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SIR EDWARD COKE

BY ROLAND G. USHER

I

If an assemblage of lawyers were asked to name the greatest English lawyer, the great majority would nominate unhesitatingly Sir Edward Coke. If they were asked to name the English lawyer who had exerted the greatest influence on the legal development of England, there would probably be a still greater proportion who would name Coke. If they were asked to select the English lawyer who had exerted the greatest influence upon the political and constitutional life of his own time and the subsequent generations, the opinion would be in all probability unanimous that Sir Edward Coke had more largely determined the trend of events than any other single lawyer. There can be no dispute; he was certainly one of the chief figures of the political and constitutional history of the early seventeenth century in Stuart England; for he was himself one of the principal leaders of the opposition to the Crown in those vital sessions of Parliament which established the constitution and created the present liberties and birthright of Englishmen. Without a doubt, modern law begins with Coke, or at least in Coke's day. Few cases older than his time are now cited. Modern legal teaching was much influenced by his work as an author, as a barrister, and as a judge. Modern parliamentary history begins in his day. There is certainly no figure in the legal annals of England comparable to him.

Yet his influence upon his own time and upon posterity has been exerted most by his writings. Their importance it is indeed difficult to exaggerate. The Reports furnished a new method of legal education at once highly approved and eagerly studied not merely by students in the Inns of Court but also by practicing lawyers, and even by the bench. The majority of the older reports of his day and after reduced a complicated case frequently to a few lines, and the extensive statements of the pleadings given by Coke and his elaborate explanation of the reasons for the decision and of the fundamental law involved in the case gave his reports at once the most extended reading any

legal work had ever received in England up to that time. Largely for the same reasons they were conned for over two centuries by nearly all students of the law in England and America with greater energy and perhaps with greater profit than any other single book. The Institutes very nearly if not quite rivaled them in consequence and influence. From the posthumous volumes of the Reports and Institutes the history of the period since 1603 has been in large measure written and his views unhesitatingly accepted by generations of historians; even today, three centuries after his death, the dissent is occasional and feeble.

Unquestionably, Coke has dominated the writing of history since his own day more than any lawyer ever did. Indeed, it is open to question whether any contemporary of constitutional events of importance has so dictated the ideas of posterity about them. Certainly Clarendon tried and failed; Burnet, himself one of the important actors in almost as great a period of constitutional settlement during the Revolution of 1689, never more than partially succeeded in convincing posterity that he was right; Napoleon Bonaparte himself left an analysis and explanation of his own time which has been in the main disregarded by historians; Bismarck was at some pains to explain his epoch and policies to later generations, only to have his immediate posterity assume a more than skeptical attitude. But Coke's estimate of King and Court, of issues and institutions, is still triumphant—three centuries after his death.

In large measure this extraordinary and sustained credence is explained by Coke's personal influence upon the bar, the bench, and the Inns of Court. Even as a student he attracted attention by the keenness of his legal analysis and his method of stating cases, and when in later years prosperity and rank came to him he spent many hours in attendance upon the moot courts held in the Inns of Court, taking therein an active part and winning many friends and adherents. Especially during the period when he was Chief Justice was his attendance most extended and his participation most frequent. It was also his habit to dine frequently at Sergeants' Inn, Clifford's Inn, in the Middle Temple where sergeants and barristers and judges congregated, and where for hours at a time he would dominate and direct the de-

bate upon legal and especially upon political and constitutional issues. Certainly these were the golden moments for the creation of a solid phalanx of common lawyers all of one mind in controversies with the King; and well he understood it, and well he made use of the opportunity. The bench and bar of his own day really learned his opinions from his own lips, debated them with him in private and, as he would have said, he resolved all their doubts.

Of all this there is far too little in the volume just published by two practicing lawyers, Hastings Lyon and Herman Block—the first biography of Coke in over a century, but by no means the book needed by lawyers and historians.¹ It belongs rather to the “new biography,” as it is often called, than to serious legal history. In order to write an interesting and striking book about Coke after the manner of Maurois and Ludwig, the authors have stressed his career as Attorney General, his political career, and the colorful personal incidents of his life and have subordinated and even in many instances intentionally omitted his legal career and his influence upon legal history. Some fifty pages are given to a frankly imaginary account of his youth and education, though his life as judge has been compressed into forty pages. A brief but really excellent summary of legal history before Coke’s time occupies nearly as many pages as are devoted to Coke’s own writings. Indeed, it might almost be said that the authors have assumed that Coke’s greatness and influence were too well known to require statement or proof. The book is nevertheless a useful account of the information about Coke easily available in print. While there are no foot-notes and no bibliography, it is clear the authors have carefully studied Gardiner’s *History of England*, Spedding’s *Bacon*, Usher’s *Reconstruction of the English Church*, and Howell’s *State Trials*. They have also raided the *Calendars of State Papers, Domestic*, and some other source material. They have made no attempt at elaborate research, and the huge mass of manuscript material about Coke, comprising the bulk of information about his life, they have made no attempt to investigate. If it were not so evident that they felt the issues of law, of jurisdictions and institu-

¹ EDWARD COKE, ORACLE OF THE LAW, by *Hastings Lyon and Herman Block*. Boston and New York: Houghton Mifflin Co., 1929.

tions, too complicated to be included at all, this would have been more culpable; but considering what they have tried to do it must be said they have on the whole done it well and have produced a useful and readable volume for those who previously knew little of Coke and his period.

II

Sir Edward Coke was born in 1552, and the authors have sought in the early portion of the work to show something of the political, social and educational influences that shaped him. They have here perhaps done their worst, for to one who has studied the life of Coke for over twenty years there is no trace in his ideas or development of the stirring times in which he grew up. Of Puritan and Catholic, Mary Stuart and Spaniard he thought apparently not at all. He lived in the books of the law day and night and never took his nose out of them. Save for the fact that he lived in England and, naturally, was studying the history and the law of the country, there seems to be no traceable shaping of the man by his time. Nor did he ever at any time evince great interest in diplomacy or foreign affairs, in theology or literature. There is not so far as the reviewer is aware, in the whole of his voluminous writings and correspondence a single reference to Shakespeare, literature, or art. After an experience at Cambridge, of which we know nothing, he pursued the usual education at London with more than the usual success in less than the usual time. His first great success was in the celebrated *Shelley's* case and thereafter he was much in demand as a barrister. Of this period we know at present all too little. Scarcely had he become Solicitor General in 1592 when he was also made Speaker of the House of Commons. In view of his later parliamentary activities and his championship of the liberties of that House, it is certainly important that he proved to be the most autocratic and domineering Speaker that the House had had for two generations. Indeed, his interference in the business of the House was so peremptory and continual—albeit extremely satisfactory to Elizabeth—that it was perhaps the cause of a great change in the attitude of the Queen toward Parliament and led to structural changes in the organization of the House of Commons, which the reviewer hopes to demonstrate were of the very first consequence.

In 1594 Coke became Attorney General, and it is this period of his life that Messrs. Lyon and Block have written most successfully, though without in the least exhausting the principal features of the narrative. Of his stupendous activity in all technical and routine business they give no idea. The number of documents he wrote himself, the correspondence he received and sent, is extraordinary in amount. At this time he was wholly subservient to the Cecils, father and son, and fairly cringed before them—he received his orders and hastened to fulfill them with an energy and fidelity which led them to believe that he could be trusted to do exactly what he was told, all of which has considerable relation to subsequent events, when it appeared that he was apparently not ready to do anything he was told. In this period came the first clash with Bacon, which has received a great deal more attention than it deserves. In 1600 came the first of the great Reports, and almost annually thereafter a new volume appeared establishing him perhaps not for the first time as a legal authority but certainly in a definitely new sense. In all probability he achieved new importance from the aid he gave in the accession of James I, a still obscure chapter of his life. Too much has also been said about his conduct toward prisoners in the trials of Essex and Raleigh, and too much emphasis has been laid upon his brutality. At the same time too little has been said about his scant attention to the rights of the subject to a fair trial, to a sight of the evidence against him, and to some fair opportunity to defend himself. For one who holds so proud a place in history as Coke as the champion of the liberties of the subject, he certainly went counter at this time to all his later declarations and pronouncements. In 1604 occurred an incident as yet correctly described only by Spedding—The Buck's Election. This famous infraction of the liberties of the House of Commons as it has always been considered was literally Coke's work. He seems indeed not merely to have executed the various steps but to have planned them as well, and one of the greatest infringements of all can scarcely be explained away.

For all these reasons he seemed to the King and to Cecil, now Lord Salisbury, an eminently safe man to be made Chief Justice of the Common Pleas in 1606. He was the Cecils' man; he was related to them; he was diligent; he obeyed his orders to the letter and always had; and he could be depended upon, as he had

often proved, not to gulp too obviously or hesitate too long if support of the Throne was required. But they ill understood the man. Indeed, a new Coke appeared—the Coke of history, the defender of the liberties of the subject and the opponent of the Crown. He at once assailed with vehemence the ecclesiastical courts, the Star Chamber, the High Commission, the Council of Wales, the Council of the North, and presently in no doubtful way the jurisdiction of the Lord Chancellor and that of the Lord Admiral. Indeed, as James facetiously remarked on one occasion, there seemed to be only one upright judge in England and Lord Coke knew him extremely well.

Little has hitherto been written about Coke's "treason" at this time. He had himself, as Attorney General, drawn the very letters patent under which the High Commission, the Council for Wales and the Council of the North were sitting, and which he now declared were illegal. He was asked to explain where he had discovered so much new legal information. Why had he not learned anything about the law during the twelve years when as Attorney General he had himself maintained that such practices were legal? He had been himself a member of the High Commission for years. As Attorney General one of his duties had been to plead in the Star Chamber. Did he mean to impugn the legality of his own acts in that Court? In 1605 had appeared his fifth Report, in which he had been understood to defend the ecclesiastical jurisdiction in all its length and breadth. The King, who had not been in England, found it perhaps less difficult than Salisbury and Bacon who had to forgive Coke in such a right-about face.

Did he really change his mind? Did his elevation to the bench really show him a view of the law which he had previously not thought of? Or had he, as Attorney General, thoroughly understood the situation at all times and been merely waiting for his opportunity when his expected elevation to the bench would untie his hands and give him freedom for the first time to act and speak according to his conscience? It is not yet possible to settle these questions by actual evidence. But posterity has never made much of charges of inconsistency and has ordinarily felt that when a man does develop sufficient courage to declare his convictions or does find convictions to match his courage, he has done well. Whatever else may be true, Coke's stand was one

which only an intrepid and courageous soul would have attempted. But in the end he was beaten and removed as Chief Justice in 1616. Not one of his contentions had been yielded by the opposition, and he was apparently disgraced and cast aside. By it all he was perhaps a little frightened, and when in 1617 he was made Privy Councilor, his conduct was such as to meet the approval of the King and the administrative entourage. He sat now as Judge in the Star Chamber, and there are extant a good many notes in his own handwriting of the grounds for his decisions. Much hilarity was also shown over the undoubtedly illegal conduct of the late champion of the law in the forcible abduction of his daughter, and the trespass and entry which he performed upon someone else's house with an axe.

Now came his election to the Parliament of 1620, and a new period in his life. Already nearly seventy years old, his energy seemed scarcely diminished and he entered into the debates of the House of Commons with a vigor surpassed by none. Again he committed "treason." As a member of the Privy Council he had certainly known of the monopolies, and there is no evidence to show that he disapproved of them or doubted their legality and justice. Now in Parliament he debated at great length upon the invasion of the rights of Englishmen by the very monopolies which he had himself approved. Once again posterity will feel that his afterthought was probably better than his original conclusion and will not tax him severely with inconsistency or moral treason. But it was not to be expected that the King and Privy Council should view his conduct with any such charity, and at the close of Parliament he was for a time in prison. In this and subsequent sessions he was one of the most active in the routine work of the House as well as in its debates. There is some ground to suppose that he was the real originator of the new method of resistance to the King, the new backbone in the House of Commons. He was one of the framers of the Petition of Right and largely instrumental in securing its passage. An ordinary man would have been exhausted by half of what Coke had already done, but he was by no means ready to stop. During the last five years of his life he worked hard upon the last three volumes of the *Institutes*—a labor in itself—a life work for a man of smaller calibre.

There are a few things that perhaps at this distance may be said not so favorable or laudatory to the great Chief Justice. It is beginning to be seen that not all he accomplished was useful. As largely as any one man, he was responsible for the continuation of the reign of legal technicalities into the nineteenth century. During the sixteenth century a movement for the diminution of the technicalities, both in procedure and in pleading, had been in progress, and its most distinguished proponent was Francis Bacon. Here we have perhaps the fundamental quarrel between Coke and Bacon; Bacon anxious to reduce the technicalities of all kinds; Coke vehement to maintain them—and in the end triumphant. To the latter, the splitting of hairs and the finest of discriminations were a positive joy, and he delighted in what should perhaps in all honesty be called the over-elaboration of the issue in the case. Himself a great technician in pleading, and past master of the subtleties of procedure, he elevated both to the rank of an art and made them more technical than before. Certainly, but for his influence, many of the older features of the land law would have been changed generations, if not centuries, before they were. To him was due the fact that land law and much substantive law remained feudal for generations after feudalism had ceased to be a living force. Here again he quarreled with Bacon. The latter would have changed all feudal law on the general ground that feudalism was gone. But of that Coke could not be convinced. Surely, also, he maintained the strictness of the lines of jurisdiction between the courts and prevented a recognition of the general principle that where doubt existed as to what the proper jurisdiction was the case should be tried in the court where it originated. The modern trend was already appearing and he crushed it. Little, far too little, has ever been said by any of his biographers or by legal historians in general of his colossal blunder in attacking equity and admiralty law. He did limit and delay the growth of equity. He did hinder the growth of international and admiralty law in England, and both were costly to later generations. Surely, as great a man as Coke should have foreseen the importance and justifiability of equity. Not to have done so must detract from his reputation as a lawyer who built for the future.