

James VI and I, *rex et iudex*: One King as Judge in Two Kingdoms

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Four hundred years ago, the man his English subjects knew as James I gave judgment in a case in the Star Chamber. It was the last time he would do so, and the final occasion on which a monarch of England or Scotland would publicly sit in judgment on his subjects.¹ His son was rather more notable for having his subjects sit in judgment on him. James's attempts to interfere in the work of his judges have been a staple of constitutional history and discussed in some detail.² But James's own judicial activity has been ignored.

Conveniently for the theme of this volume, James VI and I was both James VI of Scotland and James I of England. However much he wanted to be king of the single kingdom of Great Britain, his two realms remained very distinct.³ James I of England was a regal transplant, and that enables some comparison between two distinct places. While comparative law tends to focus on transplants of legal rules, movement of

¹ Charles I was personally involved in the Privy Council's resolution of petitions concerning judicial proceedings about the Forest of Dean, but these proceedings appear to have been private; see *Newsletters from the Caroline Court, 1631–1638: Catholicism and the Politics of the Personal Rule*, ed. M. C. Questier (Cambridge, 2005), 232 n. 1094. Charles also observed the trial of the earl of Strafford in 1641, but did not preside; J. H. Timmis, *Thine is the Kingdom: The Trial for Treason of Thomas Wentworth, Earl of Strafford, First Minister to King Charles I, and Last Hope of the English Crown* (University, AL, 1974), 65.

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² For Scotland, see T. M. Cooper, 'The King versus the Court of Session', in T. M. Cooper, *Selected Papers 1922–1954* (Edinburgh, 1957), 116–23. For England, the various incidents are outlined in J. S. Hart, *The Rule of Law, 1603–1660: Crowns, Courts and Judges* (Harlow, 2003), 102–11.

³ For James and the union project, see B. Galloway, *The Union of England and Scotland, 1603–08* (Edinburgh, 1986).

personnel can also be significant. While law as idea is important, law can only be applied (at least for now) by people. As people move, the law in practice can change. For those more inclined to political history, comparing James's judicial work in Scotland and England also addresses a significant debate about James more generally. As Jenny Wormald put it, should James VI and I be seen as two kings, one for Scotland, one for England, or one?⁴

There is another type of comparison we can undertake for James, and it is the comparison between theory and practice. James was not reticent in presenting his thoughts about kingship, or indeed about anything else. Through his writings and speeches, we can build an understanding of James's views on the role of the king as judge. And while James did not judge often, he did do so. Through his judicial activities, we can compare theory to practice, or perhaps see how theory and practice interacted. In this paper I want to argue that James saw judging as an important part of kingship in general, and crucially of his kingship. Furthermore, James also identified giving judgment as one of the methods by which he could not only be a king, but also govern the country – royal judgment was part of royal government.⁵

Before considering the cases in which James judged, an important concern is quite what is meant by James being a judge. This is trickier than we might think or want. First, in both Scotland and England, much was done in the name of the king, and technically was in fact done by the king. But it was not done by James.⁶ This poses problems, especially when James appears to have been present when judicial activity took place, such as attending the Scottish Parliament and the Scottish Privy Council.⁷ The approach taken here is to ignore such judicial activity unless sources show James's personal involvement as judge.

⁴ J. Wormald, 'James VI and I: Two Kings or One?', *History*, 68 (1983), 187–209.

⁵ On one level this should not be surprising. Law and litigation (and therefore judging) had a great significance in early-modern England. As Brooks observes, 'the great wave of litigation characteristic of the period brought a wide range of issues, stretching nearly from the cradle to the grave, into the courts'; C. W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge, 2008), 241. However, this practical importance of judging does not necessarily explain why James's personal activities as a judge in individual cases would be part of wider royal government.

⁶ As Goodare observes, James's 'personal initiative has to be argued specifically rather than merely by reference to the fact that it was done in his name'; J. Goodare, *The Government of Scotland 1560–1625* (Oxford, 2004), 290.

⁷ By the reign of James VI, the Scottish Parliament's judicial competence was limited to treason cases; see M. Godfrey, 'Parliament and the Law', in K. M. Brown and A. R.

A second problem relates to identifying what is meant by judging. Several institutions in England and Scotland had a mixture of judicial and other functions. For example, in the prosecution of Nicholas Dalgleish in 1584, Dalgleish tried to argue that he should not be prosecuted before the Justiciary Court in Edinburgh because he had already been tried and convicted in the Privy Council the day before. For Dalgleish, these Privy Council proceedings were judicial. But the Council informed the court that the hearings were in fact *pro consilij*, rather than judicial. There would therefore be no principled objection to trying Dalgleish.⁸ This is a particular issue in relation to James's 'Speech' in the Star Chamber in 1616, which will be considered below.⁹

Less formal situations are particularly challenging. James's conference with the English judges concerning the jurisdiction of the church courts could appear more like a discussion than James seeking to give judgment.¹⁰ But the judges of England frequently held informal conferences in the Exchequer Chamber, and these conferences did determine the law and resolved individual cases.¹¹ Such informal discussions therefore look more like judicial activity in the context of the early-modern English legal system. It is this context which explains why Edward Coke could criticise James in these informal activities for seeking to be a judge. Furthermore, proceedings which appear to have begun judicially might be ended in a less formal way. For example, in one of David Black's appearances before the Scottish Privy Council, Black 'declynned the king's judicatorie', suggesting he perceived the case to be judicial. But the case ended with James and Black in 'privat and homelie' conference, to James's satisfaction.¹²

MacDonald (eds.), *Parliament in Context, 1235–1707* (Edinburgh, 2010), 157–68. On the judicial competence of the Scottish Privy Council, see P. G. B. McNeill, 'The Jurisdiction of the Scottish Privy Council, 1532–1708', unpublished PhD thesis, University of Glasgow (1960). This thesis does not consider the king's personal judicial role.

⁸ R. Pitcairn, *Criminal Trials in Scotland from A.D. MCCCC.LXXXVIII to A.D. M.DC.XXIV*, 2 vols. in 3 parts (Edinburgh, 1833), vol. I, part 2, 136–7.

⁹ See below, 94–5.

¹⁰ See below, 93–4.

¹¹ On the informal Exchequer Chamber, see J. H. Baker, *Introduction to English Legal History*, 5th edn (Oxford, 2019), 150. There were two other bodies known as the Exchequer Chamber by 1600, both of them formal courts with statutory foundations; see *ibid.*, 147–8.

¹² D. Calderwood, *The History of the Kirk of Scotland*, ed. T. Thomason, 8 vols. (Edinburgh, 1842–9), vol. V, 376–81, quotes at 377 and 378.

Similar problems of informality arise in relation to James's frequent involvement in resolving disputes. For example, James acted to bring feuds to an end in Scotland, but we should see this kind of activity as more like mediation or arbitration, rather than judging.¹³ James also personally acted as an arbitrator in England.¹⁴ Contemporaries were aware of the distinction between arbitration and personal royal judgment, sometimes preferring the latter. For example, the earl of Exeter asked James to intervene 'as to a judge and a just judge, and not as an arbitrator'.¹⁵

A third exclusion relates to James's interventions in legal process. Aside from occasional direct intervention to obtain a desired outcome,¹⁶ James often intervened in ongoing cases to expedite or delay proceedings. He is most well known for delaying cases in England, in the *Case of Commendams* and *De Non Procedendo Rege Inconsulto*.¹⁷ But delays were also ordered in Scotland.¹⁸ One case was even delayed so James could be present as a judge, although there is no record of him in fact sitting.¹⁹ Records of English petitions to James contain several examples of orders for cases to be delayed²⁰ and others that it be expedited, for example by ordering a 'speadie Tryall'.²¹ While these were doubtless important interventions in legal process by the king, there is no evidence of James determining the outcome of the cases, so these are not treated as part of James's judicial activities.

¹³ On James's activity in relation to bloodfeud, see K. M. Brown, *Bloodfeud in Scotland 1573–1625* (Edinburgh, 1986).

¹⁴ R. W. Hoyle, 'Fountains of Justice: James I, Charles I and Equity', in M. Lobban, J. Begiato and A. Green (eds.), *Law, Lawyers and Litigants in Early Modern England: Essays in Memory of Christopher W. Brooks* (Cambridge, 2019), 96–108.

¹⁵ *The Letters of John Chamberlain*, ed. N. E. McClure, 2 vols. (Philadelphia, PA, 1939), vol. II, 145.

¹⁶ For example, Cooper, 'The King versus the Court'. Hannay suspects that there were probably other incidents in Scotland too, but that they were less explicit or overt and so not recorded; R. K. Hannay, *The College of Justice: Essays on the Institution and Development of the Court of Session* (Edinburgh, 1933), 119.

¹⁷ See J. H. Baker, *The Reinvention of Magna Carta 1216–1616* (Cambridge, 2017), 424–6; Hart, *The Rule of Law*, 104–7, and D. C. Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics and Jurisprudence, 1578–1616* (Cambridge, 2014), 278–82.

¹⁸ E.g. Pitcairn, *Criminal Trials*, vol. I, part 2, 381 and 384.

¹⁹ *Ibid.*, vol. II, part 1, 53–61.

²⁰ E.g. London, British Library (henceforth, BL), MS Lansdowne 216, fo. 133v.

²¹ BL, MS Lansdowne 216, fo. 16v.

Cases in Which James VI and I Judged

The focus of this paper is on the best-evidenced examples of James's judicial activities, all of which are in some sense exceptional. However, another important consideration is the evidence of James's participation in the regular administration of justice, activity for which the evidence is more sparse.

James was involved in the regular administration of justice in Scotland. There are references to him attending criminal courts in 1589²² and 1590,²³ and to a court being delayed to enable James to attend in 1598, although there is no evidence that he did in fact subsequently sit.²⁴ What is less clear is whether James judged in these cases or merely attended, as he seemingly regularly did in the Court of Session.²⁵ In 1601, in a different court, it appears James was judging, at least to the extent of giving sentence. In that year, an English agent wrote to London saying that James VI 'is become a great "justicer" having executed a Douglas, a Maxwell, a Johnstone and 2 other gentlemen for stealing and coining'.²⁶

James also attended the Scottish Privy Council, a body which undertook a wide range of judicial activities. He is recorded as having been present when cases were resolved,²⁷ as well as for interlocutory²⁸ and jurisdictional matters.²⁹ James's personal involvement in such cases cannot be shown. However, in *Basilicon Doron* James gave advice about sitting judicially in the Privy Council, suggesting that he did participate.³⁰ Scotland had a tradition of direct royal involvement in the administration of justice, especially criminal justice. All of James's sixteenth-century

²² *Calendar of the State Papers relating to Scotland and Mary, Queen of Scots 1547–1603*, 13 vols. (Edinburgh, 1898–1969) (henceforth, CSPS), vol. X, 102, no. 123.

²³ *Ibid.*, vol. X, 370–1, no. 458.

²⁴ *The Register of the Privy Council of Scotland*, ed. D. Masson, 14 vols. (Edinburgh, 1877–98) (henceforth, RPCS), vol. V, 449 and 452.

²⁵ Hannay, *The College of Justice*, 119. References to James's attendance in the Session include Pitcairn, *Criminal Trials*, vol. I, part 2, 29–34; R. Pitcairn, *Ancient Criminal Trials in Scotland*, 3 vols. in 6 parts (Edinburgh, 1833), vol. II, part 2, 358–9; CSPS, vol. XI, 236, no. 178.

²⁶ CSPS, vol. XIII, 834, no. 668. No further details have been found. My thanks to Stephanie Dropuljic for checking the Justiciary Court records.

²⁷ E.g. RPCS, vol. V, 318–19, a contract dispute involving an English merchant.

²⁸ E.g. *ibid.*, vol. V, 6–8, warding parties in castles until a dispute could be put to an assize.

²⁹ E.g. *ibid.*, vol. V, 175–6, about jurisdiction involving a Scot resident in Denmark.

³⁰ James VI and I, *Basilicon Doron*, in *King James VI and I: Political Writings*, ed. J. P. Sommerville (Cambridge, 1994), 1–61, at 45.

predecessors, and his regents, had done so, and this activity was seen as something a good king should do.³¹

The English situation was quite different. There is no evidence of James's direct judicial involvement in the regular dispensation of justice, but merely a handful of unusual cases. These better-evidenced examples of royal justice from Scotland and England are the focus of the rest of this paper.

The first group of cases concerned judicial activity in the Scottish Privy Council. The Privy Council had a wide jurisdiction, but James's personal involvement is clearly identified in cases about seditious or treasonous speech, in particular seditious sermons.³² The first example is from December 1585, as James Gibson was brought before the Council. Gibson identified James VI as a judge in the case.³³ Gibson took the Council through his sermon step by step, with James personally commenting on the acceptability of Gibson's reasoning. Every step in the process of scriptural exegesis was accepted until the very last. Gibson concluded that a king 'mainteaning wicked acts against God, sould be rooted out'. James did not accept that a king could be deposed and highlighted this as Gibson's error. Gibson was imprisoned in Edinburgh Castle at his own expense.

³¹ A. Blakeway, *Regency in Sixteenth-Century Scotland* (Woodbridge, 2015), 158–92. James's comment in the Napier assize prosecution that 'it hath not bene the custome that the Kings of this realme . . . should sit in persone upon cryminall causes' (CSPS, vol. X, 523, no. 572) might suggest that such royal activity did not involve judging cases or may refer only to the cases heard centrally in Edinburgh. Godfrey notes that before 1532, kings also participated personally in the Session; M. Godfrey, 'Control and the Constitutional Accountability of the College of Justice in Scotland, 1532–1626', in I. Czeguhn, J. A. L. Nevot and A. S. Aranda (eds.), *Control of Supreme Courts in Early Modern Europe* (Berlin, 2018), 118–49, at 127–9.

³² Another example of James's judicial, but private, involvement in a seditious speech case is the sentencing of Thomas Ross in 1619. Ross, a Scot, had written a vehement anti-Scottish text and fixed it to the doors of a church in Oxford. James had Ross returned to Scotland, to be tried there. Ross sought to place himself in the king's will but was still tried by the assize and found guilty of offences, some of which carried a mandatory death penalty by statute. The Scottish Privy Council sought James's decision as to the punishment to be inflicted. Ross had his hand struck off and was then executed. Given the content of the Privy Council's communication with James, it seems likely that James determined that this was the appropriate punishment. For the facts and documents, see Pitcairn, *Ancient Criminal Trials*, vol. III, part 2, 445–54 and 582–90.

³³ RPCS, vol. IV, 39. The *Register* includes only basic information. The detail of the process is found in Calderwood, *History of the Kirk*, vol. IV, 484–8.

As noted above, David Black also appeared in front of the Council. His first appearance, in August 1595, ended with an informal conference.³⁴ Black was back before the Council in November 1596, for preaching allegations that included lying by James VI, the Privy Council being atheists, insults to Elizabeth I of England and encouraging armed disobedience.³⁵ Black declined the Council's jurisdiction on the basis that the content of sermons was first a matter for the Kirk, being a question of doctrine.³⁶ That challenge was rejected by the king personally, as the case was 'altogidder civile and not spiritual'.³⁷ After subsequent discussion, the Privy Council as a whole, including James, found themselves competent judges in the case.³⁸ So far it is not clear that James personally acted as a judge. But once Black was found guilty by the Privy Council as a whole, the Council then ordered that Black's sentence be reserved to James's will alone.³⁹ No sentence is recorded in the Privy Council records, but James prohibited Black from returning to his post at St Andrews.⁴⁰

On his return to Scotland in the summer of 1617, James VI again sat as a judge, not in the Privy Council, but in the Scottish High Commission at St Andrews, trying ministers who objected to the introduction of certain ceremonies into the Kirk. Two ministers were imprisoned and one exiled. These were not cases concerned with seditious ministers, as in the Privy Council. However, from James's perspective the case was still a political one, as the ministers disagreed with James's exercise of his royal power in relation to matters indifferent and refused to obey what were (to James) legitimate and lawful instructions. James's actions are recorded by David Calderwood, in this instance one of the accused (and convicted) with whom James disputed.⁴¹ James's judicial action was also reported as news in London.⁴²

³⁴ See above, 88.

³⁵ CSPS, vol. XII, 368–9, no. 301.

³⁶ *Ibid.*, vol. XII, 362–3, no. 292.

³⁷ RPCS, vol. V, 326–7.

³⁸ *Ibid.*, vol. V, 336.

³⁹ *Ibid.*, vol. V, 341–2. For another example of James personally being given sentencing power by the Privy Council, see *ibid.*, vol. VI, 197–8.

⁴⁰ J. K. Cameron, 'Black, David (c. 1546–1603)', in H. C. G. Matthew and B. Harrison (eds.), *Oxford Dictionary of National Biography, from the Earliest Times to the Year 2000*, 61 vols. (Oxford, 2004), vol. V, 895.

⁴¹ Calderwood, *History of the Kirk*, vol. VII, 261–8.

⁴² *Reports on the Manuscripts of the Most Honourable the Marquess of Downshire Formerly Preserved at Easthampstead Park, Berkshire, Vol. VI: Papers of William Trumbull the*

Beyond the ecclesiastical context, James VI acted as a judge in one case in the North Berwick Witch Trials, a set of witchcraft cases in the early-1590s, printed reports of which informed *Macbeth*.⁴³ The particular case in which James became involved concerned the prosecution of Barbara Napier. She, like others in the trials, had been charged with seeking to cause the death of the king by witchcraft, raising storms while he was travelling by sea and melting his effigy in wax. This was alleged to have been at the suit of the earl of Bothwell, lending the cases a political dimension. Various other ‘sorceries, witchcrafts, and consulting with witches’ by Napier were also alleged.⁴⁴ Unlike other defendants in the various trials, Napier was convicted of consulting with witches, but acquitted of the most serious charges. As the English agent in Scotland noted ‘[t]his is not fallen out as was looked for’.⁴⁵

What followed was unusual. In June 1591 the assize (jury) were prosecuted for error under a legal, but little-used, procedure.⁴⁶ James arrived in court to sit in judgment, at which point the defendants submitted to the King’s will. James declared his will, which was described as being ‘in Judgement’. James here acted as the sentencing authority in the case, deciding in fact to permit the assize members to leave without any further penalty.⁴⁷

In England, James acted as a judge in the well-known attempt to resolve questions of jurisdiction between the common-law and church courts.⁴⁸ In 1608 and 1609 there were several conferences involving the common-law judges, ecclesiastical judges and bishops, all presided over

Elder September 1616–December 1618, ed. G. D. Owen and S. P. Anderson (London, 1995), 246–7. For the proceedings and context, see A. R. MacDonald, *The Jacobean Kirk, 1567–1625: Sovereignty, Polity and Liturgy* (Aldershot, 1998), 158–9.

⁴³ For the influence of reports of the North Berwick trials on the portrayal of witches in *Macbeth*, see E. H. Thompson, ‘*Macbeth*, King James and the Witches’, *Studii de Limbi Și Literaturi Moderne: Studii de Anglistică Și Americanistică* (1994), 131–5, an unpaginated online version is available at http://faculty.umb.edu/gary_zabel/Courses/Phil%20281b/Philosophy%20of%20Magic/Arcana/Witchcraft%20and%20Grimoires/macbeth.htm.

⁴⁴ CSPS, vol. X, 514–5, no. 561.

⁴⁵ *Ibid.*, vol. X, 515, no. 561. Two of those convicted subsequently confessed before their executions but said that they had slanderously accused Napier; L. Nomad and G. Roberts, *Witchcraft in Early-Modern Scotland: James VI’s Demonology and the North Berwick Witches* (Liverpool, 2000), 46.

⁴⁶ On the assize of error, see I. D. Willock, *The Origins and Development of the Jury in Scotland* (Edinburgh, 1966), 234–46; C. Jackson, ‘“Assize of Error” and the Independence of the Criminal Jury in Restoration Scotland’, *Scottish Archives*, 10 (2004), 1–26.

⁴⁷ CSPS, vol. X, 522–5, no. 572.

⁴⁸ On the jurisdictional disputes, see especially Smith, *Sir Edward Coke*, 176–212.

by James, with the intention of resolving various outstanding issues. The conferences ultimately ended in acrimony with no resolution to the various controversies.

Although the accounts of the conferences vary considerably, James does seem to have thought that he was acting judicially.⁴⁹ According to one manuscript, James began by asserting his judicial authority, claiming that the King is ‘the supreme judge’ and ‘may if he please, sit and judge in Westminster Hall in any Court there’.⁵⁰ Edward Coke, in his account, apparently engaged with and rejected the idea that the king could judge, corroborating the idea present in other accounts, that James asserted his judicial authority in the conferences.⁵¹ After Coke’s rejection of his judicial authority, James’s remaining judicial activity all occurred in the Star Chamber, despite Coke’s explicit denial of James’s power to sit as a judge in that court. He began to sit in 1616, with his final case in 1619.⁵² There were three occasions on which James appeared as a judge.

In the middle of the second decade of the seventeenth century, a conflict between the common-law courts and the Chancery (or perhaps between the chief justice of the King’s Bench and the lord chancellor) became overt and awkward. The long-running issues and specific challenges have been discussed in considerable detail by historians.⁵³ What is usually passed over quickly is James’s formal attempt to end the dispute in favour of the Chancery. James appeared in the Star Chamber for the first time in his reign, and delivered a lengthy speech which was subsequently printed in James’s *Workes*.⁵⁴

⁴⁹ R. G. Usher, ‘James I and Sir Edward Coke’, *English Historical Review*, 18 (1903), 664–75.

⁵⁰ BL, MS Lansdowne 160, fo. 425.

⁵¹ *Prohibitions del Roy* (1609) 12 Co. Rep. 63–5.

⁵² According to Coke in the *Prohibitions del Roy* ‘the king may sit in the Star-Chamber; but this was to consult with the justices . . . and not *in judicio*’; 12 Co. Rep. 64. Coke sat as a member of the panel in the case concerning Sir Thomas Lake and the earl of Exeter, with James himself as a judge (see below, 96–7). For Coke’s participation, see McClure, ed., *Letters of John Chamberlain*, vol. II, 214.

⁵³ J. P. Dawson, ‘Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616’, 36 *Illinois Law Review* (1941–2), 127–52; J. H. Baker, ‘The Common Lawyers and the Chancery: 1616’, 4 *Irish Jurist* (1969), 368–92; L. A. Knafla, *Law and Politics in Jacobean England* (Cambridge, 1977), 155–81; I. Williams, ‘Developing a Prerogative Theory for the Authority of the Chancery: The French Connection’, in M. Godfrey (ed.), *Law and Authority in British Legal History, 1200–1900* (Cambridge, 2016), 33–59, at 54–59.

⁵⁴ James VI and I, *The Workes of the Most High and Mightie Prince, Iames by the Grace of God, King of Great Britaine, France and Ireland* (London, 1616), 549–69. Citations to

It is easy to see this speech as judicial activity by James, as he sought to do precisely what he had also tried to achieve in relation to the church courts: determine the jurisdictional relationship between two of his courts, in effect ruling on the law. However, James made clear in the 'Speech' that he was acting 'not judicially, but declaratorily', a point which he repeated on a later occasion in the Star Chamber.⁵⁵ Nonetheless, despite this statement, a considerable portion of James's 'Speech' is directed to the issue of kings judging.⁵⁶ James also referred to himself sitting in the 'seat of Judgement',⁵⁷ and observed to the regular judges that 'you are Judges *with mee* when you sit here' (emphasis added).⁵⁸ There is at the least an ambiguity here. James presented himself in the Star Chamber as a judge, even if in some sense he did not consider his activity to be truly judicial. For the purposes of this paper, the 'Speech' will therefore be treated as an example of James's judicial activity, although its judicial status is more ambiguous than the other cases discussed in the paper.

James next sat as a judge in February 1617, in the prosecution of *Christmas and Bellingham*. The defendants were two young men who had arranged a duel between themselves and attempted to leave the country to fight. They were stopped at Dover and prosecuted in the Star Chamber. The defendants had confessed, and so James's only role was to give sentence. James's speech, summarising short reports found in letters, is briefly reported in the *Calendar of State Papers*.⁵⁹ A much fuller version of James's speech exists, which appears to have been taken down (and probably circulated) by a witness to it, running to almost five-and-a-half-thousand words, but has been overlooked by historians.⁶⁰ That report of the speech correlates with the versions in the State Papers, but provides much more detail and enables a fuller consideration of James's own views.

James's 'Speech' are from James VI and I, 'A Speech in the Starre-Chamber, the XX. of June. Annoe 1616', in Sommerville, *Political Writings*, 204–28.

⁵⁵ James, 'Speech', 207. For the repetition, see *Christmas and Bellingham*, in BL, MS Harley 1576, fo. 75v.

⁵⁶ James, 'Speech', 204–7.

⁵⁷ *Ibid.*, 207 and 209.

⁵⁸ *Ibid.*, 219.

⁵⁹ *Calendar of State Papers Domestic Series, James I*, ed. M. A. E. Green, 190 vols. (London, 1857–9) (henceforth, CSPD), vol. XC, 436, no. 65. The fuller text is in the manuscript, London, The National Archives, SP 14/90/65.

⁶⁰ BL, MS Harley 1576, fos. 75v–80v.

The final case which James judged was in many respects the most difficult. Whereas in other cases James was resolving points of law or sentencing guilty defendants, in the collection of cases concerning Sir Thomas Lake, neither side was willing to admit anything. For the first time in England, James was involved in determining liability, as well as the consequences of it.

The case concerned important families, unhappy in their own particular, and particularly peculiar, way. On one side stood the Lake family, the head of which was Sir Thomas Lake, one of the king's secretaries and a privy councillor. On the other side was the earl of Exeter, his second wife, and his descendants by his first wife. Sir Thomas Lake's daughter had married the grandson of the earl of Exeter, Lord Roos. The marriage was not happy, and the couple were soon living apart. As a consequence, Lady Roos wished to be given property for her maintenance, in particular the manor of Walthamstow. The earl of Exeter refused to relinquish his rights in the manor and the case escalated from there. To quote from Alastair Bellany's excellent summary, '[e]arly in the affair it was rumoured that [Lord] Roos had been coerced into surrendering property to the Lakes under threat of nullity proceedings that would expose his sexual impotence. Later, the Lakes alleged that the youthful countess of Exeter had had an incestuous relationship with her step-grandson', that very same Lord Roos.⁶¹ We should doubtless ignore the seeming incompatibility of those two allegations. The case continued, with allegations that the countess of Exeter had plotted to have Lady Roos poisoned. Both sides sued the other.⁶² Gossip about the case widened the range of allegations. By the time sentence was to be carried out, John Chamberlain wrote that the behaviour of Lady Roos 'by report was so filthy as is not to be named and that incest which they wold have imposed upon others returns on theyre owne heads, betwixt her brother Sir Arthur'.⁶³

The allegations were sufficiently complex that one commentator wrote that 'if all the examinations that belong to it should be read, I thincke all the Starchamber dayes of the Terme would be to fewe. The books on both

⁶¹ A. Bellany, *The Politics of Court Scandal in Early Modern England: News Culture and the Overbury Affair, 1603–1660* (Cambridge, 2002), 253.

⁶² The information and reply in the case of *Earl of Exeter v. Lake* can be found in *Calendar of the Manuscripts of the Most Honourable the Marquess of Salisbury preserved at Hatfield House (Hertfordshire), Part XXII (A.D. 1612–1668)*, ed. G. D. Owen (London, 1971), 61–76.

⁶³ McClure, ed., *Letters of John Chamberlain*, vol. II, 217.

sides containe 19,000 sheets.⁶⁴ Ultimately the case took five days in the Star Chamber, during which James sat ‘in a chair of state elevated above the table about which his lords sat’.⁶⁵ The case clearly aroused great public interest, as might be expected for a case concerning ‘so fowle scandalls of precontracts, adulterie, incest, murther, poison and such like peccadillos’.⁶⁶ A letter in late 1618 reported that the case was to be heard ‘at the great banqueting house’, presumably because the usual Star Chamber would have been too small to accommodate the expected audience.⁶⁷ Contemporary letters refer to the case frequently.⁶⁸ Ultimately the Lakes were found to have defamed members of the Exeter family. They were also found to have suborned false testimony, importantly by Lake’s abuse of his official position.

James and the King as Judge

James’s idea of kingship, at least in the idealised form he presented in his writings, was principally described in biblical terms.⁶⁹ It hardly requires the wisdom of Solomon to find examples of biblical kings judging; indeed according to the Old Testament, the Israelites asked for a king expressly ‘to judge us’.⁷⁰ From a biblical perspective, judging was at the core of kingship. References to biblical kings are frequent in James’s political writings, especially references to Solomon and David.⁷¹ Both appear in

⁶⁴ Owen and Anderson, eds., *Reports*, 596.

⁶⁵ W. Hudson, *A Treatise on the Court of Star Chamber*, in *Collectanea Juridica. Consisting of Tracts Relative to the Law and Constitution of England*, ed. Francis Hargrave, 2 vols. (London, 1791), vol. I, 9. This probably does not include the twelve legal issues which the case apparently involved. Some of these were handled at a pre-hearing in December 1618; Owen and Anderson, eds., *Reports*, 596. Some of the legal issues are reported in *Lake v. Hatton* (1618/19) Hobart 252–3. A fuller report can be found in Washington, D.C., Folger Shakespeare Library (henceforth, FSL), MS V.a.133, fos. 82–87v. According to this report, James expressly delegated the legal issues in the case to the chief justices (*ibid.*, fo. 84v), so the five days of hearing were probably focused on the facts.

⁶⁶ McClure, ed., *Letters of John Chamberlain*, vol. II, 145.

⁶⁷ Owen and Anderson, eds., *Reports*, 574.

⁶⁸ *Ibid.*, 513, 530, 552, 574, 581, 596 and 624–6; McClure, ed., *Letters of John Chamberlain*, vol. II, 144, 145, 161, 213–14 and 215–17.

⁶⁹ For a discussion of the importance of the Bible to early-modern English political thought, see K. Killeen, *The Political Bible in Early Modern England* (Cambridge, 2016).

⁷⁰ 1 Samuel 8:5 and 20.

⁷¹ On the biblical image of James VI as Solomon, see J. Goodare and M. Lynch, ‘James VI: Universal King?’, in J. Goodare and M. Lynch (eds.), *The Reign of James VI* (East Linton, 2000), 20. On the importance of both Solomon and David to James I in England, see J. N. King, ‘James I and King David: Jacobean Iconography and its Legacy’, in Daniel Fischlin

James's most abstract discussion of kingship, *The Trew Law of Free Monarchies*, referring to kings ministering judgment and deciding controversies between subjects.⁷² In his *Basilicon Doron*, supposedly written as advice for Prince Henry, James referred again to the king doing justice. Indeed, he explained that 'the most part of a Kings office, standeth in deciding that question of *Meum* and *Tuum*, among his subiects; so remember when ye sit in iudgement, that the Throne ye sit on is Gods'.⁷³ That reference to the throne echoes the paragraph in the *Trew Law* where James discussed the judicial role of a king.

The biblical idea of the king as judge was a constant in James's judicial activity. We have quite detailed records of James's speeches in the prosecution of the Napier assize and then James's various appearances in the Star Chamber. In all of them James legitimised his activity by scriptural references. In the prosecution of the Napier assize, James stated that 'God hath made me a King and judge to judge righteouse judgmente', and noted that he was doing what 'solomon teacheth'.⁷⁴ James began his 1616 'Speech' in the Star Chamber by referring to Psalm 72, 'Give the king thy judgments, O God', a psalm which continues, 'He shall judge thy people with righteousness', perhaps the influence for the language of 'righteouse judgmente' in the earlier Scottish case.⁷⁵ When sentencing *Christmas and Bellingham*, James approved a reference to Psalm 101 by the chancellor of the Exchequer, that 'Mercie and Judgment belonge to the kinge'.⁷⁶ Finally, in the Lake family litigation, 'The King made a speech in the Court of Star Chamber, comparing himself to Solomon, called to decide between two women.'⁷⁷ In that case, James also compared the defendants to Adam and Eve, implying that he was dispensing God's judgment.⁷⁸ Given the general cultural importance

and Mark Fortier (eds.), *Royal Subjects: Essays on the Writings of James VI and I* (Detroit, MI, 2002), 421–53.

⁷² James VI and I, *The Trew Law of Free Monarchies*, in Sommerville, ed., *Political Writings*, 2–84, at 64. James also refers to subjects needing to acknowledge a king as 'a Iudge set by God ouer them, hauing power to iudge them' (ibid., 72).

⁷³ James, *Basilicon Doron*, 22 and 24.

⁷⁴ CSPS, vol. X, 523–4, no. 572.

⁷⁵ James, 'Speech', 204. Citations of Psalms are from the King James Version.

⁷⁶ BL, MS Harley 1576, fo. 76v.

⁷⁷ CSPD, vol. CV, 11, no. 83.

⁷⁸ Ibid., vol. CV, 14, no. 103. Although James does not draw this out, this would link to the idea of a king sitting on God's throne when dispensing judgment, as mentioned in *Basilicon Doron* (see above) and the beginning of Psalm 72, as mentioned in his 1616 'Speech' (see above).

of the Bible in early-modern Britain, it is not surprising that these biblical ideas were mentioned by others too. In relation to the Lake litigation, the Marquess Hamilton was reported as saying ‘that the King had need be another Salomon to judge between the harlots’.⁷⁹

One other possible influence on James’s views on judging might be the *République* of Jean Bodin, a copy of which was in James’s library, probably from late 1577.⁸⁰ James’s 1616 ‘Speech’ in the Star Chamber did make use of a peculiarly Bodinian metaphor, like many other writers on the relationship between law and equity in England from around 1580 onwards.⁸¹ Whether further influence can be identified is more difficult. Bodin discussed the possibility and desirability of kings judging in book four, chapters six and seven, of the *République*, acknowledging the possibility, but advising strongly against doing so, a conclusion which James rejected.⁸² Nonetheless, as will be seen below, some of James’s views about the king as judge seem to echo material found in Bodin.⁸³

James’s view that it was possible for a king to judge, and that it was part of the royal role, was not unique to him. Most obviously, James’s use of biblical sources in relation to his judicial activities would have been both obvious and legitimate to his contemporaries. As Patrick Collinson notes, early-modern minds were ‘saturated in scripture’,⁸⁴ while Kevin Killeen has stressed that the biblical kings to whom James referred ‘constitute a major lexicon of early modern political thought’.⁸⁵ Related

⁷⁹ McClure, ed., *Letters of John Chamberlain*, vol. II, 145.

⁸⁰ G. F. Warner, ‘The Library of James VI. 1573–1583’, in *Publications of the Scottish History Society*, vol. XV (Edinburgh, 1893), x–lxxv, at xlii.

⁸¹ See Williams, ‘Developing a Prerogative Theory’, 42–8 and 54–9.

⁸² J. Bodin, *The Six Bookes of a Commonweale*, ed. and trans. K. Douglas McRae (Cambridge, MA, 1962), 500–44. Of course, James’s copy was in the original French. Pennington notes that Bodin’s views on a prince’s judicial powers were much more restrictive than the traditional *ius commune*, despite Bodin’s reliance on *ius commune* writers earlier in his discussion of sovereignty; K. Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley, CA and Los Angeles, CA, 1993), 280. However, Pennington does not observe that in the chapters discussing a prince’s judicial role, Bodin is not discussing the law about the prince’s powers but rather whether exercising judicial powers is prudent.

⁸³ See below, 104–106.

⁸⁴ P. Collinson, ‘The Coherence of the Text: How it Hangeth Together: The Bible in Reformation England’, in W. P. Stephens (ed.), *The Bible, the Reformation and the Church* (Sheffield, 1995), 84–108, at 103.

⁸⁵ Killeen, *The Political Bible*, 3. For other examples of English monarchs being compared to David and Solomon, see S. Doran, ‘Elizabeth I: An Old Testament King’, in A. Hunt and A. Whitelock (eds.), *Tudor Queenship: The Reigns of Mary and Elizabeth* (New York, 2010), 95–110, at 98.

to scripture, sermons in both England and Scotland referred to the king as a judge. In a 1592 Scottish sermon, Robert Bruce complained 'that the king himself went not about in person to execute justice yeerelie, as Samuell did', drawing on a biblical example of a royal judge.⁸⁶ When James was involved in the decision to have the Catholic Boynton executed in 1601, 'Mr. Patrik Galloway commended and encouraged the King in his sermon for the justice done of Boynton, showing him how much it had won the people's hearts.'⁸⁷ In England, one of John Donne's sermons, preached at court in 1630, refers to the king as a judge.⁸⁸

The idea of good kings as dispensing justice personally has been noted as a feature of sixteenth-century Scots kingship.⁸⁹ While the king as judge was less prominent in English thought, the idea was present. Both Archbishop Bancroft and Lord Chancellor Ellesmere apparently did consider James to have judicial power.⁹⁰ On his initial progress from Edinburgh to London, James ordered the immediate execution of a cutpurse in Newark. This was criticised by some contemporaries, but these criticisms were directed to the absence of trial, rather than the king's personal involvement.⁹¹ William Hudson's mention of

⁸⁶ Calderwood, *History of the Kirk*, vol. V, 172.

⁸⁷ CSPS, vol. XIII, 814, no. 654. Galloway's praise was directed at the execution of a Catholic, but James apparently stressed that the death penalty was the penalty imposed by law for stealing evidences of title, the offence for which Boynton had been convicted; *ibid.*, vol. XIII, 809, no. 650 and 823, no. 660. It is not clear whether James was involved as a judge at Boynton's trial, because Boynton submitted to the king's will, or in relation to the power to pardon.

⁸⁸ *The Oxford Edition of the Sermons of John Donne, Vol. 3: Sermons Preached at the Court of Charles I*, ed. D. Colclough (Oxford, 2013), 223. Donne rejects trial by jury and trial by peers, moving to trial by the king, but elides the king and God at this point.

⁸⁹ Blakeway, *Regency*, 158. See also J. E. A. Dawson, *Scotland Re-formed, 1488–1587* (Edinburgh, 2007), 40, and J. Wormald, *Court, Kirk, and Community: Scotland 1470–1625* (Edinburgh, 1981), 14–15.

⁹⁰ Smith, *Sir Edward Coke*, 199 and 203. See also BL, MS Lansdowne 211, fo. 141r.

⁹¹ For criticism, see *Nugae antiquae: Being a Miscellaneous Collection of Original Papers in Prose and Verse; Written During the Reigns of Henry VIII, Edward VI, Queen Mary, Elizabeth, and King James: By Sir John Harington, Knt. And by Others Who Lived in Those Times*, ed. T. Park (London, 1804), 180, and Francis Ashley's 1616 reading, where the executioner was identified as potentially being liable for the murder of the thief; Cambridge University Library (henceforth, CUL), MS Ee.6.3, fo. 119. The more extravagant claims made by the Venetian ambassador, that on James's progress from Scotland to London he ordered multiple executions, is not supported by any other evidence; *Calendar of State Papers and Manuscripts, Relating to English Affairs, Existing in the Archives and*

James's judicial role in the Star Chamber was not critical of James's activities.⁹²

The ruler as judge is also visible in literary sources. The plot of *Measure for Measure* (a play performed at James's court in 1604) hinges on the judicial role of the ruler.⁹³ Philip Sidney's extremely popular prose work, *Arcadia*, features a duke who personally dispenses judgment from 'the throne of judgement seat'.⁹⁴ The 'protector' who temporarily takes the place of the duke similarly sits as a judge to 'see the past evils duly punished, and your weal hereafter established', suggesting that the personal dispensation of justice was there seen as part of ensuring the well-being of the state, similar to James's own views.⁹⁵

Within the common-law tradition, Coke's remarks rejecting a judicial role for James have usually been taken as representative.⁹⁶ In fact the position was more complex. In the fifteenth century, John Fortescue wrote that 'none of the kings of England is seen to give judgement by his own lips',⁹⁷ while in 1557 William Staunford barred the king from judging in cases of treason or felony due to his partiality.⁹⁸ However, in 1505 Robert Brudenell was reported as calling the king the 'chief justice' of the realm.⁹⁹ This remark was used in James Morice's 1578 reading to justify a broader claim, that the king is 'the supream Judg of the Realme, who only ought of his princely power and authoritie to preserve the

Collections of Venice, and in Other Libraries of Northern Italy, 38 vols. (London, 1864–1947), vol. X, 25, no. 40.

⁹² See above, 97.

⁹³ M. C. Bradbrook, 'Authority, Truth, and Justice in *Measure for Measure*', *Review of English Studies*, 17 (1941), 385–99, at 386. Bradbrook observes that some passages in the play were 'palpably meant for the ear of James' (*ibid.*, 386).

⁹⁴ P. Sidney, *The Countess of Pembroke's Arcadia (The Old Arcadia)*, ed. K. Duncan-Jones (Oxford, 1985), 315.

⁹⁵ *Ibid.*, 324. As Duncan-Jones notes in her introduction, the Elizabethan *Arcadia* enjoyed 'enormous popularity' throughout the seventeenth century (*ibid.*, ix).

⁹⁶ See above, 94, for Coke.

⁹⁷ J. Fortescue, *De laudibus legum Anglie*, ed. S. B. Chrimes (Cambridge, 1942), 23. This work was first printed in Latin in 1543, *Prenobilis militis, cognomento Fortescu . . . de politica administratione, et legibus ciuilibus florentissimi regni Anglie* (London, 1543), and in English in 1567, *A learned commendation of the politiqe lawes of Englande* (London, 1567).

⁹⁸ W. Staunford, *Les ples del coron* (London, 1557), fo. 54v. Staunford was therefore silent about the king judging in cases of misdemeanours, such as cases in the Star Chamber.

⁹⁹ YB Mich. 20 Hen. VII, fos. 6–8, pl. 17, at 7 per Brudenell Sjt.

Common peace, and Judge or cause to the Judged according to the Law all causes suites and Controversies whatsoever'.¹⁰⁰

The king as judge was not unthinkable in early-modern England. However, there was no tradition of judicial activity by the king in England. James sought to provide a precedent for his appearance in the Star Chamber in 1616, observing that his predecessors, especially Henry VII, had done just that.¹⁰¹ However, Henry VII's successors did not sit in the court, and James never became a regular participant there. Furthermore, personal royal justice was not so central to, or expected of, good kingship. In his funeral sermon for James, Bishop Williams highlighted 'the Actions of Iustice in this King'.¹⁰² Nowhere in Williams's discussion of James's contributions to justice is there any mention of James himself acting as a judge. While Williams saw much to praise in relation to James and justice, James's own judicial activity was not so significant.¹⁰³

When Should the King Judge?

James's thought went beyond the simple idea that kings were judges, with a set of ideas about why kings should judge certain cases and not others. These ideas appear in his judicial remarks and so mostly have not featured in the usual corpus of James's works, leading to them being overlooked.¹⁰⁴

While James stressed his power to judge, underpinned by scriptural authority, his judicial remarks also identify restrictions on doing so. In the prosecution of the Napier jury, James explained that '[u]pon crimes

¹⁰⁰ BL, Egerton MS 3376, fos. 24–24v.

¹⁰¹ James, 'Speech', 206. James's knowledge of Henry VII's practice is likely from the 'Liber intrationum', a collection of Council/Star Chamber papers from the reign of Henry VII; reproduced in *Select Cases in the Council of Henry VII*, eds. C. G. Bayne and W. H. Dunham (London, 1958), 6–47. This circulated in multiple early-modern collections on the Star Chamber; for the manuscripts see J. H. Baker and J. S. Ringrose, *Catalogue of Legal Manuscripts in Cambridge University Library* (Woodbridge, 1996), 304. The preface to the text highlights Henry VII's attendance in the Star Chamber; Bayne and Dunham, eds., *Select Cases in the Council*, 7.

¹⁰² J. Williams, *Great Britains Salomon. A Sermon Preached at the Magnificent Funerall, of the Most High and Mighty King, James* (London, 1625), 53.

¹⁰³ *Ibid.*, 53–5. Williams did praise the eloquence of James's speeches, including those in the Star Chamber (*ibid.*, 41), but did not draw attention to the judicial nature of the speeches.

¹⁰⁴ Of James's printed works, only the 'Speech' in the Star Chamber contains such material.

touching mens lyves – as adultery, murder, theft, rebellion – yf the prince should sit in person it might be a note of rigour. And therefore it is forbidden in the civil lawe.¹⁰⁵ James here suggests, very unusually, that he could be controlled by law and barred from sitting as a judge in some cases.¹⁰⁶ Nevertheless, even if James believed that in 1591, he did not accept the position later. By 1601 he was apparently sitting in capital cases.¹⁰⁷

In England, James never accepted any legal constraints on his power to judge. Nonetheless, in both his 1616 ‘Speech’ and *Christmas and Bellingham*, James acknowledged that there were situations in which he ought not judge. In Scotland James referred to a normative limit on his judicial role. In England, his limits were more pragmatic.

The first of James’s apparently self-imposed limitations was based on expertise. In his 1616 ‘Speech’, James explained that he decided at the start of his reign that he would not act as a judge immediately; instead ‘I resolved therefore with *Pythagoras* to keepe silence seuen yeeres, and learne my selfe the Lawes of the Kingdome.’¹⁰⁸ In 1616 James was willing to claim that he had sufficient expertise to judge, referring to himself as ‘having passed a double apprenticeship of twice seuen yeeres’.¹⁰⁹ This was probably a deliberate reaction, and provocation, to Edward Coke, just as the ‘Speech’ itself determined the relationship between the common-law courts and the Chancery in favour of the Chancery and against Coke’s position.

In 1609 Coke had apparently told James that he could not judge as he lacked expertise; in 1616 James accepted the principle, although

¹⁰⁵ CSPS, vol. X, 523, no. 572.

¹⁰⁶ What James means by the ‘civil lawe’ here is not clear. The rule he recounts does not reflect the *ius commune* tradition; see E. H. Kantorowicz, ‘Kingship under the Impact of Scientific Jurisprudence’, in M. Clagett, G. Post, and R. Reynolds (eds.), *Twelfth-Century Europe and the Foundations of Modern Society* (Madison, WI, 1966), 89–101, at 93–4, and M. Schmoekel, ‘The Mystery of Power Verdicts Solved? Frederick II of Prussia and the Emerging Independence of Jurisdiction’, in G. Martyn, A. Musson, and H. Pihlajamäki (eds.), *From the Judge’s Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials* (Berlin, 2013), 110–45, at 115–19. I can find no mention in Scottish sources of this limitation on the king’s judicial power. James had consulted with the Lords of Session about the law of evidence in relation to witchcraft and treason trials and in his speech referred to those rules of evidence as ‘by the civill law’ too, which suggests the source may be unreported remarks made by members of the Session to James; CSPS, vol. X, 522 and 525, no. 572.

¹⁰⁷ See above, 90.

¹⁰⁸ James, ‘Speech’, 207.

¹⁰⁹ *Ibid.*, 207.

importantly as a self-imposed limitation, rather than one imposed upon him. However, James denied its practical application.¹¹⁰ This discussion of expertise should also be related to James's remark, two weeks before the 'Speech', in the 1616 *Case of Commendams* (in which he did not judge), where James observed that 'although wee never studied the common lawe of Englaunde, yet are wee not ignoraunt of anie pointes which belonng to a kinge to knowe'.¹¹¹ In 1616 James was clearly asserting an expertise to judge. James did not base this claim to expertise on detailed knowledge of English law, but rather his expertise as king, a view which would conform with the influence of Bodin on his 'Speech'.¹¹² Bodin viewed the relationship between law and equity as being a matter exclusively for the prince as 'that greatly concerned the rights of soveraigntie'.¹¹³ The issue of expertise never reappeared in James's judicial activity. Once James had asserted himself over Coke by both demonstrating that in suitable cases the king could judge, and by dismissing Coke from office, perhaps there was no need to engage with the expertise issue.

Other limitations on James's judicial activity appear more frequently, both in the 'Speech' and *Christmas and Bellingham*. Their repetition suggests that these were more important for James. For example, one reason that James thought he ought not judge was partiality. For James this had two meanings. The first was that James was judging in a cause affecting his own interests, whether his 'Prerogative or profit'.¹¹⁴ The second meaning was that James as judge might favour one party or another.¹¹⁵ In *Christmas and Bellingham* James suggested that he ought not judge in a case concerning jurisdiction 'because in that I might bethought to carry some parcial inclinacion', showing that James's real concern was appearances, rather than normative objections to the king's partiality.¹¹⁶ This concern with the appearance of partiality was also

¹¹⁰ *Prohibitions del Roy* 12 Co. Rep. 65. Julius Caesar's account of the dispute suggests something like Coke's remarks was said, as Caesar notes that 'The King but of six yeres standing in English Lawes and yet particeps rationis et ratio omnia legis'; BL, MS Lansdowne 160, fo. 427. This suggests that James acknowledged a lack of technical expertise in 1609 but did not regard that as a hindrance.

¹¹¹ *Acts of the Privy Council of England*, 38 vols. (London, 1864–1947), vol. XXXIV, ed. J. R. Dasent, 600.

¹¹² Williams, 'Developing a Prerogative Theory', 57–8.

¹¹³ Bodin, *Six Bookes*, 764.

¹¹⁴ James, 'Speech', 207.

¹¹⁵ *Ibid.*, 207, and BL, MS Harley 1576, fo. 75v.

¹¹⁶ BL, MS Harley 1576, fo. 75v.

present in his speech in the prosecution of the Napier assize: 'And I would not that any of you should thinke that I prosecuted this in respect of myne owne particuler, for God is my judge I did it not.'¹¹⁷

This limitation on James's actions was pragmatic, based on the possible interpretation of James's judicial activity by others, rather than the substance of James's actions. James does not explain in his speeches why this appearance of partiality would be so problematic, but when he discusses the issue in the 1616 'Speech', there may be influence from Bodin. According to Bodin, when ending disputes, 'the prince above all things must beware that hee show not himselfe more affected unto the one part than to the other: which hath bene the cause of the ruine and overthrow of many princes and estates'.¹¹⁸ Partiality here is not a substantive vice. But showing oneself to be partial is to be avoided, just like James's concern in his speeches.

James's final restriction on royal judgment was that the case was deserving of royal attention. As he observed in his 1616 'Speech', 'a meane cause was not worthy of mee'.¹¹⁹ The same concern appears again in *Christmas and Bellingham*. James thought he should not sit in a case concerning 'to private a nature', nor would he sit in a case concerning 'people of so base Rancke'.¹²⁰ The same concern also appears in Bodin's advice on judging by a prince: a prince should only be involved in 'causes such as may seeme worthy the princes hearing and iudgement',¹²¹ although Bodin does not explain what determines such worthiness.

James's restrictions did not clearly identify any particular cases in which he should judge. For several of these cases, James's intervention can be explained as politically expedient. David Black's prosecution occurred in the context of a 'wrestling match' between the king and Kirk.¹²² Barbara Napier's prosecution was linked to alleged treason by the earl of Bothwell. Napier was alleged to have been part of a conspiracy which sought James's death and the death of his new wife. The witch trials were treason trials, concerned with the protection of the king's body. The link with the earl of Bothwell, who would have been a possible

¹¹⁷ CSPS, vol. X, 524, no. 572.

¹¹⁸ Bodin, *Six Bookes*, 526. Bodin also discusses a prince who judges in his own cause, which he describes as 'contrarie unto the law of nature'; Bodin, *Six Bookes*, 514.

¹¹⁹ James, 'Speech', 207.

¹²⁰ BL, MS Harley 1576, fos. 75v and 76.

¹²¹ Bodin, *Six Bookes*, 515.

¹²² MacDonald, *The Jacobean Kirk*, 40. For the context of Black's prosecution, see especially *ibid.*, 66–9.

claimant to the throne on James's untimely childless death, only exacerbated this.¹²³ The acquittal of Napier challenged this narrative, so a conviction of the assize for acquitting in error helped to restore the credibility of the government's position. In England, while the individual defendants were of no particular significance, the prosecution of Christmas and Bellingham was part of a wider campaign against duelling. The case concerning Thomas Lake risked causing reputational damage to the Jacobean court, especially in the context of the Spanish Match.¹²⁴

However, such political explanations are not sufficient. Other politically important cases did not lead to James sitting as a judge. As Julian Goodare has observed for Scotland, James not sitting as a judge 'did not limit him' because 'he appointed the judges' and the same held true for much of his reign in England.¹²⁵ James was able to resolve the Overbury scandal at his English court through an investigation and then prosecution by the regular judges.¹²⁶ In *Christmas and Bellingham*, James even highlighted that he had not sat in two other cases concerning duelling.¹²⁷ In his speeches, James identified a set of ideas which explain many of his interventions as a judge.

One recurring principle was that of performing the office of a king, linked to the scriptural examples of biblical kings who judged. In the Napier assize prosecution, James attributed the acquittal of Napier in that case to partiality on the part of the assize, which he identified as a particular problem in Scotland:

all men set themselves more for freendes then for justice and obedience to the lawe . . . And let a man commyt the most filthie crymes that can be, yet his freendes take his parte, and first keepe him from apprehencion, and after by feade or favour, by false assisse or some waie or other, they fynde moyne of his escape from punishment.¹²⁸

¹²³ This aspect of the cases is particularly stressed in C. Lerner, 'James VI and I and Witchcraft', in A. G. R. Smith (ed.), *The Reign of James VI and I* (London, 1973), 74–90, at 79. Bothwell, Francis Stewart, was the son of the illegitimate son of James VI's grandfather, James V.

¹²⁴ On the religious sub-text to the scandal, see below, 110. Such sub-text was particularly problematic when James was engaged in negotiations for Prince Charles to marry a Spanish bride.

¹²⁵ J. Goodare, *State and Society in Early Modern Scotland* (Oxford, 1999), 14 n. 9.

¹²⁶ On the Overbury scandal, see Bellany, *Politics of Court Scandal*. The judicial investigation and trial are discussed at 218–20.

¹²⁷ BL, MS Harley 1576, fo. 76.

¹²⁸ CSPS, vol. X, 523, no. 572.

James therefore explained that he came to judge the assize of error

sithence the common assisses which are heere gyven doe not aswell *noxios condemnare* as *innocentes demittere*, condemne the gulyty as cleare the innocent, which are alike abhominable before God, as Solomon teacheth . . . I fynde men make no conscience to fynde the gulyty, to the greate perverting of justice. Therefore was I mooved at this tyme to chardge this assisse of errour . . . And this I doe of conscience of that office which God hath laid upon me.¹²⁹

For James, ensuring that the justice system worked as it should, to do that which Solomon showed to be the will of God, was part of his office. Establishing and maintaining a functioning legal system was, to James, part of a king's role and had scriptural warrant.

The same idea, of ensuring that justice was done by ensuring actors within the justice system performed their roles appropriately, could explain more of James's judicial activity. James's interventions in relation to matters of jurisdiction could be viewed in the same way. The disputes between the common-law courts and both the church courts and the Chancery could be seen as preventing the legal system from functioning and justice being done.

The idea of performing a particular royal office is also visible in *Christmas and Bellingham*. James noted that the case 'concerne the peace of the kingdome, which is the proper office of a kinge'.¹³⁰ As in the prosecution of the Napier assize in Scotland, James stressed that the act of judging was part of performing his royal office, here in ensuring peace. Giving judgment was how James performed one of his duties. Related to this was how the problem of duelling needed to be addressed. As John Ford has noted, James accepted 'that it was the sovereign's prerogative "to supply the Law where the Law wants"'.¹³¹ A writer on the Star Chamber in the reign of Charles I observed that the court existed to proceed 'against suche enormities and excesses as could not be sufficiently punished by the ordinary stroake of Comon lawe, And therefore it seemed requisite the Prince himselfe or they in neerest authority under him should there shew themselves'.¹³²

¹²⁹ Ibid.

¹³⁰ BL, MS Harley 1576, fo. 75v.

¹³¹ J. D. Ford, 'Conciliar Authority and Equitable Jurisdiction in Early-Modern Scotland', in Godfrey (ed.), *Law and Authority*, 140–69, at 160.

¹³² CUL, MS Kk.6.22, 2–3. Another copy is BL, MS Harley 6448, but the Cambridge manuscript is a superior presentation copy.

In his speech in the case of *Christmas and Bellingham*, James noted this need to supply the law because the law was wanting. As he observed, ‘no lawes have bene heretofore made against Duells, because till of late they were never practised’.¹³³ Like the Napier assize, or questions of jurisdiction, James’s intervention in relation to duelling concerned a situation where the legal system was not working as it should. That failure was also highlighted by biblical norms, with James stressing that killing in general, and duels in particular, were prohibited in the Bible.¹³⁴ This securing of peace through royal justice as a royal duty is also visible in the *Trew Law*. After James discusses the role of kings as judges, he observes that the obligation of a king, as noted by David, is to ‘procure the peace of the people’, alluding to Psalm 72.¹³⁵

At first glance the litigation concerning Thomas Lake does not seem to fall into this model of performing royal duties. The dispute was between two important families, but the surviving reports of James’s speech do not feature any explicit statement from James as to why he considered a defamation case worthy of his attention. There is no obvious royal duty affected by the throwing of insults between subjects, however prominent. However, the facts of the case and James’s reported remarks suggest several reasons as to why the case was related to James’s duties as monarch, and therefore worthy of his attention.

The first is that the alleged facts concerned members of James’s court. As a matter of presentation, allegations of reprehensible behaviour at court in this case undermined James’s prestige, just as they had in the Overbury scandal a few years earlier.¹³⁶ More importantly, however, James ‘insisted that maintaining court morality was one of the duties of the good king’.¹³⁷ As James set out in the *Basilicon Doron*:

make your Court and companie to bee a patterne of godlinesse and all honest vertues, to all the rest of the people. Bee a daily watch-man ouer your seruants, that they obey your lawes precisely: For how can your lawes

¹³³ BL, MS Harley 1576, fo. 78v.

¹³⁴ *Ibid.*, fos. 76v–78.

¹³⁵ James, *Trew Law*, 64.

¹³⁶ Bellany notes that in the Lake affair ‘accusations – many of them clearly recalling the Overbury affair – were hurled back and forth’; Bellany, *Politics of Court Scandal*, 253. On the reputational damage to James flowing from behaviour at his court, see M. Lee, *Great Britain’s Solomon: James VI and I in his Three Kingdoms* (Chicago, IL, 1990), 132.

¹³⁷ Bellany, *Politics of Court Scandal*, 138. This aspect of the case is highlighted in J. Rickman, *Love, Lust, and License in Early Modern England: Illicit Sex and the Nobility* (Aldershot, 2008), 83.

bee kept in the country, if they be broken at your eare? Punishing the breach thereof in a Courteour, more seuerely, then in the person of any other of your subjects: and aboue all, suffer none of them (by abusing their credite with you) to oppresse or wrong any of your subjects.¹³⁸

The Lake case not only raised the spectre of reprehensible crimes such as incest, adultery and poisoning being committed at court, but also oppression by a privy councillor. Part of the allegations against Thomas Lake were that he had abused his office as privy councillor to have individuals arrested without cause, using the opportunity to suborn them into giving false testimony in the case.¹³⁹ The king's duty as a 'watch-man' over his secretary was therefore engaged, redressing oppression of subjects by his servants.

James saw his duty to be ensuring 'godlinesse and honest vertues', both of which were lacking in the Lake family.¹⁴⁰ James's intervention was probably triggered by two related underlying aspects of the case: gender and religion. The dispute between the earl of Exeter and Thomas Lake was referred to by one commentator as 'the famous womens cause'.¹⁴¹ Although men were involved, it was presented as a case between women. For the Lake family, the matter was even more serious. In his speech, James 'spoke long and well, comparing Lake to Adam, Lady Lake to Eve, and Lady Roos to the serpent'.¹⁴² The paterfamilias had been swayed to sin by his wife, who had herself been tempted by her daughter. This was not a well-ordered Jacobean family, and, as Jacobean thought would have predicted, this disorder in the family led to disorder in government. As one Jacobean household manual put it: 'It is impossible for a man to understand how to govern the common-wealth, that doth not know how to rule his own house, or order his own person; so that he that knoweth not to govern, deserveth not to reign.'¹⁴³ In the Lake family and household, the dominant figure was the daughter, a reversal of both gender and

¹³⁸ James, *Basilicon Doron*, 37.

¹³⁹ Owen, ed., *Calendar*, 63 and 65.

¹⁴⁰ James, *Basilicon Doron*, 37.

¹⁴¹ Owen and Anderson, eds., *Report*, 530.

¹⁴² CSPD, vol. CV, 14, no. 103.

¹⁴³ J. Dod and R. Clever, *A Godly Forme of Household Government: For the Ordering of Private Families, According to the Direction of God's Word* (London, 1612), sig. A8v. For the importance of order, hierarchy and obedience in early-modern views of the family, and the parallels between family and government, see S. D. Amussen, *An Ordered Society: Gender and Class in Early Modern England* (Oxford, 1988), 34–66, esp. 35–42 and 54–60.

parental roles. Thomas Lake therefore demonstrated his unsuitability for government.

According to the earl of Exeter's allegations against Lake, which were accepted by the Star Chamber, Lake had not only arrested innocent subjects to pressure them into giving false testimony, he even allowed his wife to be involved in the questioning and pressuring of the prisoners.¹⁴⁴ One report of the case describes the finding 'that when he [Lake] had examined Williams on matter of state he gave him to his wife the other defendant to be examined again by her'.¹⁴⁵ James alluded to this aspect of the case as an important general lesson in his speech, as he 'bade all secretaries beware of trusting their wives with secrets of state'.¹⁴⁶

Linked to this gendered aspect of the case lay a concern with religion. As Bellany notes, 'Rumours of religious deviance had swirled around the case from its beginnings in 1617. As the affair dragged on, these rumours focused increasingly on the Lakes'.¹⁴⁷ Contemporaries smelled popery, and in his speech James 'charged the Judges to beware of Papists, especially of women, who are the nourishers of Papistry'.¹⁴⁸ The inference is that a significant threat was posed if these women could then control the men in their family, especially a servant of the king. The litigation concerning Thomas Lake therefore did touch directly on issues that James considered his royal duty: the behaviour of his courtiers and servants, as well as godliness at court.

Cases in which James judged can therefore be linked to James's view of the duties of a king. However, the Lake litigation also reveals another recurring thread in James's judicial practice, which is the role of royal judgment as part of governing the country. Although James was judging in particular cases, he saw his judgments as having wider consequences, and this was an important aspect of his judicial activity. As the archbishop of Canterbury noted in relation to the Lake case, 'the matter is held so exemplary ... that the Kinge himselfe intendeth to bee

¹⁴⁴ Owen, ed., *Calendar*, 63.

¹⁴⁵ FSL, MS V.a.133, fo. 85v. The translation from law French is my own.

¹⁴⁶ CSPD, vol. CV, 14, no. 103. Interference in the actions of her husband as lord treasurer was also a feature of the prosecution of the countess of Suffolk with her husband; A. Thrush, 'The Fall of Thomas Howard, 1st Earl of Suffolk and the Revival of Impeachment in the Parliament of 1621', *Parliamentary History*, 37 (2018), 197–211, at 201.

¹⁴⁷ Bellany, *Politics of Court Scandal*, 254.

¹⁴⁸ CSPD, vol. CV, 14, no. 104.

present'.¹⁴⁹ James chose to be present on the basis of the exemplarity of the case, with the example serving to shape future behaviour.

James seems to have thought that his personal participation rendered the judicial process itself exemplary. That personal royal presence may have been necessary in some cases for the example to be effective and for the judicial process to be a useful tool of royal government. In the Napier assize, James explained that 'I see the pride of these witches and their freendes, which can not be prevented but by myne owne presence.'¹⁵⁰ In *Christmas and Bellingham*, James noted that a previous case had failed to serve as an effective example, perhaps thinking that his presence would make a difference in this respect.¹⁵¹

This idea of exemplarity is prominent in James's speech in the Napier assize prosecution: 'I mooved at this tyme to chardge this assisse of errour, that it may be an example in tyme comyng to make men to be more wary how they gyve false verdictes, not onely in this cause but in all other causes.'¹⁵² In that case, James also took the opportunity to teach not just about false verdicts, but also about the substance of the offence for which Barbara Napier was acquitted: 'for them who thinke these witchcraftes to be but fantacyes, I remmyt them to be catechised and instructed in these most evident poyntes'.¹⁵³ This idea of using royal judgment as a means to educate James's subjects about important matters was also mentioned in his 1616 'Speech', where James acknowledged that he needed to learn the laws of England 'before I would take upon mee to teach them unto others'.¹⁵⁴ James judged the parties for their conduct in the past, as an example to the future.¹⁵⁵

James gave his most complete statement as to the role of royal judgment in teaching the people in *Christmas and Bellingham*:

For what can belonge more properly to a kinge, then consideringe that all kingdomes, and states, are governed Cheifely by example, to make such an Example, As may hereafter curbe the insolent mindes of these Duellers;

¹⁴⁹ Owen and Anderson, eds., *Reports*, 626.

¹⁵⁰ CSPS, vol. X, 524, no. 572.

¹⁵¹ BL, MS Harley 1576, fo. 77.

¹⁵² CSPS, vol. X, 523–4, no. 572.

¹⁵³ *Ibid.*, vol. X, 524, no. 572.

¹⁵⁴ James, 'Speech', 207.

¹⁵⁵ This suggests that the distinction James drew being acting judicially and declaratorily (see above, 95) was much less clear in practice.

and by solempne decree provide that the Contrie may be reformed, and shedding of bloud hereafter stayed; For which I have such an accompt to make before God.¹⁵⁶

Such an educative purpose explains why James made such a lengthy speech demonstrating the unlawfulness of duelling in scripture and in the law of nations.¹⁵⁷ Education through justice was a vital, albeit rarely deployed, tool of royal government, perhaps related to the educative role of judicial charges at assizes and quarter sessions in the English context.¹⁵⁸

This was perhaps particularly important in the context of a case about duelling. *Christmas and Bellingham* occurred after serious royal attempts to curtail duelling in England, including two proclamations, a campaign of education in printed books written by royal servants and an earlier case setting an example.¹⁵⁹ An exemplary prosecution ending in personal royal judgment was another attempt to alter public behaviour when other means had failed. The same problem of failure may also have spurred James's intervention in Thomas Lake's case. That litigation occurred only after James had been instrumental in ensuring the murder prosecutions of courtiers in the Overbury scandal.¹⁶⁰ Despite this example, courtiers continued to misbehave, and many of the allegations in the Lake case were similar to those in the Overbury scandal.¹⁶¹ James may have considered that the Overbury example had failed, and that direct personal intervention would have more effect than the normal process of the common law, just as he may have thought his personal presence would ensure a more effective example in *Christmas and Bellingham*.

This concern with examples and shaping behaviour in the future seems also to have been reflected in some of James's sentencing practices. In 1590, James Gyb was prosecuted for wearing and shooting of pistols within James's Palace of Holyrood. Gyb placed himself in the king's will.

¹⁵⁶ BL, MS Harley 1576, fo. 76.

¹⁵⁷ *Ibid.*, fos. 76v–80v.

¹⁵⁸ As William Lambarde noted of his model charge to be delivered at Quarter Sessions, one of the purposes of the charge was 'to instruct those that be ignorant, least they offende unawares'; W. Lambarde, *Eirenarcha: Or the Office of Iustices of Peace* (London, 1581), 311. On the charges generally, see Brooks, *Law, Politics and Society*, 87–92 and 157–60.

¹⁵⁹ On the Jacobean campaign against duelling, see M. Peltonen, *The Duel in Early Modern England: Civility, Politeness and Honour* (Cambridge, 2003), 80–145.

¹⁶⁰ Bellany, *Politics of Court Scandal*, 218–20.

¹⁶¹ See above, 108. It is possible that some of the allegations were deliberately crafted to resemble the earlier matter to attract James's attention.

Departing from the typical practice, a full statement of the King's will and the reasons behind the decision as to sentence were delivered to the court, suggesting royal interest (perhaps by James personally) in the case. Gyb was sentenced to death, lest his behaviour 'offerit ane perellous preparative and example to the rest of our subiectis; . . . gif it be nocht condignellie pwneist, to the example of utheris'.¹⁶² James did subsequently show mercy, remitting the death penalty and simply banishing Gyb. However, the death sentence was publicly proclaimed, while the exercise of mercy was not, maintaining the exemplary effect of the punishment.¹⁶³ The same approach can be seen in *Christmas and Bellingham*. The two defendants were each fined £1,000 and imprisoned in the Tower of London at the king's pleasure.¹⁶⁴ However, a month later their fines and imprisonment were remitted.¹⁶⁵ The example had been made.

This idea of punishments as examples to the wider community to determine behaviour in the future was not peculiar to James personally. An Elizabethan statute referred to executions for felony as 'chieflye for Terrour and Example'.¹⁶⁶ The Jacobean Court of Exchequer noted in one judgment that had the defendants not died, 'some severe exemplar punishment such as might deterr others hereafter from committing the like' would have been imposed.¹⁶⁷ In 1622, the Star Chamber is reported as using one case as a 'precedent' because of 'the frequency of such offences', clearly hoping to deter such conduct in the future.¹⁶⁸ Jacobean proclamations also make reference to the Star Chamber having provided exemplary punishments in the past and doing so in the future,¹⁶⁹ while the sentences imposed by James in the Scottish High Commission in 1617 were described as being imposed 'in exemplum et terrorem'.¹⁷⁰

¹⁶² Pitcairn, *Criminal Trials*, vol. I, part 2, 187–8.

¹⁶³ For the remission of the penalty, see *ibid.*, vol. I, part 2, 188 marginal n. 1.

¹⁶⁴ CSPD, vol. XC, 450, no. 63.

¹⁶⁵ *Ibid.*

¹⁶⁶ Stat. 8 Eliz.1 c.4.

¹⁶⁷ *AG v. Earl of Leicester* (1615), PRO E 126/2, fo. 62v. My thanks to David Foster for bringing this case to my attention.

¹⁶⁸ *R v. Saunders* (1622), CUL, MS II.6.51, fo. 86.

¹⁶⁹ *Stuart Royal Proclamations, Vol. I: Royal Proclamations of King James I, 1603–1625*, eds. J. F. Larkin and P. L. Hughes (Oxford, 1973), 153, 359, 407, 429, 539 and 540.

¹⁷⁰ Owen and Anderson, eds., *Reports*, 247. Similar language is not present in Calderwood's account of the situation (above, 92), but Calderwood was interested in other aspects of the case.

Such an approach had not always been taken by James. In the prosecution of the Napier assize, James accepted them into his will and imposed no further punishment. James explained that he believed the jurors simply to have been ignorant, rather than corrupt. In such an instance, an educative speech, correcting the ignorance of the jurors, sufficed. The Napier approach was not typical, although it fits with some of James's thought as expressed in *Basilicon Doron*: 'mixe Justice with Mercie, punishing or sparing, as ye shall finde the crime to have bene wilfully or rashly committed'.¹⁷¹ As the jurors had at best committed their wrong 'rashly', they could be spared.

James's remarks on the relationship between justice and mercy in *Basilicon Doron* are revealing, showing that by 1598 James stressed the importance of punishment as justice:

For if otherwise ye kyth your clemence at the first, the offences would soone come to such heapes, and the contempt of you grow so great, that when ye would fall to punish, the number of them to be punished, would exceed the innocent; and yee would be troubled to resolve whom-at to begin: and against your nature would be compelled to wracke many, whom the chastisement of few in the beginning might have preserved.¹⁷²

James warned that he had showed too much mercy early in his reign, and he 'found, the disorder of the countrie, and the losse of my thankes to be all my reward'.¹⁷³ James apparently experienced the same lesson during his initial progress from Edinburgh to London. Initial mercy was rapidly replaced by punishment. James ordered the execution of a cutpurse at Newark. According to Stow, the thief 'upon examination confessed, that he had from Barwicke to that place, played the Cut-purse in the Courte. The king hearing of this gallant, directed a warrant to the Recorder of New worke, to have him hanged, which was accordingly executed'.¹⁷⁴ James ordered punishment without trial, punishment which was carried out. According to Francis Ashley's later report of the matter at his reading in 1616, James had in fact twice pardoned this cutpurse. Execution was only ordered for the third offence.¹⁷⁵ After an initial attempt at mercy, James changed his practice to punishment of the thief.

¹⁷¹ James, *Basilicon Doron*, 22.

¹⁷² *Ibid.*, 22.

¹⁷³ *Ibid.*, 23.

¹⁷⁴ J. Stow, *The Annales of England* (London, 1605), 1431.

¹⁷⁵ CUL, MS Ee.6.3, fo. 119. It is possible that the second pardon was conditional, but the surviving sources do not make this clear.

In *Christmas and Bellingham*, James described the relationship between justice and mercy, and his approach to sentencing, again:

For as nothinge is more hurtfull then Cruell mercie soe nothinge is better then mercifull Justice, Cruell mercie is, where the pardon of one procured the faults of many, and mercifull Justice is, where the punishment of a few scarrs milions, for that is Gods ordinance in the seate of Justice upon earth, that the punishment of a few might adde feare to manie.¹⁷⁶

By imposing a harsh sentence, James thought to make an example of a few particular offenders for the general good.

In England, the Star Chamber was an ideal venue for such exemplary activity. It was a court which people did visit. John Holles directly compared the court to a theatre (indeed, the Globe), advising his son that ‘yow shall uppon this stage see what yow are to avoyd, what to follow, and by others errors, learn to play your owne part better, when your turn cums: or by others harms grow so wys, as yow may still conserve your self a spectator, and a philosopher’.¹⁷⁷ Another visitor, perhaps sharing similar views, paid about as much for seats in the Star Chamber as for those in the theatre.¹⁷⁸ Furthermore, those who attended the Star Chamber then circulated material about its activities to others.¹⁷⁹

In these cases, James acting as a judge was therefore part of royal government, doing more than just determining the outcome of a particular dispute. He sought to shape wider behaviour in his realms. Such royal judgment was neither frequent nor regular, but James’s judicial activities deserve to be considered in relation to James’s ideas and practice of kingship.

A question which should then be addressed is really an impossible-to-answer counterfactual: why did James not judge in person more frequently? There are only a few examples of him sitting as a judge, all seen as noteworthy by commentators. If royal judgment was a tool of royal government, why not use that tool more often? Any answers to a counter-factual question will necessarily be speculative. In a few cases, James’s personal appearance might have been politically counter-productive. This seems likely in relation to the prosecution of Thomas Howard in the Star Chamber. Thrush has argued that James’s dismissal

¹⁷⁶ BL, MS Harley 1576, fo. 76v.

¹⁷⁷ P. R. Seddon, *Letters of John Holles 1587–1637*, 2 vols. (Nottingham, 1983), vol. II, 222.

¹⁷⁸ N. Millstone, *Manuscript Circulation and the Invention of Politics in Early Stuart England* (Cambridge, 2016), 262–3.

¹⁷⁹ *Ibid.*, 262–3.

of Howard from the lord treasurership for corruption was seen as disproportionate, and that the Star Chamber prosecution was designed to show that James's actions were reasonable. In this, James was assisted by Edward Coke, whose speech in the Star Chamber presented examples of such dismissals.¹⁸⁰ For James to sit in such a case may have undermined its political purpose. Similarly, while James did attempt to assert his judicial role in the impeachment of Francis Bacon in 1621, he 'chose to sacrifice the constitutional point for the short-run objectives of his continental policy and the clearing of his honor'.¹⁸¹ However, these political reasons probably fail to explain the general absence of royal judgment by James.

A more general explanation is simply pressure of business. Even if James wanted to sit, he may not have had the time to do so. The Lake litigation took five days, time which could have been devoted to other matters.¹⁸² Some indication that James's time was too limited to judge regularly may be found in his speech in *Christmas and Bellingham*. During the speech, James apologised for its quality, explaining that his discussion had been affected by 'the Cold that I have gotten' and the 'small tyme that I have had to thinke of this (which was but since last night at tenne of the Clocke'.¹⁸³ James's time was limited, and he did not turn to preparing a deliberately exemplary speech on a significant issue of government policy until quite late the night before the case. Frequent judicial activity may simply have been unsustainable.¹⁸⁴

A Comparative Conclusion

As a matter of comparative legal history, we have one clear distinction between James as judge in his two kingdoms, in James's participation in the regular dispensing of justice. A combination of institutional and cultural differences may have affected James's inclination to participate in judicial activity in England. However, in other respects the pattern looks quite similar. There is considerable congruity between James's

¹⁸⁰ Thrush, 'Fall of Thomas Howard', 206–9.

¹⁸¹ R. Zaller, *The Parliament of 1621: A Study in Constitutional Conflict* (Berkeley, CA, 1971), 83.

¹⁸² See above, 97.

¹⁸³ BL, MS Harley 1576, fo. 77v. No closing parenthesis in the original.

¹⁸⁴ A related point may be what Conrad Russell described as James's 'declining energy' in the early 1620s; C. Russell, *James VI and I and his English Parliaments*, ed. R. Cust and A. Thrush (Oxford, 2011), 177.

activities in Scotland and England, as well as the views and ideas he expressed. In fact, the more pronounced difference, or comparison, is between James in the 1580s and early 1590s, on the one hand, and James from the later 1590s onwards, on the other. In 1595, James was happy to end his dispute with David Black in conference but was later directly involved in Black's prosecution and sentencing. In the Napier prosecution, James was happy to release the offending jurors with nothing more than a verbal punishment. But in *Basilicon Doron*, completed in 1598, James acknowledged that his view of mercy had changed due to his 'over-deare bought experience'.¹⁸⁵ That experience shaped James's ideas, ideas which he applied in fairly consistent ways in both Scotland and England. The comparative exercise here lets us reach a conclusion which would surely have delighted James himself: in his ideas and practice of royal judgment we have an example of genuinely British legal history.

A Constitutional Postscript

James's judicial activity was unusual, particularly in the English context. However, there is no evidence that his subjects saw anything problematic in his judicial role. From the perspective of constitutional history, James was the end of an older tradition. But that end was not preordained. Why did James's successors did not continue his practice of publicly dispensed personal justice? In Scotland the answer is fairly simple. Public personal justice required personal presence, which was rare after 1603.¹⁸⁶ In England, this would not have been an issue, and the answers involve

¹⁸⁵ James, *Basilicon Doron*, 22. For the completion date, see J. Sommerville, 'Introduction', in Sommerville, ed., *Political Writings*, xviii. James's disappointment with the loyalty of his subjects is evident in *Basilicon Doron*, where he observed that 'I never found yet a constant bidding by me in all my straites, by any that were of perfite aage in my parents dayes, but onely by such as constantly bode by them; I meane specially by them that serued the Queene my mother' (James, *Basilicon Doron*, 24). Examples of mercy followed by further offences would include David Black's seditious speeches and the behaviour of the earls of Bothwell and Huntly. Both earls were involved in the Brig O'Dee rebellion of 1589 and convicted of treason, but soon released and returned to court. Both then participated in further rebellious activity in the first half of the 1590s. For Bothwell, see R. Macpherson, 'Stewart, Francis, First Earl of Bothwell (1561–1612)', in Matthew and Harrison, *Oxford Dictionary of National Biography*, vol. LII, 668–9; for Huntly, see J. R. M. Sizer, 'Gordon, George, First Marquess of Huntly (1561/2–1626)', in Matthew and Harrison (eds.), *Oxford Dictionary of National Biography*, vol. XXII, 883–4.

¹⁸⁶ For an example of the king's private involvement in the case of Thomas Ross, see above, 91.

trying to explain an absence which no contemporaries seem to have regarded as notable. One explanation relates to the character of James's successors. James was not shy about engaging in debate and discussion with his subjects, just as he did in his English judicial activity. This was a feature of his Scottish practice, although less common in England.¹⁸⁷ His successors were heirs to the English tradition of a more distant monarch.

Royal judgment also required there to have been a perceived need for such activity. But most of the time English monarchs could achieve their objectives through the legal system without intervening personally, confident that their judges would reach the right decisions.¹⁸⁸ In England James only judged where the regular legal system failed to achieve his objectives, and such cases were unusual.

Culturally, there may have been a change in views about the acceptability of royal justice dispensed personally by the monarch. During the parliamentary debates concerning the abolition of the Star Chamber in 1641, the former chief justice of the King's Bench, Henry Montagu, asserted that the king had a personal judicial power. According to one newsletter writer, Montagu's remarks were 'high prerogative language' that was not acceptable to many.¹⁸⁹ Furthermore, once Coke's remarks about the king's inability to act as a judge were printed in the *Interregnum*, any attempt by a king to judge may have been likely to provoke criticism.¹⁹⁰ Such criticism might undermine the political benefits of personal intervention, rendering the monarch's judicial activity a misjudgement. Institutionally, after the abolition of the Star Chamber and judicial role of the council in 1640, it is less clear in which court a monarch could have sat.¹⁹¹

Finally, in the long term perhaps the most significant aspect of James's judicial role was not his activity, but an instance of inactivity. When Parliament moved to impeach Francis Bacon, James had proposed to the House of Commons that he would empower a commission made up of members of both houses of parliament to examine the evidence against

¹⁸⁷ Wormald, 'Two Kings', 197 and 204–5.

¹⁸⁸ On judicial independence in the seventeenth century, see Hart, *The Rule of Law*, 67–70; A. F. Havighurst, 'The Judiciary and Politics in the Reign of Charles II', *Law Quarterly Review*, 66 (1950), 62–78 and 229–52; and A. F. Havighurst, 'James II and the Twelve Men in Scarlet', *Law Quarterly Review*, 69 (1953), 522–46.

¹⁸⁹ Bedfordshire Archives and Record Services, MS St John J1386, unfoliated.

¹⁹⁰ *Prohibitions del Roy* (1609) 12 Co. Rep. 63–5. The twelfth part of Coke's reports was printed in 1656; *The Twelfth Part of the Reports of Sir Edward Coke* (London, 1656).

¹⁹¹ Stat. 16. Car.1 c.10.

Bacon. The commission would then report to James, who would personally judge the matter. However, James did not raise the proposal with the House of Lords, and it was dropped, as other matters became James's priority.¹⁹² As Zaller notes, in retrospect this may be 'the most important single decision ever made by King James'.¹⁹³ The decision had two significant consequences. First, James's decision not to assert a judicial role paved the way for unwelcome parliamentary trials against royal servants in the reign of Charles I (such as the attempted trial of the duke of Buckingham and the prosecution of the earl of Strafford), affecting relations between Charles and Parliament. Second, James's judicial inactivity generated a precedent of parliamentary judicature over royal servants, independent of any royal authorisation or control beyond dissolving Parliament. Henry Elsyng included a chapter on parliamentary judicature in his 1624 draft treatise on Parliament. He was clear that, based on the parliamentary precedents, the power of judging belonged to the House of Lords alone; the king had merely the power to assent to that judgment.¹⁹⁴ James's inaction opened the door to the parliamentary review and control of the actions of royal servants, which is still meant to be part of the constitution of the kingdom which James wished to unite.

¹⁹² See Zaller, *Parliament of 1621*, 82–84, and C. G. C. Tite, *Impeachment and Parliamentary Judicature in Early Stuart England* (London, 1974), 112–13.

¹⁹³ Zaller, *Parliament of 1621*, 84.

¹⁹⁴ *Judicature in Parlement by Henry Elsyng Clerk of the Parliaments*, ed. E. R. Foster (London, 1991), 78–85.