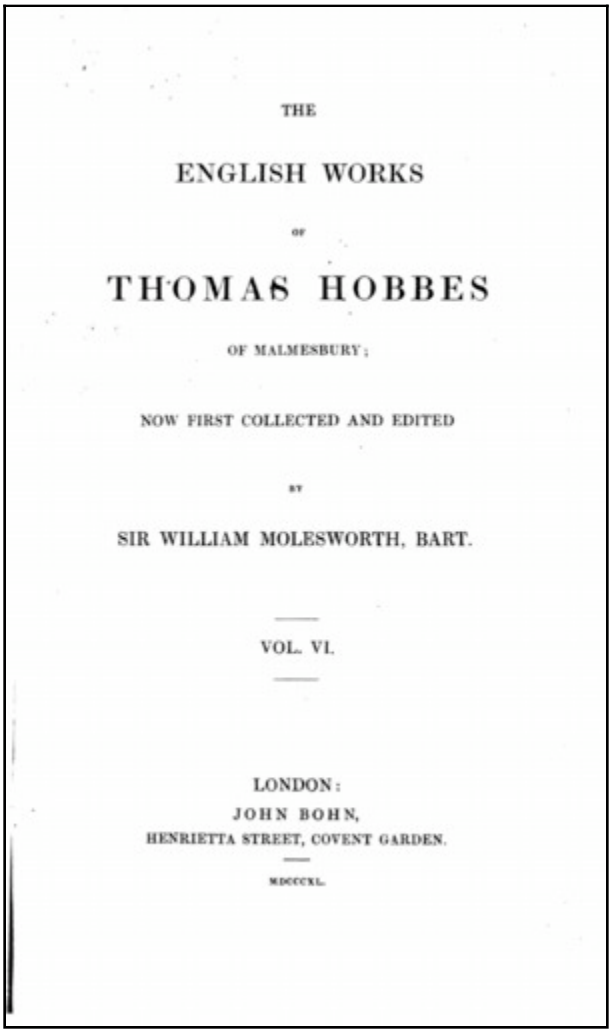
THOMAS HOBBES, *A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* (1681)


THE
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ABOUT THE AUTHOR

Thomas Hobbes was an English philosopher who lived during the English Revolution. He is most famous for his work of political philosophy *The Leviathan*.

ABOUT THE BOOK

An attack on the defenders of Common Law by a supporter of royal prerogative which Hobbes wrote in 1666 but refused to allow to be published in his lifetime.

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A DIALOGUE Between A PHILOSOPHER & A STUDENT Of THE COMMON LAWS OF ENGLAND.

A DIALOGUE of THE COMMON LAW.

Lawyer.

WHAT makes you say, that the study of the law is less rational than the study of the mathematics?

Philosopher. Of the law of reason.

I say not that; for all study is rational, or nothing worth: but I say, that the great masters of the *mathematics* do not so often err as the great professors of the law.

L.

If you had applied your reason to the law, perhaps you would have been of another mind.

P.

In whatsoever study, I examine whether my inference be rational: and have looked over the titles of the statutes from Magna Charta downward to this present time. I left not one unread, which I thought might concern myself; which was enough for me, that meant not to plead for any but myself. But I did not much examine which of them was more or less rational; because I read them not to dispute, but to obey them, and saw in all of them sufficient reason for my obedience, and that the same reason, though the Statutes themselves were changed, remained constant. I have also diligently read over Littleton's book of *Tenures,* with the commentaries thereupon of the renowned lawyer Sir Edward Coke; in which I confess I found great subtilty, not of the law, but of inference from law, and especially from the law of human nature, which is the law of reason: and I confess that it is truth which he says in the epilogue to his book, that by arguments and reason in the law, a man shall sooner come to the certainty and knowledge of the law: and I agree with Sir Edward Coke, who upon that text farther says, that reason is the soul of the law; and upon section 138, *nihil, quod est contra rationem, est licitum;* that is to say, nothing is law that is against reason; and that reason is the life of the law, nay the common law itself is nothing else but reason; and upon section 21, *æquitas est perfecta quædam ratio, quæ jus scriptum interpretatur et emendat, nulla scriptura comprehensa, sed solum in vera ratione consistens; i. e.* Equity is a certain perfect reason, that interpreteth and amendeth the law written, itself being unwritten, and consisting in nothing else but right reason. When I consider this,

and find it to be true, and so evident as not to be denied by any man of right sense, I find my own reason at a stand; for it frustrates all the laws in the world. For upon this ground any man, of any law whatsoever, may say it is against reason, and thereupon make a pretence for his disobedience. I pray you clear this passage, that we may proceed.

L.

I clear it thus, out of Sir Edward Coke (I. Inst. sect. 138), that this 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; for *nemo nascitur artifex.* This legal reason is *summa ratio;* and therefore if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law of England is; because by so many successions of ages it hath been fined and refined by an infinite number of grave and learned men.

P.

This does not clear the place, as being partly obscure, and partly untrue. That the reason which is the life of the law, should be not natural, but artificial, I cannot conceive. I understand well enough, that the knowledge of the law is gotten by much study, as all other sciences are, which when they are studied and obtained, it is still done by natural, and not by artificial reason. I grant you, that the knowledge of the law is an art; but not that any art of one man, or of many, how wise soever they be, or the work of one or more artificers, how perfect soever it be, is law. It is not wisdom, but authority that makes a law. Obscure also are the words *legal reason.* There is no reason in earthly creatures, but human reason. But I suppose that he means, that the reason of a judge, or of all the judges together without the King, is that *summa ratio,* and the very law: which I deny, because none can make a law but he that hath the legislative power. That the law hath been fined by grave and learned men, meaning the professors of the law, is manifestly untrue; for all the laws of England have been made by the kings of England, consulting with the nobility and commons in parliament, of which not one of twenty was a learned lawyer.

L.

You speak of the statute law, and I speak of the common law.

P.

I speak generally of law.

L.

Thus far I agree with you, that statute law taken away, there would not be left, either here, or any where, any law at all that would conduce to the peace of a nation; yet equity and reason, (laws Divine and eternal, which oblige all men at all times, and in all places), would still remain, but be obeyed by few: and though the breach of them be not punished in this world, yet they will be punished sufficiently in the world to come. Sir Edward Coke, for drawing to the men of his own profession as much authority as lawfully he might, is not to be reprehended; but to the gravity and learning of the judges they ought to have added in the making of laws, the authority of the King, which hath the sovereignty: for of these laws of reason, every subject that is in his wits, is bound to take notice at his peril, because reason is part of his nature, which he continually carries about with him, and may read it, if he will.

P.

It is very true; and upon this ground, if I pretend within a month or two to make myself able to perform the office of a judge, you are not to think it arrogance; for you are to allow to me, as well as to other men, my pretence to reason, which is the common law, (remember this, that I may not need again to put you in mind, that reason is the common law): and for statute law, seeing it is printed, and that there be indexes to point me to every matter contained in them, I think a man may profit in them very much in two months.

L.

But you will be but an ill pleader.

P.

A pleader commonly thinks he ought to say all he can for the benefit of his client, and therefore has need of a faculty to wrest the sense of words from their true meaning, and the faculty of *rhetoric* to seduce the jury, and sometimes the judge also, and many other arts which I neither have, nor intend to study.

L.

But let the judge, how good soever he thinks his reasoning, take heed that he depart not too much from the letter of the statute: for it is not without danger.

P.

He may without danger recede from the letter, if he do not from the meaning and sense of the law; which may be by a learned man, (such as judges commonly are,) easily found out by the preamble, the time when it was made, and the incommodities for which it was made. But I pray tell me, to what end were statute laws ordained, seeing the law of reason ought to be applied to every controversy that can arise.

L.

You are not ignorant of the force of an irregular appetite to riches, to power, and to sensual pleasures, how it masters the strongest reason, and is the root of disobedience, slaughter, fraud, hypocrisy, and all manner of evil habits; and that the laws of man, though they can punish the fruits of them, which are evil actions, yet they cannot pluck up the roots that are in the heart. How can a man be indicted of avarice, envy, hypocrisy, or other vicious habit, till it be declared by some action which a witness may take notice of? The root remaining, new fruit will come forth, till you be weary of punishing, and at last destroy all power that shall oppose it.

P.

What hope then is there of a constant peace in any nation, or between one nation and another?

L.

You are not to expect such a peace between two nations; because there is no common power in this world to punish their injustice. Mutual fear may keep them quiet for a time; but upon every visible advantage they will invade one another; and the most visible advantage is then, when the one nation is obedient to their king, and the other not. But peace at home may then be expected durable, when the common people shall be made to see the benefit they shall receive by their obedience and adhesion to their own sovereign, and the harm they must suffer by taking part with them, who by

promises of reformation, or change of government, deceive them. And this is properly to be done by divines, and from arguments not only from reason, but also from the Holy Scripture.

P.

This that you say is true, but not very much to that I aim at by your conversation, which is to inform myself concerning the laws of England. Therefore I ask you again, what is the end of statute-laws?

L.

I say then that the scope of all human law is peace, and justice in every nation amongst themselves, and defence against foreign enemies.

P. Of sovereign power.

But what is justice?

L.

Justice is giving to every man his own.

P.

The definition is good, and yet it is Aristotle's. What is the definition agreed upon as a principle in the science of the common law?

L.

The same with that of Aristotle.

P.

See, you lawyers, how much you are beholden to the philosopher; and it is but reason; for the more general and noble science and law of all the world, is true philosophy, of which the common law of England is a very little part.

L.

It is so, if you mean by philosophy nothing but the study of reason; as I think you do.

P.

When you say that justice gives to every man his own, what mean you by his own? How can that be given me, which is my own already? Or, if it be not my own, how can justice make it mine?

L.

Without law, every thing is in such sort every man's, as he may take, possess, and enjoy, without wrong to any man; every thing, lands, beasts, fruits, and even the bodies of other men, if his reason tell him he cannot otherwise live securely. For the dictates of reason are little worth, if they tended not to the preservation and improvement of men's lives. Seeing then without human law all things would be common, and this community a cause of encroachment, envy, slaughter, and continual war of one upon another, the same law of reason dictates to mankind, for their own preservation, a distribution of lands and goods, that each man may know what is proper to him, so as none other might pretend a right thereunto, or disturb him in the use of the same. This distribution is justice, and this properly is the same which we say is one's own; by which you may see the great necessity there was of statute laws, for preservation of all mankind. It is also a dictate of the law of reason, that statute laws are a necessary means of the safety and well-being of man in the present world, and are to be obeyed by all subjects, as the law of reason ought to be obeyed, both by King and subjects, because it is the law of God.

P.

All this is very rational; but how can any laws secure one man from another, when the greatest part of men are so unreasonable, and so partial to themselves as they are, and the laws of themselves are but a dead letter, which of itself is not able to compel a man to do otherwise than himself pleaseth, nor punish or hurt him when he hath done a mischief?

L.

By the laws, I mean laws living and armed. For you must suppose, that a nation that is subdued by war to an absolute submission to a conqueror, may, by the same arm that compelled it to submission, be compelled to obey his laws. Also, if a nation choose a

man, or an assembly of men, to govern them by laws, it must furnish him also with armed men and money, and all things necessary to his office; or else his laws will be of no force, and the nation remains, as before it was, in confusion. It is not therefore the word of the law, but the power of a man that has the strength of a nation, that make the laws effectual. It was not Solon that made Athenian laws, though he devised them, but the supreme court of the people; nor, the lawyers of Rome that made the imperial law in Justinian's time, but Justinian himself.

P.

We agree then in this, that in England it is the King that makes the laws, whosoever pens them; and in this, that the King cannot make his laws effectual, nor defend his people against their enemies, without a power to levy soldiers; and consequently, that he may lawfully, as oft as he shall really think it necessary to raise an army, (which in some occasions be very great) I say, raise it, and money to maintain it. I doubt not but you will allow this to be according to the law, at least of reason.

L.

For my part I allow it. But you have heard how, in and before the late troubles the people were of another mind. Shall the King, said they, take from us what he pleases, upon pretence of a necessity whereof he makes himself the judge? What worse condition can we be in from an enemy? What can they take from us more than what they list?

P.

The people reason ill. They do not know in what condition we were, in the time of the Conqueror, when it was a shame to be an Englishman; who, if he grumbled at the base offices he was put to by his Norman masters, received no other answer than this, *thou art but an Englishman.* Nor can the people, nor any man that humours their disobedience, produce any example of a King that ever raised any excessive sums, either by himself or by the consent of his Parliament, but when they had great need thereof; nor can show any reason that might move any of them so to do. The greatest complaint by them made against the unthriftiness of their Kings, was for the enriching now and then a favourite, which to the wealth of the kingdom was inconsiderable, and the complaint but envy. But in this point of raising soldiers, what is, I pray you, the

statute law?

L.

The last statute concerning it, is 13 *Car.* II. cap. 6, by which the supreme government, command, and disposing of the militia of England, is delivered to be, and always to have been, the ancient right of the Kings of England. But there is also in the same act a proviso, that this shall not be construed for a declaration, that the King may transport his subjects, or compel them to march out of the kingdom; nor is it, on the contrary, declared to be unlawful.

P.

Why is not that also determined?

L.

I can imagine cause enough for it, though I may be deceived. We love to have our King amongst us, and not to be governed by deputies, either of our own or another nation. But this I verily believe, that if a foreign enemy should either invade us, or put himself into a readiness to invade either England, Ireland, or Scotland, no Parliament then sitting, and the King send English soldiers thither, the Parliament would give him thanks for it. The subjects of those Kings who affect the glory, and imitate the actions, of Alexander the Great, have not always the most comfortable lives, nor do such Kings usually very long enjoy their conquests. They march to and fro perpetually, as upon a plank sustained only in the midst; and when one end rises, down goes the other.

P.

It is well. But where soldiers, in the judgment of the King’s conscience, are indeed necessary, as in an insurrection, or rebellion at home; how shall the kingdom be preserved without a considerable army ready and in pay? How shall money be raised for this army, especially when the want of public treasure inviteth neighbour Kings to encroach, and unruly subjects to rebel?

L.

I cannot tell. It is matter of polity, not of law. But I know, that there be statutes express, whereby the King hath obliged himself never to levy money upon his subjects

without the consent of his Parliament. One of which statutes is 25 *Edw.* I. c. 6, in these words: *We have granted for us, and our heirs, as well to archbishops, bishops, abbots, priors, and other folk of holy Church, as also to earls, barons, and to all the commonalty of the land, that for no business from henceforth, we shall take such aids, tasks, or prizes, but by the common consent of the realm.* There is also another statute of *Edward* I. (34 *Edw.* I. stat. 4) in these words: *No tallage, or aid shall be taken or levied by us or our heirs in our realm, without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land;* which statutes have been since that time confirmed by divers other Kings, and lastly by the King that now reigneth.

P.

All this I know, and am not satisfied. I am one of the common people, and one of that almost infinite number of men, for whose welfare Kings and other sovereigns were by God ordained: for God made Kings for the people, and not people for Kings. How shall I be defended from the domineering of proud and insolent strangers that speak another language, that scorn us, that seek to make us slaves, or how shall I avoid the destruction that may arise from the cruelty of factions in a civil war, unless the King, to whom alone, you say, belongeth the right of levying and disposing of the militia by which only it can be prevented, have ready money, upon all occasions, to arm and pay as many soldiers, as for the present defence, or the peace of the people, shall be necessary? Shall not I, and you, and every man be undone? Tell me not of a Parliament, when there is no Parliament sitting, or perhaps none in being, which may often happen. And when there is a Parliament, if the speaking and leading men should have a design to put down monarchy, as they had in the Parliament which began to sit the third of November, 1640, shall the King, who is to answer to God Almighty for the safety of the people, and to that end is intrusted with the power to levy and dispose of the soldiery, be disabled to perform his office, by virtue of these acts of Parliament which you have cited? If this be reason, it is reason also that the people be abandoned, or left at liberty to kill one another, even to the last man; if it be not reason, then you have granted it is not law.

L.

It is true, if you mean *recta ratio;* but *recta ratio,* which I grant to be law, as Sir

Edward Coke says, (1 *Inst.* sect. 138), is an artificial perfection of reason, gotten by long study, observation, and experience, and not every man's natural reason; for *nemo nascitur artifex.* This legal reason is *summa ratio;* and therefore, if all the reason that is dispersed into so many several heads, were united into one, yet could he 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 this is it, he calls the common law.

P.

Do you think this to be good doctrine? Though it be true, that no man is born with the use of reason, yet all men may grow up to it as well as lawyers; and when they have applied their reason to the laws, (which were laws before they studied them, or else it was not law they studied), may be as fit for and capable of judicature, as Sir Edward Coke himself, who whether he had more or less use of reason, was not thereby a judge, but because the King made him so. And whereas he says, that a man who should have as much reason as is dispersed in so many several heads, could not make such a law as this law of England is; if one should ask him who made the law of England, would he say a succession of English lawyers or judges made it, or rather a succession of kings? And that upon their own reason, either solely, or with the advice of the Lords and Commons in Parliament, without the judges or other professors of the law? You see therefore that the King's reason, be it more or less, is that *anima legis,* that *summa lex,* whereof Sir Edward Coke speaketh, and not the reason, learning, or wisdom of the judges. But you may see, that quite through his *Institutes of Law,* he often takes occasion to magnify the learning of the lawyers, whom he perpetually termeth the sages of the Parliament, or of the King's council. Therefore unless you say otherwise, I say, that the King's reason, when it is publicly upon advice and deliberation declared, is that *anima legis;* and that *summa ratio* and that equity, which all agree to be the law of reason, is all that is or ever was law in England, since it became Christian, besides the Bible.

L.

Are not the Canons of the Church part of the law of England, as also the imperial law used in the Admiralty, and the customs of particular places, and the by-laws of corporations and courts of judicature?

P.

Why not? For they were all constituted by the Kings of England; and though the civil law used in the Admiralty were at first the statutes of the Roman empire, yet because they are in force by no other authority than that of the King, they are now the King's laws, and the King's statutes. The same we may say of the Canons; such of them as we have retained, made by the Church of Rome, have been no law, nor of any force in England, since the beginning of Queen Elizabeth's reign, but by virtue of the great seal of England.

L.

In the said statutes that restrain the levying of money without consent of Parliament, is there any thing you can take exceptions to?

P.

No. I am satisfied that the kings that grant such liberties, are bound to make them good, so far as it may be done without sin: but if a King find that by such a grant he be disabled to protect his subjects, if he maintain his grant, he sins; and therefore may, and ought to take no notice of the said grant. For such grants, as by error or false suggestion are gotten from him, are, as the lawyers do confess, void and of no effect, and ought to be recalled. Also the King, as is on all hands confessed, hath the charge lying upon him to protect his people against foreign enemies, and to keep the peace betwixt them within the kingdom: if he do not his utmost endeavour to discharge himself thereof, he committeth a sin, which neither King nor Parliament can lawfully commit.

L.

No man, I think, will deny this. For if levying of money be necessary, it is a sin in the Parliament to refuse; if unnecessary, it is a sin both in King and Parliament to levy. But for all that, it may be, and I think it is, a sin in any one that hath the sovereign power, be he one man or one assembly, being intrusted with the safety of a whole nation, if rashly, and relying upon his own natural sufficiency, he make war or peace, without consulting with such, as by their experience and employment abroad, and intelligence by letters, or other means, have gotten the knowledge in some measure of

the strength, advantages, and designs of the enemy, and the manner and the degree of the danger that may from thence arise. In like manner, in case of rebellion at home, if he consult not with those of military condition; which if he do, then I think he may lawfully proceed to subdue all such enemies and rebels; and that the soldiers ought to go on without inquiring whether they be within the country, or without. For who shall suppress rebellion, but he that hath right to levy, command, and dispose of the militia? The last Long Parliament denied this. But why? Because by the major part of their votes the rebellion was raised with the design to put down monarchy, and to that end maintained.

P.

Nor do I hereby lay any aspersion upon such grants of the King and his ancestors. Those statutes are in themselves very good for the King and the people, as creating some kind of difficulty for such Kings as, for the glory of conquest, might spend one part of their subjects' lives and estates in molesting other nations, and leave the rest to destroy themselves at home by factions. That which I here find fault with, is the wresting of those, and other such statutes, to the binding of our Kings from the use of their armies in the necessary defence of themselves and their people. The late Long Parliament, that in 1648 murdered their King, (a King that sought no greater glory upon earth, but to be indulgent to his people, and a pious defender of the Church of England,) no sooner took upon them the sovereign power, than they levied money upon the people at their own discretion. Did any of their subjects dispute their power? Did they not send soldiers over the sea to subdue Ireland, and others to fight against the Dutch at sea; or made they any doubt but to be obeyed in all that they commanded, as a right absolutely due to the sovereign power in whomsoever it resides? I say not this as allowing their actions, but as a testimony from the mouths of those very men that denied the same power to him whom they acknowledged to have been their sovereign immediately before; which is a sufficient proof, that the people of England never doubted of the King's right to levy money for the maintenance of his armies, till they were abused in it by seditious teachers, and other prating men, on purpose to turn the State and Church into popular government, where the most ignorant and boldest talkers do commonly obtain the best preferments. Again, when their new republic returned into monarchy by Oliver, who durst deny him money upon any pretence of *Magna Charta,* or of these other acts of Parliament which you have cited? You may

therefore think it good law, for all your books, that the King of England may at all times, that he thinks in his conscience it will be necessary for the defence of his people, levy as many soldiers and as much money as he please, and that himself is judge of the necessity.

L.

Is there nobody hearkening at the door?

P.

What are you afraid of?

L.

I mean to say the same that you say: but there be very many yet, that hold their former principles, whom neither the calamities of the civil wars, nor their former pardon, have thoroughly cured of their madness.

P.

The common people never take notice of what they hear of this nature, but when they are set on by such as they think wise; that is, by some sorts of preachers, or some that seem to be learned in the laws, and withal speak evil of the governors. But what if the King, upon the sight or apprehension of any great danger to his people, (as when their neighbours are borne down by the current of a conquering enemy), should think his own people might be involved in the same misery; may he not levy, pay, and transport soldiers to help those weak neighbours, by way of prevention to save his own people and himself from servitude? Is that a sin?

L.

First, if the war upon our neighbour be just, it may be questioned whether it be equity or no to assist them against the right.

P.

For my part, I make no question of that at all, unless the invader will, and can, put me in security, that neither he nor his successors shall make any advantage of the conquest of my neighbour, to do the same to me in time to come. But there is no

common power to bind them to the peace.

L.

Secondly, when such a thing shall happen, the Parliament will not refuse to contribute freely to the safety of themselves and the whole nation.

P.

It may be so, and it may be not; for if a Parliament then sit not, it must be called; that requires six weeks' time; debating and collecting what is given requires as much, and in this time the opportunity perhaps is lost. Besides, how many wretched souls have we heard to say in the late troubles; what matter is it who gets the victory? We can pay but what they please to demand, and so much we pay now. And this they will murmur, as they have ever done, whosoever shall reign over them, as long as their covetousness and ignorance hold together; which will be till doomsday, if better order be not taken for their instruction in their duty, both from reason and religion.

L.

For all this I find it somewhat hard, that a King should have right to take from his subjects, upon the pretence of necessity, what he pleaseth.

P.

I know what it is that troubles your conscience in this point. All men are troubled at the crossing of their wishes; but it is our own fault. First, we wish impossibilities; we would have our security against all the world upon right of property, without paying for it; this is impossible. We may as well expect that fish and fowl should boil, roast, and dish themselves, and come to the table, and that grapes should squeeze themselves into our mouths, and have all other the contentments and ease which some pleasant men have related of the land of Cocagne. Secondly, there is no nation in the world where he or they that have the sovereignty, do not take what money they please for the defence of those respective nations, when they think it necessary for their safety. The late Long Parliament denied this; but why? Because there was a design amongst them to depose the King. Thirdly, there is no example of any King of England that I have read of, that ever pretended any such necessity for levying money against his conscience. The greatest sums that ever were levied, comparing the value of money, as it was at that

time, with what it is now, were levied by King Edward III and King Henry V; kings in whom we glory now, and think their actions great ornaments to the English history. Lastly, as to the enriching now and then a favourite, it is neither sensible to the kingdom, nor is any treasure thereby conveyed out of the realm, but so spent as it falls down again upon the common people. To think that our condition being human should be subject to no incommodity, were injuriously to quarrel with God Almighty for our own faults.

L.

I know not what to say.

P.

If you allow this that I have said, then say, that the people never were, shall be, or ought to be, free from being taxed at the will of one or other; that if civil war come, they must levy all they have, and that dearly, from the one or from the other, or from both sides. Say, that adhering to the King, their victory is an end of their trouble; that adhering to his enemies there is no end; for the war will continue by a perpetual subdivision, and when it ends, they will be in the same estate they were before. That they are often abused by men who to them seem wise, when then their wisdom is nothing else but envy of those that are in grace and in profitable employments; and that those men do but abuse the common people to their own ends, that set up a private man's propriety against the public safety. But say withal, that the King is subject to the laws of God, both written and unwritten, and to no other; and so was William the Conqueror, whose right is all descended to our present King.

L.

As to the law of reason, which is equity, it is sure enough there is but one legislator, which is God.

P.

It followeth, then, that which you call the common law, distinct from statute law, is nothing else but the law of God.

L.

In some sense it is; but it is not Gospel, but natural reason, and natural equity.

P.

Would you have every man to every other man allege for law his own particular reason? There is not amongst men a universal reason agreed upon in any nation, besides the reason of him that hath the sovereign power. Yet though his reason be but the reason of one man, yet it is set up to supply the place of that universal reason, which is expounded to us by our Saviour in the Gospel; and consequently our King is to us the legislator both of statute-law, and of common-law.

L.

Yes, I know that the laws spiritual, which have been law in this kingdom since the abolishing of popery, are the King's laws, and those also that were made before. For the Canons of the Church of Rome were no laws, neither here, nor anywhere else without the Pope's temporal dominions, farther than kings and states in their several dominions respectively did make them so.

P.

I grant that. But you must grant also, that those spiritual laws were made by the legislators of the spiritual law And yet not all kings and states make laws by consent of the Lords and Commons; but our King here is so far bound to their assents, as he shall judge conducing to the good and safety of his people. For example, if the Lords and Commons should advise him to restore those laws spiritual, which in Queen Mary's time were in force, I think the King were by the law of reason obliged, without the help of any other law of God, to neglect such advice.

L.

I grant you that the King is sole legislator; but with this restriction, that if he will not consult with the Lords of Parliament, and hear the complaints and informations of the Commons, that are best acquainted with their own wants, he sinneth against God, though he cannot be compelled to any thing by his subjects by arms and force.

P.

We are agreed upon that already. Since therefore the King is sole legislator, I think it

also reason he should be sole supreme judge.

L.

There is no doubt of that; for otherwise there would be no congruity of judgments with the laws. I grant also that he is the supreme judge over all persons, and in all causes civil and ecclesiastical within his own dominions; not only by act of Parliament at this time, but that he has ever been so by the common law. For the judges of both the Benches have their offices by the King's letters-patent; and so as to judicature have the bishops. Also the Lord Chancellor hath his office by receiving from the King the Great Seal of England. And, to say all at once, there is no magistrate, or commissioner for public business, neither of judicature nor execution, in State or Church, in peace or war, but he is made so by authority from the King.

P.

The King is the supreme judge.

It is true; but perhaps you may think otherwise, when you read such acts of parliament, as say, that the King shall have power and authority to do this or that by virtue of that act, as *Elizabeth* c. I "that your highness, your heirs, and successors, Kings, or Queens of this realm, shall have full power and authority, by virtue of this act, by letters-patent under the great seal of England, to assign, &c." Was it not this Parliament that gave this authority to the Queen?

L.

No. For the statute in this clause is no more than, as Sir Edward Coke useth to speak, an affirmance of the common-law. For she being head of the Church of England, might make commissioners for the deciding of matters ecclesiastical, as freely as if she had been Pope, who did, you know, pretend his right from the law of God.

P.

We have hitherto spoken of laws without considering anything of the nature and essence of a law; and now unless we define the word *law,* we can go no farther without ambiguity and fallacy, which will be but loss of time; whereas, on the contrary, the agreement upon our words will enlighten all we have to say hereafter.

L.

I do not remember the definition of *law* in any statute.

P.

I think so: for the statutes were made by authority, and not drawn from any other principles than the care of the safety of the people. Statutes are not philosophy, as is the common-law, and other disputable arts, but are commands or prohibitions, which ought to be obeyed, because assented to by submission made to the Conqueror here in England, and to whosoever had the sovereign power in other commonwealths; so that the positive laws of all places are statutes. The definition of law was therefore unnecessary for the makers of statutes, though very necessary to them whose work it is to teach the sense of the law.

L.

There is an accurate definition of a law in Bracton, cited by Sir Edward Coke: *Lex est sanctio justa, jubens honesta, et prohibens contraria.*

P.

That is to say, law is a just statute, commanding those things which are honest, and forbidding the contrary. From whence it followeth, that in all cases it must be the honesty or dishonesty that makes the command a law; whereas you know that but for the law we could not, as saith St. Paul, have known what is sin. Therefore this definition is no ground at all for any farther discourse of law. Besides, you know the rule of honest and dishonest refers to honour, and that it is justice only, and injustice, that the law respecteth. But that which I most except against in this definition, is, that it supposes that a statute made by the sovereign power of a nation may be unjust. There may indeed in a statute-law, made by men, be found iniquity, but not injustice.

L.

This is somewhat subtile. I pray deal plainly. What is the difference between injustice and iniquity?

P.

I pray you tell me first, what is the difference between a court of justice, and a court of equity?

L.

A court of justice is that which hath cognizance of such causes as are to be ended by the positive laws of the land; and a court of equity is that, to which belong such causes as are to be determined by equity; that is to say, by the law of reason.

P.

You see then that the difference between injustice and iniquity is this; that injustice is the transgression of a statute-law, and iniquity the transgression of the law of reason. But perhaps you mean by common-law, not the law itself, but the manner of proceeding in the law, as to matter of fact, by twelve men, freeholders; though those twelve men are no court of equity, nor of justice, because they determine not what is just or unjust, but only whether it be done or not done; and their judgment is nothing else but a confirmation of that which is properly the judgment of the witnesses. For to speak exactly, there cannot possibly be any judge of fact besides the witnesses.

L.

How would you have a law defined?

P.

Thus; a law is the command of him or them that have the sovereign power, given to those that be his or their subjects, declaring publicly and plainly what every of them may do, and what they must forbear to do.

L.

Seeing all judges in all courts ought to judge according to equity, which is the law of reason, a distinct court of equity seemeth to me to be unnecessary, and but a burthen to the people, since common-law and equity are the same law.

P.

It were so indeed, if judges could not err; but since they may err, and that the King is not bound to any other law but that of equity, it belongs to him alone to give remedy to them that, by the ignorance or corruption of a judge, shall suffer damage.

L.

By your definition of a law, the King's proclamation under the Great Seal of England is a law; for it is a command, and public, and of the sovereign to his subjects.

P.

Why not, if he think it necessary for the good of his subjects? For this is a maxim at the common-law alleged by Sir Edward Coke himself, (I Inst. sect. 306), *Quando lex aliquid concedit, concedere videtur et id per quod devenitur ad illud.* And you know out of the same author, that divers Kings of England have often, to the petitions in Parliament which they granted, annexed such exceptions as these, *unless there be necessity, saving our regality;* which I think should be always understood, though they be not expressed; and are understood so by common lawyers, who agree that the King may recall any grant wherein he was deceived.

L.

Again, whereas you make it of the essence of a law to be publicly and plainly declared to the people, I see no necessity for that. Are not all subjects bound to take notice of all acts of Parliament, when no act can pass without their consent?

P.

If you had said that no act could pass without their knowledge, then indeed they had been bound to take notice of them; but none can have knowledge of them but the members of the houses of Parliament; therefore the rest of the people are excused. Or else the knights of the shire should be bound to furnish people with a sufficient number of copies, at the people's charge, of the acts of Parliament, at their return into the country; that every man may resort to them, and by themselves, or friends, take notice of what they are obliged to. For otherwise it were impossible they should be obeyed: and that no man is bound to do a thing impossible, is one of Sir Edward Coke's maxims at the common-law. I know that most of the statutes are printed; but it does not appear that every man is bound to buy the book of statutes, nor to search for them at Westminster or at the Tower, nor to understand the language wherein they are for the most part written.

L.

I grant it proceeds from their own faults; but no man can be excused by ignorance of

the law of reason, that is to say, by ignorance of the common-law, except children, madmen, and idiots. But you exact such a notice of the statute-law, as is almost impossible. Is it not enough that they in all places have a sufficient number of the penal statutes?

P.

Yes; if they have those penal statutes near them. But what reason can you give me why there should not be as many copies abroad of the statutes, as there be of the Bible?

L.

I think it were well that every man that can read, had a statute-book; for certainly no knowledge of those laws, by which men's lives and fortunes can be brought into danger, can be too much. I find a great fault in your definition of law; which is, that every law either forbiddeth or commandeth something. It is true that the moral law is always a command or a prohibition, or at least implieth it. But in the Levitical law, where it is said that he that stealeth a sheep shall restore fourfold, what command or prohibition lieth in these words?

P.

Such sentences as that are not in themselves general, but judgments; nevertheless, there is in those words implied a commandment to the judge, to cause to be made a fourfold restitution.

L.

That is right.

P.

Now define what justice is, and what actions and men are to be called just.

L.

Justice is the constant will of giving to every man his own; that is to say, of giving to every man that which is his right, in such manner as to exclude the right of all men else to the same thing. A just action is that which is not against the law. A just man is

he that hath a constant will to live justly; if you require more, I doubt there will no man living be comprehended within the definition.

P.

Seeing then that a just action, according to your definition, is that which is not against the law; it is manifest that before there was a law, there could be no injustice; and therefore laws are in their nature antecedent to justice and injustice. And you cannot deny but there must be law-makers, before there were any laws, and consequently before there was any justice, (I speak of human justice); and that law-makers were before that which you call *own,* or property of goods or lands, distinguished by *meum, tuum, alienum.*

L.

That must be granted; for without statute-laws, all men have right to all things; and we have had experience, when our laws were silenced by civil war, there was not a man, that of any goods could say assuredly they were his own.

P.

You see then that no private man can claim a propriety in any lands, or other goods, from any title from any man but the King, or them that have the sovereign power; because it is in virtue of the sovereignty, that every man may not enter into and possess what he pleaseth; and consequently to deny the sovereign anything necessary to the sustaining of his sovereign power, is to destroy the propriety he pretends to. The next thing I will ask you is, how you distinguish between law and right, or *lex* and *jus.*

L.

Sir Edward Coke in divers places makes *lex* and *jus* to be the same, and so *lex communis* and *jus communis,* to be all one; nor do I find that he does in any place distinguish them.

P.

Then will I distinguish them, and make you judge whether my distinction be not necessary to be known by every author of the common-law. For law obligeth me to do, or forbear the doing of something; and therefore it lays upon me an obligation. But my

right is a liberty left me by the law to do any thing which the law forbids me not, and to leave undone any thing which the law commands me not. Did Sir Edward Coke see no difference between being bound and being free?

L.

I know not what he saw, but he has not mentioned it. Though a man may dispense with his own liberty, he cannot do so with the law.

P.

But what are you better for your right, if a rebellious company at home, or an enemy from abroad, take away the goods, or dispossess you of the lands you have a right to? Can you be defended or repaired, but by the strength and authority of the King? What reason therefore can be given by a man that endeavours to preserve his propriety, why he should deny or malignly contribute to the strength that should defend him or repair him? Let us see now what your books say to this point, and other points of the right of sovereignty. Bracton, the most authentic author of the common law, (fol. 55), saith thus: *Ipse Dominus Rex habet omnia jura in manu sua, sicut Dei vicarius; habet etiam ea quæ sunt pacis; habet etiam coercionem, ut delinquentes puniat; item habet in potestate sua leges. Nihil enim prodest jura condere, nisi sit qui jura tueatur.* That is to say: Our Lord the King hath all right in his own hands; is God's vicar; he has all that concerns the peace; he has the power to punish delinquents; all the laws are in his power: to make laws is to no purpose, unless there be somebody to make them obeyed. If Bracton's law be reason, as I and you think it is, what temporal power is there which the King hath not? Seeing that at this day all the power spiritual, which Bracton allows the Pope, is restored to the crown; what is there that the King cannot do, excepting sin against the law of God? The same Bracton, (*lib.* ii. *c.* 8, fol. 5), saith thus: *Si autem a Rege petatur, cum breve non currat contra ipsum, locus erit supplicationi quod factum suum corrigat et emendet; quod quidem si non fecerit, satis sufficit ei ad pœnam, quod Dominum expectet ultorem: nemo quidem de factis suis præsumat disputare, multo fortius contra factum suum venire.* That is to say: If any thing be demanded of the King, seeing a writ lieth not against him, he is put to his petition, praying him to correct and amend his own fact; which if he will not do, it is a sufficient penalty for him, that he is to expect a punishment from the Lord: no man may presume to dispute of what he does, much less to resist him. You see by this, that

this doctrine concerning the rights of sovereignty, so much cried down by the Long Parliament, is the ancient common-law, and that the only bridle of the Kings of England, ought to be the fear of God. And again, Bracton, (*lib.* ii. *c.* 24, fol. 55), says, that the rights of the Crown cannot be granted away: *Ea vero quæ jurisdictionis sunt et pacis, et ea quæ sunt justitiæ et paci annexa, ad nullum pertinent nisi ad coronam et dignitatem Regiam, nec a corona separari poterunt, nec a privata persona possideri.* This is to say: those things which belong to jurisdiction and peace, and those things that are annexed to justice and peace, appertain to none but to the crown and dignity of the King, nor can be separated from the crown, nor be possessed by a private person. Again, you will find in Fleta, a law-book written in the time of Edward II, that liberties, though granted by the King, if they tend to the hinderance of justice, or subversion of the regal power, were not to be used, nor allowed; for in that book, (*lib.* i. c. 20, § 54) concerning articles of the crown, which the justices itinerant are to enquire of, the 54th article is this: You shall inquire, *de libertatibus concessis quæ impediunt communem justitiam, et Regiam potestatem subvertunt.* Now what is a greater hinderance to common justice, or a greater subversion of the regal power, than a liberty in subjects to hinder the King from raising money necessary to suppress or prevent rebellions, which doth destroy justice, and subvert the power of the sovereignty? Moreover, when a charter is granted by the King in these words: "*Dedita etc. . . . coram etc. . . . pro me et hæredibus meis:*" the grantor by the common-law, as Sir Edward Coke says in his Commentaries on Littleton, is to warrant his gift; and I think it reason, especially if the gift be upon consideration of a price paid. Suppose a foreign state should lay claim to this kingdom, (it is no matter as to the question I am putting, whether the claim be unjust), how would you have the King to warrant to every freeholder in England the lands they hold of him by such a charter? If he cannot levy money, their estates are lost, and so is the King's estate; and if the King's estate be gone, how can he repair the value due upon the warranty? I know that the King's charters are not so merely grants, as that they are not also laws; but they are such laws as speak not to all the King's subjects in general, but only to his officers; implicitly forbidding them to judge or execute any thing contrary to the said grants. There be many men that are able judges of what is right reason, and what not; when any of these shall know that a man has no superior nor peer in the kingdom, he will hardly be persuaded he can be bound by any law of the kingdom, or that he who is subject to none but God, can make a law upon himself, which he cannot also as easily

abrogate as he made it. The main argument, and that which so much taketh with the throng of people, proceedeth from a needless fear put into their minds by such men as mean to make use of their hands to their own ends. For if, say they, the King may notwithstanding the law do what he please, and nothing to restrain him but the fear of punishment in the world to come, then, in case there come a king that fears no such punishment, he may take away from us, not only our lands, goods, and liberties, but our lives also if he will. And they say true; but they have no reason to think he will, unless it be for his own profit; which cannot be, for he loves his own power; and what becomes of his power when his subjects are destroyed or weakened, by whose multitude and strength he enjoys his power, and every one of his subjects his fortune? And lastly, whereas they sometimes say the King is bound, not only to cause his laws to be observed, but also to observe them himself; I think the King causing them to be observed is the same thing as observing them himself. For I never heard it taken for good law, that the King may be indicted, or appealed, or served with a writ, till the Long Parliament practised the contrary upon the good King Charles; for which divers of them were executed, and the rest by this our present King pardoned.

L.

Pardoned by the King and Parliament.

P.

By the King in Parliament if you will, but not by the King and Parliament. You cannot deny, but that the pardoning of injury belongs to the person that is injured; treason, and other offences against the peace and against the right of the sovereign, are injuries done to the King; and therefore whosoever is pardoned any such offence, ought to acknowledge he owes his pardon to the King alone: but as to such murders, felonies, and other injuries as are done to any subject how mean soever, I think it great reason that the parties endamaged ought to have satisfaction before such pardon be allowed. And in the death of a man, where restitution of life is impossible, what can any friend, heir, or other party that may appeal, require more than reasonable satisfaction some other way? Perhaps he will be content with nothing but life for life; but that is revenge, and belongs to God, and under God to the King, and none else; therefore if there be reasonable satisfaction tendered, the King without sin, I think, may pardon him. I am sure, if the pardoning him be a sin, that neither King, nor Parliament, nor any earthly

power can do it.

L.

You see by this your own argument, that the Act of *Oblivion,* without a Parliament, could not have passed; because, not only the King, but also most of the Lords, and abundance of common people had received injuries; which not being pardonable but by their own assent, it was absolutely necessary that it should be done in Parliament, and by the assent of the Lords and Commons.

P.

I grant it; but I pray you tell me now what is the difference between a general pardon, and an act of *oblivion?*

L.

The word Act of *Oblivion* was never in our books before; but I believe it is in yours.

P.

In the state of Athens long ago, for the abolishing of the civil war, there was an act agreed on; that from that time forward, no man should be molested for anything before that act done, whatsoever, without exception; which act the makers of it called an act of *oblivion;* not that all injuries should be forgotten (for then we could never have had the story), but that they should not rise up in judgment against any man. And in imitation of this act, the like was propounded, though it took no effect, upon the death of Julius Cæsar, in the senate of Rome. By such an act you may easily conceive that all accusations for offences past were absolutely dead and buried; and yet we have no great reason to think, that the objecting one to another of the injuries pardoned, was any violation of those acts, except the same were so expressed in the act itself.

L.

It seems then that the act of *oblivion* was here no more, nor of other nature, than a general pardon.

P.

Since you acknowledge that in all controversies, the judicature originally belongeth to

the King, and seeing that no man is able in his own person to execute an office of so much business: what order is taken for deciding of so many and so various controversies?

L. Of Courts.

There be divers sorts of controversies, some of which are concerning men's titles to lands and goods; and some goods are corporeal, as lands, money, cattle, corn, and the like, which may be handled or seen; and some incorporeal, as privileges, liberties, dignities, offices, and many other good things, mere creatures of the law, and cannot be handled or seen; and both of these kinds are concerning *meum* and *tuum.* Others there are concerning crimes punishable divers ways: and amongst some of these, part of the punishment is some fine or forfeiture to the King; and then it is called a plea of the Crown, in case the King sue the party; otherwise it is but a private plea, which they call an appeal. And though upon judgment in an appeal the King shall have his forfeiture, yet it cannot be called a plea of the Crown, but when the Crown pleadeth for it. There be also other controversies concerning the government of the Church, in order to religion and virtuous life. The offences both against the Crown and against the laws of the Church, are crimes; but the offences of one subject against another, if they be not against the Crown, the King pretendeth nothing in those pleas but the reparation of his subjects injured.

P.

A crime is an offence of any kind whatsoever, for which a penalty is ordained by the law of the land: but you must understand that damages awarded to the party injured, has nothing common with the nature of a penalty, but is merely a restitution or satisfaction, due to the party grieved by the law of reason, and consequently is no more a punishment than is the paying of a debt.

L.

It seems by this definition of a crime, you make no difference between a crime and a sin.

P.

All crimes are indeed sins, but not all sins crimes. A sin may be in the thought or

secret purpose of a man, of which neither a judge, nor a witness, nor any man can take notice; but a crime is such a sin as consists in an action against the law, of which action he can be accused, and tried by a judge, and be convinced or cleared by witnesses. Farther; that which is no sin in itself, but indifferent, may be made sin by a positive law: as when the statute was in force that no man should wear silk in his hat, after the statute such wearing of silk was a sin, which was not so before. Nay, sometimes an action that is good in itself, by the statute law may be made a sin; as if a statute should be made to forbid the giving of alms to a strong and sturdy beggar, such alms, after that law, would be a sin, but not before; for then it was charity, the object whereof is not the strength or other quality of the poor man, but his poverty. Again, he that should have said in Queen Mary's time, that the Pope had no authority in England, should have been burnt at a stake; but for saying the same in the time of Queen Elizabeth, should have been commended. You see by this, that many things are made crimes, and no crime, which are not so in their own nature, but by diversity of law, made upon diversity of opinion or of interest by them which have authority: and yet those things, whether good or evil, will pass so with the vulgar, if they hear them often with odious terms recited, for heinous crimes in themselves, as many of those opinions, which are in themselves pious and lawful, were heretofore, by the Pope's interest therein, called detestable heresy. Again, some controversies are of things done upon the sea, others of things done upon the land. There need be many courts to the deciding of so many kinds of controversies. What order is there taken for their distribution?

L.

There be an extraordinary great number of courts in England. First, there be the King's courts, both for law and equity, in matters temporal; which are the Chancery, the King's Bench, the Court of Common Pleas; and, for the King's revenue, the Court of the Exchequer: and there be subjects' courts by privilege, as the Courts in London and other privileged places. And there be other courts of subjects, as the Court of Landlords, called the Court of Barons, and the Courts of Sheriffs. Also the Spiritual Courts are the King's courts at this day, though heretofore they were the Pope's courts. And in the King's courts, some have their judicature by office, and some by commission; and some authority to hear and determine, and some only to inquire, and to certify into other courts. Now for the distribution of what pleas every court may

hold, it is commonly held, that all the pleas of the Crown, and of all offences contrary to the peace, are to be holden in the King's Bench, or by commissioners. For Bracton saith: *Sciendum est, quod si actiones sunt criminales, in Curia Domini Regis debent determinari; cum sit ibi pœna corporalis infligenda, et hoc coram ipso rege, si tangat personam suam, sicut crimen læsæ majestatis, vel coram justitiariis ad hoc specialiter assignatis:* that is to say, that if the plea be criminal, it ought to be determined in the Court of our Lord the King, because there they have power to inflict corporal punishment; and if the crime be against his person, as the crime of treason, it ought to be determined before the King himself; or if it be against a private person, it ought to be determined by justices assigned, that is to say, before commissioners. It seems by this, that heretofore Kings did hear and determine pleas of treason against themselves, by their own persons; but it has been otherwise a long time, and is now; for it is now the office of the Lord Steward of England, in the trial of a peer, to hold that plea by a commission especially for the same. In causes concerning *meum* and *tuum,* the King may sue, either in the King's Bench, or in the Court of Common Pleas; as it appears by Fitzherbert in his *Natura Brevium,* at the writ of escheat.

P.

A king perhaps will not sit to determine of causes of treason against his person, lest he should seem to make himself judge in his own cause; but that it shall be judged by judges of his own making can never be avoided, which is all one as if he were judge himself.

L.

To the King's Bench also, I think, belongeth the hearing and determining of all manner of breaches of the peace whatsoever, saving always to the King that he may do the same, when he pleaseth, by commissioners. In the time of Henry III and Edward I (when Bracton wrote) the King did usually send down every seven years into the country, commissioners called justices itinerant, to hear and determine generally all causes temporal, both criminal and civil; whose places have been now a long time supplied by the justices of assize, with commissions of the peace of *oyer* and *terminer,* and of gaol-delivery.

P.

But why may the King only sue in the King's Bench or Court of Common Pleas, which he will, and no other person may do the same?

L.

There is no statute to the contrary, but it seemeth to be the common-law. For Sir Edward Coke (IV*th Instit.*), setteth down the jurisdiction of the King's Bench; which, he says, has: first, jurisdiction in all pleas of the Crown. Secondly, the correcting of all manner of errors of other justices and judges, both of judgments and process, except of the Court of Exchequer, which, he says, is to this court *proprium quarto modo.* Thirdly, that it has power to correct all misdemeanours *extrajudicial,* tending to the breach of the peace, or oppression of the subjects, or raising of factions, controversies, debates, or any other manner of misgovernment. Fourthly, it may hold plea by writ out of the Chancery of all trespasses done *vi et armis.* Fifthly, it hath power to hold plea by bill for debt, detenue, covenant, promise, and all other personal actions. But of the jurisdiction of the King's Bench in actions real he says nothing; save, that if a writ in a real action be abated by judgment in the Court of Common Pleas, and that the judgment be by a writ of error reversed in the King's Bench, then the King's Bench may proceed upon the writ.

P.

But how is the practice?

L.

Real actions are commonly decided, as well in the King's Bench, as in the Court of Common Pleas.

P.

When the King by authority in writing maketh a Lord Chief Justice of the King's Bench; does he not set down what he makes him for?

L.

Sir Edward Coke sets down the letters-patent, whereby of ancient time the Lord Chief Justice was constituted, wherein is expressed to what end he hath his office; *viz. pro conservatione nostra et tranquillitatis regni nostri, et ad justitiam universis et singulis*

de regno nostro exhibendam, constituimus dilectum et fidelem nostrum P.B. *Justitiarium Angliæ, quamdiu nobis placuerit, Capitalem, etc.:* that is to say, for the preservation of ourself, and of the peace of our realm, and for the doing of justice to all and singular our subjects, we have constituted our beloved and faithful P. B. during our pleasure, Chief Justice of England, &c.

P.

Methinks it is very plain by these letters-patent, that all causes temporal within the kingdom, except the pleas that belong to the Exchequer, should be decidable by this Lord Chief Justice. For as for causes criminal, and that concern the peace, it is granted him in these words, "for the conservation of our self, and peace of the kingdom," wherein are contained all pleas criminal; and, in the doing of justice to all and singular the King's subjects are comprehended all pleas civil. And as to the Court of Common Pleas, it is manifest it may hold all manner of civil pleas, except those of the Exchequer, by *Magna Charta,* cap. ii. So that all original writs concerning civil pleas are returnable into either of the said courts. But how is the Lord Chief Justice made now?

L.

By these words in their letters-patent: *Constituimus vos Justitiarium nostrum Capitalem ad placita coram nobis tenenda, durante beneplacito nostro:* that is to say, we have made you our Chief Justice, to hold pleas before ourself, during our pleasure. But this writ, though it be shorter, does not at all abridge the power they had by the former. And for the letters-patent for the Chief Justice of the Common Pleas, they go thus: *Constituimus dilectum et fidelem, etc., Capitalem Justitiarium de Communi Banco, habendum, etc., quamdiu nobis placuerit, cum vadiis et fœdis ab antiquo debitis et consuetis. Id est,* We have constituted our beloved and faithful, &c., Chief Justice of the Common Bench, to have, &c., during our pleasure, with the ways and fees thereunto heretofore due, and usual.

P.

I find in history, that there have been in England always a Chancellor and a Chief Justice of England, but of a Court of Common Pleas there is no mention before *Magna Charta.* Common pleas there were ever both here, and, I think, in all nations; for common pleas and civil pleas I take to be the same.

L.

Before the statute of *Magna Charta,* common pleas, as Sir Edward Coke granteth, (2 *Inst.* p. 21), might have been holden in the King's Bench; and that court being removeable at the King's will, the returns of writs were *Coram nobis ubicunque fuerimus in Anglia;* whereby great trouble of jurors ensued, and great charges of the parties, and delay of justice; and for these causes it was ordained, that the common pleas should not follow the King, but be held in a place certain.

P.

Here Sir Edward Coke declares his opinion, that no common plea can be holden in the King's Bench, in that he says they might have been holden then. And yet this doth not amount to any probable proof, that there was any Court of Common Pleas in England before *Magna Charta.* For this statute being to ease the jurors, and lessen the charges of parties, and for the expedition of justice, had been in vain, if there had been a Court of Common Pleas then standing; for such a court was not necessarily to follow the King, as was the Chancery and the King's Bench. Besides, unless the King's Bench, wheresoever it was, held plea of civil causes, the subject had not at all been eased by this statute. For supposing the King at York, had not the King's subjects about London, jurors and parties, as much trouble and charge to go to York, as the people about York had before to go to London? Therefore I can by no means believe otherwise, than that the erection of the Court of Common Pleas was the effect of that statute of *Magna Charta,* cap. 11; and before that time not existent, though I think that for the multiplicity of suits in a great kingdom there was need of it.

L.

Perhaps there was not so much need of it as you think. For in those times the laws, for the most part, were in settling, rather than settled; and the old Saxon laws concerning inheritances were then practised, by which laws speedy justice was executed by the King's writs, in the courts of Barons, which were landlords to the rest of the freeholders; and suits of barons in County courts; and but few suits in the King's courts, but when justice could not be had in those inferior courts. But at this day there be more suits in the King's courts, than any one court can despatch.

P.

Why should there be more suits now, than formerly? For I believe this kingdom was as well peopled then as now.

L.

Sir Edward Coke (4 *Inst.* p. 76) assigneth for it six causes: 1. Peace. 2. Plenty. 3. The dissolution of religious houses, and dispersing of their lands among so many several persons. 4. The multitude of informers. 5. The number of concealers. 6. The multitude of attorneys.

P.

I see Sir Edward Coke has no mind to lay any fault upon the men of his own profession, and that he assigns for causes of the mischiefs, such things as would be mischief and wickedness to amend. For if peace and plenty be the cause of this evil, it cannot be removed but by war and beggary; and the quarrels arising about the lands of religious persons cannot arise from the lands, but from the doubtfulness of the laws. And for informers, they were authorized by statutes; to the execution of which statutes they are so necessary, as that their number cannot be too great; and if it be too great, the fault is in the law itself. The number of concealers are indeed a number of cozeners, which the law may easily correct. And lastly, for the multitude of attorneys, it is the fault of them that have the power to admit or refuse them. For my part, I believe that men at this day have better learned the art of cavilling against the words of a statute, than heretofore they had, and thereby encourage themselves and others to undertake suits upon little reason. Also the variety and repugnancy of judgments of common-law, do oftentimes put men to hope for victory in causes whereof in reason they had no ground at all: also the ignorance of what is equity in their own causes, which equity not one man in a thousand ever studied. And the lawyers themselves seek not for their judgments in their own breasts, but in the precedents of former judges: as the ancient judges sought the same, not in their own reason, but in the laws of the empire. Another, and perhaps the greatest cause of multitude of suits, is this, that for want of registering of conveyances of land, which might easily be done in the townships where the lands lay, a purchase cannot easily be had which will not be litigious. Lastly, I believe the covetousness of lawyers was not so great in ancient time, which was full of trouble, as they have been since in time of peace; wherein men have leisure to study fraud, and get employment from such men as can encourage to contention. And

how ample a field they have to exercise this mystery in, is manifest from this, that they have a power to scan and construe every word in a statute, charter, feoffment, lease, or other deed, evidence, or testimony. But to return to the jurisdiction of this Court of the King's Bench, where, as you say, it hath power to correct and amend the errors of all other judges, both in process and in judgments; cannot the judges of the Common Pleas correct error in process in their own courts, without a writ of error from another court?

L.

Yes; and there be many statutes which command them so to do.

P.

When a writ of error is brought out of the King's Bench, be it either error in process or in law, at whose charge is it to be done?

L.

At the charge of the client.

P.

I see no reason for that; for the client is not in fault, who never begins a suit but by the advice of his counsel, learned in the law, whom he pays for his counsel given. Is not this the fault of his counsellor? Nor when a judge in the Common Pleas hath given an erroneous sentence, is it always likely that the judge of the King's Bench will reverse the judgment, (though there be no question, but as you may find in Bracton and other learned men, he has power to do it); because being professors of the same common-law, they are persuaded, for the most part, to give the same judgments. For example: if Sir Edward Coke, in the last term that he sat as Lord Chief Justice in the Court of Common Pleas, had given an erroneous judgment, is it likely that when he was removed, and made Lord Chief Justice of the King's Bench, he would therefore have reversed the said judgment? It is possible he might, but not very likely. And therefore I do believe there is some other power, by the King constituted, to reverse erroneous judgments, both in the King's Bench and in the Court of Common Pleas.

L.

I think not; for there is a statute to the contrary, made 4 *Henry IV,* cap. 23, in these words: Whereas, as well in plea real, as in plea personal, after judgment in the court of our Lord the King, the parties be made to come upon grievous pain sometimes before the King himself, sometimes before the King's council, and sometimes to the Parliament, to answer thereof anew, to the great impoverishing of the parties aforesaid, and to the subversion of the common-law of the land, it is ordained and established, that after judgment given in the court of our Lord the King, the parties and their heirs shall be there in peace, until the judgment be undone by attaint, or by error, if there be error, as hath been used by the laws in the times of the King's progenitors.

P.

This statute is so far from being repugnant to that I say, as it seemeth to me to have been made expressly to confirm the same. For the substance of the statute is, that there shall be no suit made by either of the parties for anything adjudged, either in the King's Bench, or Court of Common Pleas, before the judgment be undone by error, or corruption proved; and that this was the common-law before the making of this statute, which could not be, except there were before this statute some courts authorized to examine and correct such errors as by the plaintiff should be assigned. The inconvenience which by this statute was to be remedied was this, that often judgment given in the King's courts, by which are meant in this place the King's Bench and Court of Common Pleas, the party against whom the judgment was given, did begin a new suit, and cause his adversary to come before the King himself. Here, by the King himself must be understood the King in person; for though in a writ by the words *coram nobis* is understood the King's Bench, yet in a statute it is never so; nor is it strange, seeing in those days the King did usually sit in court with his council to hear causes, as sometimes King James. And sometimes the same parties commenced their suit before the Privy Council, though the King were absent, and sometimes before the Parliament, the former judgment yet standing. For remedy whereof, it was ordained by this statute, that no man should renew his suit till the former judgment was undone by attaint or error; which reversing of a judgment had been impossible, if there had been no court besides the aforesaid two courts, wherein the errors might be assigned, examined, and judged; for no court can be esteemed, in law or reason, a competent judge of its own errors. There was therefore before this statute, some other court existent for the hearing of errors, and reversing of erroneous judgments. What court

this was, I inquire not yet; but I am sure it could not be either the Parliament or the Privy Council, or the court wherein the erroneous judgment was given.

L.

The *Doctor and Student* discourses of this statute (cap. 18 et seq.) much otherwise than you do. For the author of that book saith, that against an erroneous judgment all remedy is by this statute taken away. And though neither reason, nor the office of a King, nor any law positive, can prohibit the remedying of any injury, much less of an unjust sentence; yet he shows many statutes, wherein a man's conscience ought to prevail above the law.

P.

Upon what ground can he pretend, that all remedy in this case is by this statute prohibited?

L.

He says it is thereby enacted, that judgment given by the King's Courts shall not be examined in the Chancery, Parliament, nor elsewhere.

P.

Is there any mention of Chancery in this act? It cannot be examined before the King and his council, nor before the Parliament; but you see that before the statute it was examined somewhere, and that this statute will have it examined there again. And seeing the Chancery was altogether the highest office of judicature in the kingdom for matter of equity, and that the Chancery is not here forbidden to examine the judgments of all other courts, at least it is not taken from it by this statute. But what cases are there in this chapter of the Doctor and Student, by which it can be made probable, that when law and conscience, or law and equity, seem to oppugn one another, the written law should be preferred?

L.

If the defendant wage his law in an action of debt brought upon a true debt, the plaintiff hath no means to come to his debt by way of compulsion, neither by *subpœna,* nor otherwise; and yet the defendant is bound in conscience to pay him.

P.

Here is no preferring, that I see, of the law above conscience or equity. For the plaintiff in this case loseth not his debt for want either of law, or equity, but for want of proof; for neither law nor equity can give a man his right, unless he prove it.

L.

Also if the grand jury in attaint affirm a false verdict given by the petty jury, there is no further remedy, but the conscience of the party.

P.

Here again the want of proof is the want of remedy. For if he can prove that the verdict given was false, the King can give him remedy such way as himself shall think best, and ought to do it, in case the party shall find surety, if the same verdict be again affirmed, to satisfy his adversary for the damage and vexation he puts him to.

L.

But there is a statute made since, *viz.* 27 *Eliz. c.* 8, by which that statute of 4 *Hen. IV.* 23, is in part taken away. For by that statute, erroneous judgments given in the King's Bench, are by a writ of error to be examined in the Exchequer-chamber, before the justices of the Common Bench and the Barons of the Exchequer; and by the preamble of this act it appears, that erroneous judgments are only to be reformed by the High Court of Parliament.

P.

But here is no mention, that the judgments given in the Court of Common Pleas should be brought in to be examined in the Exchequer-chamber. Why therefore may not the Court of Chancery examine a judgment given in the Court of Common Pleas?

L.

You deny not but, by the ancient law of England, the King's Bench may examine the judgment given in the Court of Common Pleas.

P.

It is true. But why may not also the Court of Chancery do the same, especially if the fault of the judgment be against equity, and not against the letter of the law?

L.

There is no necessity of that; for the same court may examine both the letter and the equity of the statute.

P.

You see by this, that the jurisdiction of courts cannot easily be distinguished, but by the King himself in his Parliament. The lawyers themselves cannot do it; for you see what contention there is between courts, as well as between particular men. And whereas you say, that law of 4 *Hen. IV.* 23, is by that of 27 *Eliz. c.* 8, taken away, I do not find it so. I find indeed a diversity of opinion between the makers of the former and the latter statute, in the preamble of the latter and conclusion of the former. The preamble of the latter is, forasmuch as erroneous judgments given in the Court called the King's Bench, are only to be reformed in the High Court of Parliament; and the conclusion of the former is, that the contrary was law in the times of the King's progenitors. These are no parts of those laws, but opinions only concerning the ancient custom in that case, arising from the different opinions of the lawyers in those different times, neither commanding nor forbidding anything; though of the statutes themselves, the one forbids that such pleas be brought before the Parliament, the other forbids it not. But yet, if after the act of *Hen. IV* such a plea had been brought before the Parliament, the Parliament might have heard and determined it. For the statute forbids not that; nor can any law have the force to hinder the Parliament of any jurisdiction whatsoever they please to take upon them, seeing it is a court of the King and of all the people together, both Lords and Commons.

L.

Though it be, yet seeing the King (as Sir Edward Coke affirms, 4 *Inst.* p. 71) hath committed all his power judicial, some to one court, and some to another, so as if any man would render himself to the judgment of the King, in such case where the King hath committed all his power judicial to others, such a render should be to no effect. And p. 73, he saith farther: that in this court, the Kings of this realm have sitten on the high bench, and the judges of that court on the lower bench, at his feet; but

judicature belongeth only to the judges of that court, and in his presence they answer all motions.

P.

I cannot believe that Sir Edward Coke, how much soever he desired to advance the authority of himself and other justices of the common-law, could mean that the King in the King's Bench sat as a spectator only, and might not have answered all motions, which his judges answered, if he had seen cause for it. For he knew that the King was supreme judge then in all causes temporal, and is now in all causes both temporal and ecclesiastical; and that there is an exceeding great penalty ordained by the laws for them that shall deny it. But Sir Edward Coke, as he had (you see) in many places before, hath put a fallacy upon himself, by not distinguishing between committing and transferring. He that transferreth his power, hath deprived himself of it: but he that committeth it to another to be exercised in his name and under him, is still in the possession of the same power. And therefore, if a man render himself, that is to say, appealeth to the King from any judge whatsoever, the King may receive his appeal; and it shall be effectual.

L.

Besides these two courts, the King's Bench for Pleas of the Crown, and the Court of Common Pleas for causes civil, according to the common-law of England, there is another court of justice, that hath jurisdiction in causes both civil and criminal, and is as ancient a court at least as the Court of Common Pleas, and this is the Court of the Lord Admiral; but the proceedings therein are according to the laws of the Roman empire, and the causes to be determined there are such as arise upon the marine sea: for so it is ordained by divers statutes, and confirmed by many precedents.

P.

As for the statutes, they are always law, and reason also; for they are made by the assent of all the kingdom; but precedents are judgments, one contrary to another; I mean divers men in divers ages, upon the same case give divers judgments. Therefore I will ask your opinion once more concerning any judgments besides those of the King, as to their validity in law. But what is the difference between the proceedings of the Court of Admiralty, and the Court of Common-law?

L.

One is, that the Court of Admiralty proceedeth by two witnesses, without any either grandjury to indict, or petty to convict; and the judge giveth sentence according to the laws imperial, which of old time were in force in all this part of Europe, and now are laws, not by the will of any other Emperor or foreign power, but by the will of the Kings of England that have given them force in their own dominions; the reason whereof seems to be, that the causes that arise at sea are very often between us, and people of other nations, such as are governed for the most part by the self-same laws imperial.

P.

How can it precisely enough be determined at sea, especially near the mouth of a very great river, whether it be upon the sea, or within the land? For the rivers also are, as well as their banks, within or a part of one country or other.

L.

Truly the question is difficult; and there have been many suits about it, wherein the question has been, whose jurisdiction it is in.

P.

Nor do I see how it can be decided but by the King himself, in case it be not declared in the Lord Admiral's letters-patent.

L.

But though there be in the letters-patent a power given to hold plea in some certain cases, not contrary to any of the statutes concerning the Admiralty, the justices of the common-law may send a prohibition to that court, to proceed in the plea, though it be with a *non-obstante* of any statute.

P.

Methinks that that should be against the right of the Crown, which cannot be taken from it by any subject. For that argument of Sir Edward Coke's, that the King has given away all his judicial power, is worth nothing: because, as I have said before, he cannot

give away the essential rights of his Crown, and because by a *non-obstante* he declares he is not deceived in his grant.

L.

But you may see by the precedents alleged by Sir Edward Coke, the contrary has been perpetually practised.

P.

I see not that perpetually. For who can tell but there may have been given other judgments, in such cases, which have either been not preserved in the records, or else by Sir Edward Coke, because they were against his opinion, not alleged? For this is possible, though you will not grant it to be very likely. Therefore I insist only upon this, that no record of a judgment is a law, save only to the party pleading until he can by law reverse the former judgment. And as to the proceeding without juries, by two sufficient witnesses, I do not see what harm can proceed from it to the commonwealth, nor consequently any just quarrel that the justice of the common-law can have against their proceedings in the Admiralty. For the proof of the fact in both courts lieth merely on the witnesses; and the difference is no more, but that in the imperial law, the judge of the court judgeth of the testimony of the witnesses, and the jury doth it in a court of common-law. Besides, if a court of common-law should chance to encroach upon the jurisdiction of the Admiral, may not he send a prohibition to the court of common-law to forbid their proceeding? I pray you tell me what reason there is for the one, more than for the other?

L.

I know none but long custom, for I think it was never done. The highest ordinary court in England is the Court of Chancery, wherein the Lord Chancellor, or otherwise Keeper of the Great Seal, is the only judge. This court is very ancient, as appears by Sir Edward Coke, 4 *Inst.* p. 78, where he nameth the Chancellors of King Edgar, King Etheldred, King Edmund, and King Edward the Confessor. His office is given to him, without letters-patent, by the King's delivery to him of the Great Seal of England; and whosoever hath the keeping of the Great Seal of England, hath the same, and the whole jurisdiction that the Lord Chancellor ever had by the statute of 5 *Eliz. c.* 18, wherein it is declared, that such is, and always has been the common-law. And Sir

Edward Coke says, he has his name of Chancellor from the highest point of his jurisdiction, viz. a *cancellando;* that is, from cancelling the King's letters-patent, by drawing strokes through it like a lattice.

P.

Very pretty. It is well enough known that *Cancellarius* was a great officer under the Roman empire, whereof this island was once a member, and that the office came into this kingdom, either with, or in imitation of the Roman government. Also, it was long after the time of the twelve Cæsars, that this officer was created in the state of Rome. For till after Septimius Severus his time, the emperors did diligently enough take cognizance of all causes and complaints for judgments given in the Courts of the Prætors, which were in Rome the same that the judges of the common-law are here. But by the continual civil wars in after times for the choosing of Emperors, that diligence by little and little ceased. And afterwards, as I have read in a very good author of the Roman civil law, the number of complaints being much increased, and being more than the Emperor could dispatch, he appointed an officer as his clerk, to receive all such petitions; and that this clerk caused a partition to be made in a room convenient, in which partition-wall, at the heighth of a man's reach, he placed at convenient distances certain bars; so that when a suitor came to deliver his petition to the clerk, who was sometimes absent, he had no more to do but to throw in his petition between those bars, which in Latin are called properly *cancelli;* not that any certain form of those bars, or any bars at all were necessary, for they might have been thrown over, though the whole space had been left open; but because they were *cancelli,* the clerk attendant, and keeping his office there, was called *Cancellarius.* And any court bar may properly enough be called *cancelli,* which does not signify a lattice; for that is but a mere conjecture grounded upon no history nor grammar, but taken up at first, as is likely, by some boy that could find no other word in the dictionary for a lattice, but *cancelli.* The office of this Chancellor was at first but to breviate the matter of the petitions, for the easing of the Emperor; but complaints increasing daily, they were too many, considering other businesses more necessary for the Emperor to determine; and this caused the Emperor to commit the determination of them to the Chancellor again. What reason doth Sir Edward Coke allege to prove, that the highest point of the Chancellor's jurisdiction is to cancel his master's letters-patent, after they were sealed with his master's seal; unless he hold plea concerning the validity of them,

or of his master's meaning in them, or of the surreptitious getting of them, or of the abusing of them, which are all causes of equity? Also, seeing the Chancellor hath his office only by the delivery of the Great Seal, without any instruction, or limitation of the process of his court to be used; it is manifest, that in all causes whereof he has the hearing, he may proceed by such manner of hearing and examining of witnesses, with jury or without jury, as he shall think fittest for the exactness, expedition, and equity of the decrees. And therefore, if he think the custom of proceeding by jury, according to the custom of England in Courts of common-law, tend more to equity, which is the scope of all the judges in the world, or ought to be, he ought to use that method; or if he think better of another proceeding, he may use it, if it be not forbidden by a statute.

L.

As for this reasoning of yours, I think it well enough. But there ought to be had also a reverend respect to customs not unreasonable; and therefore, I think, Sir Edward Coke says not amiss, that in such cases where the Chancellor will proceed by the rule of the common-law, he ought to deliver the record in the King's Bench; and also it is necessary for the Lord Chancellor to take care of not exceeding as it is limited by statutes.

P.

What are the statutes by which his jurisdiction is limited? I know that by the 27 *Eliz. c.* 8, he cannot reverse a judgment given in the King's Bench for debt, detinue, &c.; nor before the statute could he ever, by virtue of his office, reverse a judgment in pleas of the Crown, given by the King's Bench, that hath the cognizance of such pleas. Nor need he; for the judges themselves, when they think there is need to relieve a man oppressed by ill witnesses, or power of great men prevailing on the jury, or by error of the jury, though it be in case of felony, may stay the execution and inform the King, who will in equity relieve him. As to the regard we ought to have to custom, we will consider of it afterwards.

L.

First, in a Parliament holden the 13th of Richard II, the Commons petitioned the King, that neither the Chancellor, nor other Chancellor, do make any order against the

common-law, nor that any judgment be given without due process of law.

P.

This is no unreasonable petition; for the common-law is nothing else but equity: and by this statute it appears, that the Chancellors, before that statute, made bolder with the Courts of common-law than they did afterward; but it does not appear that common-law in this statute signifies any thing else but generally the law temporal of the realm, nor was this statute ever printed, that such as I might take notice of it. But whether it be a statute or not, I know not, till you tell me what the Parliament answered to this petition.

L.

The King's answer was, the usages heretofore shall stand, so as the King's royalty be saved.

P.

This is flatly against Sir Edward Coke, concerning the Chancery.

L.

In another Parliament, 17 *Rich. II,* it is enacted, at the petition of the Commons, that forasmuch as people were compelled to come before the King's Council, or in Chancery, by writs grounded upon untrue suggestions, the Chancellor for the time being, presently after such suggestions be duly found and proved untrue, shall have power to ordain and award damages according to his discretion, to him which is so travelled unduly as is aforesaid.

P.

By this statute it appears, that when a complaint is made in Chancery upon undue suggestions, the Chancellor shall have the examination of the said suggestions, and as he may award damages when the suggestions are untrue, so he may also proceed by process to the determining of the cause, whether it be real or personal, so it be not criminal.

L.

Also the Commons petitioned in a Parliament of 2 *Hen. IV,* (not printed) that no writs, nor privy seals, be sued out of Chancery, Exchequer, or other places, to any man to appear at a day upon a pain, either before the King and his Council, or in any other place, contrary to the ordinary course of common-law.

P.

What answer was given to this petition by the King?

L.

That such writs should not be granted without necessity.

P.

Here again, you see, the King may deny or grant any petitions in Parliament, either as he thinks it necessary, as in this place, or as he thinks it prejudicial or not prejudicial to his royalty; as in the answer of the former petition, which is a sufficient proof that no part of his legislative power, or any other essential part of royalty, can be taken from him by a statute. Now seeing it is granted that equity is the same thing with the law of reason, and seeing Sir Edward Coke (1 *Inst.* sec. xxi.), defines equity to be a certain reason comprehended in no writing, but consisting only in right reason, which interpreteth and amendeth the written law; I would fain know to what end there should be any other Court of Equity at all, either before the Chancellor or any other person, besides the Judges of the Civil or Common Pleas? Nay, I am sure you can allege none but this, that there was a neeessity for a higher Court of Equity than the Courts of common-law, to remedy the errors in judgment given by the justices of inferior courts; and the errors in Chancery were irrevocable, except by Parliament, or by special commission appointed thereunto by the King.

L.

But Sir Edward Coke says, that seeing matters of fact by the common-law are triable by a jury of twelve men, this court should not draw the matter *ad aliud examen,* that is, to another kind of examination, *viz.* deposition of witnesses, which should be but evidence to a jury.

P.

Is the deposition of witnesses any more or less, than evidence to the Lord Chancellor? It is not therefore another kind of examination; nor is a jury more capable of duly examining witnesses than a Lord Chancellor. Besides, seeing all courts are bound to judge according to equity, and that all judges in a case of equity may sometimes be deceived, what harm is there to any man, or to the state, if there be a subordination of judges in equity, as well as of judges in common-law? Seeing it is provided by an Act of Parliament, to avoid vexation, that *subpœnas* shall not be granted till surety be found to satisfy the party so grieved and vexed for his damages and expenses, if so be the matter may not be made good which is contained in the bill.

L.

There is another statute of 31 *Hen. VI.* c. 2, wherein there is a proviso cited by Sir Edward Coke in these words: "*Provided that no matter determinable by the laws of the realm, shall be by the said Act determined in other form, than after the course of the same law in the King's Courts, having the determination of the same law.*"

P.

This law was made but for seven years, and never continued by any other Parliament, and the motive of this law was the great riots, extortions, oppressions, &c. used during the time of the insurrection of John Cade, and the indictments and condemnations wrongfully had by this usurped authority. And thereupon the Parliament ordained, that for seven years following no man should disobey any of the King's writs under the Great Seal, or should refuse to appear upon proclamation before the King's Council, or in the Chancery, to answer to riots, extortions, &c.; for the first time he should lose, &c. Wherein there is nothing at all concerning the jurisdiction of the Chancery or any other court, but an extraordinary power given to the Chancery, and to the King's Privy Council, to determine of those crimes, which were not before that time triable but only by the King's Bench or special commission. For the Act was made expressly for the punishment of a great multitude of crimes committed by those who had acted under the said Cade's authority; to which Act the proviso was added which is here mentioned, that the proceedings in those Courts of Chancery, and of the King's Council, should be such as should be used in the courts, to which the said causes, before this Act was made, do belong: that is to say, such causes as were criminal, should be after the order of the King's Bench; and such causes as were not criminal, but only against

equity, should be tried after the manner of the Chancery, or in some cases according to the proceedings in the Exchequer. I wonder why Sir Edward Coke should cite a statute, as this is, above two hundred years before expired, and other two petitions, as if they were statutes, when they were not passed by the King; unless he did it on purpose to diminish, as he endeavours to do throughout his Institutes, the King's authority, or to insinuate his own opinions among the people for the law of the land; for that also he endeavours by inserting Latin sentences, both in his text and in the margin, as if they were principles of the law of reason, without any authority of ancient lawyers, or any certainty of reason in themselves, to make men believe they are the very grounds of the law of England. Now as to the authority you ascribe to custom, I deny that any custom of its own nature can amount to the authority of a law. For if the custom be unreasonable, you must, with all other lawyers, confess that it is no law, but ought to abolished; and if the custom be reasonable, it is not the custom, but the equity that makes it law. For what need is there to make reason law by any custom how long soever, when the law of reason is eternal? Besides, you cannot find it in any statute, though *lex et consuetudo* be often mentioned as things to be followed by the judges in their judgments, that *consuetudines,* that is to say, customs or usages, did imply any long continuance of former time; but that it signified such use and custom of proceeding, as was then immediately in being before the making of such statute. Nor shall you find in any statute the word common-law, which may not be there well interpreted for any of the laws of England temporal; for it is not the singularity of process used in any court that can distinguish it, so as to make it a different law from the law of the whole nation.

L.

If all the courts were, as you think, courts of equity, would it not be incommodious to the commonwealth?

P.

I think not; unless perhaps you may say, that seeing the judges, whether they have many or few causes to be heard before them, have but the same wages from the King, they may be too much inclined to put off the causes they use to hear, for the easing of themselves, to some other court, to the delay of justice, and damage of the parties suing.

L.

You are very much deceived in that; for on the contrary, the contention between the courts for jurisdiction is, of who shall have most causes brought before them.

P.

I cry you mercy, I smelt not that.

L.

Seeing also all judges ought to give their sentence according to equity, if it should chance that a written law should be against the law of reason, which is equity, I cannot imagine in that case how any judgment can be righteous.

P.

It cannot be that a written law should be against reason; for nothing is more reasonable than that every man should obey the law which he hath himself assented to. But that is not always the law, which is signified by *grammatical* construction of the letter, but that which the legislature thereby intended should be in force; which intention, I confess, is a very hard matter many times to pick out of the words of the statute, and requires great ability of understanding, and greater meditations and consideration of such conjuncture of occasions and incommodities, as needed a new law for a remedy. For there is scarce anything so clearly written, that when the cause thereof is forgotten, may not be wrested by an ignorant grammarian, or a cavilling logician, to the injury, oppression, or perhaps destruction of an honest man. And for this reason the Judges deserve that honour and profit they enjoy. Since the determination of what particular causes every particular court should have cognizance, is a thing not yet sufficiently explained, and is in itself so difficult, as that the sages of the law themselves, (the reason Sir Edward Coke will leave to law itself), are not yet agreed upon it; how is it possible for a man who is no professed or no profound lawyer, to take notice in what court he may lawfully begin his suit, or give counsel in it to his client?

L.

I confess that no man can be bound to take notice of the jurisdiction of courts, till all

the courts be agreed upon it amongst themselves; but what rule to give judgment by, a judge can have, so as never to contradict the law written, nor displease his legislator, I understand not.

P.

I think he may avoid both, if he take care by his sentence that he neither punish an innocent man, nor deprive him of his damages due from one that maliciously sueth him without reasonable cause, which to the most of rational men and unbiassed, is not, in my opinion, very difficult. And though a judge should, as all men may do, err in his judgment, yet there is always such power in the laws of England, as may content the parties, either in the Chancery, or by commissioners of their own choosing, authorized by the King; for every man is bound to acquiesce in the sentence of the judges he chooseth.

L.

In what cases can the true construction of the letter be contrary to the meaning of the lawmaker?

P.

Very many, whereof Sir Edward Coke nameth three: fraud, accident, and breach of confidence. But there be many more; for there be a very great many reasonable exceptions almost to every general rule, which the makers of the rule could not foresee; and very many words in every statute, especially long ones, that are, as to *grammar,* of ambiguous signification, and yet to them that know well to what end the statute was made, perspicuous enough; and many connexions of doubtful reference, which by a *grammarian* may be cavilled at, though the intention of the lawmaker be never so perspicuous. And these are the difficulties which the judges ought to master, and can do it in respect of their ability for which they are chosen, as well as can be hoped for; and yet there are other men can do the same, or else the judges' places could not be from time to time supplied. The bishops commonly are the most able and rational men, and obliged by their profession to study equity, because it is the law of God; and are therefore capable of being judges in a court of equity. They are the men that teach the people what is sin; that is to say, they are the doctors in cases of conscience. What reason then can you show me, why it is unfit and hurtful to the

commonwealth that a bishop should be a Chancellor; as they were most often before the time of Henry VIII, and since that time once in the reign of King James?

L.

But Sir Edward says, that soon after that a Chancellor was made which was no professor of the law, he finds in the rolls of the Parliament a grievous complaint by the whole body of the realm, and a petition that the most wise and able men within the realm might be chosen Chancellors.

P.

That petition was reasonable; but it does not say which are the abler men, the judges of the common-law, or the bishops.

L.

That is not the great question as to the ability of a judge; both of one and the other, there are able men in their own way. But when a judge of equity has need, almost in every case, to consider as well the statute-law, as the law of reason, he cannot perform his office perfectly, unless he be also ready in the statutes.

P.

I see no great need he has to be ready in the statutes. In the hearing of a cause, do the judges of the common-law inform the counsel at the bar what the statute is, or the counsel the judges?

L.

The counsel inform the judges.

P.

Why may they not as well inform the Chancellor? Unless you will say, that a bishop understands not as well as a lawyer what is sense, when he hears it read in English. No, no; both the one and the other are able enough: but to be able enough is not enough, when not the difficulty of the case only, but also the passion of the judge is to be conquered. I forgot to tell you of the statute of 36 *Edw.III,*c.9, that if any person thinking himself grieved contrary to any of the articles above-written, or others

contained in divers statutes, will come to the Chancery, or any for him, and thereof make his complaint, he shall presently there have remedy by force of the said articles and statutes, without elsewhere pursuing to have remedy. By the words of this statute it is very apparent, in my opinion, that the Chancery may hold plea upon the complaint of the party grieved, in any case triable at the common-law; because the party shall have present remedy in that court, by force of this Act, without pursuing for remedy elsewhere.

L.

Yes; but Sir Edward Coke (4 *Inst.* p. 82) answers this objection in this manner. These words, says he, *he shall have remedy,* signify no more but that he shall have presently there a remedial writ grounded upon those statutes, to give him remedy at the common-law.

P.

Very like Sir Edward Coke thought, as soon as the party had his writ, he had his remedy, though he kept the writ in his pocket without pursuing his complaint elsewhere: or else he thought, that the Common-bench was not elsewhere than in the Chancery.

L.

Then there is the Court of—

P.

Let us stop here; for this which you have said satisfies me, that seek no more than to distinguish between justice and equity; and from it I conclude, that justice fulfils the law, and equity interprets the law, and amends the judgments given upon the same law. Wherein I depart not much from the definition of equity cited in Sir Edward Coke (1 *Inst.* sec .xxi.); *viz.* equity is a certain perfect reason, that interpreteth and amendeth the law written; though I construe it a little otherwise than he would have done; for no one can mend a law but he that can make it, and therefore I say it amends not the law, but the judgments only when they are erroneous. And now let us consider of crimes in particular, the pleas whereof are commonly called the Pleas of the Crown, and of the punishments belonging to them. And first of the highest crime of all,

which is high-treason. Tell me, what is high-treason?

L.

The first statute that declareth what is high-treason, is the statute of the 25 *Edw. III,* in these words: "Whereas divers opinions have been before this time, in what case treason shall be said, and in what not; the King, at the request of the Lords and of the Commons, hath made declaration in the manner as hereafter follows: that is to say, when a man doth compass or imagine the death of our Lord the King, of our Lady the Queen, or of their eldest son and heir; or if a man doth violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere; and thereof be provably attainted by open deed by people of their condition: and if a man counterfeit the King's Great or Privy Seal, or his money: and if a man bring false money into this realm counterfeit to the money of England, as the money called Lushburgh, or other like to the said money of England, knowing the money to be false, to merchandize, and make payment in deceit of our said Lord the King, and of his people: and if a man slay the Chancellor, Treasurer, or the King's Justices of one Bench or the other, Justices in Eyre, or Justices of Assizes, and all other justices assigned to hear and determine, being in their places and doing their offices. And is to be understood in the cases above rehearsed, that that ought to be adjudged treason, which extends to our royal Lord the King, and his royal Majesty; and of such treason the forfeiture of the escheats pertains to our Lord the King, as well the lands and tenements holden of others, as himself. And moreover there is another manner of treason; that is to say, when a servant slayeth his master, or a wife her husband; or when a man, secular or religious, slayeth his prelate, to whom he oweth faith and obedience; and of such treason the escheats ought to pertain to every Lord of his own fee. And because many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any case supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without giving any judgment of the treason, till the cause be showed and declared before the King and his Parliament, whether it ought to be adjudged treason or other felony."

P. Of crimes capital.

I desired to understand what treason is, wherein no enumeration of facts can give me satisfaction. Treason is a crime of itself, *malum in se,* and therefore a crime at the common-law; and high-treason the highest crime at the common-law that can be. And therefore not the statute only, but reason without a statute makes it a crime. And this appears by the preamble, where it is intimated, that all men, though of divers opinions, did condemn it by the name of treason, though they knew not what treason meant, but were forced to request the King to determine it. That which I desire to know is, how treason might have been defined without the statute, by a man that has no other faculty to make the definition of it, than by mere natural reason.

L.

When none of the lawyers have done it, you are not to expect that I should undertake it on such a sudden.

P.

You know that *salus populi* is *suprema lex,* that is to say, the safety of the people is the highest law; and that the safety of the people of a kingdom consisteth in the safety of the King, and of the strength necessary to defend his people, both against foreign enemies and rebellious subjects. And from this I infer, that to compass, that is, to design, the death of the then present King, was high treason before the making of this statute, as being a designing of a civil war and the destruction of the people. 2. That the design to kill the King's wife, or to violate her chastity, as also to violate the chastity of the King's heir-apparent, or of his eldest daughter unmarried, as tending to the destruction of the certainty of the King's issue, and by consequence to the raising of contentions about the Crown, and destruction of the people in succeeding time by civil war, was therefore high-treason before this statute. 3. That to levy war against the King within the realm, and aiding the King's enemies, either within or without the realm, are tending to the King's destruction or disherison, and was high-treason, before this statute, by the common-law. 4. That counterfeiting the principal seals of the kingdom, by which the King governeth his people, tendeth to the confusion of government, and consequently to the destruction of the people, and was therefore treason before the statute. 5. If a soldier design the killing of his general or other

officer in time of battle, or a captain hover doubtfully with his troops, with intention to gain the favour of him that shall chance to get the victory, it tendeth to the destruction both of King and people, whether the King be present or absent, and was high-treason before the statute. 6. If any man had imprisoned the King's person, he had made him incapable of defending his people, and it was therefore high-treason before the statute. 7. If any man had, with design to raise rebellion against the King, by words written or advisedly uttered, denied the King regnant to be their lawful King, he that wrote, preached, or spoke such words, living then under the protection of the King's laws, it had been high-treason before the statute, for the reasons aforesaid. And perhaps there may be some other cases upon this statute, which I cannot presently think upon. But the killing of a justice or other officer, as is determined by the statute, is not otherwise high-treason, but by the statute. And to distinguish that which is treason by the common-law from all other inferior crimes, we are to consider, that if such high-treason should take effect, it would destroy all laws at once; and being done by a subject, it is a return to hostility by treachery; and consequently, such as are traitors may, by the law of reason, be dealt withal as ignoble and treacherous enemies: but the greatest of other crimes, for the most part, are breaches of one only, or at least of very few laws.

L.

Whether this you say be true or false, the law is now unquestionable, by a statute made in the 1st and 2nd years of *Queen Mary,* whereby there is nothing to be esteemed treason, besides those few offences specially mentioned in the act of 25 *Edward III.*

P.

Amongst these great crimes the greatest is that which is committed by one that has been trusted and loved by him whose death he so designeth: for a man cannot well take heed of those whom he thinks he hath obliged, whereas an open enemy gives a man warning before he acteth. And this it is for which the statute hath declared, that it is another kind of treason, when a servant killeth his master or mistress, or a wife killeth her husband, or a clerk killeth his prelate. And I should think it petty treason also, though it be not within the words of the statute, when a tenant in fee, that holdeth by homage and fealty, shall kill the lord of his fee; for fealty is an oath of

allegiance to the lord of the fee; saving he may not keep his oath in any thing sworn to, if it be against the King. For homage, as it is expressed in a statute of 17 *Edw. II,* is the greatest submission that is possible to be made to one man by another. For the tenant shall hold his hands together between the hands of his landlord, and shall say thus; I become your man from this day forth for life, for member, and for worldly honour, and shall owe that my faith for the lands that I shall hold of you, saving the faith that I owe unto our Sovereign Lord the King, and to many other lords. Which homage, if made to the King, is equivalent to a promise of simple obedience, and if made to another lord, there is nothing excepted but the allegiance to the King; and that which is called fealty, is but the same confirmed by an oath.

L.

But Sir Edward Coke, (4 *Inst.* p. 11), denies that a traitor is in legal understanding the King's enemy. For enemies, saith he, be those that be out of the allegiance of the King. And his reason is, because, if a subject join with a foreign enemy, and come into England with him, and be taken prisoner here, he shall not be ransomed, or proceeded with as an enemy shall, but he shall be taken as a traitor to the King. Whereas an enemy coming in open hostility, and taken, shall either be executed by martial law, or ransomed; for he cannot be indicted of treason, for that he never was in the protection and ligeance of the King; and the indictment of the treason saith, *contra ligeantiam suam debitam.*

P.

This is not an argument worthy of the meanest lawyer. Did Sir Edward Coke think it impossible for a King lawfully to kill a man, by what death soever, without an indictment, when it is manifestly proved he was his open enemy? Indictment is a form of accusation peculiar to England, by the command of some King of England, and retained still, and therefore a law to this country of England. But if it were not lawful to put a man to death otherwise than by an indictment, no enemy could be put to death at all in other nations, because they proceed not, as we do, by indictment. Again, when an open enemy is taken and put to death by judgment of martial-law; it is not the law of the general or council of war, that an enemy shall be thus proceeded with, but the law of the King contained in their commissions; such as from time to time the Kings have thought fit, in whose will it always resteth, whether an open enemy, when he is

taken, shall be put to death, or no, and by what death; and whether he shall be ransomed, or no, and at what price. Then for the nature of treason by rebellion; is it not a return to hostility? What else does rebellion signify? William the Conqueror subdued this kingdom; some he killed; some upon promise of future obedience he took to mercy, and they became his subjects, and swore allegiance to him. If therefore they renew the war against him, are they not again open enemies? Or if any of them lurking under his laws, seek occasion thereby to kill him secretly, and come to be known, may he not be proceeded against as an enemy, who, though he had not committed what he designed, yet had certainly a hostile design? Did not the Long Parliament declare all those for enemies to the state, that opposed their proceedings against the late King? But Sir Edward Coke does seldom well distinguish, when there are two divers names for one and the same thing: though one contain the other, he makes them always different; as if it could not be that one and the same man should be both an enemy and a traitor. But now let us come to his comment upon this statute. The statute says (as it is printed in English) when a man doth compass, or imagine, the death of our Lord the King, &c. What is the meaning of the word compassing, or imagining?

L.

On this place Sir Edward Coke says, that before the making of this act, *voluntas reputabatur pro facto,* the will was taken for the deed. And so saith Bracton; *spectatur voluntas, et non exitus; et nihil interest utrum quis occidat, aut causam præbeat,* that is to say, the cause of the killing. Now Sir Edward Coke says, this was the law before the statute; and that to be a cause of the killing, is to declare the same by some open deed tending to the execution of his intent, or which might be cause of death.

P.

Is there any Englishman can understand, that to cause the death of a man, and to declare the same, is all one thing? And if this were so, and that such was the common-law before the statute, by what words in the statute is it taken away?

L.

It is not taken away, but the manner how it must be proved is thus determined, that it must be proved by some open deed, as providing of weapons, powder, poison, assaying of armour, sending of letters, &c.

P.

But what is the crime itself, which this statute maketh treason? For as I understand the words, to compass or imagine the King's death, &c. the compassing (as it is in the English) is the only thing which is made high-treason. So that not only the killing, but the design, is made high-treason; or, as it is in the French record, *fait compasser,* that is to say, the causing of others to compass or design the King's death is high-treason; and the words *par overt fait,* are not added as a specification of any treason, or other crime, but only of the proof that is required by the law. Seeing then the crime is the design and purpose to kill the King, or cause him to be killed, and lieth hidden in the breast of him that is accused; what other proof can there be had of it than words spoken or written? And therefore, if there be sufficient witness that he by words declared that he had such a design, there can be no question, but that he is comprehended within the statute. Sir Edward Coke doth not deny, but, that if he confess this design, either by word or writing, he is within the statute. As for that common saying, that bare words may make a heretic but not a traitor, which Sir Edward Coke on this occasion maketh use of, they are to little purpose; seeing that this statute maketh not the words high-treason, but the intention, whereof the words are but a testimony: and that common saying is false as it is generally pronounced. For there were divers statutes made afterwards, though now expired, which made bare words to be treason without any other deed; as, 1 *Eliz. c.* 6, and 13 *Eliz. c.* 1, if a man should publicly preach that the King were an usurper, or that the right of the crown belonged to any other than the King that reigned, there is no doubt but it were treason, not only within this statute of Edward III, but also within the statute of 1 *Edw. VI, c.* 12, which are both still in force.

L.

Not only so; but if a subject should counsel any other man to kill the King, Queen, or heir-apparent to the Crown, it would at this day be adjudged high-treason; and yet it is no more than bare words. In the third year of King James, Henry Garnet, a Jesuit priest, to whom some of the gunpowder traitors had revealed their design by way of confession, gave them absolution without any caution taken for their desisting from their purpose, or other provision against the danger, and was therefore condemned and executed as a traitor, though such absolution was nothing else but bare words. Also I

find in the reports of Sir John Davis, Attorney-General for Ireland, that in the time of King Henry VI, a man was condemned of treason for saying the King was a natural fool, and unfit to govern. But yet this clause in the statute of *Edw. III,* viz. that the compassing there mentioned ought to be proved by some *overt act,* was by the framers of the statute not without great wisdom and providence inserted; for as Sir Edward Coke very well observeth, when witnesses are examined concerning words only, they never, or very rarely, agree precisely about the words they swear to.

P.

I deny not but that it was wisely enough done. But the question is not here of the treason, which is either fact or design, but of the proof, which when it is doubtful, is to be judged by a jury of twelve lawful men. Now whether think you is it a better proof of a man's intention to kill, that he declare the same with his own mouth, so as it may be witnessed, or that he provide weapons, powder, poison, or assay arms? If he utter his design by words, the jury has no more to do than to consider the legality of the witnesses, the harmony of their testimonies, or whether the words were spoken advisedly. For they might have been uttered in a disputation, for exercise only; or when he that spake them, had not the use of reason, nor perhaps any design or wish at all, towards the execution of what he talked of. But how a jury, from providing or buying of armour, or buying of gunpowder, or from any other overt act, not treason in itself, can infer a design of murdering the King, unless there appear some words also signifying to what end he made such provision, I cannot easily conceive. Therefore, as the jury on the whole matter, words and deeds, shall ground their judgment concerning design or not design, so, in reason, they ought to give verdict. But to come to the treason of counterfeiting the great or privyseal, seeing there are so many ways for a cheating fellow to make use of these seals, to the cozening of the King and his people; why are not all such abuses high-treason, as well as the making of a false seal?

L.

So they are; for Sir Edward Coke produceth a record of one that was drawn and hanged for taking the great seal from an expired patent, and fastening it to a counterfeit commission to gather money. But he approveth not the judgment, because it is the judgment for petty treason: also, because the jury did not find him guilty of the offence laid in the indictment, which was, the counterfeiting of the great seal, but

found the special matter, for which the offender was drawn and hanged.

P.

Seeing this crime of taking the great seal from one writing, and fastening it to another, was not found high-treason by the jury, nor could be found upon special matter to be the other kind of treason mentioned in the same statute; what ground had either the jury to find it treason, or the judge to pronounce sentence upon it?

L.

I cannot tell. Sir Edward Coke seems to think it a false record; for hereupon he saith, by way of admonition to the reader, that hereby it appeareth how dangerous it is to report a case by the ear.

P.

True; but he does not make it apparent that this case was untruly reported; but on the contrary, confesseth that he had persued the same record; and a man may, if it may be done without proof of the falsity, make the same objection to any record whatsoever. For my part, seeing this crime produced the same mischief that ariseth from counterfeiting, I think it reason to understand it as within the statute; and for the difference between the punishments, which are both of them capital, I think it is not worthy to be stood upon; seeing death, which is *ultimum supplicium,* is a satisfaction to the law, as Sir Edward Coke himself hath in another place affirmed. But let us now proceed to other crimes.

L.

Appendant to this is another crime, called misprision of treason; which is the concealing of it by any man that knows it; and is called misprision from the French *mespriser,* which signifies to contemn or undervalue. For it is no small crime in any subject, so little to take to heart a known danger to the King's person, and consequently to the whole kingdom, as not to discover not only what he knows, but also what he suspecteth of the same, that the truth therefore may be examined. But for such discovery, though the thing prove false, the discoverer shall not, as I think, be taken for a false accuser; if for what he directly affirms, he produce a reasonable proof, and some probability for his suspicion. For else the concealment will seem justifiable by the interest, which is to

every man allowed, in the preservation of himself from pain and damage.

P.

This I consent to.

L.

All other crimes merely temporal, are comprehended under felony or trespass.

P.

What is the meaning of the word felony? Does it signify anything that is in its own nature a crime, or that only which is made a crime by some statute? For I remember some statutes that make it felony to transport horses, and some other things, out of the kingdom; which transportation, before such statutes were made, and after the repealing of the same, was no greater crime than any other usual traffic of a merchant.

L.

Sir Edward Coke derives the word felony from the Latin word *fel,* the gall of a living creature; and accordingly defines felony to be an act done *animo felleo;* that is to say, a bitter, a cruel act.

P.

Etymologies are no definitions, and yet when they are true, they give much light towards the finding out of a definition. But this of Sir Edward Coke's carries with it very little of probability; for there be many things made felony by the statute law, that proceed not from any bitterness of mind at all, and many that proceed from the contrary.

L.

This is matter for a critic, to be picked out of the knowledge of history and foreign languages, and you may perhaps know more of it than I do.

P.

All that I, or I think any other, can say in this matter, will amount to no more than a reasonable conjecture, insufficient to sustain any point of controversy in law. The word

is not to be found in any of the old Saxon laws, set forth by Mr. Lambard, nor in any statute printed before that of Magna Charta; there it is found. Now Magna Charta was made in the time of Henry III, grandchild to Henry II, Duke of Anjou, a Frenchman born, and bred in the heart of France, whose language might very well retain many words of his ancestors the German Franks, as ours doth of the German Saxons; as also many words of the language of the Gauls, as the Gauls did retain many words of the Greek colony planted at Marseilles. But certain it is, the French lawyers at this day use the word felon, just as our lawyers use the same; whereas the common people of France use the word *filou* in the same sense. But *filou* signifieth, not the man that hath committed such an act as they call felony, but the man that maketh it his trade to maintain himself by the breaking and contemning of all laws generally; and comprehendeth all those unruly people called cheaters, cutpurses, picklocks, catchcloaks, coiners of false money, forgers, thieves, robbers, murderers, and whosoever make use of iniquity on land or sea as a trade or living. The Greeks upon the coast of Asia, where Homer lived, were they that planted the colony of Marseilles. They had a word that signified the same with felon, which was Φιλήτη ς, *filetes;* and this *filetes* of Homer signifies properly the same that a felon signifies with us. And therefore Homer makes Apollo to call Mercury Φιλήτην, *fileteen,* and ἄρχον Φ ιλήτων. I insist not upon the truth of this etymology, but it is certainly more rational than the *animus felleus* of Sir Edward Coke. And for the matter itself, it is manifest enough, that which we now call murder, robbery, theft, and other practices of felons, are the same that we call felony, and crimes in their own nature without the help of statute. Nor is it the manner of punishment, that distinguisheth the nature of one crime from another; but the mind of the offender and the mischief he intendeth, considered together with the circumstances of person, time, and place.

L.

Of felonies, the greatest crime is murder.

P.

And what is murder?

L.

Murder is the killing of a man upon malice forethought, as by a weapon, or by poison,

or any way, if it be done upon antecedent meditation; or thus, murder is the killing of a man in cold blood.

P.

I think there is a good definition of murder set down by statute, 52 *Henry III, c.* 25, in these words: Murder, from henceforth, shall not be judged before our justices, where it is found misfortune only, but it shall take place in such as are slain by felony, and not otherwise. And Sir Edward Coke interpreting this statute, 2 *Inst.* p. 148, saith, that the mischief before this statute was, that he that killed a man by misfortune, as by doing any act that was not against law, and yet against his intent the death of a man ensued, this was adjudged murder. But I find no proof of that he allegeth, nor find I any such law among the laws of the Saxons set forth by Mr. Lambard. For the word, it is, as Sir Edward Coke noteth, old Saxon, and amongst them it signified no more than a man slain in the field or other place, the author of his death not known. And according hereunto, Bracton, who lived in the time of Magna Charta, defineth it, fol. 134, thus: Murder is the secret killing of a man, when none besides the killer and his companions saw or knew it; so that it was not known who did it, nor fresh suit could be made after the doer. Therefore, every such killing was called murder, before it could be known whether it could be by felony or not; for a man may be found dead that kills himself, or was lawfully killed by another. This name of murder came to be the more horrid, when it was secretly done, for that it made every man to consider of their own danger, and him that saw the dead body, to boggle at it, as a horse will do at a dead horse. And to prevent the same, they had laws in force, to amerce the hundred where it was done, in a sum defined by law to be the price of his life. For in those days, the lives of all sorts of men were valued by money, and the value set down in their written laws. And therefore Sir Edward Coke was mistaken, in that he thought that killing a man by misfortune before the statute of Marlebridge, was adjudged murder. And those secret murders were abominated by the people, for that they were liable to so great a pecuniary punishment for suffering the malefactor to escape. But this grievance was by Canutus, when he reigned, soon eased. For he made a law, that the county in this case should not be charged, unless he were an Englishman that was so slain; but if he were a Frenchman, (under which name were comprehended all foreigners, and especially the Normans,) though the slayer escaped, the county was not to be amerced. And this law, though it were very hard and chargeable, when an Englishman was so slain, for his

friend to prove he was an Englishman, and also unreasonable to deny the justice to a stranger, yet was it not repealed till the 14th *Edw. III.* By this you see that murder is distinguished from homicide by the statute laws, and not by any common-law without the statute; and that it is comprehended under the general name of felony.

L.

And so also is petit treason: and I think so is high-treason also. For in the abovesaid statute in the 25th *Edw. III,* concerning treasons, there is this clause: And because that many other like cases of treason may happen in time to come, which a man cannot think or declare at the present time; it is accorded, that if any other case, supposed treason, which is not above specified, doth happen before any of the justices, the justices shall tarry without any going to judgment of the treason, till the cause be shewed and declared before the King and his Parliament, whether it be treason or other felony. Which thereby shews that the King and Parliament thought that treason was one of the sorts of felony.

P.

And so think I.

L.

But Sir Edward Coke denies it to be so at this day. For (1 *Inst. sec.* 745) at the word felony, he saith, that in ancient time this word *felony* was of so large an extent, as that it included high-treason; but afterwards it was resolved, that in the King's pardon or charter, this word *felony* should extend only to common felonies; and at this day, under the word felony, by law is included petite treason, murder, homicide, burning of houses, burglary, robbery, rape, &c. chance medley, *se defendendo,* and petite larceny.

P.

He says it was resolved: but by whom?

L.

By the justices of assize in the time of Henry IV, as it seems in the margin.

P.

Have justices of assize any power by their commission to alter the language of the land and the received sense of words? Or in the question in what case felony shall be said, is it referred to the judges to determine; as in the question in what case treason shall be said, it is referred by the statute of Edward III to the Parliament? I think not; and yet perhaps they may be obliged to disallow a pardon of treason, when mentioning all felonies it nameth not treason, nor specifies it by any description of the fact.

L.

Another kind of homicide there is, simply called so, or by the name of manslaughter, and is not murder: and that is, when a man kills another man upon sudden quarrel, during the heat of blood.

P.

If two meeting in the street chance to strive who shall go nearest to the wall, and thereupon fighting, one of them kills the other, I believe verily he that first drew his sword, did it of malice forethought, though not long forethought; but whether it be felony or no, it may be doubted. It is true, that the harm done is the same as if it had been done by felony; but the wickedness of the intention was nothing near so great. And supposing it had been done by felony, then it is manifest, by the statute of Marlebridge, that it was very murder. And when a man for a word or a trifle shall draw his sword and kill another man, can any man imagine that there was not some precedent malice?

L.

It is very likely there was malice, more or less: and therefore the law hath ordained for it a punishment equal to that of murder, saving that the offender shall have the benefit of his clergy.

P.

The benefit of clergy comes in upon another account, and importeth not any extenuation of the crime. For it is but a relic of the old usurped papal privilege, which is now by many statutes so pared off, as to spread but to few offences, and is become a legal kind of conveying mercy, not only to the clergy, but also to the laity.

L.

The work of a judge, you see, is very difficult, and requires a man that hath a faculty of well distinguishing of dissimilitudes in such cases as common judgments think to be the same. A small circumstance may make a great alteration; wherefore a man that cannot well discern, ought not to take upon him the office of a judge.

P.

You say very well; for if judges were to follow one another's judgments in precedent cases, all the justice in the world would at length depend upon the sentence of a few learned, or unlearned, ignorant men, and have nothing at all to do with the study of reason.

L.

A third kind of homicide is when a man kills another, either by misfortune, or in the necessary defence of himself, or of the King, or of his laws; for such killing is neither felony nor crime, saving, as Sir Edward Coke says (3 *Inst. p.* 56), that if the act that a man is doing, when he kills another man, be unlawful, then it is murder. As, if A meaning to steal a deer in the park of B, shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush, this is murder, for that the act was unlawful; but if the owner of the park had done the like, shooting at his own deer, it had been by misadventure, and no felony.

P.

This is not so distinguished by any statute, but is the *common-law* only of Sir Edward Coke. I believe not a word of it. If a boy be robbing an appletree, and falleth thence upon a man that stands under it and breaks his neck, but by the same chance saveth his own life, Sir Edward Coke, it seems, will have him hanged for it, as if he had fallen of prepensed malice. All that can be called crime in this business is but a simple trespass, to the damage perhaps of sixpence or a shilling. I confess the trespass was an offence against the law, but the falling was none, nor was it by the trespass but by the falling that the man was slain; and as he ought to be quit of the killing, so he ought to make restitution for the trespass. But I believe the cause of Sir Edward Coke's mistake was his not well understanding of Bracton, whom he cites in the margin. For, fol. 120

b. lib. iii. cap. 4, he saith thus: *Sed hic erit distinguendum, utrum quis dederit operam rei licitæ, vel illicitæ; si illicitæ, ut si lapidem projiciebat quis versus locum per quem consueverunt homines transitum facere, vel dum insequitur quis equum vel bovem, et aliquis a bove vel equo percussus fuerit, et hujusmodi, hoc imputatur ei.* That is: But here we are to distinguish whether a man be upon a lawful or unlawful business; if an unlawful, as he that throws a stone into a place where men use to pass; or if he chase a horse or an ox, and thereby the man be stricken by the horse or the ox; this shall be imputed to him. And it is most reasonable; for the doing of such an unlawful act as is here meant, is a sufficient argument of a felonious purpose, or at least a hope to kill somebody or other, and he cared not whom, which is worse than to design the death of a certain adversary, which nevertheless is murder. Also, on the contrary, though the business a man is doing be lawful, and it chanceth sometimes that a man be slain thereby, yet may such killing be felony. For if a carman drive his cart through Cheapside in a throng of people, and thereby he kill a man, though he bare him no malice, yet because he saw there was very great danger, it may reasonably be inferred, that he meant to adventure the killing of somebody or other, though not of him that was killed.

L.

He is a felon also that killeth himself voluntarily, and is called, not only by common lawyers, but also in divers statute laws, *felo de se.*

P.

And it is well so; for names imposed by statutes are equivalent to definitions. But I conceive not how any man can bear *animum felleum,* or so much malice towards himself, as to hurt himself voluntarily, much less to kill himself. For naturally and necessarily the intention of every man aimeth at somewhat which is good to himself, and tendeth to his preservation. And therefore, methinks, if he kill himself, it is to be presumed that he is not *compos mentis,* but by some inward torment or apprehension of somewhat worse than death, distracted.

L.

Nay, unless he be *compos mentis,* he is not *felo de se,* as Sir Edward Coke saith, 3 *Inst. p.* 54; and therefore he cannot be judged a *felo de se,* unless it be first proved he

was *compos mentis.*

P.

How can that be proved of a man dead; especially if it cannot be proved by any witness, that a little before his death he spake as other men used to do? This is a hard place; and before you take it for common-law, it had need to be cleared.

L.

I will think on it. There is a statute of 3 *Hen. VII, c.* 14, which makes it felony in any of the King's household servants, under the degree of a Lord, to compass the death of any of the King's Privy Council. The words are these: That from henceforth the steward, treasurer, and comptroller of the King's house for the time being, or one of them, have full authority and power, to inquire by twelve staid men and discreet persons of the chequer-roll of the King's honourable household, if any servant, admitted to be his servant sworn, and his name put into the chequer-roll, whatsoever he be, serving in any manner, office, or room, reputed, had, or taken under the estate of a Lord, make any confederacies, compassings, conspiracies, or imaginations with any person, to destroy or murder the King, or any Lord of this realm, or any other person sworn of the King's council, steward, treasurer, or comptroller of the King's house. And if such misdoers shall be found guilty by confession, or otherwise, that the said offence shall be judged felony.

P.

It appears by this statute, that not only the compassing the death, as you say, of a privy-councillor, but also of any Lord of this realm, is felony; if it be done by any of the King's household servants, that is not a Lord.

L.

No; Sir Edward Coke upon these words, *any Lord of this realm, or other person sworn of the King's council,* infers (3 *Inst. p.* 38), that it is to be understood of such a Lord only as is a privy-councillor.

P.

For barring of the Lords of Parliament from this privilege, he strains this statute a little

farther, in my opinion, than it reacheth of itself. But how are such felonies to be tried?

L.

The indictment is to be found before the steward, treasurer, and comptroller of the King's house, or one of them, by twelve of the King's household servants. The petit jury for the trial must be twelve other of the King's servants. And the judges are again the steward, treasurer, and comptroller of the King's house, or two of them; and yet I see that these men are not usually great students of the law.

P.

You may hereby be assured, that either the King and Parliament were very much overseen in choosing such officers perpetually for the time being to be judges in a trial at the common-law, or else that Sir Edward Coke presumes too much to appropriate all the judicature, both in law and equity, to the common lawyers; as if neither lay persons, men of honour, nor any of the Lords spiritual who are the most versed in the examination of equity and cases of conscience, when they hear the statutes read and pleaded, were fit to judge of the intention and meaning of the same. I know that neither such great persons, nor bishops, have ordinarily so much spare time from their ordinary employment, as to be so skilful as to plead causes at the bar; but certainly they are, especially the bishops, the best able to judge of matters of reason, that is to say (by Sir Edward Coke's confession) of matters, except of blood, at the common-law.

L.

Another sort of felony, though without manslaughter, is robbery; and by Sir Edward Coke (3 *Inst. p.* 68), defined thus: Robbery by the common-law is a felony committed by a violent assault upon the person of another, by putting him in fear, and taking away from him his money, or other goods of any value whatsoever.

P.

Robbery is not distinguished from theft by any statute. *Latrocinium* comprehendeth them both, and both are felony, and both punished with death. And therefore to distinguish them aright is the work of reason only. And the first difference, which is obvious to all men, is that robbery is committed by force or terror, of which neither is

in theft. For theft is a secret act, and that which is taken by violence or terror, either from his person, or in his presence, is still robbery. But if it be taken secretly, whether it be by day or night, from his person, or from his fold, or from his pasture, then it is called theft. It is force and fraud only, that distinguisheth between theft and robbery; both which are, by the pravity only of the intention, felony in their nature. But there be so many evasions of the law found out by evil men, that I know not, in this predicament of felony, how to place them. For suppose I go secretly, by day or night, into another man's field of wheat, ripe and standing, and loading my cart with it I carry it away: is it theft or robbery?

L.

Neither, it is but trespass. But if you first lay down the wheat you have cut, and then throw it into your cart, and carry it away, then it is felony.

P.

Why so?

L.

Sir Edward Coke tells you the reason of it (3 *Inst. p.* 107). For he defineth theft to be, by the common-law, a felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another, not from the person, nor by night in the house of the owner. From this definition, he argues thus, p. 109: Any kind of corn or grain, growing upon the ground, is a personal chattel, and the executors of the owner shall have them, though they be not severed; but yet no larceny can be committed of them, because they are annexed to the realty; so it is of grass standing on the ground, or of apples, or of any fruit upon the trees, &c.; so it is of a box or chest of charters, no larceny can be committed of them, because the charters concern the realty, and the box or chest though it be of great value, yet shall it be of the same nature the charters are of; *et omne magis dignum trahit ad se minus.*

P.

Is this definition drawn out of any statute, or is it in Bracton or Littleton, or any other writer upon the science of the laws?

L.

No, it is his own: and you may observe by the logic sentences dispersed through his works, that he was a logician sufficient enough to make a definition.

P.

But if his definitions must be the rule of law, what is there that he may not make felony or not felony, at his pleasure? But seeing it is not statute law that he says, it must be very perfect reason, or else no law at all; and to me it seems so far from reason, as I think it ridiculous. But let us examine it. There can, says he, be no larceny of corn, grass, or fruits that are growing, that is to say, they cannot be stolen. But why? Because they concern the realty; that is, because they concern the land. It is true, that the land cannot be stolen, nor the right of a man's tenure; but corn, and trees, and fruit, though growing, may be cut down, and carried away secretly and feloniously, in contempt and despite of the law. And are they not then stolen? And is there any act which is feloniously committed, that is not more than trespass? Can any man doubt of it, that understands the English tongue? It is true, that if a man pretend a right to the land, and on that pretence take the fruits thereof by way of taking possession of his own, it is no more than a trespass, unless he conceal the taking of them. For in that one case, he but puts the man that was in possession before, to exhibit his complaint, which purpose is not felonious, but lawful; for nothing makes a distinction between felony and not felony, but the purpose. I have heard, that if a man slander another with stealing of a tree standing, there lies no action for it. And that upon this ground: to steal a standing tree is impossible; and that the cause of the impossibility is, that a man's freehold cannot be stolen; which is a very obvious fallacy. For freehold signifieth, not only the tenement, but also the tenure; and though it be true that a tenure cannot be stolen, yet every man sees that the standing trees and corn may easily be stolen. And so far forth as trees, &c. are part of the freehold, so far forth also, they are personal goods. For whatsoever is freehold is inheritance, and descendeth to the heir, and nothing can descend to the executors but what is merely personal. And though a box or case of evidences are to descend to the heir, yet unless you can shew me positive law to the contrary, they shall be taken into the executors' hands to be delivered to the heir. Besides, how unconscionable a thing is it, that he that steals a shilling's worth of wood, which the wind hath blown down, or which lieth

rotting on the ground, should be hanged for it, and he that takes a tree, worth twenty or forty shillings, should answer only for the damage!

L.

It is somewhat hard, but it has been so practised time out of mind. Then follows sodomy, and rape, both of them felonies.

P.

I know that, and that of the former he justly says it is detestable, being in a manner an apostacy from human nature: but in neither of them is there anything of *animus felleus.* The statutes which make them felony, are exposed to all men's reading. But because Sir Edward Coke's commentaries upon them are more diligent and accurate than to be free from all uncleanness, let us leap over them both; observing only by the way, that he leaves an evasion for an impotent offender, though his design be the same, and pursued to the utmost of his power.

L.

Two other great felonies are, breaking and burning of houses; neither of which are defined by any statute. The former of them is by Sir Edward Coke (3 *Inst. p.* 63), defined thus:—Burglary is by the common-law, the breaking and entering into the mansion-house of another, in the night, with intent to kill some reasonable creature, or to commit some other felony within the same, whether his intent be executed or not. And he defineth night to be then, when one man cannot know another's face by daylight. And for the parts of a mansionhouse, he reckoneth all houses that belong to housekeeping, as barns, stables, dairyhouses, buttery, kitchen, chambers, &c. But breaking of a house by day, though felony, and punished as burglary, is not within the statute.

P.

I have nothing to say against his interpretations here; but I like not that any private man should presume to determine, whether such or such a fact done be within the words of a statute or not, where it belongs only to a jury of twelve men to declare in their verdict, whether the fact laid open before them, be burglary, robbery, theft, or other felony. For this is to give a leading judgment to the jury, who ought not to

consider any private lawyer's institutes, but the statutes themselves pleaded before them for directions.

L.

Burning, as he defines it (ibid.p. 66), is a felony at the common-law, committed by any that maliciously and voluntarily, in the night or day, burneth the house of an other. And he hereupon infers, if a man set fire to the house, and it takes not, that then it is not within the statute.

P.

If a man should secretly and maliciously lay a quantity of gunpowder under another man's house, sufficient to blow it up, and set a train of powder in it, and set fire to the train, and some accident hinder the effect, is not this burning? Or what is it? What crime? It is neither treason, nor murder, nor burglary, nor robbery, nor theft, nor (no damage being made) any trespass, nor contrary to any statute. And yet, seeing the common-law is the law of reason, it is a sin, and such a sin as a man may be accused of, and convicted; and consequently a crime committed of malice prepensed. Shall he not then be punished for the attempt? I grant you that a judge has no warrant from any statute-law, common-law, or commission, to appoint the punishment; but surely the King has power to punish him, on this side of life or member, as he please; and with the assent of Parliament, if not without, to make the crime for the future capital.

L.

I know not. Besides these crimes, there is conjuration, witchcraft, sorcery and enchantment; which are capital by the statute 1 *James, c.* 12.

P.

But I desire not to discourse of that subject. For though without doubt there is some great wickedness signified by those crimes; yet I have ever found myself too dull to conceive the nature of them, or how the devil hath power to do many things which witches have been accused of. Let us now come to crimes not capital.

L.

Shall we pass over the crime of heresy, which Sir Edward Coke ranketh before murder?

But the consideration of it will be somewhat long.

P.

Let us defer it till the afternoon.

L.

Concerning heresy, Sir Edward Coke (3 *Inst.* p. 39) says, that five things fall into consideration. 1. Who be the judges of heresy. 2. What shall be judged heresy. 3. What is the judgment upon a man convicted of heresy. 4. What the law alloweth him to save his life. 5. What he shall forfeit by judgment against him.

P. Of heresy.

The principal thing to be considered, which is the heresy itself, he leaveth out, viz. what it is; in what fact or words it consisteth; what law it violateth, statute-law or the law of reason. The cause why he omitteth it, may perhaps be this; that it was not only out of his profession, but also out of his other learning. Murder, robbery, theft, &c. every man knoweth to be evil, and are crimes defined by the statute-law, so that any man may avoid them, if he will. But who can be sure to avoid heresy, (if he but dare to give an account of his faith), unless he know beforehand what it is?

L.

In the preamble of the statute of 2 *Hen. IV, c.* 15, heresy is laid down, as a preaching or writing of such doctrine as is contrary to the determination of Holy Church.

P.

Then it is heresy at this day to preach or write against worshipping of Saints, or the infallibility of the Church of Rome, or any other determination of the same Church. For Holy Church, at that time, was understood to be the Church of Rome, and now with us the Holy Church I understand to be the Church of England; and the opinions in that statute are now, and were then, the true Christian faith. Also the same statute of *Hen. IV* declareth, by the same preamble, that the Church of England had never been troubled with heresy.

L.

But that statute is repealed.

P.

Then also is that declaration or definition of heresy repealed.

L.

What, say you, is heresy?

P.

I say, heresy is a singularity of doctrine or opinion contrary to the doctrine of another man, or men; and the word properly signifies the doctrine of a sect, which doctrine is taken upon trust of some man of reputation for wisdom, that was the first author of the same. If you will understand the truth hereof, you are to read the histories and other writings of the ancient Greeks, whose word it is; which writings are extant in these days, and easy to be had. Wherein you will find, that in and a little before the time of Alexander the Great, there lived in Greece many excellent wits, that employed their time in search of the truth in all manner of sciences worthy of their labour, and which to their great honour and applause published their writings; some concerning justice, laws, and government, some concerning good and evil manners, some concerning the causes of things natural and of events discernible by sense, and some of all these subjects. And of the authors of these, the principal were Pythagoras, Plato, Zeno, Epicurus and Aristotle, men of deep and laborious meditation, and such as did not get their bread by their philosophy, but were able to live of their own, and were in honour with princes and other great personages. But these men, though above the rest in wisdom, yet their doctrine in many points did disagree; whereby it came to pass, that such men as studied their writings, inclined some to Pythagoras, some to Plato, some to Aristotle, some to Zeno, and some to Epicurus. But philosophy itself was then so much in fashion, as that every rich man endeavoured to have his children educated in the doctrine of some or other of these philosophers, which were for their wisdom so much renowned. Now those that followed Pythagoras, were called *Pythagoreans;* those that followed Plato, *Academics;* those that followed Zeno, *Stoics;* those that followed Epicurus, *Epicureans;* and those that followed Aristotle, *Peripatetics;* which are the names of heresy in Greek, which signifies no more but taking of an opinion; and the said *Pythagoreans, Academics, Stoics, Peripatetics, &c.* were termed by the names of

so many several heresies. All men, you know, are subject to error, and the ways of error very different; and therefore it is no wonder if these wise and diligent searchers of the truth did, notwithstanding their excellent parts, differ in many points amongst themselves. But this laudable custom of great wealthy persons to have their children at any price to learn philosophy, suggested to many idle and needy fellows an easy and compendious way of maintenance; which was to teach the philosophy, some of Plato, some of Aristotle, &c: whose books to that end they read over, but without capacity or much endeavour to examine the reasons of their doctrines, taking only the conclusions, as they lay. And setting up with this, they soon professed themselves philosophers, and got to be the school-masters to the youth of Greece. But by competition for such employment, they hated and reviled one another with all the bitter terms they could invent; and very often, when upon occasion they were in civil company, fell first to disputation, and then to blows, to the great trouble of the company and their own shame. Yet amongst all their reproachful words, the name of *heretic* came never in, because they were all equally heretics, their doctrine not being theirs, but taken upon trust from the aforesaid authors. So that though we find heresy often mentioned in Lucian and other heathen authors, yet we shall not find in any of them *hæreticus* for a heretic. And this disorder among the philosophers continued a long time in Greece, and infecting also the Romans, was at the greatest in the times of the apostles and in the primitive Church, till the time of the Nicene Council, and somewhat after. But at last the authority of the Stoics and Epicureans was not much esteemed, only Plato's and Aristotle's philosophy were much in credit; Plato's with the better sort, that founded their doctrine upon the conceptions and ideas of things, and Aristotle's with those that reasoned only from the names of things, according to the scale of the *categories.* Nevertheless, there were always, though not new sects of philosophy, yet new opinions continually arising.

L.

But how came the word heretic to be a reproach?

P.

Stay a little. After the death of our Saviour, his apostles and his disciples, as you know, dispersed themselves into several parts of the world to preach the Gospel, and converted much people, especially in Asia the Less, in Greece, and Italy, where they

constituted many churches; and as they travelled from place to place, left bishops to teach and direct those their converts, and to appoint presbyters under them to assist them therein, and to confirm them by setting forth the life and miracles of our Saviour, as they had received them from the writings of the apostles and evangelists; whereby, and not by the authority of Plato, or Aristotle, or any other philosopher, they were to be instructed. Now you cannot doubt but that among so many heathens converted in the time of the apostles, there were men of all professions and dispositions, and some that had never thought of philosophy at all, but were intent upon their fortunes or their pleasures; and some that had a greater, some a less use of reason; and some that had studied philosophy, but professed it not, which were commonly the men of the better rank; and some had professed it only for their better abstinence, and had it not farther than readily to talk and wrangle; and some were Christians in good earnest, and others but counterfeit, intending to make use of the charity of those that were sincere Christians, which in those times was very great. Tell me now, of these sorts of Christians, which was the most likely to afford the fittest men to propagate the faith by preaching and writing, or public or private disputation; that is to say, who were fittest to be made presbyters and bishops.

L.

Certainly those who, *cæteris paribus,* could make the best use of Aristotle's rhetoric and logic.

P.

And who were the most prone to innovation?

L.

They that were most confident of Aristotle's and Plato's (their former masters) natural philosophy. For they would be the aptest to wrest the writings of the apostles and all Scriptures to the doctrines in which their reputation was engaged.

P.

And from such bishops and priests and other sectaries it was, that heresy, amongst the Christians, first came to be a reproach. For no sooner had one of them preached or published any doctrine that displeased either the most, or the most leading men of the

rest, but it became such a quarrel as not to be decided but by a Council of the bishops in the province where they lived; wherein he that would not submit to the general decree, was called a heretic, as one that would not relinquish the philosophy of his sect. The rest of the Council gave themselves the name of Catholics, and to their Church the name of Catholic Church. And thus came up the opposite terms of catholic and heretic.

L.

I understand how it came to be a reproach, but not how it follows that every opinion condemned by a Church that is, or calls itself catholic, must needs be an error or a sin. The Church of England denies that consequence, and that such doctrine as they hold cannot be proved to be erroneous but by the Scripture, which cannot err; but the Church, being but men, may both err and sin.

P.

In this case we must consider also that error, in its own nature, is no sin. For it is impossible for a man to err on purpose; he cannot have an intention to err; and nothing is sin unless there be a sinful intention: much less are such errors sins, as neither hurt the commonwealth nor any private man, nor are against any law positive or natural; such errors as were those for which men were burnt, in the time when the Pope had the government of this Church.

L.

Since you have told me how heresy came to be a name, tell me also how it came to be a crime; and what were the heresies that first were made crimes.

P.

Since the Christian Church could declare, and none else, what doctrines were heresies, but had no power to make statutes for the punishment of heretics before they had a Christian King, it is manifest that heresy could not be made a crime before the first Christian Emperor, which was Constantine the Great. In his time, one Arius, a priest of Alexandria, in dispute with his bishop publicly denied the divinity of Christ, and maintained it afterwards in the pulpit, which was the cause of a sedition and much bloodshed both of citizens and soldiers in that city. For the preventing of the like for

the time to come, the Emperor called a general Council of bishops to the city of Nice; who being met, he exhorted them to agree upon a confession of the Christian faith, promising that whatsoever they agreed on he would cause to be observed.

L.

By the way, the Emperor, I think, was here a little too indifferent.

P.

In this Council was established so much of the creed we now use and call the Nicene creed, as reacheth to the words, *I believe in the Holy Ghost.* The rest was established by the three general Councils next succeeding. By the words of which creed almost all the heresies then in being, and especially the doctrine of Arius, were condemned; so that now all doctrines published by writing or by word, and repugnant to this confession of the first four general Councils, and contained in the Nicene creed, were, by the imperial law forbidding them, made crimes; such as are that of Arius, denying the divinity of Christ; that of Eutiches, denying the two natures of Christ; that of the Nestorians, denying the divinity of the Holy Ghost; that of the Anthropomorphites, that of the Manichees, that of the Anabaptists, and many other.

L.

What punishment had Arius?

P.

At the first, for refusing to subscribe, he was deprived and banished; but afterwards having satisfied the Emperor concerning his future obedience (for the Emperor caused this confession to be made, not for the regard of truth of doctrine, but for the preserving of the peace, especially among his Christian soldiers, by whose valour he had gotten the empire, and by the same was to preserve it), he was received again into grace, but died before he could repossess his benefice. But after the time of those Councils, the imperial law made the punishment for heresy to be capital, though the manner of the death was left to the prefects in their several jurisdictions; and thus it continued till somewhat after the time of the Emperor Frederick Barbarossa. But the papacy having gotten the upper hand of the Emperor, brought in the use of burning both heretics and apostates; and the Popes from time to time made heresies of many

other points of doctrine (as they saw it conduce to the setting up of the chair above the throne), besides those determined in the Nicene creed, and brought in the use of burning; and according to this papal law, there was an apostate burnt at Oxford, in the time of William the Conqueror, for turning Jew. But of a heretic burnt in England, there is no mention made till after the statute of 2 *Hen. IV,* whereby some followers of Wicliff, called Lollards, were afterwards burned; and that for such doctrines as by the Church of England, ever since the first year of Queen Elizabeth, have been approved for godly doctrines, and no doubt were godly then. And so you see how many have been burnt for godliness.

L.

It was not well done. But it is no wonder we read of no heretics before the time of Henry IV: for in the preamble to that statute it is intimated, that before those Lollards there never was any heresy in England.

P.

I think so too; for we have been the tamest nation to the Pope of all the world. But what statutes concerning heresy have there been made since?

L.

The statute of 2 *Hen. V, c.* 7, which adds to the burning the forfeiture of lands and goods; and then no more till the 25 *Hen. VIII, c.* 14, which confirms the two former, and giveth some new rules concerning how they shall be proceeded with. But by the statute of 1 *Edw. VI, c.* 12, all acts of Parliament formerly made to punish any manner of doctrine concerning religion, are repealed. For therein it is ordained, after divers Acts specified, that all and every other Act or Acts of Parliament concerning doctrine or matters of religion, and all and every branch, article, sentence, and matter, pains and forfeitures contained, mentioned, or anywise declared in the same Acts of Parliament or statutes, shall be from henceforth repealed, utterly void, and of none effect. So that in the time of King Edward VI, not only all punishments of heresy were taken away, but also the nature of it was changed to what originally it was, a private opinion. Again, in 2 *Phil. & M.* those former statutes of 2 *Hen. IV, c.* 15, 2 *Hen. V, c.* 17, 25 *Hen. VIII, c.* 14, are revived; and the branch of 1 *Edw. VI, c.* 12, touching doctrine, though not specially named, seemeth to be this, that the same statute confirmeth the

statute of 25 *Edw. III,* concerning treasons. Lastly, in the first year of Queen Elizabeth, *c.* 1, the aforesaid statutes of Queen Mary are taken away, and thereby the statute of 1 *Edw. VI, c.* 12, revived; so as there was no statute left for the punishment of heretics. But Queen Elizabeth by the advice of her Parliament gave a commission, which was called the High Commission, to certain persons, amongst whom were very many of the bishops, to declare what should be heresy for the future, but with a restraint that they should judge nothing to be heresy, but what had been so declared in the first four general Councils.

P.

From this which you have showed me, I think we may proceed to the examination of the learned Sir Edward Coke concerning heresy. In his chapter of heresy, 3 *Inst.* p. 40, he himself confesseth that no statute against heresy stood then in force, when in the 9th year of King James, Bartholomew Legat was burnt for Arianism; and that from the authority of the act of 2 *Hen. IV, c.* 15, and other acts cited in the margin, it may be gathered that the diocesan hath the jurisdiction of heresy. This I say is not true: for as to acts of Parliament, it is manifest, that from acts repealed, that is to say, from things that have no being, there can be gathered nothing. And as to the other authorities in the margin, Fitzherbert and the Doctor and Student, they say no more than what was law in the time when they writ; that is, when the Pope's usurped authority was here obeyed. But if they had written this in the time of King Edward VI or Queen Elizabeth, Sir Edward Coke might as well have cited his own authority, as theirs; for their opinions had no more the force of laws than his. Then he cites this precedent of Legat, and another of Hammond in the time of Queen Elizabeth; but precedents prove only what was done, and not what was well done. What jurisdiction could the diocesan then have of heresy, when by the statute of *Edw. VI, c.* 12, then in force, there was no heresy, and all punishment for opinions was forbidden? For heresy is a doctrine contrary to the determination of the Church; but then the Church had not determined any thing at all concerning heresy.

L.

But seeing the high-commissioners had power to correct and amend heresies, they must have power to cite such as were accused of heresy to appear before them; or else they could not execute their commission.

P.

If they had first made and published a declaration of what articles they made heresy, that when one man heard another speak against their declaration, he might thereof inform the commissioners, then indeed they had had power to cite and imprison the person accused. But before they can know what should be heresy, how was it possible that one man should accuse another? And before he be accused, how can he be cited?

L.

Perhaps it was taken for granted, that whatsoever was contrary to any of the four first general Councils, was to be judged heresy.

P.

That granted, yet I see not how one man might accuse another any the better for those Councils. For not one man of ten thousand had ever read them, nor were they ever published in English, that a man might avoid offending against them; nor perhaps are they extant. Nor if those that we have printed in Latin, are the very acts of the Councils, which is yet much disputed amongst divines, do I think it fit they were put in the vulgar tongues. But it is not likely that the makers of the statutes had any purpose to make heresy of whatsoever was repugnant to those four general Councils. For if they had, I believe the Anabaptists, of which there was great plenty in those times, would one time or other have been questioned upon this article of the Nicence Creed, *I believe one baptism for the remission of sins.* Nor was the commission itself for a long time after registered, that men might in such uncertainty take heed and abstain, for their better safety, from speaking of religion anything at all. But by what law was this hereitc Legat burnt? I grant he was an Arian, and his heresy contrary to the determination of the Church of England, in the highest points of Christianity. But seeing there was no statute-law to burn him, and no penalty forbidding, by what law, by what authority was he burnt?

L.

That this Legat was accused of heresy, was no fault of the high-commissioners; but when he was accused, it had been a fault in them not to have examined him, or having examined him and found him an Arian, not to have judged him so, or not to have

certified him so. All this they did, and this was all that belonged unto them; they meddled not with his burning, but left him to the secular power to do with him what they pleased.

P.

Your justification of the commissioners is nothing to the question. The question is by what law was he burnt? The spiritual-law gives no sentence of temporal punishment; and Sir Edward Coke confesseth that he could not be burned; and burning being forbidden by statute-law, by what law then was he burned?

L.

By the common-law.

P.

What is that? It is not custom. For before the time of Henry IV, there was no such custom in England; for if there had, yet those laws that came after were but confirmations of the custom, and therefore the repealing of those laws was a repealing of the custom. For when King Edward VI and Queen Elizabeth abolished those statutes, they abolished all pains, and consequently burning, or else they had abolished nothing. And if you will say he was burnt by the law of reason, you must tell me how there can be proportion between doctrine and burning; there can be no equality, nor majority, nor minority assigned between them. The proportion that is between them, is the proportion of the mischief which the doctrine maketh, to the mischief to be inflicted on the doctor; and this is to be measured only by him that hath the charge of governing the people; and consequently the punishing of offences can be determined by none but by the King, and that, if it extend to life or member, with the assent of Parliament.

L.

He does not draw any argument for it from reason, but allegeth for it this judgment executed upon Legat, and a story out of Holinshed and Stow. But I know that neither history nor precedent will pass with you for law. And though there be a writ *de hæretico comburendo* in the register, as you may read in Fitzherbert, grounded upon the statutes of 2 *Hen. IV, c.* 15, and 2 *Hen. V, c.* 7; yet seeing those statutes are void, you will say the writ is also void.

P.

Yes, indeed will I. Besides this, I understand not how that it is true that he saith, that the diocesan hath jurisdiction of heresy, and that so it was put in use in all Queen Elizabeth's reign; whereas by the statute it is manifest, that all jurisdiction spiritual was given under the Queen to the high-commissioners. How then could any one diocesan have any part thereof without deputation from them, which by their letters-patent they could not grant? Nor was it reasonable they should; for the trust was not committed to the bishops only, but also to divers lay persons, who might have an eye upon their proceedings, lest they should encroach upon the power temporal. But at this day there is neither statute nor any law to punish doctrine, but the ordinary power ecclesiastical, and that according to the canons of the Church of England, only authorized by the King, the high-commission being long since abolished. Therefore let us come now to such causes criminal as are not capital.

L.

The greatest offence not capital, is that which is done against the statute of provisors.

P. Of premunire.

You have need to expound this.

L.

This crime is not unlike to that for which a man is outlawed, when he will not come in and submit himself to the law; saving that in outlawries there is a long process to precede it, and he that is outlawed is put out of the protection of the law. But for the offence against the statute of provisors (which is called *præmunire facias,* from the words in the original writ), if the offender submit not himself to the law within the space of two months after notice, he is presently an outlaw. And this punishment, if not capital, is equivalent to capital. For he lives secretly at the mercy of those that know where he is, and cannot, without the like peril to themselves, but discover him. And it has been much disputed, before the time of Queen Elizabeth, whether he might not be lawfully killed by any man that would, as one might kill a wolf. It is like the punishment amongst the old Romans, of being barred the use of fire and water; and like the great excommunication in the papacy, when a man might not eat nor drink

with the offender without incurring the like penalty.

P.

Certainly the offence for which this punishment was first ordained was some abominable crime, or extraordinary mischief.

L.

So it was. For the Pope, you know, from long before the Conquest, encroached every day upon the power temporal. Whatsoever could be made to seem to be *in ordine ad spiritualia,* was in every commonwealth claimed and haled to the jurisdiction of the Pope; and for that end, in every country he had his court ecclesiastical, and there was scarce any cause temporal which he could not, by one shift or other, hook into his jurisdiction, in such sort as to have it tried in his own courts at Rome, or in France, or in England itself. By which means the King's laws were not regarded, judgments given in the King's courts were avoided, and presentations to bishoprics, abbeys, and other benefices, founded and endowed by the Kings and nobility of England, were bestowed by the Pope upon strangers, or such as with money in their purses could travel to Rome to provide themselves of such benefices. And suitably hereunto, when there was a question about a tithe, or a will, though the point were merely temporal, yet the Pope's court here would fetch them in, or else one of the parties would appeal to Rome. Against these injuries of the Roman Church, and to maintain the right and dignity of the Crown of England, Edward III made a statute concerning provisors, that is, such as provide themselves with benefices here from Rome. For in the twenty-fifth year of his reign he ordained, in a full Parliament, that the right of election of bishops, and right of advowsons and presentations, belonged to himself, and to the nobility that were the founders of such bishoprics, abbeys, and other benefices. And he enacted further, that if any clerk which he or any of his subjects should present, should be disturbed by any such provisor, that such provisor or disturber should be attached by his body, and if convicted, lie in prison till he were ransomed at the King's will, and had satisfied the party grieved, renounced his title, and found sureties not to sue for it any further; and that if they could not be found, then exigents should go forth to outlawry, and the profits of the benefice in the mean time be taken into the King's hands. And the same statute is confirmed in the twenty-seventh year of King Edward III; which statute alloweth to these provisors two months to appear: but if they appear before they be

outlawed, they shall be received to make answer; but if they render not themselves, they shall forfeit all their lands, goods, and chattels, besides that they stand outlawed. The same law is confirmed again by 16 *Rich. II, c.* 5; in which is added, because these provisors obtained sometimes from the Pope, that such English bishops, as according to the law were instituted and inducted by the King's presentees, should be excommunicated, that for this also both they, and the receivers and publishers of such papal process, and the procurers, should have the same punishment.

P.

Let me see the statute itself of 27 *Edw. III.*

L.

It lies there before you, set down *verbatim* by Sir Edward Coke himself, both in English and French.

P.

It is well. We are now to consider what it means, and whether it be well or ill interpreted by Sir Edward Coke. And first it appeareth by the preamble, which Sir Edward Coke acknowledgeth to be the best interpreter of the statute, that this statute was made against the encroachments only of the Church of Rome upon the right of the King, and other patrons, to collate bishoprics and other benefices within the realm of England, and against the power of the courts spiritual to hold plea of controversies determinable in any of the courts of the King, or to reverse any judgment there given, as being things that tend to the disherison of the King and destruction of the common-law of the realm always used. Put the case now, that a man had procured the Pope to reverse a decree in chancery. Had he been within the danger of præmunire?

L.

Yes, certainly. Or if the judgment had been given in the Court of the Lord Admiral, or in any other King's court whatsoever, either of law or equity. For courts of equity are most properly courts of the common-law of England, because equity and common-law, as Sir Edward Coke says, are all one.

P.

Then the word common-law is not in this preamble restrained to such courts only where the trial is by juries, but comprehends all the King's temporal courts, if not also the courts of those subjects that are lords of great manors.

L.

It is very likely, yet I think it will not by every man be granted.

P.

The statute also says, that they who draw men out of the realm in plea, whereof the cognizance pertaineth to the King's court, or of things whereof judgment is given in the King's court, are within the cases of præmunire. But what if one man draw another to Lambeth in plea, whereof judgment is already given at Westminster. Is he by this clause involved in a præmunire?

L.

Yes. For though it be not out of the realm, yet it is within the meaning of the statute; because the Pope's court, not the King's court, was then perhaps at Lambeth.

P.

But in Sir Edward Coke's time the King's court was at Lambeth, and not the Pope's.

L.

You know well enough that the spiritual Court has no power to hold pleas of common-law.

P.

I do so; but I know not for what cause any simple man, that mistakes his right court, should be out of the King's protection, lose his inheritance and all his goods, personal and real, and if taken, be kept in prison all his life. This statute cannot be by Sir Edward Coke's torture made to say it. Besides, such men are ignorant in what courts they are to seek their remedy; and it is a custom confirmed by perpetual usage, that such ignorant men should be guided by their counsel at law. It is manifest, therefore, that the makers of the statute intended not to prohibit men from suing for their right, neither in the Chancery, nor in the Admiralty, nor in any other court, except the

Ecclesiastical courts, which had their jurisdiction from the Church of Rome. Again, where the statute says, "which do sue in any other court, or defeat a judgment in the King's court": what is the meaning of another court? Another court than what? Is it here meant the King's Bench, or Court of Common Pleas? Does a præmunire lie for every man that sues in Chancery for that which might be remedied in the Court of Common Pleas? Or can a præmunire lie by this statute against the Lord Chancellor? The statute lays it only on the party that sueth, not upon the judge which holdeth the plea. Nor could it be laid, either by this statute or by the statute of 16 *Rich. II,* upon the judges, which were then punishable only by the Pope's authority. Seeing then the party suing has a just excuse upon the counsel of his lawyer, and the temporal judge and the lawyer both are out of the statute, the punishment of the præmunire can light upon nobody.

L.

But Sir Edward Coke in this same chapter bringeth two precedents to prove, that though the spiritual courts in England be now the King's courts, yet whosoever sueth in them for any thing triable by the common-law, shall fall into a præmunire. One is, that whereas in the twenty-second year of *Hen. VIII* all the clergy of England in a convocation by public instrument acknowledged the King to be supreme head of the Church of England; yet after this, viz. 24 *Hen. VIII,*this statute was in force.

P.

Why not? A convocation of the clergy could not alter the right of supremacy; their courts were still the Pope's courts. The other precedent, in the twenty-fifth year of *Hen. VIII,* of the Bishop of Norwich, may have the same answer. For the King was not declared head of the Church by Act of Parliament till the twenty-sixth year of his reign. If he had not mistrusted his own law, he would not have laid hold on so weak a proof as these precedents. And as to the sentence of præmunire upon the Bishop of Norwich, neither doth this statute nor that other of Richard II warrant it. He was sentenced for threatening to excommunicate a man which had sued another before the mayor. But this statute forbids not that, but forbids the bringing in or publishing of excommunications, or other process from Rome, or any other place. Before the twenty-sixth year of Henry VIII, there is no question but that for a suit in the spiritual court here in a temporal cause there lay a præmunire. And if perhaps some judge or

other hath since that time judged otherwise, his judgment was erroneous.

L.

Nay, but by the statute of 16 *Rich. II. c.* 5, it appeareth to the contrary, as Sir Edward Coke here will show you. The effect, saith he, of the statute of Richard II is, that if any pursue, or cause to be pursued, in the Court of Rome or elsewhere, anything which toucheth the King, against him, his crown, or regality, or his realm, they, their notaries, &c. shall be out of the King's protection.

P.

I pray you let me know the very words of the statute as they lie.

L.

Presently. The words are, *If any man purchase or pursue, or cause to be purchased or pursued, in the Court of Rome or elsewhere, any such translations, processes and sentences of excommunication, bulls, instruments, or any other things whatsoever, which touch the King, against him, his crown, and his regality, or his realm, as is aforesaid, &c.*

P.

If a man bring a plea of common-law into the spiritual court, which is now the King's court, and the judge of this spiritual court hold plea thereof: by what construction can you draw it within the compass of the words you have now read? To sue for my right in the King's court, is no pursuing of translations of bishoprics, made or procured in the Court of Rome, or any place else, but only in the court of the King; nor is this the suit against the King, nor his crown, nor his regality, nor his realm, but the contrary. Why then is it a præmunire? No. He that brings in or setteth out a writing in any place whatsoever, wherein is contained, that the King hath so given away his jurisdiction, as that if a subject be condemned falsely, his submission to the King's judgment is of none effect; or that the King upon no necessity whatsoever can out of Parliament-time raise money for the defence of the kingdom, is, in my opinion, much more within the statute of provisors, than they which begin suit for a temporal matter in a court spiritual. But what argument has he for this law of his, since the statute-law fails him, from the law of reason?

L.

He says, *they are called other courts, either because they proceed by the rules of other laws, as by the canon or civil law, or by other trials than the common-law doth warrant. For the trial warranted by the law of England for matter of fact, is by verdict of twelve men before the judges of the common-law, in matters pertaining to the common-law, and not upon examination of witnesses, as in the Court of Equity. So that alia curia is either that which is governed per aliam legem, or which draweth the party ad aliud examen. For if—*

P.

Stop there. Let us consider of this you have read: *for the trial warranted by the law of England is by verdict of twelve men.* What means he here by the law of England? Does it not warrant the trials in Chancery, and in the Court of Admiralty, by witnesses?

L.

By the law of England he means the law used in the King's Bench; that is to say, the common-law.

P.

This is just as if he had said, that two courts did warrant their own way of trial; but other courts not so, but were warranted by the King: only the courts of common-law were warrants to themselves. You see that *alia curia* is this way ill expounded. In the courts of common-law all trials are by twelve men, who are judges of the fact; and the fact known and proved, the judges are to pronounce the law; but in the spiritual court, the Admiralty, and in all the courts of Equity, there is but one judge, both of fact and of law; this is all the difference. If this difference be intended by the statute by *alia curia,* there would be a præmunire for suing in a court, being not the King's Court. The King's Bench and Court of Common Pleas may also be different kinds of courts, because the process is different. But it is plain that this statute doth not distinguish courts otherwise than into the courts of the King, and into the courts of the foreign states and princes. And seeing you stand upon the name of a jury for the distinguishing of courts, what difference do you find between the trials at the common-law, and the trials in other courts? You know that in trials of fact naturally, and through all the

world, the witnesses are judges, and it is impossible to be otherwise. What then in England can a jury judge of, except it be of the sufficiency of the testimony? The justices have nothing to judge of or do, but after the fact is proved, to declare the law; which is not judgment, but jurisdiction. Again, though the trial be in Chancery, or in the Court of civil law, the witnesses are still judges of the fact, and he that hath the commission to hear the cause, hath both the parts, that is to say, of a jury to judge of the testimony, and of a justice to declare the law. In this, I say, lies all the difference: which is indeed enough to make a dispute (as the world goes) about jurisdiction! But seeing it tends neither to the disherison of the King, nor of the people, nor to the subversion of the law of reason, that is of common-law, nor to the subversion of justice, nor to any harm of the realm, without some of which these statutes are not broken; it cannot be a præmunire.

L.

Let me read on. *For if the freehold, inheritances, goods and chattels, debts and duties, wherein the King and subject have right and property by the common-law, should be judged per aliam legem, or be drawn ad aliud examen, the three mischiefs afore expressed would follow; viz. the destruction of the King and his crown, the disherison of his people, and the undoing and destruction of the common-law always used.*

P.

That is to say, of the law of reason. From hence it follows, that where there are no juries, and where there are different laws from ours, that is to say, in all the world besides, neither King nor people have any inheritance, nor goods, nor any law of reason. I will examine his doctrine concerning cases criminal no further. He nowhere defineth a crime, that we may know what it is: an odious name sufficeth him to make a crime of any thing. He hath put heresy among the most odious crimes, not knowing what it signifies; and upon no other cause, but because the Church of Rome, to make their usurped power the more terrible, had made it, by long preaching against it, and cruelty shown towards many godly and learned men of this and other reformed Churches, appear to common people a thing detestable. He puts it in as a plea of the crown in the time of Queen Elizabeth; whereas in her time there was no doctrine heresy. But Justice Stamford leaves it out, because, when heresy was a crime, it was a plea of the *mitre.* I see also in this catalogue of causes criminal, he inserteth costly

feeding, costly apparel, and costly building, though they were contrary to no statute. It is true, that by evil circumstances they become sins; but these sins belong to the judgment of the pastors spiritual. A justice of the temporal law (seeing the intention only makes them sins) cannot judge whether they be sins or no, unless he have power to take confessions. Also he makes flattery of the King to be a crime. How could he know when one man had flattered another? He meant therefore that it was a crime to please the King: and accordingly he citeth divers calamities of such as had been in times past in great favour of the Kings they served; as the favourites of Henry III, Edward II, Richard II, Henry VI; which favourites were some imprisoned, some banished, and some put to death by the same rebels that imprisoned, banished, and put to death the same King, upon no better ground than the Earl of Strafford, the Archbishop of Canterbury, and King Charles the First, by the rebels of that time. Empson and Dudley were no favourites of Henry the seventh, but spunges, which King Henry the eighth did well squeeze. Cardinal Wolsey was indeed for divers years a favourite of Henry the eighth, but fell into disgrace, not for flattering the King, but for not flattering him in the business of divorce from Queen Katherine. You see his reasoning here; see also his passion in the words following: we will for some causes descend no lower: *Qui eorum vestigiis insistunt, eorum exitus perhorrescant.* This is put in for the favourite, that then was, of King James. But let us give over this, and speak of the legal punishments to these crimes belonging.

And in the first place I desire to know who it is that hath the power, for an offence committed, to define and appoint the special manner of punishment. For I suppose you are not of the opinion of the Stoics in old time, that all faults are equal, and that there ought to be the same punishment for killing a man, and for killing a hen.

L. Of punishments.

The manner of punishment in all crimes whatsoever, is to be determined by the common-law. That is to say, if it be a statute that determines it, then the judgment must be according to the statute; if it be not specified by the statute, then the custom in such cases is to be followed: but if the case be new, I know not why the judge may not determine it according to reason.

P.

But according to whose reason? If you mean the natural reason of this or that judge authorized by the King to have cognizance of the cause, there being as many several reasons, as there are several men, the punishment of all crimes will be uncertain, and none of them ever grow up to make a custom. Therefore a punishment certain can never be assigned, if it have its beginning from the natural reasons of deputed judges; no, nor from the natural reason of the supreme judge. For if the law of reason did determine punishments, then for the same offences there should be, through all the world and in all times, the same punishments; because the law of reason is immutable and eternal.

L.

If the natural reason neither of the King, nor of any else, be able to prescribe a punishment, how can there be any lawful punishment at all?

P.

Why not? For I think that in this very difference between the rational faculties of particular men, lieth the true and perfect reason that maketh every punishment certain. For, but give the authority of defining punishments to any man whatsoever, and let that man define them, and right reason has defined them, suppose the definition be both made, and made known before the offence committed. For such authority is to trump in card playing, save that in matter of government, when nothing else is turned up, clubs are trumps. Therefore seeing every man knoweth by his own reason what actions are against the law of reason, and knoweth what punishments are by this authority for every evil action ordained; it is manifest reason, that for breaking the known laws he should suffer the known punishments. Now the person to whom this authority of defining punishments is given, can be no other, in any place of the world, but the same person that hath the sovereign power, be it one man or one assembly of men. For it were in vain to give it to any person that had not the power of the militia to cause it to be executed; for no less power can do it, when many offenders be united and combined to defend one another. There was a case put to King David by Nathan, of a rich man that had many sheep, and of a poor man that had but one, which was a tame lamb: the rich man had a stranger in his house, for whose entertainment, to spare his own sheep he took away the poor man’s lamb. Upon this case the King gave judgment, “Surely the man that hath done this shall die.” What think you of this? Was

it a royal, or tyrannical judgment?

L.

I will not contradict the canons of the Church of England, which acknowledge the King of England within his own dominions hath the same rights, which the good Kings of Israel had in theirs; nor deny King David to have been one of those good Kings. But to punish with death without a precedent law, will seem but a harsh proceeding with us, who unwillingly hear of arbitrary laws, much less of arbitrary punishments, unless we were sure that all our Kings would be as good as David. I will only ask you, by what authority the clergy may take upon them to determine or make a canon concerning the power of their own King, or to distinguish between the right of a good and an evil King.

P.

It is not the clergy that make their canons to be law, but it is the King that doth it by the great seal of England; and it is the King that giveth them power to teach their doctrines, in that, that he authorized them publicly to teach and preach the doctrine of Christ and his apostles, according to the Scriptures, wherein this doctrine is perspicuously contained. But if they had derogated from the royal power in any of their doctrines published, then certainly they had been to blame; nay, I believe that they had been more within the statute of præmunire of 16 *Rich. II, c.* 5, than any judge of a Court of Equity for holding pleas of common-law. I cite not this precedent of King David, as approving the breach of the great charter, or justifying the punishment with loss of life or member, of every man that shall offend the King; but to show you that before the charter was granted, in all cases where the punishments were not prescribed, it was the King only that could prescribe them; and that no deputed judge could punish an offender but by force of some statute, or by the words of some commission, and not *ex officio.* They might for a contempt of their courts, because it is a contempt of the King, imprison a man during the King's pleasure, or fine him to the King according to the greatness of the offence: but all this amounteth to no more, than to leave him to the King's judgment. As for cutting off of ears, and for the pillory, and the like corporal punishments usually inflicted heretofore in the Star-chamber, they were warranted by the statute of *Hen. VII,* that giveth them power to punish sometimes by discretion. And generally it is a rule of reason, that every judge of crimes, in case the positive law appoint no punishment, and he have no other

command from the King, then do consult the King before he pronounce sentence of any irreparable damage on the offender: for otherwise he doth not pronounce the law, which is his office to do, but makes the law, which is the office of the King. And from this you may collect, that the custom of punishing such and such a crime, in such and such a manner, hath not the force of law in itself, but from an assured presumption that the original of the custom was the judgment of some former King. And for this cause the judges ought not to run up, for the customs by which they are warranted, to the time of the Saxon Kings, nor to the time of the Conquest. For the most immediate antecedent precedents are the fairest warrants of their judgments; as the most recent laws have commonly the greatest vigour, as being fresh in the memory of all men, and tacitly confirmed, because not disapproved, by the sovereign legislator. What can be said against this?

L.

Sir Edward Coke, (3 *Inst. p.* 210), in the chapter of judgments and executions, saith, that of judgments some are by the common-law, some by statute-law, and some by custom; wherein he distinguisheth common-law both from statute-law and from custom.

P.

But you know, that in other places he makes the common-law, and the law of reason, to be all one; as indeed they are, when by it is meant the King's reason. And then his meaning in this distinction must be, that there be judgments by reason without statute-law, and judgments neither by statute-law nor by reason, but by custom without reason. For if a custom be reasonable, then, both he and other learned lawyers say, it is common-law; and if unreasonable, no law at all.

L.

I believe Sir Edward Coke's meaning was no other than yours in this point, but that he inserted the word *custom,* because there be not many that can distinguish between customs reasonable and unreasonable.

P.

But custom, so far forth as it hath the force of a law, hath more of the nature of a

statute, than of the law of reason, especially where the question is not of lands and goods, but of punishments, which are to be defined only by authority. Now to come to particulars, what punishment is due by law for high-treason?

L.

To be drawn upon a hurdle from the prison to the gallows, and there to be hanged by the neck, and laid upon the ground alive, and have his bowels taken out and burnt whilst he is yet living; to have his head cut off, his body to be divided into four parts, and his head and quarters to be placed as the King shall assign.

P.

Seeing a judge ought to give judgment according to the law, and that this judgment is not appointed by any statute, how does Sir Edward Coke warrant it by reason, or how by custom?

L.

Only thus: reason it is, that his body, lands, goods, posterity, &c. should be torn, pulled asunder, and destroyed, that intended to destroy the majesty of government.

P.

See how he avoids the saying the majesty of the King. But does not this reason make as much for punishing a traitor, as Mettius Fuffetius in old time was executed by Tullus Hostilius, King of Rome, or as Ravaillac, not many years ago in France, who were torn in pieces by four horses, as it does for drawing, hanging, and quartering?

L.

I think it does. But he confirms it also in the same chapter, by holy Scripture. Thus Joab for treason (1 *Kings* ii. 28), was drawn from the horns of the altar; that is proof for drawing upon a hurdle: *Esth.* ii. 22; Bigthan for treason was hanged; there is proof for hanging: *Acts* i. 18; Judas hanged himself and his bowels were poured out; there is for hanging and embowelling alive: 2 *Sam.* xviii. 14; Joab pierced Absalom's heart; that is proof for pulling out a traitor's heart: 2 *Sam.* xx. 22; Sheba the son of Bichri had his head cut off; which is proof that a traitor's head ought to be cut off: 2 *Sam.* iv. 12; they slew Baanah and Rechab, and hung up their heads over the pool of Hebron;

this is for setting up of quarters: and lastly for forfeiture of lands, and goods, *Psalms* cix. 9-15: *Let their children be driven out, and beg, and other men make spoil of their labours, and let their memory be blotted out of the land.*

P.

Learnedly said; and no record is to be kept of the judgment. Also the punishments divided between those traitors, must be joined in one judgment for a traitor here.

L.

He meant none of this, but intended (his hand being in) to show his reading, or his chaplain's, in the Bible.

P.

Seeing then for the specifying of the punishment in case of treason, he brings no argument from natural reason, that is to say, from the common-law; and that it is manifest that it is not the general custom of the land, the same being rarely or never executed upon any peer of the realm, and that the King may remit the whole penalty, if he will: it follows, that the specifying of the punishment depends merely upon the authority of the King. But this is certain, that no judge ought to give other judgment, than has been usually given and approved either by a statute, or by consent express or implied of the sovereign power. For otherwise it is not the judgment of the law, but of a man subject to the law.

L.

In petit treason the judgment is, to be drawn to the place of execution, and hanged by the neck; or if it be a woman, to be drawn and burnt.

P.

Can you imagine that this so nice a distinction can have any other foundation than the wit of a private man?

L.

Sir Edward Coke upon this place says, that she ought not to be beheaded or hanged.

P.

No, not by the judge, who ought to give no other judgment than the statute or the King appoints; nor the sheriff to make other execution than the judge pronounceth; unless he have a special warrant from the King. And this I should have thought he had meant, had he not said before, that the King had given away all his right of judicature to his courts of justice.

L.

The judgment for felony is—

P.

Heresy is before felony in the catalogue of the pleas of the Crown.

L.

He has omitted the judgment against a heretic, because, I think, no jury can find heresy, nor no judge temporal did ever pronounce judgment upon it. For the statute of 2 *Hen. V, c.* 7, was, that the bishop having convicted any man of heresy, should deliver him to the sheriff, and that the sheriff should believe the bishop. The sheriff therefore was bound by the statute of 2 *Hen. IV,* after he was delivered to him, to burn him; but that statute being repealed, the sheriff could not burn him, without a writ *de heretico comburendo,* and therefore the sheriff burnt Legat (9 King James) by that writ, which was granted by the judges of the common-law at that time, and in that writ the judgment is expressed.

P.

This is strange reasoning. When Sir Edward Coke knew and confessed, that the statutes upon which the writ *de hæretico comburendo* was grounded, were all repealed, how could he think the writ itself could be in force? Or that the statute, which repealeth the statutes for burning heretics, was not made with an intent to forbid such burning? It is manifest he understood not his books of common-law. For in the time of Henry IV and Henry V, the word of the bishop was the sheriff's warrant, and there was need of no such writ; nor could be till the 25 *Hen. VIII,* when those statutes were repealed, and a writ made for that purpose and put into the register, which writ Fitzherbert cites in the

end of his *Natura Brevium.* Again, in the latter end of the reign of Queen Elizabeth, was published a correct register of original and judicial writs, and the writ *de hæretico comburendo* left out; because that statute of 25 *Hen. VIII,* and all statutes against heretics, were repealed, and burning forbidden. And whereas he citeth for the granting of this writ, in the ninth year of James I, the Lord Chief Justice, the Lord Chief Baron, and two Justices of the Common-Pleas, it is, as to all but the Lord Chief Justice, against the law. For neither the judges of Common-Pleas, nor of the Exchequer, can hold pleas of the Crown without special commission; and if they cannot hold plea, they cannot condemn.

L.

The punishment for felony is, that the felon be hanged by the neck till he be dead. And to prove that it ought to be so, he cites a sentence, from whence I know not, *Quod non licet felonem pro felonia decollare.*

P.

It is not indeed lawful for the sheriff of his own head to do it, or to do otherwise than is commanded in the judgment, nor for the judge to give any other judgment than according to statute-law, or the usage consented to by the King; but this hinders not the King from altering his law concerning judgments, if he see good cause.

L.

The King may do so, if he please: and Sir Edward Coke tells you how he altered particular judgments in case of felony, and showeth that judgment being given upon a lord in Parliament, that he should be hanged, he was nevertheless beheaded; and that another lord had the like judgment for another felony, and was not hanged but beheaded: and withal he shows you the inconveniency of such proceeding, because, saith he, if hanging might be altered to beheading, by the same reason it might be altered to burning, stoning to death, &c.

P.

Perhaps there might be inconveniency in it; but it is more than I see, or he shows, nor did there happen any inconveniency from the execution he citeth: besides he granteth, that death, being *ultimum supplicium,* is a satisfaction to the law. But what is all this

to the purpose, when it belongeth not to consider such inconveniences of government but to the King and Parliament? Or who, from the authority of a deputed judge, can derive a power to censure the actions of a King that hath deputed him?

L.

For the death of a man by misfortune, there is, he saith, no express judgment, nor for killing a man in one's own defence; but he saith, that the law hath in both cases given judgment that he, that so killeth a man, shall forfeit all his goods and chattels, debts and duties.

P.

If we consider what Sir Edward Coke saith (1 *Inst. sec.* 745), at the word *felony,* these judgments are very favourable; for there he saith, that killing a man by *chance medley,* or *se defendendo,* is *felony.* His words are: "wherefore by the law at this day, under the word *felony* in commissions, &c. is included petite treason, murder, homicide, burning of houses, burglary, robbery, rape, &c. *chance-medley,* and *se defendendo.*" But if we consider only the intent of him that killeth a man by misfortune or in his own defence, the same judgments will be thought both cruel and sinful judgments. And how they can be *felony,* at this day cannot be understood, unless there be a statute to make them so. For the statute of 25 *Hen. III, c.* 25, the words whereof, "murder from henceforth shall not be judged before our justices, where it is found misfortune only, but it shall take place in such as are slain by felony, and not otherwise," make it manifest, if they be felonies, they must also be murders, unless they have been made felonies by some later statute.

L.

There is no such later statute, nor is it to say in commission; nor can a commission, or anything but another statute, make a thing felony that was not so before.

P.

See what it is for a man to distinguish *felony* into several sorts, before he understands the general name of felony, what it meaneth. But that a man, for killing another man by misfortune only, without any evil purpose, should forfeit all his goods and chattels, debts and duties, is a very hard judgment, unless perhaps they were to be given to the

kindred of the man slain, by way of amends for damage. But the law is not that. Is it the common-law, which is the law of reason, that justifies this judgment, or the statute-law? It cannot be called the law of reason, if the case be mere misfortune. If a man be upon his appletree to gather his apples, and by ill-fortune fall down, and lighting on the head of another man, kill him, and by good fortune save himself; shall he for this mischance be punished with the forfeiture of his goods to the King? Does the law of reason warrant this? He should, you will say, have looked to his feet; that is true; but so should he, that was under, have looked up to the tree. Therefore in this case the law of reason, as I think, dictates that they ought each of them to bear his own misfortune.

L.

In this case I agree with you.

P.

But this case is the true case of mere misfortune, and a sufficient reprehension of the opinion of Sir Edward Coke.

L.

But what if this had happened to be done by one, that had been stealing apples upon the tree of another man? Then, as Sir Edward Coke says (3 *Inst. p.* 56), it had been murder.

P.

There is indeed great need of good distinction in a case of killing by misfortune. But in this case the unlawfulness of stealing apples cannot make it murder, unless the falling itself be unlawful. It must be a voluntary unlawful act that causeth the death, or else it is no murder by the law of reason. Now the death of the man that was under the tree, proceeded not from that, that the apples were not his that fell, but from the fall. But if a man shoot with a bow or a gun at another man's deer, and by misfortune kill a man, such shooting being both voluntary and unlawful, and also the immediate cause of the man's death, may be drawn, perhaps well enough sometimes, to murder by a judge of the common-law. So likewise if a man shoot an arrow over a house, and by chance kill a man in the street, there is no doubt but by the law of reason it is murder: for though

he meant no malice to the man slain, yet it is manifest that he cared not whom he slew. In this difficulty of finding out what it is that the law of reason dictates, who is it that must decide the question?

L.

In the case of misfortune, I think it belongs to the jury; for it is matter of fact only. But when it is doubtful whether the action from which the misfortune came, were lawful or unlawful, it is to be judged by the judge.

P.

But if the unlawfulness of the action, as the stealing of the apples, did not cause the death of the man; then the stealing, be it trespass or felony, ought to be punished alone, as the law requireth.

L.

But for the killing of a man *se defendendo,* the jury, as Sir Edward Coke here says, shall not in their verdict say it was *se defendendo,* but shall declare the manner of the fact in special, and clear it to the judge to consider how it is to be called, whether *se defendendo,* manslaughter, or murder.

P.

One would think so; for it is not often within the capacity of a jury, to distinguish the signification of the different hard names which are given by lawyers to the killing of a man: as murder and felony, which neither the laws, nor the makers of the laws, have yet defined. The witnesses say, that thus and thus the person did, but not that it was murder or felony; no more can the jury say, who ought to say nothing but what they hear from the witnesses or from the prisoner. Nor ought the judge to ground his sentence upon anything else besides the special matter found, which, according as it is contrary or not contrary to the statute, ought to be pronounced.

L.

But I have told you, that when the jury has found misfortune or *se defendendo,* there is no judgment at all to be given, and the party is to be pardoned of course, saving that he shall forfeit his goods and chattels, debts and duties, to the King.

P.

But I understand not how there can be a crime for which there is no judgment, nor how any punishment can be inflicted without a precedent judgment, nor upon what ground the sheriff can seize the goods of any man, till it be judged that they be forfeited. I know that Sir Edward Coke saith, that in the judgment of hanging, the judgment of forfeiture is implied, which I understand not; though I understand well enough, that the sheriff by his office may seize the goods of a felon convicted; much less do I conceive how the forfeiture of goods can be implied in a no-judgment; nor do I conceive, that when the jury has found the special manner of the fact to be such as is really no other than *se defendendo,* and consequently no fault at all, why he should have any punishment at all. Can you show me any reason for it?

L.

The reason lies in the custom.

P.

You know that unreasonable customs are not law, but ought to be abolished; and what custom is there more unreasonable, than that a man should be punished without a fault?

L.

Then see the statute of 24 *Hen. VIII, c.* 5.

P.

I find here, that at the making of this statute there was a question amongst the lawyers, in case one man should kill another, that attempted feloniously to rob or murder him in or near any common highway, courtway, horseway, or footway, or in his mansion, messuage, or dwelling place; whether for the death of such a man one shall forfeit his goods and chattels, as a man should do for killing another by chance medley or in his own defence. This is the preamble, and penned as well as Sir Edward Coke could have wished. But this statute does not determine that a man should forfeit his goods for killing a man *se defendendo,* or for killing him by misfortune; but supposeth it only upon the opinion of the lawyers that then were. The body of the statute is, that

if a man be indicted or appealed for the death of such person so attempting as aforesaid, and the same by verdict be so found and tried, he shall not forfeit anything, but shall be discharged as if he had been found not guilty. You see the statute; now consider thereby, in the case of killing *se defendendo.* First, if a man kill another in his own defence, it is manifest that the man slain did either attempt to rob, or to kill, or to wound him; for else it were not done in his own defence. If then it were done in the street, or near the street, as in a tavern, he forfeits nothing, because the street is a highway. So likewise it is to be said of all other common-ways. In what place therefore can a man kill another in his own defence, but that this statute will discharge him of the forfeiture?

L.

But the statute says the attempt must be felonious.

P.

When a man assaults me with a knife, sword, club, or other mortal weapon, does any law forbid me to defend myself, or command me to stay so long as to know whether he have a felonious intent, or no? Therefore by this statute, in case it be found *se defendendo,* the forfeiture is discharged; if it be found otherwise, it is capital. If we read the statute of *Glocester, cap.* 9, I think it will take away the difficulty. For by that statute, in case it be found by the country that he did it in his own defence or by misfortune, then by the report of the justices to the King, the King shall take him to his grace, if it please him. From whence it followeth, first, that it was then thought law, that the jury may give the general verdict of *se defendendo;* which Sir Edward Coke denies. Secondly, that the judge ought to report especial matter to the King. Thirdly, that the King may take him to his grace, if he please; and consequently, that his goods are not to be seized, till the King, after the report of the judge heard, give the sheriff command to do it. Fourthly, that the general verdict of the King hinders not the King but that he may judge of it upon the special matter; for it often happens that an ill-disposed person provokes a man with words or otherwise, on purpose to make him draw his sword, that he may kill him, and pretend it done in his own defence; which appearing, the King may, without any offence to God, punish him, as the cause shall require. Lastly, contrary to the doctrine of Sir Edward Coke, he may in his own person be judge in the case, and annul the verdict of the jury; which a deputed judge cannot

do.

L.

There be some cases wherein a man, though by the jury he be found not guilty, shall nevertheless forfeit his goods and chattels to the King. For example; a man is slain, and one A, hating B, giveth out that it was B that slew him; B hearing thereof, fearing if he be tried for it, that through the great power of A, and others that seek his hurt, he should be condemned, flieth, and afterwards is taken and tried; and upon sufficient evidence is by the jury found not guilty; yet because he fled, he shall forfeit his goods and chattels, notwithstanding there be no such judgment given by the judge, nor appointed by any statute; but the law itself authoriseth the sheriff to seize them to the use of the King.

P.

I see no reason (which is common-law) for it, and am sure it is grounded upon no statute.

L.

See Sir Edward Coke, 1 *Inst. s.* 709, and read.

P.

"If a man that is innocent be accused of felony, and for fear flieth for the same; albeit that he be judicially acquitted of the felony, yet if it be found that he fled for the same, he shall, notwithstanding his innocence, forfeit all his goods and chattels, debts and duties." O unchristian and abominable doctrine! which also he in his own words following contradicteth: "for," saith he, "as to the forfeiture of them, the law will admit no proof against the presumption of the law grounded upon his flight, and so it is in many other cases: but that the general rule is, *Quod stabitur præsumptioni, donec probetur in contrarium;* but you see it hath many exceptions." This general rule contradicts what he said before; for there can be no exceptions to a general rule in law, that is not expressly made an exception by some statute, and to a general rule of equity there can be no exception at all.

From the power of punishing, let us proceed to the power of pardoning.

L. Of pardoning.

Touching the power of pardoning, Sir Edward Coke says, (3 *Inst. p.* 236), that no man shall obtain charter of pardon out of Parliament; and cites for it the statute of 2 *Edw. III, c.* 2; and says further, that accordingly in a Parliament roll it is said, that for the peace of the land it would help that no pardon were granted but by Parliament.

P.

What lawful power would he have left to the King, that thus disableth him to practise mercy? In the statute which he citeth, to prove that the King ought not to grant charters of pardon but in Parliament, there are no such words, as any man may see; for that statute is in print; and that which he says is in the Parliament roll, is but a wish of he tells not whom, and not a law; and it is strange that a private wish should be enrolled among acts of Parliament. If a man do you an injury, to whom, think you, belongeth the right of pardoning it?

L.

Doubtless to me alone, if to me alone be done that injury; and to the King alone, if to him alone be done the injury; and to both together, if the injury be done to both.

P.

What part then has any man in the granting of a pardon, but the King and the party wronged. If you offend no member of either House, why should you ask their pardon? It is possible that a man may deserve a pardon; or he may be such a one sometimes as the defence of the kingdom hath need of. May not the King pardon him, though there be no Parliament then sitting? Sir Edward Coke's law is too general in this point; and I believe, if he had thought on it, he would have excepted some persons, if not all the King's children and his heir apparent; and yet they are all his subjects, and subject to the law as other men.

L.

But if the King shall grant pardons of murder and felony of his own head, there would be very little safety for any man, either out of his house or in it, either by night or by day. And for that very cause there have been many good statutes provided, which

forbid the justices to allow of such pardons as do not specially name the crime.

P.

Those statutes, I confess, are reasonable, and very profitable, which forbid the judge to pardon murders. But what statute is there that forbids the King to do it? There is a statute of 13 *Rich. II, c.* 1, wherein the King promiseth not to pardon murder; but there is in it a clause for the saving of the King's regality. From which may be inferred that the King did not grant away that power, when he thought good to use it for the commonwealth. Such statutes are not laws to the King, but to his judges, and though the judges be commanded by the King not to allow pardons in many cases, yet if the King by writing command the judges to allow them, they ought to do it. I think, if the King think in his conscience it be for the good of the commonwealth, he sinneth not in it: but I hold not that the King may pardon him without sin, if any other man be damnified by the crime committed, unless he cause reparation to be made as far as the party offending can do it. And howsoever, be it sin or not sin, there is no power in England that may resist him or speak evil of him lawfully.

L.

Sir Edward Coke denies not that; and upon that ground it is that the King, he says, may pardon high-treason; for there can be no high-treason but against the King.

P.

That is well; therefore he confesseth, that whatsoever the offence be, the King may pardon so much of it as is an injury to himself, and that by his own right, without breach of any law positive or natural, or of any grant, if his conscience tell him that it be not to the damage of the commonwealth; and you know that to judge of what is good or evil to the commonwealth, belongeth to the King only. Now tell me, what it is which is said to be pardoned?

L.

What can it be, but only the offence? If a man hath done a murder, and be pardoned for the same, is it not the murder that is pardoned?

P.

Nay, by your favour, if a man be pardoned for murder or any other offence, it is the man that is pardoned; the murder still remains murder. But what is pardon?

L.

Pardon, as Sir Edward Coke says, (3 *Inst. p.* 233), is derived of *per* and *dono,* and signifies thoroughly to remit.

P.

If the King remit the murder, and pardon not the man that did it, what does the remission serve for?

L.

You know well enough that when we say a murder, or any thing else, is pardoned, all Englishmen understand thereby, that the punishment due to the offence is the thing remitted.

P.

But for our understanding of one another, you ought to have said so at first. I understand now, that to pardon murder or felony is thoroughly to save the offender from all the punishment due unto him by the law for his offence.

L.

Not so; for Sir Edward Coke in the same chapter, p. 238, saith thus: "a man commits felony, and is attainted thereof, or is abjured; the King pardoneth the felony without any mention of the attainder or abjuration: the pardon is void."

P.

What is it to be attainted?

L.

To be attainted is, that his blood be held in law as stained and corrupted; so that no inheritance can descend from him to his children, or to any that make claim by him.

P.

Is this attaint a part of the crime or of the punishment?

L.

It cannot be a part of the crime, because it is none of his own act; it is therefore a part of the punishment, viz. a disherison of the offender.

P.

If it be a part of the punishment due, and yet not pardoned together with the rest, then a pardon is not a thorough remitting of the punishment, as Sir Edward Coke says it is. And what is abjuration?

L.

When a clerk heretofore was convicted of felony, he might have saved his life by abjuring the realm; that is, by departing the realm within a certain time appointed, and taking an oath never to return. But at this day all statutes for abjuration are repealed.

P.

That also is a punishment, and by a pardon of the felony pardoned, unless a statute be in force to the contrary. There is also somewhat in the statute of 13 *Rich. II, c.* 1, concerning the allowance of characters of pardons, which I understand not well. The words are these: "No charter of pardon for henceforth shall be allowed before our justices for murder, or for the death of a man by await, or malice prepensed, treason, or rape of a woman, unless the same be specified in the same charter." For I think it follows thence, that if the King say in his charter that he pardoneth the murder, then he breaketh not the statute, because he specifies the offence: or if he saith he pardoneth the killing by await or of malice prepensed, he breaketh not the statute, he specifies the offence. Also if he say so much as that the judge cannot doubt of the King's meaning to pardon him, I think the judge ought to allow it, because the statute saveth the King's liberty and regality in that point; that is to say, the power to pardon him, such as are these words, "notwithstanding any statute to the contrary," are sufficient to cause the charter to be allowed; for these words make it manifest that the charter was not granted upon surprise, but to maintain and claim the King's liberty and power to show mercy when he seeth cause. The like meaning have these words, *perdonavimus omnimodam interfectionem;* that is to say, we have pardoned the

killing, in what manner soever it was done. But here we must remember that the King cannot pardon, without sin, any damage thereby done to another man, unless he causes satisfaction to be made as far as the offender possibly can; but he is not bound to satisfy men's thirst of revenge; for all revenge ought to proceed from God, and under God from the King. Now, besides in charters, how are these offences specified?

L.

They are specified by their names, as treason, petite treason, murder, rape, felony, and the like.

P.

Petite treason is felony, murder is felony; so is rape, robbery, and theft; and, as Sir Edward Coke says, petite larceny is felony. Now if in a Parliament-pardon, or in a Coronation-pardon, all felonies be pardoned, whether is petite larceny pardoned, or not?

L.

Yes, certainly, it is pardoned.

P.

And yet you see it is not specified; and yet it is a crime that hath less in it of the nature of felony, than there is in robbery. Do not therefore rape, robbery, theft, pass under the pardon of all felonies?

L.

I think they are all pardoned by the words of the statute, but those that are by the same statute excepted; so that specification is needful only in charters of pardon, but in general pardons not so. For the statute 13 *Rich. II, c.* 1, forbids not the allowance of Parliament-pardons, or Coronation-pardons; and therefore the offences pardoned need not be specified, but may pass under the general word of *all felonies.* Nor is it likely that the members of the Parliament, who drew up their own pardons, did not mean to make them as comprehensive as they could. And yet Sir Edward Coke (1 *Inst. sec.* 745), at the word *felony,* seemeth to be of another mind. For piracy is one species of felony; and yet when certain Englishmen had committed piracy in the last year of

Queen Elizabeth, and came home into England in the beginning of the reign of King James, trusting to his coronation-pardon of all felonies, they were indicted (Sir Edward Coke was then Attorney-general) of the piracy before commissioners, according to the statute of 28 *Hen. VIII,* and being found guilty were hanged. The reason he allegeth for it is, that it ought to have been specified by the name of *piracy* in the pardon, and therefore the pardon was not to be allowed.

P.

Why ought it to have been specified more than any other felony? He should therefore have drawn his argument from the law of reason.

L.

Also he does that; for the trial, he says, was by the common-law, and before commissioners, not in the Court of the Lord Admiral, by the civil law; therefore, he says, it was an offence whereof the common-law could not take any notice, because it could not be tried by twelve men.

P.

If the common-law could not, or ought not, to take notice of such offences, how could the offenders be tried by twelve men, and found guilty, and hanged as they were? If the common-law take no notice of piracy, what other offence was it for which they were hanged? Is piracy two felonies, for one of which a man shall be hanged by the civil-law, and for the other by the common-law? Truly I never read weaker reasoning in any author of the law of England, than in Sir Edward Coke’s Institutes, how well soever he could plead.

L.

Though I have heard him much reprehended by others as well as by you, yet there be many excellent things, both for subtilty and for truth, in these his Institutes.

P.

No better things than other lawyers have, that write of the law as of a science. His citing of Aristotle, and of Homer, and of other books which are commonly read by gownmen, do, in my opinion, but weaken his authority; for any man may do it by a

servant. But seeing the whole scene of that time is gone and past, let us proceed to somewhat else. Wherein doth an *Act of Oblivion* differ from a Parliament-pardon?

L.

This word *Act of Oblivion* was never in our law-books before the 12 *Car. II. c.* 11, and I wish it may never come again; but from whence it came, you may better know perhaps than I.

P.

The first and only Act of Oblivion that ever passed into a law, in any state that I have read of, was that *amnestia* or *oblivion* of all quarrels between any of the citizens of Athens, at any time before that act, without all exception of crime or person. The occasion whereof was this. The Lacedæmonians having totally subdued the Athenians, entered into the city of Athens, and ordained that the people should choose thirty people of their own city to have the sovereign power over them. These being chosen, behaved themselves so outrageously, as caused a sedition, in which the citizens on both sides were daily slain. There was then a discreet person that propounded to each of the parties this proposition, that every man should return to his own and forget all that was past; which proposition was made, by consent on both sides, into a public act, which for that cause was called an *oblivion.* Upon the like disorder happening in Rome by the murder of Julius Cæsar, the like act was propounded by Cicero, and indeed passed, but was within a few days after broken again by Marcus Antonius. In imitation of this act was made the act of 12 *Car.II. c.* 11.

L.

By this it seems, that the Act of Oblivion made by King Charles was no other than a Parliament-pardon, because it containeth a great number of exceptions, as the other Parliament-pardons do, and the act of Athens did not.

P.

But yet there is a difference between the late Act of Oblivion made here, and an ordinary Parliament-pardon. For concerning a fault pardoned in Parliament by a general word, a suit in law may arise about this, whether the offender be signified by the word or not, as whether the pardon of all felonies be a pardon of piracy or not. For you see

by Sir Edward Coke's reports, that notwithstanding a pardon of felony, a sea-felony, when he was Attorney-General, was not pardoned. But by the late Act of Oblivion, which pardoned all manner of offences committed in the late civil war, no question could arise concerning crimes excepted. First, because no man can by law accuse another man of a fact, which by law is to be forgotten. Secondly, because all crimes may be alleged as proceeding from the licentiousness of the time, and from the silence of the law occasioned by the civil war, and consequently (unless the offender's person also were excepted, or unless the crime were committed before the war began) are within the pardon.

L.

Truly I think you say right. For if nothing had been pardoned but what was done by the occasion of the war, the raising of the war itself had not been pardoned.

P.

I have done with crimes and punishments; let us come now to the laws of *meum* and *tuum.*

L.

Of the laws of *meum* and *tuum.*

We must then examine the statutes.

P.

We must so, what they command and forbid; but not dispute of their justice. For the law of reason commands that every one observe the law which he hath assented to, and obey the person to whom he hath promised obedience and fidelity. Then let us consider next the commentaries of Sir Edward Coke upon Magna Charta and other statutes. For the understanding of Magna Charta it will be very necessary to run up into ancient times, as far as history will give us leave, and consider not only the customs of our ancestors the Saxons, but also the law of nature, the most ancient of all laws, concerning the original of government and acquisition of property, and concerning courts of judicature. And first, it is evident that dominion, government, and laws, are far more ancient than history or any other writing, and that the beginning of all dominion amongst men was in families. In which, first, the father of the family by the law of nature was absolute lord of his wife and children: secondly, made what laws

amongst them he pleased: thirdly, was judge of all their controversies: fourthly, was not obliged by any law of man to follow any counsel but his own: fifthly, what land soever the lord sat down upon and made use of for his own and his family's benefit, was his propriety by the law of first possession, in case it was void of inhabitants before, or by the law of war, in case they conquered it. In this conquest what enemies they took and saved, were their servants. Also such men as wanting possessions of lands, but furnished with arts necessary for man's life, came to dwell in the family for protection, became their subjects, and submitted themselves to the laws of the family. And all this is consonant, not only to the law of nature, but also to the practice of mankind set forth in history, sacred and profane.

L.

Do you think it lawful for a lord, that is the sovereign ruler of his family, to make war upon another like sovereign lord, and dispossess him of his lands?

P.

It is lawful or not lawful, according to the intention of him that does it. For, first, being a sovereign ruler, he is not subject to any law of man; and as to the law of God, where the intention is justifiable, the action is so also. The intention may be lawful in divers cases by the right of nature; one of those cases is, when he is constrained to it by the necessity of subsisting. So the children of Israel, besides that their leaders, Moses and Joshua, had an immediate command from God to dispossess the Canaanites, had also a just pretence to do what they did, from the right of nature which they had to preserve their lives, being unable otherwise to subsist. And as their preservation, so also is their security a just pretence of invading those whom they have just cause to fear, unless sufficient caution be given to take away their fear: which caution, for anything I can yet conceive, is utterly impossible. Necessity and security are the principal justifications before God, of beginning war. Injuries received justify a war defensive; but for reparable injuries, if reparation be tendered, all invasion upon that title is iniquity. If you need examples, either from Scripture or other history, concerning this right of nature in making war, you are able enough of your own reading to find them out at your leisure.

L.

Whereas you say, that the lands so won by the sovereign lord of a family, are his in propriety, you deny, methinks, all property to the subjects, how much soever any of them have contributed to the victory.

P.

I do so; nor do I see any reason to the contrary. For the subjects, when they come into the family, have no title at all to demand any part of the land, or anything else but security: to which also they are bound to contribute their whole strength, and, if need be, their whole fortunes. For it cannot be supposed that any one man can protect all the rest with his own single strength; and for the practice, it is manifest, in all conquests the land of the vanquished is in the sole power of the victor, and at his disposal. Did not Joshua and the High-priest divide the land of Canaan in such sort among the tribes of Israel as they pleased? Did not the Roman and Grecian princes and states, according to their own discretion, send out the colonies to inhabit such provinces as they had conquered? Is there at this day among the Turks, any inheritor of land besides the Sultan? And was not all the land in England once in the hands of William the Conqueror? Sir Edward Coke himself confesses it. Therefore it is an universal truth, that all conquered lands, presently after victory, are the lands of him that conquered them.

L.

But you know that all sovereigns are said to have a double capacity, viz. a natural capacity, as he is a man; and a politic capacity, as a king. In his politic capacity, I grant you, that King William the Conqueror was the proper and only owner once of all the land in England; but not in his natural capacity.

P.

If he had them in his politic capacity, then they were so his own, as not to dispose of any part thereof but only to the benefit of his people; and that must be either by his own, or by the people’s discretion, that is, by Act of Parliament. But where do you find that the Conqueror disposed of his lands (as he did some to Englishmen, some to Frenchmen, and some to Normans, to be holden by divers tenures, as knight-service, soccage, &c.) by Act of Parliament? Or that he ever called a Parliament, to have the assent of the Lords and Commons of England in disposing of those lands he had taken

from them? Or for retaining of such and such lands in his own hands, by the name of forrests, for his own recreation or magnificence? You have heard perhaps that some lawyers, or other men reputed wise and good patriots, have given out that all the lands which the Kings of England have possessed, have been given them by the people, to the end that they should therewith defray the charges of their wars, and pay the wages of their ministers; and that those lands were gained by the people's money. For that was pretended in the late civil war, when they took from the King his town of Kingston-upon-Hull. But I know you do not think that the pretence was just. It cannot therefore be denied but that the lands, which King William the Conqueror gave away to Englishmen and others, and which they now hold by his letters-patent and other conveyances, were properly and really his own, or else the titles of them that now hold them, must be invalid.

L.

I assent. As you have showed me the beginning of monarchies, so let me hear your opinion concerning their growth.

P.

Great monarchies have proceeded from small families. First, by war, wherein the victor not only enlarged his territory, but also the number and riches of his subjects. As for the other forms of commonwealths, they have been enlarged other ways. First, by a voluntary conjunction of many lords of families into one great aristocracy. Secondly, from rebellion proceeded first anarchy, and from anarchy proceeded any form that the calamities of them that lived therein did prompt them to; whether it were, that they chose an hereditary King, or an elective King for life; or that they agreed upon a council of certain persons, which is *aristocracy;* or a council of the whole people to have the sovereign power, which is *democracy.* After the first manner, which is by war, grew up all the greatest kingdoms in the world, viz. the Egyptian, Assyrian, Persian, and the Macedonian monarchy; and so did the great kingdoms of England, France, and Spain. The second manner, was the original of the Venetian Aristocracy. By the the third way, which is rebellion, grew up divers great monarchies, perpetually changing from one form to another: as in Rome, rebellion against Kings produced democracy, upon which the senate usurped under Sylla, and the people again upon the senate under Marius, and the Emperor usurped upon the people under Cæsar and his successors.

L.

Do you think the distinction between natural and politic capacity is insignificant?

P.

No. If the sovereign power be in an assembly of men, that assembly, whether it be *aristocratical* or *democratical,* may possess lands; but it is in their politic capacity: because no natural man has any right to those lands, or any part of them. In the same manner, they can command an act by plurality of commands; but the command of any one of them is of no effect. But when the sovereign power is in one man, the natural and politic capacity are in the same person, and as to possession of lands, undistinguishable. But as to the acts and commands, they may be well distinguished in this manner. Whatsoever a monarch does command or do, by consent of the people of his kingdom, may properly be said to be done in his politic capacity; and whatsoever he commands by word of mouth only, or by letters signed with his hand, or sealed with any of his private seals, is done in his natural capacity. Nevertheless, his public commands, though they be made in his politic capacity, have their original from his natural capacity. For in the making of laws, which necessarily requires his assent, his assent is natural. Also those acts which are done by the King previously to the passing of them under the Great Seal of England, either by word of mouth, or warrant under his signet or private seal, are done in his natural capacity; but when they have passed the Seal of England, they are to be taken as done in his politic capacity.

L.

I think verily your distinction is good. For natural capacity and politic capacity signify no more than private and public right. Therefore, leaving this argument, let us consider in the next place, as far as history will permit, what were the laws and customs of our ancestors.

P.

The Saxons, as also all the rest of Germany not conquered by the Roman Emperors nor compelled to use the imperial laws, were a savage and heathen people, living only by war and rapine, and as some men learned in the Roman antiquities affirm, had their name of Germans from that their ancient trade of life, as if *Germans* and *hommes de*

guerre were all one. Their rule over their family, servants, and subjects, was absolute; their laws, no other than natural equity; written law they had little or none; and very few there were in the time of the Cæsars that could write or read. The right to the government was either paternal, or by conquest, or by marriages. Their succession to lands was determined by the pleasure of the master of the family, by gift or deed in his lifetime; and what land they disposed not of in their lifetime, descended after their death to their heirs. The heir was the eldest son. The issue of the eldest son failing, they descended to the younger sons in their order; and, for want of sons, to the daughters jointly as to one heir, or to be divided amongst them, and so to descend to their heirs in the same manner. And children failing, the uncle by the father's or mother's side, according as the lands had been the father's or the mother's, succeeded to the inheritance, and so continually to the next of blood. And this was a natural descent, because naturally the nearer in blood the nearer in kindness, and was held for the law of nature, not only amongst the Germans, but also in most nations before they had a written law. The right of government, which is called *jus regni,* descended in the same manner, except only that after the sons it came to the eldest daughter first, and her heirs; the reason whereof was, that government is indivisible. And this law continues still in England.

L.

Seeing all the land, which any sovereign lord possessed, was his own in propriety, how came a subject to have a propriety in their lands?

P.

There be two sorts of propriety. One is, when a man holds his land from the gift of God only, which lands civilians call *allodial;* which in a kingdom, no man can have but the King. The other is, when a man holds his land from another man, as given him in respect of service and obedience to that man, as a fee. The first kind of propriety is absolute; the other is in a manner conditional, because given for some service to be done unto the giver. The first kind of propriety excludes the right of all others; the second excludes the right of all other subjects to the same land, but not the right of the sovereign, when the common good of the people shall require the use thereof.

L.

When those kings had thus parted with their lands, what was left them for the maintenance of their wars, either offensive or defensive; or for the maintenance of the royal family in such manner as not only becomes the dignity of a sovereign king, but is also necessary to keep his person and people from contempt?

P.

They have means enough; and besides what they gave their subjects, had much land remaining in their own hands, afforrested for their recreation. For you know very well that a great part of the land of England was given for military service to the great men of the realm, who were for the most part of the King's kindred or great favourites; much more land than they had need of for their own maintenance; but so charged with one or many soldiers, according to the quantity of land given, as there could be no want of soldiers at all times ready to resist an invading enemy: which soldiers those lords were bound to furnish, for a time certain, at their own charges. You know also, that the whole land was divided into hundreds, and those again into decennaries; in which decennaries all men, even to children of twelve years of age, were bound to take the oath of allegiance. And you are to believe, that those men that hold their land by the service of husbandry, were all bound with their bodies and fortunes to defend the kingdom against invaders, by the law of nature. And so also such as they called villains, and as held their land by baser drudgery, were obliged to defend the kingdom to the utmost of their power. Nay, women and children, in such a necessity, are bound to do such service as they can, that is to say, to bring weapons and victuals to them that fight, and to dig. But those that hold their land by service military, have lying upon them a greater obligation. For read and observe the form of doing homage, according as it is set down in the statute of 17 *Edw. II,* which you doubt not was in use before that time, and before the Conquest.

L.

I become your man for life, for member, and for worldly honour, and shall owe you my faith for the lands that I hold of you.

P.

I pray you expound it.

L.

I think it is as much as if you should say, I promise you to be at your command, to perform with the hazard of my life, limbs, and all my fortune, as I have charged myself in the reception of the lands you have given me, and to be ever faithful to you. This is the form of homage done to the King immediately. But when one subject holdeth land of another by the like military service, then there is an exception added, viz. *saving the faith I owe to the King.*

P.

Did he not also take an oath?

L.

Yes, which is called the oath of fealty: *I shall be to you both faithful, and lawfully shall do such customs and services, as my duty is to you at the terms assigned, so help me God and all his Saints.* But both these services, and the services of husbandry, were quickly after turned into rents, payable either in money, as in England, or in corn or other victuals, as in Scotland and France. When the service was military, the tenant was for the most part bound to serve the King in his wars, with one or more persons, according to the yearly value of the land he held.

P.

Were they bound to find horsemen, or footmen?

L.

I do not find any law that requires any man, in respect of his tenancy, to serve on horseback.

P.

Was the tenant bound, in case he were called, to serve in person?

L.

I think he was so in the beginning. For when lands were given for service military, and the tenant dying left his son and heir, the lord had the custody both of body and lands

till the heir was twenty-one years old. And the reason thereof was, that the heir, till that age of twenty-one years, was presumed to be unable to serve the King in his wars; which reason had been insufficient, if the heir had not been bound to go to the wars in person. Which, methinks, should ever hold for law, unless by some other law it come to be altered. These services, together with other rights, as wardships, first possession of his tenants' inheritance, licenses for alienation, felons' goods, felons' lands (if they were holden of the King), and the first year's profit of the lands, of whomsoever they were holden, forfeitures, amercements, and many other aids, could not but amount to a very great yearly revenue. Add to this all that which the King might reasonably have imposed upon artificers and tradesmen; for all men, whom the King protecteth, ought to contribute towards their own protection; and consider then whether the Kings of those times had not means enough, and to spare (if God were not their enemy), to defend their people against foreign enemies, and also to compel them to keep the peace amongst themselves.

P.

And so had had the succeeding Kings, if they had never given their rights away, and their subjects always kept their oaths and promises. In what manner proceeded those ancient Saxons, and other nations of Germany, especially the northern parts, to the making of their laws?

L.

Sir Edward Coke, out of divers Saxon laws, gathered and published in Saxon and Latin by Mr. Lambard, inferreth that the Saxon Kings, for the making of their laws, called together the Lords and Commons, in such manner as is used at this day in England. But by those laws of the Saxons published by Mr. Lambard, it appeareth, that the Kings called together the bishops, and a great part of the wisest and discreetest men of the realm, and made laws by their advice.

P.

I think so. For there is no King in the world, being of ripe years and sound mind, that made any law otherwise. For it concerns them in their own interest to make such laws as the people can endure, and may keep them without impatience, and live in strength and courage to defend their King and country, against their potent neighbours. But how

was it discerned, and by whom was it determined, who were those wisest and discreetest men? It is a hard matter to know who is wisest in our times. We know well enough who chooseth a knight of the shire, and what towns are to send burgesses to the Parliament. Therefore if it were determined also in those days, who those wise men should be, then I confess that the Parliaments of the old Saxons, and the Parliaments of England since, are the same thing, and Sir Edward Coke is in the right. Tell me therefore, if you can, when those towns, which now send burgesses to the Parliament, began to do so, and upon what cause one town had this privilege, and another town, though much more populous, had not.

L.

At what time began this custom I cannot tell; but I am sure it is more ancient than the city of Salisbury. Because there come two burgesses to Parliament for a place near to it, called Old Sarum, which, as I rid in sight of it, if I should tell a stranger that knew not what the word burgess meant, he would think it were a couple of rabbits; the place looketh so like a long cony-borough. And yet a good argument may be drawn from thence, that the townsmen of every town were the electors of their own burgesses, and judges of their discretion; and that the law, whether they be discreet or not, will suppose them to be discreet, till the contrary be apparent. Therefore where it is said, that the King called together the more discreet men of his realm; it must be understood of such elections as are now in use. By which it is manifest, that those great and general moots assembled by the old Saxon Kings, were of the same nature with the Parliaments assembled since the Conquest.

P.

I think your reason is good. For I cannot conceive, how the King, or any other but the inhabitants of the boroughs themselves, can take notice of the discretion or sufficiency of those they were to send to the Parliament. And for the antiquity of the burgess-towns, since it is not mentioned in any history or certain record now extant, it is free for any man to propound his conjecture. You know that this land was invaded by the Saxons at several times, and conquered by pieces in several wars; so that there were in England many Kings at once, and every of them had his Parliament. And therefore according as there were more, or fewer walled towns within each King’s dominion, his Parliament had the more or fewer burgesses. But when all these lesser

kingdoms were joined into one, then to that one Parliament came burgesses from all the boroughs of England. And this perhaps may be the reason, why there be so many more such boroughs in the west, than in any other part of the kingdom; the west being more populous, and also more obnoxious to invaders, and for that cause having greater store of towns fortified. This I think may be the original of that privilege which some towns have, to send burgesses to the Parliament, and others have not.

L.

The conjecture is not improbable, and for want of greater certainty, may be allowed. But seeing it is commonly received, that for the making of a law, there ought to be had the assent of the Lords spiritual and temporal; whom do you account in the Parliaments of the old Saxons for Lords temporal, and whom for Lords spiritual? For the book called *The mode of holding Parliaments,* agreeth punctually with the manner of holding them at this day, and was written, as Sir Edward Coke says, in the time of the Saxons, and before the Conquest.

P.

Mr. Selden, a greater antiquary than Sir Edward Coke, in the last edition of his book of *Titles of Honour,* says, that that book called *The mode of holding Parliaments,* was not written till about the time of Richard II, and seems to me to prove it. But howsoever that be, it is apparent by the Saxon laws set forth by Mr. Lambard, that there were always called to the Parliament certain great persons called Aldermen, *alias* Earls. And so you have a House of Lords, and a House of Commons. Also you will find in the same place, that after the Saxons had received the faith of Christ, those bishops that were amongst them, were always at the great moots in which they made their laws. Thus you have a perfect English Parliament, saving that the name of Barons was not amongst them, as being a French title, which came in with the Conqueror.