INTRODUCTION

Throughout the Middle Ages, land was the central source of power in England. It was the basis for wealth, for authority, for jurisdiction, and for military strength. Despite ongoing arguments between historians about our construction of feudalism – the validity of the term, the breadth of its application, and the level of systematization it implies – the distribution and organization of land in England through the Middle Ages was in some way feudal. There is no doubt that what it meant to be feudal changed over the course of the Middle Ages, but to reduce the idea to its most basic level, land was held by tenants from lords and tenants returned service to their lords for that land. Lords retained certain rights over their tenants and their land, the most important of which applied at the death of their tenant, such as escheat for failure of heirs, and, for tenants who held in knight service, the wardship and marriage of minor heirs. The relationship between lord and tenant changed between the eleventh and fifteenth centuries, as did the kinds of service rendered, the kinds of jurisdiction exercised, and the ways in which military strength was exercised. However, the basic language of lordship and service remained intact.

Throughout this period, the king also remained the chief feudal lord of the kingdom. His power came both from his status as king and from his position as the most substantial landlord in the kingdom. He was the lord of the greatest lords, and also of the most lords. Besides the inherent power that kingship gave him, he also had the revenues of land that his lordship gave him, and the benefits of prerogative lordship that came from the combination of the two. Thus his rights to escheat and wardship were greater than those of any other lord, primer seisin was his alone, and he had procedural prerogatives in court which allowed him to further safeguard his rights. The origins and development of many of these rights are

unclear, but in the reign of Edward I or Edward II they were encapsulated in the text *Prerogativa Regis*. From this point on, the king's rights were integrated into the common law, part of the common knowledge of the legal profession, and subject to the same kinds of development and interpretation as the rest of the common law.

The first place we look for interpretation is the courtroom, and the year books are legal historians' most common route to the legal mind of the Middle Ages. However, the discussion in year book cases generally focuses on the needs of the case at hand, more or less, and is usually not concerned with explaining the broader background to the dispute, or with placing it in the context of the common law as a whole. The participants spoke ad hoc, and, as a result, the legal profession recognized that year book cases could be wrong; they were examples of argument, but not necessarily guides to practice. However, from the early fourteenth century, a system was developing in the Inns of Court which did allow lawyers to consider the law in a more focused and coherent way, as part of the structure of legal education. Within this structure, prominent lawyers gave lectures on statutes, known as "readings," twice a year, during which the common knowledge on a text could be rehearsed, examined, and argued.[1]

The earliest known reading on *Prerogativa Regis* comes from the 1440s or 1450s, before Henry VI's ejection from France. The rest of the readings fall between the 1470s and the 1550s, with most of them in the reigns of Henry VII and Henry VIII. This can hardly be accidental. Although historians argue about "the New Monarchy" and whether it is Yorkist, Lancastrian, or Tudor, there can be no doubt that English kingship underwent startling changes between the second reign of Edward IV and the death of Henry VIII. While ideas of kingship, the methods and efficiency of royal administration, and the structure of the royal court all changed dramatically, the king remained, in theory and in fact, the chief lord of England. Land continued to be the basis of wealth, authority, and military power, if no longer always of jurisdiction. The lords of the land, and their tenants, continued to hold in feudal tenure, owing service for land, and the king continued to claim escheats, wardships, and primer seisin on his lands, together with other rights of lordship. While the late-fifteenth and early sixteenth-century monarchs

[1] A description of the educational system follows, below.

sought new expressions of authority, they did not neglect the elaboration of their traditional rights, and the counterpoint between the two reflects the process of transition apparent in this period.[2] Feudal forms continued well into the early modern period, and they operated, not in hidden and archaic corners, but in the most essential base of sixteenth-century life: land. This book will consider, from one particular point of view, how this worked and, a little more generally, what it meant.

The point of view is that of the legal profession. The common lawyers were charged with operating this system and operating it in a way that would make sense in contemporary society. What that meant changed over time, and the readings make it clear that the logic of the prerogative in the early fifteenth century was no longer the logic of the prerogative in the mid-sixteenth century. The function of the lawyers was to respond to changes in law and society, while maintaining the coherence of the principles within the law. However, they could not do this job in isolation, but had to respond to changing statutory law, changing administrative practices, and political pressure. The story of *Prerogativa Regis* in the early Tudor period, then, shows contemporaries, professional lawyers, grappling with the development of feudalism in a period that historians no longer see as feudal, and is a reminder that the ideas and structures of medieval society underpinned Tudor England long after the realities of that society had changed.

An examination of our base text, *Prerogativa Regis*, seems in order before we proceed any further.[3] The first three chapters of the text deal with the custody of the land and heir of the king's tenants-in-chief. Chapter one of *Prerogativa Regis* gives the king custody of all the lands of which those who held of him in chief in knight service were seised on the day they died, with the right to hold such lands until the heir is of full age. The fees of the archbishop of Canterbury, the bishop of Durham between Tyne and Tees, and the counts and barons of the March are excepted from the operation

[2] It is not unusual to find historians arguing that feudalism was irrelevant by the sixteenth century. See, for example S. E. Thorne, ed., *Prerogativa Regis: Tertia Lectura Roberti Constable de Lyncolnis Inne Anno 11 H. 7* (New Haven: Yale University Press, 1949), ix; and A. R. Buck, "The Politics of Land Law in Tudor England 1529–40," *Journal of Legal History* 11 (1990): 200–17. There are some exceptions to this, for example, Steven G. Ellis, *Tudor Frontiers and Noble Power: The Making of the British State* (Oxford: Clarendon Press, 1995).

[3] *Statutes of the Realm*, 11 vols. (London, 1810–22), vol. 1, 226.

of the statute.[4] Chapter two allows the king the marriage of any heirs in his custody, for whatever reason. Chapter three gives him primer seisin of all land held by his tenant on the day of his death, and the profits of all that land until an inquisition is held and the heir sues livery, at his majority. Though there is much of interest in the readers' discussions of the later chapters, I have restricted this study to the first three chapters of the text, partly for reasons of space, but primarily because they comprise the foundation of the statute.[5]

Though dating from the late thirteenth or early fourteenth centuries, *Prerogativa Regis* was not one of the classic statutes, and in fact its status is something of a mystery. It is presented as a list of the king's rights, for there are no words of promulgation in it, ordaining or commanding that these rules be kept. This, together with its somewhat anecdotal later sections,[6] led Maitland to conclude that it is not in fact a statute, but a treatise written by a member of the legal profession.[7] However, the definition of statutes in the thirteenth and fourteenth centuries was far from sophisticated. In this period, statutes were a relatively novel means of achieving legal change. Plucknett, for example, has looked at the nature of legislation in the first half of the fourteenth century by focusing

[4] The statute gives no reason for the exclusion of the archbishop of Canterbury. The earls and barons of the March are excepted because the king's writ does not run in the Marches, thus it is effectively an independent jurisdiction. Durham is, of course, a palatine jurisdiction, and Constable concludes that the bishop was excepted from the royal prerogative by the normal course of the law, even without the statute. This being the case, he argues that the law also excepts the other counties palatine, Lancaster and Chester, even though they are not mentioned in the statute. Robert Constable, *Prerogativa Regis: Tertia Lectura Roberti Constable de Lyncolnis Inne Anno 11 H. 7*, ed. S. E. Thorne (New Haven: Yale University Press, 1949), 26–27.

[5] The statute goes on to deal with widows and heiresses, alienation of lands, churches to which the king has right of presentation, custody of the lands of idiots and lunatics, the right to wreck, whales and sturgeon, the escheats of lands of Normans and other foreigners, and the king's right to the chattels of felons and fugitives.

[6] The chapter on the escheat of the lands of Normans gives the example of the barony of Monmouth, while another chapter relates the experiences of Matilda, daughter of the duke of Hereford.

[7] F. W. Maitland, "The *Praerogativa Regis*," in *Collected Papers* (Cambridge: Cambridge University Press, 1911), vol. 2, 183–89. Plucknett suggests that it could be a memorandum of prerogatives followed in the chancery sent by Edward II to Chief Justice Brabazon in 1314 after the judge had admitted his ignorance on the topic. T. F. T. Plucknett, *A Concise History of the Common Law* (5th edn, Boston: Little, Brown & Co., 1956), 542, n.2.

on the process of creating a statute and incorporating it in the common law. He argues that, in the early years of the common law, legislation was hardly a distinct function of king or parliament, but simply one way, and often an easy and informal way, of changing the common law.[8] Thus in the reign of Edward I and for some time thereafter, statutes did not differ in their nature from other forms of legal instruction, such as the king's instructions to judges on eyre, and might simply be the king's expression of his role as lawmaker.

This raises the question of how some texts came to be accepted as statutes, while others were not. The most important enactments, such as Westminster I, are clearly statutes, but the status of many other texts produced by the legal profession of the first three Edwards is more questionable. Plucknett concludes that the only reasonable way to deal with the problem is to accept the description of contemporaries, especially lawyers and judges, since they were the most qualified to calibrate the value and validity of any particular text. He also argues that this evaluation would take place fairly quickly after the production of the text, since most statutes are framed to deal with issues of current concern, and thus are likely to be tested fairly quickly.[9]

Richardson and Sayles also examined the early statutes, but rather than evaluating their status through the operation of the legal system, they looked at the physical recording and transmission of the early statutes and particularly the statute roll. They conclude that the statute roll is not complete, and was never intended to be either complete or authoritative.[10] The impression of uncertainty is supported by Plucknett's assertion that "reference by the court to an official copy of a statute was decidedly unusual and . . . the court did not possess a copy of its own for ready reference."[11] On the other hand, the statutes did circulate in private collections compiled for the use of lawyers. The collections were the result of private enterprise and were in no way standardized. They might include a variety

[8] T. F. T. Plucknett, *Legislation of Edward I* (Oxford: Clarendon Press, 1949), 13–15.
[9] *Ibid*., 11.
[10] H. G. Richardson and G. O. Sayles, "The Early Statutes," *Law Quarterly Review* 50 (1934): 215. They point out that there continued to be omissions on the statute roll until the end of the reign of Edward III and beyond, but argue that the statute roll gradually acquired a peculiar authority.
[11] T. F. T. Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge: Cambridge University Press, 1922), 104.

of statutory texts, and *Prerogativa Regis*, for example, is found in only about 25 percent of the surviving manuscript statute books.[12] Besides statutes, these books also contain collections of writs and other legal texts. Richardson and Sayles point out that "at any time in the thirteenth century, all the works of reference the practical lawyer needed could be contained in one moderate-sized volume; and the state of the texts is explained if we recognize such a collection for what it is, . . . a *vade mecum* aiming at being inclusive, but with no high standard of accuracy and certainly making no contemporary claim to authority."[13]

Thus the early statutes were recorded either on an incomplete and semi-official statute roll or in the catch-all unofficial collections of working lawyers. The situation was hardly conducive to the formulation of a definitive collection of authoritative texts or indeed an authoritative version of any one text. However, despite the confusion of the sources, Richardson and Sayles make at least a tentative attempt to define a statute. They conclude that there are three tests for a statute: whether the legislation arises from a petition of the *commune*; whether it will apply generally; and whether it is intended to be permanent. If the text misses any of these points, they conclude, it should not, strictly speaking, be considered a statute.[14] Though these criteria are simple, coherent, and practical, the authors go on to warn that they have been deduced from the texts and were not necessarily recognized, or accepted, by contemporary draftsmen.[15]

It seems, then, that modern scholars have found various methods of testing a text to determine whether or not it is a statute, but they warn that in the end none of these tests is beyond doubt. The safest method is simply to accept the word of contemporaries, for the practical needs of the court will determine whether a text has statutory force. A problem arises when we try to apply this criterion to *Prerogativa Regis*, for contemporaries were uncertain as to whether it was a statute or not, and modern scholars have remained equally unsure. The text is included in the *Statutes of the Realm*, but

[12] J. S. Arkenberg, "Statute Books and Medieval Legal Education" (paper presented at "Learning the Law," Thirteenth British Legal History Conference, Trinity Hall, Cambridge, 3 July 1997).
[13] Richardson and Sayles, "The Early Statutes," 544.
[14] *Ibid*., 559. [15] *Ibid*., 559–60.

there it is included with the statutes of uncertain date.[16] It is also in the early printed editions of the statutes, where it was assigned by tradition to 17 Edw. II.[17] It seems clear that it belongs to the reign of either Edward I or Edward II, for the text refers to "King Henry, father of King Edward." Maitland suggests that it belongs to the early years of Edward I,[18] but a year book case from the reign of Edward III refers to it as being made in the time of King Edward, the father of the present king,[19] while Staunford, in the mid-sixteenth century, argued that it must date from the reign of Edward II, since otherwise the text would have referred to King Henry our father, rather than King Henry father of King Edward.[20] Serjeant Kebell recognized that the date of the statute was "doubteous" in 1497, and his verdict still holds.[21] *Prerogativa Regis* is usually called a statute, but, in the period from which it dates, the two most common tests of authenticity for a statute were that it should be dated and sealed. *Prerogativa Regis* meets neither of these criteria.

This led to some discussion concerning its status among contemporary lawyers, and posed a problem for later readers, since it was generally accepted that readings must be based on statutes. Two year book cases raised this question. The first dates from about 1370 and hinges on the question of whether, when the king gives the gift of a manor with an advowson attached, the advowson automatically goes with the gift, or whether this must be expressly stated. Serjeant Cavendish argues that in the reign of Henry III the king was treated just like anyone else under the law, and that this changed with the statute *Prerogativa Regis*, made in the time of Edward II.[22] Kirton responds that *Prerogativa Regis* is not a statute, but a rehearsal of the king's prerogatives, since it is clear that the king had this prerogative before the time of the statute.[23] Fencotes

[16] *Stat. Realm*, vol. 1, 226.
[17] See, for example, *Magna Carta in F. wherunto is added more statutes than euer was imprynted in any one boke before this tyme* . . . (London, 1529), f.98. It was assigned this position because the miscellaneous undated statutes were gathered together on the statute roll at the end of the reign of Edward II.
[18] Maitland, "*Praerogativa Regis*," 188.
[19] YB Mich. 43 Edw. III, f.22, pl.12.
[20] William Staunford, *An Exposicion of the Kinges Prerogatiue collected out of the great Abridgement of Iustice Fitzherbert, and other old Writers of the Lawes of Englande* (London, 1567), f.6–6v.
[21] YB Trin. 12 Hen. VII, f.20, pl.1.
[22] YB Mich. 43 Edw. III, f.22, pl.12.
[23] *Ibid*.

is in agreement with Cavendish, that the words of the text clearly indicate that something new is being reserved to the king with this document, and therefore it is a statute.[24] The main criterion here for a statute seems to be that it changes the common law in some manner, though in this case the lawyers disagree on what has been changed and to what extent.

The second year book case dates from 1475 and it deals with the question of whether, if the king has the wardship of an heir of one of his tenants-in-chief, and the child inherits land held in socage, the king should have the wardship of this land also.[25] In this case, Serjeant Bryan characterizes *Prerogativa Regis* as an affirmation of the common law.[26] Pigot argues, based on the previous case from 1370, that it is not an affirmation of the common law, but a statute.[27] Littleton, however, chimes in on Bryan's side, arguing that *Prerogativa Regis* cannot be a statute, for it has no certain date and it is not obeyed in every point. He considers that it is just like the treatises *Dies Communes in Banco*, *Dies Communes in Dote* and *Expositiones Vocabulorum*, which were "written in our books and yet are not statutes, but were made for this purpose, that that which was in doubt in the common law should be made certain."[28] The earliest readings do not add much of use: the first reading agrees that the text is a statute, though it does not explain why, and adds that it was made "solement pur lauantage et profite de Roy."[29] The next reading argues that part of the statute is an affirmation of the common law and part is not.[30] A contemporary commonplace book rounds out the spectrum of opinion, arguing that "*Prerogativa Regis* is not a statute, because it does not specify the year it was made or the place," and quoting the exchequer chamber for its authority.[31] It seems, therefore, that the course of almost two hundred years of practical application had not settled the status of *Prerogativa Regis*. The text was used and applied because its provisions were a reasonable statement of the king's financial rights over his tenants-in-chief

[24] *Ibid*.
[25] YB Mich. 15 Edw. IV, f.12, pl.17. This is *Skrene's Case*, and we will return to a fuller discussion of its significance at pp. 43–45 below.
[26] *Ibid*. [27] *Ibid*.
[28] *Ibid*., ff.12–13. It is worth noting that just a few years earlier Serjeant Pigot had denied that *Dies Communes in Banco* was a statute, but an affirmation of the common law, though the court had termed it a statute. YB Pas. 8 Edw. IV, f.4, pl.9.
[29] CUL MS Ee.5.22, f.338. [30] CUL MS Hh.3.6, f.55v.
[31] BL MS Harley 2051, f.40.

and reason was the central criterion by which any text of the common law was judged. Any attempt to apply the text to a situation not explicitly contained therein, however, led to discussion and debate about the nature and the applicability of *Prerogativa Regis*.

Discussion and debate were, however, an integral part of the educational programme of the Inns of Court. The Inns were both educational and social institutions, and as such they came to have a central role in the way the lawyers developed both their skills and their corporate identity. Both were necessary, for the lawyers played a crucial and complex role in the interpretation and maintenance of the common law. The structure of English law meant that the preservation and construction of law were inextricably connected. The administration of justice was based on the common law of the realm and statutory law. Statutory law could introduce new law or it could declare the common law more clearly, but in either case it had to be interpreted in light of the existing common law. This meant that in theory the entire body of existing law should be kept in mind when any new statute was being made. Though the king was at the head of the legal system, it was unrealistic to expect him to have this kind of knowledge of the law, as Sir John Fortescue's *De Laudibus Legum Anglie* makes clear. When Fortescue's chancellor urges the young prince to learn the laws of the land he will one day rule, the prince objects, on the ground that such knowledge takes many years to acquire. The chancellor responds that the prince need only know "the principles and causes of the law as far as the elements."[32] It was for others to know the details. This was an old issue, and one not confined to English law. Roman law placed a similar expectation on the king, requiring him to keep all the laws in the shrine of his breast.[33] In the English context, this could become more complex, for the royal advisors in the making of the law were not necessarily the same men as those who interpreted the law; *Bracton*, for example, says that the prince was counselled by the magnates of the realm, not doctors of law, and the prince was the voice of the law, for

[32] Sir John Fortescue, *De Laudibus Legum Anglie*, ed. S. B. Chrimes (Cambridge: Cambridge University Press, 1942), 23.

[33] This maxim was later also adopted by the canon law. The jurist Cynus of Pistoia (1270–1336) warned against a literal interpretation of the idea, arguing that it was to be understood in the sense of "his court which should abound of excellent Doctors of Law through whose mouths the most law-abiding prince himself speaks." E. H. Kantorowicz, *The King's Two Bodies: A Study in Mediæval Political Theology* (Princeton: Princeton University Press, 1957), 154.

the promulgation of law was by his *auctoritas*.[34] If the relationship between the king, the magnates, and the lawyers were not complex enough, by the fifteenth century this theory had further to consider the role of parliament.

In his classic fifteenth-century exposition of English government, Fortescue presents kingship as *dominium politicum et regale*, where the king is limited, though not controlled, by parliament. There was no doubt that the king had the power to declare law, but it was equally clear that he could do this only in conjunction with parliament. The exact role that parliament played is not explicitly stated by Fortescue. Bishop Russell, in the draft of the sermon he planned for the parliament of Edward V, compared parliament to Moses and Aaron "whych escend vnto the mownt where the lawe ys geven. The peuple must stond a forr, and not passe the lymittes; ye speke with the prince, whyche is *quasi deus noster in terris*."[35] Parliament thus appears as a mediator between the king and the people, intended to moderate the force of the king's presence. Bishop Russell pursues this idea further, pointing out that:

> when so euer the kynge in hys person, for the multitude of mysdoers, takythe vpon hym to visite hys Reame . . . the ministracion of justice is wont to be so terrible and precise in processe that alle the pertees and persones adioignaunt quake and tremble for fere . . . Wherefor it ys not to doulte but that the rule and governaile of the Reame appereth then in most temperaunce and moderacion when the kynges juges and commisses be obeyd at large in every parte of the londe.[36]

The king's personal administration of law was probably associated with extreme circumstances and harsh application because his judicial tours usually followed outbreaks of political violence. Under normal circumstances, according to Russell, while parliament represented the king's wishes to the people, it was left to the judges and commissioners to put them into practice throughout the land.

Bishop Russell's parliament is a rather passive body, and he has little to say about its role as counsellor or advisor in the law-making

[34] *Ibid*., 154–55; Bracton, *On the Laws and Customs of England*, trans. S. E. Thorne (Cambridge, MA: Belknap Press of Harvard University Press, 1968), vol. 2, 305.
[35] Sermon printed in S. B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (New York: American Scholar Publications, 1966), 173.
[36] *Ibid*.