

Legal aspects of medicine

—Dr Bonham's Case—

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William Harvey (1578-1657) returned to England from the continent in 1602 and settled in London wishing for the Fellowship of the College. There had been the Medical Act 1512; little is known who were petitioners for the statute. By Henry VIII's Letter Patent 1518 the Royal College of Physicians of London was founded, and established by Thomas Linacre (1460-1524), Oxford and John Caius (1510-1573), Cambridge. There was a struggle to control the practice and to maintain the monopoly in London, and a jealousy between the College and the Barber-Surgeons Company. Harvey was admitted to the College on 5 June 1607; it was there that Dr Thomas Bonham was inquired (Keynes 79).

Munk's Roll begins, Henry VIII's Letter Patent 1518 and Statute 14 Henry VIII and Charter 10 Hen. VIII to the College being cited, "Henry the Eighth, with a view to the improvement and more orderly exercise of the art of physic, and the repression of irregular, unlearned, and incompetent practitioners of that faculty, in the tenth year of his reign founded the Royal College of Physicians of London. To the establishment of this incorporation the King was moved by the example of similar institutions in Italy and elsewhere, by the solicitations of at least one of own physicians, Thomas Linacre, and by the advice and recommendation of his chancellor, Cardinal Wolsey. By the terms of the Letters Patent constituting the College, dated 23rd September 1518, John Chambre, Thoms Linacre, Ferdinand de Victoria, the King's physicians, Nicholas Halsewell, John Francis, and Robert Yaxley, physicians, and all men of the same faculty, of all in London and with seven miles thereof, are incorporated as one body and perpetual succession, and the use of a common seal, with the liberty of holding lands whose annual value did not exceed twelve pounds. They were permitted to

hold assemblies and to make statutes, ordinances for the government and correction of the College, and of all who exercised the same faculty in London and within seven miles thereof, with an interdiction from practice to any individual, unless previously licensed by the President and College. Four persons were to be chosen yearly (Censors), to whom was consigned the correction and government of physic and its professors, together with the examination of all medicines and the power of punishing offenders by fine and imprisonment, or by other reasonable ways. And lastly, the members of the College were granted an exemption from summons on all assizes, inquests, and juries in the city and its suburbs "(Munk 1)".

Thomas Bonham (1552-1630) was a sizar at St John's College, Cambridge, and B.A. Oxford, became a doctor of medicine, Cambridge in 1595. In 1605 he sat the College examination, but failed. Without sitting it once again he engaged in practice. The College ordered him to desist and to pay a fine of five pounds or go to prison. He replied he would not obey because the College president and Censors had no authority over university doctor. The College committed Bonham to prison; he was tried in the king's bench, and was released. After his release the College immediately responded: it sent the inquiry about the College's authority on practitioner to the king James I, who asked Lord Chancellor Ellesmere and Chief Justice of King's Bench. These two summoned five judges: the seven met 1 May 1607 to consider the Letter patents and Statutes, and answered (Clark 213).

Edward Coke (1552-1634), according to Holdsworth (VOL. V, 425) was educated at Trinity College, Cambridge. Throughout life he was an ardent advocative of university education and an enthusiastic admirer of his University. He was admitted to the Inner Temple in 1572, called to the bar 1578, and was solicitor general in 1592, speaker of the Commons in 1592-93, attorney general in 1593-1606, chief justice of Common Pleas in 1606, chief justice of King's Bench and Privy Councillor in 1613. He was the judge in trial of Essex 1600, Raleigh 1603 and Gunpowder Plot Conspirators 1605. As chief justice of Common Pleas he came into conflict with the king in 1613. Then, however he was made chief justice of King's Bench and Councillor. His trouble continued; he quarrelled with Lord Chancellor, then was dismissed in 1616, but was back in Privy Council next year. In 1620 he was leader of the opposition in Parliament and took the lead for the

Petition of Right 1628. His main writings are: The Reports, most celebrated of English Reports, in 17 parts in 1600-15 with two posthumous parts 1655 and 1658. The Institutes, the first textbook of modern common law in four books; the first on tenures 1628, the second on Magna Carta 1641, the third on criminal law 1641 and the fourth on courts 1641.

On Bonham's Case, Coke writes "In an action for false imprisonment, brought against the president and censors of the College of Physicians and others the defendants justified under the charter for the incorporation of the College, and the stat. 14 and 15 Hen. 8. cap. 5. by which the charter is confirmed, and the stat. 1 Mary, cap. 9 enlarging the power of the censors, and set forth that the plaintiff practised physic not being admitted, etc.: that being examined, he was found insufficient, and forbidden to practise: but, notwithstanding such prohibition, he afterwards practised for a month or more, whereupon they amerced him 5 pounds to be paid to them at their next assembly, etc. and likewise enjoined him to forbear practising any more until he be found sufficient, etc. under pain of imprisonment: that he, continuing still to practise, was further fined and ordered to be committed: that being questioned, if he would submit to the said College? he replied, that he had practised and would practise without leave of the College; and denied that by the statute they had any authority over him, he having taken his degree of Doctor of Physic, within the University, regularly; whereupon the censors ordered him to prison, which was executed accordingly. The plaintiff in his replication shewed the clause in the act upon which he replied, and averred that he had taken the degree of Doctor of Physic in the University of Cambridge, and practised physic in the City of London as he well might: upon demurrer to the replication judgement was given for the plaintiff. Resolved, ... 1. The censors had no power to commit the plaintiff for any of the causes mentioned in the bar. Because the said clause which gives power to the said censors to fine and imprison does not extend to the clause, "That none in the said city, etc. exercise the said faculty, etc." which clause prohibits every one from practising in London, etc. without licence of the president and College, but extends only to punish those who practise in London, *pro delictis suis in non bene exequendo, faciendo, et utendo facultate medicinae*, so that their power is limited to the ill and not to the good use and practice. 2. Admitting the censors had power, yet they have not

pursued it; ... 1. Because the censors alone have power to fine and imprison whereas here the president and censors imposed this fine of five pounds. 2. The plaintiff was summoned to appear before the president and censors, and for not appearing was fined five pounds, whereas the president had no authority. 3. The fines imposed by them by virtue of this act belong to the King and not to them, and yet the fine is limited to be paid to themselves, etc. and for nonpayment they have imprisoned him. 4. They ought to have committed the plaintiff immediately, although no time be limited in the act. 5. Their proceedings ought not to be by parol inasmuch as their authority is by patent and act of parliament, and especially it being to fine and imprison. 6. The act giving a power to imprison until he be delivered by the president and censors, or their successors, shall be taken strictly, or otherwise the liberty of the subjectt is at their pleasure (8 Co. Rep. 114a)".

Holdsworth, author of the monumental work on the history of English law describes "Henry 8 had incorporated the physicians of London in 1518; the powers of the corporation to examine and license physicians were enlarged by statute in 1528 (14, 15 Henry VIII c. 5), and further powers were conferred in 1553 (1 Mary st. 2c. 9); the famous Dr Bonham's Case (1610, 8 Co. Rep. 113b) turned on the legality of certain acts done by the College of Physicians under these statutes (Holdsworth, VOL. IV, 403)." Dicey says "the sovereignty of Parliament is (from legal point of view) the dominant characteristic of our politic institutions," and "a limitation has been by judges as Coke (Bonham's Case, 1610, 8 Co. Rep. 118). This doctrine once had a real meaning but it has never received systemic judicial sanction and is now obsolete (Dicey 1908, 61)." Maitland reads "it is always difficult to pin Coke to a theory but he does seem distinctly to claim that the common law is above statute, and above prerogative...it assigns a place to both king and parliament, and keeps them in it. Coke distinctly claims that the judges may hold a statute void, either because it is against reason and natural law, or because it trenches on the royal prerogative (8 Rep. 118) (Maitland 300)."

Geldart explained that in case of conflict between statute and common law "the former prevails; the supremacy is a rule of constitutional law of England" (Geldart 3); he also quoted "it appears in our books that in many cases the Common Law will control Acts of Parliament and sometimes adju-

dge them to be utterly void; for whenever an Act of Parliament is against right and reason or repugnant or impossible to be performed, the Common Law will control it and adjudge such Act to be void (8 Co. Rep. 118).”

Holdsworth (VOL. V, 475) describes “In the first place the many cases which Coke advocated in the course of his long life were not palways consistent with one another. Thus the dicta in *Bonham’s case* (8 Co. Rep. 118) on the power of the common law to override Act of Parliament are not very consistent with the views which elsewhere expresses about the supremacy of Parliament.” “His work therefore is disfigured by inconsistent statements; and it is for this reason that it is difficult, as Maitland has pointed out, to pin him down to any particular theory (Maitland 300). In the second place his mental defect tended to make him very uncritical in the use of his authorities, and even led him to misrepresent their effect.”

de Smith said “In James I’s time there were dicta (8 Co. Rep. 114 at 118) to the effect that Acts of Parliament contrary to common right and reason were void;” he also contrasted Coke’s 4 Institutes 36 “of the power and jurisdiction of Parliament, for making of laws in proceedings by Bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons without any bounds (de Smith 83).

Dicey remarks “The Whig Revolution of 1689 and even the Puritan Rebellion of 1642 were from one point of view conservative movements. Their aim was to preserve the law of the land from either innovations of improvements introduced by arbitrary power. Coke was the legal hero of Puritans, and was the stiffest of formalists. A devotee of the common law, he detested the reforming ideas of Bacon fully as much as the despotic arbitrariness of James (Dicey 1914, 82)” Holdsworth summarizes “Coke’s work was the complement of the work of the Tudor dynasty. Just as they had adapted the medieval institutions of the English state to modern needs, without any appreciable sacrifice of the medieval ideas contained in them, so Coke restated the rules of the medieval law in such a way that they were made fit to bear rule in a modern state. Just as the Tudors determined the form of the development of the English state, so Coke determined the course of the development of our modern law (Holdsworth 1925, 147).”

Bonham’s Case has been studied in relation to the U.S. Constitution, the bicentenary of which was celebrated last year, and also to the post-war

Constitution of Japan. The difference in attitude towards fundamental law in English constitutional law between English and American authors was the subject of Gough, who discussed recent views on Bonham's Case (Gough 30).

Dr Bonham probably continued London practice. He had friends in University and in legal circles, received M.D. Oxford in 1611; was admitted to Gray's Inn in 1614, where Bacon was a bencher, and active in 1621 for Barber-Surgeons' petition against the king's new charter to the College. Unfortunately, following Bonham's affair, record in Annals of the College is defective but it is known that the College continued to summon practitioners (Clark 214).

In tracing the main current of medicine during the modern English society the evolution of medical profession comes to be of interest and of importance; the Royal College of Physicians of London has been unique. It was the age of constitutional conflict; King, Parliament, Court, University, Company were all in struggle in the course of modern England. Inns of Court had been established: physicians thought under Medical Act 1512 and Charters to the College of having a body of their own profession. Chief justice Coke and Dr Bonham influenced medicine and law.

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References

- Clark, G. A History of the Royal College of Physicians of London. VOL. I. Oxford, Clarendon Press, 1964.
- Coke, E. 8 Co. Rep. 114a. 1610.
8 Co. Rep. 118. 1610.
4 Institutes 36. 1641.
- de Smith, S.A. Constitutional and Administrative Law. 1971. 5th ed. Harmondsworth, Penguin Books, 1985.
- Dacey, A.V. An Introduction to the Study of the Law of the Constitu-

tion. 1885. 7th ed. London, Macmillan, 1908.

Dicey, A.V. Law and Opinion in England during the Nineteenth Century. 1905. 2nd ed. Oxford, Clarendon Press, 1914.

Geldart, W. Introduction to English Law. 1911. 10th ed. Oxford, Oxford University Press, 1984.

Gough, J.W. Fundamental Law in English Constitutional History. Oxford, Clarendon Press, 1955.

Holdsworth, W.S.A. History of English Law. VOL. IV and V. London, Methuen, 1924.

Holdsworth, W.S. Sources and Literature of English Law. Oxford, Clarendon Press, 1925.

Keynes, G. The Life of William Harvey. Oxford, Clarendon Press, 1966.

Maitland, F.W. The Constitutional History of England. Cambridge, University Press, 1908.

Munk, W. The Roll of Royal College of Physicians of London. 1861. VOL. I. 2nd ed. London, the College, 1878.