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A R G U M E N T

IN THE



CASE OF THE POOR'S RATE

Charged on the COLLEGES of

CHRIST AND EMMANUEL,

IN THE

UNIVERSITY OF CAMBRIDGE.

By Sir James ^{1768.} Harrington, L.L.D.

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ADVERTISEMENT to the READER.

IF this *cause* had not been dropped by a motion being made by the churchwardens and overseers to quash so much of the rate as affected the colleges, and to confirm the rest, the following argument would have been delivered from the bench; provided that, from any arguments of counsel, there should not have appeared good reason to the contrary.

The printing of a law argument, designed to have been delivered by a magistrate, will not be thought irregular by those of the profession, who will, it is believed, recollect several arguments in the Books of Reports in this way: particularly the famous argument prepared by lord chief baron *Gilbert*, upon the jurisdiction of the ecclesiastical courts: and there are published, I believe, some prepared arguments of the late lord chancellor *Hardwicke*, and of other eminent judges.

The reason of printing the following argument, without publishing it, is not only to save the trouble, and to avoid the mistakes of frequently copying it; but to communicate the same, in a private way, more easily to the members of both universities, who are interested in so important a question; affecting ultimately and extensively all their privileges: as well as the better to receive any fresh lights which may be thrown by able gentlemen of the profession of the law upon the case.

It is thought by one, of great authority in it, that the argument, which turns upon the *uncertainty* of such rates, and of the *persons* rated, is one of the strongest, among others, against the rate in question.

T H E
A R G U M E N T.

AN appeal from a poor's rate was made by an inhabitant of the parish of *St. Andrew's* in *Cambridge*, to the justices of the peace for the town of *Cambridge* at the quarter sessions: and the ground of the appeal was, 'That the colleges of *Emmanuel* and *Christ* were *not rated* within the said parish; and 'therefore ought to be rated according to the 43 *Eliz.* Two justices were of opinion that the rate should be quashed: two the contrary; and the third not giving any opinion, the rate remained established.

Since that time the churchwardens and overseers have made a second rate in which they have rated *the masters, some of the fellows, and one fellow-commoner of the said colleges.*

The rate made in the parish of *St. Andrew's, Cambridge*, is in the following manner.

£.		£.	s.	d.
30	Rev. Dr. <i>Richardson</i> , Master of <i>Emman. Coll.</i>	1	15	0
30	Rev. Dr. <i>Hugh Thomas</i> , Master of <i>Christ Coll.</i>	1	15	0
6	<i>Henry Hubbard</i> , B.D. Fellow of <i>Emman. Coll.</i>	0	7	0
6	Rev. Mr. <i>Farmer</i> , Fellow of <i>Emmanuel Coll.</i>	0	7	0
6	<i>Samuel Blackball</i> , Clerk, Fellow of <i>Emman. Coll.</i>	0	7	0
6	<i>John Askew</i> , Clerk, Fellow of <i>Emmanuel College</i>	0	7	0
6	<i>John Hynde Cotton</i> , Fellow-Commoner of <i>Em. Coll.</i>	0	7	0
6	Rev. Mr. <i>Emsel</i> , Fellow of <i>Emmanuel College</i>	0	7	0
6	<i>William Parkey</i> , Clerk, Fellow of <i>Christ College</i>	0	7	0
7	<i>James Blackley</i> , under-tenant of the Master of <i>Emmanuel College</i> .	0	8	2

Rate made *March 21, 1768.*

Francis Tunwell } Churchwardens.
John Smith }

John Blow's } Overseers.
John Wilkin }

Allowed *22 March,*

James Gifford } Justices.
W. Ewin }

From this rate the said masters and fellows appeal.

A doubt might have arisen upon the propriety of the Vice-chancellor of the university, and the mayor of the town, and others who are inhabitants of the town giving any determination on a cause, which, though *in its present shape it is confined to a particular parish, and two particular colleges*, must ultimately in its effect reach the whole university, and every inhabitant of the town of *Cambridge*: such doubt or delicacy might have arisen, if the statute of 16 *Geo. 2.* had not avoided it.

By the 16 *Geo. 2. c. 18.* ‘Justices may do all things appertaining to their offices, so far as the same relates to the laws for the relief, maintenance, and settlement of the poor: for passing and punishing vagrants: for repairs of the highways, or any other laws concerning parochial taxes, levies, or rates, notwithstanding they are rated or chargeable with the rates within any place affected by such their acts. Provided that justices for a county at large shall not act in the determination of any appeal to the quarter sessions of such county, from any order, matter or thing relating to any such parish, township, or place where such justice is so charged or chargeable.’

The act had in view the necessity of giving this jurisdiction to justices of the peace for towns corporate, and cities which are *counties* of themselves.

The appeal from the last rate not having been admitted: the churchwardens and overseers have shown a contempt for this bench, in making this second rate in defiance of that determination, and for putting parties to a great expence; they are to be condemned in full costs if this rate is quashed. For if the other rate was good, this is bad.

Fomentation of suits must be checked and punished.

That the case is determined, is an objection in *primo limine*.

But to take the whole merits, may be better in giving an opinion in a popular cause of such consequence.

The fact admitted is, that at *no time* since the making the statute of the 43 *Eliz.* viz. in a period of 167 years, colleges in the university separately or together have been made liable to any rate for the employment and maintenance of the poor of the adjoining parishes.

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The question therefore in the general issue turns upon the operation of that statute *now* upon the colleges.

Now with respect to the rule of interpreting the statute law, *usage* of long time is a *silent precedent* which is always admitted in the courts of common law, as the interpreter of all statutes.

In this it agrees with *the civil law*. “*Quid refert an populus sententiam suam declaret rebus an verbis?*” says the imperial law. And therefore so far as the *usage* upon the statute goes, and so far as it relates to the colleges in the university, they have hitherto been exempt from the poor rates by an *uninterrupted* usage of no less than 167 years.

The common law, in imitation of the civil law, requires the same qualities to support a usage. It must have been *long, uninterrupted, and reasonable in its origin*.

Now the *presumption Juris et de Jure* in this case *prima facie* on the face of so long a usage must be, that the usage, and consequently the interpretation, or rather the avoidance of the statute *quoad hoc* is well grounded, that is to say, reasonably grounded; either upon

1st, The *special* or *public* nature of the constitution of such eleemosynary and learned foundations, and their rights of incorporations as societies taken *separately* or *conjunctively* with the *whole body* of the university. Or,

2^{dly}, That something is or hath been paid by the members of that public *body*, and been accepted by another public body in *contribution* for the maintenance of the poor of the body which has accepted, so as to work a kind of *modus* or legal right of exemption from any farther contribution.

The general rights of the university, including those bodies which make a part of it, so far as it relates to a *public purpose*, undoubtedly stand upon great *grounds* of law.

It consists of societies which are in their legal and actual nature *eleemosynary* foundations of antient time, for the encouragement of good learning, sound doctrines in morals and religion, and good loyalty; and *for the support of the national government* in all its connections; affecting the minds, and frequently the conduct of the subject.

It is an indisputable fact, that as these societies were originally and before the statute eleemosynary, so they are *at this day* still *poor*, not only in the eye of the law, but in fact.

The fellows and scholars, and even masters of colleges, have only such stipends as are in *aid* of their maintenance in the pursuit of their own studies, or in directing the studies of others; and which are very far indeed from being sufficient for their support in their respective characters and stations.

Upon the general analogy of law, which has established that *ecclesia non decimas solvit ecclesie*, so it stands that public eleemosynary institutions shall not be rateable to eleemosynary purposes for other poor.

The same statute 43 *Eliz. c. 2. sect. 14. 15.* directs that a proportion of the money to be raised by virtue of this act, shall be sent for the relief of hospitals in the respective counties.

Now the act cited never intended that hospitals should be taxed for the relief of other hospitals.

As every parish is in law a body politic; so every college is a political corporation, and the university is more extensively so in its general mass.

It is distinguished more favourably from such other bodies politic as parishes, because it is a body politic for great *public uses*.

The occupiers of colleges in the university, and its officers, are *trustees* for the public; and so far as they have any particular emolument and interest themselves, they are but *stipendiaries retained in its service, under fixed regulations*.

It is not material to consider singly, whether by perambulation of bounds, colleges, or parts of them, have been taken into the circuit of any parishes or not, and so have been suffered to be held in *general opinion* and vulgar notion, a part and parcel of any parish? or otherwise, whether they are in the nature of a vill within the precinct of any parish? or whether they are reputed parishes of themselves, having a chapel, chaplains, divine service; or, in the language of the ecclesiastical law, having *sacramenta* and *sacramentalia* within themselves? Or, are intirely extraparochial; from their being ancient monasteries, or erected on their foundations?

The fact of double fees paid to the minister of the parish of *St. Andrew's*, as for strangers buried, and that the two colleges were ancient monasteries, is admitted.

The above are not material considerations, if colleges are exempt in any one view; and that they are exempt, is agreed from the usage (which is the legal rule of interpreting the statute)

statute) and from the nature of their foundation as eleemosynary and for great public uses.

These are the first great outlines of the question.

It comes next to be considered how the statute specially directs.

The 43 *Eliz. c. 2. sect. 11.* “ Directs a taxation of every inhabitant, parson, vicar, and others; and of every occupier of lands, houses, tithes impropriate; appropriation of tithes, coalmines, or saleable underwoods, in the said parish.

So that, in order that any persons should be liable to this taxation, the qualities jointly requisite are Habitaney, and Occupation, in the parish.

The persons to be taxed are *separate persons*, not *aggregate bodies*.

The ground from which the tax is to arise are *lands, houses* inhabited, and other things arising out of lands or immoveable possessions.

The rate, in case of refusal or neglect or payment, is to be levied by distress and sale of the goods of the party.

There is no doubt but the houses, lands, and other estates of colleges, are liable to the rate so far as they are occupied by any lessees of a college.

And so are the occupiers lessees of hospital estates. So 2 *Salkeld* 527. is a case that makes nothing to the point here. But it does not appear that a college, as an aggregate body, can or ought to be rated for its manse, occupied by its members. The impossibility of levying a rate upon them is an objection not to be got over. According to the act it must be laid upon separate persons, and upon separate rents and appretiaments.

The master pays no rent for his lodge. The fellows pay no rent for their apartments. They are so little separate persons in the eye of the law, that they do not even pay separately to the land-tax, but the university pays for the whole together.

That colleges are liable to the land tax does not make them equally liable to the taxation for the poor, under 43 of *Elizabeth*. The land-tax is totally different from the poors tax: there is no analogy between the nature or operation of two distinct taxes, laid on different objects, by two different acts

of parliament. The one, the poor's rate is upon the occupier inhabiting; and the other the land-tax is upon the owner. The one depends upon a person singly and his locality, and ceases with the occupancy and inhabitancy: The other follows not the inhabitancy but the property.

But how can a rate be laid upon the master for his lodge, for which he pays no rent, and which he occupies in *autre droit* as a trustee in right of his college, and as a constituent part of his corporation? the apartments of himself and fellows have no value separate from the whole college, and so there is no rent by which the rate can be measured and appretiated: and there is no person in law who can be separated from the complex of his society *singly to be rated*.

Colleges can not let their apartments but to members of their own institution; and so they cannot be valued as other tenements are, which are assignable.

As in monasteries, by law, in the spirit of the feudal system, every member was held to be *Servus Monasterii*; so in colleges at this day, which are but monasteries reformed, the masters and fellows are still but public servants of their own *politic and legal essence*, and remain so indivisible in respect to college rights. They must sue and be sued together.

With respect to any other bodies politic, it is undoubted that the university, and its colleges, are corporations perfectly independent, and so not liable to be involved in any other corporate bodies, or *small bodies politic*, such as parishes are, if there is any weight in their charters: or in the common law and usage of the realm by solemn decisions established in their favour. *It is contrary to law that one body politic should rate another, and that the inferior should tax the superior.*

Noblemen, fellow-commoners, pensioners, are not *occupiers, residents*, rateable in the eye of the law, any more than lodgers for a winter at a house in *Bath or London* are rateable as occupiers. They are not such inhabitants in the parish as can acquire this quality; they are inmates, and have no permanent domicility.

Colleges are constantly in a flux state as to occupancy; masters, fellows, scholars, are frequently changing apartments; frequently not resident, even for years.

By the *poor act* all persons are to be separated, and yet by
the

the constitution of colleges all persons are indivisible as to all dues to or from the society.

Nothing can be argued from the scite of colleges, in whole or in part. As one manor often exists in the very midst of another, so do parishes; which *generally*, from the endowments of lords, have followed the bounds of manors.

It is not *impossible* therefore that a college, or a part of it, may exist in the midst of a parish or parishes, as to the scite of their mansion, and yet may have parochial rights within themselves, may be parishes in reputation, or may be exempt as independent bodies politic.

That such independent places may exist, at common law, exempt from any adjoining parishes, is clear from the proviso of this very statute, 43 *Eliz.* in the case of the island of *Foulness*, c. 2. sect. 18.

The words are,

“ In regard to the island of *Foulness*, having a chapel of ease
 “ for the inhabitants thereof, yet *the said island is no parish*,
 “ but the *lands in the same are situated within divers parishes*,
 “ the justices are authorised to appoint inhabitants within the
 “ said island to be overseers from the poor dwelling within
 “ said island.”

In case of establishing the rate upon the colleges, a distress must be made; but none can be made *without being liable to replevin* upon the goods of any particular person; because the goods are his own, and not the goods of the college. It is to very little purpose to distrain upon bare walls.

The consequence follows, That as no body is rateable singly, nor liable singly to distress, so no rate can be made upon colleges or their members at all. And then the rate is void for *Uncertainty*.

Certainty is requisite in law.

In the case of *St. Luke's hospital*, 2 *Burrows*, p. 1057. the court held, *That the occupier rated must be particularly specified*; and held the case of *Brickbill* not to the point, *because the man*, (although not rated nominally, but as the occupier of *Roscoe's* tenement) *had long acquiesced* and paid the rate.

A master of a college, or *custos hospitii*, is not more an occupier than the steward or housekeeper of *St. Luke's hospital* is an occupier, under the statute: And yet in the latter case it was determined against the rate.

The

The rate in question need only be looked upon, to show the difficulty the churchwardens were under in making a rate, in respect to the colleges without partiality, and with certainty. The two masters are rated; a part of the fellows only: but one fellow-commoner, and not one pensioner or scholar.

The observation already made upon the land-tax extends to the window-tax. It is intirely different from the poor-tax, and stands upon the descriptions in its own particular act of parliament, and circumstances.

That a corporate body can be only taxed in its corporate capacity to a public tax; and that it is impossible to tax its individual members, was the determination of lord *Mansfield*, in the case of the Royal Assurance Company. 1 *Burrows*, 155.

But if it should be admitted, which we do not admit, that colleges, or the university, are rateable in some way or other. It may be insisted upon that they are only so of their own free will, *sub modo*, and by composition with reciprocity of benefit from the agreement.

This leads to an inquiry into a fact, whether colleges have paid, or do pay any thing in aid of the poor, either as rated, or by composition, or by a voluntary contribution? Or do charge their own poor upon the neighbouring parishes?

The fact is admitted, that the statute for the poor's rate, 43 *Eliz. made in the year 1601, never was put in force*, in respect to colleges, *at any period*: And that colleges did voluntarily contribute, both before and after the act, in private charitable aid of the poor: And about the year 1620, — 19 years after the statute, when, *the plague being in Cambridge*, some parishes were extremely burthened with poor, the university raised by voluntary contribution from the several colleges the sum of 4 *l. per month* till the year 1650; when an agreement was between the Vice-chancellor, Heads of Colleges, and the Mayor and Aldermen, that 120 *l. per annum* should be raised by the colleges, and to be paid to the over-burthened parishes in the following proportion; in which arrangement no attention was paid to what parishes any colleges were situated in.

	l.	s.	d.
To St. Andrews	36	6	0
Trinity	18	0	0
Little St. Mary	9	12	0
St. Benedi ^c t	3	0	0
St. Peter's	15	0	0
St. Giles	37	16	0
	<hr/>		
	119	14	0
Charge of collecting and paying	6	14	0
	<hr/>		
	126	8	0
	<hr/>		

A regular payment was continued down to 1748, viz. for 102 years.

In *October*, 1748, Dr. *Paris*, Vicechancellor, and five more heads at a meeting of themselves, without entering into any agreement with the corporation of the town, made an alteration: so that St. *Andrew's* parish, which used to receive 37*l.* 16*s.* received but 17*l.* and he made a proportionable distribution to 13 parishes instead of 6.

Dr. *Chapman* the next year paid it only as before to 6 parishes. Dr. *Keen*, after him, in his two years, divided it as he pleased at discretion.

In the intermediate periods of 1620, (when the agreement between the Vicechancellor, and heads on one part, and the Mayor and Corporation on the other was made,) several overtures passed upon both sides respecting the distribution and mode of payment, but no agreement appears to have been executed in form: yet the voluntary contribution *in toto* has continued to this day the same: one college excepted, which is said to have *suspended* its payment.

It is remarkable that although there are 13 parishes in *Cambridge*, yet only 6 had any share at all in this contribution: and that 7 received nothing from the colleges at any given period in the course of 128 years: viz. from the first establishment in 1620 to 1748, the year when Dr. *Paris* first altered the mode of distribution.

In all that period of 128 years the parishes in which the principal Colleges are seated received nothing. viz.

St. *Edward's*, containing all *King's College*, *Clareball*, *Trinity-ball*, and part of *Catharine-ball*; Bo-

Betolph, all Queen's, part of Pembroke, and part of Catherine-Hall;

St. Michael's, all Caius, and part of Trinity College;

All Saints, all Jesus, Sidney, part of Trinity, and Saint John's.

The parish of *Trinity* which did receive, had no colleges in it.

The inference from these facts is plain that nothing was paid *de Jure*, or in view of any rate as due from the colleges parochially. And that the parishes where the principal colleges are situated are so benefitted that they want no fixed charitable bounty. On the whole it appears that the colleges for a period of 19 years, viz. from 1601, the date of the statute, were not contributors to the poor; and that a certain voluntary contribution has been for a period of 167 years; in all which time the statute hath not *enured* with relation to colleges; and it would now be contrary to *common law* to extend it.

Acquiescence and acceptance of long time will work a prescription: and so in the case of *Brickbill* cited in *Burrows* in the case of *St. Luke's* hospital, it was said that acquiescence in a rate bound a party though he was not specified properly in the rate.

Therefore on the same ground, the town of *Cambridge* is bound by its acquiescence and acceptance of the compensation of the university; and so long as it is continued will be bound.

The compensation paid by the colleges of the university to the particular parishes meets the argument which is drawn from certain instances of the servants of some masters of colleges being sent to be maintained by a parish, because if that parish has a share of contribution from the colleges, then there is no burthen, there is a reciprocity.

But in a parish which *receives no contribution* from the *university*, such servant *possibly* ought not to be put upon that parish: he should be sent to the place of his last legal settlement, if he can acquire no settlement here.

With respect to the servants of noblemen, fellow-commoners, and pensioners, not of the foundation, they, like their masters, being only *loco motive* and inmates *pro tempore*, may gain no settlement in the town of *Cambridge*.

Parishes may have acquiesced, or justices may have allowed such settlements in a very few instances. But instances of this sort certainly work no general binding precedent of law, nor are the decisions of the quorum in a borough town conclusive upon the wisdom of his majesty's judges. And the question remains open.

With

With respect to other college servants not domiciled in college, if they, in any instance, have been a burthen to a parish, it has been on account of their having been occupiers of houses and inhabitants in a parish, and *that, many having paid to rates themselves, they are in their turn intitled to a maintainance.*

Sir Robert Heath, chief justice in 1633, gave it as *his* opinion, that a nurse child, or scholar at a grammar-school, or at the university, or persons sent to the common goal, hospital, or house of correction, are not to be esteemed as persons *settled there* more than *travellers* in their inns; but their *settling is where their parents are settled.*

So far are colleges from burthening parishes with poor that they do greatly assist them and lessen their rates by employing and maintaining several poor old men and women, inhabitants of the adjoining parishes, who would otherwise for want of work be a great burthen to the respective parishes to which they belong as inhabitants, and many of them decayed *house-keepers*. Besides that the colleges, by the private fortunes of its members being spent in the town, and by occasioning a great resort of strangers, enable the parishes the better to support their own poor, the number of which is at the same time diminished.

The last point to be considered is in what way the orders of the justices at the quarter sessions, upon the two rates would operate.

The first rate which stands, omitting the colleges, and is confirmed, is clear of any objection; because the confirmation of that rate is well supported in law; because that rate agrees with antient usage and time immemorial; so *prima facie* could not be quashed *without special cause shown.*

But the second rate, for the same reasons, ought not to be confirmed; it should be quashed, because it hath not been usual to rate the colleges, and that the statute hath at no time *enured.*

But for this especial reason the second rate should be quashed, because in confirming the second rate it would be for the justices to take upon themselves in *effect* to determine the parochiality of colleges, and consequently to judge of the several antient titles, rights, and immunities of their legal essence at common law, of their charters as particular bodies politic, or as making a part of that larger body politic, which involves them in the public and aggregate character of the UNIVERSITY.

Such a decision of the justices as should confirm the second rate

rate would be in fact annexing colleges to parishes, and the university to the town. But justices have no power to *annex* one body politic to another; if they do, *their order is void*. And so it was adjudged in several cases. There is a strong case 1 *Croke Charles* p. 286. *Nichols v. Walker and Carter*. *Totridge* was found by the jury to be a vill, antiently parcel of the parish of *Hatfield*, and that this vill had never been severed by any solemn act from the parish of *Hatfield*, and that the tythes of *Totridge* were paid to the parson of *Hatfield*, and for threescore years or more, and at the time of making the act of 43 *Eliz.* for relief of the poor, and unto this day the said vill of *Totridge* was commonly reputed a parish by itself, and had its own officers and chaplain, and repaired its own chapel. The action was brought for a trespass against the church wardens of *Hatfield* for a distress upon the goods of the plaintiff, inhabitant of *Totridge*, taken by warrant of three justices. Verdict for the plaintiff.

And on a motion to justify the officers, because they did it by the authority of three justices, it was overuled; “for the rate being *unduly* taxed, it is not like a warrant from one of the King’s courts, who have a general jurisdiction.” But here the “justices of the peace have but a particular jurisdiction, viz. to make warrants, to levy rates *well* assent.” Adjudged for the plaintiff.

And so lord *Mansfield* said, in the case of *St. Luke’s* hospital, that “in an assessment of a rate there may be not only a defect in form but in the *essence* of the thing: for unless some particular person be fixed upon who may *properly* be rated as occupiers of the building, no rate at all can be made upon it.”

In cases of reputed parishes, or vills extraparochial, or exempts, the justices cannot send persons to them from another parish, nor *vice versa*.

So it was determined in the case of the inhabitants of the forest of *Dean*, and the parish of *Linton*. 2 *Salkeld*. 487.

It was said, places exempt from receiving shall not have the benefit of removing.

These are the words of that great man lord chief justice *Holt*. “Persons in extraparochial places must subsist on private charity, as all persons did at common law, before the 43 *Eliz.*” “The 43 *Eliz.* does not extend to extraparochial places.”

Where extraparochial places contain *more houses* than one,
so