

HALLETT, J., (*orally.*) In the case of William Simpson against the La Plata Mining & Smelting Company, an action to recover damages for injuries received while in the service of the company, the plaintiff avers that the defendant, through its superintendent, brought into the smelting-house certain tanks or jackets, and stacked them up, or placed them on end, near where the plaintiff was required to pass, in the performance of his usual duties, in wheeling out slag, and that while he was passing these tanks some one of them fell upon him and injured him. He has not described with particularity the position of the tanks, and what neglect there was in the superintendent in placing them where they were. He states briefly that the tanks were placed there, and that one of them fell upon him. I think that he should give in detail the position of the tanks, so that it may be seen what the act of negligence was on the part of the superintendent; how the tanks were placed, as evincing carelessness in the superintendent; and in what way they were left so as to be a source of danger to those who should pass by them. Certainly it is not enough to aver that the tanks were put there, and that one of them fell down. It may have been some extraordinary circumstance that caused the falling. If they were so placed that it might be reasonably expected they would topple over, he ought to state that fact—describe the position so clearly that we may see from the complaint that the superintendent was careless in leaving them in the way in which they were left.

Demurrer to complaint sustained, with leave to plaintiff to amend in 30 days.

### MANVILLE v. BATTLE MOUNTAIN SMELTING CO.

(Circuit Court, D. Colorado. June 27, 1883.)

#### 1. PRACTICE—FORM OF PROCESS—CONSTITUTIONAL PROVISION NOT FOLLOWED BY STATUTE.

The legislature of a state may prescribe the form of process, but in so doing the provisions of the constitution must be observed; and where the constitution provides that every summons shall run in the name of the people, a summons in the form given in the statute, but not in the name of the people, is deficient.

#### 2. SAME—SUMMONS RETURNABLE—GARNISHMENT.

A garnishee in Colorado is entitled to 10 days in which to appear and answer, "as in other summons in courts of record:" and when the summons is made returnable *within* 10 days from the date of service, it is a fatal defect.

At Law.

Mr. Campbell, for plaintiff.

Henry T. Rogers, for garnishee.

HALLETT, J., (*orally.*) Manville recovered a judgment against the Battle Mountain Company in the district court of Lake county, and took out execution, and procured the Belden Mining Company to be

summoned as garnishee. That company entered a motion to quash the summons and the return of the sheriff thereon, and removed the cause into this court. The motion has been presented here.

Objection is made that the summons does not run in the name of the people, as required by the constitution of the state, article 6, § 30. And the objection seems to be well taken. Unquestionably the legislature may prescribe the form of process, but in doing so the provisions of the constitution must be observed. This process appears to be in the form given in the statute, (2 Sess. 1879,) but it is deficient in that it does not run in the name of the people, as required by the constitution. That it is not in the form of other process used in law actions is not important, and the circumstance that it was issued by the sheriff, rather than the clerk, is not important. In these particulars the authority of the legislature cannot be denied; but the constitution cannot be disregarded.

The statute also provides that in courts of record "the summons shall be made returnable, and be served the same as other summonses in courts of record;" and this seems to require that the time for answering shall be the same as in actions at law. In this instance the summons was made returnable within 10 days from the date of service. This is a fatal defect. The garnishee was entitled to 10 days in which to appear and answer, and if service was not made in the county where the judgment remained, then to a longer time.

The motion will be allowed, and the cause dismissed.

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THURSTON v. UNION INS. Co. of Philadelphia.

SAME v. MERCHANTS' INS. Co. of Newark.

SAME v. METROPOLE INS. Co.

SAME v. HOWARD INS. Co.

(Circuit Court, D. New Hampshire. July 12, 1883.)

1. FIRE INSURANCE POLICY—STORE FIXTURES CONSTRUED.

When a fire insurance policy contains clauses excepting from the insurance "store fixtures," and "store and other fixtures," the words "store fixtures" mean store fittings or fixed furniture, which are peculiarly adapted to make a room, a store rather than something else.

2. SAME—STORE—FACTORY.

Store being the American word for shop or warehouse, is never applied to a factory; and fixtures in a shoe factory are not covered by the term "store fixtures," in a policy of insurance.

At Law.