

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.

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#### HIRSCH v. PRESCOTT et al.<sup>1</sup>

(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-

<sup>1</sup> 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.

stead beneficiaries; and for that purpose prayed that the fund be invested, the income paid to said beneficiaries, and the principal secured to the creditors whenever the use should terminate. The Virginia constitution provides as follows:

"Every householder or head of a family shall be entitled in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnisheeing, or sale under any execution, order, or other process, issued on any demand for any debt heretofore or hereafter contracted, his real and personal property, or either, including money and debts due him, whether heretofore or hereafter acquired or contracted, to the value of not exceeding \$2,000, to be selected by him," etc. Article 11, § 1.

In section 5, art. 11, the constitution directs that:

"The general assembly shall, at its first session under this constitution, prescribe in what manner and on what conditions the said householder or head of a family shall hereafter set apart and hold for himself and family, a homestead out of any property hereby exempted, and may, in its discretion, determine in what manner and on what condition he may thereafter hold, for the benefit of himself and family, such personal property as he may have, and coming within the exemption hereby made. But this section shall not be construed as authorizing the general assembly to defeat or impair the benefits intended to be conferred by the provisions of this article."

In Code 1873, c. 183, § 8, the legislature enacted as follows:

"The homestead provided in this act shall continue after his death, for the benefit of the widow and children of the deceased until her death or marriage, and after her death or marriage, for the exclusive benefit of his minor children, until the youngest child become 21 years of age; after which period it shall pass, according to the law of descents, as other real estate, or as may be devised by said householder, not being subject to dower, yet subject to all the debts of the said householder or head of the family."

HUGHES, District Judge. The statute law of Virginia does not seem to give the courts any power to intercept from the householder or head of a family, who originally claims a homestead, the property or money exempted to him, but, in prescribing the manner and conditions of holding the homestead, has wholly omitted such a provision. I doubt the power of any court, in the silence of the statute law, to embark upon a system of judicial legislation to supply what seems an intentional omission of the legislature. I think it would be quite unseemly in a federal court to do so. The legislature of Virginia, in giving to the head of a family power to waive the homestead, and in wholly omitting to provide that, or how, it shall, if personalty or money, be tied up in his hands, for the benefit of succeeding beneficiaries of the exemption, and finally of creditors, has seemed to have intentionally constituted it a fee in his hands, and to have left it subject to his will.

In the present case it is wholly unnecessary for the federal court to interfere in the matter. It is just as competent for the creditors to petition for the action they desire in the proper state court as in this; and I will leave them, if they have any remedy, to pursue it there.

## SOMMER v. CARBON HILL COAL CO.

(Circuit Court of Appeals, Ninth Circuit. May 20, 1898.)

No. 412.

## 1. MASTER AND SERVANT—NEGLIGENCE OF MASTER—STATUTE REGULATING MINING.

A mining statute prescribing the measures that shall be taken by the operators of coal mines to insure ventilation and the safety of the miners changes the general duty imposed by law upon a master to provide a reasonably safe place for the servant to work, into a specific duty to do the things required, a failure to perform which is negligence; and such duty cannot be delegated to a servant so as to relieve the master from liability for injuries caused to another servant by its omission.

## 2. SAME—ACTION FOR INJURIES—PLEADING.

A complaint alleging that plaintiff, a coal miner, on discovering gas at the place where he was working, notified the employé of defendant in charge of the ventilation of the mine, and afterwards, supposing that the latter had taken measures to remove the gas, returned to work, and, in the performance of his work in the usual manner, lighted a match, causing an explosion of gas, by which he was injured, is not demurrable as disclosing contributory negligence; it not appearing how long plaintiff remained away from work after giving notice, nor what reasons existed for believing the gas to have been removed.

## 3. PLEADING—CONSTRUCTION—EFFECT OF STATUTE.

Under a Code provision requiring the liberal construction of pleadings, every reasonable intent and presumption is to be indulged in favor of a pleading when attacked by demurrer.

## In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This writ of error is sued out to review the action of the court below in sustaining a demurrer to the amended complaint filed in the case. The assignments of error raise the question whether the amended complaint states facts sufficient to constitute a cause of action. The complaint, as amended, alleges: That the defendant is a corporation organized under the laws of California, and doing business in Pierce county, Wash. That it owns and operates a coal mine known as the "Carbon Hill Coal Mine," situated in Pierce county, Wash. That the plaintiff was for a period of about eight years prior to and including the 22d day of June, 1896, in the employ of the defendant at the said mine, digging and mining coal for the defendant. That there are great accumulations of natural gas in the Carbon Hill Mine, which have a tendency to fill the mine as the coal therein is being dug, making it impossible for operation, all of which the plaintiff well knew. That with proper air and ventilation to the face of working places throughout the mine, as is required of defendant company by the laws of the state of Washington, the gas is not, and would not be, dangerous to the health or to the operation of the mine. That the law of the state of Washington entitled "An act relating to the proper ventilation and safety of coal mines," etc., provides in part: "Sec. 9. The owner, agent, or operator of every coal mine, whether operated by shaft, slope, or drifts, shall provide and maintain in every coal mine a good and sufficient amount of ventilation for such persons as may be employed therein, the amount of air in circulation to be in no case less than one hundred (100) cubic feet for each person per minute, measured at the foot of the down cast, the same to be increased at the discretion of the inspector according to the character and extent of the workings or the amount of powder used in blasting, and said volume of air shall be forced and circulated to the face of every working place throughout the mine, so that the said mine shall be free from standing powder smoke and gases of every kind." Laws 1891, c. 81. That the defendant, in accordance with this law, had in its employ one John Lowery, on the 22d