

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.

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.

John S. H. Frink and Joseph F. Wiggin, for plaintiff.

Batchelder & Faulkner, for defendants.

LOWELL, J. The plaintiff, who sues in behalf of a mortgagee, was owner of certain property described in the four policies as "his three-story frame building and additions, occupied for stores and shoe factory, situate on the north side of Third street, in Dover, N. H." Possession was taken by the mortgagee, the Coheco Savings Bank, November 3, 1881, of which notice was given, and the companies agreed to pay to the bank in case of loss. The four policies were for \$2,000 each, and there was a loss by fire, December 28, 1881, of which due notice and proof were furnished. The cases were, by agreement of the parties, sent to a referee to find the amount of injury and the character of the property injured in detail. His report is very full, and states the damage in 18 items. The dispute arises upon the construction of the policies.

In each of the first three policies there is a printed clause, substantially like that which I copy: "*Fences and other yard fixtures, sidewalks, store furniture and fixtures are not covered by insurance on the building, but must be separately and specifically insured.*" The policy of the Howard Company, which I call the fourth, contains this printed sentence:

"The insurance under this policy does not apply to or cover jewels, plate, watches, musical or scientific instruments, (piano-fortes in dwellings excepted,) ornaments, medals, patterns, printed music, engravings, paintings, picture frames, sculpture, casts, models or curiosities, or friezes or gilding on walls and ceilings, fences, privies, or other yard fixtures, store or other furniture or fixtures, or plate-glass in doors or windows, (when plates are of nine feet square or more,) unless each are separately and specifically mentioned, and then not exceeding the actual cost of the same."

The plaintiff bought the land in 1858, and made additions to the buildings, which is the meaning of the word "additions" in the policy. He fitted the buildings for stores and for a shoe factory, and occupied them himself for some years. I infer from the statement of the referee that some or all of the premises were occupied by tenants at the time of the fire. But this is immaterial. The question is, what are the "store fixtures" excluded from the contract under three policies, and the "store or other fixtures" excluded from the policy by the Howard Company?

There is no doubt that an exception of fixtures out of a policy upon buildings refers to things which are, under some circumstances, removable, and not necessarily and always a part of the buildings. If we could suppose a printed exception in a policy to be intended to adapt itself to the various relations of landlord and tenant, mortgagor and mortgagee, heir and executor, so that fixtures refer to what may be removed in the particular case, all the disputed items in this case would be within the policies, because they are undoubtedly irremovable, as between the plaintiff and the mortgagee. But if these

same things had been affixed by a tenant, there is no doubt that he might remove them during his term. Such a shifting construction would be unreasonable. We must look for a meaning of "store fixtures" which has a more general application. And I find it in the context and the popular meaning of the words. I hold it to mean, in this connection, store fittings or fixed furniture, which are peculiarly adapted to make a room a store, rather than something else. It is plain that "store fixtures" does not refer to the fixtures of the shoe factory, for the written part of the policies distinguishes the stores from the factory, and so does the common use of the words. Store is the American word for shop or warehouse, and is never applied to a factory. The words "store fixtures" are construed in *Whitmarsh v. Conway F. Ins. Co.* 16 Gray, 359, though that case is not of special importance in deciding this case.

For the convenience of counsel I number the items in a copy of the referee's report which I place on file. And first I will say what items I find to be covered by all the policies. These are items 1 and 2, which were admitted by the defendants' counsel to be within the contract; they are the walls, roofs, floors, partitions, doors, and windows, including the show windows which last had not plate-glass of the prohibited size. 11. Boiler fixtures in boiler-room. The boiler cannot be removed without taking down part of the boiler-house, and is used, among other things, to heat the building. 13. Elevator machinery, which, in recent usage, is as much a part of the house as are the stairs. 14. Steam piping, radiators, and iron tanks, which, both from their mode of annexation and their use, which is equally applicable to a dwelling-house, a factory, or a shop, are part of the building. 16. Gas piping, for similar reasons. 10. Speaking tube, for similar reasons. I exclude from all the policies, items 6, wooden tank; 17, gas-fixtures, which are chattels,—the former by its construction, the latter by usage. Also, as "store fixtures," 3, 4, and 5,—shelving and counters in the stores, and shelving and basin in the barber's shop.

For all items not above excluded the three companies are liable. The fourth, or Howard Company, by my construction, escapes by virtue of "or other" from the fixtures of the shoe factory, which are items 7, 8, 9, 12, 15, and 18.

I believe I have mentioned every item and that the parties can assess the damages against each company without difficulty, in accordance with this opinion.

FOSTER v. OHIO-COLORADO REDUCTION & MINING CO.¹

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

1. NOTE OF CORPORATION—WHO MAY EXECUTE.

The authority of an officer of a corporation to execute its note depends upon the by-laws, or upon the custom of the corporation. If it be the custom of a corporation to permit the treasurer to execute its promissory notes, the corporation will be bound by such note; especially, if it received the benefit of the money for which it was executed.

2. EVIDENCE—WEIGHT OF.

When there are written evidences made by the parties at the time the transactions occurred, these are entitled to more weight than contrary statements made subsequently, and after a litigation has sprung up. The jury are to judge of the evidence.

At Law.

Browne & Putnam, for plaintiff.

Wells, Smith & Macon, for defendant.

McCRARY, J., (*charging jury*.) This is largely a case to be determined upon questions of fact. Such questions are exclusively for the consideration of the jury. The province of the court is only to call your attention to the principles of law by which you are to be guided in the application of testimony.

The plaintiff, Mrs. Susan Foster, sues the defendant, the Ohio-Colorado Reduction & Mining Company, a corporation, and she alleges that company is indebted to her upon a promissory note for \$10,500. The defense is twofold: *First*, that this is not the note of this defendant corporation; and, *second*, that there was no valid, subsisting debt from the corporation to Mrs. Foster at the time the note was given, and for which it was given.

These, then, gentlemen, are the two matters for you to consider.

Upon the first question, as to whether this is the note of the defendant corporation, that is to be determined upon the question whether the person who executed the note on behalf of the corporation, Mr. Penn, the treasurer of the company, was authorized to execute such an instrument. The law upon this subject is that the authority is not presumed from the mere fact that the person assumed the right to give a note in the name of the corporation. A corporation is an artificial person, which must act within certain limits. It differs from a natural person. If an individual gives his note, it is not necessary to prove anything in the way of authority, but a corporation must act by way of agents, and the authority of the agent who acts for it is not presumed. It may, however, be shown, either by showing an express authority,—as, for example, a resolution of the board of trustees authorizing a certain party to execute a note on behalf of the corporation,—or by a provision of the constitution or by-laws of the corporation authorizing a certain offi-

¹From the Colorado Law Reporter.