

Chief Justice Coke: Common Law v Royal Absolutism

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Abstract

This contribution considers the character of Chief Justice Coke and his contribution to the development of English law. More specifically the focus falls on his profound knowledge of the common law and the concomitant emphasis he placed on human freedom. Coke's reliance on the common law was the cause of continuous conflict between himself and King James 1, and later also King Charles 1. True to the Royal approach in this era they strongly endorsed royal absolutism, believing it stemmed from a divine origin. James 1 enjoyed the support of Sir Francis Bacon. Intense rivalry of a personal nature existed between him and Coke too. In response to James 1 and Bacon's continuing attacks on his views, Coke could only turn to the common law.

Keywords

Royal prerogative; common law; parliamentary sovereignty; reason; *Dr Bonham's case*; Sir Edward Coke; King James 1; Sir Francis Bacon; *Magna Charta*.

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For a Judge who held office merely during the King's pleasure to fight as Coke did, to protect the integrity of the law against the pretensions of 'divine right' entertained by the Stuart Kings, required not merely honesty of purpose but a resolution, constant against the temptations of royal reward, and undaunted by fear of imprisonment, or even of death itself.¹

1 Introduction

In Tudor and Stuart times English constitutional history was marked by ongoing struggles between Puritan ideologies departing from the common law on the one hand and dogma emphasising royal absolutism on the other. The basic civil liberties which emerged from these struggles are today generally accepted as the foundations of modern democracy. As such these liberties have come to be regarded as a peculiarly English heritage – as a national expression of the genius of the English common law – "if there is any virtue in the common law ... it is that freedom is her sister."² The common law was the law of the land and the courts of the common law had to "protect" it. Even though the common law in this period was a complex and recondite science of writs and forms of action, it was exactly this science that furnished the armoury of weapons that assured its triumph and supremacy.

Sir Edward Coke became the mouthpiece of the Puritan revolution. He was the legal hero of the struggles fought in this era. The common law was his passion; he was "in love with the Lady of the Common Law."³ There were three distinct phases in his career. At first he was a law officer of the Crown, in which capacity he seemed to have been a defender of the Royal prerogative. In the second phase he unquestionably was the stalwart and champion of the common law. In the third phase he became a leading exponent of the sovereignty of Parliament.

2 An overview of Chief Justice Coke's career

2.1 Coke's career

Coke was born on 1 February 1552. He was educated at Trinity College and called to the bar in April 1578. He became Solicitor-General in June 1592,⁴ Speaker of the House of Commons in February 1593 and Attorney-General

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¹ Barrett 1942 *ABAJ* 611.

² Seagle *Men of Law* 161.

³ Seagle *Men of Law* 165.

⁴ Seagle *Men of Law* 171.

in March 1594. He held the post until 1606.⁵ In 1606 he became Chief Justice of the Common Pleas. In 1613 he was transferred by James I to the King's Bench but on 14 November 1616 he was dismissed after a series of quarrels with the King.⁶ From 1616 to 1620 he had hoped to be restored to favour by King James I. James, however, after the quarrels and bent on putting into effect his ideas of absolutism, was acutely aware of the political differences between himself and Coke and would not appoint him to an important position again. Coke consequently allied himself with the parliamentary opposition and served as the leader in 1620, 1624, 1625 and 1628. In 1628 he took a major part in framing and in carrying the *Petition of Right*, the first important document of its kind since *Magna Carta*.⁷

Coke's attitude towards English law was primarily mediaeval in the sense that law was the controlling factor in social life which governed Crown and Parliament equally.⁸ He was a prolific writer and it is true to say that his *Reports* and *Institutes* comprehensively influenced the future development of English Law.⁹ The *Reports* were written in a variety of forms and comprised of some 13 volumes.¹⁰ They were not written for publication and reflected the corpus of criminal and civil common law of the 16th and early 17th centuries.¹¹ In some instances he would discuss a case as a mere peg

⁵ Holdsworth 1935 *CLJ* 332.

⁶ See n 64 hereunder. Also see Holdsworth 1935 *CLJ* 335. It must be remembered that in this period a judge held office only at the King's goodwill and pleasure. Essentially, he was only a little better than the other servants of the King. It was said in this period that judges should be like lions – but lions under the throne. James being adamant to put into effect his ideas of royal absolutism expected this of his judges. See Seagle *Men of Law* 174.

⁷ Holdsworth 1935 *CLJ* 336; Seagle *Men of Law* 164, 165.

⁸ Plucknett *Concise History of the Common Law* 282.

⁹ Plucknett *Concise History of the Common Law* 278.

¹⁰ Palmer 1946 *ABAJ* 135. Plucknett *Concise History of the Common Law* 279 explains that the work of Christopher St Germain, *Dialogues between a Doctor of Divinity and a Student of Law* in 1523 in Latin and 1532 in English (*St Germain Doctor and Student*), is particularly important for the history of English legal thought and for the ideas which underlie equity. See Plucknett and Barton *St German's Doctor and Student* 31. The appearance of this work coincides with the end of the *Year Books*, which ceased to be compiled after 1535. The place of the *Year Books* was taken by the *Reporters*, of which Coke was the most famous. Plucknett *Concise History of the Common Law* 284 explains that paradoxically there appears to be truth in the fact that it was Coke, a prime exponent of *Year Book* learning, who had brought to an end the study of *Year Books* in England. Plucknett *Concise History of the Common Law* 284.

¹¹ Plucknett *Concise History of the Common Law* 282. Coke's reputation had been established by sheer weight of learning. He would immediately react to any criticism by an elaborate reference to citations to the *Year Books*. The whole of his contribution was to be found in the *Year Books*. Plucknett considers the true value of Coke's *Reports* the summary it provides of medieval authority on a point on the one hand and the laying of foundations of a modern doctrine on the other.

on which to hang his summary of the law on the specific topic.¹² In others he concisely reported a series of cases on a specific topic. He would often intervene to insert comments or advice of his own.¹³ The first *Institute*, *Coke upon Littleton*, was published in 1628 and dealt with all the matters discussed by Littleton. It was in the nature of a legal encyclopaedia arranged on no plan except that indicated by words and sentences used by Littleton. Only the first *Institute* was published in Coke's lifetime, and the others, which dealt with public law (including *inter alia* a discussion of the *Magna Charta*), criminal law and the jurisdiction of the courts, were published only after 1641. Holdsworth expresses the opinion that this may be because they touched upon the constitutional controversies of the day.¹⁴

Coke's first *Institute* had been hailed as a "masterpiece upon masterpiece". He covered the whole field of English law with such thoroughness and authority that he "insured the continuity of the common law through the changes of reformation and reception of Roman law."¹⁵ Palmer mentions that Coke did his work so skilfully that for generations lawyers and judges were content to accept it as the final word as to what the *Year Books* and

¹² It is to be noted, however, that Coke's way of doing a law report normally took the form of a rambling disquisition upon the case in question, in which he would rather give the pleadings than the arguments. With regards to the decision, it was often impossible to distinguish the remarks of the judge from his comments. In his mind there was no clear divide between what a case actually said and what he thought it ought to have said. Neither is it always clear how he distinguished between the reasons which prompted the decision and his elaborate commentary. "A case in Coke's *Reports*, therefore, is an uncertain mingling of genuine report, commentary, criticism, elementary instruction, and recondite legal history." Plucknett *Concise History of the Common Law* 281.

¹³ Palmer 1946 *ABAJ* 135. Also see Seagle *Men of Law* 167.

¹⁴ Holdsworth 1935 *CLJ* 340. Holdsworth explains that in 1628 Coke's active career was over and when the fourth *Institute* was finished Parliament had been dissolved and the country was being governed by Royal Prerogative - "We cannot blame Coke for not wishing to shorten his closing years by a close imprisonment in the Tower." Also see Hicks *Men and Books Famous in the Law* 60 *et seq* for an elaborate explanation of the reasons for Coke's publishing of his *Reports*. Coke repeatedly emphasised that the sole purpose of his *Reports* was "to serve the common good, and to quiet enjoyment of rights and property by the resolution of doubts raised by diversity of opinion among the judges." In the eleventh *Report* (which was written when Coke was already in James' disfavour) Coke expressed the desire that God may be glorified, the king be honoured, the common good "encreased", the learned confirmed and the student instructed by the particular edition. Also, see further hereunder for a discussion of the strained relationship between Coke and James 1.

¹⁵ Palmer 1946 *ABAJ* 136. MacKay 1924 *Mich L Rev* 215 states, however, that Coke's style has been a cause for conflicting interpretations of his works. He explains that Coke was an encyclopaedist rather than a philosopher of the law. His *Reports* were legal and literary puzzles – a mixture of advocate's pleas, judicial decisions and probably his own personal opinions. Also see n 30.

early cases contained. And even when it became clear later that Coke had misread earlier authority, courts would often accept his opinion.¹⁶

Coke's career bore testimony to his extraordinary enthusiastic temperament which often resulted in unfortunate extremes in thought and action. As law officer he initially approved of acts and doctrines which he later denounced as unconstitutional.¹⁷ Such included the infliction of torture and of the then practice of asking judges to give extra-judicial opinions.¹⁸ Holdsworth emphasises, however, that at no point in Coke's career did he waiver in his belief that the common law was "a well-nigh perfect system upon which not only the public and private rights of Englishmen depended, but also the very being of the English state." When he was appointed to the Bench he became the personification of the common law. In fact, the superiority of the common law came to be identified with the superiority of Coke's position over that of other lawmakers.¹⁹

Coke's character has also long been regarded as something of a psychological enigma²⁰ and on a somewhat ironical note, reference may be made to his second marriage in 1596. Coke, who had lost his first wife²¹ and Bacon, his lifelong rival, were suitors to marry a wealthy widow of twenty, Lady Hatton. She eventually married Coke, who was then 46, because of

¹⁶ Palmer 1946 *ABAJ* 136.

¹⁷ In this phase of Coke's career he had never opposed or questioned the royal prerogative. He was elected in 1593 as member of Parliament from Norfolk and was selected by the House of Commons as Speaker. When presented to Her Majesty Queen Elizabeth by the House, Coke declared that "[A]s in the heavens a star is but *opacum corpus* until it hath received light from the sun, so stand I *opacum corpus* a mute body, until Your Highness's bright shining wisdom hath looked upon me and allowed me." And when dissolving Parliament he compared Her Majesty's realm to a beehive: "[T]he little bees have but one governor, whom they all serve ... Your Majesty is that princely governor and noble Queen we all serve. Being protected under the shadow of your wings, we live. Under your happy government, we live upon honey, we suck every sweet flower; but where the bee sucketh honey, there also the spider draweth poison. But such drones we will expel from the hive. We will serve Your Majesty, and withstand any enemy that shall assault you. Our lands, our goods, our lives, are prostrate at our feet to be commanded." See Seagle *Men of Law* 171.

¹⁸ Holdsworth 1935 *CLJ* 334. In his prosecution of Raleigh for treason Coke excelled in ruthlessness. His opening address to the court read as follows: "You shall see the most horrible practices that ever came out of the bottomless pit of the lowest hell." And to Raleigh: "thou art a monster; thou hast an English face but a Spanish heart ... Go to, I will lay thee upon thy back for the confidentist traitor that ever came to the Bar. Thou art an odious fellow ... thou art thyself a spider of Hell ..." Palmer 1946 *ABAJ* 135. Also see Plucknett *Concise History of the Common Law* 242.

¹⁹ MacKay 1924 *Mich L Rev* 215.

²⁰ Seagle *Men of Law* 165.

²¹ He married her (Bridget) when she was 18 years old. Her father, William Paston Esq settled £30 000 on her when she married.

his superior wealth and position. However, to his sorrow "she did her best to make him as miserable as he deserved to be."²² She refused to get married in church and they got married in a private dwelling. Unfortunately, three infringements of the law relating to the marriage ceremony took place – the banns weren't published, the required licence was not obtained and the ceremony did not take place in a church. These rendered the marriage void and Coke, who was threatened with ecclesiastical punishment, had to make the necessary submission. He, the oracle of the common law, had to plead ignorance of the ecclesiastical requirements. The Lord Chancellor, who attended the wedding, submitted to the censure of the Archbishop of Canterbury. The act of absolution which followed read that Coke's plea had been granted "by reason of penitence, *and the act seeming to have been done through ignorance of the law*"²³ (italics added).

Coke has not been knighted and was therefore not entitled to be called Sir Edward. However, for his authoritative learning he has for centuries been acclaimed as Sir Edward by lawyers and jurists.²⁴ This title has never been challenged. In fact his *Reports* are not referred to as Coke's *Reports* but rather as *The Reports*.²⁵ It comes as no surprise therefore, that he has been hailed as the "greatest common lawyer of all time"²⁶ and "the Oracle of the Common Law ... perhaps the greatest lawyer that ever lived".²⁷ Unfortunately, references such as bigoted, brutal, stubborn, narrowminded, bad-tempered, ferocious, dictatorial, habituated to rancorous insolence, of harsh tongue, vituperative and vindictive also mark the convictions of

²² Palmer 1946 *ABAJ* 135; Seagle *Men of Law* 172. She would, for instance, not take his name and to annoy him further persisted in spelling his name as Cook.

²³ Palmer 1946 *ABAJ* 135. Plucknett *Concise History of the Common Law* 244 mentions Coke's fondness for splendid attire. He delighted "in good clothes, well worn, and being wont to say that the outward neatness of our bodies might be a monitor of purity to our souls." However, like most of his contemporaries he regarded actors as no better than vagrants and for instance he never once went to a theater to see a play of Shakespeare or any other dramatist. Furthermore, his ignorance of science was abysmal. See Seagle *Men of Law* 167.

²⁴ Palmer 1946 *ABAJ* 137 refers to a case where one of the judges had the following to say: "The fact is Lord Coke had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in Westminster Hall if what Lord Coke says without authority is not law." On the title pages of the two last parts of his *Reports* Coke describes himself as Lord Chief Justice of England. See Hicks *Men and Books Famous in the Law* 67.

²⁵ Plucknett *Concise History of the Common Law* 280. In his *Reports* Coke stated the principles of English law in systematic and historic format as they arose in litigation before him.

²⁶ Barrett 1942 *ABAJ* 610. Coke's reputation as a master of the common law grew so great that municipalities of England competed with one another for his legal services. The cities of Coventry (1585), Norwich (1586) and London (1592) elected him Recorder.

²⁷ Palmer 1946 *ABAJ* 135. Also see Orth 1999 *Constitutional Commentary* 33.

authors.²⁸ Seagle describes Coke as "[o]ne of the most disagreeable figures of our history", yet also as "[o]ne of the most important champions of our liberty."²⁹

2.2 Expressions and dicta of Coke

Coke's writings did not really show literary graces. His statements were usually terse but overburdened with allusions and citations. He would often also use Latin maxims which had an air of antiquity about them, but which he in truth personally invented.³⁰ Coke not only was a master of the common law, but his reading also included mediaeval history and references to Virgil, Horace, Tacitus, Horace and Chaucer.³¹ His judgments and writings contained expressions and axioms which he invented or made authoritative. They include the following, *inter alia*:

- "Reason is the life of the law; nay, the common law is nothing else but reason";³²
- "The gladsome light of jurisprudence";³³
- "[g]ood pleading is the heartstring of the common law";³⁴
- "[t]he laws of England are the golden metwand whereby all men's causes are justly and evenly measured";³⁵

²⁸ Palmer 1946 *ABAJ* 135. MacKay 1924 *Mich L Rev* 216 adds to these views: "[A]ny individual with such an exalted idea of his own importance and place, ... is not likely to be consistent at all times." Seagle *Men of Law* 165 says that Coke was "one of the most arrogant and avaricious of men".

²⁹ Seagle *Men of Law* 165.

³⁰ Plucknett *Concise History of the Common Law* 283. It is said that when Coke encountered difficulties in finding a precedent for a decision he wished to reach, he would simply write "as the old Latin maxim saith ..." and then invent the maxim. See Levy *Cardozo and the Frontiers of Legal Thinking* 86.

³¹ Holdsworth 1935 *CLJ* 337. Coke would always retire at 21:00 and rise at 03:00. From 03:00 to 08:00 he would study records of the common law, which were the *Year Books* containing reported decisions of cases. Seagle *Men of Law* 167 reports that he described his daily regimen as follows:

Six hours in sleep, in law's grave study six,
Four spent in prayer, the rest on nature fix.

³² Section 138 *First Institute* referred to by Barrett 1942 *ABAJ* 609. Other *dicta* emphasising reason include "Nothing that is contrary to reason is consonant to law."

³³ *Third Institute* 162 quoted in Barrett 1942 *ABAJ* 609. MacKay 1924 *Mich L Rev* 218 explains that to Coke the common law was "[t]he absolute perfection of reason" but that it was reasonable only to those learned in the law. Also see Holdsworth 1935 *CLJ* 338.

³⁴ Quoted in Holdsworth 1935 *CLJ* 338.

³⁵ *Fourth Institute* 240 quoted in Holdsworth 1935 *CLJ* 338.

- "Every man's house is his castle";³⁶
- "Knowledge of the law is like a deep well, out of which each man draweth according to the strength of his understanding";³⁷
- "I am persuaded Almighty God openeth and enlargeth the desires of justice and right";³⁸
- "[a]nd it appears in our books, that in many cases the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act 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".³⁹
- Coke wrote that he envied the plowman or mechanic who could "merrily sing" while at work while he who writes of the law has to be attentive only to that what he has collected "without any expression of joy or cheerfulness whilst he is at his work".⁴⁰
- "The King, by his proclamation or otherwise, cannot change any part of the common law, or statute law, or customs of the realm."⁴¹
- Of the universities of Oxford and Cambridge Coke said that they were "the eyes and sole of the realm, from whence religion, the humanities, and learning were richly diffused into all parts of the realm".⁴²
- Difficulties of the common law arose from statutes written by "men of very little judgment" who were uneducated in common or statute law. He proceeded that if sound advice from those learned in law had been taken before action, there would be little likelihood of uncertainty.⁴³

³⁶ *Third Institute* 162 quoted in Palmer 1946 *ABAJ* 136. Pitt's famous words followed on the basis of this proverb: "The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail, its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement."

³⁷ *First Institute* referred to by Barrett 1942 *ABAJ* 609, Seagle *Men of Law* 184.

³⁸ 9 *Reports* XIV quoted in MacKay 1924 *Mich L Rev* 218.

³⁹ *Dr Bonham's Case* reported in 8 *Reports* 118 and quoted in MacKay 1924 *Mich L Rev* 222.

⁴⁰ Epilogue 4 *Institute* referred to by Barrett 1942 *ABAJ* 611.

⁴¹ 12 *Reports* 75 quoted by Barrett 1942 *ABAJ* 610.

⁴² 8 *Reports* 116 quoted by Holdsworth 1935 *CLJ* 332.

⁴³ MacKay 1924 *Mich L Rev* 220.

- "But now in God's most just judgment, he of his Earldom shall be 'Robert the Last,' that of the Kingdom thought to be 'Robert the First'".⁴⁴
- "The law is the rule, but it is mute: the King judgeth by his judges and they are the speaking law."⁴⁵
- The Court of Common Pleas was according to Coke the most important for the King's subjects. He called the Court "the lock and key of the common law".⁴⁶

3 Coke's views of the supremacy of the common law

The point of departure carried throughout Coke's works was the recognition of a body of fundamental law.⁴⁷ However, he did not consider it a moral law but rather a body of rigid law which had been revealed and which was unchangeable. In the finding of this law the influence of reason is supreme – human wisdom had perfected the law and human reason had retained it. The law derives its imperative from its rationality - it does not derive from some divine command.⁴⁸ He explained that the common law was fundamental because it was reasonable.⁴⁹ Its unchangeableness simply stemmed from the fact that it was impracticable and dangerous to change.⁵⁰ Coke explains it thus:

The laws of England consist of three parts, the Common Law, customs, and acts of Parliament: for any fundamental point of the ancient laws and customs of the realm, it is a maxim in policy, and a trial by experience, that the alteration of them is most dangerous; for that which hath been refined and perfected by all the wisest men in former succession of ages, and proved and approved by

⁴⁴ Seagle *Men of Law* 174. As Attorney-General Coke conducted a series of prosecutions for treason against various high-placed individuals. His main victims were Robert Devereaux, the Earl of Essex and Sir Walter Raleigh. By expressions such as these he continually taunted Essex and represented him as a most depraved man. Also see n 18 for his address to Raleigh.

⁴⁵ Seagle *Men of Law* 185.

⁴⁶ Seagle *Men of Law* 185.

⁴⁷ In fact, Coke's view of equity was based on the exposition of St Germain "Dialogues in English between a Doctor of Divinity and a Student in the Laws of England" in Plucknett *Concise History of the Common Law* 31: "It is not vsed amonge them that be lernyd in the lawes of Englande to reason what thyng is commaundyd or prohybyt by the lawe of nature and what not: but all the resonyng in that behalf is vnder this manner: as when anything is groundyd vpon the lawe of nature: they say that reason wyll that suche a thyng be done and yf it be prohybyte by the lawe of nature. They say it is against reason or that reason wyll not suffer that it be don."

⁴⁸ MacKay 1924 *Mich L Rev* 217, 218.

⁴⁹ MacKay 1924 *Mich L Rev* 218. See also Lewis 1968 *LQR* 330 *et seq.*

⁵⁰ MacKay 1924 *Mich L Rev* 217.

continental experience to be good and profitable for the commonwealth, cannot without great hazard and danger be altered or changed.⁵¹

The common law being "the absolute perfection of reason" was reasonable only to those learned in the law.⁵² This argument, however, was the cause for serious conflict between Coke and James I.⁵³ He explained disagreements between "those learned in the law" that the law in its general principles is not uncertain, though in particular instances it may be. However, reason would still prevail since counsels and judges argue a case in an open court where "I am persuaded Almighty God openeth and enlargeth the desires of justice and right".⁵⁴ Coke also provides a synopsis of specific sources, *inter alia*, *Magna Carta*,⁵⁵ original writs contained in the register concerning the common pleas and the exact and true forms of indictments and judgments thereupon in criminal matters. He concludes that the *Year Books* and records are only commentaries and expositions of those laws, original writs, indictments and judgments.⁵⁶ MacKay comes to the conclusion, correctly so it is suggested, that:

To Coke the Common Law has been found, not made. It has been found by Parliament, by the judges, and by the King in Council. It has attained concrete form through the sources he indicates, but the sources only receive their validity because they are expositions of the Common Law. The idea of the Common Law has existed prior to the statutes or other sources as an ideal toward which all expositions ought to strive. The ideal is characterized by reasonableness and by justice, and the expositions of the ideal ought also to meet this test.⁵⁷

Coke's exposition of the common law gave rise to conflicting interpretations regarding its sovereignty in relation to arguments favouring parliamentary sovereignty on the one hand and the unlimited power of the king on the

⁵¹ 4 *Reports* Preface VI in MacKay 1924 *Mich L Rev* 217.

⁵² See Seagle *Men of Law* 163.

⁵³ See text accompanying n 64 *infra* for a further discussion of the strained relationship between Coke and James I.

⁵⁴ 9 *Reports* XIV in MacKay 1924 *Mich L Rev* 218. It goes without saying, of course, that some serious criticism was levelled against Coke's theory that the law was reasonable only to those learned in law – if the quality of being reasonable is the hallmark of good laws, why is it impossible for ordinary men to formulate them just as easily as lawyers? "Though it be true that no man is born with the use of reason, yet all men may grow up to it as well as lawyers; and when they have applied their reason to the laws ... may be as fit for and capable of judicature as Sir Edward Coke himself." Lewis 1968 *LQR* 335.

⁵⁵ Ironically, it has been pointed out recently that there are errors in Coke's reading of *Magna Carta*. See Palmer 1946 *ABAJ* 137.

⁵⁶ 8 *Reports* XXII and XXV in MacKay 1924 *Mich L Rev* 218.

⁵⁷ MacKay 1924 *Mich L Rev* 220. In 2 *Reports* XII and XIII Coke conveys that difficulties regarding the common law stem from Acts of Parliament that are written "[b]y men of very little judgement" and who have no knowledge of the common or statute law.

other.⁵⁸ In particular, his judgment in *Dr Bonham's Case*⁵⁹ in 1610 is at the bottom of the dissensus. He held that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed the common law will controul (*sic!*) it, and adjudge such act to be void."⁶⁰ The question arising from this *dictum* consequently is whether Coke attached such a fundamental dimension to the common law that it could serve as superior principles of right and justice by means of which parliamentary laws or royal proclamations could be tested. Supporters of Sir Thomas Smith understood the judgment to mean that parliament was sovereign⁶¹ whereas supporters of the theories of Bodin claimed that the king's power was unlimited.⁶² As this matter has been discussed elaborately in other publications, no further attention will be paid to it.⁶³

⁵⁸ "Urged by a presentiment of the coming conflict of Crown and Parliament, he felt the necessity of curbing the rising arrogance of both, and looked back upon his country's legal history to find the means." For a more elaborate discussion of the judgment, see *inter alia* Plucknett 1926 *Harv L Rev* 30; Thorne 1938 *LQR* 543; Robinson 1991 *SA Public Law* 46.

⁵⁹ The judgment is reported in 8 *Reports* 114. See too Thorne 1938 *LQR* 543; Orth 1999 *Constitutional Commentary* 34; Lewis 1968 *LQR* 338. The facts of *Dr Bonham's Case* related to an apparent attempt to grant the Royal College of Physicians both the right to impose fines for unlicensed practice and the right to retain half of the fines collected. Coke held that the practice was illegal since *iniquum est aliquem suae rei esse* (it is unfair for someone to be a judge in his own affairs.)

⁶⁰ See 8 *Reports* 118. MacKay 1924 *Mich L Rev* 226 refers to Coke's judgment in *Rowles v Mason* in 1612 in which he confirmed his standpoint in *Dr Bonham's Case*. "Fortescue and Littleton and all others are agreed 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 in *Dr Bonham's Case* ... "

⁶¹ "The most high and absolute power of the realme of Englande, consisteth in Parliament ... That which is doone by this consent is called firme, stable and sanctum, and is taken for lawe. The Parliament abrogateth olde lawes, maketh newe ... and hath the power of the whole realme, both the head and the body. For everie Englishman is entended to be there present, either in person or by procuracion and attornies." See Alston *De Republica Anglorum*.

⁶² See Taswell-Langmead *English Constitutional History* 330; Maitland *Constitutional History of England* 255.

⁶³ See Plucknett 1926 *Harv L Rev* 30; Robinson 1991 *SA Public Law* 46; MacKay 1924 *Mich L Rev* 215 *et seq.* At 227 MacKay warns that parliamentary sovereignty as it is understood today must be distinguished from that of the early Stuart period. Parliament was supreme as a court and had by then not attained superiority as a legislature. Its supremacy as a court enabled it to change or revise any previous statute or any principle of the common law. Effectively it was a court of last resort from which there was no appeal. Its acts were the final decision on any principle of law. Also see Lewis 1968 *LQR* 333; Orth 1999 *Constitutional Commentary* 34. It must further be understood that while the common law was indeed the king's law, it also implicated that the king's law was to be set against himself. As early as 1215 *Magna Carta* was signed by a very reluctant King John. In its origin it was only a

4 Judicial independence

Coke's position as Chief-Justice of the Common Pleas enabled him to enforce his views of the common law from the bench. However, his views continuously clashed with those of King James I.⁶⁴ Coke was unmoved in his approach that the common law was the supreme law in the state and that judges, unfettered and uncontrolled save by the law, were the sole exponents of this supreme law. James on the other hand maintained that judges were like other civil servants, officers of the Crown. The Crown could supersede them if necessary and decide a matter for itself. In the final instance it was the prerogative that was supreme.⁶⁵ Inevitably there was a series of conflicts with the king.⁶⁶ King James was aware that Coke's fanatical appreciation of the common law was a reflection of a deep-seated national feeling.⁶⁷ In fact, Coke's popularity to a substantial degree had been enhanced by his judgments to the effect that the common law was the greatest safeguard against arbitrary power.⁶⁸

Coke's transfer to the Kings Bench in 1613 was an effort for him to be removed from a bench specifically concerned with safeguarding the rights of people to one looking after the rights of the King.⁶⁹ It was thought that in this capacity he would do less harm to the rights of the Crown.⁷⁰ This belief

grant of feudal privileges but in its 39th chapter it contained a provision that would have a significant impact in creating the ideology of the supremacy of the law: "No freeman shall be taken, or imprisoned, or disseized, or exiled, or in any way destroyed, nor shall we go upon him, nor send upon him, except by the lawful judgment of his peers, or by the law of the land." See Seagle *Men of Law* 164.

⁶⁴ See e.g. Barrett 1942 *ABAJ* 609. Hicks *Men and Books Famous in the Law* 60 refers to an early standoff between Coke and James I. Coke had seriously begun to purchase property and when he was about to purchase Castle Acre Priory, the King told him that he already had as much land as was proper for a subject to possess. Coke responded, "Then, please your Majesty, I will only add one *acre* more to my estate."

⁶⁵ Holdsworth 1935 *CLJ* 334. In *Case of Proclamations* 12 Co Rep 74 76 Coke held that "The King hath no prerogative, but that which the law of the land allows him."

⁶⁶ Coke attached great importance to *Magna Carta*. In a debate on the *Petition of Right* where the addition was made "saving the King's sovereign power", he consequently declared that "Magna Charta is such a fellow, that he will have no sovereign." See MacKay 1924 *Mich L Rev* 233.

⁶⁷ This popularity may be ascribed to Coke's views of equity which underlies the common law. See the discussion of *Dr Bonham's Case* in Robinson 1991 *SA Public Law* 56-59.

⁶⁸ Holdsworth 1935 *CLJ* 335.

⁶⁹ Holdsworth 1935 *CLJ* 335.

⁷⁰ Coke was promoted to the vacant office of the Chief Justice of the King's Bench on 28 October 1613. It was a promotion in the sense that the Chief Justice of the King's Bench took precedence over Chief Justice of the Common Pleas. The emoluments of the new post were substantially less, however. This promotion was the result of a suggestion by Bacon, who had wished to become Attorney General but could achieve this object only by getting the incumbent of the office of the Attorney General

held true in the sense that Coke had the mindset of an advocate and certainly would leave no stone unturned for a cause he was instructed to defend. On the other hand, the belief underestimated his conviction regarding the supremacy of the common law, which bordered on fanaticism. Consequently, Coke's three years as Chief Justice were marked by a series of quarrels with James. On 26 June 1616 Coke was provisionally suspended from the Privy Council and was ordered to revise and correct his reports.

James 1 was a man of substantial intellectual capacity even though his judgment of men and of the temper of the English people was poor.⁷¹ Palmer points out that he had inherited all the power and prestige of the Tudor monarchy which had sent St Thomas More to the block because of his denying of the monarchy's totalitarian claims.⁷² James argued that:

kings are the breathing images of God upon earth. ... Kings are not only God's lieutenants upon earth and sit upon God's throne, but even by God himself they are called gods. ... That which concerns the mystery of the King's power is not lawful to be disputed ... As to dispute what God may do is blasphemy, so it is sedition in subjects to dispute what a king may do.

Against this exposition of the royal prerogative stood Coke's declaration that the Common Law was fundamental because it was reasonable. James was prompted to claim the right to transfer any cause from a court of law to the King to permit his "judging whatever cause he pleases in his own person, free from all risk of prohibition or appeal."⁷³ In a conference on 13 November 1608 between James and his judges⁷⁴ they were instructed to voice their views regarding the proposal. When James was advised that a King is not to act as a judge because an injured party would have no remedy should he err, the following occurred:⁷⁵

Coke: 'By the law of England, the King in his own person cannot adjudge any case, either criminal as treason, felony, etc., or betwixt party and party concerning his inheritance or goods; but this ought to be determined and

promoted to Chief Justice of the Common Pleas. Bacon convinced James that the promotion to an office of lesser profit but greater honour would be a warning to Coke and make him turn obsequious.

⁷¹ Barrett 1942 *ABAJ* 610.

⁷² Palmer 1946 *ABAJ* 137.

⁷³ Barrett 1942 *ABAJ* 610.

⁷⁴ The meeting took place after the judges had been summoned before the King. The Archbishop was anxious to put an end to the judges' interference with the Court of the High Commission and suggested that the King could take over any case he pleased. His view was that the judges were merely delegates of the King and they administered the law in the King's name. All the judges assented to this proposition, which would practically have destroyed the supremacy of the common law.

⁷⁵ Seagle *Men of Law* 177.

adjudged in some court of justice, according to the law and custom of England.'

James: 'My Lords, I have always thought, and by my soul I have often heard the boast, that your English Law was founded upon reason. If that be so, why have not I and others reason as well as you the Judges?'

Coke: 'True it is, please your Majesty, that God has endowed your Majesty with excellent science as well as great gifts of nature; but your Majesty will allow me to say, with all reverence, that you are not learned in the laws of this your realm of England, and I crave to remind your Majesty that causes which concern the life or inheritance, or goods or fortunes, of your subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it. The law is the golden mete-wand and measure to try the causes of your Majesty's subjects, and it is by the law that your Majesty is protected in safety and peace.'

James: 'Then I am to be under the law – which it is treason to affirm.'

Coke: 'Thus wrote Bracton, '*Rex non debet esse sub homine, sed sub Deo et lege*.'⁷⁶

James was not convinced and proceeded to make laws by means of proclamations – he promulgated new laws, amended old laws and prescribed penalties to be inflicted without trial. He furthermore ordered that the judges be summoned to declare that these powers that he had assumed had by law belonged to him. Coke added to the answers of the judges which were against the King that "The King, by his proclamations or otherwise, cannot change any part of the common law, or statute law, or customs of the realm."⁷⁷

Besides the king, Sir Francis Bacon was Coke's chief rival.⁷⁸ His and Coke's careers ran almost parallel – they were constantly thrown together, took part

⁷⁶ Barrett 1942 *ABAJ* 610. It is reported that Coke was asked in the presence of Henry VIII whether the maxim *quod principi placuit* did not apply to the king of England. Coke replied that "I had read indeed of kings that had their wills always received for a law, but I told him the form of his reign, to make the laws his will was more sure and quiet, and by this form of government ye be established, and it is agreeable with the nature of your people." See Holdsworth 1935 *CLJ*.

⁷⁷ 12 *Reports* 75, reported in Barrett 1942 *ABAJ* 610. Palmer 1946 *ABAJ* 136 refers to Coke's dismissal of the King's prerogative in a message emphasising the independence and integrity of the judiciary: "[F]ear not to do right to all, and to deliver your opinions justly according to the laws ... And if you shall sincerely execute justice, be assured that though thereby you may offend great men and Favourites, yet you shall have the favourable kindness of the Almighty ... and God will defend you with a shield." This statement was almost naming the King and was directly the opposite of Bacon's views that judges were to uphold the King's prerogative as they were servants of the executive.

⁷⁸ At the age of 32 Bacon aspired to become Attorney General and Coke made no secret that he considered Bacon's aspirations presumptuous. Queen Elizabeth did not appoint him to the post and he did not even get the lesser post of Solicitor

in the same public events, gained advantages over each other and consistently represented two opposing sides in controversies.⁷⁹ Contrary to Coke, Bacon had a "starveling, shriveled soul, the soul of a lackey" but he was unsurpassed in amplitude of general learning. He had an encyclopedic mind which he did not hesitate to apply to cunning devices to further his ambitions, and more particularly to destroy Coke.⁸⁰ He was able to appreciate Coke's merits, however, and he once said that if it had not been for Coke's *Reports* "the law by this time had almost been like a ship without ballast." Coke, on the other hand, was less than courteous towards Bacon. When Bacon presented him with a copy of his *Novum Organum* which showed a ship in full sail passing through the Pillars of Hercules, he wrote the following on the title page:

It deserves not to be read in schools,
But to be freighted in the Ship of Fools.⁸¹

Against the powers of the king and Bacon, Coke stood fearless and he was not deterred by arbitrary arrest, imprisonment in the Tower or the very imminent danger of disembowelment and death for treason in a time when beheading frequently took place at the mere behest of the king.⁸² In seeking to curb the absolutist approach of the King, Coke employed two remedies in the arsenal of the common law; the writ of prohibition and the writ of *habeas corpus*. The writ of prohibition had been issued by the common law courts to inferior tribunals to determine whether they had exceeded their jurisdiction. In particular they had been useful in the campaign of the royal courts to limit the jurisdiction of the feudal and popular courts. The writ of *habeas corpus* had become the guarantee of the liberty of the subject even though it was in its origin a method whereby the King could put a subject into his jail rather than helping him to get out of it. The common lawyers of the 16th century have begun to convert it into a procedure to test the unlawfulness of an imprisonment, however. "Thus, the means of

General since Coke preferred to carry the office until a more suitable incumbent could be chosen. This episode was the impetus for an ongoing rivalry between Coke and Bacon. The temper of the two men became clear in an altercation between them in the Court of the Exchequer.

Coke: "Mr. Bacon, if you have any tooth against me, pluck it out; for it will do you more hurt than all the teeth in your mouth will do you good."

Bacon: "Mr. Attorney, I respect you; I fear you not; and the less you speak of your own greatness, the more I will think of it."

Coke: "I think it scorn to stand upon terms of greatness towards you who are less than little – less than the least."

⁷⁹ Hicks *Men and Books Famous in the Law* 66.

⁸⁰ Palmer 1946 *ABAJ* 137.

⁸¹ See Seagle *Men of Law* 72.

⁸² Palmer 1946 *ABAJ* 137.

establishing the hegemony of the king's courts were employed in resisting the king himself."⁸³

Coke's focus had been aimed specifically on the greatest of the ecclesiastical tribunals, the Court of the High Commission, against which he levelled the writs both of prohibition and *habeas corpus*. This court had been established to consolidate the Elizabethan religious settlement but had later attempted to exercise jurisdiction over temporal offenses and interests. As a court the Commission's rules were fluid and its judgments were not subject to appeal. It consequently became an ideal tool for royal tyranny. Coke constantly interfered with its proceedings and James sought to put a stop to his opposition by naming him also as a judge of the High Commission. Coke, however, resolutely refused to sit.⁸⁴

Two well-known episodes led to the removal of Coke from office. The first is the case of *Commendams*,⁸⁵ in 1616, which dealt with the ancient prerogative of the king to appoint a suitable clergyman to a benefice *in commendam* – with the right to have its duties performed by a deputy. The case was heard on 20 April 1616 in the Exchequer Chamber before all the judges. Bacon acted as attorney-general and argued for the king. The date for the judges to deliver their opinions was April 27. James feared that his prerogative of appointing to plural benefices might be denied or brought into question and instructed Bacon to write to the judges to command them not to proceed with the case until they had consulted with him. Bacon's letter to Coke was dated April 25. Upon receiving the same Coke requested that similar letters be sent to the other judges. The judges thereafter met on April 27, argued the case and adjourned it to June 8. They then informed the King in a letter that the case was "between subjects" and further that the express words of the judges' oaths were "that in case any letters come unto us contrary to law, that we do nothing by such letters but certify your Majesty thereof, and go forth to do the law, notwithstanding the same letters." They then conveyed the information that they had held the letters of the Attorney-

⁸³ Seagle *Men of Law* 175.

⁸⁴ Seagle *Men of Law* 176.

⁸⁵ *Colt and Glover v Bishop of Coventry and Lichfield* Hobart's Reports 140-166 as discussed in Hicks *Men and Books Famous in the Law* 67 *et seq.* Reference may also be made to the case of *Edmund Peacham* in 1613. Bacon as Attorney General intended to prosecute a Puritan clergyman, Peacham, for treason after his house had been raided and an undelivered and unpublished sermon had been found in which he inveighed against tyrannical rule. Bacon was not certain that he would get a conviction and sought to have the judges commit themselves in advance. Two of the judges agreed to give their opinions in advance but when Bacon consulted Coke, he was informed that "such particular and auricular taking of opinions is not according to the custom of this realm" because it was unfair to the accused.

General to be contrary to the law and such that due to their oath they could not yield to it. The King replied that the judges "forbear to meddle any further in this plea" until he could discuss it with them.

On 6 June a Privy Council meeting was held. All the judges were present, and the King in person. The date was specifically chosen so that the case might not be heard on the 8th. Bacon furnished an elaborate memorandum for the King to use in preparing himself. In the meeting the King ordered that the letters that had been written be read, and thereafter berated the judges for their errors and omissions. These included that they had permitted too free discussion of the King's prerogative, that they had disobeyed his instructions and only after this disobedience had they notified him of their action. The report of the Act of Council describes as follows what happened at the meeting:

After this his Majesty's declaration, all the judges fell down on their knees, and acknowledged their error for matter of form, humbly craving his Majesty's gracious favour and pardon for the same.

But for the matter of the letter, the Lord Chief-Justice of the King's Bench entered into a defence thereof ...

The King thereafter called upon the Lord Chancellor and upon Bacon as Attorney-General to give their opinions. They disagreed with Coke.

Thereupon his Majesty and the Lords thought good to ask the judges severally for their opinion; the question being put in this manner: Whether, if at any time, in a case depending before the judges, which his Majesty conceived concern him either in power or profit, and thereupon required to consult with them, and that they should stay proceedings in the meantime, they ought not to stay accordingly? They all (the Lord Chief Justice except) yielded that they would, and acknowledged it their duty so to do; only the Lord Chief Justice of the King's Bench said for answer, that when that case should be, *he would do that should be fit for a judge to do* ...⁸⁶ (italics added)

The second episode came to be known as the *Praemunire* case. *Praemunire* related to specific criminal matters the adjudication of which by statute fell in the jurisdiction of the King's Court. However, the penalties for praemunire were later applied to various other offences. When the Court of Chancery began to exercise jurisdiction in matters that had already been decided by the King's Court, Coke found that an unwarranted interference with his power.⁸⁷ He found authority for his endeavour to prevent this encroachment in another statutory enactment which forbade all other courts

⁸⁶ See Barrett 1942 *ABAJ* 610; Hicks *Men and Books Famous in the Law* 69. It was after this incident that Coke was dismissed as Chief Justice with the message from the King that "we will that you be no longer our Chief Justice."

⁸⁷ *Courtney v Glanvil* Cro Jac 343 referred to in Hicks *Men and Books Famous in the Law* 71.

from meddling with any case which the King's Bench had decided. Based on this provision Coke found a decision of the Court of Chancery which overturned a decision at common law of the King's Court to be unlawful and an indictable offense. Indictments of *praemunire* in the King's Bench were consequently instituted against all persons who had been concerned in the proceedings in Chancery. The indictments failed and the proceeding was reported by Bacon, the Attorney General to the King. James appointed a committee of the Privy Council to examine the precedents and make recommendations. The reported recommendations rejected Coke's contentions and James issued a decree corresponding with the findings of the report.⁸⁸

In both episodes mentioned above, Coke not only found himself in conflict with the King but also laid himself open to attack by his archival, Bacon. Even though he suffered defeat, he carried himself boldly and with dignity. However, when the outcome of an investigation regarding his complicity in pecuniary matters of a doubtful nature was also brought to the King's attention, the latter took further action. Incited by the nature of the rulings Coke had been making, an investigation was launched into the doctrines contained in his *Reports*. On 30 June 1616 Coke was informed by the King's command that he was temporarily suspended from the exercise of his duties as Privy Councillor and from his judicial duties on the bench. His leisure was to be employed in reviewing and correcting his *Reports*.⁸⁹

It was clear that the King had meant to deal gently with Coke. Besides his knowledge of the law, Coke was wealthy and possessed of many State secrets. It was possible therefore for Coke to extricate himself from the situation in which he had found himself; if he were willing to concede somewhat in matters relating to appointments to office and in lip service to the King, the matter of the *Reports* would have been dropped.⁹⁰ However, he failed to take this course and made no report to the King, who then

⁸⁸ The King, on July 18, 1616 issued the "decree touching the granting of praemunires against any for suing in Chancery after a judgement at Common Law ... that our Chancellor or Keeper of the Great Seal for the time being shall not hereafter desist to give unto our subjects upon their several complaints now or hereafter to be made such relief in Equity (notwithstanding any former proceedings at the Common Law against them) and shall stand with the true merits and justice of their cases, and with the former ancient and continued practice and precedency of our Chancery." *Letters and Life of Bacon*; Spedding (ed) 395 reported in Hicks *Men and Books Famous in the Law* 71. Also see Holdsworth 1935 *CLJ* 335.

⁸⁹ Hicks *Men and Books Famous in the Law* 72. The instruction further read: "And having corrected what in his discretion he found meet in those Reports, his Majesty's pleasure was that he should bring the same privately to himself, as in his princely judgement should be found expedient."

⁹⁰ Hicks *Men and Books Famous in the Law* 72.

directed Chancellor Egerton and Bacon to call Coke before the Council on October 2, 1616. This meeting yielded no satisfactory results. On the contrary, Coke remained recalcitrant and expressed the opinion that there was nothing of any importance to correct in his *Reports*.⁹¹

It was not clear how to proceed with the matter. Bacon urged for the matter regarding Coke's *Reports* to be aired before the Council but the King refused. In fact, he appeared reluctant to take further steps against Coke. The King's indecisiveness therefore caused Coke's opponents to prepare elaborate statements indicating mistakes in Coke's *Reports*. These were presented to the King to force his hand. It is especially the statement of Egerton that went into considerable detail.

It is to be observed throughout all his Books that he hath as it were purposely laboured to derogate much from the rights of the Church, and dignity of churchmen, and to disesteem and weaken the power of the King in the ancient use of his prerogative.⁹²

Egerton further accuses Coke that he in some instances reported cases erroneously, sometimes gave decisions that were never made or, in most cases, scattered in his own conceits. Coke consequently was called before Egerton, Bacon and Yelverton, the Solicitor General, on October 1617 and informed that since he had not furnished a satisfactory answer, he now had the opportunity.⁹³ A selection of five cases was made and the objectionable passages in them were pointed out. Coke undertook to respond in "in such sort that no shadow should remain against his Majesty's prerogative." On October 21 Coke answered to the charges and denied the interpretation that had been put upon his statements of the cases. His approach left the King and his advisers in a position from which they could not withdraw with dignity. Without pursuing the matter of the Reports any further, James declared to the Council on 10 November 1616 his intention to remove Coke

⁹¹ According to Hicks *Men and Books Famous in the Law* 73-74, Egerton and Bacon explained that Coke defended his *Reports* as follows: "that there were of his Reports eleven books, that contained about five hundred cases: that heretofore in other Reports, as namely those of Mr. Plowden (which he revered much) there hath been found nevertheless errors which the wisdom of time had discovered and later judgments controlled." Egerton and Bacon proceeded that "he enumerated to us four cases in Plowden which were erroneous; and thereupon delivered in to us the enclosed paper, wherein your Majesty may perceive that my Lord is an happy man, that there should be no more errors in his five hundred cases than in a few cases in Plowden."

⁹² Reported in Hicks *Men and Books Famous in the Law* 74.

⁹³ "... [t]hat he should be put in mind of some passages dispersed in his books, which his Majesty being made acquainted with his as yet distaste, until he heard his explanation and judgment concerning the same." See Hicks *Men and Books Famous in the Law* 74.

from the Bench. However, he did so with respect to Coke and "gave him this character, that he thought him no way corrupt, but a good justicer; with so many other good words, as if he meant to hang him with a silken halter."⁹⁴ Interestingly, these words were not in the spirit of the speech which Bacon had prepared for the King.⁹⁵ Bacon nevertheless had the satisfaction of preparing and sending to the King the order for Coke's removal and the warrant for the appointment of Sir Henry Montague as his successor.⁹⁶

The inquisition into Coke's *Reports* was not over. Bacon had prepared for the King a warrant to review and reform them. It was no simple matter as Coke had begun to regain royal favour, partly because of his daughter's marrying the Duke of Buckingham. Bacon opposed the marriage and due to the enormous marriage portion that was demanded Coke initially also refused his consent. After the marriage Coke was recalled to the Council. When Bacon, who had become the head of the Court of Chancery in the meantime, moved to enlarge the Commission to review Coke's Reports, Coke demanded a full investigation. He addressed the King through his brother-in-law, the Duke of Buckingham. The *Reports* were never revised, reformed or corrected.

5 An overview of Coke's parliamentary career

After his dismissal from the bench Coke was elected to the Parliament. In that capacity he maintained his resistance to the encroachments on people's rights by King James and later also by King Charles 1. He later became leader of the Parliamentary opposition – a decisive event because it cemented the alliance between Parliament and the common law.⁹⁷ His rivalry with King James took on a new dimension after the publication of a *Protestation* of which he was the author, and which had been adopted by Parliament. In this document it was maintained *inter alia* that the liberties, franchises and privileges, the making of laws, and freedom of speech to

⁹⁴ Hicks *Men and Books Famous in the Law* 75.

⁹⁵ Bacon's speech was rather venomous. He is reported to have said that the King had given Coke the summer's vacation "to reform his Reports, wherein there be many dangerous conceits of his own uttered for law, to the prejudice of his Crown, Parliament, and subjects ... but that his Majesty hath failed of the redemption he desired, but hath met with another kind of redemption from which he little expected. For as to his Reports, after three months' time and consideration, he had offered his Majesty only five animadversions, being rather a scorn than a satisfaction to his Majesty."

⁹⁶ When administering the oath of office to Montague on November 15, the Lord Chancellor Egerton once again accused Coke of "many errors and vanities for his ambitious popularity." The so-called four P's were given as an explanation for Coke's fall – pride, prohibitions, praemunire and prerogative. See Hicks *Men and Books Famous in the Law* 76.

⁹⁷ Holdsworth 1935 *CLJ* 345.

debate them in Parliament were "the ancient and undoubted birthright and inheritance of the subjects of England."⁹⁸ King James prorogued Parliament and declared the *Protestation* to be invalid and of no effect. He removed it from the Journal of the House of Parliament and tore it to pieces in the presence of the Privy Council and Judges of the Courts.

After James had had Coke arrested he seized all his papers and sealed up his home and chambers in the Temple. Coke was imprisoned in the Tower of London and informed that he might consult with eight of the best learned in the law to prepare for his case. In true fashion Coke rejected the offer. He replied that –

He knew himself to be accounted to have as much skill in the law as any man in England, and therefore, needed no such help, nor feared to be judged by the law; he knew his Majesty might easily find a pretense whereby to take away his head; but against this it mattered not what might be said.⁹⁹

Coke was released nine months later after no evidence of treason could be found. However, he continued writing his commentaries in the Tower. During the reign of Charles 1 Coke framed and was influential in carrying the *Petition of Rights*, also referred to as the *Second Magna Carta*.¹⁰⁰ After retiring to his home in Stoke Pogis, Coke wrote his *Second, Third and Fourth Institutes* of the laws of England. However, while on his deathbed his home was searched on the order of Charles 1. All his papers and manuscripts were seized and taken to Charles for his inspection and to prevent the publication of material that could be considered prejudicial to the prerogatives of the King – lest the people "might be misled by anything that carried such authority as all things do he either speaks or writes."¹⁰¹

6 Conclusion

The law regarding the royal prerogatives as understood and laid down by Coke has repeatedly been found to reflect the law of England correctly. It is settled that the King cannot act as judge in any cause at law, nor can he direct the decisions or force judges to consult with him as to the disposition of cases pending before them. It is also now clear that the King cannot make new laws by way of proclamations and especially following Coke's *dictum* in *Dr Bonham's Case*, cannot dismiss a judge as long as the judge does what is fit for a judge to do.

⁹⁸ Barrett 1942 *ABAJ* 611.

⁹⁹ Barrett 1942 *ABAJ* 611.

¹⁰⁰ Seagle *Men of Law* 183; Palmer 1946 *ABAJ* 138.

¹⁰¹ Barrett 1942 *ABAJ* 611.

As a lawyer and a statesman he belonged to the greatest period of the Tudor dynasty – the Elizabethan age; and so, like many of the other great of thought and action in that age, he was the author of much in our national life that we still rightly treasure. What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the authorised version of the Bible have been to religion, Coke has been to the public and private law of England.¹⁰²

Bibliography

Literature

Alston *De Republica Anglorum*

Alston L (ed) *De Republica Anglorum: A Discourse on the Commonwealth of England* (Cambridge University Press Cambridge 1906)

Barrett 1942 *ABAJ*

Barrett OR "A Brief for Sir Edward Coke" 1942 *ABAJ* 609-611

Hicks *Men and Books Famous in the Law*

Hicks FC *Men and Books Famous in the Law* (Lawyers Co-operative Publishing Rochester 1921)

Holdsworth 1935 *CLJ*

Holdsworth W "Sir Edward Coke" 1935 *CLJ* 332-346

Levy *Cardozo and the Frontiers of Legal Thinking*

Levy BH *Cardozo and the Frontiers of Legal Thinking* (Press of Case Western Reserve University Cleveland 1969)

Lewis 1968 *LQR*

Lewis JU "Sir Edward Coke (1552-1633): His Theory of 'Artificial Reason' as a Context for Modern Basic Legal Theory" 1968 *LQR* 330-342

MacKay 1924 *Mich L Rev*

MacKay RA "Coke – Parliamentary Sovereignty or the Supremacy of the Law?" 1924 *Mich L Rev* 215-247

Maitland *Constitutional History of England*

Maitland FW *The Constitutional History of England: A Course of Lectures* (Cambridge University Press Cambridge 1941)

¹⁰² Holdsworth 1935 *CLJ* 346.

Orth 1999 *Constitutional Commentary*

Orth JV "Did Sir Edward Coke Mean What He Said?" 1999 *Constitutional Commentary* 33-38

Palmer 1946 *ABAJ*

Palmer BW "Edward Coke, Champion of Liberty" 1946 *ABAJ* 135-139

Plucknett 1926 *Harv L Rev*

Plucknett BS "Bonham's Case and Judicial Review" 1926 *Harv L Rev* 30-70

Plucknett *Concise History of the Common Law*

Plucknett TFT *A Concise History of the Common Law* 5th ed (Little Brown Boston 2001)

Plucknett and Barton *St German's Doctor and Student*

Plucknett TFT and Barton JL *St German's Doctor and Student* (Selden Society London 1974)

Robinson 1991 *SA Public Law*

Robinson J "Gedagtes oor die Regsteoretiese Grondslae van Parlementêre Soewereiniteit met Besondere Verwysing na die Invloed van Sir Edward Coke" 1991 *SA Public Law* 46-61

St Germain *Doctor and Student*

Saint Germain C *Doctor and Student: Or Dialogues between a Doctor of Divinity and a Student in the Laws of England* (R Clarke Cincinnati 1874)

Seagle *Men of Law*

Seagle W *Men of Law: From Hammurabi to Holmes* (McMillan New York 1947)

Taswell-Langmead *English Constitutional History*

Taswell-Langmead TP *English Constitutional History from the Teutonic Conquest to the Present Time* (Houghton Mifflin Boston 1960)

Thorne 1938 *LQR*

Thorne S "Dr Bonham's Case" 1938 *LQR* 543-552

Case law

Case of Proclamations 1611 12 Co Rep 74

List of Abbreviations

ABAJ

American Bar Association Journal

CLJ

Cambridge Law Journal

Harv L Rev
LQR
Mich L Rev

Harvard Law Review
Law Quarterly Review
Michigan Law Review