

SIR EDWARD COKE*

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Introduction

Four hundred and thirty-seven years ago last Monday, Edward Coke, one of the most famous lawyers in history, was called to the bar of Westminster Hall. Sir William Holdsworth said of him¹:

"What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the authorized version of the Bible have been to religion, Coke has been to the public and private law of England."

In North America, Coke has long been venerated as the common law's greatest sage².

English commentators have, in the main, tended to be somewhat less enthusiastic in their estimate of Coke than Holdsworth or our American colleagues. Samuel Thorne of the Selden Society said³ that Coke was "an unpleasant, hard, grasping, arrogant, and thoroughly difficult man".

As a barrister, legal scholar, parliamentarian, and judge, Coke embodied some of the very best and some of the very worst traits of the Elizabethan Age. He was vain to the point of folly (he refused, all his life, to wear glasses despite being profoundly short-sighted); he had an appalling temper which led some who knew him well to think he was mad; and he was a brazen and energetic self-promoter who stood out in this respect in an age teeming with brazen and energetic self-promoters. At the same time, however, he was a courageous, passionate, and vigorous defender of his view of the rights of ordinary Englishmen with whom he was very popular.

In the turbulent age in which Coke made his mark in the history of ideas, he was at the very centre of some of the most dramatic moments in England's history. Medieval and modernising ideas of law and government swirled and clashed in the dangerous currents of Elizabethan and Stuart politics. Coke's life and work were shaped by the violent tensions between conservative medieval ideas of natural law and the central importance of the customs of the realm, the radical claims of a divinely ordained monarchy to absolute power, and emerging notions of nationhood and sovereignty dependent upon the consent of the governed which would, in due course, find fuller, and very different, expressions in Hobbes' *Leviathan* published in 1651, and in Locke's *Second Treatise on Government* published in 1689.

* Supreme Court Library Queensland Selden Society Lecture, Queen Elizabeth II Courts of Law, Brisbane on 23 April 2015.

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¹ Holdsworth, "Sir Edward Coke", (1935) 5 *Cambridge Law Journal* 332 at 346.

² Alward, "Coke: The Great Oracle of the Common Law", (1912) 32 *The Canadian Law Times* at 929; Boyer, *Law, Liberty and Parliament: Selected Essays on the Writings of Sir Edward Coke*, (2004); Hostettler, *Sir Edward Coke: A Force for Freedom*, (1998).

³ Thorne, "Sir Edward Coke: 1552-1952", *The Selden Society Lectures 1952-2001*, (2003) 3 at 4.

It would be simplistic and wrong to see in Coke's work the vindication of the modern mind over the medieval: he was too inconsistent to be neatly compartmentalised. And his inconsistencies were such as to throw into doubt, both the veneration of Coke as "a hero judge", and the very notion that the common law can be sensibly understood as the product of hero judges. But the brief survey of Coke's work as a barrister, parliamentarian, scholar and judge which follows can, I think, leave no doubt that it is entirely fitting that the Australian Chapter of the Selden Society's series on the lives of great English judges should begin with him⁴.

Beginnings

Coke was born in 1552⁵. He grew up with seven sisters in Norfolk – "the most fruitful nursery of lawyers" as William Camden said – and, following the death of his father at age nine, went off to school at the Free Grammar School in Norwich⁶. He learnt his Latin early, absorbing the works of "Caesar, Sallust, Virgil, Ovid, Cicero, Juvenal [and] Valerian"⁷; but the most important of his early formative influences was the Church of England. As Catherine Drinker Bowen says, in her magisterial 1957 biography of Coke, *The Lion and the Throne*⁸:

"There is no overestimating the effect of ... burning missionary Protestantism on the youth of Edward Coke. Morning and evening the boy knelt with his fellows on the stone schoolroom floor and chanted the Lord's Prayer and the Creed, with some final devotion in English from the recently established Book of Common Prayer. The reiterated words, English and Protestant where, since time immemorial, they had been Latin and Catholic, reached very deep. Coke lived – and died (his daughter was to testify) – a Church of England man, 'a deare lover of its Liturgie, constant to it in his life and at his death.'"

In the autumn of 1567, Coke set off for Trinity College, Cambridge. The University was favoured by Queen Elizabeth; it was, unlike Oxford, a Protestant stronghold.

We tend to associate Cambridge at this time with that strain of fiery evangelical Protestantism celebrated in its Puritan graduates, the most famous of whom was Oliver Cromwell; but there were many other important, albeit less radical, Protestants produced by Cambridge. As Macaulay said: "Cambridge had the honour of educating those celebrated Protestant Bishops whom Oxford later had the honour of burning."⁹

Coke was virulently anti-Catholic. But notwithstanding Coke's later clashes with the ecclesiastical courts and the royal prerogative, his world view remained in the Anglican mainstream. He was an Episcopalian rather than a Puritan. And just as he was a committed Anglican, so he was a proud Englishman. He became an eloquent champion of English legal exceptionalism. His exalted view of the supremacy of the common law of England was of a

⁴ Incidentally, the very first lecture in the Selden Society lecture series was given by Samuel Thorne on Sir Edward Coke in 1952.

⁵ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 45-46.

⁶ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 47.

⁷ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 48.

⁸ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 49.

⁹ Macaulay, *Critical and Historical Essays Contributed to the Edinburgh Review*, 5th ed (1848), vol 2 at 287.

piece with his belief in the inferiority of the institutions of continental Europe. These he saw as irretrievably tainted by their association with the Catholic Church. His anti-Catholicism suffused his opposition to all things European and the courts of equity in particular.

At Cambridge, Coke studied rhetoric and dialectics. "Disputations" overseen by the Doctors of the University took place, in Latin and in public, in Great St Mary's Church in Cambridge¹⁰. He became a skilful debater.

After three years, Coke left Trinity College without obtaining a degree, which was not unusual at that time. He travelled to London, his sights set on becoming a barrister.

Early Career

On 21 January 1571, Coke first entered that "little kingdom of the law", the ancient Inns of Court¹¹.

After completing a year's study of law at Clifford's Inn, Coke made his way across Fleet Street to join the fellowship of the Inner Temple where, for seven years, he studied law.

In 1578, Coke was admitted to the bar. He travelled back to Norfolk, finding himself at the right time and in the right place for his first big case. It was a libel suit that involved great names and the abiding controversy over religion¹².

Coke's client, an orthodox Vicar of the Church of England, accused Lord Henry Cromwell, the grandson of Thomas Cromwell, of sedition by reason of Cromwell's puritanism. Cromwell sued Coke's client for damages under the ancient legislation which was intended to prevent people speaking ill of the aristocracy, the statute *Scandalum Magnatum*. Bowen relates that:

"Coke ... discovered a mistake in the written declaration of [Cromwell's] counsel – only one word, but it sufficed. The original act of *Scandalum Magnatum* had been, since its passage in 1378, translated from Latin into law French, then into English. Cromwell's lawyer, instead of referring to the original statute, had been content with a third-hand English version which rendered the French word *messoiages* (lies) as 'messages.' Translating this back into Latin, Coke's opponent wrote *nuncia* (Latin for *messages*), 'whereas' Coke told the court triumphantly, 'it should have been *mendacia* [lies].'"

Cromwell's case was thrown out, and Coke's reputation was made. That Coke's career took off on the basis of this piece of pettifogging pedantry says as much about the legal system of the time as it says about Coke's talent.

From 1579 to 1581, Coke was involved as counsel for one of the defendants in the famous *Shelley's Case*, and from there onwards started to appear without a leader in important cases¹³.

¹⁰ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 56.

¹¹ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 59-60.

¹² Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 69-71.

¹³ Coke had appeared many times as junior counsel to Plowden and Popham.

In 1582, he married his first wife Bridget Paston (then aged 17). Bridget was a devoted and loving wife and mother. She bore Coke 10 children over 15 years. She also made him a very rich man: her dowry was £30,000¹⁴.

Speaker of the House of Commons

Coke's rise through the ranks of the Bar coincided with the extraordinary intellectual flowering of the Elizabethan Age teeming with brilliant diamonds such as Sir Philip Sydney, Sir Walter Raleigh, Edmund Spenser, Christopher Marlowe, John Donne, Ben Jonson, William Shakespeare, and, a little later, the brilliant scholars who produced the King James Bible¹⁵.

In 1592, Elizabeth named Coke Solicitor-General, making him second among the government's lawyers only to the Attorney-General, Sir Thomas Egerton, who later became Lord Ellesmere. Six months later, Elizabeth named Coke Speaker of the House of Commons¹⁶.

Given Coke's later reputation as a champion of the common law, it should be noted here that, as Speaker of the House of Commons in 1592-1593, he exalted Parliament as "the great corporation or body politic of kingdom". Significantly, in the case of the man who as a judge would write the judgment in *Dr Bonham's Case*¹⁷, he was, in the role of Speaker, disposed to assert Parliament's "absolute powers"¹⁸.

Here, we get an early glimpse of Coke as an example of what might be called the Thomas Becket syndrome. That is the condition, common to the great careerists, whereby the beliefs and allegiances of an office holder change to accommodate the requirements of the office that he or she currently holds.

Coke's time as Speaker was short. Encouraged by his evident powers of persuasion as Speaker, and angered by a speech given in Parliament by Francis Bacon questioning the Crown's attempts to secure supply, Elizabeth settled upon Coke, rather than Bacon, as her next Attorney-General. On 10 April 1594, "Elizabeth signed letters patent advancing Thomas Egerton to the vacant office of Master of the Rolls ... and granting the Attorney-Generalship to Edward Coke."¹⁹

Attorney-General

Coke's time as Attorney-General was marred, four years later, by the sudden death of his wife in June 1598.

Coke remarried immediately. His choice of bride, Lady Elizabeth Hatton, was entirely opportunistic. Lady Hatton was wealthy and well-connected, being related to the all-powerful Cecils. He pursued her with unseemly haste. Coke buried Bridget Paston in July 1598. In

¹⁴ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 71.

¹⁵ Spigelman, "Lions in conflict: Ellesmere, Bacon and Coke – the years of Elizabeth", (2007) 28 *Australian Bar Review* 254 at 258.

¹⁶ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 12-15.

¹⁷ (1610) 8 Co Rep 1136 [77 ER 646].

¹⁸ Holdsworth, *A History of English Law*, 3rd ed (1945), vol 4 at 184.

¹⁹ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 81.

August, he proposed and was accepted by Lady Hatton. In November 1598, they were married. This was all to the chagrin of Bacon, who also had his eye on Lady Hatton.

As Attorney-General, in 1594, Coke prosecuted the Queen's personal physician, Dr Lopez. In 1597, he prosecuted the Jesuit priest, Father Gerard, whose only crime was his inability to declare, without equivocation, his complete loyalty to the Queen of England as distinct from the Pope in Rome.

As a barrister, Coke appeared in many important cases; but there are three trials which are particularly memorable: the trial of the Earl of Essex, the trial of Sir Walter Raleigh, and the trial of Guy Fawkes. I turn now to examine Coke's conduct as a barrister in these cases.

The trial of Essex

Robert Devereux, the Earl of Essex was a General of Her Majesty's Forces and a favourite of Elizabeth at Court. In 1599, the Queen sent him to Ireland to deal with the troublesome Earl of Tyrone. The campaign was a catastrophe. Due mostly to the Earl's own mismanagement, he failed to put down the Irish rebels. Without orders permitting him to do so, he abandoned his army and returned to London to demand more troops. The Queen promptly placed him under house arrest. Eventually, he was released but he continued to agitate for a Puritan uprising in London²⁰ ostensibly in support of the Queen and against her wicked advisers.

It seems that Essex' intention had been to march on the Queen's Palace at Whitehall, however he believed he could increase his band of followers by diverting through the city, which was in the other direction. This was his critical mistake. The city was empty, and the diversion gave the Palace time to double its guard. Essex raced back to his house and barricaded himself inside; but the uprising was over, and Essex surrendered himself into custody²¹.

Essex was charged with treason; he pleaded "not guilty". Coke's address to the jury began with a detailed discussion of the case law and frequent Latin quotations²². Finally, he began a recital of the facts as asserted by the Crown. His confident account of the facts was calculated to suggest that he was in possession of written proof of Essex' intention to overthrow the Queen ready at hand. That suggestion was never actually made good.

"*O tempora! O mores! Hic tamen vivit?*" ("Oh the times! Oh the scandal! Is he still living here after all this!"), Coke cried theatrically, emulating Cicero's oration against Catiline in the Roman Senate. Coke turned to the judges, "Why should I stand upon further proofs? The treason is so evident that my Lord himself will not deny it."²³

Essex did, of course, deny it, and not just by pleading not guilty. He told the jury, accurately enough one might think, that Coke had simply engaged in slander. Coke called several witnesses

²⁰ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 131-132.

²¹ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 134.

²² Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 144-146.

²³ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 147-148.

including Chief Justice Popham, who was himself a judge in the trial. Sadly, but perhaps inevitably, Coke's tactic of vigorous and repeated accusation prevailed²⁴.

Essex was convicted; and six days later, he was beheaded within the grounds of the Tower of London.

The execution of Essex was not popular with the general public, although the contemporary opprobrium did not seem to attach to Coke²⁵. In this regard, Coke was luckier than he deserved. Essex may have been a foolish and vainglorious upstart, but it is hard to see that he was proved to have acted with treasonous intent. The "written proof" of which Coke hinted was never forthcoming. Even making allowance for the very different nature of a criminal trial in those times, it has to be said that Coke's bombast, exaggeration and scant regard for the evidence were not the finest examples of the art of the barrister.

Death of Elizabeth; Ascension of James

On 24 March 1603, Queen Elizabeth died.

When the news of Elizabeth's death reached Edinburgh, James VI of Scotland left Holyrood Palace and made for London to become James I of England. There was general rejoicing throughout the country as James made his triumphal progress through the English countryside²⁶.

But on the journey an ominous incident occurred, news of which spread quickly. At Newark-on-Trent a thief was caught. He had been following James' procession cutting purses. Without any trial or hearing as to sentence, James ordered that the thief be hanged. Sir John Harrington wryly observed:

"I heare oure new King hath hanged one man before he was tried; 'tis strangely done: now if the winde bloweth thus, why may not a man be tried before he hath offended?"²⁷

Events would prove that Harrington's concerns were not idle.

So far as James was concerned, the principle *Quod principi placuit legis habet vigorem* – What pleases the prince has the force of law – justified the hanging. Coke's steadfast opposition to this principle, both on the Bench and later as a parliamentarian, secured his place in history.

Trial of Raleigh

After the accession of James I, Sir Walter Raleigh, who had been Captain of Elizabeth's Guard, sought the position of Captain of the Guard under James, but was passed over²⁸. The two men were never going to be friends. Bowen says that James was:

²⁴ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 159.

²⁵ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 164.

²⁶ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 177.

²⁷ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 178.

²⁸ It may be noted that the correct pronunciation of Raleigh's name may be gathered from James' pun on meeting Sir Walter: "I have heard rawly of you."

"[a] pious King, fond of theological disputes in the Presbyterian manner, [and he] instinctively disliked this magnificent Captain who was reputed godless. Besides, Sir Walter smoked tobacco, a matter for the royal loathing [evidenced by] James's book, *A Counterblaste to Tobacco*, [which] declared the devilish, unhealthy weed was brought to England by 'a father generally hated.'"²⁹

James was not content merely to dismiss Raleigh from Court. The King ordered Raleigh to vacate Durham House, where he lived in London. Raleigh protested, but in vain, and royal spies were sent to watch him. They noted late night meetings at Durham House between various men, including Lord Cobham and the Earl of Northumberland. The King grew suspicious, on this pretty flimsy evidence, that a plot was being hatched to kill him, and Raleigh was arrested on a charge of high treason³⁰.

Raleigh was kept in the Tower for four months. Meanwhile, Coke gathered confessions from other prisoners, principally Lord Cobham.

To speak of Raleigh's "trial" is misleading: it was more of a "show trial": in fact, it really was just a "show". One conclusion that emerges from a study of the record of the trial is that Sir Walter Raleigh was an impressive man, as well as one who was not guilty of the charge against him.

While Coke's conduct in the trial cannot accurately be judged by reference to the standards expected of prosecutors today, there can be no denying that, even by the standards of the time, his performance was grossly unfair. Coke lashed out at Raleigh: "To whom, Sir Walter, did you bear malice? To the royal children?"³¹ Raleigh objected to the assertion that he bore malice to anyone. Coke continued:

"I will then come close to you; I will prove you to be the most notorious traitor that ever came to the bar! ...

Your words cannot condemn me [said Raleigh]; my innocency is my defense. I pray you go to your proofs. Prove against me any one thing of the many that you have broken, and I will confess all the indictment, and that I am the most horrible traitor that ever lived, and worthy to be crucified with a thousand torments.

Nay, I will prove all [Coke said]. Thou art a monster! Thou hast an English face but a Spanish heart ... I look to have good words from you, and purpose not to give you worse than the matter press me unto. But if you provoke me, I will not spare you and I have warrant for it ... You would have stirred England and Scotland both. You incited Lord Cobham."³²

²⁹ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 180.

³⁰ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 185.

³¹ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 194.

³² Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 194.

Coke proceeded to read Lord Cobham's confession that he, that is Cobham, acted with malice towards the King. Raleigh responded with an obvious point:

"What is that to me? Here is no treason of mine done. If my Lord Cobham be a traitor, what is that to me?"

All that he did was by thy instigation, [Coke replied] thou viper: For I *thou*³³ thee, thou traitor! I will prove thee the rankest traitor in all England.

No no, Mr Attorney, I am no traitor! [said Raleigh] Whether I live or die, I shall stand as true a subject as any the King hath. You may call me a traitor at your pleasure, yet it becomes not a man of quality and virtue to do so. But I take comfort in it, it is all you can do, for I do not yet hear that you charge me with any treason."³⁴

Chief Justice Popham felt the need to intervene. "Sir Walter Raleigh," he said, "Mr Attorney speaks out of zeal of his duty for the service of the King, and you for your life. Be patient on both sides."³⁵

When Coke had finished shouting at Raleigh, Sir Walter asked³⁶:

"Mr Attorney, have you done?"

Yes [said Coke], if you have no more to say.

If you have done [said Raleigh], then I have somewhat more to say.

Nay, I will have the last word for the King [Coke said].

Nay, I will have the last word for my life [said Raleigh].

Go to, I will lay thee upon thy back for the confidentest traitor that ever came to the bar! [Coke yelled]

Cecil [interjected, saying]: Be not so impatient, good Mr Attorney. Give him leave to speak.

I am the King's sworn servant and must speak [Coke said]. If I may be patiently heard, you discourage the King's Counsel and encourage traitors."

³³ The second person singular was used commonly to refer to an inferior person, and was certainly disrespectful to a knight.

³⁴ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 196.

³⁵ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 196.

³⁶ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 210-211.

Coke reacted in what seems to have been a not uncharacteristic display of self-indulgent, and indeed, childish petulance³⁷. The report notes:

"Mr Attorney sat down in a chafe and would speak no more until the Commissioners urged and entreated him. After much ado, he went on and made a long repetition of the evidence for the direction of the jury. And at the repeating of some things, Sir Walter Raleigh interrupted him and said he did him wrong."

Coke then shouted at Raleigh: "Thou art the most vile and execrable traitor that ever lived!"

"You speak indiscreetly, uncivilly and barbarously [Raleigh replied].

Thou art an odious fellow! [said Coke] Thy name is hateful to all the realm of England for thy pride.

It will go near to prove a measuring cast between you and me, Mr Attorney [countered Raleigh].

Well, [said Coke] I will now lay you open for the greatest traitor that ever was. This, my Lords, is he that hath set forth so gloriously his services against the Spaniard, and hath ever so detested him! This is he that hath written a book against the peace [with Spain]. I will make it appear to the world that there never lived a viler viper on the face of the earth than thou! I will show you wholly Spanish, and that you offered yourself a pensioner to Spain for intelligence. Then let all that have heard you this day judge what you are, and what a traitor's heart you bear, whatever you pretended."³⁸

Coke did not even attempt to make good these allusions to Raleigh's dealings with Spain by actual evidence.

Raleigh countered by tendering a statement signed by Lord Cobham, which Raleigh had obtained, denying "upon his soul" any treason on Raleigh's part. Coke then presented a statement obtained by him from Cobham the day before retracting the retraction he had made to Raleigh. In Cobham's latest statement, he said: "I protest upon my soul to write nothing but the truth." This prompted the wry observation from Raleigh to the jury: "You see how many souls this Cobham hath."³⁹

Lord Cobham was available to give evidence under oath, but was not called to do so. There were no other witnesses in the Crown case. Even by the standards of the day, one couldn't hang a dog on the case made by Coke; but it did not take the jury long to reach a verdict of guilty of treason. Raleigh remained in the Tower for some years before James finally had the sentence carried out.

³⁷ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 211.

³⁸ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 211.

³⁹ Spigelman, "Lions in Conflict: Ellesmere, Bacon and Coke treason and unity", (2008) 30 *Australian Bar Review* 144 at 150-151.

Coke's involvement in this episode was shameful. In 1995, a summary of the prosecution brief prepared for Lord Ellesmere was discovered. It showed that after Cobham had made his statement implicating Raleigh, he had retracted it before the investigators⁴⁰. It is inconceivable that Coke did not know of the retraction. It is to his eternal shame that he never mentioned it.

Coke's conduct in Raleigh's trial was not all that much worse than in the trial of Essex, but, while one may think that Essex was rightly convicted, even though one may have reservations as to whether he had been proved to have intended to harm the Queen, in Raleigh's case, Coke was eagerly complicit in the judicial murder of a great man who was innocent of the charge by which he was brought down.

Trial of Gunpowder Plotters

The trial of the gunpowder plotters came about as a result of King James' crackdown on Catholics in early 1604. Guy Fawkes and his co-conspirators planned to retaliate. They planned to overthrow the entire system of government, so as to usher in a regime friendly to Catholicism. As is well known, they secretly prepared to explode the Palace of Westminster on the occasion of its opening on 5 November 1605. Merely hours before the explosion was to take place, Guy Fawkes was discovered and promptly imprisoned⁴¹.

The outcome of the trial was not in doubt. In crowded Westminster Hall, Coke ranted for hours at the evil souls that stood in the dock. He focussed on their religion, saying that it was practically impossible to be a loyal subject of the King, and a good Catholic at the same time⁴². And he pressed home the horror that the prisoners sought to unleash. "Most cruel and damnable" Coke said, were the means attempted by the prisoners to accomplish their ends.

"[B]y mining and by thirty-six barrels of powder, having crows of iron, stones and wood laid upon the barrels to have made the breach the greater ... Lord! What a wind, what a fire, what a motion and commotion of earth and air would there have been! *Horret animus*, I tremble even to think of it! O barbarous and more than Scythian or Thracian cruelty!"⁴³

As expected, the conspirators were all pronounced guilty. They all were hanged from the gallows just four days later to the roars of the onlooking crowd.

Coke's performance might be said to have been lacking in dignity; but one could hardly say that he was at his worst in this case.

Speaking generally of Coke's work as a barrister and, particularly as a prosecutor, it is true that, in Coke's time, criminal trial procedure was very different from that with which we are familiar. The accused was unrepresented and was subject to interrogation by the prosecutor and the judge. The prevailing theory was that the prosecutor and the judge could be relied upon to ensure that

⁴⁰ Nicholls, "Sir Walter Raleigh's Treason: A Prosecution Document", (1995) 110 *English History Review* 902.

⁴¹ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 245.

⁴² Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 256.

⁴³ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 257.

the accused received a fair trial. Coke wrote in the Third Part of the *Institutes*: "[T]he Court ought to be ... of counsel for the prisoner, to see that nothing be urged against him contrary to law and right."⁴⁴ Coke's conduct as a prosecutor went a long way to demonstrating that this theory was pious folly.

According to Professor Langbein, it was the work of defence counsel, once legal representation came to be permitted, which forged the adversarial system as we know it, with its in-built protections of the accused, including the right to silence and the privilege against self-incrimination, this work taking place between the mid-17th and late 19th Centuries⁴⁵. It is one of the ironies of history that the diligent work of defence counsel over the subsequent decades, which culminated in the accusatorial system of criminal justice with its protections of the individual against the State, was a reaction to the kind of abuses perpetrated by Coke, the iconic defender of the liberty of the subject.

It is telling in this regard, that in the eyes of King James, Coke's performance as Attorney-General qualified him for promotion.

Chief Justice of the Common Pleas

In early 1606, Robert Cecil indicated that appointment as Chief Justice of the Common Pleas might be in the offing. Coke, ever the controlling pedant, wrote to Cecil advising him of the proper procedure: "I am bold to inform you what course I must take", Coke said.

"First, I must be made Serjeant, which may be on Saturday next, and the Chief Justice on Monday. There must be a writ (for which my Lord Chancellor will have warrant) returnable on Saturday to call me to be a Serjeant, and a warrant for the patent of the office of Chief Justice of the Common Pleas."⁴⁶

In accordance with Coke's instructions, he was made a Serjeant-at-law on 20 June 1606 and was elevated to the Chief Justiceship on 30 June.

As Attorney-General, Coke had been, as we will see, a champion of the royal prerogative in its darkest aspect. As Chief Justice of the Common Pleas, Coke's attitude toward the prerogative of the King would undergo an almost complete reversal. In his new position he became a spokesman for the institutional claims of the courts of common law against the claims of the prerogative.

Nicholas Fuller – a barrister and member of Parliament and an enthusiastic Puritan – in the course of defending Puritan clients on charges of contempt of the ecclesiastical court known as the High Commission, insulted the bishops who were members of the court. He was imprisoned by them for contempt.

⁴⁴ Cited by Langbein in "The Historical Origins of the Privilege Against Self-Incrimination at Common Law", (1994) 92 *Michigan Law Review* 1047 at 1050, fn 9.

⁴⁵ Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law", (1994) 92 *Michigan Law Review* 1047 at 1050-1052.

⁴⁶ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 279.

Writs of prohibition were issued by the Court of Common Pleas restraining the ecclesiastical and civil courts from proceeding further against Fuller on the basis that the conduct of a barrister, even in an ecclesiastical court, was exclusively regulated by the courts of common law whose officer the barrister was⁴⁷.

The King sought to resolve the case himself in order to break the deadlock between the courts, which he saw as mere agents through which he exercised sovereign power. James' position was that his prerogative was supreme, given that, as he put it, there were kings "before any Parliaments were holden, or laws made"⁴⁸. He arranged for a meeting of the ecclesiastical and common law judges to be held at Whitehall on 6 November 1608. The report of the meeting is called the *Case of the Prohibitions*⁴⁹. The first meeting was inconclusive, so a further meeting was held the following week. At this meeting James said:

"In cases where there is not express authority in law, the King may himself decide it in his royal person; the Judges are but delegates of the King, and the King may take what causes he shall please from the determination of the Judges and may determine them himself."⁵⁰

Coke disagreed, saying the King may consult with the Judges but not decide cases himself. Growing agitated, the King said⁵¹ that:

"as supreme head of justice, [he] would defend to the death his prerogative of calling judges before him to decide disputes of jurisdiction. Moreover, he would 'ever protect the common law.'

'The common law,' Coke interjected, 'protecteth the King.'

'A traitorous speech!' James shouted. 'The King protecteth the law, and not the law the King! The King maketh judges and bishops. If the judges interpret the laws themselves and suffer none else to interpret, they may easily make, of the laws, shipmen's hose!'"

Coke's report⁵² of the incident picks up the story:

"[T]hen the King said that he thought the law was founded upon reason, and that he and others had reason as well as the Judges: to which it was answered by me, that true it was that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects are not to be decided by natural reason but by the artificial

⁴⁷ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 298-299.

⁴⁸ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 294.

⁴⁹ (1607) 12 Co Rep 64 [77 ER 1342].

⁵⁰ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 303.

⁵¹ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 304.

⁵² (1607) 12 Co Rep 64 at 64-65 [77 ER 1342 at 1343].

reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege* – that the King should not be under man, but under God and the law."

Coke's report of this famous incident ends there; but we know from other sources that, in fact, the confrontation continued. The King rejected Coke's quotation from Bracton; and Coke fell weeping to his knees begging forgiveness.

But he was not beaten: "[n]ext morning a new prohibition, under Coke's seal, went out to the High Commission from the Court of Common Pleas."⁵³

Coke championed the supremacy of the common law as an essentially continuous body of law derived from Anglo-Saxon custom and reflecting natural law as Coke saw it. His view was that the authority of the common law pre-dated the Norman Conquest. But he was not a disinterested champion. His position was polemical and political. In supporting the notion that the power of the King was itself the creature of the common law, Coke was supporting the claim of the judges, of whom he was now leader, to the lion's share of sovereign power.

As a legal historian, Coke's scholarship was seriously (and possibly even deliberately) deficient. The historical reality was that the English judiciary were the creature of Henry II. The judges were, from the first moments of the common law's self-consciousness, directly dependent on the King in whose name they dispensed justice throughout the realm. The judges even discussed their cases directly with the King. As Ralph Turner has noted⁵⁴, the judges at the time of the Angevin Kings often marked their cases "loquendum cum rege", that is, "to be discussed with the King".

And as noted by Edward Rubin, the researches of Pollock and Maitland have amply demonstrated that, as a matter of history, it is to Henry II and his justiciars that we must look for the creation of the common law as a body of rules administered throughout the realm⁵⁵. In this, the better view of the historical development of the common law, the King, and the sovereign power initially embodied solely in the King, was the true fountain of justice.

We can detect echoes of Coke's argument in the observations of Lord Steyn in the House of Lords' decision in *R (Jackson) v Attorney General*⁵⁶ to the effect that while the supremacy of Parliament is the basic principle of the UK constitution, the principle was itself a construct of the

⁵³ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 306.

⁵⁴ Turner, "The English Judiciary in the Age of Glanvill and Bracton", (1985) *Cambridge University Press* at 159.

⁵⁵ Rubin, "Seduction, Integration and Conceptual Frameworks: The Influence of Legal Scholarship on Judges", (2010) 29 *University of Queensland Law Journal* at 106-107.

⁵⁶ [2006] 1 AC 262. See also, Dixon, "The Common Law as an Ultimate Constitutional Foundation", (1957) 31 *Australian Law Journal* 240.

common law created by the judges who might, in some circumstances, create qualifications to the principle. Admirers of Henry II, or of Oliver Cromwell, would respond that the British constitutional principle as to the Supremacy of Parliament might have been *described* by the judges of the common law, but the principle being described was established, as a political fact, by means other than the decisions of the courts.

The second, and more obvious, point about Coke's position on the supremacy of the common law is that he did not consistently maintain the view he espoused in the *Case of the Prohibitions*. As we have seen, when his interest in his own advancement coincided with the institutional claims of the sovereign legislature, he spoke in favour of the "absolute" authority of the King in Parliament.

Chief Justice of the King's Bench

Coke's conduct as Chief Justice of the Common Pleas did not endear him to James. He fell into disfavour. Upon the death of Coke's friend and patron Robert Cecil in May 1612, Coke's arch-rival Francis Bacon was at last able to gain greater influence with the King. Bacon sought to isolate Coke.

Bacon's opportunity came on 7 August 1613, when Chief Justice Fleming of the King's Bench died. Bacon proposed that Coke be removed from the Common Pleas to the King's Bench. Bacon made the cynical suggestion that "[a]s Chief Justice, Lord Coke would see the coveted position of Privy Councilor dangling 'and thereupon turn obsequious.'"⁵⁷ The King agreed, and Coke became Chief Justice of England on 25 October 1613⁵⁸.

As Chief Justice of the King's Bench, Coke continued to frustrate the prerogative by promoting the supervisory jurisdiction of the common law courts over what they regarded as inferior tribunals. Writs of prohibition were issued to the Chancery and to the High Court of Admiralty. The jurisdictional war waged by Coke came to a head in the *Case of the Commendams*, which concerned the right of the King to fill benefices of the Church of England as they became vacant.

When James became aware that it was being argued in the Exchequer Court that the King had no right to fill the benefices, he commanded Coke, by a letter from Bacon, his Attorney-General, to halt proceedings until after he had given the matter his personal consideration.

The case proceeded in defiance of the Royal instruction. Coke drafted his famous letter to James, which was signed by 12 judges:

"Most dread and most gracious Sovereign [it began]: We, your Majesty's Justices of the courts of Westminster ... hold it our duties to inform your Majesty that our oath is in these express words: 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. We have advisedly

⁵⁷ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 338-339.

⁵⁸ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 340-341.

considered of the said letter of Mr Attorney [Bacon] and with one consent do hold the same to be contrary to law, and such as we could not yield to the same by our oath."⁵⁹

The King responded by summoning the judges to Whitehall. The King, in the presence of Ellesmere and 17 of his Privy Councillors, demanded of the judges why they had not:

"checked and bridled 'impudent lawyers' who encroached not only on the prerogative but 'on all other courts of justice?' The Judges' letter was itself 'a new thing, very undecent and unfit for subjects to disobey the King's commandment, but most of all to proceed in the meantime and to return to him a bare certificate.'"⁶⁰

James then tore the judges' letter up. The 12 judges fell to their knees begging pardon. Seeking to mollify the King, they humbly confessed that their letter – drafted by Coke – was "wrong in form". But while Coke would accept that the letter might have been better expressed, he would not yield on the point of principle. Still on his knees, he faced the King and said: "The stay required by your Majesty was a delay of justice and therefore contrary to law and the Judges' oath."⁶¹

James described this response as "mere sophistry", and asked Ellesmere for his opinion on the lawfulness of the stay. The wily Ellesmere was not to be drawn into this crisis between the King and his judges. In one of English legal history's most oleaginous moments, Ellesmere responded to the King's question by saying that the King's Attorneys were better qualified than he to answer.

Bacon seized his chance, and attacked the judges for dereliction of duty. Coke, still on his knees, turned to Bacon and said⁶²: "I take exception! The King's counsel learned are to plead before the Judges, and not dispute with them!" Bacon struck back: "A strange exception! By oath and office, the King's learned counsel are to proceed against judge, peer or House of Parliament, should the King's prerogative be called in question." When James agreed with Bacon, Coke gave in. He said: "I will not dispute with your Majesty."⁶³

By now, James had had enough of Coke; and Bacon took the opportunity to ensure the downfall of his great rival. He drew up a lengthy document entitled "Innovations into the Laws and Government" recounting Coke's "offences". Seventeen such charges were listed. He sent the charge sheet to James accompanied by a note:

"I send your Majesty a form of discharge for my Lord Coke from his place of Chief Justice of your Bench.

⁵⁹ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 371.

⁶⁰ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 373.

⁶¹ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 373.

⁶² Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 373.

⁶³ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 372-373.

I send also a warrant to the Lord Chancellor for making forth a writ for a new Chief Justice, leaving a blank for the name to be supplied by your Majesty."⁶⁴

The King executed the form of discharge, which was sent to Coke in his chambers. The discharge stated:

"For certain causes now moving us, we will that you shall be no longer our Chief Justice to hold pleas before us, and we command you that you no longer interfere in that office, and by virtue of this presence, we at once remove and exonerate you from the same."

This was in November 1616. Earlier, on 20 June 1616, James himself had sat in the Star Chamber, something that no monarch since Henry VIII had done.

"Give thy judgments,' he began, 'to the King, O God, and thy righteousness of the King's son. ... Kings are properly called judges, and judgment properly belongs to them from God: for Kings sit in the throne of God, and thence all judgment is derived. It is atheism and blasphemy to dispute what God can do; so it is presumption and high contempt in a subject to dispute what a King can do, or say that a King cannot do this or that. ... I remember Christ's saying, 'My sheep hear my voice,' and so I assure myself, my people will most willingly hear the voice of me, their own Shepherd and King."⁶⁵

This is pretty loopy stuff. And the Stuarts did not improve after James I: the Stuart family can be seen as God's way of making the point that the Divine Right of Kings is a very bad theory of government. William Butler Yeats wrote that a man's greatest glory lay in his friends. Perhaps Coke's greatest glory was that he had such enemies.

If nothing else, the spectacle of the King using the Court of Star Chamber as the forum for the solemn proclamation and enforcement of his theory of the divine right of the King to concentrate in himself all the powers of government, ensured that the Star Chamber would be abolished just as the political nation would reject the theory of divine right.

Time would show that, in the struggle for judicial independence from the Crown, Coke had the better of the argument with Bacon and the King. The constitutional settlement at the end of the 17th Century reformed the position of the judiciary in relation to the Crown. While the judges continued to be appointed by the Crown, their work became independent of it for all practical purposes because they no longer continued to serve at the pleasure of the King.

So far as the system of justice is concerned, this was one of the great successes of the Whig project.

Until the beginning of the reign of William III, the judges were appointed "durante bene placito", i.e. "during [the King's] pleasure". From the beginning of his reign, the judges were appointed

⁶⁴ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 388.

⁶⁵ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 374-375.

"quamdiu se bene gesserint", i.e. "for as long as they are of good behaviour". And importantly, the judge of judicial misbehaviour was not the King but the Parliament.

And so Coke's courage in his battle over the power of the King to control his judges was ultimately vindicated. It may be said that his courage was shored up by the alignment of his self-interest and the institutional interest of the courts on which he sat. It might even be said, as Macaulay wrote, that "Coke's opposition to the Court ... was the effect, not of good principles, but of a bad temper."⁶⁶ But making due allowance for all these things, Coke's courage is undeniable and still very impressive. As Macaulay said⁶⁷, he was a "pedant, bigot and brute[;] [but nevertheless] an exception to the maxim ... that those who trample on the helpless are disposed to cringe to the powerful."

The scholar

In 1615, King James and his son, Charles, went to Trinity College, Cambridge, to watch the performance of a play written by George Ruggle.

The play was a comedy, the "principal character [of which] was a pompous, silly old Inns of Court lawyer named Ignoramus"⁶⁸. (This name was borrowed from the legal procedure whereby grand juries who were unable to find a case worthy to be tried wrote on the indictment *Ignoramus* [we don't know]⁶⁹. It was from this play that the word "ignoramus" came into common English usage, meaning an ignorant and foolish person⁷⁰.)

Ignoramus was intended to parody a local lawyer who had given grief to Cambridge University, but as soon as the character appeared on stage, dressed ostentatiously in his robes, everyone in the audience identified him as Edward Coke. He strutted about the stage spouting bad schoolboy Latin – "Quota est clocka nunc?", he asked when he wanted to know the time – much to laughter and applause of the King and the aristocratic crowd who were, of course, all well-versed in Latin.

Coke tried to have the play suppressed, but acknowledged that "Never did anything so hit the King's humour as this play did."⁷¹ He was humiliated. His cherished *alma mater* had held him up to public ridicule, and in front of the King. James enjoyed the play so much that he saw it twice.

Coke's critics teased him for not being able to take a joke (which, of course, was completely true); and this teasing, which was unlikely to have been harmless fun, added to his ill-humour. "The Lord Chiefe Justice," wrote Chamberlain, "both openly at the Kings Bench and divers other places hath galled and glaunched at schollers with much bitterness."⁷²

⁶⁶ Macaulay, *Critical and Historical Essays Contributed to the Edinburgh Review*, 5th ed (1848), vol 2 at 346.

⁶⁷ Macaulay, *Critical and Historical Essays Contributed to the Edinburgh Review*, 5th ed (1848), vol 2 at 330.

⁶⁸ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 358.

⁶⁹ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 358.

⁷⁰ Riddell, "Ignoramus or the War of the Gowns", (1921) 7 *American Bar Association Journal* 109 at 110.

⁷¹ Riddell, "Ignoramus or the War of the Gowns", (1921) 7 *American Bar Association Journal* 109 at 110.

⁷² Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 358.

While it is no doubt unfair that a public man of Coke's eminence should have been dismissed in fashionable court circles as a pedantic and posturing fuddy-duddy, the Ignoramus episode makes a significant point about Coke as a scholar, which is all the stronger because of its contemporaneity. The point is that his scholarship was so polemical in its tone and partisan in its content that it was inevitable that he should become a political target for those of his contemporaries who disagreed with his views. It also became a target for later scholars who thought that historians should aspire to a degree of objectivity.

When Coke left the Bench he returned to Parliament. Here, he made his greatest contribution to the English articulation of the relationship between the individual and the State as the author of the Petition of Right.

The Petition of Right set out in clear and unambiguous terms what Coke regarded as the pre-existing rights of Englishmen to be free from martial law, billeting of soldiers, non-Parliamentary taxation and imprisonment without cause. The petition was initially resisted by the Crown, but the pressure of Parliament eventually proved too great. Coke was active in securing its passage through the Parliament.

On 7 June 1628, King Charles I capitulated and gave the petition his unqualified assent. The existence of some fundamental rights of individuals was definitively established; and the scope of the royal prerogative was substantially reduced.

In the course of his work as a parliamentary spokesman for what would later become recognisable as the Whig position in politics, Coke became the sponsor of the adulatory view of Magna Carta, what Edward Jenks described as "The Myth of Magna Carta". Speaking of Coke's time, Jenks said⁷³:

"It was an age in which historical discoveries were received with credulity, in which the canons of historical criticism were yet unformulated. Doubtless, more than one of Coke's contemporaries (John Selden, for example) must have had a fairly shrewd idea that Coke was mingling his politics with his historical research. But, for the most part, those competent to criticise Coke's research were of his way of thinking in politics, and did not feel called upon to quarrel with their own supporter. Zeal for historical truth is apt to pale before the fiercer flame of zeal for political victory. It is a tribute to Coke's character and ability, that he imposed his ingenious but unsound historical doctrines, not only on an uncritical age, but on succeeding ages which deem themselves critical."

In the course of Coke's promotion of the Petition of Right, and in the second book of his *Institutes* written after he left the Bench, he presented Magna Carta to the political nation as a guarantee of individual liberty and Parliamentary government. Coke's work provided the foundational myth of the English State which inspired the English Whigs. And it was this inspiration which also drove the political imagination of the American colonists. It was Coke the visionary politician, and not Coke the judge, whose work was the great dynamic force in the movement to constitutional monarchy in England over the succeeding centuries.

⁷³ (1904) 4 *Independent Review* 260 at 272-273.

In an address in March this year to the Friends of the British Library, Lord Sumption made the point that, before Coke, English ideas of limited government owed more to Aristotle and Aquinas than to Magna Carta. Until Coke began to trumpet Magna Carta as an original expression of the special English genius for constitutional government, Magna Carta had little claim on the English imagination. Lord Sumption makes the telling point that in Shakespeare's play "King John", there is no mention of the incident at Runnymede in June 1215.

In the *Institutes*, which included *Coke on Littleton*, Coke attempted an authoritative and comprehensive statement of the common law. I am confident that none of you has ever read it; you are none the worse for that. Indeed, you are fortunate not to have had to grapple with Coke's prose; it is no accident that no one has ever speculated that Coke (rather than Bacon) might have been the true author of the works of Shakespeare.

Dr McPherson in *The Reception of English Law Abroad*⁷⁴ explained that the enormous and immediate success in America of *Blackstone's Commentaries on the Laws of England* upon its publication in 1765 occurred because, in contrast to the "incoherent mass" of *Coke on Littleton*, so described by the brilliant John Quincy Adams, *Blackstone's Commentaries* presented a comprehensible, clear and elegant statement of the common law.

In Coke's academic work, his overweening concern for his own reputation led him to be less than candid. In the third volume of his *Institutes*, which was published after his death, he famously asserted that: "There is no law to warrant tortures in this land." In truth, although torture was not authorised under the common law, it was authorised in England under the royal prerogative when treason and sedition were alleged. So torture did occur pursuant to a warrant issued in the name of the monarch. And Coke's name appears on seven warrants authorising the torture of Catholics and Puritans⁷⁵.

One of Coke's more important scholarly contributions was the establishment of the Law Reports. He produced the first full set of law reports in England. It was not so much the quality of the reports themselves that was important; but the idea that it was essential then, as it is now, to the common law as a system founded upon the judicial observance of precedent, that precedents should be collected and made available to the profession and the courts for application to like cases.

The importance of this aspect of Coke's contribution to the common law cannot be overstated. Bacon himself said that before Coke's Reports "the law had been like a ship without ballast". To draw further upon Bacon's nautical metaphor to illustrate the power of the precedents Coke collected, and of the idea of precedent itself as central to the coherence of the common law, it is noteworthy that a partial set of Coke's Reports travelled to America on the Mayflower⁷⁶.

Later life

⁷⁴ McPherson, *The Reception of English Law Abroad*, (2007) at 485, 242-243.

⁷⁵ Spigelman, "Lions in conflict: Ellesmere, Bacon and Coke – the years of Elizabeth", (2007) 28 *Australian Bar Review* 254 at 276.

⁷⁶ Thorne, "Sir Edward Coke: 1552-1952", *The Selden Society Lectures 1952-2001*, (2003) 3 at 3.

He spent the later decades of his life at Stoke House working principally on his Reports, updating his commentaries on Littleton as part of his on-going work on the *Institutes*. By this time, he and his wife had effectively separated.

In late 1634, Coke was dying. Stubborn to the end he refused medical assistance⁷⁷.

Bowen recounts an incident that occurred just before his death which is a strong reminder that, for all his faults, Coke was often on the right side of history. On 1 September 1634, Charles I issued a warrant to search Coke's home. As he lay dying in his great curtained bed:

"[the King's officers] took away the manuscripts of all four Parts of the *Institutes*, the manuscript notes for two additional books of *Reports* – 'and I think,' wrote Roger Coke '51 other manuscripts, with the last will of Sir Edward, wherein he had for several years been making provisions for his younger grandchildren.'

... Coke's chambers at Temple too were searched. After six years of quiet and retirement in the country, Sir Edward, dying, was still dangerous. His chambers in the Temple yielded a considerable cache, brought solemnly to Whitehall: 'A black buckrom bagg of the Powder Treason. A bundle of draughts, acts and petitions touching the late Parliament.'⁷⁸

Judicial legacy

One aspect of Coke's judicial legacy warrants particular attention. It might fairly be said that judicial activism, that apparently modern phenomenon which so excites some commentators (who, curiously, also tend to be admirers of Sir Edward Coke), actually reached its apogee in the early 17th Century when Coke made a claim for judicial power that was apt to exalt the judiciary over the legislature as the principal voice of sovereign power.

Most famously, in *Dr Bonham's Case*⁷⁹, Coke wrote:

"[I]n many cases, the common law will ... controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void".

It is difficult not to see the Becket syndrome at work here. But it must also be said that Coke was speaking in support of a view with deep roots in natural law thinking, the idea that the exposition of the law was a matter for learned men, steeped in tradition, and for them only. That mindset was very much at odds with the radical Protestant view that individuals can find their way to the truth for themselves without the mediation of a priestly caste.

⁷⁷ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 532.

⁷⁸ Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke*, (1957) at 534.

⁷⁹ (1610) 8 Co Rep 113b at 118a [77 ER 646 at 652].

When Coke spoke of the "common law" as an abstraction, the practical reality, well understood by his contemporaries, as his exchanges with the King show, was that he was promoting the supremacy of the judges over the King in Parliament.

At this historic crossroads, Coke's great rival, Francis Bacon, took the road that led to Parliamentary supremacy. In the course of argument in *Chudleigh's Case* in which, fittingly, Bacon and Coke were opposed as counsel, Bacon argued that the judges' authority over the laws of England was merely "to expound them faithfully and apply them properly"⁸⁰.

The English civil wars of the 17th Century established, in the most emphatic way, that Sir Francis Bacon had the better of this argument. The claim of the Parliament to be the sole organ of government with authority to say what the law should be was established in England following the constitutional settlement at the end of the 17th Century. After that time, any claim of the judiciary for the larger share of sovereign lawmaking power remained dormant, until the founding of the United States, shortly after which the great judgment of Marshall CJ in *Marbury v Madison*⁸¹ established that the Supreme Court of the United States could invalidate Acts of Congress held by the judges to be inconsistent with the Constitution.

Coke's observations in *Dr Bonham's Case* might be thought to have foreshadowed the strong form of judicial review established by *Marbury v Madison*; but to the disappointment of those who would claim Coke as the originator of judicial review of legislation, it is noteworthy that *Dr Bonham's Case* was not even mentioned in the celebrated judgment of Marshall CJ.

Marshall's decision in *Marbury v Madison* was founded squarely on the eminently practical ground that interpreting written documents is simply what judges do and what they had always done within the common law tradition. Constitutional adjudication is an exercise in interpreting the effect of the Constitution as a written document; and that exercise is of a piece with the work which characterises the work of judges in interpreting deeds and wills. For Marshall, there was no occasion to seek more direct authority.

Marshall's insight, that "it is emphatically the province and duty of the judicial department to say what the law is"⁸² reflected the practical experience of practising lawyers that declaring what the law is is a characteristic function of judges in the common law tradition. This practical and institutional approach informed by the separation of powers effected by the US Constitution is, of course, very different from the doctrinaire and highly authoritarian approach of Coke in *Dr Bonham's Case*.

Conclusion

As to Coke's claim to be regarded as a hero judge, we might say, viewing his work through the prism of the separation of powers, that Coke was too committed to politics and his political vision to meet modern notions of a truly great judge. But that would not be fair: that Coke played such a prominent role in politics is hardly surprising given that, in his time, no one saw government through the prism of the separation of powers. But, putting that aside, the story of

⁸⁰ Holdsworth, *A History of English Law*, 3rd ed (1945), vol 4 at 186.

⁸¹ 5 US 137 (1803).

⁸² *Marbury v Madison* 5 US 137 at 177 (1803).

British constitutional and legal development, while adorned with the names of famous judges like Coke, is not a story of the work of judicial heroes but rather, as with the evolution of the adversarial system, of a practical process of iteration, from generation to generation of lawyers of the bench and the profession, whereby the nation's legal institutions moved, sometimes slowly and often tentatively, to meet the nation's needs in an ongoing process of self-definition.

If one were to attempt to sum up Coke's career in a sentence, one might say that Coke was a brave but partial judge, a prolific but partisan and unreliable scholar, and a truly appalling barrister. But he was also a very great politician, the maker of the foundational myth that inspired the Whig project in England and the United States.

It is perhaps best to leave the last word to the long-suffering Lady Hatton, his wife of 36 years, who said upon his death at the age of 82: "We shall never see his like again, praise be to God."⁸³

⁸³ Simpson, "Review of *Sir Edward Coke and the Grievances of the Commonwealth* by Stephen D White", (1982) 98 *Law Quarterly Review* 174 at 174.