

Law, Liberty, and Parliament:
Selected Essays on the Writings of
Sir Edward Coke



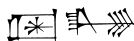
Sir Edward Coke

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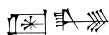


Edited and with an
Introduction
by Allen D. Boyer



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Sir Edward Coke, by Simon van der Passe, ca. 1618–20.

Courtesy of Sir John Baker.

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Introduction



Sir Edward Coke was born in the village of Mileham, Norfolk, on February 1, 1552. His family belonged to the minor gentry. His father was Robert Coke, a lawyer attached to Lincoln's Inn. His mother, Winifred, owned lawbooks, a fact that suggests she was a remarkable woman.

In 1567, at age fifteen, Coke enrolled at Trinity College, Cambridge, leaving in 1570 without taking a degree. On January 21, 1571, a date he carefully recorded, Coke arrived in London and enrolled at Clifford's Inn. In 1572 he moved on to the Inner Temple and began attending the courts in Westminster. Coke was called to the bar in April 1578.

In 1579 Coke argued his first case in the King's Bench, and won by out-researching his opponent. Edward, Lord Cromwell, had sued a parson for defamation, but Coke showed that the plaintiff's case was based not on the Latin text of the statute, but on a badly translated Law French abridgement. Soon afterward, Coke's role in arguing *Shelley's Case* (1581) brought him wider acclaim. *Shelley's Case* featured anomalous facts, an ingenious new reading of black-letter conveyancing formulae, and a prominent family bitterly divided over religion. Coke orchestrated an energetic, brilliant defensive action and then celebrated the victory by circulating manuscript copies of his arguments — his first published case-report.

During the 1580s and 1590s, Coke became one of the most prominent lawyers in England. The great cases in which he participated, usually winning his point, were many. In *Chudleigh's Case* (1594), Coke argued that the Statute of Uses flatly made all transfers "to use" subject to the rules on similar transfers made at law. In *Slade's Case* (1602), Coke argued successfully that a plaintiff seeking payment for an unkept promise to pay money should be allowed to sue in assumpsit, rather than being required to bring an action for debt. This decision helped make assumpsit actions synonymous with contract claims and opened the door more broadly to jury trials. Professional advancement followed. Coke became recorder of Coventry in 1585, of Norwich in 1586, of

London in 1592. He was made solicitor general (June 1592) and attorney general (April 1594), appointments he owed to the support of the Cecil family. During the Parliament of 1593, Coke served as speaker of the Commons. As a government prosecutor, Coke took part in the treason prosecutions of Elizabeth's last decade. In early 1601 he presented the case that sent the Earl of Essex to the scaffold. After the accession of James I, who knighted him in May 1603, Coke continued to serve as attorney general. He prosecuted Sir Walter Raleigh (the bitterest proceeding of his career). The winter of 1605–1606 saw him investigating the Gunpowder Plot.

Coke was appointed chief justice of the Court of Common Pleas in June 1606. He was appointed chief justice of the King's Bench in October 1613 and was dismissed from the bench in November 1616. His tenure on these courts was a turbulent period, marked by friction with King James I and two archbishops of Canterbury, Richard Bancroft and George Abbot.

Throughout the reign of James, as during Elizabeth's years on the throne, the Puritan believers of England faced prosecution by Anglican bishops and by the Court of High Commission. In its proceedings, the High Commission questioned defendants under oath, often forcing them to choose between incriminating themselves or committing perjury. (This was the notorious "ex officio oath," so called because it was used in proceedings initiated directly by the commission.) The commission also meted out fines and prison terms.

Skillfully seeking every legal advantage, the Puritans sued in common-law courts for writs of prohibition, orders enjoining such prosecutions. Their lawyers argued that the commission's powers to interrogate, fine, and imprison were invalid, simply because these powers were set forth only in letters patent issued by the crown—not by the statute that established the commission. Effectively, such arguments suggested that the royal prerogative was limited by what Parliament enacted, and they tended to align Puritan defendants, the House of Commons, and common-law judges against the crown and the Anglican hierarchy. Rather than relentlessly pursuing conflict, Coke emphasized the need to limit the High Commission to serious, "enormous" cases and to prevent misuse of the power to compel self-incrimination. Nonetheless, when compared with other judges, Coke circumscribed the High Commission's jurisdiction more closely. In *Fuller's Case* (1607), Coke wrote that "when there is any question concerning what power or jurisdiction belongs to ecclesiastical judges . . . the determination of this belongs to the judges of the common law."

In November 1608, when King James personally tried to resolve the feuds among his judges and churchmen, the controversy reached its highest pitch. James informed the common-law judges that he planned to decide the dispute between his courts of law and the tribunals of the church he headed; the judges were all his servants, he explained, and accordingly he could withdraw cases from their consideration and decide them himself. In reply, Coke asserted that the king lacked the professional training necessary to serve as a judge. He wrote that he had told James “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 . . . which law is an act which requires long study and experience, before that a man can attain to the cognizance of it.” The king reportedly “fell into that high indignation as the like was never known in him, looking and speaking fiercely with bended fist, offering to strike him, etc., which the Lord Coke perceiving fell flat on all four; humbly beseeching his majesty to take compassion on him and to pardon him.” James continued to rage, until Robert Cecil intervened.

The controversy faded out, leaving the chief justice with the reputation of a man who sought out explosive confrontations. Yet Coke was not constantly at odds with the crown; nor was Coke the only judge who infuriated James; nor was he the only judge whom James bullied or suspended. Coke was frequently willing to favor the crown. *The Prince’s Case* (1606) allowed James to recover many crown estates that had been cheaply sold during Elizabeth’s last years. In *Calvin’s Case* (1608), Coke and the judges finessed a delicate political issue, whether James’s Scottish subjects possessed the rights of English subjects. However confrontational the course that Coke steered as chief justice, the confrontations are not the entire story.

In 1613, against his own will, Coke was advanced to the King’s Bench. For more than a century, a quarrel had smoldered between King’s Bench and Chancery. King’s Bench judges had asserted that chancellors could not interfere with the finality of judgments given by courts of law, while chancellors had claimed that they could mitigate harsh law-court judgments even after those judgments had been handed down (effectively allowing someone who had lost in the law courts to appeal yet again to chancery). In a trio of controversial cases, *Heath v. Ridley* (1614), *Glanvill v. Courtney* (1614), and *The Case of Magdalene College* (1615), Coke and Lord Chancellor Ellesmere sparred over such issues.

In the same period, Coke stirred up other enmities. In 1614, during the Addled Parliament, he reversed precedent and kept the judges from advising the House of Lords on points of law. Prohibitions were issued routinely to the Admiralty, to the Council of the North and the Council of the Marches, and to other prerogative courts. In *Bagg's Case* (1615), Coke announced that the King's Bench had the authority "to correct all lesser authorities in the realm," a claim that could be stretched to cover even Chancery.

In the spring of 1616, a case pitting common-law rights against episcopal privilege—a decision reported as *Colt v. Glover*, or as *The Case of Commendams*—finally brought matters to a head. King James had supplemented the bishop of Coventry and Lichfield's income with the profits of an additional rectory, only to see a landowner challenge his action. James wrote to the judges, stating that the case concerned his power to govern the church and asking that they stay proceedings until he decided whether further consultation between judges and churchmen was required. The judges unanimously replied, in a letter probably drafted by Coke, that the king's letter was "contrary to law" and that "our oath in express words is that in case any letter comes to us contrary to law that we do nothing by such letters, but certify your Majesty thereof, and go forth to do the law." James summoned the judges. He tore up their letter and demanded of each judge whether he now would obey any future royal order. All the judges save Coke backed down. Asked what he would do, Coke answered, "When that case should be, he would do that [which] should be fit for a judge to do."

In late June, Coke was suspended from his privy council seat, charged with showing contempt for the Chancery and the crown. Meantime, James ordered, Coke was not to ride on the summer assize circuit. Instead, he was to censor his own law reports, "wherein (as his majesty is informed) there be many exorbitant and extravagant opinions set down and published for positive and good law." When Coke refused to recant, the king finally acted. On November 16, 1616, Coke was removed from the bench. It was said, John Chamberlain wrote, that "four p's" had overthrown the chief justice, "that is, pride, prohibitions, praemunire, and prerogative."

Within a few months, Coke had bought back royal favor. He arranged a match between his daughter Frances and the duke of Buckingham's older brother. This brought Coke a return to his seat on the Privy Council, although he never returned to judicial office. The cost was a scandal—an armed clash

between his servants and the servants of his wife, who opposed the match—and final marital estrangement.

Coke traced the source of law to custom and judicial wisdom rather than to royal command. He gave mythic dimensions to the common law by tracing legal doctrines into dim antiquity. More importantly, Coke defined law as the “artificial reason” of the judges, a professional consensus based on training and experience. “Reason is the life of the law,” he wrote, “nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man’s natural reason.”

“Nothing that is contrary to reason, is consonant to law,” Coke wrote. While such assertions dated back to Bracton, Coke and his colleagues pursued the principle with newfound energy. Coke asserted that judges found law and did not make it, but he clearly preferred reform by judicial action to reform by legislation. He argued that legal traditions were rich enough to solve any question facing a court. As lawyer and as judge—in cases such as *Davenant v. Hurdis* (1598), *Tooley’s Case* (1613), and the notable *Taylor’s of Ipswich* (1614)—Coke supported artisans seeking to follow their trades over opposition from craft guilds.

In 1610, in *Bonham’s Case*, Coke laid the foundations for judicial review of legislation, allowing judges to strike down statutes. “It appears in our books,” Coke wrote, “that in many cases, the common law will control 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 control it, and adjudge such act to be void.”

Absent from the House of Commons for nearly three decades, Coke returned for four parliaments in the 1620s. In these assemblies, he figured as one of the Commons’ most prominent leaders. Always an oracle, he ended as somewhat of a statesman, moving into opposition to the crown.

In the Parliament of 1621, Coke attacked abuses within the legal system. The Commons showed a vogue for impeaching state officers; Coke supported this effort by supplying precedents and conducting crucial hearings. The Commons began by attacking corrupt monopolists and then turned upon the man

who had approved their patents, Lord Chancellor Sir Francis Bacon. Coke headed the committee that investigated Bacon and fended off compromises that might have saved his rival.

In late December, after Coke and the Commons had asserted the right to debate and legislate on all matters concerning the commonwealth, the king retaliated. Coke was arrested and James dissolved the Parliament. Coke was removed from the Privy Council and spent most of 1622 in confinement, initially in the Tower, later under house arrest.

In the Parliament of 1624, Coke seemed temporarily chastened. Complaints were once more aired, but this time hopefully. The session was a short-lived interlude in the worsening relationship between the Commons and the crown. The Parliament of 1625, the first convened by Charles I, saw a sea change in Coke's role. No longer was he the tireless legislator who analyzed the details of bills. Instead, linked with opposition figures, he pressed a series of initiatives uncongenial to the new king—criticizing his foreign policy, challenging his decisions on religion, and hesitating to grant financial support.

The Parliament of 1628 was Coke's most memorable. The duke of Buckingham—once James's favorite, now Charles's favorite—had recklessly brought on wars with both France and Spain. This had led, in turn, to new crises at home: fears of taxation without parliamentary consent, the institution of martial law, and the royal power to imprison without cause shown. Coke was now the crown's most prominent critic. "Other Parliaments had been concerned with particular liberties," Conrad Russell has written, such as purveyance and customs duties and monopolies, but it was this Parliament "which first saw these liberties as collectively threatened by a threat to the ideal which held them all together, the rule of law." The metaphors Coke employed in his speeches to the Commons—that no man was tenant at will for his liberties, or that if a lord could not imprison a villein without cause, no king could imprison a freeman without cause—provided an ideology that closely associated liberty and property.

Coke led the Commons in rejecting compromise. "I know that prerogative is part of the law," Coke cautioned, "but sovereign power is no parliamentary word: in my opinion, it weakens Magna Carta. . . . Magna Carta is such a fellow that he will have no sovereign." When Charles warned the Commons that he would veto any bill that did more than reconfirm Magna Carta, Coke responded by suggesting that the Commons present exactly such a measure—the Petition of Right, something more than a list of grievances, if less than an

actual bill of rights. In June 1628, when the king returned an evasive answer and announced his intention to prorogue Parliament, Coke played a final, pivotal role. On June 6, in highly dramatic circumstances, he named Buckingham as “the grievance of grievances” and “the cause of all our miseries.” With the favorite under attack, Charles backed down. On June 7, 1628, the king assented to the Petition.

This was Coke’s last venture into public life. He retired to his mansion at Stoke Poges, where he apparently worked to complete his *Institutes*. In August 1634, while the old man lay dying, the king’s men ransacked both Coke’s study at Stoke and his files at the Inner Temple. Coke died late on the evening of September 3, 1634. His papers vanished for seven years, until the Long Parliament voted that they be returned to his heir and published.

In his lifetime, Coke published eleven volumes of judicial decisions, known to lawyers simply as “the *Reports*,” and his massive *Book of Entries* (1614). The value of these collections, as a working reference for the bar, has never been gainsaid. Sir Francis Bacon wrote: “Had it not been for Sir Edward Coke’s reports (which, though they may have errors, and some peremptory and extra-judicial resolutions more than are warranted, yet they contain infinite good decisions and rulings over of cases), the law, by this time, had been almost like a ship without ballast.”

In 1628 the old judge published his masterwork, the *Commentary upon Littleton*, known ever thereafter as “Coke on Littleton.” The book ostensibly presents Coke’s glosses on the text of the *Tenures* of Sir Thomas Littleton, a treatise on the law of real property. In fact, however, Coke’s glosses range broadly across the law of his day. *Coke on Littleton* was the first volume of Coke’s four *Institutes of the Laws of England*. The *Second Institute* covers thirty-nine statutes of significance, beginning with Magna Carta. The *Third Institute* covers criminal law. The *Fourth Institute* was a treatise on structural constitutional law and the powers of the various government bodies existing in England—legislative, administrative, ecclesiastical, collegiate, metropolitan, even baronial. After Coke’s death, some of his other works found their way into print: treatises on bail and mainprise, treatises on copyhold tenures, and two additional collections of cases.

Wherever the common law has been applied, Coke’s influence has been monumental. As legal historian William Holdsworth noted, Coke’s works have been

to the common law what Shakespeare has been to literature, and the King James Bible to religion. He is the earliest judge whose decisions are still routinely cited by practicing lawyers, the jurist to whose writings one turns for a statement of what the common law held on any given topic. His discussion of a phrase from Magna Carta, *nisi legem terrae*, is one of the earliest commentaries to give a deeply constitutional resonance to the phrase “due process of law.” For his defense of liberties and property rights, for his assertion of judicial independence, for his active, careful role in adjusting law to the demands of litigants and the interests of society, few figures have deserved more honor.

Allen D. Boyer

Editor's Note



The essays collected here were published on two different continents and over a span of more than seventy years. Only as necessary has any standardization of usage, style, spelling, or form been applied, except that references are uniformly presented in footnote form. In certain pieces, occasional notes and cross-references that would have directed the reader to pages or sections not included in the present volume have been silently deleted.

Introduction to Coke's "Commentary on Littleton"

THOMAS G. BARNES



Having playfully suggested in the *Notes* to the first volume of Coke upon Littleton that Littleton's motto might just as well have been "One Law and One Book," the Editor must reveal at the outset that the tomb of Littleton's great commentator, Sir Edward Coke, carries a Latin inscription exalting the deceased as *Duodecem Liberorum [et] Tredecim Librorum Pater*, Father of Twelve Children and Thirteen Books. One begs the question of how accurate the number of children is, but thirteen books was dead-on for the eleven volumes of *Reports* published in Coke's lifetime, his *Book of Entries* (1614), and his *First Institutes*, Coke upon Littleton (1628).¹ Supposing that by modern American academic standards Coke has published more than enough not to have perished, Littleton also could hardly have been denied tenure on the grounds of the quality of his one book. But these considerations are less relevant than to contrast the real motto of Littleton—*Ung Dieu et Ung Roy*, One God and One King—with the motto chosen by Coke at his call at serjeant-at-law a day before going to the Common Pleas: *Lex Est Tutissima Cassis*, Law is the Safest Helmet.² Littleton's motto reflected the conventional Catholic piety of the twilight of the Middle Ages and asserted a fervent, even prayerful monarchism that had marked relevance in the England of the Wars of the Roses. Coke's England of 1606 was no longer Catholic (and God need not be tolled since He was Protestant if not Anglican and certainly English). A century of

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1. Catherine Drinker Bowen, *The Lion and the Throne* (Boston, 1956), p. 535.

2. *Ibid.*, p. 280. Mrs. Bowen translated "Cassis" as shield, which is much too free a rendering; this is not the worst bit of literary license in the book.

strong Tudor monarchy had banished the specter of rival royal houses engaged in civil war for a crown hanging on a bush; and indeed, instead had raised the specter of a monarch so strong as to be fearsome if not restrained by the Law. If perhaps this is to invest retrospectively too much portentousness in Coke's motto, there is no doubt that it was a perfect and complete statement of his guiding principle, his singular devotion to the primacy of the law.

Reference to "helmet" strikes the right note of bellicosity in Coke. Throughout his life and long career as advocate, judge, councillor and parliamentarian he was a fighter, toughly adversarial, aggressive, never wont to lose a case by faint prosecution. Like the true soldier, he was courageous under fire, resilient in defeat, and magnanimous (only) in victory. But "helmet" also bespeaks a certain defensiveness—it is a device of protection rather than a weapon. *Justitia* in European iconography has always been represented holding scales in one hand and a sword in the other (whether she is blindfolded or not varies); she never wears a helmet. Perhaps in Coke's day she needed one. Justice fared poorly in an age of assertive, absolutist monarchs, and as she needed protection so was her law the armor of the liberties of the monarch's subjects. If this was not all that apparent to Coke in June 1606, when he basked in the favor of King James I, who had rewarded his servant's fourteen years as counsel-learned by elevation to the chief justiceship of the Common Pleas, it would become evident enough a decade later when the servant was driven from the bench as if he were a treasonous clerk.

Edward Coke came from an old and modestly well-to-do gentle family in Norfolk. Born in 1552 at his father's manor house at Mileham, he was the only boy among seven sisters. Schooling at Norwich was liberating if nothing else. In fact it was a great deal more, for there he acquired a mastery of Latin grammar and rhetoric that got him into Trinity College, Cambridge, in 1567 and never deserted him. Coke's reputation for learning owed a great deal to his Latinity, in an age when education meant a command of that language above all else. The rhetoric of Latin was the foundation of his logic; its grammar, vocabulary, and syntax the mortar, stone, and chisel of those finely wrought Latin maxims that he tossed off with abandon to embellish his obiter dicta and lend them an antiquity and authority that seduced his contemporaries and corrupted his successors; its philology and etymology the foundation of his grasp of English and Law French and the source of his legal-historicism. Absent his Latinity, Coke might have been easier reading, but his written corpus would have been

much reduced in substance and lessened in persuasiveness. Cambridge, which he would always revere as alma mater, made no mistake in conferring upon him by grace after only three and one-half years the degree master of arts, for it recognized in the young man destined for the lawyer's, not the parson's, robe a true son and disciple of scholastic learning.

Coke was of the last generation of English barristers who as a matter of course would pass a year or two at one of the inferior Inns of Chancery before going on to an Inn of Court. The commendable justification for such a sojourn was that the fledgling barrister would learn something about the chirographic and procedural, the clerical and "paper" side of the law before proceeding to the superior Inn to learn the law. The denizens of the Inns of Chancery were court clerks and attorneys, clearly inferior in professional function and also—almost by necessary deduction—inferior in social status to the advocate-barristers who peopled the Inns of Court. Increasing definition of the distinction in status (rather than in function) in Elizabethan England impelled the governing barristers of the Inns of Court, the "benchers," to exclude the attorneys from their "company" and to confine them to the Inns of Chancery satellite to every Inn of Court. The benchers were acting not only from their own somewhat inflated self-esteem but also responding to the reality that the sons of noblemen and gentlemen flocking to the Inns of Court for a year or two introduction to the common law would not tolerate rubbing elbows with their social inferiors or be prepared to admit that they could learn anything useful from them. Therefore, the clerks and attorneys were to keep their place in the Inns of Chancery and *real* gentlemen maintain their exclusivity in the Inns of Court. What was lost to the future barrister was intimacy with the entire adjective dimension of the law, an immediate comprehension of how and even why so much of the law was process rather than substance. In a sense, young Edward Coke was lucky in a way his successors would not be. His year at Clifford's Inn, following Cambridge and before entering the Inner Temple in 1572, reinforced his almost medieval scholastic bent, enabled him to perceive the law from the bottom up, and taught him all of the method and some of the skills of the legal draftsman. In short, the year at Clifford's Inn formed Coke in an institutional frame and a pedagogy that more closely resembled the world of Justice Sir Thomas Littleton a century earlier than it did the world of Chief Justice Sir Edward Coke less than a half century later.

In his six years' studentship at the Inner Temple—he was admitted in April 1572 and called to the bar in April 1578—Coke progressed rapidly through the

exercises: moots, which were exceptionally long and complicated at the Inner Temple; simple “case-putting”; attendance at Readings (twice-yearly lectures on statutes); residence; court-sitting. In the twilight of his career, Coke would deprecate the value of the Readings as “long, obscure, and intricate, full of new conceits, liker rather to riddles than lectures, which when they are opened they vanish away like smoke” [I *Institutes*, fol. 280.b.]. One supposes that he excepted from this harsh judgment his own Readings, one at Lyon’s Inn in 1579 and the other at the Middle Temple in 1592!³ Of the dozen Readers young Coke should have heard at the Temple, three were to become Serjeants-at-Law and two of these judges, the most eminent being Edmund Anderson, Chief Justice of the Common Pleas, 1582–1605. It is difficult to believe that he did not find their efforts intellectually rewarding. Yet his own experience as a student at the Temple gave point to the convention that the informal activities at the Inns were as much a feature of legal education as the formal exercises. Tradition has it that sometime during his last year before call, Coke led a student rebellion against the Inn’s cook for the poor food served in hall! He drafted a Latin bill of particulars against the cook, arguing that the cook in his malfeasance had breached his engagement with the Inn (and its students), and he presented the case personally before the benchers to the admiration of his fellows and the favorable notice of his superiors. The records of the Inn are silent as to the outcome, indeed, silent as to whether the incident actually occurred.⁴ But henceforth, thanks to the so-called “*Cook’s Case*,” there would be no end of puns on the name of Edward Coke—pronounced by his contemporaries “cook.” Few, though, surpassed that of his inveterate foe and rival, Francis Bacon: too many Cokes spoil the law.

Coke’s early rise in the profession was meteoric. The Readership at Lyon’s Inn a year after his call was a rare, perhaps unique honor for one of such short continuance at the bar. He soon enjoyed a large practice, of a mixed sort, well rooted in his East Anglican home counties of Norfolk and Suffolk. Within a decade of call this practice had expanded so much as to place him in the front rank of leaders, men who were widely sought after as advocates and counselors, enjoying practices that were genuinely national rather than merely regional. His appointment in 1586 as recorder of Norwich in his native county—that

3. The Lyon’s Inn reading, which is extant, was on 27 Edw. I. Statute de Finibus (1299); the Inner Temple reading, which was discontinued after the fifth lecture because of the plague, was on the Statute of Uses (1536). No longer extant, it would have been interesting to compare it with Francis Bacon’s reading on the same statute.

4. *Calendar of Inner Temple Records*, I. F. A. Inderwick, ed. (London, 1896).