause after judgment.

4. There shall also be provided by the Clerk a "*Common Rule Book*," in which shall be entered by the Attorneys asking or taking them, both in vacation and term time, all rules in any cause, and at their peril.

5. There shall likewise be provided a "*Special Motion Book*," in which shall be entered by the Attorneys making them all motions, either in vacation or term time.

6. There shall also be provided and kept, by the Clerk, a "*Criminal Docket*," in which he shall enter all criminal prosecutions; the names of the Grand Jurors present at each term; the record of the *venire* upon which they were returned; the style of each prosecution; the nature of the offence charged in the indictment; the pleadings; together with all recognizances, rules, motions, and orders made therein; the names of the trav-

erse Jurors who try the indictment, and their verdict; the sentence and judgment of their Court, and an exhibit of the fees of the officers.

7. There shall also be kept on the Federal side of the Court, in the same manner as prescribed for the Territorial side, a "*General Docket*," "*Court Journal*," "*General Judgment Record*," *and* "*Criminal Docket.*"

CHAPTER VII.

DEFAULTS.

1. Motions to set aside defaults, if entered in vacation, shall be made on or before the second day of the term; and if entered in term, shall be made and argued during such term, unless otherwise ordered by the Court.

2. In all actions sounding in damages, after judgment for the plaintiff by default, on demurrer or confession, the damages shall be assessed on a *writ of inqury* in open Court, or before the Sheriff or Marshal in vacation.

3. Damages on bills of exchange, promissory notes, bonds, orders, drafts for the payment of money, contracts for the payment of a sum certain in specific articles, and all other cases where the amount is liquidated or may be ascertained by calculation, may be assessed by the Clerk of the Court.

4. Defaults incurred under the rules of Court, or any order or decree, may be entered as of course by the Clerk.

CHAPTER VIII.

DEPOSITIONS.

1. Either party, his agent or Attorney, may at any time after suit has been commenced, enter in the *Common Rule Book*, a rule for a commission to take depositions of witnesses residing out of the Territory, which shall name one or more Commissioners on the part of the party entering it; the State, Territory or county, and the city, county, town or place particularly, where the same is to be executed; the names of the witnesses and the interrogatories to be be propounded to each; a copy of which rule shall be served upon the opposite party, his agent or Attorney, at least fifteen days before such commission may issue, that he may have an opportunity on his part, to name Commissioners and file cross interrogatories.

2. At the expiration of fifteen days after notice, the party en-

tering the rule may take out the said commission, drawn out in due form by the Clerk, under the seal of the Court, directed to the Commissioners by name jointly and severally, and accompanied by a certified copy of all the interrogatories on file, together with the names of the witnesses to be examined and a copy of rules 3, 4 and 5, regulating the execution of commissions to take testimony.

3. On the receipt of the commission by any one of the Commissioners named therein, he shall give notice to his colleagues if practicable, of the time and place of taking said testimony, and should either of the Commissioners fail to attend at the time and place named, any one or more present may proceed to execute the same; and shall certify that the absentees were duly notified, or if not notified, shall state the reasons why it was not done.

4. All depositions, together with the commission under which they were taken, shall be enclosed in an envelope and directed to the District Court of the proper county by the person or persons taking the same, endorsing upon such envelope the style of the suit in which taken. They may be remitted by mail.

5. A commission will not be considered executed unless some answer be made to every interrogatory, the witnesses subscribe their names to their testimony, and the Commissioners certify the age of the witness, and that they were severally sworn or affirmed to their depositions; and the said Commissioners shall further state the time, place and manner of taking the same.

6. Upon the receipt of the depositions by the Clerk, he shall open the seal and mark them with the envelope "filed," with the date of such filing. He shall also note from whom and how he received them. They will then be considered in Court and cannot be taken therefrom without consent of parties, or an order of Court or Judge upon notice.

CHAPTER IX.

EXCEPTIONS.

1. Exceptions taken to the ruling of the Court therefore, or interlocutory points, shall, with the reasons, be reduced to writing *instanter* and presented to the Court, that they may be sealed and made a part of the record.

2. Bills of exception to the Supreme Court shall be made up by the party taking the same, within two days after verdict, and in all cases before the rising of the Court.

3. Such bill shall contain a fair and impartial statement of the

trial and the material portions of the testimony, and shall be exhibited to the Attorney of the adverse party before presenting it to the Court to be signed and sealed.

CHAPTER X.

MOTIONS.

1. All motions, with the reasons upon which they are founded, shall be entered in the "*Special Motion Book*" of the Court.

2. The following shall be deemed "*enumerated motions*," to wit: Motions for new trials, in arrest of Judgment, to set aside defaults, and *non suits*, verdicts, inquisitions and reports, and to quash and dismiss proceedings; and a copy shall be served upon the adverse party, if entered in vacation, ten days, and if in term time at least one day, before the motion can be argued.

3. All others shall be deemed "*non enumerated motions*," and one day's notice before argument shall be deemed sufficient.

4. All motions pending at the commencement of the term shall, with a brief note of the object of such motion, be placed upon the argument list and disposed of in regular order.

5. After a motion has been entered for a rule to be asked for at the next Court, and notice given, either party, upon legal notice, may proceed to take testimony to be read on the final hearing of said rule.

6. *Ex parte affidavits* may be filed and read to the Court as the foundation of any original rule or motion.

CHAPTER XI.

NEW TRIAL AND ARREST OF JUDGMENT.

1. Motions for new trials and in arrest of judgment shall be made within one day after verdict and argued at the same term.

2. Such motions shall be accompanied by affidavit containing an assignment of the error; the reasons upon which such motion is founded, and that it is made for justice and not delay.

CHAPTER XII.

NON SUITS.

1. Non suits may be set aside on motion, accompanied by an affidavit showing to the Court satisfactory reasons for the leches of the party, and that he has a good cause of action, upon payment of the costs of the term.

2. Motions to set aside non suits, entered in vacation, must be made on or before the record day of the term; and if entered in term, shall be made and argued during said term, unless otherwise directed; and the Clerk is hereby authorized to enter judgment absolute in all cases wherein this rule is not complied with.

CHAPTER XIII.

NOTICES.

1. All notices shall be in writing, signed by the party, his agent or Attorney, and served by delivering a true copy thereof to the adverse party, or by leaving it at his or her place of residence, office, or usual place of business.

2. Notices in pursuance of any rule, motion, order or decree, shall have prefixed thereto a true copy of such rule, motion, order or decree, and the reasons and affidavit, if any, upon which any rule or motion is founded.

3. Notice and service shall be proved by producing a copy of the paper or notice served, with a written statement endorsed thereon, verified by affidavit of the time and manner of service, and that the paper in Court is a true copy of the original served upon the party.

4. Where a party has an Attorney of record, notice to such Attorney will be deemed sufficient.

5. If a non-resident be entitled to notice, such notice may be given by mailing the same, directed to the party by his proper name at the nearest Post Office to his place of residence, and by pre-paying the postage.

CHAPTER XIV.

PLEADINGS.

1. Rules to declare or plead in twenty days or be defaulted, may be taken of course in any cause at any time after service of process, and if the party ruled neglect to comply with such rule within the said twenty days, his default may be entered by the Clerk.

2. Upon calling over the appearance Docket where defaults have been taken, unless a motion be pending to remove the default, judgment absolute will be entered by the Court.

3. Any party against whom judgment upon demurrer has been awarded, may, upon payment of the costs of the term, be per-

mitted to respond over or plead issuably instanter, or within such period as the Court shall allow, by accompanying his answer or plea with an affidavit of merit.

CHAPTER XV.

RULES.

1. All rules with the reasons upon which they are based, shall be entered by the Attorney asking them in the Common Rule Book of the Court.

2. Rules may be taken of course upon any of the officers of the Court, Judges of Probate or Justices of the Peace, to make, amend, perfect or return, to bring in the body, pay over money, or show cause why; and if the party ruled, after *personal notice*, refuse to answer such rule or to comply with its requirements, an attachment may be ordered of course, be proceeded upon before the Court, and such delinquent committed or discharged as the nature of the case shall require.

3. Rules to produce books and papers upon trial, may be taken of course, upon the adverse party to lay the foundation for the introduction of secondary testimony.

CHAPTER XVI.

WRITS AND PROCESS.

1. No process shall be issued by the Clerk unless upon a precipe signed by the party, his agent or Attorney, which precipe shall be filed of record and preserved in the office.

2. All process issuing from or out of said Courts shall be signed by the Clerk and sealed with the seal of the Court; they shall be tested of the day of issuing, endorsed with the style, number and term of the suit and the name of the Attorney ordering the same.

3. All process shall be made returnable to the first day of the ensuing term, unless issued at too late a period to admit of such return.

CHANCERY RULES.

RULE I.

The District Court, as Courts of Equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions, and for making interlocutory motions, orders, rules, and other proceedings preparatory to the hearing of all causes upon their merits.

RULE II.

The several Judges will, at Chambers, on the first Monday in each alternate month in vacation, and at the seats of Justice to which they are assigned, hear such motions and petitions, and make such orders as may be rightfully heard or made in vacation.

RULE III.

The Judge of any District Court, as well in vacation as in term, may, at Chambers, or on rule days, make and direct all such interlocutory orders, rules, and other proceedings, as may be necessary in any cause; reasonable notice of the application thereof being first given to the adverse party, or his solicitor, to appear and show cause, if any, to the contrary, at the next rule day thereafter, unless some other day is assigned by the Judge for the hearing.

RULE IV.

The Clerks of the several District Courts shall provide and keep in their respective offices suitable registers and books for the equity side of the Court, in which shall be appropriately entered the titles of all causes and matters, with memorandums of the proceedings in such causes, docket decrees, enter orders, the appointment, reports, and inventories of guardians and receivers, and the receipt, investment, payment, and expenditure of moneys paid into Court; the issuing, date, and return of all process, with an exhibit of the fees in each cause. Which books shall be open at all office hours for the inspection of parties.

RULE V.

Motions, rules, and orders made or directed at Chambers, or on rule days, shall be entered by the Clerk in an order book kept by him, on the day when they are made and directed; and, except in cases where personal or other notice is specially required or directed, such entry in the Order Book shall be deemed sufficient notice to the parties or their solicitors; and notice to the solicitors shall be deemed sufficient when they appear in all cases where personal notice on the parties is not specially required.

RULE VI.

It shall be the duty of each Master in Chancery to procure and keep in his office a register which shall be delivered over by him to his successor in office. He shall enter in such register the title of all causes and matters referred to him, and the proceedings had before him on such reference.

RULE VII.

All bills and petitions shall be addressed

"To the Hon. (name the Judge) sitting in equity at (name the place) in and for the (number of district) Judicial district of the Territory of Minnesota."

And all orders and decrees shall commence as nearly in the form following as may be:

"A. B.
vs. (Names of parties or suit.) } Decree or order.
C. D.

Be it remembered that this day this cause came on to be heard before the Hon. (name the Judge) upon the bill, answer, &c." (Here refer to the pleadings in the cause.)

RULE VIII.

When the solicitors for the adverse parties do not reside in the same county where the cause is pending, service of notice or other paper may be made by putting the same into the Post Office, directed to such solicitor at his place of residence, to be ascertained according to the best information and belief of the person making the service, and proved by his affidavit; but when service of any notice or other paper is required, it may be made by delivering a copy thereof to the adverse party or his solicitor personally, or, in case of their temporary absence, by leaving the same at their dwelling-house or office, in some suitable and conspicuous place within usual business hours.

RULE IX.

In all cases where the complainant or complainants are not residents of this Territory, before process shall issue, a bond in the penal sum of one hundred dollars, with approved security, shall be filed with, and the sufficiency thereof allowed by the Clerk, conditioned to pay all costs and damages decreed against him or them in such proceeding.

RULE X.

Bills may be verified by the oath of the complainant; and in case of his absence from the Territory, or other sufficient cause shown, by the oath of his agent, attorney, or solicitor.

RULE XI.

All bills, petitions, answers, &c., shall be signed by counsel, and drawn in conformity with the established usages of Courts of Chancery.

At the conclusion of such bill, answer, or petition (requiring verification), and immediately succeeding the signature of counsel, an affidavit shall be appended in the form following:

"TERRITORY OF MINNESOTA, } *ss.*
County of , }

This day came before me (person administering the oath), (the affiant), who made oath, in due form of law, that the mat-

ters and things in the foregoing bill, answer, or petition contained, as stated upon his own knowledge, are *true*; and that those stated upon the information of others he verily believes to be true.

(Signed by the affiant.)

Sworn to and subscribed before me this day of , 185 .

A. B., Officer."

RULE XII.

All process issuing from the District Courts of this Territory, sitting as Courts of Equity shall be executed upon the defendants at least ten days before the return day thereof, unless other wise ordered by the Court. In the event of process not having been executed ten days prior to such return day, new process may issue as of course, upon the return to the Clerk of the prior process.

RULE XIII.

The names of parties defendant shall be inserted in the subpœna, and shall be executed by delivering a copy of such subpœna, accompanied with a copy of the bill or petition, to the defendant or defendants, and in his or their absence, by leaving such copies at their respective places of abode.

RULE XIV.

No writ, process, or subpœna shall issue from the Clerk's office in any cause, until the bill or petition be filed in said office.

RULE XV.

Final process for the enforcement of any order, decree, or judgment for the payment of money solely, may be by a writ of execution in the form of the writ issued from the Courts of law upon judgments in debt or assumpsit. But if such order or decree be for the specific performance of any act or duty, the order or decree shall prescribe the period within which such order or decree shall be executed; and the defendants shall be required, without further notice, to execute the same; and if they neglect or refuse to comply with such decree within such prescribed period, the Clerk may, upon the filing of an affidavit of the com-

plainants, or any one of them, stating the omission, issue an attachment against such delinquents; and when arrested, shall not be discharged, unless upon a full compliance with the decree and payment of costs; or upon the special order of the Court or Judge, enlarging the time for its performance. If, upon the issuing of an attachment, the delinquent cannot be found, a writ of sequestration shall be issued aganst his estate to enforce obedience to the decree.

RULE XVI.

The defendant shall plead, answer, or demur to the bill or petition within ten days after the service of the subpœna to answer, unless otherwise ordered by the Court, upon cause shown on motion and affidavit; and in default thereof, the complainant may enter an order, as of course, in the Order Book, that the bill be taken as confessed. When such default is entered, the cause will be proceeded in *ex parte*, and the Court may decree therein, if it be a cause of such nature as will warrant the same, which decree shall be deemed absolute, unless the same be set aside, or the time enlarged, upon sufficient cause shown upon affidavit, within sixty days after such decree be entered, and upon payment of the costs incurred by reason of such default. And if the complainant has commenced proceedings or issued process for the purposes of discovery, to enable him to obtain a proper decree, he shall be entitled to an attachment to compel an answer. And when a defendant be arrested upon such process, he shall not be discharged therefrom, unless he first comply with such order as the Court may make in the premises.

RULE XVII.

If the complainant waives the necessity of an answer on oath, such waiver must be distinctly stated in the bill. Any bill or answer may be sworn to before any officers of the Territory competent to administer an oath. If the defendant reside out of the Territory, the answer may be sworn to before any judge of any Court of Record in the State, Territory, or County where the answer is made, who shall certify that the same was sworn to and subscribed before him, together with the date and place of executing it. The genuineness of the signature of such Judge, the fact that he is Judge of the Court which his subscription indicates, and that due faith and credit are due to his acts as such, must be certified to by the Clerk of such Court, under the seal thereof.

RULE XVIII.

Any bill, answer, or pleading may be excepted to for scandal, impertinence, or insufficiency. But exceptions to an answer shall not in anywise prevent the dissolution of an injunction, or the quashing of a ne exeat. All exceptions shall be filed with the Clerk and heard in their regular order either in term time or upon regular motion day; and if to be disposed of in vacation or motion day, notice shall be given to the adverse party or his solicitor.

RULE XIX.

Should the Court determine that the matter excepted to is scandalous or impertinent, an order, of course, will be made for the expunging of such scandalous or impertinent portions, and that the party decreed against pay the costs incurred by the filing and proceeding upon such exceptions, upon the service of such order and the bill of costs. If the party submit to the exceptions, a like order may issue upon filing notice of submission with the Clerk.

RULE XX.

Where exceptions to an answer for insufficiency are allowed by the Court, or submitted to by the party, the party excepting may have an order of course on his adversary, that he put in a further answer within two days, unless further time be given by the Court, and pay the costs incurred by reason of the exceptions.

RULE XXI.

If the defendant neglect to put in his further answer, pay the costs, or to comply generally with such order within the time prescribed, the complainant by filing an affidavit showing such default, may have an order of course, that the bill be taken *pro confesso*, or may have an attachment without further notice.

RULE XXII.

Every cause shall be deemed at issue on filing a general replication to a plea or answer. After issue joined, either party may, as of course, enter in the Common Rule Book of the Court, a rule for an order to take testimony before a Master in Chanc-

ery or such other person as may be designated or appointed by the Court, by giving *eight days* notice to the other party, his agent or solicitor; and if the adverse party desire to join in such rule for an order, he may do so at any time within eight days after notice, by entering his joinder in the said Common Rule Book, or giving notice thereof to the Clerk. After the issuing of such order, either party, upon six days notice of the time, place and names of his witnesses, may proceed to take their testimony.

RULE XXIII.

Either party desirous of taking the testimony of witnesses residing out of the Territory or county where such suit is pending, may, at any time after issue joined, enter of course in the Common Rule Book of the Court, a rule for a commission to take such testimony, which shall name a Commissioner on his part, the State, Territory, country and city, town, county or place distinctly and unequivocally, where the same is to be executed; the names and residence of the witnesses to be examined, a copy of which shall be served upon the adverse party, his agent or solicitor, at least ten days before such commission shall enter. And if at the expiration of the said ten days the party served does not appear and join in such commission, name a Commissioner and the witnesses wished to be examined on his part, or object to the Commissioner named, the same shall be issued by the Clerk to the Commissioner designated.

RULE XXIV.

Where a Commissioner named is objected to by either party within the period allowed, the Clerk, after hearing the allegation of the parties, shall allow or disallow such person, and in case of refusing to allow, shall issue said commission to some fit person of his own selection. Any one of the Commissioners named may alone execute the same, but the reason of the others not joining in its execution shall be distinctly stated in the certificate of him who acts.

RULE XXV.

Testimony taken out of the Territory on commission, shall be upon interrogatories, which interrogatories shall always be filed in the Clerk's office, and notice of the interrogatories in chief given to the opposite party.

RULE XXVI.

Process of subpœna to compel the attendance of witnesses before a Master or Commissioner, shall issue of course, and witnesses failing to comply with such process may be punished for contempt.

RULE XXVII.

When testimony is taken as provided in the foregoing rules, before any Master or Commissioner, the person executing the same shall forthwith return and file such testimony, with the rule, order or commission upon which it was taken, with the interrogatories, if there be any, in the Clerk's office, with a certificate annexed of the time, place and manner of executing the same; and also state whether the parties or their solicitors were in attendance. And where such commission is executed out of the Territory, the Commissioner shall seal the same in an envelope, endorse thereon the style of the suit and direct it to the Clerk of the Court of the county in which such suit is pending, and transmit it by mail. As soon as received by the Clerk, and motion filed, it will be considered in Court, and cannot be taken therefrom without consent of parties or permission of Court or Judge.

RULE XXVIII.

All notices of special motions where notice is required, shall be given by serving a copy of the motion and affidavits, certificate or other document upon which such motion is founded, upon the opposite party or his solicitor at least (4) four days before a hearing can be had. And where neither the adverse party nor his solicitor resides in the county where the cause is pending, the service of notice shall be at least eight days before hearing, unless otherwise directed by the Court.

RULE XXIX.

All causes shall be deemed ready for hearing as soon as issue is joined therein, and may be proceeded in at the same or any subsequent term of the Court. No continuance of any cause, at issue, can be had except upon motion, founded upon affidavit, showing to the Court satisfactory reasons why the same should be continued, unless reasons are apparent upon the record or by consent of parties.

RULE XXX.

No private agreement or stipulation concerning proceedings in Court will be regarded, unless the same is in writing, signed by the parties, agents or solicitors and filed.

RULE XXXI.

Time, in regard to notice and other proceedings in pursuance to any rule or order of Court, will be computed by counting one day inclusive and one day exclusive; if it expire on Sunday, the next day will be allowed.

RULE XXXII.

The Court, upon satisfactory cause shown, may extend the time for putting in any answer, plea, or other pleading, beyond the specified period fixed by the rules of practice; and may open or set aside defaults, orders or decrees obtained by default, upon such terms as it may deem just and equitable.

RULE XXXIII.

In drawing up decrees and orders it shall not be necessary to recite at length the prior proceedings or pleadings in the cause, and all clerical mistakes or omissions may, at any time before issuing execution or other final process, be corrected by the Court or Judge upon application without the expense or form of rugular hearing.

NOTE.—During the sittings of the Court in the first Judicial District, on each morning immediately after the reading of the minutes, the roll of Attorneys will be called, when motions and decrees will be heard by the Court.

Appendix

On March 6, 1852, the last day of the session, the Third Legislative Assembly passed an amendment to a law on the Supreme Court's powers that authorized 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.*[11]**

In July 1852, the Supreme Court of Minnesota Territory convened for the second time. It was composed of Associate Justices Bradley Meeker and David Cooper, who had served since 1849, and Chief Justice Jerome Fuller who took office in October 1851, replacing Aaron Goodrich. On July 26th, the Court adopted rules of practice for it, the district courts and the chancery court. Unlike the 1850 rules, they were not published in pamphlet form. They were not published until July 1858, after Minnesota became a state, when they were included in the Appendix to the opinions of the Territorial Supreme Court collected by Harvey Officer, a St. Paul lawyer, and published as the first volume of Minnesota Reports.

In an advertisement at the beginning of this volume, Officer describes how he compiled the court's rulings. He re-published those 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. He also added the Territorial

[11] 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).

Supreme Court's rules, adopted in July 1852, which he noted can "now be read for the first time by many members of the Bar." But he did not, for reason long forgotten, include the first Rules of Practice adopted by the Supreme Court in January 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.

VOL. I.

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.

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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