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Petition useth to grant *Subpœna's* to Persons to appear before the Mayor in his Court, and cited a Precedent 28 Febr. 3 Jac. Fish and Cole's Case, of a *Subpœna* out of the *Subpœna* Office.

Maynard for the Defendant. This Custom concerns the Country as well as the City, and must be tried by Verdict; and it is inconvenient for Country Gentlemen to be put to give Security to the Orphans Court by Recognizance.

The *Lord Keeper* decreed the Plaintiffs to try the Custom.

But though the Chancery will assist the Jurisdiction of inferior Courts in the doing of what is Just and Right; yet if there will likely be a Failure of Justice, Equity will prohibit their Proceedings, and restrain their Jurisdiction, as in 1 *Roll. Abr.* 374, *Pl.* 4; 12 *Co.* 113; *Max. Eq.* 25, 26.

[204] DE TERM. SANCT. TRIN. ANNO REGIS 23 CAR. II. [1671] IN CANCELLARIA.

The Lord Keeper.

Doctor SALMON against the HAMBOROUGH Company, by the Name of the Governor, Assistants and Fellowship of Merchant Adventurers of ENGLAND, and divers particular Members of that Company by Name, in their natural Capacities. [1671.]

A Course to recover a Debt from a Corporation that hath nothing whereby it may be summoned.

The Bill charged, that the Company were incorporated *prout per* Letters Patent, and had Power to make By-Laws, and to assess Rates upon Cloaths (which was the Commodity they dealt in) and by Poll upon every Member to defray the necessary Charge of the Company, and that the Company had imposed Rates accordingly, as namely, 4s. 6d. upon every white Cloath exported, and divers others, and thereby raised £8000 *per Ann.* towards the Support of the Common Charge of the Company, and that they had thereby got great Credit, and borrowed great Sums of Money by their Common Seal, and particularly the Plaintiff lent £2000 upon that Security many Years since. And the Bill did set forth divers Advantages they had [205] in Trade by being Members of this Corporation, which others wanted. And the Bill did charge, That the Company having no Common Stock, the Plaintiff had no Remedy at Law for his Debt, but did charge that their Usage had been to make Taxes, and levy Actions upon the Members and their Goods, to bear the Charge of their Company to pay their Debts, and did complain that they now did refuse to execute that Power, and did particularly complain against divers of the Members by Name, that they did refuse to meet and lay Taxes, and that they did pretend want of Power by their Charter to lay such Taxes, whereas they had formerly exercised Power, and thereby gained Credit; whereupon the Plaintiff lent them £2000, which was for the Use and Support of the Company's Charge, and so ought to be made good by them, and so prayed to be relieved.

Paschæ, 1656, this Bill was filed, and the Company served with Process, but would not appear, they having nothing by which they may be distrained: But divers particular Members being served in their natural Capacities, did appear and demur, for that they were not in that Capacity liable to the Plaintiff's Demands. 10 *May* 1666, On the Argument the Demurrer was allowed, and the Bill dismissed as to them, and that Dismission enrolled, and thereupon a Petition of Appeal was preferred to the Lords in Parliament, admitting that in the ordinary Course of Proceedings in Chancery that Court could not help the Plaintiff. But in Causes of this Nature the Lords House had given special directions to the Chancery to relieve, and it had been accordingly so done, and produced two Precedents against Companies in *London* for that Purpose. And to this Petition the Defendants particularly named did put in an Answer, Plea and Demurrer; and the Company, tho' several times summoned, did not appear. And upon Debate of the Matters before the Lords at the Bar of the Lords House 20 *January*, 1670, this Order was made.

The matter upon the Petition of *Salmon*, Dr. of Physick, exhibited to the Lords

Spiritual and Temporal in Parliament assembled, against the Governors, Assistants and Fellowship of the Merchant Adventurers of *England*, commonly called the *Hamborough Company*, and Sir *Charles Lloyd* Baronet, Sir *Anthony Bateman* Knight, *Thomas Smith*, *Richard Wyan*, *John Dogget*, *Henry Colliar*, *Henry [206] Smith*, *John Lethieulier*, *Christopher Pack*, *George Wytham*, and others, Members of the said Company, and upon the Answer, Plea and Demurrer of the said *Rowland Wyan*, *John Dogget*, *Henry Colliar* and *John Lethieulier* put in to the said Petition (the Governor, Assistants and Fellowships, tho' several times summoned, not appearing) being heard at the Bar of this House, in Presence of Counsel learned on both sides, the said Petition being on Appeal made from a Dismission in the High Court of Chancery, and the Petitioners Bill there. Their Lordships on reading the said Petition, the Answer, Plea and Demurrer thereto, and the said Dismission, and the Charter by which the said Governor and Fellowship are incorporated, and hearing what was alledged on both sides, do order that the Dismission, for so much as concerns the said Company, be, and do stand reversed, and that the Lord Chancellor, or the Lord Keeper of the Great Seal of *England* for the Time being, do retain the said Bill. And that the said Court of Chancery shall issue forth the usual Process of that Court, and if Cause be, Process of *Distringas* thereupon against the said Corporation; provided the said Process be served one Month before the Return thereof. And if upon Return of the Process, the said Corporation shall not file an Appearance, or shall appear and not answer, the said Bill shall be taken *pro confesso*, and a Decree shall thereupon pass. But in case the said Corporation shall appear and answer within the Time aforesaid, then the Court of Chancery shall proceed to examine what the Plaintiff's just Debt is, and shall decree the said Company to pay so much Money as the same shall appear to amount unto, with reasonable Damages. And in case the Corporation shall not pay the Sum decreed within ninety Days after the Service of the said Decree upon their Governor, Deputy-Governor, Treasurer, Clerk or Secretary for the Time being; then the Lords Spiritual and Temporal do farther order, adjudge and direct, that the Lord Chancellor or Lord Keeper for the Time being shall order and decree, that the Governor or Deputy-Governor and the twenty-four Assistants of the said Company, or so many of them as by the Tenor of their Charter do constitute a *Quorum* for the making of Leviations upon the Trade, or Members of the said Company, for the Use of the said Company, shall within such Time as by the Lord Chancellor or Keeper shall be thought fit, make such a [207] Leviation upon every Member of the said Company as is to be contributory to the Publick Charge, as shall be sufficient to satisfy the said Sum to be decreed to the Plaintiff in that Cause, and to collect and levy the same, and to pay it over to the Plaintiff as the Court shall direct. And such a Leviation is to be put in Writing, and signed with the Hand of the Governor, Deputy-Governor and Assistants of the aforesaid Company for the Time being, and so many of them, as by the Constitution of the said Charter do make a *Quorum*, shall not make or return such Leviations, as aforesaid, the Lord Chancellor or Lord Keeper may issue Process of Contempt against them, as is usual against Persons in their natural Capacities. And if by the said Time so to be limited by the said Court of Chancery, the said Money so to be assessed, shall not be paid, then and from thenceforth every Person of the said Company, upon such a Leviation, shall be made to be liable in his Capacity to pay his *quota* or Proportion assessed. And the Lord Chancellor or Lord Keeper is to order or decree, that such Process shall issue against any such Member so refusing or delaying to pay his *quota* or Proportion, as is usual against Persons charged by the Decree of the said Court, for any Duty in their several Capacities. And if the Total so returned and filed with the Register shall not amount to so much as shall be sufficient to satisfy the Sum decreed, with Respect had to such Person as shall make it appear that they are overcharged, or ought not to be charged at all, then the said Lord Chancellor or Lord Keeper for the Time being, may from Time to Time, order that a new Leviation be made and returned into the Registers of the Court of Chancery, of such Sum as shall be sufficient, by way of Supplement for that Purpose, to the Payment whereof every individual Person is to be bound in such Manner as aforesaid.

6 *March*, 1670. The Lord Keeper on a Motion grounded on the Lords, ordered that the Dismission stand reversed, and the Bill stand revived, and that Process and other Proceedings issue as is thereby directed, and the Service thereby directed be sufficient.

Accordingly the Treasurer and Secretary were served with a *Distringas* against the Company, and Copies of the Lords Order. The Sheriff returned *Nulla bona*; and no Appearance is made.

[208] 5 July, 1671. Ordered the Cause be put into the Paper to be heard, and Notice to be given to the Treasurer, Clerks and Secretary.

And now the 5th of July, 1671, none appearing for the Defendants, the Court decreed the Bill to be taken *pro confesso*, and the Defendants to pay the Plaintiff's Debt, according to the Lord's Order in Parliament.

The Lord Keeper ; Justice Wyld ; Baron Windham.

The Lord CORNBURY and Dame FLORA his Wife, formerly the Lady BACKHOUSE, against SIMON MIDDLETON, and others. July 1671.

[For previous proceedings see S. C. *sub nom. Backhouse v. Middleton*, 1 Chan. Cas. 173.]

This Cause begins *fol.* 173, and being abated by the Plaintiff's Inter-marriage since the last Hearing, a Bill of Revivor was brought, and the Cause was reheard by the Lord Keeper, assisted with Justice *Wyld* and Baron *Windham* the 3d of March, 1670. And the Case appearing to be as before, it was for the Defendants insisted, that the Contract made by Sir *Hugh Middleton*, with Mr. *Bishop*, did not bind; and that he being but *Cestui que trust* of a Surplus, had no Power to sell, for that it was against the very Essence of the Trust for him to have a Power to dispose; and it would be a vain Thing for any Parent to settle his Estate by way of Trust, to prevent his Sons imprudent Disposition of it (which Sir *William Middleton* did here to settle his Estate with a Design to keep a Hand on his Son), if notwithstanding his Son might have Power to sell it when he pleased.

And it was farther insisted on for the Defendant, that if the Agreement with *Bishop* were binding, yet the Plaintiffs have no Title to have the Benefit of that Agreement, for that the Breach of an Agreement, as the Case was, was not devisable, and so the Plaintiff had no Title; Things in Action, as this Case is, being not devisable.

To which it was answered by the Plaintiffs Counsel, That Equity consists purely in Action, and is only to be come by, by the Process of this Court; and cited *Cole* and *Moor's Case*, 5 *Jac.* [1607] *Moor's Rep.* [806].

[209] *Windham* was of Opinion that the Benefit of this Agreement is not devisable: For Things that consist in Privity must be carried on in Privity; and Sir *Hugh Middleton* could not have enforced the Devisee, unless she had pleased, to pay the Money *Bishop* was to pay, and the Remedy ought to be reciprocal.

Wyld. Sir *Hugh* had an Equity to the Residue after the Debt and Portions paid, and it was a Crime to sell a Thing twice, and the Defendant was *particeps Criminis*, and so no Decree ought to be for him; but would have Sir *Samuel Jones* and the other Trustees for Sir *William Middleton*, in whom three Parts of the four were vested in Point of Law, convey fourteen Shares to the Lady *Cornbury* and her Heirs.

Lord Keeper agrees with *Wyld* that the clear Equity and Conscience was with *Bishop's* Title, and that the Defendant *Simon Middleton* did interlope; but did much doubt upon the Devise: Yet forasmuch as *Bishop's* Heir was a Defendant, and consents to the Devise by Answer, did decree, that Sir *Samuel Jones* and the Six Clerks to whom he had conveyed by Order of this Court, should convey, by Consent of the Heir of *Bishop*, fourteen Shares to the Lady *Cornbury* and her Heirs.

The Lord Keeper upon the Hearing by himself alone in June, 1670, being of Opinion to dismiss the Bill, and the Court being now divided in Opinion, the Defendant *Simon Middleton* petitioned for a Rehearing, and had a Hearing accordingly in July, 1671, before the Lord Keeper, Master of the *Rolls*, *Rainsford*, *Wyld* and *Windham*.

And now upon this Rehearing, it was for the Defendant *Simon Middleton* insisted, that the Agreement with *Bishop* did not bind, for the Reason *supra*; and farther, that the Agreement itself was imperfect, because the Money was to be paid as the Trustees should agree, and they did never agree to it, but *Henry Middleton* the only acting Trustee did, so soon as he heard of it, utterly disagree to it; and also for that the Agreement with *Bishop* was not pursued, for the Agreement with *Bishop* was in June, 1657, and by that the Conveyances were to be executed in August next, but those not so much as prepared, nor any Thing done in Time, and but £250 paid, and the Defendant *Simon* had paid above £15,000, and had a Conveyance by Deed and Fine of the whole thirty-six Shares (*Bishop's* Contract being but for fourteen Shares executed above [210] twelve Years since), and had been in the Possession of the whole thirty-six