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# Arbitrator of constitutional crisis : a study of Edward Coke: 1607-1628

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ARBITRATOR OF CONSTITUTIONAL CRISIS:  
A STUDY OF EDWARD COKE: 1607-1628

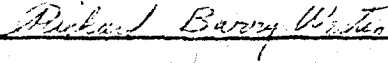
BY

FRANCIS REAMES BEERS

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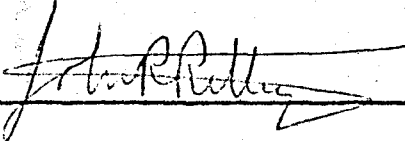
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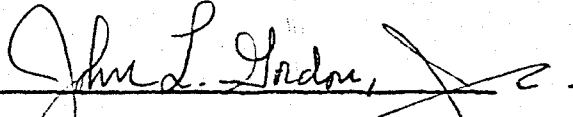
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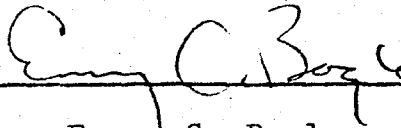
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## INTRODUCTION

Shortly after the Norman conquest, the king's justice became organized and regular, and superseded nearly all the functions of the ancient county and hundred courts. This rapid extension of the king's peace continued until it was the normal and general safeguard of public order.<sup>1</sup> The king centralized his power until it had expanded so greatly that Sir John Banks', Charles I's Attorney-General, could say with some truth: "Whatsoever was not granted from the crown remaineth in the person of the king."<sup>2</sup>

James I claimed that "the state of monarchy is the supermost thing upon earth. For kings are not only God's lieutenant upon earth and sit upon God's throne, but even by God Himself are called gods." Like God,

...they make and unmake their subjects. They have the power of raising and casting down, of life and of death, judges over all, and yet accountable to none but God only. They have the power to exalt low things and abase high things and make subjects like men at the chess, a pawn to take a bishop or knight, for to emperors or kings their subjects' bodies and goods are due for their defense and maintenance.<sup>3</sup>

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1. Frederick Pollock, "Anglo-Saxon Law," English Historical Review 8 (1893):252.

2. Chester and Ethyn Kirby, "The Stuart Game Prerogative," English Historical Review 46 (1931): 239.

3. D. Harris Willson, King James VI and I (New York, 1956), p. 243. Hereinafter cited as: Willson, James VI and I.

In Sir Edward Coke's earlier days, he too had been a supporter of the sanctity of the crown. In 1603, when Coke was Attorney-General, he prosecuted Sir Walter Raleigh for treason. In the trial Coke tried to ride roughshod over the defendant. With vigor he attacked Raleigh with remarks that were "shameful and unworthy" <sup>4</sup> of a man in his position. He was also careless at the quality of the evidence upon which he based his assertions. <sup>5</sup> With such judicial intimidation, the Attorney-General was able to secure <sup>6</sup> a verdict of guilty for the crown.

From his position as staunch supporter of the crown, Coke gradually underwent a metamorphosis. Finally Edward Coke became the man who stood in direct opposition to the royal prerogative as defined by James. Coke moved to the position that law--common law, or natural law, had an existence of its own, independent of all the will of man, even perhaps the will of God. <sup>7</sup>

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4. Catherine Drinker Bowen, The Lion and the Throne: the Life and Times of Sir Edward Coke: (1552-1634) (Boston, 1956), p. 195. Hereinafter cited as: Bowen, Lion and the Throne.

5. Samuel R. Gardiner, History of England from the Accession of James I to the Outbreak of the Civil War: 1603-1642, vol. 1, (London, 1900), p. 127. Hereinafter cited as: Gardiner, History of England.

6. A study of the trial is in: Bowen, Lion and the Throne, p. 190-217, and Gardiner, History of England, vol. 1, p. 120-138.

7. R.W.K. Hinton, "English Constitutional

James I was to fight for his prerogative, and Coke, from his position on the bench, was to oppose it. Coke explained the extent of the royal prerogative in the following manner:

It is a maxime, that the common law hath so admeasured the prerogative of the king, that they should not take away, nor prejudice the inheritance of any; and the best inheritance that a subject hath, is the law of the Realm....There is nothing more conducing to the good Weal of a state, than to live under the oeconomy of just and wholsome laws.<sup>8</sup>

If these opposing views had remained without conflict, the great constitutional developments of the seventeenth century would not have occurred then. But this was not to be, and the battleground became the bench upon which Coke sat, determined to uphold the office and duty of a judge which he believed was to:

Cherish the quiet and Peace of the Church, Clergy and people; that they would keep and observe the ancient laws and customes of the Kingdome which were received and established by consent of the whole people, and abrogate all such customes and laws which will ill and naught. And Lastly, that they would to the utmost of their powers, assure the Peace of the People and their kingdome, and procure it from

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Theories from Sir John Fortescue to Sir John Eliot," English Historical Review 75 (1960): 421. Hereinafter cited as: Hinton, "Constitutional Theories."

8. Com Cooke, Magna Charta Made in the Ninth Year of King Henry the Third and Confirmed by K. Edward the first in the twenty-eight year of his Reign with Some Short, but Necessary Observations from the Chief Justice Coke's Comments Upon It (London, 1680), preface.

9  
others.

And in upholding his judicial office, the root of Coke's thought became his firm belief that the law was purely an insular product<sup>10</sup> from which he made the common law the supreme law in the realm. The sole exponents of this supreme law were the judges who became unfettered and uncontrolled, save by the law.<sup>11</sup> It was because of his profound knowledge of the common law of England and his commitment to its supremacy that Coke stands unrivaled. As a judge he was not only above suspicion of corruption but at great risk he displayed an independence and dignity of deportment which would have deserved the highest credit even if he had held tenure and could have defied the displeasure of the government.<sup>12</sup> Even one of his staunchest rivals, Lord Campbell, could only extol Sir Edward as a judge:

Although holding his office at the pleasure

9. John Cowell, The Institutes of the Lawes of England Digested into the Method of Civil and Imperiall Institutions (London, 1651), p. 249.

10. J.G.A. Pocock, The Ancient Constitution and the Feudal Law (New York, 1967), p. 63. Hereinafter cited as: Pocock, Ancient Constitution.

11. William Holdsworth, "Sir Edward Coke," Some Makers of English Law: the Tagore Lectures: 1937-1938 (Cambridge, 1938), p. 115. Hereinafter cited as: Holdsworth, Some Makers of English Law.

12. John Gist, "The Writings of Sir Edward Coke," Yale Law Journal 18 (1909): 515. Hereinafter cited as: Gist, "Writings of Sir Edward Coke."



of a King and Ministers disposed to render the Courts of Justice the instruments of their own tyranny and caprice, he conducted himself as much lofty independence as any who have ornamented the Bench.<sup>13</sup>

Coke's independent nature helped make the first half of the seventeenth century the turning-<sup>14</sup> point in English constitutional and legal history. This paper will deal with some of those constitutional conflicts involving Sir Edward Coke that helped to transform English law.

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13. Charles Warburton James, Chief Justice Coke: His Family and Descendants at Holkham (London, 1929), p. 31. Hereinafter cited as: James, Coke: His Family.

14. Holdsworth, Some Makers of English Law, p. 111.

## EDWARD COKE ON THE BENCH

Sir Edward Coke's first attack on the established system of laws was against Archbishop Bancroft's disciplinary body, the Ecclesiastical High Commission, which had been authorized in 1559, by an act of parliament, to keep order within the Established Church, discipline the clergy and punish such lay offenses as were included in the ecclesiastical jurisdiction. Since James's accession to the throne, the Commission had grown larger and called itself a court--the Court of High Commission.<sup>1</sup>

The conflict between the ecclesiastical courts and the courts of common law was not new, but came to a head during the reign of James I. The temporal courts had been accustomed to enforcing their monopoly of temporal jurisdiction by issuing "writs of prohibition"<sup>2</sup> forbidding the spiritual court from proceeding further in particular cases which might come

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1. Bowen, Lion and the Throne, p. 295.

2. Blackstone defines a prohibition as a "Writ issuing properly only out of the court of King's Bench, being the King's prerogative writ; but, for the furtherance of justice, it may also be had in some cases out of the court of chancery, common pleas, or exchequer; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court." William Blackstone, Commentaries on the Laws of England, vol. 3, (Oxford, 1758), p. 112. Hereinafter cited as: Blackstone, Commentaries.

before the High Commission until the judges had determined that the case raised a spiritual question and did not fall within temporal jurisdiction. Thus the courts of common law claimed an unqualified superiority, for they asserted their right to decide the limits of ecclesiastical jurisdiction.<sup>3</sup>

The church in these conflicts would usually sue for tithes to the church, and the defendant would apply for redress to the courts of common law. Then, if the church brought suit in the common law court, the defendant would be entitled to a trial by jury. Since the jury would ordinarily consist of fellow farmers who might find themselves in the same position, there was little doubt of an innocent verdict.<sup>4</sup> To stem this erosion of the High Commission's power, in 1605 Archbishop Bancroft presented complaints to the Star Chamber in the form of twenty-five elaborate articles of grievances against the common law courts. Bancroft seems to have been willing to have placed the total power of prohibition in the hands of the Courts of Chancery, but the common law judges, who were aware that Chancery was more political in nature, declared;

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3. J.R. Tanner, English Constitutional Conflicts of the Seventeenth Century: 1603-1689 (Cambridge, 1947), p. 34. Hereinafter cited as: Tanner, Constitutional Conflicts.

4. Hastings Lyon and Herman Block, Edward Coke: Oracle of the Law (Boston, 1929), p. 173. Hereinafter cited as: Lyon, Oracle of the Law.

No man maketh any question but that both the jurisdictions are lawfully and justly in his Majesty, and if any abuses be, they ought to be reformed; but what the law doth warrant in cases of prohibitions to keep every jurisdiction in his true limits, is not be said an abuse, nor can be altered but by Parliament.<sup>5</sup>

This effectually silenced the Archbishop, who knew how little he had to hope from the Commons. But it was this appeal to parliament which raised this jurisdictional dispute to the "dignity of a constitutional event."<sup>6</sup>

The dispute simmered until 1607, when a new law dictionary by John Cowell, entitled The Interpreter, dedicated to Bancroft, defined the word "king" as follows: "He is above the law by his absolute power; he may alter or suspend any particular law that seemeth hurtful to the public estate."<sup>7</sup> This claim of royal power was commensurate with Bancroft's appeal to the vanity of James by urging him to endorse this definition of his powers as monarch.

The entire affair was brought to a head when a Puritan lawyer, Nicholar Fuller, was imprisoned for contempt for insulting the bishops, while trying a

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5. J.R. Tanner ed., Constitutional Documents of the Reign of James I: A.D. 1603-1625 with an Historical Commentary (Cambridge, 1930), p. 178. Hereinafter cited as: Tanner, Constitutional Documents.

6. Gardiner, History of England, vol. 2, p. 36.

7. For a complete view of the theories of the

case before the Court of High Commission. Fuller then applied for a writ of prohibition, which infuriated James, who declared that if Fuller escaped punishment he would call the Council before him and censure the common law justices in person. The twelve judges met to discuss the point of law and maintained the right of the common law judges to prevent the High Commission from deciding the legality of its own acts; but they also expressly acknowledged its claim to punish schism and heresy. The judges, though at first inclined to defend Fuller by a writ of prohibition, saw the need to satisfy the king's objections. They avoided a confrontation with James on the technical grounds that Fuller's words fell within the scope of the High Commission's power to punish schism and heresy, and denied Fuller the writ.<sup>8</sup> Archbishop Bancroft was not satisfied by the legal maneuvers of the judges and appealed directly to the king, because the decision had not succeeded in stopping the flood of prohibitions; it had only side stepped a head-on collision.

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author of The Interpreter see: S.B. Chrimes, "The Constitutional Ideas of Dr. John Cowell," English Historical Review 64 (1949):461-487.

8. Sir Edward Coke, The Twelveth Part of Certain Select Cases in Law Reported by Sir Edward Coke, Rt. Late Lord Chief Justice of England and One of His Majesty's Council of State (London, 1738), p. 44. Hereinafter cited as: Coke, The Twelveth Part of Certain Select Cases.... Willson, James VI and I, p. 258. Gardiner, History of England, vol. 2, p. 40.

The king then summoned Coke and some of the other judges to Whitehall to discuss the general question with the ecclesiastical lawyers. James saw himself as an arbitrator to decide the issues. In his own words he declared:

The King is the Supreme judge; inferior judges his shadows and ministers...and the king may, if he pleases, sit and judge in Westminster Hall in any Court there, and call their Judgements in question....The King being the author of<sup>9</sup> the Laws is the interpreter of the Laws.

It can clearly be seen, that at this point, James had definite predetermined ideas concerning his authority over the two opposing sides. This is further bolstered by his opening statement to the session:

When the controversy ariseth to the subjects of both parts; namely when the controversy ariseth upon the jurisdiction of my Courts of ordinary justice; and because I am the Head of justice immediately under God... I thought that it stood with the office of a King, which God hath committed to me, to hear the Controversy between the Bishops and other of his Clergy, and the Judges of the Laws of England, and to take Order [that] the one does not encroach upon the other, but that every of them, hold themselves within their natural and local jurisdiction.<sup>10</sup>

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9. Roland Usher, "James I and Sir Edward Coke," English Historical Review 18 (1903):664. Hereinafter cited as : Usher, "James I and Coke."

10. Sir Edward Coke, The Thirteenth Part of Certain Select Cases in Law Reported by Sir Edward Coke, Rt. Late Lord Chief Justice of England and One of His Majesty's Council of State (London, 1738), p. 38. Hereinafter cited as : Coke, The Thirteenth Part of Certain Select Cases....

As the meeting wore on, James became irate at some speeches he considered offensive, especially when Sir Edward Coke said that "the common law protecteth the King." James retorted:

A traitorous speech! The King protecteth the laws and not the laws the King. The King maketh Judges and Bishops. If the Judges interpret the laws themselves and suffer none else to interpret, then they may easily make, of the laws, shipmen's hose.<sup>11</sup>

Sir Edward describes what happened next:

Then the King said that he thought the law was founded upon reason and that he and others had reason as well as the judges. To which it was answered by me that true it was God, that, had endowed his Majesty with excellent science and great endowments of nature, but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgement of law, which law is an act which required long study and experience before that a man can attain to the cognizance of it; and that the law was the golden metwand and a measure to try the causes of the subjects, and which protected his Majesty in safety and peace: with which the King was greatly offended, and said that then he should be under the law, which was treason to affirm, (as he said): to which I said that Bracton saith quod Rex non debet esse sub homine,

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11. John Nichols, "Letter of Mr. Chamberlain to Dudley Carleton," The Progresses, Processions, and Magnificent Festivities of K. James First, vol. 2, (London, 1828), p. 210. Hereinafter cited as: Nichols, The Progresses...of King James I. Usher sees the account used here, by Sir Julius Caesar, as being the most accurate report of the conflict between James and Coke. Usher, "James I and Coke," p. 669. There are no less than four separate accounts of the meeting. Ibid., p. 669.

sed sub Deo et Lege. that the king should not be under man, but under God and the laws.<sup>12</sup>

In deference to the unanimous opinion of his judges, James did not again allow himself to be allured by the vision of an English King Solomon.<sup>13</sup> It is clear that Coke and his fellow judges gave a new turn to the theory of the subordination of church to state expressed in the preamble to Henry VIII's Statute of Appeals. It would seem that, in their eyes, the church and its courts were subject not only to the royal supremacy, but also to the control of the common law. Whether such an interpretation carried out the intention of Henry VIII is more than doubtful. Also, of particular importance in this struggle was the insistence of Coke upon the exclusive right of parliament to change

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12. Tanner, Constitutional Conflicts, p. 36-37. Coke never lost his reverence for the law and the experience that was required to master it. "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 drawn up but with a great difficultie; so albeit beginnings of this study seems difficult, yet when the professor of law can dive into this depth it is delightful, easie, and without heavey burthen, so long as he keeps himself in his own proper element." Gist, "The Writings of Sir Edward Coke," p. 532.

13. Coke, The Twelveth Part of Certain Select Cases..., p. 63-65.



the laws of England, and his vigorous opposition to claims of any right, even by the king, to change the laws of the land. The result of the victory of Coke's views was to fix firmly these doctrines in English<sup>14</sup> law.

The most controversial judicial dictum of Coke's life came in the case involving Dr. Thomas Bonham, a London physician. Dr. Bonham was practicing medicine without a certificate from the Royal College of Physicians, which was empowered by statute to fine and imprison any unlicensed practitioners, with half the fine going to the crown and the other to the college.<sup>15</sup> The college censors arrested Bonham and put him in the Fleet, whereupon he brought action for false imprisonment. The censors' defense centered around the argument they were only following statutory law as prescribed by parliament.

Coke first noted that the statute gave the college one half of each fine collected, thus making the censors at once judge and party to every case they brought to court. This, explained Coke, contradicted a maxim of the common law: No man ought to be a judge in his own case; "Aliquis non debet esse iudex in

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14. W.S. Holdsworth, A History of English Law, vol. 5, (London, 1945), p. 471. Hereinafter cited as: Holdsworth, History of English Law.

15. Theodore F. Plucknett, "Bonham's Case and Judicial Review," Harvard Law Review 40 (1926): 32. Hereinafter cited as: Plucknett, "Bonham's Case."

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propria causa."

On the question of party and judge in the same case, the statute should have been disallowed, but Coke felt the necessity of curbing the rising arrogance of both crown and parliament. In solution Coke used the idea of a fundamental law<sup>17</sup> which limited both indifferently. In short, Coke was aiming at an independent judiciary powerful enough to bring both king and parliament into line<sup>18</sup> when he delivered the rest of the opinion:

And it appears in our books, that in many cases the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act is against common right and reason, or repugnant, or impossible to be preformed, the common law will control it, and adjudge such an act to be void.<sup>19</sup>

It would be very hazardous to assume that we can accurately reconstruct the court's sentiment upon the subject of voiding laws passed by parliament, and

16. Ibid., p. 34.

17. When the people in the seventeenth century talked about a fundamental law they meant the rights which existing law gave them, and that the supremacy of law in England meant the supremacy of a law which parliament could change. Holdsworth, History of English Law, vol. 2, p. 441; vol. 4, p. 187.

18. J.W. Gough, Fundamental Law in English Constitutional History (Oxford, 1955), p. 31. Hereinafter cited as: Gough, Fundamental Law.

19. R.A. Mackay, "Coke--Parliamentary Sovereignty or the Supremacy of the Law?," Michigan Law Review 22 (1923): 222. Hereinafter cited as: Mackay, "Parliamentary Sovereignty."

herein lies the basic constitutional conflict involved in the Bonham Case. Despite Coke's worship of the common law and his sincere belief that it was more reasonable, more just than any statute which may set it aside, and despite the opinion that parliament was frequently a meddling powerful and sometimes ignorant body, he had never declared the common law beyond parliament's reach. He, instead, spoke of correcting the law, yet it is hardly conceivable that if he had any idea of a law beyond the power of parliament, or so perfect that it could not legally be changed, Coke would have omitted to mention the fact.<sup>20</sup> When he wrote that the common law would "control" an act of parliament, Coke meant that the courts would interpret it in such a way as not to conflict with the accepted principles of reason and justice which were presumed to underlie all law.<sup>21</sup> Also, "common right and reason" does not refer to any particular body of law, but seems to point conclusively to common sense or the general reasonableness of the law, and nothing else; but it must be remembered that it is the common sense of those learned in the law, or to use Coke's own words, the "artificial reason" of the law.<sup>22</sup>

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20. Ibid., p. 220-221.

21. Gough, Fundamental Law, p. 35.

22. MacKay, "Parliamentary Sovereignty," p. 229.

There had been some doubt about what Coke meant by "repugnant." In his judgment in *Rowles & Mason*,<sup>23</sup> delivered shortly after (and in reference to) *Dr. Bonham's Case*, Coke suggests that by repugnant he meant something comparable if not equivalent to "unreasonable."<sup>24</sup> A repugnancy, then, is a contradiction; it occurs when a statute provides one thing, and then through oversight perhaps, creates its opposite.<sup>25</sup>

When he spoke of "adjudging an act void," he did not mean that the court could declare it to have been beyond the power of parliament to enact, but that the court could construe it strictly, if this were necessary to bring it into conformity with recognized principles. An act could not be declared unconstitutional in the modern sense, but, in short, this opinion gave the right of strict construction in the courts.<sup>26</sup> The general opinion of constitutional scholars is that Coke

23. "If there be repugnancy in statute or unreasonableness in custom, the common law disallows and rejects it, as it appears by *Dr. Bonham's Case*." *Rowles & Mason*, 2 *Brownlow* 198.

24. Gough, Fundamental Law, p. 36-37.

25.. Though not technically a repugnancy, certainly a statute making a man judge his own case and a self-contradictory statute might well be regarded as cognate, and as Coke presented his precedents on statutes repugnant and statutes impossible to be performed, his theory of a statute against common right and reason took form. S.E. Thorne, "*Dr. Bonham's Case*," Law Quarterly Review 54 (1938): 549.

26. Gough, Fundamental Law, p. 35. MacKay, "*Parliamentary Sovereignty*," p. 229.

was here attempting to appeal to natural law, or  
 higher law, or fundamental law.<sup>27</sup>

Coke, himself, did not take the concept of  
 strict construction of the law lightly.<sup>28</sup> He wrote:

The laws of England consist of three parts. The Common law, customs, and acts of Parliament: for any fundamental point of the ancient laws and customs of the realm, it is a maxim in policy, and a trial by experience, that the alteration of any of them is most dangerous; for that which hath been refined and perfected by all the wisest men in former succession of ages, and proved and approved by continual experience to be good and profitable for the commonwealth, cannot without  
 great hazard and danger be altered or changed.<sup>29</sup>

Therefore, to Coke the common law had to be found, not made, but it was not Coke who developed and expounded upon his theory, but generations of later judges and lawyers. His views were in conformity with Chief Justice Hobart, who in 1615, claimed broad power in judicial review: "If you ask me, then, by what rule the judges guided themselves in this diverse exposition of the self same work and sentence? I answer, it was by that liberty and authority that judges have over laws,

27. Frederick Pollock, The Expansion of the Common Law (London, 1904), p. 122.

28. Maitland states that Coke distinctly claims that the judges may hold a statute void, either because it is against reason and natural law, or because it trenches on the royal prerogative. 8 Report 118: But this view may not have been Coke's at the time of the Bonham decision.; F.W. Maitland, The Constitutional History of England: A Course of Lectures (Cambridge, 1908), p. 300.

29. Mackay, "Parliamentary Sovereignty," p. 217.

especially over statute laws, according to reason and best convenience, to mold them to the best use...."<sup>30</sup>

But the issue of judicial review was not settled quickly, for even Blackstone seems to have changed his mind on the subject. In the 1765 edition of his Commentaries he stated:

Lastly acts of parliament that are impossible to be performed are of no validity; and if there arise out of them collaterally any absurd consequences, manifestly to common reason, they are, with regard to those collateral consequences void....if parliament will positively enact a thing to be done which is unreasonable, I know no power that can controll it: and the examples usually alledged in support of this sense of the rule do none of them prove that where the main object of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive to all government...there is no court that has the power to defeat the legislature.<sup>31</sup>

In 1765, Blackstone opposed the theory of judicial review, but there is a note, said to be in Blackstone's own hand, found in the margin of a copy of the 1778 edition, which when injected into the text, makes the third sentence read: "But the Parliament will positively enact a thing to be done which is unreasonable, I know of no power 'in ordinary forms of the Constitution that is vested with authority' to control it."<sup>32</sup> Though

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30. Plucknett, "Bonham's Case," p. 50.

31. Blackstone, Commentaries, vol. 1, (Oxford, 1765), p. 91.

32. Plucknett, "Bonham's Case," p. 60.

the wording here is extremely vague, many American legal historians suggest that these qualifying words, found printed in the posthumous editions,<sup>33</sup> show Blackstone supporting Coke's theory.<sup>34</sup>

In general, many American writers, lawyers and historians, have judged Coke's theory more sympathetically because they have seen in his attitude an important and interesting forerunner of the principle of judicial review, which though rejected in England, came to fulfillment in the United States. English lawyers, on the other hand, while accepting this interpretation of Coke's intention, have treated his efforts as an ill-judged excursion from the main current of English legal development, which fortunately came to nothing and let it flow, majestic and unimpeded, into the modern doctrine of legislative sovereignty. These critics have treated Coke's remarks as "dicta,"<sup>35</sup> uncalled for and unessential to the case he was trying. But no matter which view one takes, English or American, few will argue that it was in the Middle Ages and in the sixteenth century that the lawyers helped make the English

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33. This wording is definitely printed in the 1786 edition. Blackstone, Commentaries, vol. 1, (London, 1786), p. 96.

34. Josiah Quincy, Quincy Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772 (Boston, 1865), p. 526.

35. Gough, Fundamental Law, p. 32.

parliament an effective representative assembly. Seventeenth century parliaments handsomely repaid this debt by helping Coke maintain the medieval conception of the supremacy of law, and apply it to the government of a modern state. In this matter England became a model both to the framers of the constitutions in the continental countries and the United States. Through this evolution, the Supreme Court of the United States became the body which safeguards, more effectually than any other tribunal in the world, Coke's ideal of the supremacy of the law.<sup>36</sup>

By 1610, another important conflict had arisen over the issue of government by proclamation. There were cases in which the king had the right to issue proclamations which had the force of law. But these cases were restricted to invasion, internal rebellion, or when the danger was so imminent that parliament could not be consulted.<sup>37</sup> The problem was that the parliaments failed to stop the royal encroachment on their authority.<sup>38</sup> In the seven years of his reign, James I had

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36. Holdsworth, Some Makers of English Law, p. 131.

37. Francis S. Sullivan, Lectures on the Constitution and Laws of England with a Commentary on Magna Charta, and Illustrations of Many of the English Statutes, vol. 1, (Portland, 1805), p. 321.

38. Matthew Hale, The Analysis of the Law: Being a Scheme, or Abstract, of the Several Titles and Partitions of the Law of England, digested in Method (London, 1716), p. 12. Blackstone summarized the situat-



expedited more proclamations than Elizabeth had in the entire last thirty years of her reign.<sup>39</sup> This controversy simmered until 1610, when there was a poor wheat harvest and James restricted the use of wheat in making starch while the Commons still had the matter under legislative consideration.

In response to the king's action, the Commons petitioned James:

...that all impositions set without the assent of Parliament be quite abolished and taken away; and that your Majesty, in imitation likewise of your noble progenitors, will be pleased, that a law may be made during this session of Parliament, to declare that all impositions set or to be set upon your people, their goods or merchandise, save only by common assent in Parliament, are and shall be void....<sup>40</sup>

James took no immediate action on the Common's petition but waited until Coke returned from riding circuit to request an opinion from the judges.. The Lord Chancellor advised the judges to "maintain the power and

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ion: "It must be however remarked that (particularly in his later years [Henry VIII]) the royal prerogative was then strained to a very tyrannical and oppressive height; and, what was the work of circumstance, its encroachments were established by law under the sanction of those pusillanimous parliaments, one of which to its eternal disgrace passed a statute, whereby it was enacted that the King's proclamations should have force of acts of parliament." Blackstone, Commentaries, vol. 4, (1758), p. 424.

39. Rule by proclamation had been a problem under Elizabeth, but never to the magnitude of James' reign. Bowen, Lion and the Throne, p. 319.

40. G.W. Prothero ed., Select Statutes and other Constitutional Documents Illustrative of Elizabeth and James I (Oxford, 1898), p. 302.

prerogative of the king; and in cases in which there is no authority and precedent, to leave it to the king to order it according to his wisdom...otherwise the king would be no more than the Duke of Venice...."<sup>41</sup>

But Sir Edward had his own view of the situation:

When the authority and precedent is wanting, there is a need of great consideration before anything of novelty shall be established, and to provide that this be not against the law of the land; for I said that the King cannot change any part of the common law, nor create an offense by his proclamation which was not an offense before, without parliament.<sup>42</sup>

Once again the weight of Coke's view carried the judges, who ruled that the king could not create any offense by his proclamation. He could only admonish his subjects to keep the law. Nor could he, by proclamation, make offenses punishable in the Star Chamber which were not by law under the jurisdiction of that court. That there might be no doubt of the opinion, the judges "formally declared that the King had no prerogative but that which the law of the land allowed him."<sup>43</sup>

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41. Holdsworth, History of English Law, vol. 4, p. 396.

42. Henry Hallam, The Constitutional History of England from the Accession of Henry VII to the Death of George II, vol. 1, (New York, 1846), p. 331. Hereinafter cited as: Hallam, Constitutional History.

43. Gardiner, History of England, vol. 2, p. 104. This decision was a severe blow to James, for in his The Trew Law of Free Monarchies he wrote that the king could make both statutes and ordinances without "any advice of Parliament or Estates." James felt he needed no power, save his own to enact laws.

The king meekly accepted the adverse decision, but, as usual, made no concession with respect to the Ecclesiastical Commission, and evaded some of their other requests, but promised that his proclamations would go no further than warranted by law.<sup>44</sup>

Coke and the Commons had gained their point. Their decision would stand. In a few words, Coke had again set forth salient features of the constitution.

James did not forget Coke's actions against the crown. By April 7, 1613, there was a vacancy on the King's Bench and Francis Bacon immediately recommended that Coke be appointed to the position of Chief Justice. Coke opposed this promotion because he knew that it would remove him from the position of being arbitrator between the crown and subject. James was determined to remove his antagonist from the Common Pleas and Coke was forced to accept the promotion. This upward promotion of Coke has been accepted by the majority of historians as an attempt by James to deter others from offending the crown as Sir Edward had so often done. But to the king's chagrin, this "penal promotion" did not silence the lawyer for long.

In a contest which threatened the judges' professional dignity and personal income, Coke's colleagues were willing enough to follow his lead; but

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44. Hallam, Constitutional History, vol. 1, p. 324.

when he launched himself into a personal battle with King James, they predictable abstained. The gulf between Coke and his fellow judges emerged in 1615, in Peacham's case, where Coke insisted, in the face of established custom and precedent, that the king had no right to consult the judges individually before they tried a case.<sup>45</sup>

Edmund Peacham, Rector of Hinton St. George, in Somerset, was frequently in trouble with the authorities because of his Puritan sympathies, and was finally imprisoned because of some intemperate accusations made against his bishop. While in prison, his house was searched and some rough notes for a sermon were found which read:

The people might rise in rebellion against these new taxes...all the King's officers ought to be put to the sword, and when Prince Charles assumed the throne, might not the people say, Come, this is the heir, let us kill him? King James had promised mercy and judgement, but we find neither. It is the duty of preachers to lay open the infirmities of princes and let them see their evil ways....On a sudden the King might be stricken with death, perhaps<sup>46</sup> within eight days, as Ananias or Nabal.

James read these words and old fears enveloped him. The royal bed was moved against the wall and barricaded with feather mattresses. James feared a conspir-

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45. J.P. Kenyon, ed., The Stuart Constitution: 1603-1688: Documents and Commentary (Cambridge, 1966), p. 97.

46. Bowen, Lion and the Throne, p. 351.

acy, so he ordered Peacham examined under the manacles. He was put to the rack and examined with various interrogations, "before torture, between torture and after torture,"<sup>48</sup> He would implicate no one and justified his conduct by saying that it was by the examples "of preachers and chronicles [that] king's infirmities should be laid open."<sup>49</sup>

James then decided that before bringing Peacham to open trial, it would be wise to consult the judges singly, to reveal their true opinions, and to minimize Coke's effect. Also, Attorney-General Bacon felt that the prosecution had to be successful to prevent outbreaks of civil disorder incited by writings like Peacham's. He feared that if Peacham's writings were not held to be treasonable, the country would be flooded with seditious writings. There can be no doubt that Bacon sought

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47. Though the common law expressly rejected the use of torture, it was generally understood that the Council had the right of obtaining information by this means, whenever the needed evidence was sufficiently important to render it necessary to appeal to such a mode of extracting a secret. Gardiner, History of England, vol. 2, p. 275. Holdsworth feels that anyone who is familiar with the character of the continental criminal procedure will agree that the eventual elimination of torture from the English criminal code, which was a result of the victory of the commons law, far outweighs the disadvantages that victory might have entailed. Holdsworth, History of English Law, vol. 5, p. 170-176.

48. Hallam, Constitutional History, vol. 1, p. 331.

49. Gardiner, History of England, vol. 2, p. 273.

to protect only the interests of the crown and not merely to prosecute a vendetta against the unlucky Peacham.<sup>50</sup>

Therefore, Bacon approached each of the judges and asked his opinion concerning the case. Through three meetings, Coke remained steadfast. He refused to give his opinion declaring that "'this auricular taking of opinions, single and apart, was new and dangerous; and other words more vehement than I repeat.'"<sup>51</sup> Finally, during the fourth meeting, Coke delivered the opinion--but not the verdict that Bacon expected--that Peacham was not guilty. There were two basic issues upon which Coke questioned the treasonable nature of Peacham: (1) the work was never set to print, and (2) the writing as it stood was not treason in any sense of the word. Coke boldly asserted that no mere declaration of the king's unworthiness to govern amounted to treason.<sup>52</sup>

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50. Willson, James VI and I, p. 380. Gardiner, History of England, vol. 2, p. 277 and 280.

51. Tanner, Constitutional Conflicts, p. 39. Coke is wrong because it was not an innovation to consult the judges in this manner. There had been many instances of it, as in Sir Walter Raleigh's case, where Coke knew the judges had been consulted, and other cases in Elizabeth's reign. Hallam, Constitutional History, vol. 1, p. 337 and 343.

52. Gardiner, History of England, vol. 2, p. 279. It seems that Coke chose to overlook the 1351 Statute of Treasons in his opinion and is therefore incorrect in his conclusions as drawn here.

James expressed his fury at Coke's refusal to capitulate:

That his writing of this libel is an overt act, the judges themselves do confess: that it was made for publication, the form of it betrays the self; that he kept not these papers in a secret and safe fashion but in an open house and lidless cask, both himself and the messenger do confess....May, he confesses that in the end he meant to preach it....

The only question that remains then is, whether it may be verified and proved that by the publishing of this sermon, or rather libel of his, he compasses or imagined the King's death....So the only thing the Judges' can doubt is of the delinquent's intention; and then the question will be, whether if these reasons be stronger to enforce the guiltiness of his intention, or his base denial to clear him, since nature teaches every man to defend his life as long as he may....<sup>53</sup>

In view of Coke's strong rebuke, James through Bacon, did not bring Peacham before the Court of King's Bench, but sent him to trial at Taunton where the outspoken preacher was sentenced to death for treason. Before sentence could be carried out, Peacham died from his torture and the unhealthy conditions in the jail.<sup>54</sup>

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53. Tanner, Constitutional Documents, p. 191-192. It was James who was correct in asserting that Peacham had committed treason. It is treason to "compass or imagine the death of the King." Statute of Treasons 1351, 25 Edward III stat. 5, chap. 2.

54. James was to hold this opinion against Coke. In 1616, Coke's offenses against the crown, entitled Innovations into the Laws and Government, records one charge that referred directly to the Peacham case. It charged that Coke felt that "no words of scandal or defamation, importing that the King was utterly unable or unworthy to govern, were treason," Bowen, Lion and the Throne, p. 387.

Even though Peacham was found guilty, it was in 1615, that Coke laid down the maxim that it was contrary to the law to ask judges separately to give their opinions whether certain acts charged against an accused person amounted to high treason. It would have to wait until a later day, when he was no longer judge, for Coke to object to the entire practice of consulting the judges in any manner concerning pending decisions. When Sir Edward wrote his Institutes<sup>55</sup> in 1628, he was totally opposed to any outside interference with the judicial process. The maxim of the independence of the judiciary became so engrained in English constitutional development that no king since the fall of the Star Chamber has sought "to act as judge."<sup>56</sup>

Since Coke had been appointed to the bench, he had been a thorn in James' side. In the year 1616, Coke led a determined but unsuccessful resistance to an

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55. Coke gives this advice to judges: "And you honourable and reverend Judges and Justices, that do, or shall sit in the High Tribunals or Seats of Justice, feare not to do right at all, and to deliver your opinions justly according to the Law; for feare is nothing, but a betraying of the succours that reason can afford, and if you shall sincerely execute justice, be assured of three things: First, though some may maligne you, yet God will give you his blessing. Secondly, that though you may offend Great men and Favourites, yet you shall have the favourable kindness of the Almighty, and be his Favourites against all scandalous complaints and pragmaticall devices. And, lastly, God will defend you as with a shield." James, Coke: His Family, p. 35.

56. Maitland, Constitutional History, p. 270, 438, and 479.



attempt by the crown to delay proceedings in a case where the royal prerogative was concerned. Coke's position in the case of the Commendam was so bold a break with James that "the Lord Coke fell in disfavor... and many men feared it would be his utter overthrow."<sup>57</sup>

The case began when Bishop Neile was given the land in the See of Lichfield in commendam, but this appointment was disputed by two other persons who claimed that the presentation was theirs and not the king's. The two, Colt and Glover, carried the case before the Exchequer Chamber where they questioned the king's right to make presentations in commendam at all. At this point James intervened in defense of his prerogative.<sup>58</sup>

The king instructed Attorney-General Bacon to communicate with Coke and the other judges. On April 25, 1616, Bacon wrote Coke:

The day appointed for the further proceedings by arguments of the judges in that case, be put off until His Majesty's further pleasure

57. Nichols, "Letter from Lord Chamberlain to Dudley Carleton, June 8, 1616," The Progresses...of King James I, vol. 3, p. 171.

58. Tanner, Constitutional Conflicts, p. 39. To James a law was an expression of the king's will. The king was the supreme interpreter of the law, the great judge from whom inferior judges drew their authority and competence.. "'Kings are properly judges, and judgement properly belongs to them from God: for Kings sit on the throne of God and hence all judgement is derived.'" He saw other judges as deputies of the king. The king could sit and judge in any court and call its judgments in question, according to James. Willson, James VI and I, p. 257. James carried this view to his grave.

be known upon consulting with him and to that end that your Lordship forthwith signify His commandment to the rest of the Judges.<sup>59</sup>

The twelve judges assembled and discussed Bacon's letter. On April 27, in a letter signed by all twelve justices, they answered the king's request:

We...hold it our duties to inform your Majesty that our oath is in these express words: That in case of any letters come unto us contrary to law, that we do nothing by such letters, but certify your Majesty thereof, and go forth to do the law, notwithstanding the same letters. We have advisedly considered of the same to be contrary to law, and such as we could not yield to the same by our oath.... And therefore knowing your Majesty's zeal to justice, we have, according to our oaths and duties (at the day openly prefixed the last term) proceeded, and thereof certified your Majesty; and shall ever pray to the Almighty for your Majesty in all honour, health and happyness long reign over us.<sup>60</sup>

Again James had interfered, but now the judges stood firm. The bench not only "certified" that they were going ahead with the trial despite royal orders, but the trial had already been held before the judges wrote their letter.

In answer, James assured the judges that he had no wish to interfere with justice, but that in the present case he was in essence a party and therefore should enjoy the same consideration as the other parties. He went on to remind the justices that the practice of delaying a trial was common and he requested that he be

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59. Lyon, Oracle of the Law, p. 201.

60. Bowen, Lion and the Throne, p. 371.

given such a delay when he was party.

But James was not beaten so quickly. On the sixth of June, he summoned all the judges to Whitehall. James presided over the meeting and did much of the talking. When given a chance to defend their actions, the Lord Chief Justice contended that Bacon's letter was a delay of justice and contrary to law and their oath. Coke further stated that the case (as the judges saw it) did not concern the king's prerogative of grant of commendams, and that they could not adjourn the case because Bacon's letter showed no certain date and adjournment must always be to a certain day.<sup>62</sup>

James had no difficulty in answering that the judges might easily have fixed any day they pleased, and that, when it arrived, if they had not yet had time to confer with him, they might have adjourned the case again. He then asserted that they had no right to decide before consulting him, in order that he might know whether the question concerned his prerogative or not. Further, James wanted to know Chancellor Ellesmere's opinion on the bounds of the judges' oath.<sup>63</sup>

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61. Gardiner, History of England, vol. 3, p. 16.

62. Tanner, Constitutional Documents, p. 195.

63. Ellesmere concurred with Bacon's opinion that the oath of the judges bound them to give counsel to the king whenever they were called upon to do so, and if they refused to do so, then it was "more than a simple refusal to give him counsel." Gardiner, History of England, vol. 3, p. 17.

Having been reinforced by Chancellor Ellesmere's opinion, James asked each of the judges, one by one, "whether if at any time a case depending before the judges which his Majesty conceived to concern him either in power or profit, and thereupon required to consult with them, and that they should stay proceedings in the meantime--they ought not to stay accordingly?"<sup>64</sup> All twelve, save Coke, meekly promised to uphold the royal prerogative and agreed to stop any barrister who presumed even to question it. Coke said for an answer, "that I would do that which an honest and just Judge ought to do."<sup>65</sup>

This open rebuke of James' authority and the crown was the incident that made James decide to take action against the impertinent Coke. In late June, Coke was called before the Privy Council to answer three articles of accusation. First, that he had concealed a sum of twelve thousand pounds due the crown from the late Chancellor Hatton. Secondly, that while sitting on the bench, he had uttered words of very high contempt, saying that the common law would be overthrown; and therein reflecting upon the king. Thirdly, his uncivil and indiscrete carriage in the matter of commendam.

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64. Tanner, Constitutional Conflicts, p. 40.

65. The account of the exchange as described above was written by Coke in a letter describing the commendam case. James, Coke: His Family, p. 34.

On the first article his defense was so satisfactory that no more was said of it at the time, and Coke afterward obtained a legal decision in his favor. The second charge he palliated, without disclaiming the words. The third he confessed and prayed forgiveness.<sup>66</sup>

The immediate affect was that Coke was sequestered from the Council, from riding circuit, and ordered to review and correct his Reports, which James felt were in many ways faulty and full of novelties of law.<sup>67</sup> These measures were no more than temporary harassment, as James' real objective was obtained on November 15, 1616:

For certain causes now moving us, we will that you shall be no longer our Chief Justice to hold the pleas before us, and we command you that you no longer interfere in that office, and by virtue of these present, we at once<sup>68</sup> remove and exonerate you from this office.

There was no formal impeachment and no trial, and even though Coke was dismissed from the bench, he had made his point well known because the common speech around the realm was that the "four P's have been overthrown and put down--that is Pride, Prohibitinns, Pre-

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66. Lucy, Aikin, Memoirs of the Court of King James the First, vol. 2, (London, 1922), p. 46.

67. Nichols, "Letter from Lord Chamberlain to Dudley Carleton, July 6, 1616," The Progresses...of King James I, vol. 3, p. 178. There were twenty-eight objections to his Reports. Coke sufficiently answered all the objections but five and these five answers were turned over to James for his evaluation. Ibid., p. 194.

68. Lyon, Oracle of the Law, p. 207.

munire, and Prerogative." Once again, Coke, through defeat, indeed seemed victorious.

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69. Nichols, "Letter from Lord Chamberlain to Dudley Carleton, November 14, 1616," The Progresses... of King James I, vol. 3, p. 226.

## COKE CONTINUES FROM PARLIAMENT

James was successful in removing Sir Edward  
Coke from the bench, but this severe blow <sup>1</sup> did not  
diminish his desire to remain in the public limelight.  
In mid-November when Chief Justice Henry Montague asked  
him to sell his official collar for which he now had  
no further use, Coke refused, saying that he would keep  
it for his posterity so that they would know that one of  
their ancestors had been a Chief Justice. <sup>2</sup> This was not  
the only inkling that Sir Edward longed to return to  
public service. In December, hardly a month after his  
dismissal, the rumor circulated in London that Coke had  
traveled to Newmarket to beg a royal audience to suggest  
a marriage between his daughter Frances and Sir John  
Villers, brother of the king's new favorite. <sup>3</sup>

Coke envisioned the marriage as a ploy to re-  
gain the royal ear. He immediately entered into neg-  
otiations with Lady Compton, Viller's mother, over the  
amount of the expected dowry. <sup>4</sup> She demanded ten thousand

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1. It is reported that when Coke received the word of his dismissal from the bench that he burst into tears. Gardiner, History of England, vol. 3, p. 84.

2. John Chamberlain, "Letter of Chamberlain to Sir Dudley Carleton, November 23, 1616," The Letters of John Chamberlain, ed. Egbert Norman McClure, vol. 2, (Philadelphia, 1939), p. 38. Hereinafter cited as: McClure, Letters of Chamberlain.

3. Bowen, Lion and the Throne, p. 394.

4. The practice was for the parents to arrange marriages, if the couple was attracted to each other, so much the better; if not they could learn to love in the school of marriage. Ibid., p. 399.

pounds outright, with another one thousand pounds per annum while Coke lived. The ex-Chief Justice immediately answered that two-thirds the sum was high enough and that he would "not buy the King's favor too deare, being so uncertain and variable."<sup>5</sup>

For several months Coke remained steadfast. Then in June of 1617, Sir Ralph Winwood, Secretary of State, moved to reopen the bargaining. Winwood sent a letter to Sir George Villers stating that Coke wanted to regain the royal favor, "'without which he could no longer breathe. Sorry for his former disrespectful behavior, Sir Edward would be happy if the proposed marriage contract might be renewed....'"<sup>6</sup> The outrage of several months earlier disappeared and Sir Edward agreed to pay ten thousand pounds outright for the dowry.<sup>7</sup>

Now all that Coke had to do was to obtain the permission of Lady Hatton, Frances's mother. This was easier said than done. Lady Hatton suddenly announced that she refused Sir John as her son-in-law. Coke at-

5. McClure, "Letter of Chamberlain to Sir Dudley Carleton, March 15, 1617," Letters of Chamberlain, vol. 2, p. 64. Gardiner, History of England, vol. 3, p. 88.

6. Bowen, Lion and the Throne, p. 399.

7. If Coke had not been so ambitious, John Villers might have married Frances without the dowry. His love certainly was not taxed by the knowledge that she was to receive 1,300 pounds per annum after the death of her parents or the assumption that she would not be left penniless before their death. Gardiner, History of England, vol. 3, p. 87.



tempted almost every avenue to persuade his wife to consent to the marriage. As a last resort, Winwood went to see her and tried to reason but was forced to leave with the threat that Frances would be married in spite of anything she could do or say.<sup>8</sup>

Feeling pressed on all sides, Lady Hatton took her daughter and fled in secret to Oatlands, near Hampton Court. Here Lady Hatton set upon the scheme to forge a letter presumed to be from Henry de Vere, the eighteenth Earl of Oxford, proposing marriage to Frances. Seeing that Frances was receptive to the marriage plans, an Obligation was drawn up which Frances signed that agreed to the match.<sup>9</sup>

I vow before God...doe gyve myself  
absolutley to Wyffe to Henry Vere  
Viscount...to whom I plyghte my trothe  
and inviolate vows to keepe myself, till  
Death us do part....(10 July 1617)<sup>10</sup>

The document was kept from her father for some time, but when Coke discovered that the two women were missing he began to search for their hiding place. When their hide-out was discovered, a party led by "fighting Clem Coke," Sir Edward's son, with search warrant in hand, took a battering ram and broke the doors open

8. Ibid., vol. 3, p. 90.

9. The young Earl was in Venice at the time and had in fact never seen Frances. Bowen, Lion and the Throne, p. 400.

10. Ibid., p. 400.

and dragged the two frightened women from each others arms. Sir Edward then announced that Frances would  
 "come with me to Stoke."<sup>11</sup>

Lady Hatton immediately appealed to Francis Bacon for aid. Finding him in a meeting, "'she thrust in with them, and desired his Lordship to pardon her boldness, but she was like a cow that had lost her calf."<sup>12</sup> She sought relief through Bacon and it seems that he told her that she must apply for a warrant against her husband before the Privy Council.<sup>13</sup>

In the Council, Lady Hatton accused her estranged spouse of plotting to kidnap her daughter and carry her to France. She also charged him with having an improper warrant by which he broke into the house. To this charge, Coke set forth a doctrine of questionable logic: he asserted that the "rights of a father over his child carried with them the right of breaking into any house in which she might happen to be." The Attorney-General decided that the Star Chamber could more properly handle this unusual plea,<sup>14</sup> but before this touchy matter came before the Chamber, Coke and

11. McClure, "Letter of Chamberlain to Dudley Carleton, July 19, 1617," Letters of Chamberlain, vol. 2, p. 89.

12. Bowen, Lion and the Throne, p. 401-402.

13. McClure, "Letter of Chamberlain to Dudley Carleton, May 24, 1617," Letters of Chamberlain, vol. 2, p. 77.

14. Gardiner, History of England, vol. 3, p. 93.

Hatton arranged a reconciliation that permitted a mutual guardian to keep their daughter.<sup>15</sup>

By now James was firmly in support of the marriage. When the Privy Council attempted to move against Secretary Winwood for issuing Coke the search warrant without first consulting the other lords, Winwood pulled out what proved to be the perfect excuse: a letter from the king that sanctioned all his actions in the matter. After reading the letter to the Council, he asked them to re-direct their accusations. There was no answer from the members at the table.<sup>16</sup> Several days later, the king personally interceded by commanding Lady Hatton to restore her daughter to Sir Edward and "not to again entice her away. And the Lady Frances shall not be contracted to anyone without the assent of Sir Edward Coke."<sup>17</sup>

On September 28, 1617, Coke once more took his place on the Privy Council,<sup>18</sup> and the following day

15. Bowen, Lion and the Throne, p. 403.

16. McClure, "Letter of Chamberlain to Dudley Carleton, July 19, 1617," Letters of Chamberlain, vol. 2, p. 89.

17. Bowen, Lion and the Throne, p. 405. McClure, "Letter of Chamberlain to Dudley Carleton, August 9, 1617," Letters of Chamberlain, vol. 2, p. 91.

18. At Council James could employ Coke in routine matters and thereby keep a sort of control over him. Coke had paid dearly for this symbolic position and got nothing more from James. Gardiner, History of England, vol. 3, p. 94. Bowen, Lion and the Throne, p. 407.

James gave the bride away at a state wedding celebrated at Hampton Court.<sup>19</sup> Coke had indeed gained the royal favor but it seems that it was an empty victory. It would have been foolhardy for Coke to have expected James to reward him with a position from which he could possibly attack the crown anew. Sir Edward remained with this token position until the parliament of 1621 was called. In the House of Commons he began a career that would parallel and in some cases exceed the important accomplishments of his tenure on the bench.

When the 1621 parliament opened, James was torn between two opposite lines of policy which caused him to become irresolute and hesitating, hoping against hope, that the question--war or parliament--would solve itself. For over two years he ignored the pleas of his ministers and did nothing. He would have continued to do nothing had not the Spanish invaded the Palatinate.<sup>20</sup>

When parliament opened, the climate was one of open concern because of certain "domestic abuses and a miserable foreign policy."<sup>21</sup> The king was in no mood to

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19. McClure, "Letter of Chamberlain to Dudley Carleton, October 11, 1617," Letters of Chamberlain, vol. 2, p. 100.

20. David Harris Willson, "Summoning and Dissolving Parliament: 1603-1615," American Historical Review 45 (1940): 292).

21. Willson, James VI and I, p. 416.

be humored either. Yet despite this formula for disaster, both retained a remarkable composure for months. <sup>22</sup>

In this parliament, the most damaging problem to the crown was not the lack of policy coordination or displays of personal antipathy, but the position that <sup>23</sup> Coke and Lionel Cranfield, the Earl of Middlesex, took toward the investigation of monopolies. Both men rejected reconciliation with the crown and instead openly encouraged the Commons to probe for the highest levels of <sup>24</sup> governmental corruption.

The problem of the monopolies was so acute that "the world doth ever groan under the burden of these perpetual patents, which are become so frequent that whereas, at the King's coming in, there were complaints of some eight or nine monopolies then in being, they are

22. Willson, James VI and I, p. 416.

23. By the opening of parliament in 1621, Sir Edward fully realized that James would never place him into the type of position that a man of his energy and motivation needed. Therefore he and others developed a whole field of antiquarian research which they used to buttress the concept of the balanced constitution, using --or abusing--the myth of Magna Carta as their cornerstone. By the 1620's, Coke felt that he had failed to make the bench the guardian of the constitution, so he strove to elevate the parliament to this position. Lawrence Stone, The Causes of the English Revolution: 1529-1642. (London, 1972), p. 104.

24. Robert Zaller, The Parliament of 1621: A Study in Constitutional Conflict (Berkeley, 1971), p. 51. Hereinafter cited as: Zaller, Parliament of 1621.

now said to be multiplied by so many scores." <sup>25</sup> James, as had Elizabeth before him, saw the granting of these monopolies as a revenue source to the crown, but Coke felt that the "monopolizer engrosseth to himself what should be free for all men. The despulator, encloser of land, turns all out of doors and keeps none but a shephard and his dog." <sup>26</sup>

Coke championed this position so forcefully that James called him Captain Coke, the leader of the faction of the parliament. He not only quarreled with James, but also clashed fiercely with his colleagues when they got in his way. <sup>27</sup> But both Coke and his fellow members felt that they had an excellent opportunity to push their demands. James's administration could no longer control the public's ear. The public was well informed of the events in parliament because "speeches were printed and sold on the streets--pirated, ascribed to wrong names, often filled with error yet plainly revelatory of what"

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25. McClure, "Letter of Chamberlain to Dudley Carleton, July 8, 1620," Letters of Chamberlain, vol. 2, p. 310.

26. Bowen, Lion and the Throne, p. 420.

27. Thomas Birch, "Letter of Mead to Stuteville, Feb. 2, 1622," The Court and Times of James the First, vol. 2, (London, 1849), p. 289. McClure, "Letter of Chamberlain to Sir Dudley Carleton, Feb. 10, 1621," Letters of Chamberlain, vol. 2, p. 342. McClure, "Letter of Chamberlain to Dudley Carleton, May 2, 1621," Letters of Chamberlain, vol. 2, p. 370. Wallace Notestein et al. eds., Common's Debates: 1621, vol. 2, (New Haven, 1935), p. 362. Hereinafter cited as: Notestein, Common's Debates.

members of parliament were saying, doing, and voting. The king's problem did not cease here. The Commons wanted to examine not only the monopolies but with them the referees, whom James had appointed to examine the grants to assure that they were legal and fairly administered. If Francis Bacon and Lord Treasurer Mandeville, the principal referees, were successfully prosecuted, impeachment would be revived.

Through the monopolies and their referees, Coke was mounting a personal attack on Bacon. Both he and Cranfield joined hands to bring Bacon under intense investigative pressure. And both, moved with zeal, knowing that if successful they would procure both Bacon's removal from office and his public disgrace.

The patent of the inns was the first to be examined. After showing that the monopoly had been drawn up by Bacon, Justice Finch and Solicitor Coventry, Coke found James blame-less concerning the issuance of the patent. Having removed James from personal blame, the patent of the inns was the first to be condemned in 1621.

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28. Bowen, Lion and the Throne, p. 419.

29. Willson, James VI and I, p. 418.

30. Gardiner, History of England, vol. 4, p. 40.

31. Zaller, Parliament of 1621, p. 55.

32. Notestein, Common's Debates, vol. 4, p. 253.

Soon afterward, the patent of the alehouses was found to be a "base thing" and therefore "we branded the very institution of it" like the patent of the inns.<sup>34</sup> The Commons, led by Coke, had passed condemnation against not only the monopolies but their authors: the referees.<sup>35</sup> The road now lay clear and open to the revival of impeachment which had been dormant for one hundred and fifty years.

It was because of Bacon's desire to crush the opposition to the gold and silver thread patent, which he firmly believed had been established to benefit the commonwealth, that he alienated the Commons. As the parliament dragged on, the mutual animosity nurtured old wounds. Few of the members were shocked when Christopher Aubrey, a former client of Bacon's charged Bacon with accepting a hundred pound bribe in 1618<sup>36</sup> from Aubrey's

33. Ibid., vol. 2, p. 108-111; vol. 5, p. 478-481; vol. 6, p. 254-257.

34. Ibid., vol. 2, p. 118.

35. Zaller, Parliament of 1621, p. 57.

36. Bribery, as defined by Blackstone, is when a judge or other person concerned in the administration of justice, takes an undue reward to influence his behavior in office. But in judges, especially the superior ones, Blackstone cautions, it has always been looked upon as so heinous an offense that the Chief Justice Thrope was hanged for bribery in the reign of Edward III. Also by statute of Henry IV, all judges of offices of the king, convicted of bribery, shall forfeit triple the bribe, be punished at the king's will, and be discharged from the king's service forever.



counsel, Sir George Hastings. For his money, Aubrey expected a "favorable decision upon his case," but when Bacon finally announced his decision in November of 1620, Aubrey was disappointed. He was determined to appeal to the House of Commons.<sup>37</sup>

As if Aubrey's charge was not enough to damage Bacon, Edward Egerton, another disappointed complainant, charged that he sent Sir Francis four hundred pounds which was "a thankful remembrance from a client" but "that the money was intended as a bribe is impossible to doubt." Egerton brought his charges before the Commons only after his discovered, as did Aubrey, that his money had not influenced a favorable verdict.<sup>38</sup>

Both men, therefore, chose the Commons to settle their dispute with Bacon. The charges were brought before a Committee of the Whole House. Coke assured the Commons that there was legal groundwork to undertake such a case in parliament. On February 28, Coke asserted that the "complaints and examinations have been ancient in the House of Commons."<sup>39</sup> Again on March 6,

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Blackstone, Commentaries, vol. 4, (1786), p. 139.

37. Gardiner, History of England, vol. 4, p. 58-60.

38. The decisions in both the Aubrey and Egerton cases, most historians agree, were judicially correct. *Ibid.*, vol. 4, p. 61-64.

39. Notestein, Common's Debates, vol. 4, p. 253. Zaller sees these medieval precedents as being out of context. Zaller, Parliament of 1621, p. 69. Also,

he justified his position before the House with precedents.<sup>40</sup> On March 8, the former Chief Justice summed up his position by noting the different areas of jurisdiction:

The Lords judge alone where the king is party and interested, as upon writs of Error, upon judgements in Banco Regis etc. And the commons judge alone upon offenses done during the Parliament or touching the House or anie member of it, etc. The Lords judge of common grievance at the complaint and praiers of the commons etc.<sup>41</sup>

Coke further strengthened his argument by suggesting that the parliament had not only the power but the duty to impeach.<sup>42</sup> He warned the Commons to "question not the King's prerogatives; yet there is a prerogative which is disputable and may be questioned."<sup>43</sup>

Blackstone states that a "peer may be impeached for any crime," implying that this parliamentary trial was a legal method of punishment and without the need of the extensive justification given by Coke. Blackstone, Commentaries, vol. 4, (1786), p. 257.

40. Notestein, Common's Debates, vol. 5, p. 274.

41. Notestein, Common's Debates, vol. 5, p. 32. The court of parliament is "the most high and supreme court of criminal jurisdiction in the most solemn grand inquest [impeachment] of the whole kingdom." Blackstone, Commentaries, vol. 4, (1786), p. 256.

42. The word "impeachment" was used only once in the parliament of 1621. Notestein, Common's Debates, vol. 2, p. 314. The power of impeachment first appeared in 1376. For a further study see: T.F.T. Plucknett, "The Origin of Impeachment," Transactions of the Royal Historical Society, 4th Ser., 25: 47-71. T.F.T. Plucknett, "The Impeachment of 1376," Transactions of the Royal Historical Society, 5th Ser., 1: 153-164.

43. Notestein, Common's Debates, vol. 6, p. 249.

Still some of the members were not convinced that a trial was the proper course because there was only one witness to each alleged offense. On March 17 Coke moved to allay these fears by reminding his colleagues that it was proven precedent that "though there were a single witness in several matters, yet agreeing on one and the same third person, it was held sufficient to prove a work of darkness."<sup>44</sup> With this evidence before them, the Committee decided that the charges should be examined and presented to the Lords for prosecution.<sup>45</sup>

There can be little doubt that the House of Commons was to some degree prejudiced against the Lord Chancellor because of his conduct concerning the patents, but there seems to have been no overt desire to deal with him unjustly. Bacon's real danger lay with the House of Lords, who, with the Commons, were not without their prejudices in conducting a political trial. Furthermore, at the time of the impeachment trial, only one member had received a legal education.<sup>46</sup>

At this point, James realized that if he allowed parliament to proceed alone in this matter he would

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44. Notestein, Common's Debates, vol. 2, p. 242; vol. 4, p. 168. Journals of the House of Commons, 1547-1714, vol. 1, (London, 1803), p. 561. Hereinafter cited as: Common's Journal.

45. Notestein, Common's Debates, vol. 4, p. 100.

46. Gardiner, History of England, vol. 4, p. 60.

forfeit all future power in such cases because of the precedent which Bacon's impeachment would establish.

On March 19, James proposed that he empower a special commission, consisting of twelve members of the

Lower House and six of the Upper, to examine the proceedings.<sup>47</sup>

At first Coke seemed to approve of the king's plan and suggested that the members of parliament "should take heed the commission did not hinder the manner of our parliamentary proceedings."<sup>48</sup>

He then recommended that a joint conference be held between the Commons and Lords "before we give answer to this gracious message."<sup>49</sup>

But after further examination, Coke rejected the plan outright. He charged that the plan forced parliament to draw temporary power from the king and that the commission could merely investigate the case, because the king would reserve the right of final judgment to himself.<sup>50</sup>

With Edward presenting so strong an opposition, support for the king's plan collapsed.<sup>51</sup>

Upon hearing that James's plan had been rejected, the Lord Chancellor wrote a letter to the Lords request-

47. Zaller, Parliament of 1621, p. 82.

48. Common's Journal, vol. 1, p. 563.

49. Notestein, Common's Debates, vol. 2, p. 245.

50. Ibid., vol. 4, p. 170; vol. 5, p. 50-51.

51. Zaller, Parliament of 1621, p. 82.

52. Common's Journal, vol. 1, p. 563. Notestein, Common's Debates, vol. 2, p. 244-245; vol. 4, p. 170.

ing that they give him time to make a defense and allow him to cross-examine and call witnesses. But he hastened to add that he did not intend "to make greatness a subterfuge for guiltiness."<sup>53</sup>

On March 21, Lady Wharton, a third disappointed plaintiff, filed a petition with the House of Commons, charging Bacon with accepting a three-hundred-pound bribe.<sup>54</sup> In both the Aubrey and Egerton cases it was not impossible that Bacon could have been deceived about the purpose of the bribe. But in the Wharton case, the bribe was so open that Bacon could not have failed to know that Wharton expected to buy a favorable verdict. The fact that the money was actually taken from a suitor before judgment was announced remained unaffected by any explanations, and was later admitted to be true by Bacon. Coke was delighted at the turn of events and declared that "'a corrupt judge is the grievance of grievances.'"<sup>55</sup>

In Bacon's defense it must be said that the

53. Mary Anne Everett Green ed., Calender of State Papers Domestic of the Reign of James I, vol. 10, (London, 1858-1859), p. 236. Hereinafter cited as: Green, St.P. Domestic.

54. For details see Gardiner, History of England, vol. 4, p. 72-78.

55. McClure, "Letter of Chamberlain to Sir Dudley Carleton, March 24, 1621," Letters of Chamberlain, vol. 2, p. 356. Gardiner, History of England, vol. 4, p. 78. Coke felt that the money taken from Aubrey, Egerton, and Wharton was for a reward for pervert service. Therefore he felt Bacon had to be punished. Dr. Birch ed., The Works of Francis Bacon, vol. 6, (London, 1824), p. 282-283. Hereinafter cited as: Birch, Works of Bacon.

final decisions in the Aubrey, Egerton, and Wharton cases were a mere formality. The real decision on each case had been given long before the bribe was given. All that Bacon intended to do was to reaffirm earlier decisions.<sup>56</sup> His reason for taking the money seems to be the great expense of his love of pomp and ceremony. He supplemented the compensation of his offices by receiving gifts or bribes from litigants.<sup>57</sup> It is estimated that the total amount that Bacon received from these so-called presents amounted to not less than one-hundred-thousand pounds.<sup>58</sup>

James was deeply disturbed about the whole issue of the Bacon investigation. He remarked to the Venetian Ambassador that "'if I were to imitate the conduct of your republic and begin to punish those who took bribes, I should soon not have a single subject left.'"<sup>59</sup> But by March 23, there seemed to be little the king could do. The Lord Chancellor was suspended from his duties and many felt that he would not be able

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56. Gardiner, History of England, vol. 4, p. 80.

57. Even though Bacon felt that some forms of bribery were wrong, he felt that the type he engaged in was not illegal because "the cause was really ended, and it is sine fraude, without relations to any precedent promise." Birch, Works of Bacon, vol. 6, p. 282-283.

58. Charles N. Burch, "The Rivals," Virginia Law Review 14 (1928):513. Hereinafter cited as: Burch, "The Rivals."

59. Bowen, Lion and the Throne, p. 428.

to vindicate himself.

Two days later, on March 25, Bacon wrote James pledging that he would not try to "'trick my innocency... by cavillations or voidances," but that he would confess to his misgivings and pray "God to give me the grace to see to the bottom of my Faults."<sup>61</sup> This may have been his intent to the king, but the members of parliament felt that he was using delaying tactics in the proceedings in the hope of "winning time, till the heat of prosecution may be part over, or the parliament ended."<sup>62</sup>

But the accused Lord Chancellor was not the only one trying the patience of the parliament. Sir Edward was accused by some of his colleagues of being "careless in his opinions" and setting forth precedents that were either misapplied or perverted to "a wrong sence." Although some surely felt this was an attempt by Coke to ensure to prosecution of his enemy, most simply attributed his lack of acumen to the ravages of age.<sup>63</sup>

60. Green, St.P. Domestic, vol. 10, p. 237.

61. Gardiner, History of England, vol. 4, p. 82.

62. Bacon probably hoped James would dismiss parliament and thereby end the prosecution. McClure, "Letter of Chamberlain to Sir Dudley Carleton, March 28, 1621," Letters of Chamberlain, vol. 2, p. 359.

63. Green, St. P. Domestic, vol. 10, p. 240. McClure, "Letter of Chamberlain to Dudley Carleton, March 28, 1621," Letters of Chamberlain, vol. 2, p. 358. A flaw in Coke's character was his mistaking his personal battles with James or Bacon with titanic conflicts of principle. G.R. Elton, Studies in Tudor and Stuart

On March 30, the king, in a move clearly designed to utilize the factions within parliament and to allay the resentment against Bacon in the popular party, issued a proclamation repealing the alehouse patent and the patent for concealed lands.<sup>64</sup> But this move had almost no effect on the members,<sup>65</sup> because as Pym explained it, "the power of judgement in parliament, which the great while hath slept, hath been awakened to the terror of such offenders."<sup>66</sup>

In mid-April a joint committee was formed in the House of Lords to examine all the charges against Bacon. With the evidence and sentiment mounting against him, Bacon's hope grew faint and on April 20 he told the king that he would confess all that he could not excuse. But when handed a copy of the charges against him, he knew that any further defense would be futile.<sup>67</sup>

The Lord Chancellor then appealed to James and the Lords to accept his general submission to the charges and suggested that the loss of the seal would be suffi-

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Politics and Government: Papers and Reviews: 1946-1972, vol. 2, (Cambridge, 1974), p. 165. Hereinafter cited as: Elton, Studies in Politics.

64. Green, St.P. Domestic, vol. 10, p. 240.

65. McClure, "Letter of Chamberlain to Dudley Carleton, April 7, 1621," Letters of Chamberlain, vol. 2, p. 360.

66. Notestein, Common's Debates, vol. 5, p. 185.

67. Gardiner, History of England, vol. 4, p. 90-91.



cient punishment for his wrongs. James took steps in an attempt to aid his fallen Chancellor. On Friday, April 23, he met both Houses and chided them not "to scandalize great persons without pregnant proof."<sup>69</sup>

The House was not in such a conciliatory mood and demanded a full confession to every point. Bacon handed to the House the required confession on April 30.<sup>70</sup>

In his confession, he made no attempt to blind the eyes of the judges, but at the same time he neither admitted that his intentions were corrupt nor that his actions had been innocent.<sup>71</sup>

On May 2, the great seal was taken from Bacon and as punishment for his crimes he was censured from parliament, ordered to pay forty thousand pounds to the king, banished from court and told not to come within twenty miles thereof, and to be imprisoned at James's pleasure.<sup>72</sup>

68. Green, St.P. Domestic, vol. 10, p. 249.

69. McClure, "Letter of Chamberlain to Dudley Carleton, April 23, 1621," Letters of Chamberlain, vol. 2, p. 366.

70. See Cobbett for a full text of the Bacon confession. William Cobbett, The Parliamentary History of England from Earliest Times to the Year 1803, vol. 1, (London, 1806). p. 1244. Hereinafter cited as: Cobbett, Parliamentary History.

71. Gardiner, History of England, vol. 4, p. 99.

72. McClure, "Letter of Chamberlain to Dudley Carleton, May 2, 1621," Letters of Chamberlain, vol. 2, p. 370. Walter Yonge, Diary of Walter Yonge, Esq.: 1604-1628, ed. George Roberts, (London, 1848), p. 36.

The following day, Sir Edward, in a speech to parliament, suggested that "we dare not to gaine any new Judicature and therefore we say so; and for the other part, we desire that he [James] will ratify that we have donn; it will be his act as well as ours."<sup>73</sup> It was a credit to Coke that, notwithstanding his feelings and his vindictiveness toward Bacon, he deported himself on this occasion without any show of arrogance over the ruin of his rival. Lord Macaulay, who regarded Coke as one of the meanest and most narrow-minded men, said that "Sir Edward Coke, for the first time in his life, behaved like a gentleman."<sup>74</sup>

In early June, James dissolved parliament with the statement that he would never call another.<sup>75</sup> But after adjournment he "swept away eighteen monopolies and listed another seventeen to be examined by the courts." This "was a victory in fact but not in essence; parliament had desired to cancel these grants through legislation, not by 'the King's Grace.'<sup>76</sup>"

Coke's victory did not last long because soon after parliament adjourned, Bacon was granted a pardon by James under "the power of the Privy Seal."<sup>77</sup> James

73. Notestein, Common's Debates, vol. 2, p. 342.

74. Burch, "The Rivals," p. 522.

75. Willson, "Summoning...Parliament," p. 297.

76. Bowen, Lion and the Throne, p. 445.

77. Birch, Works of Bacon, vol. 6, p. 292.

was again ready to pluck the thorn from his side: Sir Edward Coke, whom he described as the "fittest instrument for a tyrant that ever was in England."<sup>78</sup> There was a bill registered in the Star Chamber against the former Chief Justice,<sup>79</sup> and orders were issued to seal up the door of Coke's London home and to seize all his papers.<sup>80</sup> He was taken to the Tower where he remained for seven months, or "twenty-six weeks and five days" as he put it. In August of 1622, Sir Edward was permitted to go home but confined to six miles from Stoke. During that period the king had his papers closely examined. When nothing could be found that displayed disloyalty to the crown, James was forced to release him. "'Throw this man where you will,'" fumed James, "'and he falls upon his legs.'"<sup>81</sup>

In essence, the parliament successfully revived the dormant power of impeachment and in doing so forced the government to change its approach to grievances.<sup>82</sup> In other words, the Commons were claiming that there was no aspect of policy too high for them to deal with. It almost amounted to the total claim of the modern

78. Zaller, Parliament of 1621, p. 188.

79. Roberts, Diary of Yonge, p. 51.

80. Cobbett, Parliamentary History, vol. 1, p. 1371.

81. Bowen, Lion and the Throne, p. 455-457.

82. David Willson, The Privy Councillors in the House of Commons: 1604-1629 (New York, 1971), p. 45.

House of Commons to have the executive pursing policies with broad lines approved by parliament.<sup>83</sup>

James's promise to never call another parliament was short lived. In the fall of 1623, Charles and Buckingham returned from Madrid and demanded a reversal of English policy which would advocate war against Spain. They proposed the calling of a parliament which would have the purpose of dissolving the marriage treaties with a minimum of royal embarrassment. The parliament would also be expected to supply the funds for the war material. According to the Venetian ambassador, James reluctantly capitulated only when it was agreed that Coke and Sandys would be excluded from the Commons.<sup>84</sup> Therefore, when on December 20, 1623, the Council voted for a parliament, James consented only after the two prospective leaders, Coke and Sandys, were appointed to a commission that was to leave for Ireland on January 12, 1624. Almost immediately pressure began to mount for James to change his mind. Prince Charles implored his father to allow the aging Coke to remain in London "in respect of his years being threescore and fourteen."<sup>85</sup> By the end of the month, James had rescinded his order and postponed the trip

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83. Ronald Butt, The Power of Parliament, (New York, 1967), p. 43.

84. Willson, "Summoning...Parliament," p. 298.

85. McClure, "Letter of Chamberlain to Dudley Carleton, Jan. 31, 1624," Letters of Chamberlain, vol. 2, p. 536.

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 until late spring. With this action the parliament of 1624 opened with both men in their seats.

James appeared before the parliament asking its advice as to how the Spanish treaties could be handled so as to advance religion and the common good and to restore the Palatinate<sup>87</sup> to his daughter Elizabeth and her husband Frederick. With the door ajar, the Lords and Commons took the initiative and at once debated the Spanish treaties. They sent the king a petition begging that the treaties be ended and promising assistance if war broke out with Spain.<sup>88</sup> James was angered that parliament would dare suggest war with Spain, which he considered beyond their comprehension and sent them sharp rejoinders. But Charles and Buckingham boldly interceded and explained away the king's words which had the effect of entirely<sup>89</sup> altering their meaning.

When the time came for parliament to grant the assistance they had promised, James asked them to

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86. Ibid., "Letter of Chamberlain to Sir Dudley Carleton, Jan. 31, 1624," vol. 2, p. 543.

87. The Palatinate was near Frankfurt and Worms, and is now part of West Germany.

88. The general attitude in England was that war with Spain was a good thing in itself, needing no further justification. England argued Coke, never prospered so well as when she was at war with the Spanish. Coke felt that if war proved successful, England need not "care for Pope, Turk, Spain nor all the devils in hell." In essence, many English felt that a Spanish war would provide the economic stimulus for a boom at home. Gardiner, History of England, vol. 5, p. 194.

provide for a vast continental alliance that would require no less than nine hundred thousand pounds, an amount which was utterly unprecedented in the reign of James. By March 20, the parliament agreed to provide<sup>90</sup> only three hundred thousand pounds.

Having successfully forced James to renege on his personal vow not to alienate Spain, Coke and his colleagues turned toward new prey. Lord Treasurer Cranfield was soon charged with bribery and of being personally responsible for the dissolution of the parliament of 1621. On April 7 Coke stated that "the affirmative in accusations is ever presumed, til the negative is proved." Upon hearing about Sir Edward's new impeachment effort, Sir Edward Conway, the Earl of Essex, wrote that "if once in seven years he were not to help ruin a great man he should die himself."<sup>91</sup> But the aging jurist was not alone in his zeal to discredit Cranfield. John Chamberlain reported that "there has been no man in England these two hundred years whose ruin has been so thirsted after by all sorts of people."<sup>92</sup> The mood of Chamberlain also seems to have been the mood of the majority of the Commons. This sentiment seems to have been shared by William Noy, who as early as April 5 had leaned

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90. Gardiner, History of England, vol. 5, p. 200.

91. Robert E. Ruigh, The Parliament of 1624: Politics and Foreign Policy (Cambridge, 1971), p. 319.

92. Green, St.P. Domestic, vol. 11, p. 214.

toward discounting the charges against Cranfield as matters of small importance. But in less than one week's time, he had re-examined the evidence and became convinced that the Lord Treasurer was guilty as charged.<sup>93</sup>

By April 15, all the charges had been laid out by Coke and Sandys against Cranfield. They demanded no less than his removal from office by impeachment.<sup>94</sup> The same day James addressed a letter to the Speaker of the House of Commons specifically absolving the Treasurer of all blame in connection with the dissolution of the parliament of 1621 by stating that the Lord Treasurer "was upon his knees before us humble, desiring us to continue it [the parliament]."<sup>95</sup>

Once again royal intervention proved to be of little value, and on April 18, Coke took up the charge of bribery<sup>96</sup> and the "high court of the realm" decided to treat Cranfield as they had earlier dealt with Bacon--meaning conviction as charged which carried the penalty of loss of office, imprisonment in the Tower, and heavy fines.<sup>97</sup>

In reference to Buckingham's and Charles's "re-definition" of James's words at the beginning of

93. Ruigh, Parliament of 1624, p. 332.

94. Gardiner, History of England, vol. 6, p. 230.

95. Ruigh, Parliament of 1624, p. 333.

96. Green, St. P. Domestic, vol. 11, p. 217.

97. Bowen, Lion and the Throne, p. 462.

the session, James turned to Buckingham and blurted:

"'You are a fool; You are making a rod of impeachment, with which you will be scourged yourself.'" Then turning to his son, he remarked:"'You will live to have your bellyfull of impeachment.'" <sup>98</sup>

With the exception of the Statute of Monopolies, little else was accomplished in the parliament of 1624, and it was soon adjourned. Within a year after the parliament ended, James was dead and England passed rapidly from the England under James, who felt a hostility toward parliament he was afraid to antagonize, to the England under Charles I, who endeavored to overrule <sup>99</sup> the parliaments which he hated.

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98. Gardiner, History of England, vol. 5, p. 231.

99. James Oscar Pierce, "Constitutional Phases of English History in the Seventeenth Century," American Law Review; 37:26.



## EDWARD'S LAST PARLIAMENT: 1628

As was customary, a new parliament was called in 1625 to open the new reign. Little was accomplished because of Coke's stern opposition to granting huge new subsidies. This parliament was short-lived because the plague swept through London. Thus the next year, Charles called another parliament, and to prevent opposition, the king appointed his antagonists, including Coke, as sheriffs so they could not sit. Also, Charles ordered the collection of a forced loan to bolster his sagging treasury. Those who refused to contribute were committed to prison where they remained until they granted the king the funds he had requested.<sup>1</sup> Finally five of the prisoners, collectively known as the Five Knights, decided to appeal to the Court of King's Bench for a writ of habeas corpus in order to know their offense. The case was heard on November 22, 1627. The defense argued that the cause of committal must be expressed. Along with this position, the Five Knights quoted from the Magna Carta which states that "'no man should be imprisoned except by the legal judgement of his peers, or by the laws of the land,'" which the knights claimed meant "'due process of law.'<sup>2</sup>" They also entered a long line of precedents where the persons committed by the Privy Council had been brought before the King's Bench for

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1. E.R. Adair, "The Petition of Right," History 5 (1920):99.

2. Gardiner, History of England, vol. 6, p.

bail as a preparation for trial. But the royal attorney attempted to show that in all such cases the king had voluntarily handed over the defendants by "King's Grace" and not by any legal precedent. The royal lawyer then asked the judges to trust the king because he had good reason to withhold the case from their knowledge.<sup>4</sup>

On November 28, in their decision, the judges chose to take a middle of the road view. They refused to order a hearing on bail for the Knights, but they also refused to assert that the crown could "persistently refuse to show cause." It was clear that the bench did not contain the quality of leadership that Coke had provided in earlier years, and therefore the issue remained in limbo until it could be debated in the forthcoming parliament.<sup>5</sup>

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214. For a study of the application of Magna Carta in the seventeenth century see: Maurice Ashley, Magna Carta in the Seventeenth Century, Magna Carta Essays, (Charlottesville, 1966).

3. Gardiner, History of England, vol. 6, p. 215.

4. Ibid., p. 216.

5. The Five Knights were no doubt appealing to the edition of 1215 and not to any of the later editions. For a complete legalistic approach to the Five Knight's case and to the writ of Habeas Corpus see: Frances Helen Relf, The Petition of Right (Minneapolis, 1917), p. 1-10. Hereinafter cited as: Relf, Petition of Right. Edward Jenks, "The Story of Habeas Corpus," Law Quarterly Review 18:64-77. C.C. Crawford, "The Writ of Habeas Corpus," American Law Review 42:488-502. Daniel John Meador, Habeas Corpus and Magna Carta, Magna Carta Essays, (Charlottesville, 1966). The University of Virginia Press has also published an entire series called Magna Carta Essays that the student might find useful.

As the day of the opening of the parliament of 1628 drew near, the leaders began to see that the struggle would have to go beyond the ministers to the king himself. The fundamental right of property was at stake and this great abuse of the prerogative aroused a strong feeling of resentment and opposition in the lawyers, and the question of the use of the writ of habeas corpus gave them the legal means to combat the abuse. This desire to curb the king's prerogative was the direct result of the imprisonment for refusing to contribute to the loan. A few days before the opening session of the parliament, a caucus met, including Edward Coke, Robert Phelips, Thomas Wentworth, and John Selden, and agreed that they would go directly to the point of the king's invasion of the rights of his subject.

Sir Edward insisted that the common law recognized no power of the king's to punish. "Whatever the king's power was by common law," he explained, "yet it was qualified by acts of parliament, and no man will deny but the king may limit himself by acts of parliament." In another meeting Coke asserted that the king "hath distributed his judicial power to the Courts of Justice." The lawyers, therefore, attempted to show that Charles's

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6. Gough, Fundamental Law, p. 61.

7. Relf, Petition of Right, p. 20.

8. Lyon, Oracle of the Law, p. 315.

9. Relf, Petition of Right, p. 22.

policy was by all measure against the best interests of the kingdom. The first argument set forth by the lawyers approached the subject from the negative side.<sup>10</sup> The legalists tried to demonstrate that there was no power to imprison in the king because the existing law did not recognize it. To "extend an imprisonment without reason," said Coke, "is against reason."<sup>11</sup> To the old jurist, the lack of regulation was conclusive proof that the power was not recognized by the law. The second argument against arbitrary imprisonment followed the reasoning that according to the common law, imprisonment without cause made subjects less than freemen. Coke backed their argument by citing two cases that he felt demonstrated that a criminal could not be imprisoned by his lord without cause being shown. No freeman, so the lawyers claimed, could be imprisoned for any offense unless the charge was explicitly provided for by statute.<sup>12</sup> And it was through the effort of the Commons to settle the issue of arbitrary imprisonment that led them to develop the Petition of Right.

The first sign of visible protest came on March 20, when Coke and Phelips advocated that the Commons join them and participate in a fast, because as Sir Edward put it, "there are, I fear, some devils that will not be

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10. Ibid.,p.22.

11. Ibid.,p.23.

12. Ibid.,p.22-23.

cast out by fasting and prayer." The next day, Coke presented a bill that included provisions that guaranteed that no man for any cause of crime be held in prison more than three months without trial or release; and that he should be given the opportunity to answer the charges within two months, and if he were not given bail by the third month, he would be released on habeas corpus as a matter of course.<sup>13</sup> The Commons hotly debated this bill. Little progress was made until the opinion of former Chief Justice Anderson was read to the members which swayed many of the listeners. In his opinion, Anderson favored the leaders of the Commons rather than the lawyers for the crown.<sup>14</sup> Coke summed up the issue when he stated that the question was "'whether a freeman can be imprisoned by the King without setting down a cause.'" <sup>15</sup> With the opinion, the Commons on April 1, voted a resolution which held the position that no freeman could be committed without cause shown and that everyone committed had a right to habeas corpus, which meant immediate release if no justification <sup>16</sup> for imprisonment could be given.

On April 7, Coke, Dudley Digges, Selden, and Thomas Littleton met with the Lords with the con-

13. Lyon, Oracle of the Law, p. 316.

14. Gardiner, History of England, vol. 6, p. 245.

15. *Ibid.*, p. 245.

16. Lyon, Oracle of the Law, p. 317.

clusions of the Lower House. After explaining at length the platform of the Commons, Coke closed by quoting the Roman Agrippa who felt that "it was unreasonable, in sending a prisoner <sup>17</sup> to prison, not to indicate the charges against him." The House of Lords took the Common's resolution under advisement. On Good Friday, April 10, Charles, in dire need of new subsidies from parliament, ordered the members not to take the traditional <sup>18</sup> Easter recess.

The debate in the Lord's became so intense that <sup>19</sup> Joseph Mead described the tone as "like tongue-combat was never heard in the upper house." Out of this struggle in the Lords came a counter-proposal to the Commons. The resolution passed by the Lords was in five parts. The first four were general and vague, whereas those from the Commons had been direct and to the point; but the fifth was of quite a different nature. It declared that the king's prerogative was "instrinsic to his sovereignty and entrusted him from God," and then it declared that when, for reasons of state, it was necessary to imprison without showing cause, the king could "within a convenient time...express a cause...either general or

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17. Acts of the Apostles, 25:27.

18. Lyon, Oracle of the Law, p.318.

19. Mead was a biblical scholar who is most remembered for Clavis Apocalyptica. Leslie Stephen and Sidney Lee eds., Dictionary of National Biography, vol. 23, (London, 1921), p.178.

special."<sup>20</sup>

Coke denounced the Lord's proposal with ridicule. "Our resolutions," he snorted, "are plain and open and clear, what theirs are to dispute."<sup>21</sup> Selden echoed his objections: "Our own are all clear points of law, their answer is not what is law, but they would have to be law." With great apprehension, Coke went on to declare that "'Reason of State lames Magna Carta!'" and Selden wondered out loud if "'at this little gap,'" referring to the words 'convenient time,' "'every man's liberty in time go out.'"<sup>22</sup>

On April 28, Charles summoned the Commons before him in the Upper House. The situation was becoming critical. Nearly every available penny of funds had been diverted to the war effort, but since the fall the armies on the continent had been left to shift for themselves. The German campaign had turned into disaster and the same fate loomed against the armies in France. There was little doubt in the parliament about what the message would be. Charles explained that everyday the need for additional funds increased. He went on to blame the cause of the delay on the debate on liberty which the king felt had dragged on much too long. In order to expedite the proceedings, Charles declared that he held

20. Relf, Petition of Right, p. 28.

21. Ibid., p. 28.

22. Gardiner, History of England, vol. 6, p. 262.

Magna Carta and the six statutes to be in force and would "'maintain all his subjects in the just freedom of their persons and safety of their estates, according to the laws and statutes of the realm.'" For this the Commons were asked to rely upon Charles's good word.<sup>23</sup>

Sir John Coke, a member of the Privy Council, rose to urge the Commons to accept the king at his word. He readily argued that the Commons would get as much by promise as by law because "whatsoever law we shall make, it must come to his Majesty's allowance." John Coke went on to point out the advantage of the promise over law: "His promise is bound by his own heart," and he reminded his fellows that against a law a king could use his dispersing and pardoning power, thereby making their efforts mute. He lectured that "all law with the wrath of a king is nothing." Yet the pleas of King Charles and John Coke were met by deaf ears and the Commons pushed forward with their bill.<sup>24</sup>

On May 1, 1628, Charles interrupted the debate demanding to know if the Lower House would abide by his promise. A series of messages passed back and forth between the Commons and Crown with the result that the king prohibited any bill that would be more than a bare confirmation and not new law. The right of a bare

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23. Gardiner, History of England, vol. 6, p. 263.

24. Relf, Petition of Right, p. 28-29.

25. *Ibid.*, p. 34.



confirmation meant nothing. As far as the bill was concerned, the members knew that "'to speak in a plain language, we are now come to the end of our journey.'" <sup>26</sup>

The Commons had to stand their ground. In spite of the warning from Charles that he would allow but a bare confirmation, on May 5, the Commons answered the king with a remonstrance that charged Charles's ministers with having violated the laws of the realm. Before the paper was sent, they softened their position by adding the statement that they had no wish to encroach on his sovereignty or prerogative. <sup>27</sup> In response to the remonstrance, the king held his ground and said nothing because to answer would be to admit guilt by association. Charles would only acknowledge that he would repeat the earlier promise he had made. During the debates over what answer, if any, Charles should give, the Royal Secretary put forth the idea that a petition might be presented to Charles. With the remonstrance a dead letter, <sup>28</sup> Edward Coke took hold of the idea of a petition:

Did ever Parliament rely on messages? They ever put up petitions of their grievances, and the King ever answered them? The King's answer is very gracious. But what is the law of the realm? That is the question. I put no difference in his Majesty. The King must speak by a record and in particulars, and not in general. Let us have a conference with the Lords, and join in a Petition of

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26. Bowen, Lion and the Throne, p. 492.

27. Gardiner, History of England, vol. 6, p. 270.

28. Holdsworth, History of English Law, vol. 5, p. 452.

Right to the King for our particular grievances. Not that I distrust the King, but because we cannot take his trust but in a Parliamentary way.<sup>29</sup>

What the Commons had originally wanted was a bill to interpret the ancient laws from their particular point of view, so as to shut out forever the equally legitimate interpretation that the crown had put upon them. Therefore they rejected Charles's idea of a mere confirmation of the laws, and seeing that there was no hope of passing their bill, dropped it and decided to proceed by a petition of right.<sup>30</sup> And this petition of right was the first attempt to commit to the statute books what had been regarded as certain fundamental rights, which now would bind the judges henceforth.<sup>31</sup>

Everything to which Charles had objected in the bill sprang forth again in the petition<sup>32</sup> "in a harder and

29. Gardiner, History of England, vol. 6, p. 274.

30. Adair, "Petition of Right, p. 100. In the change from bill to petition and in the subsequent action upon the petition is revealed the bitterness and what must have seemed as the almost complete hopelessness of the struggle. More than that, this struggle reveals that the end was not victory, but compromise. Relf, Petition of Right, preface iii.

31. Kenyon, Stuart Constitution, p. 103. The last petition of right to be presented before the nineteenth century was presented in 1614. Ludwik Ehrlick, "Petitions of Right," Law Quarterly Review 45 (1929): 69.

32. Blackstone explained that "...if any person has, in point of property, a just demand upon the King, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion;" Blackstone, Commentaries, vol. 1, (1786), p. 243. Therefore the Commons ran the risk that Charles would refuse to assent to their petition.

more obnoxious form." His acceptance of the bill would have been a friendly agreement to order his relations with the nation on new terms. "His acceptance of the petition would be a humble acknowledgement of error."<sup>33</sup>

The petition, which was delivered to the Lords by Coke, had four main points: (1) "That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or suchlike charge, without the common consent" through parliament; (2) that no freeman be detained in prison without cause shown; (3) that soldiers and marines should not be billeted upon inhabitants against their wills, thus recognizing the ancient custom that "'no man is forced to take soldiers but inns, and thus to be paid by them;" (4) that commissions for proceeding by martial law "'against soldiers and marines or other dissolute persons joining with them'" be revoked and no fresh commissions be granted in time to come.<sup>34</sup>

On May 12, Charles appeared before parliament and fought hard to save his emergency power of imprisonment without showing cause. He argued that the petition, as presented, involved "'the very intermitting of that constant rule of government practiced for so many ages within this Kingdom," and warned that it would soon "dissolve the foundation and frame of our monarchy."<sup>35</sup>

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33. Gardiner, History of England, vol. 6, p. 275.

34. Tanner, Constitutional Conflicts, p. 62.

35. Gardiner, History of England, vol. 6, p. 276.

The Commons rejected the king's overture, but the Lords, who had invited Coke to sit in committee with them, tried to accommodate him with the insertion of this clause:

We humbly present this Petition to your Majesty, not only with a case of preserving our liberties but with a due regard to leave entire that sovereign power where- with your Majesty is entrusted for the protection, safety, and happiness of your people.<sup>36</sup>

Coke was shocked by the Lord's wording. "'I know that prerogative is part of the law, but 'sovereign power' is no parliamentary word. In my opinion it weakens Magna Carta and all our statutes, for they are absolute, without any savings of 'sovereign power'....Magna Carta is such a fellow that he will need no sovereign.'<sup>37</sup>" Coke felt that this gave him reason to hold the members in line for the petition, because as a fellow member reminded the House, "the King declared that if we went by Act of Parliament, he would not assent." Coke further lectured his fellows that there were precedents to prove that "whatsoever the Lords house and this house have at anytime agreed upon no judge ever went against it; and the judges in former times doubted of the law they went to Parliament, and there resolutions were given to which they were bound."<sup>38</sup>

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36. Tanner, Constitutional Conflicts, p.62-63.

37. Ibid., p.63.

38. Relf, Petition of Right, p.43.

By May 25, members of the Lords who wished to accommodate Charles no further were able to command a majority. The next day the petition, as presented by the Commons, was read three times and then assented to--"per omnes, nemine dissentient"--unanimously.<sup>39</sup> By May 28, the petition had successfully passed both Houses and now awaited only the king's assent.

The king's dire need for the subsidies placed him in a position where he was close to being forced to give his approval. By May 27, he had already lost three ships to pirates, and without the money the relief of La Rochelle and the hoped for cracking of the French fortifications was an impossible dream.<sup>40</sup> In spite of the urgency, Charles again held back. He feared the loss of any of his power. Charles began to maneuver behind the scenes. He summoned the judges into his presence to seek their legal council before making any more decisions.<sup>41</sup>

The first question that the king directed toward

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39. Gardiner, History of England, vol. 6, p. 288. Relf, Petition of Right, p. 47, note 24. Harold Hulme, "Opinion in the House of Commons of the Proposal for a Petition of Right, 6 May 1628," English Historical Review L (1935): 306.

40. Gardiner, History of England, vol. 6, p. 293. Ever since 1626, relations with France had been poor. Charles was at war with both Germany and France. But it was not until 1628, that the need for money to continue the war became critical. The crisis began in April of 1628, when German Stade surrendered. It soon became apparent in England that without immediate funds, the English would also be driven out of France.

41. Ibid., p. 294.

the judges was "'whether in a case whatsoever the King may not commit a subject without showing cause.'" The answer came back that "'by general rule of the law the cause of commitment by his Majesty ought to be shown; yet some cases may require such secrecy that the King may commit a subject without showing cause, for a convenient time.'" <sup>42</sup> Still not satisfied, he then asked "'whether in a case of habeas corpus be brought, and a warrant from the King without a general or specific cause returned, the judges ought to deliver him before they understood the cause from the King.'" Upon this request, the judges replied:

Upon an habeas corpus brought for one committed by the King, if the cause be not generally or specially returned, so that the Court may take knowledge thereof, the party ought, by general rule of law, be delivered. But if the case be such that requireth secrecy, and may not be presently disclosed, the Court in discretion may forbear to deliver the prisoner for a convenient time, to the end the Court <sup>43</sup> may be advertised the truth thereof....

Feeling he needed further clarification, Charles <sup>44</sup> placed one final question before the bench. He wanted to know "whether, if he grant the Petition of Right,

42. Ibid., p. 294.

43. W.J. Jones, Politics and the Bench (London, 1971), p. 165.

44. The answer was not exactly what Charles wanted. It meant that the judges might grant a remand at their discretion but that the length of the remand was not to depend upon the king's pleasure. Gardiner, History of England, vol. 6, p. 295.

he does not conclude himself from committing a subject without showing cause?" On May 31, the answer came back which stated that "although the petition be granted there is no fear of the conclusion as is intimated in the question."<sup>45</sup>

But this indirect promise of compliance to the crown's view did not relieve Charles from apprehensions that he might lose the prerogative of arbitrary commitment. Nevertheless, the king gave his answer to the petition on June 2, 1628. The Lord Keeper read the royal approval:

The King willeth that right be done according to the laws and customs of the realm; and that the statutes be put in due execution, that his subjects may have no cause to complain of any wrongs or oppressions contrary to their just rights and liberties, to the preservation whereof he holds himself in conscience as well obliged as of his prerogative.<sup>46</sup>

Charles then spoke directly to the members:

Gentlemen, I am come here to perform my duty. I think no man can think it long, since I have not taken so many days in answering the petition as ye spent weeks in framing it; and I am come hither to show you that, as well in formal things as essential, I desire to give you as much content as in my lies.<sup>47</sup>

But the answer upon examination meant nothing at all. Coke counseled his fellow members that the judges

45. John Bruce ed., Calender of State Papers Domestic Series of the Reign of Charles I, vol. 3, (London, 1859), p. 142. Hereinafter cited as: Bruce, St. P. Domestic.

46. Gardiner, History of England, vol. 6, p. 297.

47. *Ibid.*, p. 297.

were bound by the petition if the king gave consent with the Norman "soit droit fait comme il est desire." Without these words the answer, in Coke's opinion, was meaningless.<sup>48</sup> Charles did not even mention the petition nor did he agree to the Common's interpretation of the resolution. When the king's answer was later read before the Commons there was general dissatisfaction and the leaders became united in the determination that Charles's answer should omit any reference to the prerogative, for as Coke warned, "In a doubtful thing, Interpretation always goes for the King."<sup>49</sup>

Charles was furious with this turn of events. He felt that he had done enough. But to complicate matters, another remonstrance, suggested by Sir Edward against the Duke of Buckingham,<sup>50</sup> was presented on the floor. On Thursday, June 4, Charles told the Commons that the session would end in a week and that he would give no other answer to their petition. The next day Charles sent a sharply worded message to the House of Lords forbidding them to take up any new business.<sup>51</sup> The king's attempt

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48. Bowen, Lion and the Throne, p.499.

49. Margaret Atwood Judson, The Crisis of the Constitution (New York, 1971), p.264. Hereinafter cited as : Judson, Crisis of the Constitution.

50. The remonstrance was to charge the Duke of Buckingham with general governmental mismanagement. Bowen, Lion and the Throne, p.499.

51. The message to the Lords arose because the Upper House chose to ignore the warning given by Charles to the Commons. The Lords had begun hearings on the



to prevent the remonstrance that had arisen earlier in the week was of no avail. In the Commons, Coke rose to remind his colleagues of what he saw as their responsibility. He argued that they must continue with their remonstrance. The parliament of Edward III had attacked John of Gaunt. Likewise, parliament had attacked the crown under Henry III and Richard II. "'What shall we do,'" pleaded Coke. "'Let us palliate no longer! If we do, God will not prosper us.'" <sup>52</sup> The rest of the house was only too glad to follow Coke's lead, "'as when one good hound recovers the scent, the rest come in with a full cry.'" <sup>53</sup>

On June 7, the Lords asked the Commons to join them in requesting another answer to the petition from Charles. The Upper House feared that the Common's investigation of grievances under the auspices of their new remonstrance had gone far enough. The Commons reluctantly agreed to the request and a deputation was sent to ask for a clear and satisfactory answer to the petition. <sup>54</sup>

On June 8, Charles answered their request:

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remonstrance prepared by Eliot, who felt that the king should be made aware of the grievances and trends of thought in the Commons. Gardiner, History of England, vol. 6, p. 301.

52. Bowen, Lion and the Throne, p. 501.

53. Gardiner, History of England, vol. 6, p. 305-306.

54. Bruce, St.P. Domestic, vol. 3, p. 153.

The answer I have already given you was made with so good deliberation and approved by the judgement of so many wise men, that I could not have imagined but that it should have given you full satisfaction, but to avoid all ambiguous interpretations and to show you that there is no doubtness in my meaning, I am willing to please you in words as well as substance. Read your petition, and you shall have such an answer as I am sure will please you.<sup>55</sup>

After the Petition had been read, the clerk pronounced the royal approval with "soit droict fait comme desire."<sup>56</sup> But Charles was not finished. After the approval was given, he went on to lecture the members:

This I am sure is full; yet no more than I granted you on my first answer; for the meaning of that was to confirm all your liberties; knowing, according to your protestations that you neither mean nor can hurt my prerogative. And I assure you that my maxim is, that the people's liberties strengthen the King's prerogatives, and that the King's prerogative is to defend the people's liberties. You see how already I have shown myself to satisfy your demands, so that I have done my part; wherefore if the Parliament have not a happy conclusion, the sin is yours; I am free from it.<sup>57</sup>

55. Lyon, Oracle of the Law, p. 326.

56. The verb Droict can still give a double meaning. The phrase can be changed from the simple "be it enacted" to "let justice be done as is desired." Ibid., p. 327.

57. Gardiner, History of England, vol. 6, p. 309. It is because of this postscript by Charles that the writer must conclude that without royal support the Petition of Right would become a meaningless document. Elton agrees, calling the petition "as futile a document as ever constitutional struggles have thrown up." Elton, Studies in Politics, vol. 2, p. 160. Relf terms the document as "unenforcable." Relf, Petition of Right, p. 58. Wedgwood asserts that the Commons paid "to highly for their victory" because it "so hardened the King and inflamed the Commons that no accommodation could ever again be reached"--meaning that without mutual support

Sir Edward hastened to declare that "we could never have had a better answer. The King granteth all we desire."<sup>58</sup> He went on to joyfully claim that the "petition is a branch of the Magna Carta; and fitt to follow that presedent."<sup>59</sup>

The Commons were thus able to adopt a definite procedure whereby the Commons were able to place on record the statement that certain practices were illegal according to the already existing laws and when the king gave his assent to this view the entire result became binding upon the judges while at the same time not attempting to infringe the royal prerogative.<sup>60</sup> Through this process of declaring the law (as parliament interpreted it) to be supreme, and by implying that ministers had a duty to act within the framework of law, the Petition of Right furthered the growth of responsible government in England.<sup>61</sup>

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the petition would become mute. C.V. Wedgood, Stafford: 1593-1641 (Westport, 1935), p. 71.

58. Judson, Crisis of the Constitution, p. 265.

59. Relf, Petition of Right, p. 56. Another jurist, Matthew Hale, was not nearly so quick as Coke to rank the Petition of Right with the Magna Carta. "The exercise of Martial Law, whereby any person should lose his life or member or liberty, may not be permitted in time of peace, when the King's Courts are open for all persons to receive justice, according to the laws of the land. This is the substance declared by the Petition of Right." Matthew Hale, The History of the Common Law in England (London, 1716), p. 39.

60. Adair, "Petition of Right," p. 101.

61. Clayton Roberts, The Growth of Responsible

Charles had assented to the Petition of Right, but ever since that time the question has been debated as to whether it was legally a bill or merely a petition. <sup>62</sup>

While it is true that the ceremony was exactly the same as that given bills, the key difference is the timing of the royal approval. According to the practice of the day, no law received the king's approval until the end of the session. Had the petition been statute, Charles's action would have automatically terminated the session. Of course this did not happen. Accordingly, on May 27, the Commons were reminded that "if we send it up with the indorsement as a law we could have no answer till the late end of the Parliament." Another member protested that "though he [Charles,] now give assent, it does not end the session." Therefore the conclusion must follow that it was Charles's intent to approve the petition as a petition and not as a statutory bill. <sup>63</sup>

In any case, this was Sir Edward Coke's last parliament--it was in this parliament of 1628 that he did his most important work for the constitution: for it

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Government in Stuart England (Cambridge, 1966), p. 67.

62. Many leading historians assert that the Petition of Right was granted as a bill: Gardiner, History of England, vol. 6, p. 309 and 327. Maitland, Constitutional History, p. 307. Holdsworth, History of English Law, vol. 1, p. 382. Fewer have asserted that the Petition was granted as a petition: Adair, "Petition of Right," p. 101. Relf, Petition of Right, p. 48.

63. Relf, Petition of Right, p. 47-48. Adair,

was in that parliament that he took the largest part in framing and in carrying the Petition of Right, the first of those great constitutional documents since the Magna Carta which safeguard the liberties of the people by securing the supremacy of the law. Throughout his life, Coke had held the common law supreme, and that it only needed to be clearly declared to be all sufficient to safeguard the rights of Englishmen. The placing on the Statute Book of the Petition of Right, which embodied these ideas, was a fitting apex to his career.

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"Petition of Right," p. 101.

64. Holdsworth, Makers of English Law, p. 117.

## CONCLUSION

The parliament of 1628 effectively ended the career of Sir Edward Coke, but his influence remained and continued to mold English constitutional law. Coke's writings have had more influence upon the law than those of any other legal writer.<sup>1</sup> In historical perspective, Coke appeared at the transition from the medieval concept of law to the modern. Medievalists regarded law as unchangeable, as a permanent body of rules which had existed from the birth of man and would continue until his disappearance. They saw no legal authority that could change these rules; they were almost as rigid as the laws of the universe; there was no such thing as new law. Coke, on the other hand, regarded the old law as generally the best and therefore as dangerous to change. He was, nevertheless, quite aware that it had been and could be changed either by interpretation or by the introduction of new law. Coke felt that "out of old fields must come the new corne."<sup>2</sup> He saw law as custom and this custom as being in perpetual adaptation.<sup>3</sup>

In essence, Coke's theories and conflicts elevated common or customary law to a new height, making it fundamental law.<sup>4</sup> And while pursuing his policy of the elevation of the common law, Coke and his colleagues est-

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1. Gist, "Writings of Coke," p.505.
  2. MacKay, "Parliamentary Sovereignty," p.247.
  3. Pocock, Ancient Constitution, p.170.
  4. Hinton, "Constitutional Theories," p.442.

abished the bench as an independent authority arbitrating between the crown and the subject.<sup>5</sup>

But Sir Edward Coke's influence did not stop with English law. He eventually had a profound effect on both American law and its constitution. The first and most obvious effect is that the United States Constitution provides for a single body of law to be equally administered to all. Along with this principle came the separation of Church and State which allows each to function independently of the other, so long as each obeys the law as administered through the Constitution. Also embodied in the United States Constitution is the principle that law, as interpreted by the Constitution, cannot be changed except by a majority of both Houses of Congress and with the approval of the President, unless, of course, his veto is overridden by a two-thirds vote in both Houses.

To ensure that these changes of law are consistent with the Constitution, the framers borrowed from the Bonham controversy to establish the doctrine of judicial review. There is little doubt that Coke had not intended that judges be able to void laws passed by parliament, but what is basically important is that other legalists have thought that the power of judicial review was Coke's intent. Therefore, the Supreme Court in the case of *Marbury v. Madison* in 1803, established the right of the courts to be the watchdog of the Constitution to ensure

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5. Tanner, Constitutional Conflicts, p. 37.

that there will be no infringement by Congress.

The men who developed the basis of American legal thought also owe Coke the now accepted, and taken for granted, doctrine that asserts that when judges are hearing a case they cannot be consulted individually or collectively concerning a matter in or about to be adjudicated. This is not to say that the political and economic realities of life do not influence many judicial decisions. This would be folly to assert, but this doctrine, in principle, allows the justices to determine the outcome of the issues without undue outside pressures.

Along the same vein, the judicial system was further protected from outside interference by the idea of a separation of powers. This theory was the justification for the practice that allows judges to remain in office for life instead of just for good behavior, as was the practice in the English system which usually meant at the pleasure of the crown, at least until 1701 when English justices got tenure. The many conflicts between the crown and Coke gave an excellent historical precedent for inclusion of life tenure. First James tried to silence Coke by removing him from the Court of Common Pleas. When Coke's promotion did not silence him, James expelled the jurist from the bench in 1616. In the American system, and the English after 1701, a judge cannot be dismissed merely for unpopular decisions.

However, the legal minds were also farsighted



enough to provide against the obviously incompetent or inept public official. The Constitution provided that "all civil officials of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." This precedent had been revived by Coke and his colleagues in 1621. Justice John Pickering was the first federal official to fall to the ax of impeachment and of the following conviction. The power of impeachment, born in 1376, and revived through the efforts of Coke, has shown that every official was and is indeed accountable for his conduct while in office.

Coke's greatest personal achievement, the Petition of Right, is also deeply rooted in the American legal tradition. When the colonies were preparing for the Revolution of 1776, they often referred to the freedoms guaranteed by the Petition. And when the new Constitution of America was finally framed, it included the most important provision of the Petition of 1628. The Constitution guarantees that "no soldier shall, in time of peace be quartered in any house, without consent of the Owner, nor in time of war, but in a manner to be prescribed by law." The Constitution then goes on to provide that "probable cause" be made to justify any search and seizure, thereby giving the American people the protection of the same writ that brought the Petition of Right to its birth--the writ of habeas corpus.

There can be no doubt of the profound effect of Edward Coke upon the legal thought of the entire English speaking world. Perhaps the best gauge of the success and effect of this man can be seen through the men he opposed. James I often compared Coke to "a cat, that whatever happened, [he] would always light upon his feet."<sup>6</sup> But the supreme compliment was paid by Charles I. In 1631, when Coke's death was expected, Charles gave orders that Edward's papers were to be secured, to prevent the publication of anything that might be against the prerogative, "for he held too great an oracle among the people, and they may be misled by anything that carries such an authority as all things to which he either speaks or writes."<sup>7</sup>

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6. The History of England from the Earliest Accounts of Time, to the Death of the Late Queen Anne, vol.3, (London,1722),p.125.

7. Tanner, Constitutional Conflicts,p.42.

## PRIMARY SOURCES

- Aikin, Lucy. Memoirs of the Court of King James the First. 2 vols. London, 1922.
- Birch, Dr. ed. The Works of Francis Bacon. 10 vols. London, 1824.
- Birch, Thomas, ed. The Court and Times of James the First. 2 vols. London, 1849.
- Blackstone, William. Commentaries on the Laws of England. 4 vols. Oxford, editions of 1758, 1765, and 1786.
- Bruce, John, ed. Calender of State Papers Domestic Series of the Reign of Charles I. London, 1859.
- Chamberlain, John. The Letters of John Chamberlain. 2 vols. Edited by Egbert Norman McClure. Philadelphia. 1939.
- Coke, Sir Edward. The Twelveth Part of Certain Select Cases in Law Reported by Sir Edward Coke, Rt. Late Lord Chief Justice of England and One of His Majesty's Council of State. London, 1738.
- Coke, Sir Edward. The Thirteenth Part of Certain Select Cases in Law Reported by Sir Edward Coke, Rt. Late Lord Chief Justice of England and One of His Majesty's Council of State. London, 1738.
- Cooke, Com. Magna Charta Made in the Ninth Year of King Henry the Third and Confirmed by K. Edward the First in the Twenty-eight year of His Reign, with some short, but Necessary Observations from the Chief Justice Coke's Comments upon it. London, 1680.
- Cowell, John. The Institutes of the Laws of England Digested into the Method of the Civil and Imperiall Institutions. London, 1651.
- Green, Mary Anne Everett, ed. Calender of State Papers Domestic Series of the Reign of James I. Vols. 10 and 11. London, 1858-1859.
- Hale, Matthew. The Analysis of the Law: Being a Scheme, or Abstract, of the Several Titles and Partitions of England, digested in Method. London, 1716.
- Hale, Matthew. The History of the Common Law of England. London, 1716.

Journals of the House of Commons: 1547-1714. 17 vols.  
London, 1805.

Kenyon, J.P., ed. The Stuart Constitution: 1603-1688:  
Documents and Commentary. Cambridge, 1966.

Nichols, John. The Progresses, Processions and Magnif-  
icent Festivities of K. James the First. 2 vols.  
London, 1828.

Notestein, Wallace, et al., eds. Commons Debates: 1621.  
7 vols. New Haven, 1935.

Prothero, G.W., ed. Select Statutes and other Constitu-  
tional Documents Illustrative of the Reigns of  
Elizabeth and James I. Oxford, 1898.

Statutes of the Realm.

Tanner, J.R., ed. Constitutional Documents of the Reign  
of James I: A.D. 1603-1625, with a Historical Com-  
mentary. Cambridge, 1930.

Yonge, Walter. Diary of Walter Yonge, Esq.: 1604-1628.  
Edited by George Roberts. London, 1848.

## SECONDARY WORKS

- Adair, E.R. "The Petition of Right." History 5:99-103.
- Ashley, Maurice. Magna Carta in the Seventeenth Century  
Magna Carta Essays. Charlottesville, 1965.
- The Bible.
- Bowen, Catherine Drinker. The Lion and the Throne: the  
Life and Times of Sir Edward Coke: 1552-1634.  
Boston, 1956.
- Burch, Charles N. "The Rivals." Virginia Law Review  
24:507-525.
- Butt, Ronald. The Power of Parliament. New York, 1967.
- Chrimes, S.B. "The Constitutional Ideas of Dr. John  
Cowell." English Historical Review 64:461-487.
- Cobbett, William. The Parliamentary History of England  
from Earliest Times to the Year 1803. 36 vols.  
London, 1806.
- Crawford, C.C. "The Writ of Habeas Corpus." American  
Law Review 42:488-502.
- Ehrick, Ludwick. "Petitions of Right." Law Quarterly  
Review 45:60-85.
- Elton, G.R., ed. Studies in Tudor and Stuart Politics  
and Government: Papers and Reviews: 1946-1972.  
2 vols. Cambridge, 1974.
- Gardiner, Samuel R. History of England from the Acces-  
sion of James I to the Outbreak of the Civil  
War: 1603-1642. 10 vols. London, 1900.
- Gist, John. "Writings of Sir Edward Coke." Yale Law  
Journal 18:504-532.
- Gough, J.W. Fundamental Law in English Constitutional  
History. Oxford, 1955.
- Hallam, Henry. The Constitutional History of England  
from the Accession of Henry VIII to the Death of  
George II. 2 vols. New York, 1846.
- Hinton, R.W.K. "English Constitutional Theories from  
Sir John Fortescue to Sir John Eliot." English  
Historical Review 75:410-425.

- The History of England from the Earliest Accounts of Time, to the Death of the Late Queen Anne.  
3 vols. London, 1722.
- Holdsworth, William. A History of English Law. 5 vols.  
London, 1945.
- Holdsworth, William. "Sir Edward Coke." Some Makers of English Law: the Tagore Lectures: 1937-1938.  
Cambridge, 1938.
- Hulme, Harold. "Opinion in the House of Commons of the Proposal for a Petition of Right, 6 May 1628."  
English Historical Review 50:302-306.
- James, Charles Warburton. Chief Justice Coke: His Family and Descendants at Holkham. London, 1929.
- Jenks, Edward. "The Story of the Habeas Corpus." Law Quarterly Review 18:64-77.
- Jones, W.J. Politics and the Bench. London, 1971.
- Judson, Margaret Atwood. The Crisis of the Constitution.  
New York, 1971.
- Kirby, Chester and Ethyn. "The Stuart Game Prerogative."  
English Historical Review 46:239-253.
- Lyon, Hastings and Block, Herman. Edward Coke: Oracle of the Law. Boston, 1929.
- Mackay, R.A. "Coke--Parliamentary Sovereignty or the Supremacy of the Law?" Michigan Law Review 22: 215-247.
- Maitland, F.W. The Constitutional History of England: A Course of Lectures. Cambridge, 1908.
- Meador, Daniel John. Habeas Corpus and Magna Carta.  
Magna Carta Essays. Charlottesville, 1966.
- Pierce, James Oscar. "Constitutional Phases of English History in the Seventeenth Century." American Law Review 37:26-32.
- Plucknett, Theodore F. "Bonham's Case and Judicial Review." Harvard Law Review 40:30-70.
- Plucknett, Theodore F. "The Impeachment of 1376."  
Transactions of the Royal Historical Society  
5 ser., 1:153-164.

- Plucknett, Theodore F. "The Origin of Impeachment." Transactions of the Royal Historical Society 4 ser., 24:47-71.
- Pocock, J.G.A. The Ancient Constitution and Feudal Law. New York, 1967.
- Pollock, Frederick. "Anglo-Saxon Law." English Historical Review 8:239-271.
- Pollock, Frederick. The Expansion of the Common Law. London, 1904.
- Quincy, Josiah. Quincy Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay Between 1761 and 1772. Boston, 1865.
- Relf, Frances Helen. The Petition of Right. Minneapolis, 1917.
- Roberts, Clayton. The Growth of Responsible Government in Stuart England. Cambridge, 1966.
- Rowles vs. Mason, 2 Brownlow 198.
- Ruigh, Robert E. The Parliament of 1624: Politics and Foreign Policy. Cambridge, 1971.
- Stephen, Leslie, and Lee, Sidney, eds. Dictionary of National Biography. 22 vols. Oxford, 1921.
- Stone, Lawrence. The Causes of the English Revolution: 1529-1642. London, 1972.
- Sullivan, Francis S. Lectures on the Constitution and Laws of England with a Commentary on Magna Charta and Illustrations of many of the English Statutes. Portland, 1805.
- Tanner, J.R. English Constitutional Conflicts of the Seventeenth Century: 1603-1689. Cambridge, 1947.
- Thorne, S.E. "Dr. Bonham's Case." Law Quarterly Review 54:543-551.
- Usher, Roland. "James I and Sir Edward Coke." English Historical Review 18:664-675.
- Wedgwood, C.V. Stafford:1593-1641. Westport, 1935.
- Willson, D. Harris. King James VI and I. New York, 1956.

- Willson, D. Harris. The Privy Councillors in the House of Commons: 1604-1629. New York, 1971.
- Willson, D. Harris. "Summoning and Dissolving Parliament: 1603-1625." American Historical Review 45:279-300.
- Zaller, Robert. The Parliament of 1621: A Study in Constitutional Conflict. Berkeley, 1971.