

based on the erroneous supposition that by the original petition it was sought to recover for the deposits of the public funds made by Treasurer Hill during his term of office, before the depository law went into effect, while the amended petition, now under consideration, is a claim for deposits made by Treasurer Bartley under the provisions of the depository law. The two petitions do not state the cause of action in identical language, yet they are substantially alike in the statement of the cause of action. Both are based on the deposits made by Bartley after the depository law had gone into effect, and after the bank had become a designated state depository. It is true that in the original petition the allegation is that Bartley deposited in the bank the certificates of deposit received from Hill, and that the bank gave him credit therefor to his account as treasurer, while in the amended petition, now under consideration, the allegation is that Bartley presented the certificates to the bank for payment, received payment thereof, and deposited the proceeds in the bank. The legal effect was the same. It is only a different method of stating the same cause of action. *Allibone v. Ames* (S. D.) 68 N. W. 165; *Post, J., in State v. Hill*, 47 Neb. 537, 66 N. W. 541; *State v. McFetridge*, 84 Wis. 473, 54 N. W. 1, 998. The motion is overruled.

TRIMBLE v. ERIE ELECTRIC MOTOR CO.

(Circuit Court, W. D. Pennsylvania. August 18, 1898.)

1. PROCESS—SUFFICIENCY OF SERVICE—RETURN.

Under a rule of court requiring a summons to be served on a defendant by "giving him notice of its contents," a return of service of a writ by "making known the contents" to the defendant is sufficient.

2. SAME—IMPEACHING RETURN.

Following the rule of the state courts, a federal court in Pennsylvania will not receive extrinsic evidence to impeach the return of a marshal which is good on its face, in support of a motion to set it aside.

Brainerd & Higgins, for plaintiff.

S. A. Davenport, for defendant.

BUFFINGTON, District Judge. This is a motion to set aside the service of summons. Cir. Ct. Rule 86 provides as follows:

"It is ordered that the act of assembly of the commonwealth of Pennsylvania, relative to the service of summons, &c., and the service required by this court, shall be as follows: A writ of summons shall be executed by reading the same in the hearing of the defendant, or by giving him notice of its contents and by giving him a true and attested copy thereof; or, if the defendant cannot be conveniently found, by leaving such a copy at his dwelling house with an adult member of his family; or, if the defendant resides in the family of another, with one of the adult members of the family in which he resides."

The marshal made return of the writ, which is under seal and duly entitled in the cause, as follows:

"Served the within writ upon John C. Brady, vice president Erie Electric Motor Company, by giving him a true and attested copy of the same, and making known the contents to him June 14th, 1898. So answers," etc.

Motion is now made to set aside service of the writ because the copy served was neither a true nor attested copy of the writ returned. In our opinion, the service returned by the marshal was, in substance, a service made on Mr. Brady, "by giving him notice of the contents, and by giving him a true and attested copy thereof." "Making known the contents to him" was certainly "giving him notice of its contents."

The return of the marshal, then, constituting upon its face a lawful one, the question before us is, can the defendant be permitted to contradict it, and aver that it is a false return? An examination of the cases shows that in Pennsylvania this cannot be done. If the return on its face is good, the court will not receive extraneous evidence to contradict it. If the facts stated in the return are false, the plaintiff's remedy is by action against the officer for false return. *Hill v. Robertson*, 2 Pittsb. R. 106; *Kennard v. Railroad Co.*, 1 Phila. 41; *Patton v. Insurance Co.*, Id. 396; *Kleckner v. Lehigh Co.*, 6 Whart. 66; *Winrow v. Raymond*, 4 Pa. St. 501, 1 Troub. & H. Prac. 149. The general rule as to the return of a Pennsylvania sheriff would apply to the marshal of this district. *Wilson v. Hurst*, Pet. C. C. 441, Fed. Cas. No. 17,809; *U. S. v. Lotridge*, 1 McLean, 246, Fed. Cas. No. 15,628. Of course, it will be understood that these decisions do not interfere, in a proper case, with the exercise of the inherent power of any court to open a judgment taken by default without notice, and allow a party to defend on the merits; but the present is not such case. The motion to set aside the marshal's return is therefore discharged.

HIRSCH v. PRESCOTT et al.¹

(Circuit Court, E. D. Virginia. October 4, 1881.)

HOMESTEAD—RIGHTS OF CREDITORS—VIRGINIA LAWS.

In the absence of any provision in the Virginia statutes relating to homestead exemption, for the tying up of the homestead, if personalty or money, in the debtor's hands for the ultimate benefit of creditors, it would seem to be the legislative intent to make it a fee in his hands. In any event, a federal court should not, by judicial legislation, attempt to supply what seems an intentional omission of the legislature.

This was a bill in equity by one Hirsch, a nonresident creditor of defendant Prescott, in behalf of himself and other creditors, to enforce the proper execution of a deed of trust made by Prescott. This deed provided for the sale of the property conveyed by it, and contained a clause requiring that, out of the proceeds, there should be reserved the homestead of \$2,000, which is secured by the Virginia constitution and laws to householders and heads of families. The remainder of the fund was then to be distributed to creditors in a prescribed manner. The bill sought, among other things, to subject to the claims of creditors a reversion in this \$2,000 after expiration of the rights of the home-

¹ This case has been heretofore reported in 4 Hughes, 436, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.