

LORD COKE.

I ventured upon a former occasion to offer to the readers of this Review a sketch of John Selden. In the course of a desultory investigation of his life and times, I became interested in another singular personality whose life, opinions and character offer a marked contrast.

Lord Coke was also a lawyer. He and Selden were contemporaries, breathed the same air, mingled with the same companions, were educated in the same schools and bred to the same profession; yet no two men could have been more unlike. Selden was broad, tolerant, kind; his justice was mild; and every man was his friend. Coke was narrow, intolerant, cruel; his law was harsh and technical; and he was friend to no man. Selden is wellnigh forgotten, whereas Coke is today one of the revered sages of the law. By what caprice of destiny hath this wrong been wrought? Let us examine the life of Lord Coke and search out the answer to the riddle.

Edward Lord Coke was born February 1, 1551. He was well educated, began the study of law at Clifford's Inn in 1571, and after six years was called to the bar. Almost immediately after his admission he was elected Reader of Lyon's Inn, an honor usually reserved for an older man. His progress was amazingly rapid. He was elected Recorder of Coventry, then of London, and later became in turn Solicitor General, Attorney General, Chief Justice of the Common Pleas and Chief Justice of the King's Bench. He was elected to parliament in 1593, *nullo contradicente*, or as he himself proudly proclaimed, "*sine ambitu seu aliqua requisitione ex parte mea*," and retained his seat for many years. How much he was assisted by his talents, industry and learning and how much by the base art of flattery, at which he was an adept, it is impossible to tell. He married twice, both times profitably. We know that he was meanly subservient to all in power and relentlessly eager in the pursuit of wealth and office. That his rapid elevation was in some measure due to his connection with the Cecil family cannot be doubted. He pleased the king by his obsequious behavior as the Prosecutor of the Crown; but as soon as he had achieved his ambition and become Chief Justice of the King's Bench he displayed qualities which won him the esteem of his fellow-citizens and the hatred of the court. He lost his office by reason of his refusal to do that which the king commanded.

In the prosecution of Essex, he used language which was utterly unpardonable. When Raleigh was on trial for his life, he said, "Thou art a monster, thou hast an English face but a Spanish heart,

thou viper, for I thou thee, thou traitor, thou art thyself a spider of hell." To a poor woman who came before him as Chief Justice, charged with a capital crime, he said before the verdict was rendered, that she had the seven deadly sins, to-wit: "a whore, a bawd, a sorcerer, a witch, a papist, a felon and a murderer." Yet as Chief Justice he defied the authority of the king himself. He gave an opinion in opposition to the council that the king could not by his proclamation create any offense which was an offense before. He dared to release a prisoner of the Court of High Commission brought before him by a writ of habeas corpus. He was promoted from the Common Pleas to the King's Bench for his humiliation and because the place was one of less profit. The result of his "turbulent" carriage, as the king called it, was that he was forbidden to ride his summer circuit and soon after removed from office. He received his dismissal with "dejection and tears." Nevertheless, he retired with the general applause, having somehow won the confidence of the people. Ben Jonson wrote of him, in a sonnet addressed to his grandson:

"Cyriac, whose grandsire on the royal bench
A British Themis with no mean applause
Pronounced and in his volume taught our laws
Which others at their bar so often wrench."

His career in parliament was no less honorable. He opposed the usurpation of the Crown, himself prepared the Petition of Right and was sturdy in his opposition to the oppressions which ultimately provoked the rebellion.

Coke was therefore at once admirable and despicable, or like a bit of bacon, part fat and part lean, as is all human nature. We are concerned with his fame. Does he deserve the veneration with which he is now regarded by lawyers? Upon what does his reputation rest? Not alone upon his sturdy resistance to tyranny, for others who are forgotten were brave and liberty-loving; not upon his magnanimity, for none can admire his prosecutions of Raleigh and Essex; not upon his love of justice, because he opposed with all his might the benign innovations of the Lord Chancellor; not upon his generosity, courtesy, or any of those sweeter qualities which constitute the gentleman, because he was at once mean, selfish, ambitious and unscrupulous, and if he was learned in the law he seems to have been ignorant of all else.

His fame rests perhaps upon his Institutes and Reports. I will not attempt to appraise these remarkable books. They contain a lawyer's mind, unashamed and undisguised. I must say, however, that

they declare the law in all its foul deformity and that Coke admired it, called it the *summa ratio*; revered it and thought it a sort of impiety to inquire into its excellent and admirable doctrines. He said of it, "*Nemonem oportet esse sapientiores legibus.*"

When we remember that the law allowed of attainder after acquittal, punished with death more than a hundred petty crimes, allowed of the torture of witnesses, of the *peine forte et dure*, of imprisonment for debt, of the writ *capias ad respondendum*, and that it would not permit parties in interest to testify, and abounded in fictions and pitfalls which seemed rather cunningly designed for the vexation of litigants than to remedy wrong; we cannot do otherwise than pause before we join in the traditional homage of the Bar. Lord Coke was Chief Justice of England, when a lad of ten, convicted in Cambridge of firing a rick, as he mounted the scaffold said, "Please, good people, forgive me this time, I will not do it again," yet was hung by the neck until he was dead. If *summa ratio* can justify such iniquity, then it is indeed a perverted, despicable and artificial ratio and none should do it reverence. The *corpus juris* of the sixteenth and seventeenth centuries was not a respectable body of law; it was bad even as between private citizens; it allowed few remedies and in many cases afforded none at all. It afforded few sanctions for private liberty and private property. The courts of High Commission and Star Chamber imprisoned without hearing and punished without trial. Coke himself was unjustly confined. The Magna Charta was law in name only. General warrants had not become illegal; searches and seizures were constantly resorted to; indulgences and benevolences were compelled; the dispensing power had not been curtailed; there was neither free speech nor free printing; parliament could not protect its members; the language of James I. addressed to it upon a solemn occasion was high, insolent and menacing. The judges might whisper that the king was "*sub deo et sub lege,*" but his subordination was never an obstacle to deeds wrong in morals and legally wrong. How could a great lawyer honestly admire such a body of law! Selden detested its iniquities, Bacon tried to ameliorate them. Coke cherished them and was jealous of them and guarded them with affectionate solicitude. He says:

"Knowledge of the law is like a deep well, out of which each man draweth according to the strength of his understanding. He that reacheth 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."

He advises the student to confine himself to the law and to avoid all other learning as "praepostera lectio" and an enemy to real learning. Coke does not commend any mean thing in the law, but neither does he condemn any mean thing in it, yet it was full of wrong and deserved condemnation, and he was familiar with all its cracks and crannies. To what should we attribute the obsession of so strong a mind? What made him stiff in resistance to innovation, content with the past, contemptuous of general culture and indifferent to cruelties and asperities which now amaze us? Were these things due to his learning? Is there something in knowledge of the law which prevents judgment and starves thinking? I cannot think the law alone can have had such a result. Coke lived side by side with Bacon. They were rivals, but Bacon became a great chancellor, a great philosopher and a great reformer. Coke was Selden's friend. Both were learned in the law, but Selden was far more: he was a scholar and a gentleman. The law itself could not have wrought such havoc with the intelligence, for Bacon and Selden were also profoundly versed in its mysteries. We must then search elsewhere for the explanation of Lord Coke. Can it be found in his neglect of those liberating studies which he affected to despise and that "praepostera lectio" which he deprecated?

Consider the things he despised. He lived throughout that remarkable period which has ever since been called the English renaissance. He was born before and died after Shakespeare. The fructifying influences which made the literature of his time to flower and flourish as never before were still powerful; the Bible had recently been translated and made available for the use of the common people; Hooker had created English prose; books had been put within the reach of all by the printing press; the Reformation had emancipated men's minds and the literature of Greece and Rome had enriched them; new worlds had been discovered and the fabulous tales of hardy adventurers had roused the dormant imaginations of men; Spenser, Marlowe, Beaumont, Fletcher, Jonson, and a host of others almost equal in faculty to Shakespeare, had poured out their rhapsodies; Bacon, the master mind of the age, had re-established philosophy upon a firm foundation; the threatened invasion of England by the hosts of Spain had been quickly, gloriously and forever averted; good Queen Bess reigned over Merrie England and all that lay in the dust had risen and begun to sing. Under the kindling influences of the time that generation of men outran themselves. Many, gathering capacity from their fellows, so increased in power, dazzled the

world by the splendor of their accomplishments. They lived upon a high plateau elevated into a rare and exhilarating atmosphere, seeking and communicating knowledge. Coke alone communicated and derived nothing from his contemporaries.

His style is stiff and rough. What he quotes is law Latin. There is not in all his works a gleam of that sort of enlightenment which results from scholarship. His law is a dead law, Hooker's a living principle. Coke said:

"The common law is nothing else but reason, which is to be understood of an artificial perfection of reason gotten by long study, observation and experience and not of every man's natural reason. If all the reason that is dispersed into so many several heads were united in one, yet it could not make such a law as the law of England is, because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection as that no man ought to be wiser than the law, which is the perfection of reason. *Lex civitus tolerare vult privatum damnum quam publicum malum*"—

by which he intended "The court should be governed by the principle of law and not by the hardship of any particular case," said Lord Ellenborough.¹

Hooker said:

"Of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world: all things in heaven and earth do her homage, the very least as feeling her care, the greatest as not exempted from her power; both men and angels and creatures of what condition sever, though each in different sort and manner, yet all with uniform consent admiring her as the mother of peace and joy."

What a contrast! Coke's law is a petrified law, indifferent to justice, scornful of private consequences, proud of its antiquity, repugnant to enlightenment; Hooker's is the mother of peace and joy, a generous aspiration, the helper of the people. Coke attributes to his predecessors a wisdom and infallibility which he withholds from his contemporaries. His veneration for them was his undoing. That he was wrong is proved by the obsolescence of all that he cherished. The innovations he resisted won their way. We have today

¹ 4 Maul. et S., 261.

a corpus juris as wise as his but more benign. Equity has prevailed over law. You cannot today enforce a bond which has been discharged, upon the ground that the discharge was not made by a speciality; neither can you hang a boy for a petty act of wickedness.

That Coke's obsessions were due in some measure to the narrowing effect of his intense and concentrated study of law cannot be doubted. What is hardly won is eagerly cherished. Some men carry their learning as porters carry corn, on their backs in a sack; and some carry it in their bellies as affording food for wisdom. Coke was by propensity one of the former. His laborious and habitual pursuit of special knowledge made him overvalue the fruits of his industry. Having spent so much energy in acquisition, he had not enough for assimilation. It is frequently so with the mere scholar; gazing at a star he is apt to fall into a ditch. The love of learning, like avarice, inclines to hoarding. The black-letter lawyer is much like the miser: the one starves his body and the other his mind. To consume knowledge, to convert it into new and strange thinking seems somehow a desecration to a mere student. Coke loved his learning, he could not endure to have it undervalued, he hated those easy-going philosophers who pretended to perceive without effort what had cost him long years of labor. He therefore inclined always to authority and scorned what men called reason and justice. We perceive in his prosecution of Raleigh something more than zeal for the king's service; the lawyer hated the brilliant offender. Raleigh was at once a poet, a philosopher, a soldier, a statesman, an historian and a courtier. Coke detested the versatility, charm and distinction of the man of the world. He seems always to have hated letters and literary men. I cannot find that he ever resorted to the Mermaid. The brilliant men of his time were unpleasant to him: he could not answer them. They did not yield to his authorities and were scornful of his learning.

Jonson was a free-thinker who dared claim equality with any man:

"I do not desire to be equal to those that went before but to have my reasons examined with theirs and so much to be given to them as they deserve. I will have no man addict himself to me, but, if I say anything right defend it as true, non mihi cedendum sed veritati,"

however humble it may sound to the reader, was a proud man's declaration of independence. Coke disliked the wits; he could not compete with them; they denied his superiority.

Coke was not only a black-letter lawyer, he was if not in name yet in character a Puritan. I hesitate to speak with levity of so formidable a thing as the Puritan character, yet it provokes levity. What is the Puritan? Is he not one of those who, obsessed by egotism, denies to another the right to a like obsession? His philosophy was simple enough: God wrote the Scriptures for men, and had wit enough to say what He meant, and men who read Him understand what He intended, and ceremonies and decorated cathedrals and vestments and images are obstructions to piety because they cloud understanding and tend to idolatry. That such a doctrine lacked logic was unimportant; it satisfied self-righteousness. Logic might have suggested that if two honest men cannot agree with respect to the meaning of the Scriptures, either God did not write them or He did not intend mankind to understand them. It was however, pleasant to an egotist to bring himself into immediate contact with God, and so the Puritan hated the established church and all pagan learning and all beauty and all else that might distract the mind from the holy contemplation of what he regarded as revealed truths. Puritanism tended to self-sufficiency and what we call fanaticism.

Coke being at once a black-letter lawyer and a Puritan, had his share of the blinding prepossessions which pertain to each character. He rejected culture and the enlightenment which resulted from discursive reading instinctively, denouncing it as "praepostera lectio" because his bigotry hated innovation. Selden and Bacon perceived the deformities of the law because they had become superior to it by reason of their familiarity with those general considerations of which conventional law is but an important part. They knew as much law as Coke, but they knew much else besides. Neither was a Puritan; both rejected fanaticism because both had become humble under the influence of that sort of thinking which cannot rely upon memory for conviction. They mingled with the wits, derived light from conflict, were open-minded to the new learning and so fortified, dared question those sacred principles which Coke regarded with reverence. Who questioned the law and was denied a reason became an innovator.

Nevertheless, Coke has become and remained a great man, while Selden is forgotten. Coke's fame rests upon tradition, and that tradition upon the lawyer's propensity now as always to cherish what is reputed to be great. Coke was never a great lawyer. He was never equal to Bacon, yet because lawyers have said he was great we insist that he was so. Addicted to authority, we like the serenity it affords:

it saves thinking, and thinking is ever more distressing than investigation. I think the reputation of Coke has done harm to generations of lawyers. He stands for an idea which is perilous, and that idea is that lawyers must be narrow in order to be thorough. Nothing can be farther from the truth. I prefer that great saying of Milton:

"That is a complete and generous education which fits a man to perform justly, skillfully and magnanimously all the offices, both public and private, of peace and of war."

Coke lacked such an education. So much of his fame as results from his resistance to tyranny he deserves. As Chief Justice he became associated with the rights of man as opposed to the prerogatives of kings and in that character, but in that character alone, does he deserve the veneration of posterity.

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