

James Otis and *The Writs of Assistance* Case (1761)

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1 Introduction: A Brief Approximation to the Dictum in *Bonham's Case*

The dictum pronounced by Chief Justice *Edward Coke* in *Bonham's Case* (1610) is well known by any constitutional law specialist. Nevertheless, I would like to discuss the basis upon which *Coke* formulated the constitutional theory of judicial review of legislation.

On April 30, 1606 *Thomas Bonham* was cited before the president and censors of the Royal College on a charge of practising medicine in London without a certificate to practise from the Royal College. Bonham was a Doctor of Philosophy and Physic, having graduated from Cambridge University. He did not, however, hold any degree or certificate from the Royal College. He was fined one hundred shillings and further forbidden – under pain of imprisonment – to practise medicine until he was first properly admitted to the Royal College.

The Royal College of Physicians was a unique institution in early modern England.¹ Chartered in 1518 under Cardinal Wolsey's Chancellorship, the College was founded by three royal physicians and three London physicians, all with academic doctorates of medicine. By an Act of Parliament confirming their charter passed during the reign of *Henry VIII*, the College had gained the right to sit as a court itself in order to judge all other practitioners. It had the power to admit those academically qualified to membership, to grant licenses to those without academic qualifications but proven practical experience, and to punish those practising negligently and/or without license. A statute of Queen Mary's first Parliament also allowed the officers of the College to imprison offenders at their pleasure. The juridical authority of the College thus flew in the face of the common law assumption that to practise medicine one needed only the consent of the patient.² Moreover, the College's power of medical licensing overlapped with one of the bishop's authority

¹ Cook 2004, p. 129.

² Cook 2004, p. 130.

to grant licenses to physicians and surgeons, in addition to conflicting with the other universities' ability to issue licenses for the practice of physic and surgery (ancillary to their powers to grant degrees).

Bonham took the position that since he was a Doctor of Medicine at Cambridge University, the Royal College of Physicians had no jurisdiction whatsoever over him. As a consequence of this stance, *Bonham* was imprisoned for seven days. This case then, as it was brought before Justice *Coke*, was an action for false imprisonment by *Bonham* against *Henry Atkins*, *George Turner*, *Thomas Moundford*, and *John Argent*, doctors in physic, and *John Taylor* and *William Bowden*, both yeomen (leading members of the Royal College of Physicians). According to *Smith*³, the defendants pleaded the Letters Patent dated from the 10th year of the reign of *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.

Coke analyses whether a doctor of physic of one university or another, be by the Letters Patents, and by the body of the Act of 14 Henry VIII, is restrained to practise Physic within the City of London. His reply is:

They (the members of the Royal College) did rely upon the Letter of the grant, ratified by the said Act of 14 H. VIII which is in the negative, *scil. Nemo in dicta civitate et cetera exerceat dictam facultatem nisi ad hoc per praedict' praesidentem et communitatem, et cetera admissus sit, et cetera*. And this proposition is a general negative, and *Generale dictum est generaliter intelligendum*; and *nemo* excludeth all; and therefore a Doctor of the one University or the other, is prohibited within this negative word *Nemo*. And many cases were put, where negative Statutes shall be taken *stricte et exclusive*, which I do not think necessary to be recited.⁴

But later, *Coke* adds with a significant emphasis:

The University is *Alma mater*, from whose breasts those of that private College have sucked all their science and knowledge (which I acknowledge to be great and profound) but the Law saith, *Erubescit lex filios castigare parentes*: the University is the fountain, and that and the like private Colleges are *tanquam rivuli*, which flow from the Fountain, *et melius est petere fontes quam sectari rivulos*.⁵

Coke puts forth five arguments in support of his holding that the College had not properly exercised their general powers. The fourth argument is the true keystone in which *Coke* uttered what many⁶ believe to be his most controversial dictum:

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, *quia aliquis non debet esse Iudex in propria causa, imo iniquum est aliquem sui rei esse iudicem*: and one cannot be Judge and Attorney for any of the parties.

The idea that it takes three persons, a plaintiff, a defendant, and a judge, to make a case and reach a judgment, was clear to the earliest writers on English law⁷,

³ Smith 1966, p. 302.

⁴ *Bonham's Case* may be seen in Sheppard 2003, p. 270.

⁵ Sheppard 2013, p. 272.

⁶ E. g. Bowen 1957, p. 315.

⁷ Fleta had already written in this respect: "Est autem iudicium trinus actum trium personarum ad minus, actoris, iudicis et rei, sine quibus legitime consistere non potest", cf. Yale 1974, p. 80.

and implicit in such a proposition was the understanding that a judgement was not properly attainable unless the three persons of the trinity were kept distinct. On the matter, *Henry de Bracton*, in his very outstanding book *De legibus et consuetudinibus angliae*, wrote that a judge should be disqualified on such grounds as kindred, enmity or friendship with a party, or because he was subordinate in status to the party, or had acted as his advocate. However, this seems to have been borrowed from the doctrines of canon law, and while the church courts clearly applied these provisions for recusation of the *suspectus iudex*, there seems no case in which the yearbook lawyers who referred to *Bracton* had borrowed these principles.⁸

Of course, a fundamental idea of this nature has long been enshrined in the maxim that no one may be judge in his own cause. *Coke* adopted this notion into his reasoning. Just after the above-mentioned argument, he added in his celebrated dictum: “And it appeareth in our Books, that in many Cases, the Common Law doth control Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such Act to be void.”⁹

Many have considered this passage to be the birth certificate of judicial review of legislative acts. For Plucknett, a distinguished professor from Harvard University, *Coke*’s solution was in the idea of a fundamental law which limited Crown and Parliament. What that law was, was a question as difficult to answer as it was insistent – and, as subsequent events showed, capable of surprising solutions.¹⁰ The nearest we find is the assertion of the paramount law of “reason”. For the rest, the common lawyer’s “reason” is left in as much uncertainty as he himself ascribed to the Chancellor’s equity. Moreover, *Coke* was prepared to advance medieval precedent for his theory and it has thus evoked the criticism of later investigators. In Plucknett’s opinion, *Coke*’s theory reaches its final expression in *The Case of the College of Physicians*. Nevertheless, Plucknett acknowledges that *Coke*’s challenging of both Crown and Parliament has provoked controversy up to his own time.¹¹

Conversely, the interpretation given by *Thorne* is very different. *Coke*’s dictum is considered as a maxim of statutory interpretation. According to *Thorne*¹², *Coke*’s fourth argument was directed toward an interpretation of the statute which on its face seemed to make *Bonham*’s imprisonment lawful. As the question of the legality of *Bonham*’s imprisonment was the only question before the Court, *Coke*’s fourth point is, according to *Thorne*, not a dictum, but a material portion of his argument. And finally, though *Coke*’s fourth argument is phrased in very wide terms, it foresees no statute as void because of a conflict between it and common law, natural law, or higher law, but simply a refusal to follow a statute as absurd on its face.

⁸ Yale 1974, p. 81.

⁹ Sheppard 2013, p. 275.

¹⁰ Plucknett 1926–1927, p. 31.

¹¹ Plucknett 1926–1927, p. 34.

¹² Thorne 1938, p. 547 et seq.

In order to settle the matter, one may say that the interpretation given to his dictum in the American colonies would be the main characteristic of the constitutional theory of judicial review of legislation. *Sherry* may have correctly written that it seems to be widely accepted that *Coke* was one of the primary sources of the American institution of judicial review.¹³ Likewise, *Schwartz* has underlined *Coke*'s fundamental contribution to American constitutionalism. He stated the supremacy of law in terms of positive law, and it was in such terms that the doctrine was of such importance to the Founders of the American Republic: "When they spoke of a government of laws and not of men, they were not indulging in mere rhetorical flourish."¹⁴ Of course, there were other philosophical influences on the Founders, including *Locke*, continental Enlightenment philosophers, radical English Whigs, and the Scottish Common Sense School.¹⁵

It is necessary not to forget the peculiar political circumstances of the colonies, which were already quite predisposed against the British Parliament as it had been seen as an organ of oppression; such a situation would make it possible that *Coke*'s dictum soon be incorporated into the arsenal of weapons used to oppose the English Parliament. Therefore, the *Writ of Assistance Case* and the figure of *James Otis* are paradigmatic.

2 The Great Impact upon Juridical Colonial Thought by the Doctrine Established by Chief Justice Edward Coke in *Bonham's Case*

2.1 *Coke*'s juridical thinking would have a very remarkable impact on the colonies that went far beyond the doctrine of judicial review. The men of the American Revolution fed their appetite for new ideas by way of *Coke*'s writings, particularly his *Institutes*. Even more, for the Americans of the eighteenth century, *Coke* was the contemporary colossus of the law – "our juvenile oracle", *John Adams* termed him in an 1816 letter – who combined in his own person the position of highest judge, commentator on the law and leader of the parliamentary opposition to royal tyranny. It also contributed to considering *Coke* (whose more evident manifestation was his knowledge of ancient law) as a true antiquarian.¹⁶ Furthermore, he contributed greatly to the opening of new fields of knowledge, always seen from his own viewpoint as genuine defender of the rule of law.

Coke's dictum was easily accessible since it appeared in the *Abridgments*¹⁷ which were frequently studied by the lawyers of the colonies. It was repeated

¹³ *Sherry* 1992–1993, p. 174.

¹⁴ *Schwartz* 1993, p. 5.

¹⁵ *Michael* 1990–1991, p. 427 et seqq.

¹⁶ "(H)is learning, antiquarian to the core, opened up vistas and past crises as history scarcely could." *Mullet* 1932, p. 471.

¹⁷ Most scholars agree that the three more important *Abridgments* were those of *Bacon* 1736, *Viner* 1741–1756 and *Comyn's Digest* 1762, cf. *McGovney* 1944–1945, p. 7.

in the *Abridgments* of *Viner*, *Bacon* and *Comyns* and as *Goebel* tells us,¹⁸ *Coke*, *Strange*, *Keble* and *Salked* were frequently cited in common law cases, even into the late eighteenth century, and a lot of American law came out of *Bacon's* and *Viner's Abridgments*. In addition, a significant number of the colonial lawyers were educated in England. According to *Kramer*,¹⁹ there was a time when it was popular to read *Sir Edward Coke's* opinion in *Bonham's Case* and his reports of the proceedings in *Prohibitions Del Roy* and *Proclamations* as an early, albeit failed, effort to establish something along the lines of modern judicial review. In this respect, *Mullett*²⁰ reminds us that *Coke's* reputation was even more gilded in the eighteenth century when he was the lamp by which young Aladdins of the law secured their legal treasures. Six weeks with him alone was sufficient to secure *Patrick Henry's* admittance to the Virginia Bar. *Thomas Jefferson* must have spent a much longer time dutifully studying *Coke's* writings. "I do wish", he wrote, "the devil had old *Coke*, for I am sure I never was so tired of an old dull scoundrel in my life." But in the days of the Revolution, *Jefferson* was more charitable, preferring the whiggish virtues of *Coke* to the "honeyed Mansfieldism" of *Blackstone*.

Examples of the influence of *Coke* upon colonial politicians and lawyers are manifold. *Jefferson* said that *Coke's Commentary upon Littleton* "was the universal elementary book of law students and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of . . . British liberties."²¹ *John Adams* gained the belief from *Coke* that common law was common right, and the subject's best birth right, and without it there was no right. The law, he further argued, provided a remedy for every wrong and delighted in so doing. Particularly, the common law was a defence against the Stamp Act, for *Coke* himself had once held that acts of Parliament that were unreasonable should be judged void. *Samuel Adams*, who lost his desire to be a lawyer after a brief experience with the *Institutes*, found in *Coke* an irreproachable authority for questioning parliamentary supremacy with particular reference to taxation. The dictum that Parliament could not tax the Irish *quia milites ad Parliamentum non mittunt* was applied to America. *Mullett*²² reminds us that *Coke's* eulogy of *Magna Charta* as declaratory of the fundamental laws and liberties was interpreted to mean that an act of Parliament contrary to it was void whether *Coke* had "expressly asserted it or not." Finally, *Adams* found in *Coke* proof that colonies ought not to be ruled tyrannically.

The influence of *Coke* on other important pamphleteers of the epoch is also remarkable. *John Rutledge*, an important personage of South Carolina in the revolutionary era, wrote that *Coke's Institutes* seem almost the grounds of our law. *John Dickinson* who ultimately became a home ruler, found in *Coke* justification for the theory that subjects ought not to have to contribute to wars outside the realm. *James Wilson*, Supreme Court Justice since 1789, was the most exhaustive colonial student

¹⁸ Goebel, Jr. 1954, p. 455.

¹⁹ Kramer 2001–2002, p. 24 et seq.

²⁰ Mullet 1932, p. 458.

²¹ Schwartz 1993, p. 5.

²² Mullet 1932, p. 468.

of *Coke*,²³ and it was from *Calvin's Case* that *Wilson* derived the blanket defence of colonial claims, namely that the colonies were not bound by English statutes.

The meaning of the dictum in *Bonham's Case* in colonial America was unequivocal. The germinal idea had evolved in colonial America and was effectuated in the doctrine that a court could void an act promulgated by a legislative assembly subject to a higher law when the court found that the law had transgressed its boundaries. Going even further, *Hall* writes²⁴ that in the eighteenth century, leaders of the incipient American Revolution extracted from *Coke's* opinion that a judicially enforceable higher law limited their imperial masters' authority. This had important practical implications for judicial review because it meant that judges could legitimately claim a policy-making role without the necessity of direct popular support.

The dictum became the most important source of the concept of judicial review. In due time, *Coke's* theory of parliamentary supremacy under the law was wholly merged into the notion of legislative supremacy. In 1915, *Smith*²⁵ reminds us of a committee report to the New York State Bar Association: "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." *Lord Coke's* theory of the supremacy of the fundamental law, while not engrafted to or enshrined in the English common law itself, did travel the seas and find fertile ground for ready expression in the American colonies.

2.2 The theory established in *Bonham's Case*, or at least its interpretation in the English colonies, would find in them an appropriate setting for its revival. The supremacy of a fundamental law found faithful supporters in the colonists beyond the Atlantic Ocean. According to *Corwin*,²⁶ the Cokian doctrine corresponded exactly to the contemporary necessities of many of the colonies in the earlier days of their existence, which explains how it represented the teaching of the highest of all legal authorities before *Blackstone* appeared on the scene.

Of course, the theory of legislative supremacy so ardently argued by *Blackstone* and shared by the Whigs, did not originally mean that legislative assemblies would exist for the elaboration of the laws, the settling of the politics or the integration of the different interests of a society becoming ever more commercialised. During the Glorious Revolution, the dogma of legislative supremacy was primarily aimed at preventing an arbitrary monarch from unilaterally making decisions without parliamentary consent. When this theory was transferred to the colonies, its meaning was made more patent: in order to provide for every executive's unilateral action, the governor, appointed from London, should guarantee that the expression of popular consent was what should really give legitimacy to the law. Conversely, the British Parliament found itself far from being the idealised hero of the colonists, who so far away from it considered it a distant body lacking comprehension for their problems

²³ Mullet 1932, p. 470.

²⁴ Hall 1985, p. 4.

²⁵ Smith 1966, p. 313; Boudin 1928–1929, p. 223. The only disagreement between both scholars is the date; whereas Boudin dates the report to 1915, Smith dates it as 1917.

²⁶ Corwin 1925, p. 515.

and in whose deliberations they no longer participated. Similarly, the deeply rooted ideal of the existence of a fundamental law, alongside the refusal to deal with Parliament's arbitrariness, in addition to a certain fear of abuse of power of colonial legislative assemblies would make the juridical colonial world turn its eyes towards *Coke* and his theory of judicial review. Even more, the colonists would come to the great English Chief Justice in order to ground their creed that this fundamental law warranted rights such as those of "no taxation without representation" or "trial by jury".

Coke had spoken of something beyond human invention; *Blackstone*, on the other hand, knew of no such limit on human law-makers.²⁷ The American lawyers, fervent followers of *Coke* for a long time, now found themselves faced with the theories of *Blackstone*. They placed all their confidence in *Coke's* doctrine, which does not indicate that *Blackstone's* influence was fugacious. As *Wood* tells us, it would be a devastating logic if we think that almost all eighteenth-century Englishmen on both sides of the Atlantic had recognised something called fundamental law;²⁸ it was a guide to the moral rightness and constitutionality of ordinary law and politics. Even a despot such as *Cromwell* could confidently declare a century and half before the *Marbury v. Madison* opinion that "[i]n every government there must be something fundamental, something like a *Magna Charta* which would be inalterable." And the colonists on the other side of the Atlantic found *Coke's* ideas very attractive inasmuch as they synchronized with their view of what ought to be the law.

For that reason it is not surprising that during the revolutionary war the theoretical basis for judicial review was grounded in the constant appeals of the colonists for a higher law in order to support particular laws of the British Parliament or the King's provisions as being null and void. In this way, the North American system of judicial review "is nothing more than the absence of any special system"²⁹ and was closely linked with the colonial experience, and therefore prior to independence.

Coke's doctrine would be followed by the great dogmatic constructions of *Vattel*, *Burlamaqui* and *Pufendorf*, to mention but a few scholars. Their theories coincided with the less elegant, but equally fruitful *Coke's* dicta. Namely, *Vattel's* "The Constitution of the State, and the Duties and Rights of the Nation in this Respect"³⁰ is of particular interest in this regard.

According to *Vattel*, legislation was limited not only by the natural law but by any norm that the people would include in their constitution. For the Swiss theorist, respect for the constitution was as decisive as was respect of the law. "The constitution of a State and its laws are the foundation of public peace, the firm support of political authority, and the security for the liberty of the citizens. But this constitution is a mere dead letter, and the best laws are useless if they be not sacredly observed. It is therefore the duty of a Nation to be ever on the watch that the laws be

²⁷ Black 1987–1988, p. 694.

²⁸ Wood 1999, p. 794.

²⁹ Grant 1954, p. 189.

³⁰ Vattel 1964/1758, p. 17 et seqq.

equally respected, both by those who govern and by the people who are to be ruled by them.” *Vattel* mints the idea that the written constitution is the basis, the ground of all public authority, and at the same time he makes clear the distinction between the fundamental law and ordinary laws. With regard to the question of legislative power in relation to the constitution, *Vattel* answers in astonishing modernity:

The question arises whether their power extends to the fundamental laws, whether they (the legislative power) can change the constitution of the State. The principles we have laid down lead us to decide definitely that the authority of these legislators does not go that far, and that the fundamental laws must be sacred to them, unless they are expressly empowered by the nation to change them; for the constitution of a State should possess stability; and since the Nation established it in the first place, and afterwards confided the legislative power to certain persons, the fundamental laws are excepted from their authority. It is clear that the society had only in view to provide that the State should be furnished with laws enacted for special occasions, and with that object it gave to the legislators the power to repeal existing civil laws, and such public ones as were not fundamental, and to make new ones. Nothing leads us to think that it wished to subject the constitution itself to their will. In a word, it is from the constitution that the legislators derive their power; how, then, could they change it without destroying the source of their authority?³¹

Impeccably, the last reflection about the constitution’s modification by the legislative is very conclusive since *Vattel* underlines that the constitution is a higher law, a superior law with regard to ordinary law and therefore it is a norm limitative of the legislative power’s intervention. This idea would be further developed by *Alexander Hamilton*’s number LXXVIII of the *Federalist Papers*.

The transcendence of these theories would be enormous since, as *Plucknett* tells us,³² it was due to the reception of *Vattel*’s theoretical discussions and also to the firm faith that “what my Lord Coke says in *Bonham’s Case* is far from any extravagance” that we owe him the idea of the bold experiment of making a written constitution which should have judges and a court (the Supreme Court) for its guardians.

3 Approximation to the Figure of James Otis and to Some Other Personages of the Case

3.1 *James Otis* was born in 1725 at West Barnstable, in the spur of Massachusetts that bounded Cape Cod Bay. From 1739 to 1743 he attended Harvard College, and in 1748 he began his practice of law at Plymouth. That southern area of the province was his father’s stamping-ground as a lawyer, and no doubt the influence of *Otis* senior helped him get started. He seems to have made reasonable progress, for as early as May 1751 the Superior Court on circuit in Bristol appointed him “attorney for the Lord the King at this Term, the Attorney General being assent”.³³

³¹ *Vattel* 1964/1758, p. 19.

³² *Plucknett* 1926–1927, p. 70.

³³ *Smith* 1978, p. 312 et seq.

In 1756 *Otis* was made a justice of the peace for Suffolk County, but this was largely an honorific mark of social advance.

In 1757 *Thomas Pownall* was appointed to the governorship of the province. The good relations between *Otis* and *Pownall* possibly meant nothing so much as a shared interest in the classics. His early taste for the genre had never left *Otis*. As late as 1760 he published *The Rudiments of Latin Prosody with a Dissertation on Letters and the Principles of Harmony in Poetic and Prosaic Composition*. A century after, *Tyler* considered the work as “a book which shows that its author’s natural aptitude for eloquence, oral and written, had been developed in connection with the most careful technical study of details. No one would guess . . . that it was written by perhaps the busiest lawyer in New England.”³⁴

A short time before ceasing to practise law, in the fall of 1760, *Pownall* endorsed *Otis* for acting Advocate General. After *Pownall*’s demission, *Otis* still performed as Advocate General in the period of Governor *Hutchinson*’s caretaker administration, until Governor *Bernard* arrived on the scene. At first, there was no antipathy between the two men since *Otis* was not yet in politics. In 1761, he had swung into opposition against the governor, and the custom house, as *Smith* writes, was in the thick of the roughest common law assault the Vice-Admiralty Court had undergone in thirty years. In the elections of May 1761, the previously apolitical government lawyer had become one of the representatives for Boston in the House of Representatives and leader of an incipient anti-court party.

It is not exactly known when *Coke* resigned as Advocate General, but it can hardly have been later than the 24th of December 1760, for that day he was spokesman for the petition to the Assembly against lawful fees in the Vice-Admiralty Court. *Otis* was already situated in open conflict as opposed to the Vice-Admiralty Court. Relating how he had been asked to support the writ of assistance, the abstract shows *Otis* going on to speak of his resignation as acting Advocate General:

I was solicited to argue this cause as Advocate-General, and because I would not, I have been charged with a desertion of my office; to this charge I can give a very sufficient answer, I renounced that office, and I argue this cause from the same principle; and I argue it with the greater pleasure as it is in favour of British liberty . . .³⁵

These words convey the impression that it had been on account of the writ of assistance that he quit; even that he quit specifically in order to argue against it. If this was true, it would enhance even more the historical importance of the writs of assistance controversy, for when *Otis* moved out of the establishment circle and into opposition, a force of unique impact was loosed upon the pre-revolutionary American scene. But if *Otis* had sacrificed his job solely because he objected to arguing for the writ of assistance, one wonders why he did not say so more clearly and positively. The proposition is that *Otis*’s resignation was precipitated by hostile influences bearing down from on high.

³⁴ *Tyler* 1897, p. 37; cited by *Smith* 1978, p. 314.

³⁵ *Smith* 1978, p. 323.

3.2 It is worth mentioning something about *Hutchinson*, a very outstanding personage in the case and also in the history of Massachusetts. *Hutchinson* was destined to be the last civilian governor of the province of Massachusetts-Bay. Born in 1711, after his graduation from Harvard College in 1727 he spent several years exclusively in the family merchant business. His career as a public man appears to have begun in 1737, when he became a selectman of the town of Boston. Soon afterward he was elected to the province's House of Representatives. In 1740 *Hutchinson* went to England to argue the cause of Massachusetts in a boundary squabble with New Hampshire. In 1742 he was back in America and again in the House of Representatives, of which he was soon to be speaker. In 1749 he was elected, by the House itself, to the other branch of the General Court, the Council. Like the House of Representatives, the Council was a legislative branch of the General Court, the overall organ of government under the Massachusetts province charter; but it also did duty as the consultative body to whom the Governor looked for advice and consent in matters of executive action. In 1752, *Hutchinson* became a judge.

An important assignment for our personage was his appointment as one of the Massachusetts representatives at the Albany conference in 1754: the plan for a colonial union produced at that abortive gathering owed much to the work of *Hutchinson*.

At the end of his life *Hutchinson* wrote an outstanding work, *The History of the Colony and Province of Massachusetts-Bay*.

The customs officer whom *Hutchinson* came upon at the warehouse was *Charles Paxton*. *Paxton* was also to have a considerable future in the events leading to the American Revolution, if only for his part in the appointment and the affairs of the ill-starred American board of customs commissioners under the Townshend legislation of 1767. According to *Sabine*,³⁶ "as far as individual men are concerned . . . Charles Townshend, in England, and Charles Paxton, in America, were among the most efficient in producing the Revolution". *Paxton* was born in New England in 1708. In his early twenties he was appointed marshal of the Vice-Admiralty Court at Boston. The responsibilities of the post – broadly, the execution of the court's decrees – involved *Paxton* naturally in the common law imbroglios that broke out between the court and the merchants around this time.

According to *Smith*,³⁷ *Paxton* went about his rewarding duties with such energy and resource that for an instant one might wonder whether Boston was not under visitation by the reincarnate spirit of *Edward Randolph*, its custom house tormentor of seventy years before. But *Paxton* was no *Randolph*. The architect of the customs regime in the colonies had been a man of considerable force of character. *Paxton* was above all a pussyfoot. To the world at large *Paxton* may have been "no man's friend"; but his relations with *Thomas Hutchinson* seem always to have been cordial. Indeed, in his account of the warehouse incident, *Hutchinson* referred to himself as a friend of *Paxton*.

³⁶ Sabine 1854, p. 154; cited by Smith 1978, p. 99.

³⁷ Smith 1978, p. 100 et seq.

Common European Legal Thinking

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