

PEASLEE v. HABERSTRO.

{15 Blatchf. 472;¹ 8 Reporter, 486.}

Circuit Court, N. D. New York. Jan. 21, 1879.

WRITS—SUMMONS—SEAL OF COURT—CLERK'S
SIGNATURE.

1. A summons, in a common law action, in this court, must be signed by the clerk, and be under the seal of the court.

{Cited in *Dwight v. Merritt*, 4 Fed. 615; *U. S. v. Rose*, 14 Fed. 682.}

2. Section 911 of the Revised Statutes of the United States, which prescribes that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof," is not inconsistent with, or repealed by, the subsequent provision, in section 914, that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held."

{Cited in *Dwight v. Merritt*, 4 Fed. 615; *U. S. v. Rose*, 14 Fed. 682; *Pentlarge v. Kirby*, 20 Fed. 899; *Paine v. Warren*, 33 Fed. 358; *Wolf v. Cook*, 40 Fed. 437; *U. S. v. Turner*, 50 Fed. 735.}

{This was an action at law by Charles A. Peaslee against Joseph L. Haberstro. Heard on motion to set aside the summons.}

William F. Cogswell, for plaintiff.

Tracy C. Becker, for defendant.

WALLACE, Circuit Judge. The motion to set aside the summons in this action must be granted, upon the ground that the summons was not signed by the clerk or under the seal of the court. Section 911 of the Revised Statutes of the United States prescribes, that "all writs and processes issuing from the courts of the United States shall be under the seal of the

court from which they issue, and shall be signed by the clerk thereof." This provision is not inconsistent with, and, therefore, is not repealed by, the subsequent act of congress (Act June 1, 1872, § 5; 17 Stat. 197), now embodied in section 914 of the Revised Statutes, which enacts, that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held." Giving due effect to the later act, the practice, and forms and modes of proceeding, in the courts of the United States, in common law actions, is to conform to, and be regulated by, that of the state courts, when there is no statute of the United States prescribing different practice or forms or modes of procedure. When the 72 statutes of the United States are silent, the practice of the state courts will prevail, but, when those statutes speak, they are controlling. If the summons in this case had been signed by the clerk, it could be amended as regards the seal. As it is, there is no summons in the nature of process known to this court. The summons is set aside.

¹ [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

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