

## THE WRITINGS OF SIR EDWARD COKE

Elizabeth, Queen of England, had many claims to great distinction. Her very name was Tudor, a contraction, it seems, of Theodore, "the gift of God," an epithet of happy omen associated with the mighty rulers of the earth, among whom may be mentioned the African king, Theodore of Abyssinia. This monarch is described in the *Encyclopedia Britannica* as a "man of education and intelligence, superior to those among whom he lived, with natural talents for governing and gaining the esteem of others. He had a noble bearing, and a frame capable of enduring any amount of fatigue, and he was the best shot and the best horseman in Abyssinia. He was generous to excess and free from cupidity but subject to violent bursts of anger."<sup>1</sup>

Elizabeth also possessed many of these royal traits of character, although Coke said her name was not really Tudor but rather Owen or Meredith, though "God would not suffer her to have a sir name because by his grace and goodness she should deserve for her imperial vertues to be called Elizabeth the great."<sup>2</sup> "She was," said Coke, "the phoenix of her sex;<sup>3</sup> she was *Angliae Amor*,<sup>4</sup> familiar with French, Italian and Spanish and learned in Latin and Greek; and "as the rose is the queen of flowers \* \* she was the Queen of Queens. You cannot question what rose I mean; for take the red or the white she was not only by royal descent and inherent birthright but by roseal beauty also, heir to both."<sup>5</sup>

Whether or not Elizabeth deserved this praise and even if she had no right to bear the royal name of Theodore, she was fortunate enough to lend her own to the most glorious period of her country's history. Never before was thought more effesvescing or life more iridescent and vivid. There was a volcanic eruption of brilliant men; Coke was born in 1552, Bacon in 1561, Shakes-

<sup>1</sup> *Encyclopedia Britannica*, Art. Abysinnia.

<sup>2</sup> 4 Inst. 239. The references to 2, 3 and 4 Inst. are to the London Ed. of 1809.

<sup>3</sup> 8 Rep. 77a. The references to the reports are to Thomas and Frazer's edition.

<sup>4</sup> 2 Inst. 578.

<sup>5</sup> 4 Inst. 227.

<sup>6</sup> Co. Litt. Pref. Coke often alluded to his service as Elizabeth's Attorney General. 3 Inst. 79, 112, 164, 191, 236; 4 Inst. 110, 257, 341, 347.

peare in 1564. Why it was that these men, unequalled respectively as lawyer, philosopher and poet, should have appeared within the narrow limits of a dozen years is certainly strange, but as writers always say of what they cannot explain, we shall not stop here to inquire.

Among these and other men who graced the complex Elizabethan Age, Coke was by no means the least important. He was the oracle and ornament of the common law; a lawyer of prodigious learning, untiring industry and singular acumen, with an accurate knowledge of human nature. He was a judge of perfect purity, a patriotic and independent statesman and a man of upright life; and, to bring us to the subject of this paper, his writings have had more influence upon the law than those of any other law writer—certainly in England—who ever lived. And yet there are some who, while admitting his learning, would deny every other claim just made for him. It is indeed hard to estimate correctly even after three centuries, those mighty men who then occupied the center of the stage. Everyone who reads the fascinating Elizabethan story becomes insensibly a Baconian or a Cokian, a partisan of one or the other of those wonderful men. They were indeed antipathetic, each doubtless feeling for the other intellectual compassion rather than sympathy.

We are finding out in the twentieth century what the English lawyers discovered in the sixteenth, that the old common law, with its unsurpassed powers of adaptability and expansion contains within it the solution of present day problems, and in our renewed study upon historical lines we cannot have a better motto than "Back to Coke." As he himself said: "Out of the old fields must come the new corne."<sup>7</sup> There are few principles of the common law that can be studied without an examination of Coke's *Institutes* and *Reports* which summed up the legal learning of his time. From this study the student is deterred by the too common abuse of Coke's character and the general criticism of his writings as dry, crabbed, verbose and pedantic. Much of this criticism is incorrect, for his severest critics, I am sure, are the least familiar with his writings; much of it is unfair, for Coke, like every man, was necessarily a product of the age in which he lived. His faults were the faults of his time, his excellencies those of all time. He was diffuse; he loved metaphor, literary quibbles and verbal conceits; so did Bacon, and so did

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<sup>7</sup> 2 Inst. 22; Pref. 1 Rep. xxx

Shakespeare. So did all the writers of his day. They were creative, not critical. But Coke as a law writer was as far superior in importance and merit to his predecessors, at least if we except Bracton, as the Elizabethan writers in general were superior to those whom they succeeded, and, as the great Elizabethans fixed the standard of our English tongue, so Coke established the common law on its firm foundation. A modern lawyer who heaps his abuse on Coke and his writings seems as ungrateful as a man who climbs a high wall by the aid of the sturdy shoulders of another and then gives his friend a parting kick in the face as he makes the final leap.

The two writers who are responsible for most of the unfair criticism of Coke as a man and a lawyer are Lord Macaulay and Lord Campbell, the former exhibiting all his violent prejudice and the latter his inaccurate superficiality. Just criticism requires sympathy with its subject and these men did not walk with Coke. They stood on the other side of the street and called him names. It is not the present purpose of the writer to defend Coke's personality, but only the literary characteristics of his writings, and in this mere sketch, I shall, after quoting the charges of Macaulay and Campbell, endeavor to prove their unfairness and then to show by quotations from Coke himself that his literary taste and abilities have been underrated, and that his writings possess a certain characteristic charm.

Macaulay, in his *Essay on Lord Bacon*, attacked Coke with the same "rancorous insolence" of which he accuses Coke. He calls Coke a "stupid sergeant,"<sup>8</sup> pedant, bigot and brute," although Macaulay grudgingly admits that "he had qualities which bore a strong, though a very disagreeable resemblance to some of the highest virtues which a public man can possess."<sup>9</sup>

Again Macaulay says: "Coke's opposition to the Court, we fear, was the effect, not of good principles, but of a bad temper,"<sup>10</sup> and in recounting Bacon's downfall, Macaulay says: "Coke for the first time in his life, behaved like a gentleman."<sup>11</sup> Lord Campbell, on the first page of his *Life of Coke*,<sup>12</sup> praises

<sup>8</sup> *Macaulay's Works* in 12 vols. Longman's, Green & Co., Vol. viii., p. 516. Coke was not made a sergeant until he went on the Bench. I *Johnson's Coke*, p. 215.

<sup>9</sup> Vol. viii., p. 547.

<sup>10</sup> Vol. viii., p. 562.

<sup>11</sup> Vol. viii., p. 583.

<sup>12</sup> *Lives of the Chief Justices*, Vol. i. Murray's Ed.

him in no slight language for his knowledge of the law, his ability and independence as a judge,<sup>13</sup> and his great services to his country in framing the *Petition of Right*,<sup>14</sup> but throughout his biography severely criticizes Coke's personal characteristics. These criticisms can best be refuted by a calm consideration of his life and the opinions of those more capable of correct judgment than these brilliant but prejudiced men who wrote two centuries after their victim died. But what is more important for us just now is Campbell's criticism of the method and style of Coke's writings. Collected from various portions of the biography, these charges are about as follows: "His reasoning," says Campbell, "is narrow minded;" he had an "utter contempt for method and style in his compositions,"<sup>15</sup> he had "no genuine taste for elegant literature;"<sup>16</sup> his mind was wholly unimbued with literature or science;<sup>17</sup> he knew "hardly anything beyond the wearisome and crabbed learning of his own *craft*,"<sup>18</sup> although Campbell elsewhere says of Coke: "He is uniformly perspicuous and gives amusing glimpses of history and manners."<sup>19</sup> He endeavors to prove Coke's distaste for literature by saying that at school "he was more remarkable for memory than imagination and he had as much delight in cramming the rules of prosody in doggrel verse as in perusing the finest passages of Virgil."<sup>20</sup> If Campbell had any authority for this he fails to give it, and it is probable that he displayed his own imagination rather than his memory when he made this silly statement. But he makes another statement quite as foolish.<sup>21</sup> "Coke," he says, "values the father of English poetry only in so far as the Canon's *Yeoman's Tale* illustrates the Stat. 5 H. IV, c. 4 against Alchemy or the craft of the multiplication of metals;—and he classes the

<sup>13</sup> Campbell emphasizes this frequently; see pp. 257, 268, 277, 279, 282, 286, 293, 346.

<sup>14</sup> Vol. i. pp. 330, 339.

<sup>15</sup> Vol. i., p. 239. On p. 345 he calls Coke a "deep but narrow-minded lawyer," but says on p. 289 his *Reports* "were executed with great accuracy and ability, though tinged with quaintness and pedantry."

<sup>16</sup> Vol. i., 239. Campbell, however, gives several good examples of Coke's style; pp. 341, 342.

<sup>17</sup> Vol. i., p. 337.

<sup>18</sup> Vol. i., p. 345. It is interesting to observe how Campbell speaks of his own profession.

<sup>19</sup> Hardcastle's *Life*, Vol. ii., p. 26.

<sup>20</sup> Vol. i., p. 241.

<sup>21</sup> Vol. i., p. 337.

worshipper of the Muses with the most worthless and foolish of mankind;—The fatal end of these five is beggary,—the alchemist, the monopolist, the concealer, the informer and the poetaster.

*Saepe pater dixit, studium quid inutile tentas?  
Maconides nullas ipse reliquit opes.*"<sup>22</sup>

This is indeed a curious innuendo. It would not prove that a lawyer does not care for literature, to show that he does not quote poetry in his law books. Coke was not obliged to quote Chaucer at all, but if he did, he would naturally cite him to illustrate some point of law. But in fact Coke quoted Chaucer no less than four times. In speaking of good pleading, Coke refers to Chaucer's sergent-at-law:

"Thereto he could indite and make a thing,  
There was no wight could pinch at his writing."<sup>23</sup>

and he applies the same verses to Littleton in the preface to Co. Litt. from which it appears that Campbell never read or had forgotten the very interesting and well-written preface to Coke's most famous work.<sup>24</sup> Coke, in explaining the meaning of Vavasor, cites Chaucer "our English poet" in the *Franklyn's prologue*,<sup>25</sup> and he illustrates the meaning of Lusheburghs, a kind of base coin, by a quotation from the *Prologue to the Monk's Tale*.<sup>26</sup> Lord Campbell would have been fairer also had he noted that Coke quoted from Chaucer "*in libro meo*,"<sup>27</sup> showing that he thought enough of Chaucer to own a copy. Prejudiced statements like this have widespreading influence. Emerson in his *Essay on Culture* evidently adopted Campbell's remark about Coke and Chaucer.

Nor does Coke "class the worshipper of the Muses with the most worthless and foolish of mankind." He classes the "poetaster" with the alchemist *et al.*, but "poetaster" is not equivalent to "poet," for it means a "trifling" or "foolish" poet. It would be as just to say that Ben Jonson, in ridiculing such a one in his play "*The Poetaster*," meant to decry his own profession. Coke, as I shall endeavor to show, had a great respect for

<sup>22</sup> 3 Inst. 74.

<sup>23</sup> 2 Inst. 123.

<sup>24</sup> Hardcastle Life, i., 62, 71. As a student Campbell does not seem to have read Co. Litt. very industriously.

<sup>25</sup> 2 Inst. 667.

<sup>26</sup> 3 Inst. 1.

<sup>27</sup> 3 Inst. 74.

poets and was fond of poetry, and the Latin verses which he quotes from *Ovid*,<sup>28</sup> simply express the obvious truth that poetry is not a money-making business, for even Homer left no fortune.

It seems almost certain indeed that Coke, in this passage about the "poetaster," alluded to Ben Jonson's play of that name, for in the *Apologetical Dialogue* which follows it, the dramatist defends himself from the charge that he had intended to ridicule the profession of the law, by saying:

"Indeed, I brought in Ovid,  
Chid by his angry father for neglecting  
The study of their laws for poetry;  
And I am warranted by his own words:  
*'Saepe pater dixit, studium quid inutile tentas?  
Maconides nullas ipse reliquit opes.'*  
But how this should relate unto our laws,  
Or the just ministers, with least abuse,  
I reverence both too much to understand!"

Campbell's citation, therefore, proves the exact opposite of his proposition, for it shows that Coke had read at least this much of Jonson.

Coke was a lover of learning, a Cambridge man and very loyal to his university. His allusions to Cambridge are always devoted and affectionate. Thus he says: "That famous University of Cambridge, *alma mater mea*;<sup>29</sup> In remembrance of my love and duty *almae matri Academiae Cantabrigiae*."<sup>30</sup> "The liberal arts and sciences," he says in his chapter on the University Courts, are the *lumina reipublicae*," and the Act of 13 Eliz., confirming the universities in their rights, he called, "this blessed Act."<sup>31</sup>

But to return to Campbell: "The *Globe* and other theatres were rising into repute, but he never would appear at any of them; . . . *it is supposed* that in the whole course of his life he never saw a play acted, or read a play, or was in company with a player."<sup>32</sup> This must have been "supposed" by Campbell himself, for no authority is given for the statement, and, as shown above, Coke, it is almost certain, had read Jonson's *The Poetaster*. Even if it were true that Coke did not attend the theatre, the fact would not prove that he did not care for literature or poetry.

<sup>28</sup> *Tristia* Lib. 4. Eleg. 10.

<sup>29</sup> *Co. Litt.* Pref.

<sup>30</sup> *Co. Litt.* 109 b.

<sup>31</sup> 4 *Inst.*, 227. Holt, C. J. in 1 *Ld. Ray* I., 468, speaks of Coke's loyalty to Cambridge as shown in *Bonham's Case*, 8 *Rep.* 107 a.

<sup>32</sup> *Campbell's Lives*, Vol. i., p. 243.

Very likely the leader of the bar, an indefatigable worker in his profession, could not spare the time. But Campbell makes a more serious charge. "He shunned the society of Shakespeare and Ben Jonson as of *vagrants*, who ought to be set in the stocks or whipped from tithing to tithing. The Bankside company having one summer opened a theatre at Norwich while he was recorder of that city, in his next charge to the grand jury he thus launched out against them: 'I will request that you carefully put in execution the statute against *vagrants*; since the making whereof I have found fewer thieves and the gaol less pestered than before. The abuse of *stage players* wherewith I find the country much troubled, may easily be reformed, they having no commission to play in any place without leave, and therefore if by your willingness they be not entertained, you may soon be rid of them.'" And Campbell adds a note: "It is supposed to be out of revenge for this charge that Shakespeare parodied his (Coke's) invective against Sir Walter Raleigh in the challenge of Sir Andrew Aguecheek."<sup>33</sup>

There is no foundation whatever for the statement that Coke regarded Shakespeare and Jonson as vagrants, and shunned their society, nor can any such inference be fairly drawn from Coke's Norwich charge. This was delivered on August 4, 1606, when Coke was Chief Justice of the Common Pleas and not during his recordership, which office he had held nearly twenty years before. The charge was piratically published by one Pricket, and in the preface to 7 Rep., Coke explains that it was printed without authority with many errors and omissions. But even if he was correctly reported, it must be remembered that theatres and actors were strictly regulated by the Statutes of 14 Eliz. C. 5, and 39 Eliz. C. 4, by which "Common Players in Enterludes & Minstrels with Fencers Bearwardes" and other undesirables were classed as "Rogues, Vagabonds and Sturdie Beggars" and punished accordingly unless belonging to a "Baron or other honorable Personage or having licences of two Justices of the Peace."<sup>34</sup>

It was perfectly proper that the grand jury should have their attention called to these statutes and their violation by companies of irresponsible strolling players. Jonson himself was accused of having in *The Poetaster* ridiculed actors, and Coke might have

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<sup>33</sup> Campbell's Lives, Vol. i., pp. 337-338.

<sup>34</sup> The statute is alluded to in *The Poetaster*, Act I, Sc. I.

defended himself from the charge of persecution in Jonson's own words:

"Now for the players, it is true I tax'd them  
 And yet but some; and those so sparingly,  
 As all the rest might have sat still unquestioned,  
 Had they but the wit or conscience  
 To think well of themselves."

*Apologetical Dialogue, Poetaster.*

More than this, we have Jonson's own words to show the great respect he entertained for Coke. In his *Underwoods*, Jonson thus addressed Coke when the latter was Lord Chief Justice, in part as follows:

"He that should search all glories of the gown,  
 And steps of all raised servants of the crown,  
 He could not find than thee, of all that store,  
 Whom fortune aided less, or virtue more,  
 Such, Coke, were thy beginnings when thy good  
 In others' evil best was understood:  
 Whén, being the stranger's help, the poor man's aid,  
 Thy just defences made th' oppressor afraid.

\* \* \* \* \*

And now such is thy stand, while thou dost deal  
 Deserved justice to the public weal,  
 Like Solon's self,——"<sup>35</sup>

The Norwich charge was delivered August 4, 1606, Coke having been made Chief Justice of the Common Pleas on June 20th of the same year. As Gifford, Jonson's editor, points out, Coke is addressed as Lord Chief Justice of England, and as Coke was not promoted, or as he considered it demoted to the King's Bench until October 25, 1613, at which time he assumed the title of Lord Chief Justice, the above lines must have been written on or after that date, and therefore subsequent to the charge at Norwich. It is incredible that Jonson should have addressed such praise to Lord Coke if in fact Coke was the persecutor of play-actors or had abused them in his charge.

The reference to Coke's conduct at the Raleigh trial and Shakespeare's alleged resentment is without foundation. Sir Walter Raleigh's trial took place November 17, 1603,<sup>36</sup> at which Coke, who as Attorney General was the prosecutor, addressed Raleigh in the celebrated invective: "All that Cobham did was by thy inspiration, thou viper, for I thou thee, thou traitor." The editor of the State Trials adds in a note that Shakespeare in all

<sup>35</sup> *Underwoods* LXV.

<sup>36</sup> 2 St. Tr. 1.

probability alludes to this when he makes Sir Toby Belch, in *Twelfth Night*, Act III, Scene 2, say, in giving directions to Aguecheek for his challenge to Viola: "If thou thou'st him some thrice it may not be amiss." This mistake has been repeated by every detractor of Coke (including Campbell) ever since, none of them stopping long enough to note that *Twelfth Night* was produced long before Raleigh's trial. It was almost certainly acted in the Temple before February, 1601-2.<sup>87</sup> It is of course possible to argue that the words were a later addition after the trial and before the Folio was printed in 1623, but this is very unlikely. Shakespeare died, it will be remembered, in 1616. Dr. Furness in his *Variorum Edition* observes on this passage that he has small faith in these contemporary allusions. Coke, therefore, more probably took the phrase from Shakespeare, or indeed it may have been a common expression of disdain.

Campbell is still more unfortunate in his disparagement of Coke's scientific attainments. "His progress in sciencè we may judge of by his *dogmatic assertion* that the metals are six, and no more;—gold, silver, copper, tin, lead and iron; and they all proceed originally from sulphur and quicksilver as from their father and mother."<sup>88</sup> Campbell, however, does not quote Coke accurately or fairly. Coke said: "There are six kinds of metals, viz.: aurum, argentum, aes, sive cuprum (*quia inventum fuit in Cypro*) stannum, plumbum et ferrum. That is to say, gold, silver, copper, tynne, lead, and iron; for *chalbys*, steel, is but the harder part of iron, and orichalcum, auri-chalcum, viz.: lattyn or brasse, is compounded of copper and other things. \* \* \* How these several kinds of metallis as *is supposed*, proceed originally from sulphur and quicksilver as from their father and mother and other things concerning the same, you may at your leisure read in George Agricola, lib. 10, ca. 1." &c.

Coke made no professions to scientific attainments and merely adopted on this question, and as to the quintessence, in the same chapter, the views current in his day under the authority of Paracelsus and others. He evidently accepted the common opinion with some distrust, and at any rate may certainly be excused for not knowing any more than Sir Thomas Browne and Sir

<sup>87</sup> Singer's *Shakespeare*, preliminary remarks.

<sup>88</sup> 3 Inst. ch. xx. Campbell i., 338.

Francis Bacon, the former of whom was willing to encourage the experiments of alchemists even if he distrusted them.<sup>39</sup>

George Agricola was the foremost mineralogist of his day, and Coke was quite right in referring to him as an authority. Bacon speaks of Agricola with respect as "*scriptor recens, diligenter admodum in mineralibus.*"<sup>40</sup> Sir Thomas Browne owned a copy of Agricola and in writing to his son Edward in Vienna, refers him to that author;<sup>41</sup> and Dr. Edward Browne in his letter to his father, Feb. 3, 1669, encloses several inquiries from the secretary of the Royal Society, such as: "Whether in all the mines of gold, silver, copper, iron and lead of Hungary, there be found everywhere quicksilver and sulphur?" showing that the question was a live one.

Bacon himself, although he believed alchemy to be an imposture,<sup>42</sup> seems to have believed in the transmutation of metals,<sup>43</sup> and he thought it would be easier to make silver than gold because both quicksilver and lead are weightier than silver,<sup>44</sup> and he expressly says that "mercury and sulphur are the principal materials of metals."<sup>45</sup> This all shows that Coke relied upon recognized authority in matters of science, as he generally did in everything else, and surely is not to be blamed if he accepted the views of the day, especially when a professed philosopher and scientist like Bacon expressed pretty much the same theories. It is not a little curious, by the way, that the latest theory of modern scientists indicates the ultimate unity of all matter and the possibility of its change from one form to another.

Finally Campbell charges Coke with "a contempt for all philosophical speculation."

"Having received a copy of Bacon's *Novum Organon* from the author he wrote on the fly leaf: 'Edw. C., *ex dono auctoris,*' and he vented his spleen in the following sarcastic lines which he subjoined:

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<sup>39</sup> 1 *Browne's Works*, Ed. Simon Wilkin, xcvi.

<sup>40</sup> *De Augmentis*, Lib. iii.; 1 Spedding, 572.

<sup>41</sup> 1 *Browne* 183, 188.

<sup>42</sup> *In Praise of Knowledge*, 1 Montague Bacon, 253.

<sup>43</sup> *Advancement of Learning*, Book II; 2 Montague 147; 4 Spedding 367; *Natural History*, Century iv.; 4 Montague 159; 2 Spedding, 448, *Physiological Remains*, 7 Montague 209, 212; 3 Spedding 809.

<sup>44</sup> *Physiological Remains*, 7 Montague 193; 3 Spedding 803.

<sup>45</sup> *Natural History*, Century iv.; 4 Montague 175; 2 Spedding 459. See also *Novum Organon*, 2nd *Book of Aphorisms*; L.; 4 Spedding 242.

## "AUCTORI CONSILIUM.

"*Instaurare paras veterum documenta sophorum;  
Instaura leges, justitiamque prius.*"

"In the title page which bore the device of a ship passing under a press of sail through the Pillars of Hercules, he marked his contempt of all philosophical speculations by adding a distich in English:

"*It deserves not to be read in schools,  
But to be freighted in the Ship of Fools.*"<sup>46</sup>

This book was Bacon's *Instauratio Magna*, printed in 1620, and its title page is reproduced by Spedding.<sup>47</sup>

After all the enmity which Bacon had for years openly exhibited to Coke, it strikes one as remarkable that he should have presented Coke with a copy of his great book. Whatever might have been his motive he could hardly expect the donee to look on his production with an indulgent eye. Coke was born, like John the Baptist and all the rest of us, of a woman; he was only human, and the "sarcastic" but truthful advice may well have been written by Coke six months afterwards, when Bacon fell from his high estate. The ship sailing triumphantly through the Pillars of Hercules, was of course intended by Bacon to typify a comparison between the recent discovery of the new material world and his own anticipated discovery of a new intellectual world,<sup>48</sup> and Coke's verses, comparing Bacon's ship to the well-known Ship of Fools,<sup>49</sup> were doubtless provoked by a claim which he, and others since his time, thought too boastful. But to say that Coke had a "contempt for all philosophical speculation" is an incorrect inference.

In taking leave of Campbell it is only fair to add that he bestows high praise upon the technical merits and great value of Coke's writings. Thus he says: "Coke's *magnum opus* is his *commentary on Littleton*, which in itself may be said to contain the whole common law of England as it then existed. Notwithstanding its want of method and its quaintness, the author writes from such a full mind, with such mastery over his subject and with such unbroken spirit, that every law student who has made

<sup>46</sup> Campbell's *Lives* i., 307. Campbell takes this from Bacon's collected works. See 7 Montague 380.

<sup>47</sup> 1 Spedding 119.

<sup>48</sup> Abbott's *Francis Bacon*, 377.

<sup>49</sup> By Sebastian Brand. Translated from Latin and German into English, 1508.

or is ever likely to make any proficiency must peruse him with delight,"<sup>50</sup> and the other *Institutes* are "wonderful monuments of his learning and industry."<sup>51</sup>

Of Coke's reports Campbell says: "He presents a great many questions to be 'resolved' which were quite irrelevant, or never arose at all in the case, and these he disposes of according to his own fancy. Therefore he is often rather a codifier or legislator than a reporter, and this mode of settling or reforming the law would not now be endured, even if another lawyer of his learning and authority should arise. Yet all that he recorded as having been adjudged was received with reverence."<sup>52</sup> The criticism is not wholly deserved, at least is too strongly stated, and Coke has made his own defense. He explains the length of some of his reports by the number of questions argued at the Bar in cases involving large sums,<sup>53</sup> and says that he purposely endeavored to avoid the omission of authorities cited or arguments made,<sup>54</sup> while in Mountjoy's case<sup>55</sup> he says: "Many other matters were moved by the counsel on both sides at the Bar in this case, which I purposely omit because the court gave no resolution of them." A fair and careful reading of his reports will lead to the conclusion that Coke conscientiously tried to pay the debt which he owed to his profession,<sup>56</sup> and further, that it was the frequent habit of the judges of the time to decide, as though part of the case, questions which were only collaterally involved. How well upon the whole Coke discharged his debt Campbell eloquently admits: "Belonging to an age of gigantic intellect and gigantic attainments, he was admired by his contemporaries and time has in no degree impaired his fame. For a profound knowledge of the common law of England he stands unrivalled. As a judge he was not only above suspicion of corruption but at every risk he displayed an independence and dignity of deportment which would have deserved the highest credit (even) if he had held his office during good behavior, and could have defied the displeasure of the government. To his exertions as a parliamentary leader we are in no small degree indebted for the free constitution

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<sup>50</sup> Campbell i., 340. See Hardcastle's *Life*, ii., 261.

<sup>51</sup> Campbell i., 335.

<sup>52</sup> Campbell i., 340.

<sup>53</sup> 10 Rep. Pref. xxi.

<sup>54</sup> 9 Rep. Pref. xxxix.; 7 Rep. Pref. ix.

<sup>55</sup> 5 Rep. 6 b.

<sup>56</sup> 9 Rep. Pref. xl.

under which it is our happiness to live. \* \* \* There were other public-spirited men, who were ready to stand up in defence of freedom, but Coke alone from his energy of character and from his constitutional learning was able to carry the *Petition of Right*, and upon his model were formed Pym and the patriots who vindicated that noble law on the meeting of the Long Parliament."<sup>57</sup>

I now pass to the evidence, collected from the writings of Coke which show the extent of his acquaintance with literature and his own literary taste. Coke was perfectly familiar with classical literature, both prose and poetry, and his marvelous memory suggested on almost every page some parallel passage from the best Latin writers. The Greek authors he quotes less frequently and nearly always from Latin translations. Of course in his day Latin was the language of all learning, and every educated man understood it. To a lawyer it was indispensable, as was also the law French. Coke knew both languages as his mother tongue, and as a matter of course quoted sentences and pages from the Year Books, the Parliamentary Rolls or old records or authors like Bracton, Britton, and others without thinking it necessary to translate. Bacon, it is well known, committed to Latin in preference to English, those of his writings which he considered of permanent value. Perhaps Coke's fondness for the Latin and his discursive habit in writing has given rise to the charge that he was a pedant. But pedantry is a useless display of learning, or perhaps a display of useless learning, at any rate, the term involves the double idea of display or affectation and uselessness. Holofernes was a type of pedant. King James I was probably another. Coke, however, was no pedant any more than Ben Jonson or Jeremy Taylor; as he said in one place, he took all in his way and omitted little or nothing, "for there is no knowledge (seemeth it at the first of never so little moment) but it will stand the diligent student in stead at one time or other."<sup>58</sup>

To illustrate the breadth of Coke's acquaintance with the classics and Latin authors I have noted in his works, from Juvenal, three citations; from Tacitus, eleven; Virgil, twenty-eight; Cicero, twenty-four; Ovid, five; Cato, three; Aristotle, thirteen; Sallust, three; Seneca, nine; Horace, eight; Pliny, three; writers on civil law, thirteen; Lyndwood<sup>d</sup> and writers

<sup>57</sup> Campbell i., 339.

<sup>58</sup> 4 Inst. *Proeme*, cf. Co. Litt., 9a; 4 Inst. 98.

on canon law, twenty; St. Augustine, five; and he has quoted less frequently from Homer, Terence, Euripides, Martial, Strabo, Suetonius, Caesar and a number of post-classical writers including Thomas Aquinas, Jerome and St. Ambrose. As Coke remarked: "*Auctoritates philosophorum, medicorum et poetarum sunt in causis allegandae et tenendae*,"<sup>59</sup> and he notes with pleasure: "This is the fourth time that our author (Littleton) hath cited verses."<sup>60</sup> "Verses," he says, were invented for the helpe of memorie and it standeth well with gravitie of our lawyer to cite them."<sup>61</sup> Did space permit, it might perhaps be interesting, at least to some, to note the very many instances in which he makes an apposite poetical quotation. Following are a few only. In the Case of Swans, he quotes the verses about the death song:

*"Dulcia defecta modulatur carmina lingua  
Cantator cygnus funeris ipse sui."*<sup>62</sup>

After quoting Virgil he says: "But fearing that one of Virgil's verses should be applied to us:

*"Sed jam age, carpe viam, suscepium perface munus."*<sup>63</sup>

When he speaks of a right *in nubibus*, as the phrase was, he quotes the description of Juno from *Aeneid*, B. IV:

*"Ingreditur solo, et caput inter nubila condit."*<sup>64</sup>

He mentions younger sons, and the lines of Horace occur to him:

*"Haud facile emergunt quorum virtutibus obstet,  
Res angustal domi."*<sup>65</sup>

In Twyne's case, he gives us the well-known verses:

*"Quaeritur, ut crescunt tot magna volumina legis?  
In promptu causa est, crescit in orbe dolus."*<sup>66</sup>

The right of every accused person to be heard in his defense recalls the "damnable and damned" proceedings of Rhadamanthus in Virgil:

*"Gnosius hic Rhadamanthus habet durissima regna  
Castigat, auditque dolos subigitque fateri."*<sup>67</sup>

<sup>59</sup> Co. Litt., 264 a.

<sup>60</sup> Co. Litt., 236 b; 263 b; 308 b; 395 a.

<sup>61</sup> Co. Litt. 237 a; Co. Litt. 264 a.

<sup>62</sup> 7 Rep. 17 a.

<sup>63</sup> Aeneid v. 2 Inst. 574.

<sup>64</sup> Co. Litt., 342 b.

<sup>65</sup> Co. Litt., 140 b.

<sup>66</sup> 3 Rep. 82 a.

<sup>67</sup> 2 Inst. 55.

and everyone knows the ancient verses he has made familiar as to the distribution of time:

*"Sex horas somno, totidem des legibus acquis,  
Quatuor orabis, des epulisque duas.  
Quod superest ultro sacris largire camoenis."*<sup>68</sup>

Again:

"For true it is that neither fraud nor might,  
Can make a title where there wanteth right."<sup>69</sup>

In his chapter on Witchcraft,<sup>70</sup> Coke himself dips into poetry. He translates:

*"Carminibus Circe socios mutavit Ulyssis—"*  
"By charmes in rhyme (O cruel fates!)  
Circe transform'd Ulysses' mates."

And again:

*"Carmina de coelo possunt detrudere lumen—"*  
"By rhyme they can pull down full soon  
From lofty sky the wandring moon."<sup>71</sup>

There are many entertaining literary chapters in Coke. The entire preface to Co. Litt. is well worth reading. Then there is the Chapter, Of Diet, 3 Inst. 200, in which Coke speaks of the statutes regulating the eating of flesh, and taking these as his text warns his readers against "the dainty and disorderly ex-cesse of meat and drink" as opposed to orderly hospitality, illustrating his topic with quotations from the Bible, Cicero and Horace, and the customs of the Danes, Normans, English and the ancient Britons. Likewise in his chapter Of Buildings, 3 Inst. 201, Coke laments the elaborate and costly style of building then fashionable, and quotes Sir Thomas More's translation of Euripides:

*"Aedificare domos multas et pascere multos  
Est ad pauperiem semita laxa nimis—"*  
"To build many houses and many to feed  
To poverty that way doth readily lead."

He gives us much curious and entertaining learning about the building of tombs, and actions for their defacement, church pews and funeral expenses, the seven wonders of the world in six Latin verses, the uses of funeral monuments, the "burial of the dead," the consecration of churches, the subterranean buildings of the ancient Germans related by Tacitus. Then he talks of lighthouses—

<sup>68</sup> Co. Litt. 64 b.

<sup>69</sup> 8 Rep, 153 b.

<sup>70</sup> 3 Inst. 43.

<sup>71</sup> See a longer poetical translation 3 Inst. 156.

*"Lumina noctivagae tollit pharus aemula lunae."*

"In light house top is rear'd the light  
As high as the moon that walks by night,"<sup>72</sup>

of restrictions against building, and the derivation of certain words.

Chapter 73 of 4 Inst. treats of the Forest Law. "And seeing," says Coke, "we are to treat of matters of game and hunting, let us (to the end we may proceed the more cheerfully) recreate ourselves with the excellent description of Dido's doe of the forest with a deadly arrow sticken in her, and not impertinent to our purpose."

*"Uritur infelix Dido, totaque vagatur  
Urbe furens, &c."*

And then he goes on to tell of forests, and the forest courts, "the false and furious officers," vert and venison, the survey of dogs, the court of swanimote, and verderors, hue and cry, dog-draw, stable-stand, back-bear and bloody-hand, purlieus, scotale, the duties of woodwards, and much more. Coke delights in explaining the technical terms of venary. What is a pretty pleasing pricket, you may here see, and what is venison and why a hare and a boar are venison and a bear is not; and all with copious references to Bracton, the Year Books, old Charters, Virgil, Lyndwood, Aristotle, Martial, the Bible, Suetonius and many notable records. "Recreations," says Coke, "should not be used as professions and trades, but to be used as medicines to make men more able and fit for higher and greater affairs \* \* \* and thus have we wandered in the wilderness of the laws of the forest \* \* \* wherein (as the studious reader may well perceive) we have respected matter more than method."

Coke's writings abound with quaint, axiomatic, idiomatic, and pithy expressions. The following may serve as examples (the reader may look for others and seeking will find them): "The life of a man is much favoured in law, but the life of the law itself ought to be more favoured."<sup>73</sup>

"The general custom of the realm is the common law."<sup>74</sup>

"Questions (are) like spirits which may be raised with much ease but vanquished with much difficulty."<sup>75</sup>

<sup>72</sup> (See parallel passages in 4 Inst. 148.)

<sup>73</sup> 9 Rep. 68 b.

<sup>74</sup> 9 Rep. 75 b.

<sup>75</sup> 10 Rep., 29 a.

"Perpetuities were born under some unfortunate constellation." <sup>76</sup>

"All the sons of Adam must die." <sup>77</sup>

"Idleness is the mother of all vice and wickedness." <sup>78</sup>

Of death bed wills he says: "Few men pinched with the messengers of death have a disposing memory." <sup>79</sup>

Of rebutter Coke says: "A title of the law in my opinion, excellently curious and curiously excellent;" <sup>80</sup> so he speaks of "the great weightiness and weighty greatness" of *Magna Charta*.<sup>81</sup>

Of a hog sty as a nuisance he says: "One ought not to have so delicate a nose that he cannot bear the smell of a hog." <sup>82</sup>

Fraud Coke compares to "birds closely hatched in hollow trees," or "*in arbore cava et opaca*." <sup>83</sup>

"The common law is an old, true and faithful servant to this commonwealth." <sup>84</sup>

"I am not afraid of gnats that can prick and cannot hurt, nor of drones that keep a-buzzing and would but cannot sing." <sup>85</sup>

Of certain books he said: "They are like to apothecaries' boxes whose titles promise remedies but the boxes themselves contain poison." <sup>86</sup>

Of ignorant physicians: "Who more hurt the body of man than the disease itself, one of which said of one of their patients, *fugiens morbum incidit in medicum*." <sup>87</sup>

"To proceed farther were but to gild gold or to add a little drop to the great ocean." <sup>88</sup>

A certain statute he says: "is cousin German to another." <sup>89</sup>

"It is the worst oppression that is done by colour of justice." <sup>90</sup>

<sup>76</sup> 10 Rep. 42 b.

<sup>77</sup> 10 Rep. 50 b.

<sup>78</sup> 10 Rep. Pref. vii., 11 Rep. 53 b; cf. 11 Rep. 162.

<sup>79</sup> 10 Rep. Pref. xiv.; Co. Litt. 111 b.

<sup>80</sup> 10 Rep. Pref. xvi.

<sup>81</sup> Co. Litt. 81 a.

<sup>82</sup> 9 Rep. 58 a.

<sup>83</sup> 4 Inst. 63; 5 Rep. 60 b.

<sup>84</sup> 6 Rep. 42 b.

<sup>85</sup> 7 Rep. Pref. vii.

<sup>86</sup> 7 Rep. Pref. vi. Coke hated medicine, and boasted that he never took it.

<sup>87</sup> 8 Rep. 117 a.

<sup>88</sup> 9 Rep. Pref. xxiv.

<sup>89</sup> 10 Rep. 60 b.

<sup>90</sup> 2 Inst. 48.

"There is no greater injustice than when under colour of justice injury is done."<sup>91</sup>

"Sometime when the public good is pretended, a private benefit is intended."<sup>92</sup>

"This case is calculated for the meridian of the Court of Wards."<sup>93</sup>

Of the *ex-officio* oath: "No man shall be examined upon secret thoughts of his heart or of his secret opinion."<sup>94</sup> "Thought is free."<sup>95</sup>

"The law and custom of England is the inheritance of the subject which he cannot be deprived of without his assent in Parliament."<sup>96</sup>

"Trade and traffic is the life of every island."<sup>97</sup>

"The Judges cannot create offences nor do as Hannibal did to make his way over the Alps when he could find none."<sup>98</sup>

"Ambition rideth without reins."<sup>99</sup>

Of Ranulph, Bishop of Durham: "He lived without love and died without pity, saving of those who thought it pity he lived so long."<sup>100</sup>

"Every one thirsteth after gaine."<sup>101</sup>

"No man can carry the words of a positive law by Parliament in his head."<sup>102</sup>

Of attendance at several courts on the same day: "A man can be but in one place at one time."<sup>103</sup>

"Elections are free."<sup>104</sup>

"They which gladly heare false reports and newes will be also as ready to publish them."<sup>105</sup>

<sup>91</sup> 2 Inst. 112; 2 Inst. 388.

<sup>92</sup> 10 Rep. 142 b.

<sup>93</sup> 11 Rep. Pref. iv.

<sup>94</sup> 12 Rep. 26.

<sup>95</sup> 13 Rep. 10.

<sup>96</sup> 12 Rep. 29; cf. Co. Litt. 95 b.

<sup>97</sup> 12 Rep. 79.

<sup>98</sup> 12 Rep. 122.

<sup>99</sup> 2 Inst., *Proeme* 4.

<sup>100</sup> 2 Inst. 15.

<sup>101</sup> 3 Inst. 196.

<sup>102</sup> 2 Inst. 88.

<sup>103</sup> 2 Inst. 9. A remark having some present-day application.

<sup>104</sup> 2 Inst. 169.

<sup>105</sup> 2 Inst. 225, on Stat. West. 1, ch. xxxiv., as to devisors of tales.

"Once forsworne, and ever forlorne." <sup>106</sup>

"Preventing justice is better than punishing justice." <sup>107</sup>

"The devil deviseth delays." <sup>108</sup>

"Odious in law is waste and destruction." <sup>109</sup>

"The debts of cruelty are never unpaid, *respice finem*." <sup>110</sup>

"Truth is the mother of justice." <sup>111</sup>

"A law worthy to be written in letters of gold, but more worthy to be put in due execution." <sup>112</sup>

"It is good chance to obtaine, but great wisdom to keep." <sup>113</sup>

"They that buy deare, must sell deare." <sup>114</sup>

"Those two great pronouns *meum et tuum*." <sup>115</sup>

Of flattery: "It getteth away much and giveth smoke." <sup>116</sup>

Of bribery: "They that buy will sell." <sup>117</sup>

"Though the bribe be small, yet the fault is great." <sup>118</sup>

"Where shall a man be safe, if it be not in his house?" <sup>119</sup>

"The house of every man is his castle and fortress." <sup>120</sup>

"The King can never be poor when his subjects are rich." <sup>121</sup>

"Three costly things do much impoverish the subjects of England, viz.: costly apparell; costly diet, and costly building." <sup>122</sup>

"The sins of the soul are turned to fire." <sup>123</sup>

"Parliaments, palaces of princes, and pulpits should be free from adulation and flattery." <sup>124</sup>

"Good bills in Parliament seldom die." <sup>125</sup>

<sup>106</sup> 2 Inst. 238.

<sup>107</sup> 2 Inst. 248. 299.

<sup>108</sup> 2 Inst. 260.

<sup>109</sup> 2 Inst. 329.

<sup>110</sup> 4 Inst. 12; 2 Inst. 508.

<sup>111</sup> 2 Inst. 524.

<sup>112</sup> Co. Litt. 234a; 2 Inst. 526, 625; Co. Litt. 3 b.

<sup>113</sup> 2 Inst. 527.

<sup>114</sup> 2 Inst. 566.

<sup>115</sup> 3 Inst. *Proeme*.

<sup>116</sup> 3 Inst. 207.

<sup>117</sup> 3 Inst. 148.

<sup>118</sup> 3 Inst. 147.

<sup>119</sup> 3 Inst. 162.

<sup>120</sup> 5 Rep. 91 b; 11 Rep. 82 b.

<sup>121</sup> 3 Inst. 194.

<sup>122</sup> 3 Inst. 199.

<sup>123</sup> 3 Inst. 200.

<sup>124</sup> 3 Inst. 209.

<sup>125</sup> 4 Inst. 32; 4 Inst. 83.

"No man ought to be condemned without answer." <sup>126</sup>

"The golden and streight metwand of the law and not the uncertain and crooked cord of discretion." <sup>127</sup>

"Peace is the mother of plenty, and plenty the nurse of suits." <sup>128</sup>

"Execution is the life of the law." <sup>129</sup>

In the chapter on Ambassadors, speaking of gold and silver money, he calls them "mute but moving ambassadors." <sup>130</sup>

"Hope is the dream of a waking man." <sup>131</sup>

"Earth is the suburbs of heaven." <sup>132</sup>

"The agreement of the parties cannot make that good which the law maketh void." <sup>133</sup>

"Three things be favoured in law: life, liberty and dower." <sup>134</sup>

"The law is the rule but it is mute. The Judges are the speaking law." <sup>135</sup>

"Justice is the daughter of the law, for the law bringeth her forth." <sup>136</sup>

"Certainty is the mother of quietness and repose." <sup>137</sup>

"When the courts of justice be open, it is time of peace." <sup>138</sup>

"A right cannot die: trodden down it may be, but never trodden out." <sup>139</sup>

"Everie man is presumed to make the best of his owne case." <sup>140</sup>

"Warranties are favoured in law, but estoppels are odious." <sup>141</sup>

"Extortion is no other than robbery but is more odious." <sup>142</sup>

<sup>127</sup> 4 Inst. 41; Co. Litt. 227 b.

<sup>128</sup> 4 Inst. 38.

<sup>128</sup> 4 Inst. 76.

<sup>129</sup> 4 Inst. 130; 5 Rep. 88 b; 2 Inst. 729.

<sup>130</sup> 4 Inst. 157.

<sup>131</sup> 4 Inst. 203. The same thought is ascribed to Aristotle, Plato and Quintilian.

<sup>132</sup> Co. Litt. 4 a.

<sup>133</sup> Co. Litt. 51 b.

<sup>134</sup> Co. Litt. 124 b.

<sup>135</sup> Co. Litt. 130 a.

<sup>136</sup> Co. Litt. 142 a.

<sup>137</sup> Co. Litt. 212a.

<sup>138</sup> Co. Litt. 249 b.

<sup>139</sup> Co. Litt. 279 a.

<sup>140</sup> Co. Litt. 303 b.

<sup>141</sup> Co. Litt. 365 b.

<sup>142</sup> 10 Rep. 101 b.

"Robbery is apparent and hath the face of a crime, but extortion puts on the visure of vertue for the expedition of justice."<sup>143</sup>

"Copyholders though very meanly descended, yet come of an ancient house."<sup>144</sup>

"A mischief is rather to be suffered than an inconvenience."<sup>145</sup>

"Nothing that is contrary to reason is consonant to law."<sup>146</sup>

"These informers were best trusted where they were least known."<sup>147</sup>

"Corporations have no souls."<sup>148</sup>

"Reason is the life of the law."<sup>149</sup>

"The realm of England is an Empire."<sup>150</sup>

"There be three kinds of unhappy men: He that hath knowledge and teacheth not; He that teacheth and liveth not thereafter; He that knoweth not and doth not enquire to understand."<sup>151</sup>

"The King's treasure is the sinews of warre."<sup>152</sup>

"Three marks of a libeller: Increase of lewdness, decrease of money, and shipwreck of conscience."<sup>152a</sup>

"It is less than a dream of a shadow or a shadow of a dream."

"As was excellently shadowed by the Trojan horse in Virgil's Second Book of his Aeneid."<sup>152b</sup><sup>152c</sup>

"The real worth of anything, Is just as much as it will bring."<sup>153</sup>

And Coke's loyalty prompted this praise of England's navy: "The King's navy excels all others in the world: for beauty they are so many royal palaces; for strength, so many moving castles, and for safety they are the most defensive walls of the realm. Among the ships of other nations they are like lions amongst silly beasts or falcons amongst fearful fowle."<sup>154</sup>

<sup>143</sup> Co. Litt. 368 b.

<sup>144</sup> Comp. Copy. § xxxii.

<sup>145</sup> Of Bail ch. xiii.

<sup>146</sup> Co. Litt. 56 b.

<sup>147</sup> 4 Inst. 172.

<sup>148</sup> 10 Rep. 32 b.

<sup>149</sup> Co. Litt. 319 b.

<sup>150</sup> 4 Inst. 342.

<sup>151</sup> Co. Litt. 232.

<sup>152</sup> Co. Litt. 90 b. Probably an ancient saying, apparently from Plutarch.

<sup>152 a</sup> 5 Rep. 126a.

<sup>152 b</sup> 7 Rep. 27a.

<sup>152 c</sup> 7 Rep. 18b.

<sup>153</sup> 3 Inst. 105.

<sup>154</sup> 4 Inst. 50; cf. 4 Inst. 147.

The "dull and crabbed" Coke was not, however, altogether devoid of a sense of humor, albeit of a somewhat dry vintage. His works are not exactly jest books, nevertheless there is an occasional word in lighter vein. It takes two, remember, to make a quarrel or a joke, him who speaks and him who hears,—the vibration of a note and the tuning fork in sympathy. He that hath ears to hear let him hear.

Coke doubtless noted with pleasure the names "Catcher and Skinner," as the sheriffs in Westby's case,<sup>155</sup> and in another case he observed that "the land lying near the ditch is drowned *ad dampnum*."<sup>156</sup>

Of conflicting sumptuary laws against excess of apparel, he says: "Some of them fighting with and *cuffing* one another"<sup>157</sup> He says: "The temporal Judge commits the party convict to the gaoler, but the spiritual Judge commits the person excommunicate to the devil,"<sup>158</sup> but notes that excommunication had no effect upon the wheat crop of the excommunicate.<sup>159</sup>

He derives *placitum* or plea, "*a placendo, quia bene placitare super omnia placet*, and not, as some have said, so called *quia non placet*."<sup>160</sup>

Of precedency among women: "The contention about precedency between persons of that sex is ever fiery, furious and sometimes fatal." <sup>161</sup>

In speaking of the posterity of Littleton, Coke said: "It quartereth many fair coats and enjoyeth fruitful and opulent inheritances thereby," and he added in the margin: "The best kind of quartering of arms."<sup>162</sup>

Of the white staff, the Lord Treasurer's badge of office: "When treasure failed the white staff served to rest him upon it, or to drive away importunate suitors."<sup>163</sup>

An infant being permitted to levy a fine before commissioners

<sup>155</sup> 3 Rep. 67 a.

<sup>156</sup> 9 Rep. 54 b.

<sup>157</sup> 3 Inst. 199.

<sup>158</sup> 12 Rep. 79.

<sup>159</sup> 3 Inst. 42.

<sup>160</sup> Co. Litt. 17 a.; Co. Litt. 303 a.

<sup>161</sup> 4 Inst. 363.

<sup>162</sup> Co. Litt. Pref.

<sup>163</sup> 4 Inst. 104.

who knew she was within age, the commissioners were every one of them *fined*, but the *fine* stands.<sup>164</sup>

He said as to ecclesiastical patronage which he exercised himself, says Campbell, with perfect purity: "Livings ought to pass by Livery and Seisin and not by Bargain and Sale."<sup>165</sup>

Lord Bacon tells us that Coke was wont to say when a great man came to dinner to him and gave him no notice of his coming: "Well, since you sent me no word of your coming, you shall dine with me; but if I had known of your coming, I would have dined with you."<sup>166</sup>

Partington's case he mentions as: "The honorable funeral of fond and new found perpetuities, a monstrous brood *carved out* of mere invention and never known to the ancient sages of the law. \* \* At whose solemn funeral I was present and accompanied the dead to the grave of oblivion but mourned not."<sup>167</sup>

"An oratour having spoken much in commendation of Hercules, it was demanded of one that stood by, *Quis vituperavit?* ad quod non fuit responsum."<sup>168</sup>

Occasionally Coke gives us some amusing mixed metaphors.—Of certain statutes: "They were so like labyrinths with such intricate windings and turnings, as little or no fruit proceeded of them."<sup>169</sup>

"To wind up the thred of this discourse with three acts of Parliament."<sup>170</sup>

"We have broken the ice, and out of our owne industry and observation framed this high and honorable building of the jurisdiction of courts."<sup>171</sup>

"This little taste shall give a light to the diligent reader."<sup>172</sup>

"But I perceive myself rashly running into an inextricable labyrinth; I will therefore sail no longer in these unknown coasts, but will hasten homewards."<sup>173</sup> But mixing metaphors was common enough in those days. Shakespeare "took up arms against a

<sup>164</sup> 12 Rep. 123.

<sup>165</sup> 1 Campbell, 343.

<sup>166</sup> Apothegms No. 133; 7 Spedding, 143.

<sup>167</sup> 10 Rep. Pref. x.

<sup>168</sup> 4 Inst. 12.

<sup>169</sup> 3 Inst. 204.

<sup>170</sup> 3 Inst. 224.

<sup>171</sup> 4 Inst. Epiloque.

<sup>172</sup> Co. Litt. 290 a.

<sup>173</sup> Co. Litt. 110 a.; 9 Rep. Pref. xxv.

sea of troubles." The language was plastic. A man who had two images in his mind at once did not hesitate to utter them together.

Coke was fond of etymology and liked to give or guess at the derivation of words. Of course he was wrong as often as correct, and as Lord Campbell said: "Some of his etymologies are as good for a laugh as Joe Miller or 'Punch.'" <sup>174</sup> There was no science of philology in his day, so he innocently supposed that the suffix—*ment* was the root of *mens*, the mind. Testament he derives from *testis* and *mens*, just as Parliament was supposed to be "*parler la ment*," speak the mind," &c. <sup>176</sup> But this definition of testament is given in *Justinian's Institutes*, <sup>177</sup> and Coke may be pardoned for assuming that the compiler of the *Institutes* understood the Latin language. Pages might be filled with funny specimens, such as "Gavelkind," from "gave all kinde," <sup>178</sup> *terra a terendo, quia vomere teritur*, <sup>179</sup> and "cadaver" from the first syllables of the words *caro data vermibus*. <sup>180</sup>

Coke gives us some entertaining stories from Hollingshed and others: "King Edward IV called before him the wealthiest of his subjects and demanded of each of them a certain sum of money. Amongst the rest there was a widow of a very good estate of whom the King merely asked what she would willingly give him for the maintenance of his wars. 'By my faith,' quoth she, 'for your lovely countenance's sake, you shall have twenty pounds;' which was more than the King expected. The King thanked her and vouchsafed to kiss her, upon which she presently swore he should have twenty pounds more." <sup>181</sup>

Then there is the rare and strange case of Margaret de Camoys, who was by deed of her husband given to Sir William Paynel. Coke recites at large the deed for the strangeness thereof, styling it "*concessio mirabilis et inaudita*." <sup>182</sup>

He gives the stories of Prince Henry and Chief Justice Gas-

<sup>174</sup> Hardcastle's *Life* ii, 261.

<sup>175</sup> Co. Litt. 322 b.; Co. Litt. 112 a; 10 Rep. 57 a.

<sup>176</sup> Co. Litt. 110 a. m.; Rep. Pref. xxv.

<sup>177</sup> B. ii, Tit. x.

<sup>178</sup> Co. Litt. 140 a. The common etymology when Coke wrote; Butler's note 224.

<sup>179</sup> 4 Rep. 37 b.

<sup>180</sup> 3 Inst. 203.

<sup>181</sup> 12 Rep. 119.

<sup>182</sup> 2 Inst. 435.

coyne,<sup>183</sup> of Robin Hood and Little John;<sup>184</sup> John Langton, Lord Chancellor Temp. Ed. I.,<sup>185</sup> and of King Canute and the sea;<sup>186</sup> the story of how the Abbott of Westminster and forty-eight of his monks broke into the Exchequer and feloniously robbed the King of a hundred thousand pounds, "*ad damnum inestimabile*," saith the record,<sup>187</sup> and the story of Radulphus de Ingham, Chief Justice of England, who altered the record of a fine after the term had passed out of pity for a poor defendant, and was compelled by way of fine to erect Westminster clock and clock house at a cost of £ 800.<sup>188</sup>

Coke is often accused of narrow-mindedness by those who have not studied or have not appreciated his life and works. He was doubtless a conservative, as all great lawyers are apt to be, but in many ways he was far ahead of his day and generation. He advocated the humane treatment of criminals in an age when barbarity was the rule, and that they should be speedily tried and encouraged to answer without fear.<sup>189</sup> He urged that prisoners should not be put in irons, or tortured or punished before hearing, citing Virgil's verses about Rhadamanthus, contrasting this with the Divine method, "*innocentem*," he says, "*cogit mentiri dolor*."<sup>190</sup>

"There are two great adversaries to the due execution of these laws, especially in criminal cases, viz.: *precipitatio et morosa cunctatio*. As for a man to be committed to prison and within so short a time to be indicted and arraigned as it is not possible for them to procure their witnesses \* \* \* . *In criminalibus probationes debent luce clariores*."<sup>191</sup> And again: "*De morte hominis nulla est cunctatio longa*."

He advocated humanity to the criminal insane,<sup>192</sup> and calls attention by an oft-quoted illustration to the danger of circumstantial evidence.<sup>194</sup>

<sup>183</sup> 3 Inst. 225.

<sup>184</sup> 3 Inst. 197.

<sup>185</sup> 2 Inst. 574.

<sup>186</sup> 3 Inst. 207.

<sup>187</sup> 4 Inst. 112.

<sup>188</sup> 4 Inst. 255. See as to Hengham's clock, Holdsworth's History, i,

91 n. 3; ii, 244.

<sup>189</sup> 2 Inst. 316, 381, 386; 3 Inst. 91.

<sup>190</sup> 3 Inst. 35; Luke xvi.1; John vij. 51.

<sup>191</sup> 3 Inst. 210.

<sup>192</sup> Co. Litt. 134 b.

<sup>193</sup> 3 Inst. 6.

<sup>194</sup> 3 Inst. 232.

In other of his suggestions he shows broadminded wisdom. Surely it was no harsh and narrow-minded man who said: "True it is that we have found by careful experience that it is not frequent and often punishment that doth prevent like offences, *praestat cantela quam medela*; those offences are often committed that are often punished, for the frequency of the punishment makes it so familiar that it is not feared. For example, what a lamentable case it is to see so many Christian men and women strangled on that cursed tree of the gallows, in so much as if in a large field a man might see together all the Christians that but in one year throughout England, come to that untimely and ignominious death, if there were any spark of grace or charity in him, it would make his heart to bleed for pity and compassion." Coke then advocates preventive justice; first, in the good education of youth, and their learning a trade in their tender years; secondly, in the execution of good laws; and thirdly, as many offend in the hope of pardon, that pardons be rarely granted.<sup>195</sup>

"Laws," he says, "without extreme punishment or penalty are better obeyed than laws made with great punishment,"<sup>196</sup> and "too severe laws are never duly executed."<sup>197</sup>

Coke was in favor of allowing the accused defendant in criminal cases the right to produce witnesses, and maintains that there was no authority in the common law for the contrary practice. This, he says, is for the better discovery of the truth, and he tells the story of his introduction by Lord Burleigh to the Queen as her Attorney General. "Madame," said the Lord Treasurer, "here is your Attorney General, *Qui pro domina regina sequitur*," whereupon Elizabeth said the form should be: "*Attornatus Generalis, qui domina veritate sequitur*."<sup>198</sup>

Something should be said about Coke's use of legal maxims. All the law books and reports abounded with them, *regulae*, as they were called, short, pithy sentences generally in Latin and intended to express or emphasize a general principle of law. They were like popular proverbs in common conversation. They

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<sup>195</sup> 3 Inst. Epilogue.

<sup>196</sup> 3 Inst. 24.

<sup>197</sup> 3 Inst. 163.

<sup>198</sup> 3 Inst. 79. The writer is informed by Charles C. Binney, Esq., that this anecdote suggested to Judge Jeremiah S. Black, when Attorney General, the legend on the seal of the Department; *Qui pro domina Justitia sequitur*.

point the argument and adorn the opinion. Coke's writings are filled with them and it would be interesting, if it were possible to trace their origin. Some were taken from the civil law; some from the canonists; some from the writings of Greek and Latin authors; some were familiar sayings, and it is more than likely that many were the coinage of Coke's private mint. Some modern writers deprecate their use, regarding them as inaccurate or misleading.<sup>199</sup> Undoubtedly they are the most general of general rules and often indicate little more than the point of view of him who uses them and should be employed with judgment in the light of experience, like tests of scripture. They are the result, however, of a serious attempt to reduce the law to scientific principles like axioms in geometry, and in many cases do really express general rules of law or public policy in a crystallized form. No one need hesitate to use such maxims as the following: "*Id certum est quod certum reddi potest*,"<sup>200</sup> "*Nemo punitur pro alieno delicto*,"<sup>201</sup> "No one can take advantage of his own wrong,"<sup>202</sup> "*Qui sentit commodum sentire debet et onus*,"<sup>203</sup> "*Qui facit per alium, facit per se*,"<sup>204</sup> "*Vigilantibus non dormientibus jura subveniunt*,"<sup>205</sup> "*Communis error facit jus*,"<sup>206</sup> "*Nemo debet bis puniri pro uno delicto*,"<sup>207</sup> "*Inclusio unius est exclusio alterius*,"<sup>208</sup> "No man can be a judge in his own cause,"<sup>209</sup> "*Melior est conditio possidentis*,"<sup>210</sup> "*Malus usus abolendus est*."<sup>211</sup>

Such maxims Coke would call: "A sure foundation or ground of art and a conclusion of reason."<sup>212</sup>

It is very easy for us with the fruits of historical research at our hand so painfully gathered by generations of students, to condemn Coke's errors, and even to call him, as did Maitland,

<sup>199</sup> Lord Esher in *Yarmouth v. France* 19. Q. B. D. 647.

<sup>200</sup> Co. Litt. 96 a.; 142 a.

<sup>201</sup> Co. Litt. 145 b.

<sup>202</sup> Co. Litt. 148.

<sup>203</sup> Co. Litt. 231 a.

<sup>204</sup> Co. Litt. 258 a.

<sup>205</sup> 2 Inst. 690.

<sup>206</sup> 4 Inst. 240.

<sup>207</sup> 11 Rep. 59 b.

<sup>208</sup> 11 Rep. 59 a.

<sup>209</sup> 12 Rep. 114.

<sup>210</sup> 2 Inst. 391; 2 Inst. 477; 4 Inst. 180.

<sup>211</sup> 4 Inst. 274.

<sup>212</sup> Co. Litt. 11 a. Bacon made a Collection of "Maxims of the Law."

“the credulous Coke.”<sup>213</sup> We may smile or frown at his etymologies, his belief in witchcraft, his views of trial by jury, his implicit faith in *The Mirror* and its stories about King Alfred and King Arthur.<sup>214</sup> Coke himself closed his labors with the words: “Blessed be the amending hand, Deo gloria et gratia,” and would repeat the sentiment now.<sup>215</sup> His faults, I have said, were the faults of his time, his excellencies those of all time. Let us overlook his errors in our gratitude for the mighty things which he accomplished for the Common Law.

This paper might readily be expanded to many times its length, but I shall conclude with something of what Coke said upon the subject which he loved most of all—the practice and the study of the law.

“No man can be a compleat lawyer by universalitie of knowledge without experience in particular cases, nor by bare experience without universalitie of knowledge; he must be both speculative & active, for the Science of the laws, I assure you, must join hands with experience. *Experientia* (saith the great Philosopher) *est cognitio singularium, ars vero universalium*. The learned Sages of the law doe found their judgment upon legall reason and judiciall President;

“But it is safe for the Client and for the Councillor also (if he respects his conscience) to follow Presidents formerly approved and allowed, and not to trust to any new frame carved out of his owne invention, for *Nihil simul inventum et perfectum est*.

“Read these Presidents (learned Reader) and reape in this faire and large field, the delectable and profitable fruits of reverend Experience and Knowledge; which you may doe with greater ease, for that more easily shall you learne by patterne than by precept; and they have beene so painfully and diligently weeded, as it cannot be sayd, that in this fruitfull field, *Infoelix lolium aut steriles dominantur avenae*.<sup>216</sup>

“Common law is nothing else but common reason, and yet we mean not thereby that common reason wherewith a man is

<sup>213</sup> *The Mirror*, 7 Seld. Soc. ix.

<sup>214</sup> 9 Rep. Pref.; 10 Rep. Pref.; 3 Inst. 224; 2 Inst. 498; 4 Inst. 78 &c. But Coke criticizes *The Mirror* upon occasion. 2 Inst. 339; 2 Inst. 377.

<sup>215</sup> 4 Insf. Epilogue, citing Plowden.

<sup>216</sup> Co. Entries Preface.

naturally endued, but that perfection of reason which is gotten by long and continuall study." <sup>217</sup>

"The knowledge of the law is like a deepe well, out of which each man draweth according to the strength of his understanding. He that reachest deepest, he seeth the amiable and admirable secrets of the law, wherein, I assure you, the sages of the law in former times have had the deepest reach. And as the bucket in the depth is easily drawne to the uppermost part of the water, but take it from the water it cannot be drawne up but with a great difficultie; so albeit beginnings of this study seem difficult, yet when the professor of the law can dive into the depth it is delightfull, easie and without any heavy burthen, so long as he keepe himself in his owne proper element."<sup>218</sup>

"Whilest we were in hand with these foure parts of the *Institutes*, we often having occasion to go into the city and from thence into the country, did in some sort envy the state of the honest plowman and other mechanics; for the one when he was at his work would merrily sing, and the plowman whistle some selfpleasing tune, and yet their work both proceeded and succeeded; but he that takes upon him to write, doth captivate all the faculties and powers both of his minde and body, and must be only intente to that which he collecteth, without any expression of joy or cheerfulness, whilest he is at work."<sup>219</sup>

"And for a farewell to our jurisprudent, I wish unto him the gladsom light of jurisprudence, the lovelinesse of temperance, the stabilitie of fortitude and the soliditie of justice."<sup>220</sup>

*Philadelphia.*

*John Marshall Gest.*

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<sup>217</sup> Cf. Co. Litt. 394 b.; 97 b.; Co. Litt. 191 a.; Co. Litt. 232 b.; Co. Litt. 319 b. 2 Inst. 179; 3 Inst. 100.

<sup>218</sup> Co. Litt. 71 a.

<sup>219</sup> 4 Inst. Epilogue

<sup>220</sup> Co. Litt. Epilogue.