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## DR. BONHAM'S CASE AND THE MODERN SIGNIFICANCE OF LORD COKE'S INFLUENCE

GEORGE P. SMITH, II\*

Cognizant of the significant, yet comparatively short-lived, contribution which Lord Edward Coke made to the English society of his day and to the inadvertent, as well as permanent, effect that his theory of fundamental law and judicial review had upon the American revolutionaries and the framers of the Constitution, the scope of this article has been limited primarily to a critical examination of the *raison d'être* of the noted *Dr. Bonham's Case*—or, that case which structured Coke's entire argument for the supremacy of the fundamental law as ensured by judicial review. It is hoped that some idea may be gleaned of the development which the general concepts of judicial review and fundamental law assumed in their original historical-legal perspective and an appreciation developed of their continuing effect in current legal thought.

### I.

Edward Coke—lawyer extraordinaire, eminent judge, legal father of judicial review, truly remarkable Parliamentary leader, and inferentially, yet at times wistfully, regarded by some historians as the defender of the basic fundamental rights of seventeenth century Englishmen<sup>1</sup>—was born in 1549 and lived to the age of eighty-six years.<sup>2</sup> His lifetime spanned an extremely critical period in English history—for it was a period in which the medieval world was being completely transformed into another new and highly complex world. A world where the influences of the Renaissance, the Reformation, the commercialization of land, the agrarian revolution, the economic

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<sup>1</sup> See generally BOWEN, *THE LION AND THE THRONE* 315 *passim* (1957); THORNE, *SIR EDWARD COKE 1552-1952*, at 4-8 (1957); WORMUTH, *THE ORIGIN OF MODERN CONSTITUTIONALISM* 163 *passim* (1949); Boudin, *Lord Coke and the American Doctrine of Judicial Power*, 6 N.Y.U.L. REV. 223, 233-36 (1929); McGovney, *British Origin of Judicial Review of Legislation*, 93 U. PA. L. REV. 1-3 (1944); McKay, *Coke—Parliamentary Sovereignty or the Supremacy of the Law?* 22 MICH. L. REV. 215-47 (1923); Wagner, *Coke and the Rise of Economic Liberalism*, ECON. HIST. REV. 30 (1935).

<sup>2</sup> *Ibid.*

effects of the dissolution of the monasteries, the power struggle between the supremacy of the Crown and the supremacy of the law, the steady rise of mercantilism, the incipient struggle for economic liberalism, and the rise of the gentry were being brought into a new focus.<sup>3</sup> Unfortunately, no one unified pattern evolved from this heterogenous grouping. Instead, a societal potpourri was the rather *temporary*, yet in the same respect *long-lasting*, result of it all.

Coke, as an individual personality, was hard, arrogant, and extremely ambitious. His raucous and ruthless personality traits as Queen Elizabeth's attorney general—which were displayed with great vehemence in the prosecution of Sir Walter Raleigh—were, however, completely discarded when he subsequently ascended the Bench. "Coke, while Attorney General, was liable to the severest censure; he unscrupulously stretched the prerogative of the Crown, showing himself for the time utterly regardless of public liberty; he perverted the criminal law to the oppression of many individuals; and the arrogance of his demeanor to all mankind is unparalleled."<sup>4</sup> Nonetheless, the most offensive of attorney generals later became the Honourable Judge Edward Coke, the most admired and venerated judge of his day.<sup>5</sup> Lord Coke had a keen perceptive memory, when he wished to exercise it. Although his court pleadings were concise, his oratorical declamations were often brutal and his scholarly writings tended generally to be diffuse.<sup>6</sup>

Despite his many character weaknesses, Coke was a devoted family man, at least for a brief time during his life. His first wife, Bridget Paston, whom he greatly loved, gave him seven sons and three daughters and subsequently died June 27, 1598.<sup>7</sup> Within five months after Bridget's passing, however, Lady Hatton—who was also courted before her marriage by Francis Bacon—became Lord Coke's second wife. Although two daughters were produced from their union, Lady Hatton, who, incidentally, never took the name of Coke, was constantly at odds with her husband and they were frequently separated. Upon his death she wrote, "We shall never see his like again, praise be to God."<sup>8</sup>

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<sup>3</sup> GALPIN, A HISTORY OF ENGLAND 184-89, 243-70 (1938); HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 179 (1925); THORNE, *op. cit. supra* note 1, at 4-7; Wagner, *supra* note 1, at 30-44.

<sup>4</sup> I CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 275 (1873).

<sup>5</sup> BOWEN, *op. cit. supra* note 1, at 291.

<sup>6</sup> 6 FOSS, THE JUDGES OF ENGLAND 108, 110, 125 (1857).

<sup>7</sup> JAMES, CHIEF JUSTICE COKE: HIS FAMILY AND DESCENDANTS 10-13 (1929).

<sup>8</sup> THORNE, *op. cit. supra* note 1, at 4.

Lord Coke was neat but not overly meticulous as to his appearance. He is reported to have once said that "The cleanness of a man's clothes ought to put him in mind of keeping all clean within."<sup>9</sup> For three things he said he would give God solemn thanks: "That he never gave his body to physic, nor his heart to cruelty, nor his hand to corruption."<sup>10</sup>

Queen Elizabeth I chose Edward Coke as her solicitor-general in 1592, and as her attorney general in 1594. James I knighted Coke in 1603 and in 1606 appointed him Chief Justice of the Court of Common Pleas. In 1613, Coke was raised to the position of Chief Justice of the King's Bench and sworn in as a member of the Privy Council. After his dismissal from the Bench in 1616, Coke went on to distinguish himself in Parliament where, in 1628, he presented and sponsored the now famous Petition of Right.<sup>11</sup>

## II.

Voltaire once said that if man did not like his present laws, he should quickly proceed to destroy them and subsequently make new ones to his better liking.<sup>12</sup> Lord Coke, however, felt that the law could not be made overnight. Instead, it must grow slowly and evolve from ancient roots.<sup>13</sup>

<sup>9</sup> 10 GENERAL BIOGRAPHICAL DICTIONARY 11 (Chalmers ed. 1813).

<sup>10</sup> I SEWARD, ANECDOTES OF DISTINGUISHED PERSONS 242 (1804).

<sup>11</sup> See generally MONTAGUE, THE POLITICAL HISTORY OF ENGLAND 1603-1660, at 75 (1807); MACKINNON, THE MURDER IN THE TEMPLE 120-90 (1935); 10 GENERAL BIOGRAPHICAL DICTIONARY 1-14 (Chalmers ed. 1813); Foss, *op. cit. supra* note 6, at 110-21.

<sup>12</sup> BOWEN, *op. cit. supra* note 1, at 291.

<sup>13</sup> I COKE ON LITTLETON 9-10 (Thomas ed. 1827), lists the "ancient roots" of law as being:

1. *Lex coronae*, the law of the crowne. 2. *Lex et consuetudo parliamenti*. *Ista lex est ab omnibus quaerenda, a multis ignorata, a paucis cognita*. c. *Lex naturae*, the law of nature. 4. *Communis Lex Angliae*, the common law of England, sometimes called *lex terrae*. . . . 5. Statute law. Lawes established by authority of parliament. 6. *Consuetudines*, customes reasonable. 7. *Jus belli*, the law of arms, war, and chivalrie. . . . 8. Ecclesiastical or cannon law in courts in certain cases. 9. Civil law in certaine cases not only in courts ecclesiastical, but in the courts of the constable and marshall, and of the admiraltie, in which court of the admiraltie is observed *la ley Olyron*. . . . 10. *Lex forsetae*, forest law. 11. The law of marque or reprisal. 12. *Lex mercatoria*, merchant etc. 13. The lawes and customes of the isle of Jersey, Guernsey and Man. 14. The law and privilege of the Stannaries. 15. The lawes of the east, west, and middle Marches, which are now abrogated.

In the case of *Rowles v. Mason*, 2 Brownslow & Goldesborough 198, 123 Eng. Rep. 829 & 892 (C.B. 1612), Coke endeavored to qualify and thereby delineate the three primary parts of the Law when he said:

. . . all agree that the law consists of three parts. First, Common Law. Secondly, Statute Law, which corrects, abridges, and explains the Common Law: The third, Custom which takes away the Common Law: But the Common Law corrects, allows, and disallows both Statute Law and Custom, for if there be repugnancy in a statute, or unreasonableness in Custom, the Common Law disallows and rejects it as appears by Dr. Bonham's Case. . . .

Coke was obviously quite aware of the fact, as Dean Roscoe Pound notes,<sup>14</sup> that while the law must be stable and unfaltering, it must not remain completely still. While man has continually sought to establish a permanent foundation in order that his human actions might be structured, the ever-changing climates of the social schema demand that frequent necessary adjustments be made.<sup>15</sup> Perhaps the only way this paradox of the law's *stability* and plastic *flexibility* could be solved in seventeenth century England and can be solved modernly, then, was by a conscientious reinterpretation by both judges and lawyers alike of the rich historical records of the past.<sup>16</sup> Coke followed this line of reasoning and accordingly adopted medieval common law—envisaged as such primarily through the Magna Charta—to the needs of his own newly emerging society.<sup>17</sup> The Magna Charta was “the fountain of all the fundamental laws of the realm.”<sup>18</sup> Unfortunately, Coke's lack of historical perspective contributed to numerous mistakes in his decisions. Nonetheless, he is to be respected for his firm and decisive stand on the supremacy of the law over the supremacy of the Crown. “*Non sub homine set sub Deo et lege.*”<sup>19</sup>

“Reason,” said Coke, “is the life of the law, nay the common law itself is nothing else but reason.”<sup>20</sup> Reason “is gotten by long study, observation, and experience, and not of everyone's natural reason; for *nemo nascitus artifex.*”<sup>21</sup> Hence it is apparent, then, that Lord Coke felt the law was experience itself, developed and nurtured by reason. But, without the “mustard seed of experience,” man's own natural reason could not possibly avail as a permanent substantive body of law.

Coke espoused the idea that the Bench should function as an independent and separate entity apart from the Crown.<sup>22</sup> It was to be given enough power to bring both King and Parliament into line, when the occasion so arose. The highest law of the realm—the

<sup>14</sup> POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON* 23 (1960).

<sup>15</sup> *Ibid.*

<sup>16</sup> THORNE, *SIR EDWARD COKE 1552-1952*, at 12, 13 (1957).

<sup>17</sup> HOLDSWORTH, *SOURCES AND LITERATURE OF ENGLISH LAW* 140 (1925).

<sup>18</sup> 1 COKE, *INSTITUTES* 81 (1628); 2 COKE, *INSTITUTES* 57 (1642).

<sup>19</sup> *The Case of Prohibitions*, 12 Co. 64, 77 Eng. Rep. 1338 (1607); *The Case of Proclamations*, 12 Co. 74, 77 Eng. Rep. 1352 (C. P. 1610); *GOVERNMENT UNDER LAW* 1-3, 571 (Sutherland ed. 1956).

<sup>20</sup> THORNE, *op. cit. supra* note 16, at 45.

<sup>21</sup> 2 COKE, *INSTITUTES* 179 (1642).

<sup>22</sup> TANNER, *CONSTITUTIONAL DOCUMENTS OF THE REIGN OF JAMES I, A.D. 1603-1625*, at 76 (1930); TANNER, *ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603-1689*, at 387 (1937); MacKay, *Coke—Parliamentary Sovereignty or the Supremacy of the Law?* 22 MICH. L. REV. 215, 231 (1923).

natural or fundamental law—was to be administered by the court and was thereby to serve as a type of disciplinary gauge to the power struggle between the sovereign and the court.<sup>23</sup> Montague suggests that the primary issue between the interested parties was whether the strict and decided rules of law were to be the touchstones for the administration of justice or whether justice was to be handled by the courts according to the wishes of the state. In other words, was the law or the will of the King to be supreme in England?<sup>24</sup>

### III.

*The Case of the College of Physicians*, commonly referred to as *Dr. Bonham's Case*, is reported by Coke as Chief Justice of the Court of Common Pleas,<sup>25</sup> as well as by Brownlow,<sup>26</sup> who attended the court in his official capacity of Prothonotary of the Court. These two sources taken together enable one to reconstruct the complete arguments of the case in considerable detail.

On April 30, 1606, Thomas Bonham, Doctor of Philosophy and Physics, graduate of Cambridge University, was cited to before the president and censors of the Royal College of Physicians of London on a charge of practicing medicine in London without obtaining a proper certificate to practice from the Royal College. Dr. Bonham was fined one hundred shillings for his failure to obtain the certificate and was further forbidden—under pain of imprisonment—to practice, until he was first properly admitted by the College. Bonham, being a strong-willed individual continued to practice, however, and was later recalled by the College to answer for his misdeeds. On this occasion he defaulted, and in his absence was consequently fined the sum of ten pounds. Within several months, Bonham appeared once again before the College and not only arrogantly refused to pay his fine, but also to refrain from the further practice of medicine. He took the position that since he was a Doctor of Medicine of the University of Cambridge, the Royal College of Physicians had no jurisdiction whatsoever over him. Because of this stand, Dr. Bonham was imprisoned for seven days.<sup>27</sup>

<sup>23</sup> McGovney, *The British Origin of Judicial Review of Legislation*, 93 U. PA. L. REV. 1 *passim* (1944).

<sup>24</sup> MONTAGUE, *THE HISTORY OF ENGLAND, 1603-1660*, at 75 (1807).

<sup>25</sup> 8 Co. 114a, 77 Eng. Rep. 646 (C.P. 1610).

<sup>26</sup> 2 Brownl. 255, 77 Eng. Rep. 646 (C. P. 1610).

<sup>27</sup> 8 Co. 114a, 77 Eng. Rep. 646 (C.P. 1610). See generally, Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 *passim* (1962); BOWEN, *THE LION AND THE THRONE* 315 *passim* (1957).

This case, then, as it was brought before Mr. Justice Coke, was an action for false imprisonment by Bonham against Henry Atkins, George Turner, Thomas Moundford, and John Argent, doctors in physics, and John Taylor and William Bowden, yeomen—leading members of the Royal College of Physicians. The defendants pleaded the letters patent dated 10 Henry VIII, which gave them the powers as a College to impose fines on practitioners in London who had not been duly admitted to practice medicine by them. They further claimed the right, under the letters, to govern all physicians in London and impose fines and imprisonment, if necessary, upon them for infractions thereof.<sup>28</sup>

The letters patent were later confirmed by statute.<sup>29</sup> Therefore, the statute under consideration by the court in this case was negative—or one which superseded and defeated the common law. Nonetheless, the words of patent were clear and unambiguous—no one was to be allowed to practice medicine in London without first being admitted by the letters of the president and the College. Coke, himself, said, “Every statute consisteth of the letter and the Meaning,”<sup>30</sup> and accordingly, “every statute ought to be expounded according to the intent of them that made it.”<sup>31</sup> But, even though the intent of the framers was obviously clear, Justice Coke could not allow their intent to be recognized.

While one provision of the College's patent given it by the Act of 14 Henry VIII supposedly held that medical graduates of the Universities of Cambridge and Oxford were to be permitted to practice their profession outside the seven-mile circuit of the City of London without being first examined by the Royal College, the authenticity and applicability of this provision were not even discussed by Coke.<sup>32</sup> Instead, he undertook an exhaustive consideration of the original letters patent of the Royal College.

The first clause of the letters patent, as noted previously, stated in essence that no one was to be allowed to practice medicine within the City of London until he was properly admitted to the practice by the College of Physicians and that a fine of one hundred shillings would be imposed upon an unlicensed physician for each month he so practiced, yet the second clause provided that the College was to

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<sup>28</sup> 8 Co. 114a, 77 Eng. Rep. 646 (C. P. 1610).

<sup>29</sup> 14 & 15 Hen. 8, c. 5 (1523) ; 1 Mary, 2d Sess. c. 9 (1553).

<sup>30</sup> 4 COKE, INSTITUTES 324 (1944).

<sup>31</sup> *Id.* at 330.

<sup>32</sup> 8 Co. 114a, 116a, 77 Eng. Rep. 646, 649-50 (C. P. 1610).

have the general supervisory and disciplinary powers to govern *all* physicians of the city—including the foreign physicians practicing there.<sup>33</sup> Chief Justice Coke considered the two most basic points as regards the letters patent, from which all others stemmed and were ultimately decided, as being whether the censors of the College had power to fine and imprison Dr. Bonham and, admitting they had the power if they had correctly and properly executed it.<sup>34</sup> Before he plunged into the holding and its defense, Coke could not restrain himself from briefly commenting—and by so doing setting the tenor of his final decision—on the timely and very controversial question of whether the graduates of the Universities of Cambridge and Oxford were, generally, under the jurisdiction of a private college. He firmly stated that there could be no comparison made between a private college and the two great universities—just as no comparison could be made between a father and his child, or between a fountain and its meandering streams and tributaries.<sup>35</sup> “The university is *alma mater*, from whose breasts those of that private college have sucked all their science and knowledge . . . the university is the fountain, and that and the like private colleges are *tanquam rivuli*, which flow from the fountain.”<sup>36</sup>

Coke put forth five arguments in support of his holding that the censors and president of the Royal College of Physicians did not possess the powers they claimed to fine or imprison a competent yet unlicensed physician, as opposed to a physician malpracticing, and that therefore the College had not properly exercised their general powers.<sup>37</sup> The first argument was that the first and second clauses of the letters were distinct and parallel. Therefore, the definite penalty of the first clause did not attach, and imprisonment was not properly imposed on an unlicensed physician. Second, since the body of a man was greatly harmed by a physician's malpractice, it was but reasonable that the offending physician should himself receive punishment by having his body incarcerated. But, when a physician endeavored to practice his profession in a proper manner in London—without first obtaining a license from the Royal College—and no harm thereby came to his patients, that physician was not to be imprisoned.<sup>38</sup> Third, while the time interval in the first clause of the letters was fixed as a month, so that no charge under it could be so brought until a month

<sup>33</sup> *Id.* at 117a, 77 Eng. Rep. at 651.

<sup>34</sup> *Id.* at 116b, 77 Eng. Rep. at 650.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Id.* at 117a, 77 Eng. Rep. at 651.

<sup>38</sup> *Id.* at 117b, 77 Eng. Rep. at 651-52.



elapsed, the second clause had no fixed stated time, and therefore the first and second clauses were distinct.<sup>39</sup> Fourth, since the Royal College of Physicians was to receive one-half of all the fines, the members of the College were in fact not only judges but also actual parties to any cause of action before them. And here, by way of reinforcing dicta, Coke uttered what many believe to be the most controversial judicial dictum of his life.<sup>40</sup> "The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture . . . [t]he common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: *for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.*"<sup>41</sup> The fifth and final argument which Coke made in support of his holding was that no one should be punished twice for the same offense.<sup>42</sup> In effect, this is the result which would have occurred if the two clauses in the original letters patent were not held to be distinct—for an unlicensed physician would not only have been liable to a fine of one hundred shillings, after he had practiced without a license for a month, but under the second clause of the letters, he would also have been subject to a fine as well as imprisonment. Therefore, Justice Coke reasoned that the second clause had to be understood as applying only to improper practice or malpractice, rather than to both unlicensed and improper practice.<sup>43</sup>

Sir Frederick Pollock stated that there were no cases which one could find where the English court, by an independent act of their own, either overruled or disregarded the plain meaning of an act of Parliament.<sup>44</sup> But, what of the holding in the *Bonham* case? Did Pollock inadvertently overlook it in his writings? First of all, it is well to recognize that *Dr. Bonham's Case* did not involve a *general law* enacted by Parliament in its legislative capacity—but rather, the case centered around a *grant* made by King Henry VIII which was subsequently confirmed by Parliament. By its very implication, a *grant* either limits and restricts or entirely gives away the rights and

<sup>39</sup> *Id.* at 117b-118a, 77 Eng. Rep. at 652.

<sup>40</sup> BOWEN, *op. cit.* *supra* note 27, at 315; Thorne, *Dr. Bonham's Case*, 54 L. Q. REV. 543 (1938).

<sup>41</sup> 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (C. P. 1610) (Emphasis added).

<sup>42</sup> *Id.* at 118b, 77 Eng. Rep. at 654.

<sup>43</sup> *Ibid.*

<sup>44</sup> POLLOCK, *FIRST BOOK OF JURISPRUDENCE* 264 (3rd ed. 1911); Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

liberties of the community. Here, King Henry's grant not only did this, but also had the additional feature of embodying certain obvious characteristics of a monopoly in the Royal College. Conversely, legislative acts may generally be thought of as acts which express self-government and which are technically initiated by the people through their representatives.

Lord Coke was definitely opposed to the exercise and use of monopolistic powers in the realm.<sup>45</sup> In his *Second Institute*, at article twenty-nine, he observed that "no freeman shall be . . . deprived of his freehold or liberties, or free customs . . . but by the lawful judgment of his peers or by the law of the land." Coke, then, felt that all monopolies were against the Magna Charta. This was so because monopolies were against the liberty and freedom of the individual as guaranteed by the Magna Charta.<sup>46</sup> So, it was natural that Coke—not being a quiet, docile "lion under the throne"<sup>47</sup>—struck out with great vigor at the monopoly created by the Royal College of Physicians' patent.

Nowhere in Coke's opinion did he unequivocally state that the act, under which the cause was brought, was invalid or void.<sup>48</sup> It was not said by the court that the act was impossible to apply. Instead, it was held to be *impertinent*—which inferentially seems to make out a strong case for impossibility of a rather superficial nature.<sup>49</sup> Since the official court reporter merely speaks of an *opinion* given by the court, there is considerable reason, therefore, to question whether a final judgment on the case was actually rendered.<sup>50</sup> Hence, Pollock was apparently correct—at least in respect to *Dr. Bonham's Case*—when he stated that he could find no cases where an English court completely and *without doubt* held an act of Parliament void.

While a cursory yet overcritical reading of the case might lead one to conclude that Coke was not merely making an argument directed against the validity of the letters patent in their statutory form, but

<sup>45</sup> Wagner, *Coke and the Rise of Economic Liberalism*, 6 ECON. HIST. REV. 30-40 (1935).

<sup>46</sup> McKECHNIE, *THE MAGNA CHARTA* 384 (2d ed. 1914). It is generally felt that Coke greatly extended the use of the word *liberties*. Whatever the word may possibly have meant in the seventeenth century, when it was used in the Magna Charta, it referred to a strictly limited type of liberty and probably referred to nothing more than specific immunities and privileges of various sorts.

<sup>47</sup> James I said that though the Judges of the realm should be lions, "they should be lions under the throne, being circumspect that they do not check or oppose any points of sovereignty." DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 366 (8th ed. 1926).

<sup>48</sup> 8 Co. 108a & 114a, 77 Eng. Rep. 638 & 646 (C. P. 1610); Boudin, *Lord Coke and the American Doctrine of Judicial Power*, 6 N.Y.U.L. REV. 223, 244 (1929); Plucknett, *supra* note 44, at 35-43.

<sup>49</sup> Plucknett, *supra* note 44.

<sup>50</sup> *Id.* at 39.

rather for a particular construction that he was placing upon them,<sup>51</sup> a careful and thorough consideration of the case—set in its historical, economic, and social perspective—allows one to comprehend the complete, yet simple significance of the holding. Coke, who was imbued with a missionary zeal as regards the ultimate fulfillment of the Magna Charta, was, in his holding in the *Bonham* case, merely continuing in his effort to enforce a rule of higher law—the wellspring of democracy, the Magna Charta, the natural law—which was binding on Parliament as well as the courts of law.<sup>52</sup>

#### IV.

Now, let us direct our efforts to a critical analysis of the “precedents” which supposedly supported the famous dictum in the fourth argument which Coke made in the *Bonham* case.

“[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.”<sup>53</sup> In support of this argument, Coke cited *Thomas Tregor’s* case where Justice Herle said: “some statutes are made *against law and right*, which those who made them perceiving, would not put them into execution. . . .”<sup>54</sup> Coke, however, added the above underscored words when he used this quote and thereby sought to offer it as proof of the judges’ general power to disregard the statutes which were against the fundamental or common law. By this insertion, however, Coke completely transformed the obviously clear and simple statement of Herle’s opinion into a vague, unrelated group of words which prove practically nothing. There can be little, if indeed any, relation between the opinions held by the Bench and those wishes and opinions which legislators often entertain subsequent to passage of their bills. Legislative intent is generally held to be expressed in legislation itself.<sup>55</sup>

The second source which Coke relied upon for favorable support of his argument was an anonymous case printed by one Fitzherbert,

<sup>51</sup> Boudin, *supra* note 48, at 244.

<sup>52</sup> Corwin, *The Higher Background of American Constitutional Law*, 42 HARV. L. REV. 365, 372 (1929); MacKay, *Coke—Parliamentary Sovereignty or the Supremacy of the Law?* 22 MICH. L. REV. 215, 230 (1924).

<sup>53</sup> 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (C. P. 1610).

<sup>54</sup> Y. B. Pasch., 8 Ed. 3, 30 (1596).

<sup>55</sup> 8 Co. 118a, 77 Eng. Rep. 652 (C. P. 1610). See generally McILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 286 (1910); MacKay, *supra* note 52, at 234; Plucknett, *supra* note 44, at 31.

Mr. Justice Herle’s words, by themselves, are taken to mean that legislators often repent of their hasty, ill-conceived pieces of legislative drafting and allow them to become merely “dead letters.”

from an unedited yearbook and referred to as *Cessavit 42*.<sup>56</sup> In this case, a statute<sup>57</sup> on the books authorized lords (as well as the lords' heirs) to recover their tenements from those tenants who failed to perform *fealty service* and rents on the tenement for a two-year period. The lord of the tenement in question died and his heir subsequently brought a writ of *cessavit* against the delinquent tenant. The writ was denied on the grounds that, under the common law arrearages and damages did not belong to the heir, and that to allow the writ to issue would further "be against common right and reason," and "the common law adjudges the said Act of Parliament as to that point void."<sup>58</sup> The court went on to observe that if the writ had been brought while the lord was living the tenant would have an opportunity to render the arrearages and the damages before final judgment and thereby be allowed to keep his tenement.

Coke evidently felt that this case stood for the common sense proposition that one should not be allowed to acquire rights in a res that did not belong to him and that another should not be unjustly deprived of his tenement without a proper remedy. The case really seemed to be one merely of strict statutory construction by which the question raised in the case was held to be outside the scope of the statute. The complete statute was not invalidated, however, but only that part which was considered.

Next, Coke relied on an annuity case which was tried during the twenty-seventh year of Henry VIII and involved an interpretation as well as application of the Statute *De Asportatis Religiosorum* of 35 Edward I. This statute in *Annuity 41*, as the case is commonly called, directed that the common seal of the order of the Cistercians and Augustines be kept by the prior and four others, yet left for safekeeping with the prior's superior, the abbot. All deeds had to be sealed with the common seal, and those which were not so sealed were held to be void.<sup>59</sup> The case arose under a claim against the abbot that a grant was made by the abbot's predecessor and sealed with the official common seal, which had not been held in custody by the prior, and therefore the grant itself was to be held void. The court, however, held that the document in question was valid—regardless of the provisions set forth in the statute. This position was taken because the court rea-

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<sup>56</sup> 8 Co. 114a, 118a, 77 Eng. Rep. 646, 653 (C. P. 1610).

<sup>57</sup> Statute of Westminster, 1285, 13 Ed. 1, ch. 21.

<sup>58</sup> 8 Co. 114a, 118a, 77 Eng. Rep. 646, 653 (C. P. 1610).

<sup>59</sup> *Ibid.*

soned that if the seal had been kept in the prior's possession, the abbot, who was the superior ranking member and leader of the religious community, would not have been allowed to sign all official documents and, conversely, if the abbot kept the seal, the prior would not have been fulfilling his duties imposed by statute. Hence, because of the impossibility of performance, that portion of the statute pertaining to the seal was held void and of no effect. The *impossibility* referred to in this case seemed to be developed more as a legal fiction by the judges themselves rather than being a legal impossibility grounded in hard principles of the law. Indeed, McIlwain points out<sup>60</sup> that other than a form of dialectical impossibility, which is often created to avoid statutory requirements on the grounds of "public policy," there was no impossibility of performance in the case of *Annuity 41*.

*Strowd's case*<sup>61</sup> is the final precedent Coke used in support of his argument that the Bench had power to declare acts of Parliament void when they went against decided principles of fundamental law.<sup>62</sup> With the suppression of the religious houses and chauntries during the time of the Reformation, and the extensive overturning of the legal land titles which belonged to the religious orders, a grave situation consequently developed as a result of this action. Not only did many of the ecclesiastical lands support their owners, but the lands had further been subjected to a wide variety of rent charges which were payable to laymen who had no connection with the church. In order to allow these laymen to maintain their incomes, even though the lands upon which the incomes had been secured were confiscated by the Crown, the statute of 1 Edward 6, chapter 14, 1547, provided that the rents were to be saved to all effected laymen. Regardless of the King's seisin and that of his patentee, if any, the rents of the class were still to be paid not only by the King himself, but all those who acquired title from him. Yet, since some of the lands were encumbered with *rent service*, or that service due a lord from his tenant because of their feudal relationship, this was *not a mere charge* but a *service* which the feudal lord could exact by a distress action. So, when land burdened with *rent service* was taken by the King a problem resulted, chiefly because the King's prerogative allowed him to refuse to render such services to any ordinary man. Because of this prerogative, then, the rent services were extinguished. Since the statute of 1

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<sup>60</sup> McILWAIN, *op. cit. supra* note 55, at 273.

<sup>61</sup> 1 And. 45, 123 Eng. Rep. 345 (C. P. 1575).

<sup>62</sup> 8 Co. 114a, 118b, 77 Eng. Rep. 646, 652 (C. P. 1610).

Edward 6, chapter 14, 1547, contained a clause saving all peoples' rights to rents, even including rent services, accordingly due from chantry land, a serious conflict arose.<sup>63</sup>

The *Strowd* case, then, sought a remedy to end the confusion of the day by holding:

If a man has lands which were once parcel of the possessions of a chantry, and which came to the King under the Statute of Dissolution at the time of the dissolution, and were formerly held of someone else by rent and fealty [i.e., by rent service] or by service which is chivalry, the King's patentee shall now hold the tenements according to the patent [i.e., of the King] and not of the former lord and his heirs, and by the services by which they were anciently held, save that the same rent that was formerly rent service, he shall pay as a rent charge distrainable of common right only by the said person who was formerly lord and his heirs. And thus was the saving in the said statute expounded by the Justices of the Common Bench.<sup>64</sup>

The most interesting feature of this holding is that while the rent services were still maintained, the court maintained them as such under the technical term of *rent charge*. It is also to be recognized that Coke's theory of the omnipotence of the common law was not discussed by the learned judges. Nevertheless, when Coke seized upon the case, he proceeded to "touch it up" and amplify its significance by stating:

So the statute of I E. 6 c. 14 gives chauntries, &c. to the King, saving to the donor, &c. all such rents, services, &c. and the common law controuls it, and adjudges it void as to services, and the donor shall have the rent, as a rentseck, distrainable of common right, for it would be against common right and reason that the King should hold of any, or do service to any of his subjects, 14 Eliz. Dyer 313. and so it was adjudged in . . . *Strowd's case*.<sup>65</sup>

Coke made it appear in his report that the court held the statute in question void on the grounds of absurdity and impossibility.

Turning now to a recapitulation of the four cases which Coke used in his fourth argument, one clearly sees that even though *Tregor's*

<sup>63</sup> Plucknett, *supra* note 44, at 42; MacKay, *supra* note 52, at 224. *Strowd's case* is an exceptional case and apparently has no actual question of common law involved within it.

<sup>64</sup> 1 And. 45, 123 Eng. Rep. 345 (C. P. 1575). Coke also mentions by inference, 8 Co. 118b, 77 Eng. Rep. 654 (C. P. 1610), but does not comment upon, an *Anonymous case*, 3 Dyer 313a, 73 Eng. Rep. 709 (K. B. 1572). The decision held by the Court there was basically to the same effect as that of *Strowd's case*—namely, that the Act of 1 Ed. 6, ch. 14, was to be enforced.

<sup>65</sup> 8 Co. 114a, 118b, 77 Eng. Rep. 646, 654 (C. P. 1610).

case proves little, if anything, *Cessavit 42*, on the contrary, is clearly a strong precedent for Coke's basic argument. The case of *Annuity 41* is of little import because of the extreme arbitrariness of the Bench in basing their decision on legal impossibility of performance. And, finally, *Strowd's case* offers no reinforcing foundation for Coke's basic premise.<sup>66</sup> Lord Coke's position that Bonham's imprisonment had been illegal does not seem to have been strengthened by the fourth argument. It is well to remember that this fourth argument embodied one, if not the most, basic idea which Coke espoused—namely, that the Bench stood above all other bodies as the protector and enforcer of the fundamental law—and that, therefore, because of his great fervor for its preservation, he often would push it forward in an opinion or holding which had no apparent connection with the main line of the argument itself.<sup>67</sup>

"Of the power and jurisdiction of the Parliament for making of laws in proceeding by Bill," said Sir Edward Coke, "it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds. Of this Court it is truly said: Si antiquitatem spectes, est vetustissima, si dignitatem est honoratissima, si jurisdictionem, est capacissima."<sup>68</sup> How could Coke have possibly made this statement in light of his holding, and particularly his fourth argument, in *Dr. Bonham's Case*? Blackstone used this very same quoted passage, a century later, to express the notion of Parliamentary sovereignty.<sup>69</sup> It is indeed very doubtful, however, that Coke attached the same significance to his work as Blackstone did. Coke classified Parliament as a court rather than a legislature. Not once did he recognize the antithesis between adjudication and legislation as current writers have so interpreted him.<sup>70</sup> The acts which Parliament

<sup>66</sup> Plucknett, *supra* note 44, at 43.

<sup>67</sup> See note 13 *supra* for a discussion of *Rowles v. Mason* wherein Coke enumerated the three primary parts of the law.

<sup>68</sup> 4 COKE, INSTITUTES 39 (1644). De Lolme stated that, "Parliament can do everything but make a woman a man, and a man a woman." JENNINGS, PARLIAMENT 2 (2d ed. 1957).

The purposes which Coke assigned to Parliament were:—"Daughters and heirs apparent . . . may by act of Parliament inherit during the life of the ancestor. It may adjudge an infant or minor of full age. To attain a man of treason after death. [To attain a man during life was too ordinary a manifestation of Parliamentary authority to deserve, in Coke's estimate, special mention.] To naturalize a mere alien, and make him a subject born. It may bastard a child who by law is legitimate, the father being a proved adulterer. To legitimize one that is illegitimate. . . ." 4 COKE, INSTITUTES 36 (1644).

<sup>69</sup> 1 BLACKSTONE'S COMMENTARIES 160. The parliamentary supremacy concept is discussed in MCLWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 378 (1910).

<sup>70</sup> MCLWAIN, *supra* note 69, at 148.

enacted were analogous, so Lord Coke felt, to judgments handed down by a court. Therefore, considered as such, they were not regarded as rules of an inviolable nature made by an omnipotent legislature. Instead, they were considered as judgments of another court—which could always be disregarded if they contravened the fundamental law.<sup>71</sup>

So it was that Parliament was supreme only so long as it stayed within the purviews of the common law.<sup>72</sup> Nonetheless, it was Lord Coke's avowed intention to make Parliament the judicial body of prominence that it had been in the fourteenth century. As such, it was to be the highest court in the realm and stand above the "council-made" courts of equity, and at the very apex of the common law.<sup>73</sup>

The modern use of the word, "supreme," differs greatly from its use during Lord Coke's time—particularly so in reference to Parliament as a Supreme Body. In England, supreme never meant "of an unlimited nature," regardless of whether it was being applied to a court or a king. Rather, it implied the absence of a superior and not the seemingly unfettered discretion which the idea of "legislative supremacy" unquestionably conveys.<sup>74</sup> Too, when Coke spoke of the "transcendent power and jurisdiction" of Parliament, he was not referring to law-making activities as one would today under modern standards. Instead, he was referring to a type of equity jurisdiction exercised by Parliament.<sup>75</sup>

## V.

In light of the consideration of the above points, the answer to the rhetorical question of whether Coke's view regarding the supremacy of Parliament was in direct conflict and inconsistent with his

<sup>71</sup> HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 41 (1925).

<sup>72</sup> DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37-38 (1926), states that modernly the principle of parliamentary sovereignty merely means that Parliament—consisting of the King (Queen), the House of Lords, and the House of Commons—under the English Constitution has the right to make or unmake any law whatever. Further, "no person or body is so recognized by the law of England as having the right to override or set aside the legislation of Parliament." *Id.* at 38. See DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 37-176 (1905) for an especially well-written exposition on parliamentary sovereignty and its origins.

<sup>73</sup> Thorne, *Courts of Record and Sir Edward Coke*, 2 U. TORONTO L. J. 24, 48-49 (1937); RELF, NOTES OF THE DEBATES IN THE HOUSE OF LORDS at xiv (1929).

Coke generally regarded the cause of Parliament and that of the law as identical. The Magna Charta was, itself, of Parliamentary origin. "Parliament and the Common Law are the principal means to keep greatness in order and due subjection." 2 COKE, INSTITUTES 626 (1642).

<sup>74</sup> See McILWAIN, *op. cit. supra* note 69, at 175-95.

<sup>75</sup> McILWAIN, *op. cit. supra* note 69, at 148.



position in the *Bonham* case as regards the supremacy of the common law must, of necessity, be in the negative.

The English Revolution of 1688 marked the technical—but not by any means the complete or absolute—abandonment of the doctrinal dicta of *Dr. Bonham's Case*.<sup>76</sup> This abandonment was prompted by a seeming realization of the utter futility of seeking a permanent and well-structured legal system which, like practically everything else of the age, was suffering from dramatic, and oftentimes even radical, change. The Revolution increased immeasurably and even “glorified” the status which Parliament enjoyed. Parliament, as the embodiment of the national life in England, and under the surging pressures of new democracy became, then, the representative of the whole body of householders—and not merely of just the middle class. In the last resort, Parliamentary sovereignty came to mean the unrestricted power of the wage earners.<sup>77</sup>

The dicta in the fourth argument of *Dr. Bonham's Case* should not be thought of as unimportant “filler” material postulated by Coke in his decision. It served a much more important purpose—specifically, that of justifying the strict construction of the statute upon which the case was based. This construction was not, however, merely embedded in a quagmire of statutory rules. Instead, it was couched primarily within the structure of the principles of fundamental law.

One cannot but respect Coke's vision of a social system which was to have as its fulcrum a supreme, fundamental law—interpreted and enforced by the courts. His work may be thought of as the complement of the work which the Tudor dynasty accomplished. While the Tudors adapted the medieval institution of England to the

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<sup>76</sup> Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30, 53 (1926). Other authorities disagree with Plucknett as to the absolute abandonment date of the dicta in the *Bonham* case in England. Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 104 (1910), states that the dicta was not completely negated until the eighteenth century. Professor W. Howard Mann of the Indiana University School of Law felt that not until the Septennial Acts of 1730 were the courts unequivocally forbidden to overrule legislative enactments. Lecture by Prof. Mann, Indiana University School of Law, March 27, 1963. WORMUTH, *THE ORIGINS OF MODERN CONSTITUTIONALISM* 207-10 (1949), notes that the idea of the superiority of the common law found frequent expression, after *Dr. Bonham's Case*, for about 150 years in England. *Day v. Savadge*, Hobart 85, 80 Eng. Rep. 235 (1614), and *City of London v. Wood*, 12 Modern Rep. 66, 88 Eng. Rep. 1592 (1701), are among the pertinent cases cited by Wormuth in support of his point.

In the case of *Lee v. Bude & Tourington Junction Ry.*, L. R. 6 C. P. 576, 582 (1871), a categorical denial of Coke's principle was conclusively held. Mr. Justice Willes held that since the proceedings before a court of law were judicial and not autocratic, a court could not of its own volition make laws. Instead, a court was only to administer the laws which Parliament made.

<sup>77</sup> DICEY, *op. cit. supra* note 72, at 310.

modern needs of their society without making any significant sacrifice to the underlying medieval ideas therein contained, Lord Coke accomplished the Herculean feat of restating the rules of the medieval law in order that they might be made applicable to his own newly emerging modern state. Further, while the Tudors successfully determined the form of development of the English state, the course of development of modern law itself was similarly determined by Coke.<sup>78</sup>

Although Coke did not suffer from myopia, so far as historians can tell, his extreme eagerness to disseminate or proselytize, if you will, his idea of the supremacy of the law often led him to make vague qualifying statements which had little, if indeed any, actual support in the precedents which he cited. The originality of Coke's idea of a law of nature superior to man-made law was not new. It was both new and radical, however, that the courts of law should be given the power and the right to enforce the superiority of the fundamental law. Therein lies Coke's peculiar contribution to judicial review of legislation. The dictum in *Bonham's* case became the single most important source of the concept of judicial review. In due time, with the subsequent differentiation of the legislative and the adjudicative functions of Parliament, Coke's theory of Parliamentary supremacy under the law was wholly merged into the notion of legislative supremacy functioning as such within a framework of laws subject to construction by the adjudicative process.

A committee report to the New York State Bar Association in 1915<sup>79</sup> noted that: "In short the American Revolution was a lawyers' revolution to enforce Lord Coke's theory of the invalidity of Acts of Parliament in derogation of the common right and of the rights of Englishmen." These words are quite strong. Their significance is, nonetheless, not to be understated. Unfortunately, space does not permit a historical consideration of the entire background of the American Revolution. Nevertheless, a few pertinent comments are in order.

Lord Coke's theory of the supremacy of the fundamental law, while not engrafted to or enshrined in the English common law itself, did, however, travel the seas and find fertile ground for ready expression in the American Colonies. When the Colonies, New England in partic-

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<sup>78</sup> HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 147 (1925).

<sup>79</sup> New York State Bar Association Yearbook 1915, p. 238. This committee report is severely and, in part, unduly criticized by Boudin in *Lord Coke and the American Doctrine of Judicial Power*, 6 N.Y.U.L. REV. 223 (1929).

ular, protested the Stamp Act, which Parliament passed in 1765, James Otis shouted, "An Act against natural equity is VOID!"<sup>80</sup> The Massachusetts Assembly declared the Stamp Act invalid, against the Magna Charta and the natural rights of Englishmen and therefore, according to Lord Coke, null and void.<sup>81</sup> James Otis also cited Coke as authority for the Colonial nullification of the Parliamentary Acts.<sup>82</sup>

*Giddings v. Brown*, a 1657 case in the Boston courts, was the very first clear holding by which a judicial body in the Americas ruled a legislative act, by a town meeting, invalid because of the dicta in the *Bonham* case.<sup>83</sup> In 1875, the United States Supreme Court in *Loan Association v. Topeka*<sup>84</sup> also conclusively followed the dicta in *Bonham's* case. With the passage of the Constitution of the United States—and more particularly, article III—in 1787, Coke's concept of judicial review was finalized and thereby given permanent recognition.<sup>85</sup>

Lord Coke's theory of judicial review—which arose upon the basis of the doctrine of fundamental law—has been nurtured and reinforced by later generations of judges, lawyers, and commentators and, to this very day, rests on the same historical basis. Thus, the so-called "dictum" in *Dr. Bonham's Case* not only foreshadowed and subsequently became an essential part of the power which the courts in America modernly exercise in their voidance of statutes on the ground of constitutional conflict, but also gave rise to the test of *reasonableness* which is the ultimate *raison d'être* of that power.

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<sup>80</sup> BECKER, *THE EVE OF REVOLUTION* 70 (1921).

<sup>81</sup> McGovney, *The British Origin of Judicial Review of Legislation*, 93 U. PA. L. REV. 1, 3-37 (1944).

<sup>82</sup> *Id.* at 5.

<sup>83</sup> 2 Hutchinson Papers 1-15 (Prince Soc. 1865). Winthrop v. Lechmere, (Conn. 1727), Robin v. Hardaway, Jeff. 109 (Va. 1772), Trevett v. Weeden, 10 Records of Rhode Island 219 (1865), Bowman v. Middleton, 1 Bay 252 (South Carolina 1792) are all considered to be landmark cases which held according to the dicta in *Dr. Bonham's Case*.

<sup>84</sup> 87 U. S. (20 Wall.) 655, 662-63 (1874).

<sup>85</sup> ROOD, *THE HISTORY OF BUILDING THE CONSTITUTION OF THE UNITED STATES* 125-33 (1948).