

LIONS IN CONFLICT: ELLESMERE, BACON AND COKE

- THE PREROGATIVE BATTLES*

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When Sir Edward Coke was appointed Chief Justice of the Court of Common Pleas in 1606, he was the first for a century who had never appeared as an advocate in that Court. Such appearances were restricted to the handful of senior counsel called serjeants-at-law—the QC's of the day. Coke had only been coifed as a serjeant the day before his elevation. The coif was a white silk cap worn in court, which Coke once called the helmet of Minerva, traditionally the goddess of wisdom, whom he called, revealingly the goddess of counsel.

Coke brought to his new task the full force of his considerable intellect. His encyclopaedic knowledge and his output were prodigious. The Latin inscription on his tombstone correctly describes him as having been a “living library”. However, his mind was so narrow and unsubtle, so incapable of jettisoning detail, so often inconsistent, that no one has ever speculated that he wrote the works of Shakespeare.

Macaulay described him as a: "... pedant, bigot and brute [but] ... an exception to the maxim ... that those who trample on the helpless are disposed to cringe to the powerful".¹

The Institutional Imperative

Coke's aggressive pursuit of the institutional interests of his new Court became as fervid as his advocacy of the interests of the King had been prior to his appointment. His transmogrification was as passionate and as complete as that of Thomas Becket's transition from Henry II's Chancellor to the office of Archbishop of Canterbury, a matter with which I have already dealt.² As a regrettably anonymous pundit once put it: "Where you stand depends on where you sit".

Competition between the Court of Common Pleas and the Court of Kings Bench, was one of the mainsprings of the development of the common law. Coke accepted the unity of the common law in its tripartite institutional manifestation of Common Pleas, Kings Bench and Exchequer. So far as I am aware, Coke did not campaign to reverse the substantial incursions that the Kings Bench – theoretically limited to crime, pleas of the Crown and supervisory jurisdiction – had made into the traditional civil jurisdiction of Common Pleas.

Coke's targets were the specialist jurisdictions in the patchwork quilt of juridical institutions, all of which claimed to derive their authority from the sovereign. Coke subsequently listed about a hundred courts and tribunals in his *Institutes*. His confrontations extended to the Court of Requests, the Council of Wards and Liveries, the Councils of Wales and of the North, and, particularly, to those infected with the European vice of civil law: the High Court of Admiralty, Chancery and the ecclesiastical courts, particularly the Court of High Commission.

In this era there was no integrated judicial system in England. A system would only emerge, and did emerge, by the assertion on the part of the common law courts of a supervisory jurisdiction over other courts. No one did more to advance that jurisdiction, of which we remain the beneficiaries today, than Sir Edward Coke.

He built on a significant body of precedent, where Common Pleas had protected or sought to aggrandize its caseload by issuing writs of prohibition, praemunire and habeas corpus to other courts. However, Coke pursued this course to an unprecedented extent and with stentorian vigour. This conduct brought him into repeated conflict with the expansive view of the prerogative under which the rival institutions

operated. It is not without irony that the tools of the common law courts thus deployed came to be known as the prerogative writs.

His motives were mixed. In Isaiah Berlin's dichotomy, he was a hedgehog not a fox, with his one big idea being the ancient origins of the common law – a fable to which I will return in the next lecture. There is no doubt he genuinely believed in the conviction of the common law profession, led by the judges, of the continuity and centrality of the common law. Indeed, he did more than anyone else to perpetuate that intellectual tradition.

Further, like any new leader of an organization, his capacity for leadership and his own power in the community depended on acceptance of an institutional imperative to protect and expand his organisation's dominion. It was more than simply convenient that aggressively pursuing these institutional interests also served his financial interests and that of the judges of his Court and of the profession that practiced before them. The judges kept the fees of providing "justice" which, at the time, was an exceptionally lucrative service industry.

Adam Smith himself, in *The Wealth of Nations* explained how competition between the common law courts, driven by financial

incentives, was the principal explanation of the high quality of the common law system. Others have shown how this competition operated by developing practices and substantive principles in such a way as to favour plaintiffs, who decided which court would hear the case.³

Throughout their careers, each of Ellesmere, Bacon and Coke, were careful to develop their wealth, Bacon least successfully. Perhaps for that reason, he alone articulated the limits of this pursuit. He explained, in his essay “Of Riches”:

“As the baggage is to an army, so is riches to virtue. It cannot be spared or left behind, but it hinders the march and the care of it sometimes loses or disturbs the victory. Of great riches there is no real use, except it be in the distribution, the rest is but conceit”.⁴

Admiralty

Immediately after his appointment, Coke launched an assault on the commercial jurisdiction long exercised by the Court of Admiralty. With its speedy and economical procedure, Admiralty had attracted a

significant proportion of such litigation, even beyond its special expertise in international trade and commerce.

In 1575, the common law judges and Admiralty had negotiated a truce – each acknowledging the jurisdiction of the other and limiting the scope for conflict. Coke repudiated this agreement.⁵ The number of prohibitions issued by Common Pleas to prevent proceedings in Admiralty expanded dramatically. The Spanish ambassador was moved to complain about the effect of such prohibitions on increasing delays in resolving international trade disputes.⁶

The Lord Admiral submitted formal grievances to the King in 1611, notably about the use of fictions by Coke to pretend overseas contracts had been made in England.⁷ For example, holding that the “Marseilles” in one agreement, was obviously a town to be found somewhere in Kent.

Statutes creating the Admiralty jurisdiction contained restrictions which Crown patents, issued to the Admiral, purported to override. Coke adopted a narrow construction of the statutes to disallow this exercise of the prerogative.⁸ Later observers noted that in this field Coke had no compunction about distorting the reasoning in case law, which he cited as authority.⁹

A landmark case was *Thomlinson*.¹⁰ Common Pleas issued a writ of habeas corpus, for the release of a litigant before it, who had been locked up by Admiralty, in a counter suit in the same matter. He had refused to answer, on oath, interrogatories issued in accordance with civil law practice. The Common Pleas judgment declared that Admiralty only had jurisdiction for matters done “upon the seas”. Refusing to swear an oath in London was not done there. In any event, Admiralty was not a court of record and had no jurisdiction to fine or arrest anyone. This was a common theme of writs issued by Common Pleas to other rival courts.

Coke prepared *Thomlinson* for publication in Volume 7 of *The Reports*, his first volume after becoming a judge. King James, not for the last time, prohibited publication. The report did not appear until 1656 in the posthumous Volume 12. Ellesmere prepared a tract attacking the intervention of the common law courts. He was especially scathing about the use of transparently fake fictions.¹¹ This conflict between Coke and the powerful Lord Chancellor was a harbinger of future events.

Council of Wales

Another of Coke's targets was the Council of Wales which administered the province. In its judicial role, it operated outside common law rules. Early in James' reign the Kings Bench had rejected the Crown's submission that the jurisdiction of the Council covered the four English counties on the border of the Marcher lands. Later, in the exercise of his prerogative, James purported to reinstate the Council's jurisdiction over those counties.

James summoned the judges to determine the legality of this extension. Francis Bacon, as Solicitor-General, appeared to argue the case for the Crown. He chose a narrow point of statutory interpretation as his focus, namely, the meaning of the word "Marches" in the statute. Despite the fact that the King had a personal interest – he was attempting to increase the wealth available to his son, about to be appointed the Prince of Wales– the judges rejected the Crown case.

There was considerable tension during the course of this hearing, particularly when James criticised the judges for the frequency of their issue of prohibitions against the Council of Wales and attacked their intransigence. Although James announced that he accepted the ruling,

this, like other similar rulings I will discuss below, was ignored in practice.¹² The Courts in Westminster were like the Emperor in the ancient Chinese proverb: “The mountains are high and the Emperor is far away”.

The High Commission

Richard Bancroft, who became Archbishop of Canterbury in 1605, had served his predecessor as the ruthless, indeed ferocious, scourge of non-conformists in the Church. Collectively, Puritans constituted a threat to the unity, and therefore to the institutional strength, of the Church. James made it quite clear at the Hampton Court Conference of 1604 that non-conformity had no place in his new kingdom.

Bancroft was determined to ensure conformity by whatever means necessary. He gave detailed written instructions to the men who translated what became the King James Bible – the most influential book in English history. He instructed them that in certain critical respects they must reject the translation of William Tyndale, which was otherwise the basis of their work. The word “*ecclesia*” must not be translated as “congregation”, but as “church”. The word “*presbyteros*” must not be

translated as “elder” but as “priest”. As Adam Nicholson notes: “the entire meaning of the Reformation hinges on these differences”.¹³

Bancroft drove the promulgation of a new set of Canons, which constituted a complete statement of the theological uniformity now required of the clergy. He proceeded to conduct a nationwide investigation, in effect an Anglican Inquisition, to ensure that clergy with non-conformist views either agreed to comply or were removed from their benefices.

The Court of High Commission - the judicial role of which rose to prominence in the 1580s and 1590s, with Bancroft as the key organiser on behalf of his predecessor as Archbishop.¹⁴ It was the centralised mechanism to achieve uniformity, even at the expense of the jurisdiction of traditional ecclesiastical courts, including the courts of the bishops, which enthusiasts like Bancroft believed to be unable to ensure conformity because they could not fine or imprison. The sanctions of penance and of excommunication were too weak.

The Court of High Commission is accurately described by one historian as "the spiritual counterpart to the Court of Star Chamber".¹⁵ It is no coincidence that in 1641, amongst the early reforms of the Long

Parliament, the Star Chamber and the High Commission were abolished on the same day.

The procedures of the High Commission included the infamous oath *ex officio*, a form of self incrimination frequently deployed to trap Puritans into committing perjury, for which they would subsequently be imprisoned. This was standard procedure in the investigatory approach of jurisdictions derived from Roman law. However, in England, both Chancery and the Star Chamber administered this oath only *after* setting out charges. The High Commission required the oath - swearing that the deponent had committed no transgression - before s/he knew what was being investigated. If, in the subsequent proceedings, an error was revealed, s/he was charged with perjury. This oath was an abomination to common lawyers, who already had a strong commitment to what we would now call the right to silence.¹⁶

At one stage the House of Commons sought an advisory opinion from Chief Justice Popham of the Kings Bench and Chief Justice Coke of Common Pleas. In accordance with the views of the common law bar and bench, they affirmed that no one – lay or clerical – could be asked to swear generally, unless s/he knows the charge and no layman could be examined *ex officio*, except in matrimonial and testamentary cases.¹⁷

Matrimonial and testamentary cases were within the jurisdiction of the traditional ecclesiastical courts, not the High Commission.

Coke and Popham quoted, approvingly, a civil lawyer who denounced the oath as “the invention of the Devil to destroy miserable souls in hell”.

Even more pointedly, in a critique of the Church’s attempt to ensure theological conformity, the two Chief Justices proclaimed: “No man ecclesiastical or temporal shall be examined upon secret thoughts of his heart; or of his secret opinion. But something ought to be objected against him what he hath spoken or done”.¹⁸

In 1605 Bancroft had put before the Privy Council a comprehensive set of twenty five objections to the manner in which the common law courts issued prohibitions against ecclesiastical courts. Entitled *Articles of Abuses*, which Coke, with his customary studied archaism and a touch of derision, would later call *Articuli Cleri*, after a statute of 1300. The document revealed the extraordinary frequency of intervention by common law judges into the most minute details of the exercise of jurisdiction by ecclesiastical courts. The Judges responded in writing to each of the complaints, rejecting any suggestion that they would discontinue their practice.

This was a conflict of fundamental principle. The writs of prohibition customarily began by reciting that the proceedings in the High Commission constituted a breach of the due process rights guaranteed by Magna Carta, already regarded as one of the pillars of the English legal system, a status Coke would do much to reinforce.¹⁹

After Coke's appointment the attack on the High Commission escalated. The historian of the reconstruction of the English church during this era, who cast Bancroft as hero, asserted:

"...[T]he flood of prohibitions which were issued in 1607 and 1608 by the courts of common law ... threatened to wreck the administration of the Church and to crush its new institutional life ... Without the power to fine and imprison, without the right to summon men to London from all dioceses, without the authority to try all subjects of ecclesiastical cognizance, the High Commission would be a broken reed, utterly unfit for most uses to which it had been put. Without it, the administration of the Church would again sink into the lethargy in which Bancroft found it".²⁰

Fuller's Case

Nicholas Fuller, a barrister of Grays Inn – which he would ultimately lead as Treasurer – and a parliamentarian during the reign of James I, was described by an American historian as a "forgotten exponent of English liberty". That was a century ago. We need reminding again.²¹

Fuller combined within himself the three elements that would prove critical in the English Civil War later that century: a belief in the central role of Parliament, a commitment to the common law as the source of the legitimacy of national institutions and a supporter of Puritan dissent from the doctrines and practices of the established Church of England. Fuller was engaged, as either a parliamentarian or barrister - frequently as both - in opposition to the full range of the Crown's agenda under James I.

This radical barrister was one of the first men in English history to devote himself to opposing, on a recognisable constitutional basis, the claims of the executive branch of government. There was virtually nothing that James I wanted that Fuller did not oppose. It is understandable that James and Cecil called him a "graceless rogue".²² Lord Chancellor Ellesmere agreed: "Fuller", he said "of all lawyers the worse".²³

Nicholas Fuller had two clients who had refused to take the *ex officio* oath. On their behalf he invoked the supervisory jurisdiction of the Kings Bench by writ of habeas corpus. He embellished his submissions, which were reasonably based, with an attack on the Court as representing the Antichrist and as "popish" - which at that time was basically an allegation of high treason. He attacked the oath as a "perversion of souls" and asserted it was being used to suppress the true religion. He accused the High Commissioners of embezzling the fines they collected. He also asserted that the High Commission was in the process of usurping the jurisdiction of all other courts.

Fuller was imprisoned by the High Commission for slander of the Court and for "malicious impeachment of his Majesty's authority in Causes Ecclesiastical". Fuller now invoked the supervisory jurisdiction of the common law courts on his own behalf. The reasoning, in what became known as *Fuller's Case*, rejected the jurisdictional base for which the Church contended.²⁴

The case was referred to a joint session of all 12 common law judges from the three common law courts – Common Pleas, Kings Bench and the Exchequer. The judges accepted that the High Commission had

authority to determine matters of heresy, schism and erroneous opinions in matters religious. Subsequently, the High Commission could, and did, proceed against Fuller on this narrow basis. The King attributed the compromise, with thanks, to Coke.

However, the judges did not accept that the ecclesiastical courts had any jurisdiction to determine allegations of contempt, even of themselves.

This was a matter in the exclusive jurisdiction of the common law courts.

The critical step in the reasoning of the judges in *Fuller's Case* was that the source of jurisdiction of the High Commission was to be found, and found only, in the Elizabethan *Act of Supremacy* as passed by Parliament, together with the Letters Patent authorised by that Act. This was contrary to the reasoning of the Kings Bench in *Cawdrey's case*, a 1594 judgment which Coke had reported in 1605 in Volume 5 of *The Reports*. In that case, a Puritan cleric deprived of his benefice by the High Commission, also represented by Nicholas Fuller, sued in Kings Bench for trespass. The Court had then rejected the proposition that the *Act of Supremacy* was the sole source of the King's authority in matters religious.²⁵

In *Fuller's case* the judges found that there was no separate, let alone overriding, element of the prerogative involved. It was a matter

exclusively for the common law courts to interpret these instruments and, accordingly, to determine the jurisdiction permitted by Parliament and by the subordinate legislation in the Letters Patent, which was authorised by the Act, not by the prerogative. The judgment affirmed the uncompromising position that common law judges had taken to the threat posed by the ambitions of the Church of England for institutional independence from the supervisory jurisdiction of the common law courts and of Parliament.

Confrontation

In 1608 Bancroft brought the conflict between the High Commission and the courts to a head by asking James to authoritatively resolve the jurisdictional dispute. The Privy Council convened in November at Whitehall Palace, as usual on a Sunday morning, the week after the conference on the Council of Wales I have mentioned above. All the common law judges and ecclesiastical commissioners were in attendance to argue their respective cases for James' decision.

Bancroft spoke of the King in Convocation operating in parallel with the King in Parliament. Ecclesiastical courts and common law courts were both, he said, manifestations of the royal prerogative. "The authority of

spiritual courts and temporal courts of law flowing equally from the Crown” Bancroft added, “and it being of so great importance to the good of the community that each be kept within its proper bounds, it seems no means agreeable to that equality of origin and descent ... that the one should be set as a judge over the other and prescribe bounds to it and take to itself the cognizance of whatever matters itself shall please”.²⁶

Bancroft said that any dispute as to the boundary between the respective jurisdictional claims of the Church Courts and of the common law courts could be decided personally by the King. This argument was calculated to appeal to James’ philosophy of government, as expressed in his writings when he was the King of Scotland. He thought judges, both spiritual and temporal, were his delegates. This approach was an anathema to Parliamentarians and to common lawyers.

The heated confrontation between the clergy and the judges proceeded over two Sundays in November 1608. There are a number of contemporary accounts of the events and a later account by Coke which, despite its grandiloquent title – *Prohibitions del Roy* – is probably the least reliable.

During his lifetime Coke was never permitted to publish this or other reports on the issue of prohibitions. Just before he died, all of his papers were confiscated by order of Charles I. Later, his papers – or what was left - were returned to his family. Many cases were eventually published – just before the restoration of the Stuarts - in the Twelfth and Thirteenth Volumes of *The Reports* in 1656 and 1659, respectively. However, Coke had ample opportunity to fine tune his version of events in the last decades of his life.

In his version of the November 1608 consultation, Coke asserted that the common law courts, and they alone, were entitled to interpret statutes, including the *Act of Supremacy* under which, he contended, jurisdiction was conferred on the High Commission. This was a position he had long held. In the Fourth Volume of *The Reports*, published in 1605, he said precisely that with respect to the writ of praemunire, which operated against ecclesiastical courts in the same way as a prohibition.²⁷

The contrary contention of the Church was that the *Act of Supremacy* was merely declaratory of the Crown's responsibility for religion. The express declaration in the *Act of Supremacy*, the Church argued, was only required at the time to confirm the removal of the claim of the Church of Rome to intervene in English religious affairs.

During the debate a representative of the clergy, probably Bancroft himself, interjected in a manner clearly directed at engaging James' own prejudices. The King was entitled himself to sit as a judge and to determine any matter. In reply, Coke asserted that only judges could determine the law and decide legal cases. This had long been the position of common lawyers. A 15th century Chief Justice, Fortescue, had asserted that it was not "customary for the Kings of England to sit in court or pronounce judgment themselves".

Coke would have been well aware that only a few months before, Lord Chancellor Ellesmere in his scholarly and polished reasoning in *Calvin's* case (discussed in the last lecture), had stated that, because that case was so clear, it could be decided by judges. It was, therefore, not necessary for it to be resolved by that ultimate authority, "the most religious, learned and judicious King that ever this Kingdom or Island had."²⁸

Elizabeth had never sat as a judge, not even in Star Chamber. She, like James, had no doubt of the divine origin of her sovereignty, which extended over all the nation's institutions: executive, legislative, judicial and religious. However, Elizabeth exercised her powers pragmatically. She did not need to sit in judgment when she had confidence in what Her

courts would decide. In contrast, the intellectual in James loved disputation about concepts and categories. Where Elizabeth shrouded her power in mystery, James sought out opportunities to publicly display his learning and, never appreciating the political importance of circumspection, rejected ambiguity and any disconnect between theory and practice.

At the conference of November 1608, James dismissed, scornfully, Coke's proposition that only the judges could interpret statutes. He asserted that he had the same capacity to reason as any judge. On Coke's version of the sequence of events, he told the King that the law involved "artificial reason and judgment ... which requires long study and experience". Furthermore, it was the law that protected the King.

According to Coke, at this stage James "was quite greatly offended" and said that it was treason to suggest that in some manner he was "under the law". The King protected the law, the law did not protect the King.

Coke, in his version, heroically, replied that although the King is not under men, he is under God and the law. None of the other three versions suggest any such heroism. They state that James was not merely "offended", he exploded in anger and physically threatened Coke, who begged forgiveness, on one version, by throwing himself on the ground in

subjection. I will return in the next lecture to the numerous occasions on which Coke in his *Reports* was found to have distorted cases or just made things up.

Coke's position was not an assertion of independence. A judge subject to dismissal at pleasure could hardly claim that. It was, however, an assertion of institutional autonomy. In all practical respects he was correct. His position had long been the practice. James did nothing to enforce his will on this, or any similar occasion. His conduct, as distinct from his rhetoric, accepted that the common law of England was a complex amalgam of custom, case law and statute which, as Coke argued, had long lost its origins as a manifestation of the will of a medieval monarch.

The consultation of November 1608 did not resolve the dispute. Indeed, the very next morning, Coke issued a further prohibition against an ecclesiastical court. He seemed to proceed on the basis that James' hostility was more concerned with form than substance.

A further conference six months later, and a detailed statement of his position by Coke, only emphasised the extent of the conflict. Coke reasserted that the Statute did not authorise Letters Patent which

permitted the Commission to fine and imprison, notwithstanding the fact that, as Attorney General, he had drafted three Letters Patent which included such powers.²⁹ Coke accepted only two precedents for a power to fine or imprison – heresy - and a case which Lord Ellesmere sardonically described as “a pretty case” - when a fine was imposed on a clergyman for incontinence.³⁰

James, in exasperation at being unable to resolve the dispute by compromise, assured the judges he would maintain the common law, but asked them to adopt “a moderate course” in the interests of the people rather than in their own interests.³¹ The flow of prohibitions continued.³²

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The attempts to resolve jurisdictional conflicts between the common law courts and other judicial institutions, like the Court of Admiralty, the Councils of Wales and of the North and the High Commission, were part of a broadly based process under James to modernise, or at least rationalise, the institutions of government which many historians, operating with the benefit of hindsight of the Revolution, and legal historians who reflect the views only of the common lawyers, often ignore.

The confrontations between James and Coke are interpreted, particularly by legal scholars, in the light of subsequent developments, especially the excesses of Charles I and the events leading to the English Revolution. James was not Charles and, although he held similar general views, he did not act upon them in the same way as his son. A claim for divine right, which James frequently invoked, does not necessarily lead to royal absolutism. James acted as a mediator rather than as an arbitrator in most of these disputes. That is why they were not definitively determined.

However, James was right to believe that Coke's approach was fundamentally inconsistent with his own. His view that law was constituted by commands from the King or his delegates cannot stand with the common law perspective, which Coke reflected and articulated more forcefully than anyone: that law was a gradual accretion over time by the application of the reasoning skills of the professional judiciary as accepted by the broader profession.

The choice between majesty and history as the ultimate source of law remained unresolved. Substituting parliamentary sovereignty for the former, to some degree it still is.

Impositions

One of Coke's last acts as Attorney-General was to launch a prosecution of a London merchant, John Bate, for his refusal to pay import duties, referred to at the time as "impositions". Such long-standing levies imposed on numerous imported goods - in *Bate's Case*, currants from Venice - had been a subject of controversy between merchants and the Crown for decades.³³ John Bates brought the matter to a head on the legal basis that the particular levy which he had refused to pay was not authorised by Parliament. He paid levies of tonnage and poundage, which had been so authorised. The legal status of the application of the prerogative to raise revenue in this way was a threat to the authority of Parliament. Nicholas Fuller was one of the principal supporters of Bate in the House of Commons.

In *Bate's Case* the Barons of the Exchequer delivered a judgment that resolved the legal doubts by affirming the breadth of the prerogative. Chief Baron Fleming proclaimed that the Crown had an "absolute power" to act "according to the wisdom of the King on matters of public interest".³⁴

As controversy grew amongst London merchants and Parliamentarians about the judgment, the other common law judges were brought in to bolster the Crown case. In notes of a conference, in effect an advisory opinion, Coke set out the views reached by himself and Popham, Chief Justice of the King's Bench:

"The King cannot at his pleasure put any imposition on any merchandise to be imported into this kingdom, or exported, unless it be for advancement of trade and traffic, which is the life of any island".

Although confirming a broad discretion, sufficient to support the particular case, the opinion says nothing fulsome about the absolute nature of the prerogative. Further, there are references to the significance of Parliamentary sanction for taxation. This opinion, if fully accurate, for we only have Coke's version, was an early example of Coke refusing to accept the full scope of the prerogative for which James and his advisers contended.

The opinion was suppressed and only published in 1656 in the 12th volume of *The Reports*. Later, in *The Second Part of the Institutes*,

published in 1641, Coke referred to the judgment in *Bate's Case* and asserted:

"The common opinion was that that judgment was against the law and diverse express acts of Parliament."³⁵

As Maitland has put it:

"It is difficult to understand the judgment as an exposition of law; rather, I think, we must say that the King succeeded in obtaining from the Barons of the Exchequer a declaration that there is a large sphere within which there is no law except the King's will."³⁶

In 1637, this approach was controversially repeated in *Hamden's Case* on ship money. One of the earliest Acts of the Long Parliament was to overturn this line of authority by statute.

Recent scholarship has established that the judgment in *Bate's Case* was fundamentally corrupt. As with many government taxes, the levy on currants had been farmed out. In exchange for a guaranteed annual sum

payable to the King, persons were entitled to collect the revenue and bear the risks and costs of collection.

Robert Cecil, now Earl of Salisbury and, as Secretary of State, James' most senior adviser, had a covert interest in the farm over currants. He intervened with Lord Treasurer Dorset - who, formally, was entitled to sit as a judge in Exchequer - to ensure a verdict in the King's, and therefore his own, favour.³⁷ As one historian put it:

“What followed was a three way correspondence between Dorset, Cecil and the Exchequer Bench, designed to determine both what, or how much, the judges should say in explaining the decision, and when they should”.³⁸

James and Cecil responded to *Bate's Case* in triumph. The King issued a general order entitled *The Levy of Impositions*, formally addressed to Cecil, imposing new levies on a wide range of imports and exports, but exempting food. A bit like our GST. Revenue increased to £70,000 p.a.³⁹ It had been £13,000 p.a. when James acceded to the throne.

This order made it clear that the levy could be imposed on goods, even if owned by an Englishman. Many merchants and Parliamentarians regarded this tax as undermining the right to security of property, as protected by the common law and by the Magna Carta. Such a right, they asserted, could only be taken away by Parliament. This issue would not go away.

Elizabeth, save in war time, had consistently run surpluses. James ran a spendthrift and, even by the standards of the time, a corrupt government.

On one estimate annual expenditure more than doubled between 1603 and 1610 – from £218,000 to £510,000.⁴⁰ The flow to his Scottish mendicants - at an average of £30,000 p.a.⁴¹ - was particularly resented.

By 1610 the fiscal crisis was acute. Even the new impositions, other revenue measures and sale of assets, did not bring in enough. James was forced to recall Parliament to grant him what was then called a “subsidy”.

The Parliament of 1610

James would have a hard time getting funds from Parliament. As one member of the Commons put it: “The royal cistern had a leak which, till

it were stopped, all our consultations to bring money unto it was of little use”.⁴² Some members launched a proxy attack on the pretensions of the Crown.

John Cowell was the Regius Professor of Civil Law and Master of Trinity Hall at Cambridge. He published the first English legal dictionary, entitled *The Interpreter*. Cowell was close to Archbishop Bancroft. *The Interpreter* was dedicated to him. Cowell helped draft Bancroft's 1605 List of Abuses, allegedly committed by common law courts against the High Commission and was appointed by him to serve on the Commission.⁴³

It was bad enough, as far as common lawyers were concerned, that *The Interpreter* made fun of *Littleton on Tenures*, the work later to be extolled by Coke as “the most perfect and absolute work”. More significantly, Cowell’s dictionary was a statement of support for royal absolutism.

What attracted the wrath of Parliamentarians and common lawyers, were the definitions touching on the Royal prerogative. Cowell stated, as part of the definition of “King”, that “he is above the law by his absolute power”. The King, he added, was entitled to make laws and levy taxes without Parliament, and could act “non obstante”, namely, contrary to

any statute. Finally, part of Cowell's definition of "prerogative" stated that the King's powers were "above the ordinary course of the common-law". When, a century and a half later, Blackstone stole this definition, he replaced the word "above" with "out of".⁴⁴

In February 1610 Cecil addressed the new Parliament, making it clear that, as usual, it had been recalled by the King for the primary purpose of raising additional revenue. He outlined the parlous state of the national accounts. He proposed a Great Contract by which the King would surrender certain traditional rights in exchange for a guaranteed annual appropriation.

A week later the House of Commons appointed a committee to investigate Cowell. Archbishop Bancroft had to defend him in the House of Lords. It appears that at a dinner James had been understood to say something positive about the Cowell book. The attack on Cowell was, indirectly, a critique of James. Cecil's objective was threatened by this political side wind. James was forced to compromise.

On 8 March Cecil informed Parliament that the King repudiated Professor Cowell's book. This very useful book was suppressed, although Coke kept his copy.⁴⁵ Cecil announced that the King rejected

several specific propositions advanced by Cowell. James accepted that he was King of England by the common law of the land and that “he had no power to make laws or to exact subsidies”, without the consent of Parliament. Cecil made no reference to impositions. Nor was there any reference to the ability of the King to introduce new legal rules by proclamation. Nevertheless, this was a significant statement of the constraints which James accepted.

On 21 March, in a major address to Parliament, James sought to further allay the fears. He emphasised that what Cecil had said had been at this specific direction. He reiterated his rejection of Cowell's book. He acknowledged that his comments at dinner may have been the source of the rumour that James himself preferred the civil law to the common law. He reiterated that he accepted that his government would act in accordance with the traditional institutional arrangements of England and that he had no intention to assert an absolute power. He accepted that the original right of a King to make laws had been modified by the evolution of practice in England - what we would call constitutional conventions. He further accepted the centrality of the common law, whilst mentioning, correctly, that civil law did apply in some jurisdictions in England.

James had been briefed on the “grievances” which the Commons had

under consideration. In his address, he emphasised that anything he had done in accordance with the law could not be a grievance. This was probably a reference to *Bate's Case*.

Wearily, he indicated he had had to spend three full days dealing with the issue of prohibitions to the Council of Wales and the High Commission. He accepted that all judicial jurisdictions should stay within their proper borders, but he had been most concerned by the explosion in the number of prohibitions granted by the common law courts. He thought the supervisory jurisdiction should principally be the responsibility of Chancery, and to a smaller extent Kings Bench. He doubted whether Common Pleas – Coke's court - had any such jurisdiction.

In a telling remark, James said: "every court striving to bring in most moulture in their own mill, by multitude of causes, which is a disease very natural to all courts and jurisdictions in the world". The judges were very wealthy men. Every case that went to another court reduced their income. James emphasised that his purpose was to reduce the extraordinarily high level of wasteful turf warfare and reminded Parliament that he had concluded the November 1608 consultation by calling for restraint on both sides.

James' speech appears to me to be balanced and reasonable. That did not long remain the position. Negotiations for the Great Contract dragged on and new grievances emerged.

James returned to address the Parliament again on 21 May. This time in anger. Setting aside the conciliatory rhetoric of his previous speech, he belaboured the divine origin of his powers and rebuffed those who wished to raise, what he described as, "matters impertinent". Foremost amongst these was the issue of impositions. He had acted in accordance with the law – determined in *Bate's Case* – and Parliament should not question the lawful exercise by him of his prerogative power.

As the Comte de Tillieres, the French Ambassador put it: “When James wanted to play the King he sounded like a despot and when he stooped to conquer, he was simply vulgar”.⁴⁶

Rhetoric aside, James always sought to govern in accordance with the law as it applied in England. He had to. His government had no national administrative structure. It depended on the aristocracy and the gentry to implement policy. James accepted that law and custom imposed restrictions on what he believed was his otherwise unfettered sovereignty. As a matter of self-restraint, in accordance with the established law and

practice of his second kingdom, which he had promised to uphold in his coronation oath, he was prepared not to exercise the powers he held by divine right. However, he would never accept a new restriction.

The second speech reflected his grudging acceptance of the restraints. As he later told the Spanish Ambassador about Parliament: “I am surprised that my ancestors should ever have permitted such an institution to come into existence. I am a stranger, and found it when I arrived so that I am obliged to put up with what I cannot get rid of”.⁴⁷

James had promised to uphold the “privileges” granted by his predecessors. He did not understand that what he regarded as “privileges”, others had come to regard as rights.

The reaction in the House of Commons to his second, tactless and provocative speech was very hostile. James, at first, refused to even permit the Commons to debate the issue of impositions, but changed his mind after the Commons sent him a written “Remonstrance” objecting to his interference with its traditional right of free debate.⁴⁸ On 27 June, Francis Bacon, as Solicitor General and James’ spokesman in the Commons, vociferously supported the King’s prerogative on impositions.⁴⁹ However, contrary to the ruling in *Bate’s case*, and

rejecting Francis Bacon's plea that the issue be confined to a Petition of Grievances without questioning their legality, the House resolved that impositions were illegal without Parliamentary consent.⁵⁰

Protracted negotiations on the Great Contract continued but proved fruitless. Sceptics, like Lord Ellesmere, who was concerned about the surrender of any element of the prerogative - including the traditional feudal dues - were not disappointed.⁵¹

Petition of Grievances, 1610

The agitation in the Commons left a detailed Petition of Grievances on the political agenda. When Francis Bacon presented the Petition to James, he did so with a plea for mercy. "Excellent Sovereign, let not the sound of grievances, though it be sad, seem harsh to your princely ears."⁵²

The first stated Grievance was the impositions. The Commons asked that they all be removed and a law enacted that no such taxes could be imposed in the future without the approval of Parliament.

Secondly, the High Commission, the power of which to fine and imprison was not authorised by the *Act of Supremacy*, was "a great wrong to the

subject". Furthermore, there was a long list of practices, including the *ex officio* oath, by which the procedures and outcomes of the High Commission were inconsistent with common law practice, which the Commons assumed set the standard for judicial conduct.

The third Grievance set out a long catalogue of Proclamations which had altered the law without Parliamentary sanction, a practice the Commons said, which, had become frequent in the last few years. The Commons requested that no legal sanction should be imposed, except in accordance with common law or statute passed by Parliament.

Fourthly, the Petition emphasised the significance of the supervisory jurisdiction of the common law courts when issuing prohibitions against other courts and tribunals, such as the High Commission, the Councils of Wales and the North, the Court of Admiralty and the courts of Equity. The Petition asked the King to ensure that his judges continued to exercise that jurisdiction.

Fifthly, the Petition proclaimed that the Council of Wales had no jurisdiction in the four adjacent counties.

The Petition concluded with a number of specific examples of the adverse effects of monopolies granted and impositions levied, without the approval of Parliament. The power to grant monopoly rights in exercise of the prerogative had long been contentious, not least as a source of revenue to the Crown. Coke's *Report of the Case of Monopolies (Darcy v Allen)* in which Coke, when Attorney-General, appeared for the playing card monopolist and Nicholas Fuller was the opposing barrister, is a case that is traditionally treated as the origin of the common law doctrine against restraint of trade. Later, Ellesmere exposed the report to be a fabrication. Modern scholars agree.⁵³

On every point of conflict, the House of Commons took the side of the common lawyers. Frustrated, James dissolved the Parliament.

In a written summary of the work of the Parliament, Lord Ellesmere dismissed these "supposed" grievances as an attempt to impeach the royal prerogative, rather than being an endeavour to remedy or reform matters affecting the Commonwealth.⁵⁴ He referred to the proceedings of the Commons as "irregular and insolent".⁵⁵

Ellesmere was committed to the balanced Tudor constitution in which the King's prerogative and sovereignty was preserved, the honour and

dignity of the Lords, including the bishops, was maintained and the liberties and privileges of the Commons continued. He accepted that if any of these three estates became too powerful, the polity would be corrupted: into a tyranny, if the monarchy became so, into an aristocracy, if the Lords, and into a democracy, if the Commons. He made it clear that recent events suggested that the third was the contemporary threat.⁵⁶ He would be proven right.

This Aristotlean perspective of political legitimacy as a balance amongst the one, the few and the many – King, Lords and Commons – was widely accepted at the time. Contentious issues arose in the course of achieving a balance at the apex – then referred to as the High Court of Parliament. How much the King was entitled to do alone was the central theme of the Petition of Grievances. This conflict of constitutional principle – determining the legitimate basis for the exercise of political authority – would take almost a century, a civil war and a foreign invasion, in 1688, to resolve.

Proclamations

The use of the Royal proclamation to create law without Parliamentary approval had long been controversial. Henry VIII enacted a Statute of

Proclamations in 1539⁵⁷ which gave full legal effect to such executive action. It was repealed immediately after Henry's death. However, Henry's successors did issue proclamations, including some imposing fines or imprisonment. Their use expanded considerably under James, as the Petition of Grievances complained.

The grievance from the Commons about proclamations in the 1610 Petition was taken up by the Privy Council, which summoned Coke to affirm the validity of the practice. According to his Report, in *The Case of Proclamations*, only two of the proclamations listed in the Petition were raised with him for advice. One was concerned with a proclamation restricting new buildings in and about London. The second involved the regulation of the trade of starch, essential to stiffen the newly fashionable ruffed collars.

It is surprising if these were the only matters on which he was asked to express a legal opinion. Again, the Report was published posthumously and he had ample opportunity to revise it before his death.

The explanation he gave in his Report was that those particular proclamations had been issued after his elevation to the bench. As Attorney General, he had probably drafted most of the earlier

proclamations about which the Commons had complained. Indeed, Francis Bacon, present as Solicitor General, even on Coke's version, said to him that Coke had himself been involved in Star Chamber cases leading to convictions, based on the very proclamation against building under review. Coke's puerile response referred to the absence of any references to the proclamation in the indictment.

Coke asked for time to confer with his fellow judges before rubber stamping the validity of proclamations. Ellesmere was clearly annoyed by his prevarication. He announced that every precedent started somewhere and it was up to the judges to "maintain the power and prerogative of the King and in cases in which there is no authority and precedent to leave it to the King to order in it, according to his wisdom and for the good of his subjects". Ellesmere added that, if the King could not act in this way "he would be no more than the Duke of Venice".⁵⁸

Everyone in the room knew that the elected Dogue of the Republic of Venice had limited powers. They would also have remembered that, in 1605, James had attended Shakespeare's *The Merchant of Venice*. The King was so impressed by the play that he ordered that it be performed again in front of a larger audience. The only other occasion on which James wanted to see a play twice was at Cambridge in 1615. It was a

play called *Ignoramus*, a satire on lawyers, including satirising Coke's physical appearance.

In the dramatic trial scene in *The Merchant of Venice*, the Duke was shown to be powerless to overrule the strict application of the common law, pursuant to which Antonio's pound of flesh would have to be delivered. The Duke was reduced to pleading with Shylock to show mercy. The position was saved only by Portia's strict application of the law. The play was understood to emphasise the significance of the King's discretion to intervene and overturn the rigidities of the common law, not least by the exercise of the equity jurisdiction in Chancery, of which Ellesmere was Lord Chancellor. To assert that the King was as powerless as the Duke of Venice was a confronting allegation.⁵⁹

According to his Report, Coke, indicated his own opinion that "The King by his proclamation cannot change any part of the common law, or statute law, or the customs of the realm... Also the king cannot create any offence by his prohibition or proclamation." After consultation with the Chief Baron and Chief Justice of Kings Bench, Coke recorded their joint opinion. "The King by his proclamation cannot create any offence ... The King has no prerogative, but that which the law of the land allows him. But the King for prevention of offences, may

by proclamation admonish his subjects that they keep the laws and do not offend them, upon punishment to be inflicted by the law".⁶⁰

Like many of his Reports, there is no other version of this opinion. No doubt something like this happened, but it is very doubtful that Coke was as blunt as he suggests. Coke's report bears on its face the mark of subsequent change. The final sentence states: "After this resolution, no proclamation imposing fine and imprisonment, was afterward made."

This is plainly wrong, as Holdsworth amongst others has shown.⁶¹

Like so many of his inconvenient judgements and opinions, the *Case of Proclamations* was not published until the 12th volume of *The Reports*. It is often treated as a great constitutional case, which it is, but only in the hindsight of the English Revolution.

Maitland stated the reality:

"[T]hough James had the opinion of his judges against him, still he went on issuing proclamations. It is difficult for us to realise the state of things – that of the government constantly doing what the judges consider

unlawful. The key is the Court of Star Chamber
– the very Council which has issued these
proclamations enforces them as a legal tribunal,
and as yet no one dares resist its judicial
power".⁶²

This did not change until the Star Chamber was abolished. Coke was proven right, but not because of his judgment.

High Commission: Reprise

Archbishop Bancroft died at the end of 1610. James, manifesting his pragmatism, chose as his successor a liberal-minded conforming Puritan, Bishop George Abbot, rather than Bancroft's High Church candidate, the uncompromising Bishop Lancelot Andrews.

In the early months of 1611 the conflict between Coke and the High Commission blew up again. Coke personally issued two prohibitions: one in the case of a fundamentalist Puritan who publicly challenged all the practices of the established church – bishops, surplices, candles, the Book of Common Prayer, the lot - and the other, was a layman accused of adultery and desertion. These two prohibitions, James said angrily, were

"extraordinary and showing more the perverseness of (Coke's) spirit than any other prohibitions".⁶³

At a meeting of the Privy Council, in the absence of the King, the new Archbishop of Canterbury launched an attack on the judges, which led Coke to proclaim: "I think this be the first time that ever any judge of the realm have been questioned for delivering their opinions in matter of law according to their consciences in public and solemn arguments".⁶⁴

Detailed legal arguments were put orally at the meeting and in subsequent documents. Ellesmere, who had, two years before, tried to negotiate a compromise between the clergy and the judges, intervened again. He had originally been concerned at the way in which the High Commission had invaded the jurisdiction of the traditional ecclesiastical courts. He was particularly concerned about the way in which common law courts asserted jurisdiction over tithes. Parishioners often combined in a form of class action, knowing that juries would be more sympathetic to their cause than ecclesiastical judges.

Ellesmere prepared a tract at this time. It made numerous criticisms of the common law courts on the issue of prohibitions to ecclesiastical courts and to the Court of Admiralty.⁶⁵ He set out a detailed legal critique

of the legal propositions for which Coke contended and also of a number of his judgments. He specifically rejected the argument that only courts of common law were entitled to interpret Acts of Parliament. Further, he asserted that some of the interpretations for which the judges contended were "forced ... injurious and absurd".⁶⁶

In his tract, Ellesmere's principal objective was to achieve a compromise and thus to ensure that the traditional institutions of England worked in some kind of harmony. As he concluded:

"It would be great quietness to the subjects and a good means to avoid much needless trouble and expense, if the jurisdiction of all courts were contained within some known, certain and reasonable bounds and limits".⁶⁷

This tract was to be a source for Ellesmere's later attack on Coke's judicial conduct, which would eventually remove him from office.

In subsequent meetings James, Ellesmere and Cecil all intervened, attempting to get the judges to compromise with the clergy, to no avail.

Eventually, James announced a compromise. He would issue new Letters

Patent reconstituting the High Commission which would address some of the concerns of the common lawyers. To some extent the new document did so. However his compromise resulted in a further stand-off.

James appointed a number of senior judges, including the three chief justices, as members of the reconstituted High Commission. It seems that there was nothing Coke and the other judges could do about this.

The members of the new Commission were called to an inaugural meeting at Lambeth Palace to take their oaths and to sit for the first time. It was a high-powered ceremonial occasion: an Archbishop, numerous Lords, bishops, judges and other members of the Commission in full regalia and ceremonial dress. There is, it appears, only one record of what transpired on that occasion. It was written by Coke.

According to him he had not been given a copy of the new Letters Patent and, therefore, did not know what was involved in sitting on the Commission. He could not, he proclaimed, take the oath unless he knew what was contained in the document and, on behalf of the Common Pleas judges, added threateningly: "[I]f the Commission be against the law they ought not to sit by virtue of it".⁶⁸

In a further act of defiance, as the Commissions charter was read on the order of the new Archbishop of Canterbury, all of the Common Pleas judges, led by Coke, refused to sit down. They stood throughout the ceremony. It is not clear what this symbolic act was meant to convey. I am unaware of any record which suggests that the common law judges ever participated in the High Commission, to which the King had appointed them in an apparent act of compromise. The institutions were not reconciled.

Kings Bench

In August 1613 Chief Justice Fleming who succeeded Popham at Kings Bench died. Francis Bacon, who had been complaining about his lack of promotion for some years, wrote immediately to the King. The obvious thing, he said, was to promote Attorney General Hobart to the vacant Chief Justice position and to promote Bacon himself from Solicitor General to Attorney General. However, there was an even more subtle strategem which may appeal to the King.

Under the heading "Reason for the Remove of Coke", he advanced the proposition that the best thing to do was to promote Coke to Kings Bench and to appoint the Attorney to the position of Chief Justice of Common

Pleas. The Kings Bench position was of higher status. Indeed, the occupant was referred to as the Chief Justice of England.

If anything, the supervisory jurisdiction of Kings Bench was more firmly established than that of Common Pleas. In 1605, when Attorney-General, Coke had argued that Kings Bench had such jurisdiction over all other courts, which were subordinate to it. Chief Justice Popham had agreed and enforced the writs of habeas corpus which had been ignored by the jail keeper of the Council of Wales, saying the contempt was “a derogation of the royal prerogative of the King”. Bacon would have remembered that, as the Solicitor General then, he had unsuccessfully supported the powers of the Council of Wales against both Coke and Ellesmere.⁶⁹

The principal difference was not, however, jurisdiction, it was money. The revenue was much higher in Common Pleas. Bacon made the objective of the strategy clear: "The removal of my Lord Coke to a place of less profit... will be thought abroad as a kind of discipline to him for opposing himself in the Kings causes, the example whereof will contain others in more awe".⁷⁰ The move Bacon asserted "will strengthen the King's causes greatly amongst the judges". Furthermore, both predecessors, Popham and Fleming, had served on the Privy Council.

The "promotion" would suggest to Coke that he may also be appointed a Privy Councillor and "thereupon turn obsequious".⁷¹

Bacon, arguing his own case, added that it was essential for the "orderly advancement" of persons occupying the Attorney and Solicitor roles to ensure that they were motivated to perform their duties as "the champions places for (the King's) rights and prerogatives".⁷² With some temerity, Bacon referred the King to the view that was "voiced abroad touching the supply of places", to the effect that they were able to be acquired for the payment of money, rather than on merit. Perhaps this was intended to remind the King of Bacon's disappointment after the lucrative Mastership of Wards had been denied to Bacon and given to a courtier, when Cecil had died the year before. That death had allowed Bacon to take his revenge about the way in which the hunchback Cecil had frustrated Bacon's preferment for decades, by the publication of a new edition of his Essays, which included the essay "On Deformity", with its scathing assessment of the character defects of the deformed.

Coke objected to the judicial reshuffle. James indicated that he wished to proceed and hinted that he may elevate Coke to the Privy Council, which he did a week after Coke's appointment. When Coke walked the short distance in Westminster Hall from the Court of Common Pleas to the

Court of Kings Bench, according to the only report, he wept, as did his colleagues of his former Court.

"This is all your doing" he complained to Bacon. The latter replied with sarcasm about Coke's judicial overreach in his previous role and the promotion involved in his new role, saying: "Your Lordship all this while have grown in breadth; you must need to now grow in height, or you will be a monster."⁷³

Finally, 20 years after Coke outmanoeuvred Bacon for the post, Bacon was appointed Attorney General.

Duelling

Bacon's first case as Attorney was a prosecution in Star Chamber over duels – the alternative dispute resolution mechanism of the day. It was also one of Coke's first appearances as Lord Chief Justice of England.

There had recently been a significant increase in the number of duels, including amongst very senior courtiers. James was determined to put a stop to it. In October 1613 James issued a proclamation which made duelling an offence. This is only one example of the falsity of Coke's

claim in his report of the *Case on the Proclamations* that none such had been issued after that Case.

Bacon, for the prosecution, made an elegant, comprehensive and acute submission to the Star Chamber.⁷⁴ Chaired by Ellesmere, many of the leading figures of English public life – Lords, Judges, Archbishop and Bishops - upheld the prosecution case. They held that matters of honour did not simply involve a dispute between consenting adults. Duels were against the public interest.

To ensure maximum publicity for the crackdown, the Star Chamber decreed that the two men convicted of the offence had to appear in Court to acknowledge their "high contempt and offence against God, his Majesty, and his laws and show themselves penitent for the same".⁷⁵ Secondly, the Star Chamber ordered their decision be published throughout the kingdom. Thirdly, expressing their approval for the judgement that Coke had delivered, they asked him to print the whole decision in his *Reports*.⁷⁶

The first two directions were carried out. However Coke never published the judgement. Bacon had to publish his own submission to the Court

himself. Petty, perhaps, but fraught with the tension which would not be suppressed for long.

* This is the third in a (much delayed) series of (eventually six) lectures. The first two are published: "Lions in conflict: Ellesmere, Bacon and Coke—the years of Elizabeth" (2007) 28 *Australian Bar Review* 254 and "Lions in conflict: Ellesmere, Bacon and Coke - treason and unity" (2008) 30 *Australian Bar Review* 144

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- ¹ Lord Macaulay *Critical and Historical Essays* London, Longmans, Green & Co, 1877 p 362
- ² See J J Spigelman *Beckett and Henry: the Beckett Lectures* St Thomas More Society, Sydney, 2004
- ³ See Daniel Klerman "Jurisdictional Competition and the Evolution of the Common law" (2007) 74 *U. Chicago L. Rev.* 1179
- ⁴ Brian Vickers (ed) *Francis Bacon: the Major Works* Oxford Uni. P, Oxford 2002 pp 409 - 410
- ⁵ See Reginald G. Marsden (ed) *Select Pleas in the Court of Admiralty* Volume 2 Selden Society, London, 1897, p xiv; William Holdsworth *A History of English Law* Vol 1 Methuen, London, 1938 pp 553 - 554; Vol V 1937 pp 140 - 164
- ⁶ Holdsworth above Vol 1 p 355 n
- ⁷ See Brian P. Levack *The Civil Lawyers in England* Oxford, Clarendon P. 1973 pp 77 - 79; Gary M. Anderson and Robert D. Tollison "Barristers and Barriers: Sir Edward Coke and the Regulation of Trade" (1993) 13 *Cato Journal* 49 pp 53 - 55
- ⁸ See C. W. O'Hare "Admiralty Jurisdiction" (1979) 6 *Monash Uni Law Rev* 91 @ 93 - 94
- ⁹ See Holdsworth above Vol 1 pp 553 - 554
- ¹⁰ 12 *The Reports* 104, reprinted in Steve Sheppard (ed) *Selected Writings Sir Edward Coke* Liberty Fund, Indianapolis, 2003 Vol 1 490.
- ¹¹ See Louis A Knafla *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* Cambridge Uni P., Cambridge 1977 pp 293 - 294
- ¹² See Coquillette *Francis Bacon* Stanford Uni P., Stanford, 1992 pp 149 - 154; see also Hart *The Rule of Law* above 39 - 42; F. W. Maitland *Constitutional History* Cambridge Uni. P., Cambridge, 1909 p 264; Christopher W. Brooks *Law Politics and Society in Early Modern England* Cambridge Uni. P., Cambridge, 2010 pp 126 - 128
- ¹³ Adam Nicholson *Power and Glory: Jacobean England and the Making of the King James Bible* Harper Perennial, London, 2003 p 75
- ¹⁴ Roland G. Usher *The Reconstruction of the English Church* London and New York, D. Appleton & Co, 1910 Vol 1 pp 166 ff
- ¹⁵ James S. Hart Jr *The Rule of Law; 1603 - 1660: Crowns, Courts and Judges* Pearson, Great Britain, 2003, p 35
- ¹⁶ The intense controversy about the *ex officio* oath from late Elizabethan times is summarised in Brooks above pp 101 - 111
- ¹⁷ 12 *The Reports* 26; Sheppard above Vol 1 pp 432 ff
- ¹⁸ *Ibid* p 433
- ¹⁹ Brooks above p 111
- ²⁰ Roland G. Usher *Reconstruction* above p 206
- ²¹ Roland G. Usher "Nicolas Fuller: A Forgotten Exponent of English Liberty" (1907) 12 *The American Historical Review* 743. See generally R L Greaves and R Zaller *Biographical Dictionary of English Radicals in the 17th Century*, Brill, 1985 pp 306-307.
- ²² Usher, *ibid* page 743.
- ²³ Wilfred R Prest *The Rise of the Barristers* Clarendon Press, Oxford, 1986 p 303
- ²⁴ On Fuller's Case see 12 *The Reports* 41; Roland G. Usher *Reconstruction* above pp 134 - 151; Usher "Nicholas Fuller" above p 745 f; Roland G. Usher *The Rise and Fall of the High Commission* (2nd Ed) Oxford Uni. P., Oxford, 1968 pp 170 ff; Charles H. Randall Jr, "Sir Edward Coke and the Privilege against Self-incrimination", 1956 8 *South Carolina Law Quarterly* 417 especially 442 ff
- ²⁵ See Usher *High Commission* above pp 136 - 140; Allen D. Boyer *Sir Edward Coke and the Elizabethan Age* Stanford Uni. P., Stanford, 2003 pp 169 - 171

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- ²⁶ Randall above p 441
- ²⁷ See *Sheppard* Vol 1 above p 447
- ²⁸ See Knafla above p 249. See also Spigelman above 30 *ABR* pp 166-167
- ²⁹ See Usher *Rise and Fall* above p 194
- ³⁰ Usher *Rise and Fall* above p 191
- ³¹ Usher *Reconstruction* above p 229
- ³² For Coke's version see *Prohibitions del Roy*; *Sheppard* Vol 1 above p 478 ; for a short summary see Hart *The Rule of Law* above at pp 26-27; for a detailed treatment see Roland G. Usher "James I and Sir Edward Coke" (1903) 18 *English Historical Review* 664
- ³³ See G. Y. G. Hall "Impositions and the Courts 1556-1606" (1953) 69 *LQR* 200
- ³⁴ J. B. Howell *State Trials* Longman et al, London, 1816 Vol 2 p 389
- ³⁵ *Second Part of The Institutes* at [63], reprinted in S Sheppard *The Selected Writings of Sir Edward Coke* Liberty Fund, Indianapolis, 2003 volume 2 p 886
- ³⁶ Maitland *Constitutional History* above pp 258-259
- ³⁷ See Pauline Croft "Fresh Light on Bate's Case" (1987) 30 *The Historical Journal* 523; Hart *The Rule of Law* above p 91
- ³⁸ See Hart *ibid* p 94
- ³⁹ See Carl Stephenson and Frederick George Marcham (eds) *Sources of English Constitutional History* Harper, New York, 1932 pp 424-5
- ⁴⁰ Samuel Gardiner *Parliamentary Debates in 1610* Camden Society, London, 1862 pp xii - xiii
- ⁴¹ *Ibid* p xiv
- ⁴² Alan G. R. Smith *the Reign of James VI and I* Macmillan, London, p 163
- ⁴³ On Cowell, see Levack *Civil Lawyers* above pp 221 and 100, 103 – 106; Charles Howard McIlwain *The Political Works of James I* Legal Classics, New York 1994 at p lxxxvii and p 310; J. P. Somerville *Politics and Ideology in England, 1603 – 1640* Longman, London p 121 ff; N. Burgess *The Politics of the Ancient Constitution - an Introduction to English Political Thought 1603 – 1642* Macmillan, London 1992 p 149 ff; Alan D. Boyer (ed) *Shaping the Common Law Essays by Thomas Gordon Barnes* Stanford Uni. P. Stanford, 2008 pp 96 ff
- ⁴⁴ See Holdsworth above Vol V p 22 n
- ⁴⁵ See references in D. Alan Orr *Treason and the State: Law, Politics and Ideology in the English Civil War* Cambridge Uni. P., Cambridge, 2002 p 30
- ⁴⁶ Thomas Gordon Barnes "James VI and I" in Allen D Boyer (ed) *Shaping the Common Law* above p 81
- ⁴⁷ D. M. Loades *Politics and the Nation 1450 – 1660* Fontana, London, 1974 p 331
- ⁴⁸ *State Trials* vol 2 above p 490 n
- ⁴⁹ See Lisa Jardine and Alan Stewart *Hostage to Fortune: The Troubled Life of Francis Bacon 1561 – 1626* Phoenix, London, 1998 pp 319 – 324
- ⁵⁰ See Alan Stewart *The Cradle King: A Life of James VI and I* Pimlico, London, 2003 pp 239 - 241
- ⁵¹ See Knafla above p 89
- ⁵² *State Trials* vol 2 above p 534
- ⁵³ Jacob I Corre "The Argument, Decision and Reports of *Darcy v Allen* (1996) 45 *Emory Law Journal* 1261
- ⁵⁴ Knafla above pp 258 - 259
- ⁵⁵ *Ibid* p 261
- ⁵⁶ *Ibid* p 254 and see pp 80 - 81
- ⁵⁷ See Stephenson and Marcham (eds) above @ 316 - 317
- ⁵⁸ *State Trials* above p 725; or *Sheppard* Vol 1 above p 480
- ⁵⁹ See Stephen A. Cohen "'The Quality of Mercy': Law Equity and Ideology in the Merchant of Venice" (1994) 27 *Mosaic Winnipeg* 35
- ⁶⁰ *State Trials* above p 725; *Sheppard* Vol 1 above and see now (1610) E.W.H.C.K.B.J. 22
- ⁶¹ William Holdsworth *A History of English Law* Vol VI p 31
- ⁶² Maitland *Constitutional History* above p 258
- ⁶³ Usher *High Commission* above p 210
- ⁶⁴ *Ibid* p 216
- ⁶⁵ Knafla above p 282 and cf p 143
- ⁶⁶ Knafla above p 140
- ⁶⁷ Knafla above p 294 and c/f pp 188 - 189

⁶⁸ Sheppard *Selected Writings* above Vol 3 p 1308; 12 *The Reports* 88

⁶⁹ Paul D. Halliday *Habeas Corpus: from England to Empire* Belknap Press, Cambridge Mass. , 2010 pp 11 – 14, p 338 n 3, and see pp 22 - 28

⁷⁰ *Ibid* p 340

⁷¹ Catherine Drinker Bowen *The Lion and the Throne: the Life and Times of Sir Edward Coke* Atlantic, Little Brown, Boston 1957 pp 338 – 339

⁷² Jardine and Stewart above p 339

⁷³ *Ibid* p 340

⁷⁴ See “The Charge Touching Duels” reprinted in Brian Vickers (ed) *Francis Bacon* above pp 304 and 680

⁷⁵ Coquillette above p 169

⁷⁶ *Ibid* p 170