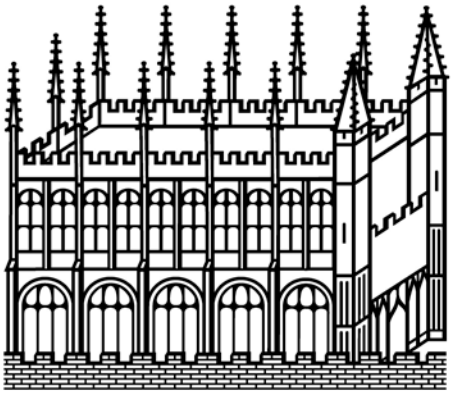

THE RIGHTS AND PRIVILEGES OF BOTH THE UNIVERSITIES AND OF THE UNIVERSITY OF CAMBRIDGE IN PARTICULAR DEFENDED

IN A CHARGE TO THE GRAND JURY AT THE QUARTER SESSIONS FOR THE PEACE HELD IN AND FOR THE TOWN OF CAMBRIDGE THE TENTH DAY OF OCTOBER 1768.

ALSO

AN ARGUMENT

IN THE CASE OF THE COLLEGES OF CHRIST and EMMANUEL.

BY JAMES MARRIOTT, LL.D.

CAMBRIDGE,
Printed by J. ARCHDEACON, Printer to the UNIVERSITY:
Sold by T. & J. MERRILL, and J. WOODYER in CAMBRIDGE
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B. WHITE, JOHNSON & Co. J. BEECROFT, and
J. WORRALL in LONDON. 1769.

For the Benefit of the HOSPITAL at CAMBRIDGE. *(Price 1 s.)*

IT is owing to certain miſrepreſentations that the following charge is printed: although the Perſon who delivered it as a Magiſtrate could have wiſhed to have avoided the ſubmitting to ſtrict peruſal words ſpoke without preparation, on a ſudden occaſion, when he was ſpecially requeſted by the reſt of the Bench to attend on account of a proſecution of much conſequence. It will however be a very great ſatisfaction if the publication may ſerve a general purpoſe, and keep up for the future in the minds of the inhabitants of this place, the ideas which were meant to be impreſſed concerning the ſubmiſſion due to the good government of the Laws in general, and the preſervation of the moſt invaluable Rights and Privileges to this Univerſity in particular.

CHARGE.

Gentlemen of the Grand Jury,

YOU have heard his Majeſty's proclamation read againſt prophaneſs and immorality: I dare ſay no motive for a diſcharge of the duty required by it can be wanting to you: and I am extremely happy to ſee, in point of character and property, a Grand Jury ſo very reſpectable: It will be the leſs neceſſary therefore for me to preſs upon your attention the importance of that truſt which the conſtitution of your country repoſes in you.

With you, Gentlemen, as a Grand Jury, the laws begin and end: I mean with regard to their effect: for unleſs bills are found by grand juries, no crimes againſt the public peace and the ſafety of perſons or properties can be brought to puniſhment, and ſo future attempts diſcouraged and repreſſed; becauſe without bills are found no perſons can be tried. An ill-judged lenity therefore of Grand Juries, if occaſioned by perſonal favour, or the fears or hopes of private connection, is a crime againſt the conſtitution of our country, and deſtroys the laws in the firſt entrance of juſtice.

The bench, however enlightened or ſupplied in any place, can do little more than explain and announce the laws; but you, Gentlemen, are in fact the Judges for your Country: for you are, as judges of the fact in the firſt inſtance, the Guardians of the peace, and properties, and lives of your fellow ſubjects; becauſe you are to judge whether the bills preferred are ſuch as are fit to be proceeded upon by a more exact trial of the parties charged.

I know it has been attributed to an exceſs of lenity of former Grand Juries in this place, whether with or without a cauſe I know not, that crimes againſt the peace have eſcaped without farther trial. If this charge were true, the conſequence would have been plainly the greateſt public diſorder, from a preſumption of impunity. I inquire not into the cauſe, but what paſſed laſt winter is as obvious to your reflection as it is recent in your memories. Your houſes were not ſafe: ſcarce a week paſſed without ſhops being robbed, or attempted to be robbed: the ſtreets ſwarming at unſeaſonable hours with vagrants, and diſorderly perſons of both ſexes. The magiſtrates and officers of juſtice intimidated in the diſcharge of their duties: a murder committed, without the actor of that barbarity being yet diſcovered.

When I recollect a magiſtrate in this place, of the moſt reſpectable rank, being inſulted by the populace in the ſtreets upon the ſucceſs of a certain cauſe, I cannot help obſerving to you the general diſpoſition among the lower orders of the people to hold in contempt the authority of the magiſtrates; it has ſhowed itſelf almoſt in every corner of the kingdom, and broke out into violent diſorders: For my own part I tremble, leſt the continuance of them ſhould occaſion remedies as terrible as the diſeaſe. While this licentiouſneſs ſtalks abroad you cannot be too watchful, Gentlemen, to ſupport the laws and the magiſtrates: In them you ſupport your own property and ſafety. More particularly muſt you be attentive to ſtop the firſt ſources of public evils: I know none more certain cauſes of them here, than the numerous ſmall public houſes, the peſts of this town; and thoſe which come under the general deſcription of the law as diſorderly houſes, or houſes of bawdry. From hence proceeds all that diſſoluteneſs, and fa-

tal

tal extravagance attending it, which induce young perſons, by inflaming their paſſions, to deſtroy their conſtitutions, and to betray too often their truſts and their duties towards their maſters, their parents and families. Pilferings, robberies, and murders, flow from theſe places of vicious entertainment. You have a long liſt of priſoners: Among others, I ſee the ſon of a reſpectable inhabitant of this place charged with aſſaulting his own father, and afterwards drawing a knife upon the magiſtrate. If this is ſo: it is madneſs; ſuch as every greatly wicked perſon is poſſeſſed with: and to what can we attribute ſuch ſort of outrages, if it is poſſible, but to ſuch cauſes as theſe which I have mentioned?

You have in the calendar of priſoners ſeveral perſons who are charged with keeping houſes of debauchery: Among them is one who once was ſo ſucceſsful as to obtain a verdict againſt a reſpectable magiſtrate who was unfortunately miſtaken in the mode and forms of office. I think it neceſſary to obſerve here, for the ſake of the audience, that this verdict, as was the declared opinion of the King's Judges in *Weſtminſter* Hall, did not, and does not affect in any degree the juriſdiction of the magiſtrate, nor the right of the officers under him, nor the privileges of that body in which the magiſtrate preſided, who acted upon that occaſion.

By the laws of this land in favour of liberty, miſtakes in form are always uſeful to the criminal; a defect in the nicety of pleadings, the negligence or want of judgement in any counſel who ſettles them; the prejudices, or a little too much firmneſs of opinion, in perſons not verſed in the laws which are out of their profeſſion, are circumſtances, any one of which may occaſion at any time the loſs of a ſuit: but ſuch a caſe may happen

without deſtroying the general authority of the magiſtrates, or the legal privileges in the mode of exerting it, neceſſary to good order and government. There are great privileges exiſting within the diſtrict of this place. Thoſe privileges remain the ſame: they were granted for great public purpoſes: they have always been ſupported, and will, I truſt, this day, and ever be ſupported by thoſe whoſe duty it is to ſupport them, on the beſt and ſureſt foundation.

Should this woman, who has once triumphed, be now found guilty, I mean, if the evidence ſhould be full, in your opinion, and in that of the reſt of the jurors, it will only ſhow that public juſtice, however evaded or inſulted, however ſlow or obſtructed, at laſt overtakes a criminal. But I would not prejudice you againſt the perſon: I only mean to awaken your attention to the nature of the crime; that if you ſee reaſon you may find bills in this and the like caſes, in order to try the fact.

There are two other perſons charged with the ſame offence of keeping a common houſe of bawdry; *Morris Bearfoot* and *Sarah* his wife. I muſt obſerve to you, Gentlemen, that there is a ſtile of vice, ſo much the more dangerous to the morals of this place as it is ſuperior in elegance, and therefore it will deſerve your ſerious attention.

In order to obviate any niceties or diſtinctions which may be taken by counſel as to the indictments of theſe two perſons, it is proper for me to inform you that, by law, a wife may be indicted together with her huſband, and condemned to the pillory with him for keeping a bawdy houſe: for this is an offence as to the government of the houſe, in which the wife has a principal ſhare;

and

and it is alſo ſuch an offence as may generally be preſumed to be managed by the intrigues of her ſex. And ſo it is laid down 1 *Haw.* 2. *ibid.* 74.

I muſt farther obſerve to you, that although two perſons are proſecuted according to the 25 *Geo.* 2. which is made perpetual by the 28 *Geo.* 2. *c.* 19. yet that act only directs the mode of proſecution, and neither alters the nature of the offence, nor the puniſhment of it at common law.

This act is declarative of the common law, when this act ſays, *ſect.* 1. That the maſter or miſtreſs are equally puniſhable, and that any perſon who ſhall at any time appear, act, or behave him or herſelf as maſter or miſtreſs, or as the perſon having the care, government, or management of any bawdy houſe, gaming houſe, or other diſorderly houſe, ſhall be deemed or taken to be the keeper thereof, and ſhall be liable to be proſecuted: For, according to Lord *Coke*, Inſtit. 205. and 1 *Hawkins* 196. it is held, that the keeping a bawdy houſe is an offence at common law, as well as eccleſiaſtical; being a common nuſance, not only in reſpect of its endangering the public peace by drawing together diſſolute and debauched perſons, but alſo in reſpect of its apparent tendency to corrupt the manners of both ſexes.

For puniſhment of ſuch offences, antiently, the lords of leets had pillories: ſo 2 *Hawkins, p.* 73. and the ſheriffs held the leet or view of frankpledge, where all perſons appeared, and took oaths of allegiance, and ſwore to maintain the King's peace; and ſo great an effect, ſays Lord *Coke*, had this univerſally in keeping the peace, that before the conqueſt a man might have rode with a white wand, and much money about him, without weapon, throughout *England*. And although the view

of frankpledge, and the formal ſwearing of all perſons to keep the King's peace is diſuſed, yet it is a matter worthy the attention of all perſons who hear me, that every man is at this day ſtill bound by his natural allegiance, and by tacit obligation under which he is born: and in return for the benefit and protection of the laws, he is ſtill held in duty to keep and maintain the peace of the King and the land.

And it was upon the ground of this allegiance, in view of frankpledge, that the ſtatute of Hue and Cry was made: all perſons being charged in the King's name to aid and aſſiſt.

When I obſerve that this act of 25 *George* 2. is declarative of the common law, in reſpect to the puniſhment of the offence, it may be obſerved in general, that the penal ſtatute law has grown to ſo immenſe a ſize as to make us think leſs than we ſometimes ought to do of the officers and penalties at common law. This act particularly regards the mode of proceſs. The ſubterfuges of old offenders, more accurately verſed in the means of eſcaping juſtice than even their own ſollicitors or counſel, have occaſioned acts of parliament to be made to reach offences with greater certainty in the proceſs.

I know of no acts which the policy of the legiſlature has dictated in this view that deſerves to be applauded more than the act by which theſe parties are proſecuted: and it does infinite honour to the Judge who drew it; not more diſtinguiſhed by his birth than his talents, the Honourable Mr. Juſtice *Bathurſt*.

As this act, the 25th of *George* 2. *c.* 36. is but little known, and I believe this is the firſt inſtance

in

in which it has been made uſe of, and carried into execution in this place, it will be for the benefit of the people, who make the audience here, to be acquainted with its contents. By the 5th ſection of this act, the conſtable, upon notice of any two inhabitants of a pariſh paying ſcot and lot, that any perſons keep a diſorderly houſe, is obliged to go before a juſtice; they then, upon oath that they can prove, are to enter into recognizances of 20 *l.* each to give evidence; and the conſtable in 30 *l.* to proſecute; and 10 *l.* on conviction is to be paid by the overſeers to each of the pariſhioners ſo informing, upon conviction of the offenders; and the overſeers to be reimburſed by the pariſh.

So that the policy of this act is to oblige the overſeers themſelves to inform, in order to ſave the money of the pariſh. It alſo obviates the falſe notion of diſhonour in laying informations of this kind, by rendering ſuch informations neceſſary.

A common informer, that is to ſay, a perſon who make a general trade of it, is certainly an odious character, but in ſuch caſes as theſe, where the morals, peace, and even ſafety of families, in a whole neighbourhood is concerned, informations muſt be conſidered in a very different light. Ill Fame, Notoriety, Vicinity, and a general diſorderly manner of living, will juſtify every ſuch ſort of proſecution, which is an act of merit towards the public.

Having mentioned the words ill fame, and bad repute, it leads me to obſerve, that the common law has not defined or ſtrictly drawn the line to ſhow what ſort of houſes are houſes of bawdry. An indictment may even be generally laid of infamy and bad repute, at common law: and ſo Lord *Mansfield*, and the court of King's Bench, held in the

the caſe of *the King, v. Higginſon.* No acts of parliament have defined the offence: in ſhort, it was impoſſible to define that which the law has better left to the idea of a jury: who being of the vicinity themſelves cannot fail of being perfect judges of what houſes may rightly be held to be Houſes of Bawdry, Ill Fame, or Diſorderly, and the Keepers of them of courſe to be liable to the puniſhment inflicted by the laws.

With reſpect to evidence in ſuch caſes I muſt obſerve to you, that leſs evidence is neceſſary to induce a Grand Jury to find a bill, than may be ſufficient to convict; becauſe the evidence for the finding the bill is of the nature of the evidence upon examination of criminals in order to commitment; both being only in order to ſomething farther, and as a foundation for a trial.

In ſpeaking of evidence I muſt obſerve, that in caſes like thoſe now before you, the turpitude of any witneſs is no objection either to their competency or credibility; unleſs there appears revenge againſt the criminal: for without the evidence of perſons of ill fame, and diſorderly lives, thoſe perſons who are the principal abetters, perſuaders, and maintainers of ſuch evil and miſerable courſes, cannot be brought to juſtice.

Gentlemen, I have endeavoured to clear the way for you; and I enter the more willingly into this detail upon account of this audience; and that the proceedings in the criminal laws may be well underſtood, in order that they may be well executed.

So full and large a diſſertation is the more proper for me, and in my place, in order that many of the young perſons of this Univerſity who are near me, and who are deſtined, ſome of them, one day or other

ther to profeſs and practice the law, may underſtand the admirable conſtitution of their country in theſe particulars, and may admire with you, that which we are all equally bound to ſupport, the elegant ſimplicity of the laws in criminal trials, which our anceſtors, having built up with ſo much ſolidity, conſecrated to liberty.

I cannot conclude this charge, Gentlemen of the Jury, without publicly commending the zeal and diligence of a very good officer, the preſent high conſtable, and ſaying a word of the nature of his office. It is an office of great truſt and powers, and of a much antienter date as conſervator of the peace by common law than that of the juſtices of the peace, who were created by ſtatute; and whoſe powers in ſome reſpects are thought to break in upon the line of the Great Charter. This officer may do many things upon view: and the petty conſtables, who, I deſire will take notice what I ſay, are to obey him as their commanding officer, or to ſuffer upon complaint duly made and proved for their diſobedience; ſubordination being the life of civil as well as of military diſcipline. I fling out this becauſe there has been lately an aſſault upon this officer in the diſcharge of his duty. And now I mention him as a conſervator of the peace, I cannot omit the ſpeaking of other conſervators of the peace of a higher rank and character; leſt any perſons ſhould imagine, that their power is ceaſed, or to be reſiſted with impunity. I mean the Proctors of this Univerſity. By common law and uſage, and by the charters and privileges of both the Univerſities of this land confirmed by act of parliament, the Proctors in both Univerſities are the nightwatch and ward eſtabliſhed by immemorial cuſtom, and may *apprehend* and *detain* diſorderly and *ſuſpected* perſons, and thoſe who break the peace, *upon their own view without ſpecial warrant to apprehend and de-*

detain, in the ſame manner as any other peace officers and perſons keeping watch and ward in cities and great towns by law may do. For which ſee the Statutes 13 *Ed.* 1. c. 4. 5 *Hen.* 4. c. 3.

Many people have entertained abſurd notions, and others have induſtriouſly cultivated them, that the verdict at the aſſizes in the caſe of *Mart* and his wife was deciſive againſt the power of the Vice-Chancellor and the Proctors of the Univerſity.

In the caſe of *Mart* and his wife againſt Dr. *Elliſton*, Vice-Chancellor, and others, upon a motion for a new trial in the King's Bench, Lord *Mansfield* is ſaid, upon good authority, to have expreſſed his ſurprize that any ſet of men ſhould have looked upon that cauſe as a popular one; or wiſh to looſen the diſcipline of the Univerſity: that the cauſe was tried under particular circumſtances; and that the general rights and privileges of the Univerſity remained unimpeached by the verdict at the aſſizes. Sir *Eardly Wilmot* obſerved, that from what appeared on the trial, the rights of the Univerſity were rather eſtabliſhed than impeached; becauſe it appeared, that no ſuit had been commenced in conſequence of the exerciſe of thoſe rights for 200 years: ſo that they never had the ſanction before which they have now had.

This caſe of *Mart* againſt Dr. *Elliſton* has been much talked of, and little underſtood in this place. I will ſtate it fully; becauſe it will have its uſes in the future government of this place: and it will remove, I am confident, many prejudices and errors.

This cauſe in the firſt inſtance, I mean on the trial at the aſſizes here, turned upon a ſpecial plea. The declaration of the plaintiff was for impriſonment of the plaintiff by the Vice-Chancellor and Proc-

Proctors *for* 12 *hours* without reaſonable or probable cauſe. The plea of the defendants was firſt generally of the charter and privileges of the Univerſity and its officers exerciſed by antient uſage in taking up diſorderly and ſuſpected women; and it juſtified the detention of the plaintiff *one hour* only: So that the plaintiff proving a detention of more hours than one, a verdict was found by the jury for the plaintiff; of neceſſity, becauſe the defendant juſtifying but one hour, and the plaintiff proving 12 *hours*, 11 hours according to the logic of the law remained *not juſtified*. Beſides it might be, that the plaintiff was not in her *then* circumſtances a proper object. Any juſtice of the peace or other peace officer might have erred in the ſame manner, both as to the object of detention, or as to the mode of ſupporting his act by proper pleadings. So that this caſe does not affect in the leaſt the juriſdiction of the Vice-Chancellor, or the powers of the peace officers of the Univerſity.

I dare ſay, Gentlemen, you wiſh with me, that the public inſults on the chief acting magiſtrate of the Univerſity, and on the body which he repreſents, may be buried in oblivion. I cannot however preſs too ſtrongly upon your attention in theſe times the neceſſity of a perfect union between the magiſtrates of the Town and Univerſity; as I will do my beſt endeavours, while I have the honour of being in office, to maintain the inſeparability of that authority which is ſo naturally and cloſely linked together in the chain of all conſtitutional government.—There are privileges for great public purpoſes which muſt be ſupported. There is an alliance in the exerciſe of legal diſcipline, which none but the enemies of both the Town and the Univerſity, and of every uſeful national eſtabliſhment, ever attempted or wiſhed to ſeparate.

I will now conclude. I have taken up, Gentlemen, much of your time; but with this view, that leſs of it may be taken up for the future; and I have hazarded the fatiguing your patience in hearing me, for the ſake of all theſe good people here, who deſerve to be inſtructed: for altho' they are apt to be miſled and inflamed by perſons who make it their buſineſs to cultivate popular prejudices, yet I have ever obſerved, that natural good ſenſe and good humour are qualities common among our countrymen even of the loweſt degree; and that they are generally ſatisfied with juſt reaſoning, if it is but clearly and diligently laid open and adapted to their capacities. They muſt be ſenſible that without public order men cannot either eat, drink or ſleep; walk forth, or breathe freſh air in ſafety. In few words we all know that ſome muſt govern, or that all muſt be miſerable: And certainly, as there are but two ways of governing mankind, either by military force, (an inſtrument too apt to get the better of its maſter) or by the reſpect due to the laws and the magiſtrate, it is much better for every community to be armed with laws, than to be awed by arms; and reduced into a ſlaviſh ſubjection, fit only for irrational creatures.

Let me then, Gentlemen, once more exhort you to ſatisfy the duties expected of you: do juſtice to theſe people, and to yourſelves; to your own peace, your own properties, and your own characters, and to the perſon who has the honour to ſpeak to you. If you ſhall ſee ſufficient reaſon, you will find the bills; if you ſhall not ſee ſufficient reaſon, you will reject them: but in every caſe you will remember your Oaths, and SUPPORT THE LAWS.

ARGUMENT

IN THE

CASE OF THE POOR'S RATE

Charged on the COLLEGES of

CHRIST AND EMMANUEL,

IN THE

UNIVERSITY OF CAMBRIDGE.

1768.

THE

ARGUMENT.

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. *Richardſon*, Maſter of *Emman. Coll.*	1	15	0
30	Rev. Dr. *Hugh Thomas*, Maſter of *Chriſt Coll.*	1	15	0
6	*Henry Hubbard*, B. D. Fellow of *Emman. Coll.*	0	7	0
6	Rev. Mr. *Farmer*, Fellow of *Emmanuel College*	0	7	0
6	*Samuel Blackhall*, Clerk, Fellow of *Emman. Coll.*	0	7	0
6	*John Aſkew*, Clerk, Fellow of *Emmanuel College*	0	7	0
6	*John Hynde Cotton*, Fellow-Commoner of *Em. Coll.*	0	7	0
6	Rev. Mr. *Elmſal*, Fellow of *Emmanuel College*	0	7	0
6	*William Payley*, Clerk, Fellow of *Chriſt College*	0	7	0
7	*James Blackley*, under-tenant of the Maſter of *Em. Coll.*	0	8	2

Rate made *March* 21, 1768.

Francis Tunwell, *John Smith* } Churchwardens.

John Blows, *John Wilkin* } Overſeers.

Allowed 22 *March*,

James Gifford, *W. Ewin* } Juſtices.

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 puniſh-'ing vagrants: for repairs of the highways, or any 'other laws concerning parochial taxes, levies, or '*rates,* notwithſtanding they are rated or chargea-'ble 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.

Fo-

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.

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

1*ſt*, 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 conſequently 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,

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 eccleſiæ*, 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 antient 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 has been aſſerted, and that the two colleges were ancient monaſteries, is admitted.

The above are not material conſiderations, if colleges are *exempt in any one view* of the whole argument; and that they are exempt, is agreed from the uſage (which is the legal rule of interpreting the 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 impro- "priate; propriation of tithes, coalmines, or ſalea- "ble underwoods, in the ſaid pariſh."

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

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

The

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 of 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 poor's 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 oc-

cupancy 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 cannot 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 independant, 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*, *reſiants*, 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 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

" are *ſituated within divers pariſhes*, the juſtices are " authoriſed to appoint inhabitants within the ſaid " iſland to be overſeers of the poor dwelling " within the 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 *Brickhill* 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.

A ſtreſs was laid upon Colleges of the Univerſity being eleemoſynary foundations of *antient time* for conſtitutional purpoſes, in order to diſtinguiſh them from any modern charitable foundations.

But this caſe does not reſt merely on the ſingle quality of the eleemoſynary Inſtitution.

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 reciprocality 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*

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 made 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. *Andrew's*	36	6	0
Trinity	18	0	0
Little St. *Mary*	9	12	0
St. *Benedict*	3	0	0
St. *Peter's*	25	0	0
St. *Giles*	37	16	0
	119	14	0
Charge of collecting and paying	6	14	0
	126	8	0

A regular payment was continued down to 1748, *viz.* for 128 years.

In *October*, 1748, Dr. *Paris*, Vice-chancellor, and five more heads at a meeting of themſelves, without entering into agreement with the corporation of the town, made an alteration: ſo that St. *Andrew's* pariſh, which uſed to receive 36 *l.* 6 *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

fore 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 Vice-chancellor, 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 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*, *Clare-hall*, *Trinity-hall*, and part of *Catharine-hall*;

Botolph, all *Queen's*, part of *Pembroke*, and part of *Catharine-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

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 *Brickhill* 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 it's 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 reciprocality.

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

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 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 maintenance.

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 imploying 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 *houſekeepers*. Beſides that the colleges, by the private fortunes of its members

bers 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 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.*

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 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 parti- " cular juriſdiction, viz. to make warrants, to levy " rates *well* aſſeſt." 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 inhabi-

tants 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 per-* "*ſons 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 as to come under the denomination of a vill or a townſhip, there the juſtices may exerciſe all the powers of the 43 *Eliz.* So held lord chief juſtice *Parker*. Caſe of *Stokelam* and *Dolting*. B.R. *Hill.* 11. 11 *Anne.*

So that when there is one houſe or manſe extraparochial, the inference is clear, that the juſtices cannot do any thing under the ſtatute.

In the caſe of *Rudd v. Morton.* 2 *Salkeld* 501. the court ſaid, to make a reputed pariſh within the 43 *Eliz.* it muſt have a chapel, wardens, and ſacraments at the *time the ſtatute was made.*

In the caſe of *Bridewell* precinct, and pariſh of *Clerkenwell*, vide 2 *Salkeld*, p. 486. *per Holt*. chief juſtice, "If a place is extraparochial, and has not the "face of a pariſh, the juſtices have no authority "to ſend any man to be maintained by them."

With reſpect to *taxing* in *aid*, that part of the ſtatute is obſolete.

It is a caſe that cannot exiſt; and it has at no time

time been executed; firſt, Becauſe no pariſh is intirely unable to maintain its own poor. Secondly, It would produce a *circuity* of *taxation* through the whole kingdom, and conſequently confuſion, for all would tax their neighbours. Thirdly, It depends upon the judgement and diſcretion of the juſtices. The words of the 43 *Eliz. c.* 2. *ſect.* 3. are, "if the juſtices do *perceive* that the inhabitants "of any pariſh are not able."

To conclude: If therefore the juſtices ſhould confirm the ſecond rate, it would be inconſiſtent with their former deciſion; they would take upon themſelves indirectly to overturn the moſt antient uſages, to fix the parochiality of colleges, to limit the extent of privileges and charters, and to annex and mingle together diſtinct bodies politic: And therefore as they have rightly confirmed the former rate, ſo they are under a *neceſſity* of ſetting aſide the ſecond rate upon the ſame bottom: becauſe it is contrary to the *uſage*, the ſtatute having at no time *enured:* becauſe there is a voluntary contribution paid, and accepted; becauſe the rate is defective in *eſſence*, the perſons rated not being proper objects: nor the rate capable of being appretiated and levied with certainty: becauſe the colleges and the univerſity, in their original conſtitution, and political eſſence, *for ſome one, or all of theſe reaſons*, were, and are EXEMPT.

POST-

POSTSCRIPT.

IT will be a ſatisfaction to the Members of both the Univerſities to know that the *reſult* of this Argument, which was drawn up long before the Opinions of any other Counſel were communicated, has been ſince confirmed by the King's Attorney General, the Honourable Mr. *Charles Yorke*, and Sir *Fletcher Norton*.

THE END.