## Kennedy *v.* Brent.

### *Effect of attachment.*

The marshal of the district of Columbia is bound to serve a *subpœna* in chancery, as soon as he reasonably can; and the service of such subpœna, in case of a chancery attachment, in Virginia, will make the garnishee liable, if he pays away the money, after notice of the *subpœna*.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action on the case, by Kennedy against Brent, marshal
*188] of the district of *Columbia, for the neglect of his deputy, in not serving a *subpœna* in chancery, commonly called a chancery attachment, in due time, whereby the plaintiff lost his debt.

The declaration stated, that one Johnston, who did not reside in the district of Columbia, was indebted to the plaintiff, a resident of Alexandria, in that district, and that one Hampson was indebted to Johnston; that in order to subject the money in Hampson's hands to the payment of the debt due from Johnston, the plaintiff, on the 13th of December 1804, filed his bill in chancery, in the circuit court of the district, for the county of Alexandria, and caused to be issued a *subpœna* in chancery against Johnston and Hampson to answer the bill, which *subpœna* was then and there delivered to the defendant's deputy to be executed: and was prosecuted with an intention that the debt due from Hampson to Johnston would be subjected to the payment of the debt due from Johnston to the plaintiff. Nevertheless, the defendant, by his said deputy, not regarding his office of marshal, in the true execution thereof, but contriving and fraudulently intending to hinder the plaintiff of his proper remedy for the recovery of his debt aforesaid, did not serve the said *subpœna* in chancery upon the said Hampson, within a reasonable time after receiving the same to be executed as aforesaid, but neglected to serve the said process, without any reasonable cause for so doing, for a long time, to wit, for the space of four months and upwards, by means of which said neglect, the said defendant altogether lost the effect of his said suit in chancery against the said Johnston and Hampson as aforesaid; wherefore, the plaintiff saith he is injured, and hath sustained damage, &c.

The defendant pleaded not guilty, and a verdict, by consent, was rendered for the plaintiff, subject to the opinion of the court upon a case agreed, which stated, that on the 13th of December 1804, the plaintiff filed his bill in chancery against Johnston and Hampson, in the common form of a bill for a chancery attachment in Virginia. And that the clerk of the court, at
*189] the instance of the plaintiff, issued a process commonly *called a chancery attachment, being a *subpœna* in the common form to answer a bill in chancery, upon which was the following indorsement, viz:

"Memorandum. The object of the bill this day filed in this case is to stay the moneys and effects of the defendant Johnston in the hands of the defendant Hampson, to satisfy a debt due from the defendant Johnston to the complainant. (Signed) G. Deneale."

That this process, shortly after it was issued, was put into the hands of W. Fox, one of the defendant's deputies, to be executed, and might have been served by him, if he had endeavored to have served the same, but it so happened, that he did not serve the same, and that it afterwards got into the

hands of Lewis Summers, another of the defendant's deputies, who served the same on the 20th day of June 1805, and made the following return thereupon:

"I received this attachment, shortly after it issued, and delivered it to W. Fox, D. M., to serve, who, shortly after, left the town of Alexandria, leaving in the marshal's office two bundles of process, one marked 'process served,' and the other, 'process not served.' In the first bundle, was this *subpœna* in chancery. On or about May or June last, I was informed, it had not then been served. I then examined this process and found it without any indorsement, and took the earliest opportunity to inquire of Mr. Fox as to the service of the *subpœna*, who informed me he did not recollect having served it. I then, on the 20th of June, served the same on Bryan Hampson. The other defendant, Johnson, not found.

(Signed) L. Summers, D. M."

Whereupon, it was agreed, that the verdict should be subject to the opinion of the court upon the following questions:

1. As the marshal, by his deputy, executed the process, on the 20th of June 1805, before the day appointed *for the return thereof, and returned the same, on the return-day thereof, whether he was in law [*190 bound to have served the same, if in his power so to do, at any time previous to the said 20th of June 1805, unless he was specially required by the plaintiff to serve the same, notwithstanding he received the same, as marshal, on the day on which the said process was issued.

2. Whether the indorsement on the said process of *subpœna* would, after service thereof, create an legal impediment to the payment of the money over to the said Johnston, by the said Bryan Hampson, and would, in case of such payment, after service, make the said Bryan Hampson personally liable for the amount so paid over.

If the court should be of opinion, that the said marshal was not bound to have served the said process, if in his power to do so, at any time previous to the 20th of June 1805 (unless he was specially required by the plaintiff to serve the same, notwithstanding he received the same, as marshal, on the day on which the said process issued), then the judgment is to be rendered for the defendant. And if, under the circumstances mentioned in the second question, the court should be of opinion, that the said Bryan Hampson would not be personally liable for the amount so paid over, and that his not being personally liable would be sufficient to discharge the marshal from any liability in this case, then judgment is to be rendered for the defendant. But if both those questions are decided for the plaintiff, then judgment upon the verdict is to be rendered for him.

The court below was of opinion, that the statement of the case was not full enough to justify a verdict for the plaintiff, and directed judgment to be entered up for the defendant; whereupon, the plaintiff brought his writ of error.

*Swann, for plaintiff in error.—The marshal is bound to serve all [*191 process put into his hands for service, as soon as possible, and if he does not, he is liable, in a special action on the case, to any party who suffers any injury by his neglect. Bac. Abr. tit. Sheriff. The service of the

*subpœna* in this case would have bound Kennedy, and if he should pay over the money after service of the *subpœna*, he would do it, at his peril. If there should be a decree against him, he could not avoid it, by showing that he paid away the money after notice. The decree would relate back to the time of notice.

*E. J. Lee*, contrà.—The marshal is not bound to serve process as soon as he can by any possibility serve it, which was the principle which the court below was called upon, by the case stated, to sanction. It is sufficient, in such a case as this, if he serve it, at any time before the return-day. The indorsement is no part of the process. The marshal was not bound to serve that, or to give notice of it to the defendant. All that he was commanded to do was, to summon the defendant to answer the bill, according to the command of the *subpœna*. The indorsement was a mere private notice. It might have been served by any person, and would have been as obligatory upon Hampson as if served by the marshal. This was the opinion of Chancellor Wythe, in the case of *Davis* v. *Fulton*.

February 28th, 1810. MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—The questions intended to be submitted to the court were, 1st. Whether the marshal was bound to serve this process as soon as he reasonably could; and 2. *Whether the service of such process would have made Hampson liable, in case he had paid over the money after such service. On these points, the court has no doubt. But the case is imperfectly stated. It does not appear that the plaintiff has sustained any loss by the neglect of the officer to serve the process, and for this reason—

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The judgment is affirmed.

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KORN & WISEMILLER *v.* MUTUAL ASSURANCE SOCIETY against Fire on Buildings, of the State of Virginia.

*Mutual insurance company.*

The separation of Alexandria from Virginia did not affect existing contracts between individuals. An insurance upon buildings in Alexandria did not cease by the separation, although the company could only insure houses in Virginia.

The obligation of the insured to contribute, does not cease, in consequence of his forfeiture of his policy by his own neglect.[1]

All the members of the company are bound by the act of the majority.[2]

No member can divest himself of his obligations as such, but according to the rules of the society.

ERROR to the Circuit Court of the district of Columbia, sitting at Alexandria.

This was a motion, in the court below, in the name of the principal agent of the Mutual Assurance Society, for judgment against Korn & Wisemiller, for $116, "being the amount due from them for a half quota, under a declaration for insurance made to the society, with six per cent. interest

[1] Hammel's Appeal, 78 Penn. St. 320; Smith *v.* Saratoga County Mutual Fire Ins. Co., 3 Hill 508; Hyatt *v.* Wait, 37 Barb. 29.

[2] Marshall *v.* Lycoming Mutual Ins. Co., 51 Penn. St. 402; Burger *v.* Farmers' Mutual Ins. Co., 71 Id. 422.