

## DID SIR EDWARD COKE MEAN WHAT HE SAID?

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“When it is said in the books, that a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean that the courts are to give the statute a reasonable construction.”<sup>1</sup> So James Kent summarized centuries of English constitutional history in his magisterial *Commentaries on American Law*. On its face, the sentence is remarkable: the English reports contain cases saying that “a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void,” but the judges in those cases did not mean what they said; what they meant to say, according to Chancellor Kent, is that such a statute should be given “a reasonable construction.” If that were so, why did they not say so? Why did they not say in those very words “a statute contrary to natural equity and reason, or repugnant, or impossible to be performed *is to be given a reasonable construction*”? Is it likely that royal judges, confronting a case involving a statute that had necessarily passed both houses of parliament and received the royal assent, would lightly use the word “void”?

In particular, how likely was it when the source, the *fons et origo*, of the idea in question was none other than Sir Edward Coke, the oracle—if ever there was one—of the common law? What Coke said in *Dr. Bonham’s Case* in 1610, as he himself reported, was: “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>2</sup> The specific violation of “common right and reason” that

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1. James Kent, 1 *Commentaries on American Law* 447 (12th ed. 1873).

2. 8 Co. Rep. 113b, 118a, 77 Eng. Rep. 646, 652 (C.P. 1610). For the most detailed account of the case, see Harold J. Cook, *Against Common Right and Reason: The College of Physicians Versus Dr. Thomas Bonham*, 29 Am. J. Legal Hist. 301 (1985). That

Coke detected in the facts of Dr. Bonham's Case was the apparent attempt to grant to the Royal College of Physicians both the right to impose fines for unlicensed practice and the right to keep half of any fines collected:

[I]f any Act of Parliament gives to any to hold, or to have conusans of all manner of pleas arising before him within his manor of D., yet he shall hold no plea, to which he himself is party; for, as hath been said, *iniquum est aliquem suae rei esse judicem* [it is unfair for someone to be a judge in his own affairs].<sup>3</sup>

Sir Henry Hobart, Coke's successor at Common Pleas, echoed this judgment and declared that "an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in it self, for *jura naturae sunt immutabilia* [the laws of nature are unchangeable], and they are *leges legum* [the laws of law]."<sup>4</sup> Years later Sir John Holt, Chief Justice of the Court of King's Bench, said:

And what my Lord Coke says in *Dr. Bonham's case* in his 8 Co[ke's Reports] is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament. . . .<sup>5</sup>

Could it be that Coke and the other judges in the books referred to by Chancellor Kent were merely mouthing dicta, words thrown out *obiter*, "by the way" or "in passing," words on which the judicial mind was not really concentrated?

So Chancellor Kent would have us believe, and so modern American historians have repeated. According to Bernard Bailyn, who accepted Kent's gloss: "by saying that the courts might

Coke's words in his own printed report were well-considered was demonstrated by a comparison with manuscript reports of the case and with the other printed version, 2 Brownl. & Golds. 255, 123 Eng. Rep. 928 (C.P. 1610). See Charles M. Gray, *Bonham's Case Reviewed*, 116 Proc. Am. Phil. Soc. 35 (1972).

3. 8 Co. Rep. 118b, 77 Eng. Rep. 654. Coke's Latin maxim is drawn from Roman law. See Alan Watson, trans., *The Digest of Justinian* 5.1.17 (U. of Pennsylvania Press, 1985). For the history of the concept at common law, see D.E.C. Yale, *Judex in Propria Causa: An Historical Excursus*, 33 Camb. L.J. 80 (1974). Coke's animadversion concerning the College's fine of Dr. Bonham is technically dictum since what Bonham was immediately challenging was his imprisonment, not his fine.

4. *Day v. Savadge*, Hob. 85, 87, 80 Eng. Rep. 235, 237 (C.P. 1615). Hobart also echoes Coke's Latin maxim in *Calvin's Case*, 7 Co. Rep. 1a, 25a, 77 Eng. Rep. 377, 407 (Exch. Ch. 1608) ("*leges naturae perfectissimae sunt et immutabiles*").

5. *City of London v. Wood*, 12 Mod. 669, 687, 88 Eng. Rep. 1592, 1602 (K.B. 1701).

'void' a legislative provision that violated the constitution, he [Coke] had meant only that the courts were to construe statutes so as to bring them into conformity with recognized legal principles,"<sup>6</sup> that is to say, to give them a reasonable construction. Charles Hobson recently and a little more cautiously said the same thing. According to Hobson, it was Blackstone who said more accurately what Coke had meant to say: "Coke's dictum, resonant as it is to modern ears, should not be read anachronistically as sanctioning judicial review. Probably he meant no more than to state a rule of statutory construction that was substantially in accord with Blackstone's later enunciation of the principle of legislative sovereignty."<sup>7</sup> To repeat: if that was what Coke meant, why had he not said so? And how, exactly, was Coke's dictum to be reconciled with legislative sovereignty?

Kent's *Commentaries* on the point in question was in fact only restating, rather broadly, the formulation in the more famous *Commentaries* of Sir William Blackstone. After laying down the hardly controversial rule that "acts of parliament that are impossible to be performed are of no validity," Blackstone conceded that he knew it was "generally laid down more largely, that acts of parliament contrary to reason are void."<sup>8</sup> The source of this view was, of course, Coke, but Blackstone, with rather more candor than Kent, confessed the error in Coke's dictum: "if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it,"<sup>9</sup> giving Coke the lie direct.

To put his meaning beyond all doubt, Blackstone illustrated his remark with the very example Coke had used in Dr. Bon-

6. Bernard Bailyn, *The Ideological Origins of the American Revolution* 177 (Harvard U. Press, 1967). See also Bernard Bailyn, ed., 1 *Pamphlets of the American Revolution, 1750-1776* at 412 (Harvard U. Press, 1965):

Coke had not meant that positive, statute laws were restricted to areas defined by a higher law binding on Parliament and that they could be nullified—declared to be legally nonexistent—by the judges as custodians of the higher law when they exceeded these bounds. . . . Coke had meant only that the basis of statute law, like that of common law, was reason and justice, and that when laws created unreasonable or manifestly unjust or self-contradictory situations—situations wherein law violated the principles of law—it was the duty of the courts, not to annihilate the statutory provisions, but, as Coke's successor Hobart put it, "to mold them to the truest and best use."

In addition to Kent, Bailyn also relied on S.E. Thorne, *Dr. Bonham's Case*, 54 L.Q. Rev. 543 (1938) (arguing that Coke was applying strict rules of statutory construction rather than making a constitutional point).

7. Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* 60 (U. Press of Kansas, 1996).

8. William Blackstone, 1 *Commentaries on the Laws of England* 91 (1760).

9. *Id.*

ham's Case. Giving as much scope as he could to Coke's dictum, Blackstone reluctantly but firmly confined it to cases where general words worked unintended consequences:

Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel.<sup>10</sup>

But Blackstone knew he could not leave it at that. In candor, with uncharacteristically awkward words that seemed wrung from him, he haltingly continued: "if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or not."<sup>11</sup> Refusing to the end to concede the rightfulness, or even the lawfulness, of the proceeding, Blackstone rested the result in this case on power alone: English courts lacked the power to overrule the legislature. Palliate it as he might, the result was not pretty: Parliament could do anything, even so egregious a thing as make a man a judge in his own case.

What made Blackstone right and Coke—retrospectively—wrong was the English Civil War of 1642-49 and the Glorious Revolution of 1688. When, in the early seventeenth century, the Stuart monarchs had made a bid for absolute power on the French model, their opponents had searched for some counterbalancing English institution. Not unnaturally, Coke, the great lawyer and judge, had sought to locate the limits on royal power in the common law, that is, as a practical matter in the courts. Despite the facts that the king was the font of justice and that English judges were royal appointees, still holding office "*durante bene placito*" [during the good pleasure (of the Crown)], Coke had sought to use certain powerful medieval concepts, drawn from natural law and customary right, to cabin the sovereign. Barely three years earlier, according to his own account, he had warned King James to his face that even a monarch was unfit to judge a case between himself and one of his subjects, that an Englishman's rights were protected by the "artificial reason and judgment of law," and that the king himself was under

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10. *Id.* (citing 8 [Co.] Rep. 118, that is, Coke's dictum in *Dr. Bonham's Case*).

11. *Id.*

God and the law (“*sub Deo et lege*”), a concept that King James thought treasonable.<sup>12</sup> Coke had counted on a cadre of resolute and well-connected judges, led by himself, to stand up to the king. As things turned out, of course, the courts proved to be frail reeds. The only institution that was a match for the Crown was Parliament.<sup>13</sup>

The establishment of parliamentary supremacy meant that English courts could never again seriously claim the right to declare statutes void. To do so, as Blackstone put it, would be “to set the judicial power above that of the legislature, which would be subversive of all government.”<sup>14</sup> Lord Campbell later brutally dismissed Coke’s dictum, calling it “a foolish doctrine alleged to have been laid down extra-judicially in ‘*Dr. Bonham’s Case*’ . . . . a conundrum [that] ought to have been laughed at. . . .”<sup>15</sup>

Blackstone had not been so contemptuous, but he had been forced, as he perceived it, to beat a strategic retreat. With a maneuver Coke himself might have appreciated, Blackstone tried to cover his tracks by denying that anything much had changed. There were still things Parliament could not do: adopt statutes “impossible to be performed.” So, something of what Coke had said could be raked from the fires of the Civil War: some statutes were truly “of no validity.” Chancellor Kent, blunderingly, took matters farther. By a simple act of commentatorial legerdemain, Kent declared that Coke had not meant what he said. Although Coke had said that statutes “against common right and reason, or repugnant, or impossible to be performed” were “void,” he had meant merely that they were to be given “a reasonable construction.” In a final irony that seemed to escape its author,

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12. *Prohibitions del Roy*, 12 Co. Rep. 63, 65, 77 Eng. Rep. 1342, 1343 (1607). D.E.C. Yale described the connection between Coke’s confrontation with the king and *Dr. Bonham’s Case* as follows:

In Coke’s hands the principle [that no man could be a judge in his own cause] was used for something more than keeping subordinate judges to the proprieties of judicature. He employed it to tell the king to his face that the sovereign could not personally judge a cause between himself and his subjects, and he was understood also to have affirmed that the principle was parliament-proof, a rule beyond the reach of statute [citing *Dr. Bonham’s Case*].

Yale, 33 Camb. L.J. at 83 (cited in note 3).

13. John V. Orth, *On the Relation Between the Rule of Law and Public Opinion*, 80 Mich. L. Rev. 753, 762 (1982) (reviewing Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (U. of North Carolina Press, 1980)).

14. Blackstone, 1 *Commentaries* at 91 (cited in note 8).

15. Lord John Campbell, 1 *The Lives of the Chief Justices of England* 298 (Soule, Thomas & Wentworth, 1874; 1st ed. 1849). Risible or not, Lord Campbell admitted that he had “often” heard it “quoted in parliament against the binding obligation of obnoxious statutes.” *Id.*

Kent worked this magic in his *Commentaries on American Law*, the one off-shoot of English common law in which the courts did have the power to declare statutes void! When in the fullness of time the United States Supreme Court confronted a judge in his own case, who was empowered by statute to pocket part of any fines he levied, it cited *Bonham's Case* and adjudged the act to be void.<sup>16</sup>

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16. *Tumey v. Ohio*, 273 U.S. 510, 524 (1927) (violation of Due Process Clause).