PART I

CENTRAL GOVERNMENT

CHAPTER I

THE CROWN

INTRODUCTION

In the history of the crown and the royal prerogative the later middle ages are of great interest and significance. The period saw the deposition of two kings who were in the rightful line of succession; of the three dynasties inaugurated after Richard II's downfall the Lancastrian had no direct hereditary claim, while the short-lived legitimist Yorkist rule was succeeded by the Tudor *régime*, and, as Fuller declared, Henry VII's claim by descent "was but the back door to the crown".

When we recall the history of kingship before 1307 two developments are noticeable. In the first place the crown had greatly increased its powers during the medieval period, for to the personal rights of the Anglo-Saxon monarchy had been added the tenurial privileges of a feudal king, and in consequence of the reforms of Henry II the notion of the crown as fountain of justice had been developed and exemplified. The crown had indeed the inestimable advantage of a long-established tradition and a vast reserve of hitherto undefined powers. The royal resources were at first considerable, for in addition to the demesne lands and judicial dues the king had, for example, the right of prisage, which was specially important with the increase of trade, of preemption, of purveyance, which included the custom of demanding men and supplies for war (6), and of patronage and appointments; some of the royal powers came to be delegated, as to the chancellor or justices, but in theory final decision lay with the king.

On the other hand, at no time after the Norman Conquest was the crown entirely free from some moral and practical limitation. In the feudal state the relation between king and tenants in chief was admittedly contractual; they were bound by feudal law to give him advice and he was expected to seek it, though no given

vassal had a right to be summoned to his court. There was in fact a generally recognised theory that the king was subject to the law. Magna Carta, essentially a feudal document, exemplifies the king's subjection to the law expressed in the coronation oath which is itself older than feudalism. In Bracton's view the king could not go beyond the law, because of the very nature of his office, and if he had no peer it was only in his position as representative of God and as administrator of the law. In the later thirteenth century some held a more extreme view, that the king had associates, *comites*, in government, and that his *curia* was superior to him. This theory can be traced in the Song of Lewes; it is to be found in an early addition to Bracton;[1] it is given in the so-called "Fleta"; and it is expressed in syllogistic form by a justice, possibly John of Longueville, in a commentary on the same addition to Bracton (2).[2] Yet this more extreme theory was not widely accepted, and in actual practice the judges were usually unwilling to give an opinion against the crown. In a famous case in 1292 (1) when the magnates were protesting that it was not their custom to take oath, the judges declared that the king's prerogative set him above the law, *pro communi utilitate*. It is clear that, whatever the theory, the problem of how to enforce the law against the king was not to be easily solved.

The history of the prerogative in the late medieval period is intimately bound up both with the development of the household and of parliament. It was natural that the crown should rely increasingly on household officials, and under Henry III and still more under Edward I the activities of the wardrobe were much extended. The distinction between royal and public interests, however, was by no means clear, and the household was inevitably drawn into political conflict. Both Edward II and his son went even further in using wardrobe and chamber in such a way as to challenge, at least for a time, the chancery and exchequer. This policy failed, but when the household was subordinated to the other departments, its officials continued to transact much administrative work and to provide an efficient "civil service".[3] As for the relation between crown and parliament, the crown had the advantage of deciding on the time of summons and the duration of parliament itself. It will be seen, however, that in matters of

[1] G. E. Woodbine, *Bracton de legibus et consuetudinibus Angliae*, 1, 332–3. Yale University Press, 1915.
[2] Cf. J. C. Davies, *The baronial opposition to Edward II*, p. 16.
[3] See below, Household section, pp. 94 ff.

legislation and the control of revenue royal rights were challenged and considerably defined, while limitations were set to royal purveyance (13) and to demands for military service (10, 11).[1]

The struggle between crown and baronage which had been approaching during the thirteenth century was by no means continuous, for the king and magnates were still very largely interdependent: in Edward I's reign, however, the baronial opposition was becoming more definitely political, especially after 1297, and the events at the turn of the century go far to explain the attitude of the barons at the beginning of the next reign. In February, 1308, a new form of coronation oath was used by Edward II (3);[2] the first three clauses seem to go back to the threefold promise made by the Anglo-Saxon and Norman kings; in the fourth clause there was a new departure, the king promising to keep the laws which the commonalty of the realm shall have chosen.[3] Stubbs considered that the oath in its new form was intended to replace the coronation charter, the last having been granted by Henry II.[4] In May, 1308, Edward had to consent to the banishment of Gaveston, and the struggle between king and barons which followed is of the utmost importance in the history of the prerogative. The barons were unconsciously arriving at a theory that the person and office of a king were not necessarily one, and that a king who debased his office might be rightfully resisted. Their view, however, was by no means consistent; it was clearly enunciated in the 1308 declaration about Gaveston (4), but in the charges against the Despensers in 1321–2 the barons were blaming individuals for an action which they had themselves committed as a body earlier (7).[5]

A policy of reform was initiated, the articles of Stamford were drawn up in 1309, and by accepting them Edward obtained Gaveston's recall. The articles were soon evaded, however, while Gaveston once again completely alienated the magnates, and in order to prevent further delay twenty-one ordainers (eight earls, six barons and seven bishops) were chosen in 1310 to draw up a programme of reform. They produced preliminary articles in August, and in the next year a full list of ordinances was presented

[1] See below, Parliament section, pp. 122–3.
[2] See paper by B. Wilkinson in *Essays in honour of James Tait*.
[3] C. H. McIlwain, *Growth of political theory in the west* (1932), p. 196, accepts Brady's view that this clause refers to existing custom and not, as Prynne argued, to future legislation.
[4] Stubbs, *C.H.* II, 344.
[5] J. C. Davies, *op. cit.* pp. 24–5, and cf. his whole introductory chapter.

to the king(5). He was able, however, to avoid many of the limitations imposed, for the opposition was by no means united; the political situation varied very considerably between 1311 and 1322, when the royal policy triumphed, and the last years of the reign saw Edward independent. His deposition in 1327 can mainly be accounted for by the fact that the magnates were united in their opposition to Despenser, who had roused their animosity by his activities in the Welsh march,[1] and their support was cleverly utilised in the political intrigue of Queen Isabella and Mortimer.

The chief interest in the deposition is in the legality which was observed throughout.[2] There is no reference to the proceedings in the rolls of parliament, and possibly no official record was drafted. In October, 1326, the young Edward had been proclaimed guardian of the realm(8), but writs were sent out in Edward II's name until January 21, 1327, the parliament which met on January 7 being summoned in this way. The chief difficulty confronting parliament was the absence of the king. On January 13, when London had already shown its loyalty to the queen, a number of prelates, magnates, lower clergy, knights and burgesses took their oath outside parliament in her support. Most probably on the same day Edward II was deposed in parliament. A representative deputation waited on him at Kenilworth on January 20, obtained his abdication, and on the next day allegiance and homage were renounced in the name of the whole realm, as reported in parliament three days later(9). The deposition, and the proclamation of Edward III in parliament, had not served to make him king, and he was not legally recognised until his father's abdication had been accepted by the representative committee of estates.

During Edward III's reign there was more sympathy between crown and magnates, partly due to the French war and to the king's activities. In the political crises of the reign, and especially after 1340–1, the king was able to avoid the main issues, but before the end of the reign it is seen that a stage had been reached; a procedure had been evolved whereby proceedings could be taken against royal officials, who were no longer saved by royal prerogative.[3] At this time the form and procedure of parliament

[1] Tout, *Edward II*, pp. 136–43, 153–6.

[2] See paper by M. V. Clarke, in *Essays in honour of James Tait*, whose account is followed here.

[3] Cf. the survey given by Miss Clarke of the main tendencies at this time, in *Oxford essays . . . presented to H. E. Salter*, especially pp. 166–74.

were developing, and it is not surprising that when Richard II was faced by baronial opposition parliament itself became the scene of combat. Richard inherited not only the acute economic problems of his predecessor but the immediate troubles already brewing among the political factions of his grandfather's court. After the death of his mother in 1385 and the departure of John of Gaunt for Spain in the next year, Richard's government was open to the attack of magnates who could certainly rely on a general feeling of discontent. The leaders of the opposition, to be known later as the lords appellant, were more capable than the ordainers had been, and they represented wide interests; Henry of Derby, for example, stood for the Lancastrian house, the adherence of the Duke of Gloucester, Richard's uncle, was significant, and there was considerable ecclesiastical support. At first the king would not meet the parliamentary attack of 1386 (15), and refused to dismiss his officials. Gloucester and Arundel, sent to confer with Richard at Eltham, then invoked alleged statutes regulating the relation of crown and parliament and authorising the deposition of a king under certain circumstances. The king thereupon gave way in so far that he agreed to attend the parliament and to allow a change of ministers, but he was unable to save his chancellor Suffolk from impeachment, and a commission was set up to inquire into the abuses of government. Before the close of the session Richard made his protest in very definite phrase (16).

During the next months he toured the country in a desperate attempt to obtain adherents; he consulted sheriffs on the possibility of influencing the elections to parliament, and he further secured an opinion from five of his judges on the recent commission (17). The magnates, however, were determined to resist and finally Richard yielded, only to see his followers accused of treason in the Merciless Parliament of 1388. At the same time a declaration of the supremacy of the law of parliament was a noteworthy reply to the king's claim for the royal prerogative.[1] In view of the severity of the acts of this parliament it is all the more remarkable that Richard, on assuming the government in 1389, was so restrained and apparently unrevengeful.

When the blow fell on the lords appellant in 1397 it is interesting that Richard in his turn used parliament as a convenient weapon of attack. In the next session at Shrewsbury in 1398 he was given grants for life, and a parliamentary commission was set up, at first with limited powers, though these may have been

[1] See Parliament section, pp. 156–7.

extended.[1] After these successes the deposition of Richard was as sudden as his own *coup d'état*. A most interesting article has recently shed new light on the details of his renunciation, and has suggested that the evidence of the official parliamentary roll is most probably unreliable.[2]

The so-called constitutionalism of the Lancastrians is partly bound up with the prevalent ideas of Richard II's absolutism. If the sequence of events in 1399 is examined there seems little to justify the claim of Stubbs that the new accession was a "solemn national act". Henry of Lancaster was leader of a faction and he was singularly fortunate in the weakness of possible rivals and in the turn of events. On August 19, when Richard surrendered, writs were sent out in his name to summon a parliament to Westminster. His abdication was obtained on September 29 (cf. 19); on the next day, in an assembly of lords spiritual and temporal and of other people,[3] the abdication was accepted, a long list of charges against him was read (20), and a commission was set up to depose him (21). Henry then challenged the realm, basing his claim to the throne on hereditary descent (22). On the next day William Thirning addressed Richard in an interesting speech, distinguishing the estates from parliament (23), and renounced homage on behalf of the realm. Meanwhile writs had been issued in Henry's name and parliament met on October 6 as the first of the new reign, Arundel explaining in his speech as chancellor the theory of the cession of the crown following on the abdication and deposition of Richard (24, cf. 29). It was later definitely stated that Henry IV had royal power as great as that of his predecessors (25).

During the three Lancastrian reigns it is difficult to see that the theory of the prerogative was weakened,[4] in spite of the development of conciliar government and of aggressive demands of the commons. Certain of the royal powers might be limited in practice, as seen, for example, in a judicial opinion that letters patent might not override a statute (26). In fact there was an ever widening gulf between the theory and practice of kingship, as seen

[1] J. G. Edwards, "The parliamentary committee of 1398", *E.H.R.* XL, 1925. See below, p. 158.

[2] M. V. Clarke and V. H. Galbraith, "The deposition of Richard II", in the *Bulletin of the John Rylands Library*, 1930. Cf. G. Lapsley, "The parliamentary title of Henry IV", *E.H.R.* XLIX, July, October, 1934.

[3] Mr Lapsley argues that this assembly is a convention and not a parliament.

[4] Cf. T. F. T. Plucknett, "The Lancastrian Constitution," in *Tudor Studies* (ed. R. W. Seton-Watson), 1924.

especially in Henry VI's reign, under whose personal rule the crown was much discredited. In consequence the factions of magnates became more dangerous, and the civil wars of York and Lancaster followed. The claims of Richard of York to the throne were at first evaded, then a compromise was reached by which the duke was to be considered as heir to Henry VI (28). York and many of his adherents fell in battle in the same year, but by 1461 Edward of York with the help of Warwick had made good his claim to succeed, on the plea that his was the right by legitimate descent and that the Lancastrian kings had usurped the throne. A party of nobles saluted Edward as king, the Londoners acclaimed him, and parliamentary recognition of his title followed. The Yorkist kings managed to maintain a stronger personal rule than that of Henry VI, and although social disorders were too great for them to effect many necessary reforms, yet it is true to say that the interlude of Yorkist rule made Tudor reorganisation more quickly possible.

The works of Sir John Fortescue, lord chief justice and loyal adviser to Henry VI until 1471, when he was pardoned by Edward IV to whom his later writing was addressed, are the most interesting of this period. In his *De natura legis naturae* (1461–3) and further in the *De laudibus legum Angliae* (1468–70) (30), and the *Governance of England* (1471–6) (31) he claimed England as a *dominium politicum et regale*, as contrasted with the absolutism of France, a *dominium regale*. In the *De laudibus* he exhorted the young prince Edward, son of Henry VI, to adhere to the rule of law, whereby the king was morally bound. Thus at the end of the period as at the beginning we find the insistence on the strength of law as opposed to unbridled prerogative, a contrast which was to be of fundamental importance in a later age.

We have lastly to notice the history of the law of treason during this period. Its origin can be traced in Alfred's law,[1] and it developed naturally with the increasing powers of kingship. In the early fourteenth century a crime was treated as treason if it could be shown, even constructively, to involve an offence against the crown. Following on a petition of the commons against the vagueness and danger of such constructions, in 1352 treason was defined by statute (12) as compassing the death of the king, the queen and their heir, of violating the wife or eldest unmarried daughter of the king, of levying war against the king in his realm,

[1] Stubbs, *S.C.* p. 70.

or adhering to his enemies in the land, etc.[1] The judges were forbidden to go beyond this and directed to refer cases of constructive treason to parliament, which was extending the law in 1382 to include beginning a riot or rumour against the king (14). In 1388 the magnates insisted that it was the right of parliament and not of the judges to decide on the legality of the appeal of treason brought against the King's friends.[2] In 1398 Richard II secured an act of parliament making treasonable any reversal of its statutes; and in the same session the definition of treason was extended to include conspiracy to depose a king (18). Under Henry IV the recent acts of treason were repealed, and in Henry VI's reign the extensions of the law of treason were unimportant, only referring to escape from prison (27), arson, and the treatment of the English on the Welsh border. Apart from the statutory legislation, the main interest in the fifteenth century is in the judicial interpretation of treason, and it has been shown that there were several cases during the century wherein the judges of the common law considered that words constituted high treason, and offenders were put to death as traitors.[3]

[1] Miss Clarke in *Trans. R.H.S.* XIV, 1931, 80 ff., considers that this statute was due rather to political agitation than to commons' petitions, and that both king and magnates benefited by this narrow interpretation of treason.
[2] Stubbs, *C.H.* III, 559.
[3] Cf. article by I. D. Thornley, *E.H.R.* XXXII, 1917.

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(1) *Royal prerogative and the law; ruling of the judges in the case between Humphrey de Bohun and Gilbert de Clare* 1292

.....

Et quia Dominus Rex per literas suas patentes mandavit Justiciariis suis hic, quod...voluit...per ipsos Justiciarios quod inde rei veritas inquireretur, per sacramentum tam Magnatum quam aliorum proborum et legalium hominum, de partibus Wallie, et Comitatuum Gloucestrie et Herefordie,...Ita quod nulli parceretur in hac parte, eo quod res ista Dominum Regem et Coronam et dignitatem suam tangit;...

Dictum est, ex parte Domini Regis, Johanni de Hasting, et omnibus aliis Magnatibus supranominatis, quod pro statu et jure Regis,...apponant manum ad librum ad faciendum id quod eis ex parte Domini Regis injungetur.

Qui omnes unanimiter responderunt quod inauditum est quod ipsi vel eorum antecessores hactenus in hujusmodi casu ad prestandum sacramentum aliquod coacti fuerunt.

Dicunt etiam quod nuncquam consimile mandatum regium venit in partibus istis, nisi tantum quod res tangentes Marchiam istam deducte fuissent secundum usus et consuetudines partium istarum.

Et licet prefatis Johanni et aliis Magnatibus expositum fuisset quod nullus in hac parte potest habere Marchiam Domini Regis qui, pro communi utilitate, per prerogativam suam in multis casibus est supra leges et consuetudines in regno suo usitatas, ac

pluries eisdem Magnatibus ex parte ipsius Regis, conjunctim et separatim, libroque eis porrecto, injunctum est, quod faciant sacramentum, Responderunt demum omnes singillatim, quod nichil inde facerent sine consideratione parium suorum.

. . . . . .

Rot. Parl. I, 71.

(2) *A justice of assize writing on the theory of kingship*
Temp. Edward I or Edward II

Rex ideo sibi associat comites, barones et milites et alios ministros ut sint participes honoris et oneris, quia per se non sufficit sibi ipsi ad regendum populum. Rex enim dicitur a regendo. et qui regere debet praecipere oportet et non praecipi, quia aliter sequeretur quod non esset regens et gubernatus [gubernans] set potius rectus et gubernatus. quod quidem non est verum, et satis hoc probatur in littera. quia parem non habet nec superiorem. set hoc videtur instantiam recipere, quia comites dicuntur socii regis. et sic arguo: Qui habet socium habet magistrum: rex habet socium, scilicet comitem, ergo rex habet magistrum. et ultra: Qui habet magistrum habet superiorem: rex habet magistrum, ergo rex habet superiorem.

Select passages from . . . Bracton and Azo (S.S.) p. 125, notes attributed to John of Longueville, a justice of assize, oyer and terminer and gaol delivery.

(3) *The coronation oath* 1308

Et fuerunt verba Regis in Coronatione prædicta sub Juramento præstita, ut patet in Cedula annexa.

Petitio. Sire, volez vous graunter, e garder, et, par vostre Serment, confirmer au Poeple d'Engleterre les Leys, et les Custumes, a eux grauntees par les auntienes Rois, voz Predecessours droitures et devotz a Dieu; et nomement les Lois, les Custumes, et les Franchises, grauntez au Clergie, e au Poeple, par le Glorieus Roi Seint Edward, vostre Predecessour?

Responsio. Jeo les grante et promette.

Sire, garderez vous a Dieu, et Seint Eglise, et au Clerge, et au Poeple Paes, et acord en Dieu entierment, solonc vostre Poer?

Jeo les garderai.

Sire, freez vous faire, en touz voz Jugements, ove droit Justice et discretion, en misericorde et verite, a vostre Poer?

Jeo le frai.