Chapter I

THE ESTATE OF KING

The progress of ideas, Maitland taught us in one of his most brilliant generalisations, is not from the simple to the complex, but from the vague to the definite.[1] The truth of this assertion is nowhere more apparent than in the history of the idea of monarchy. The history of monarchy is, in some sense, everywhere the history of its definition. A vast course of evolution, indeed, separates 'the ancient king who was often little more than the chief magician of his tribe'[2] from the kings of the house of Windsor; but the development in the conception of kingship during that course has been continually away from the vague. The English kingship is the oldest now surviving in Europe, if not in the world; and looking back over its thousand and more years of unbroken history, the modern enquirer can discern how complicated are the factors that have gone to make it what it is, and how slow the process of its definition has been.

We can see, dimly perhaps, that early Germanic notions of kingship by right of election and of kingship by right of birth were merged by the pressure of events into the belief in an hereditary right to be elected; and we can see the slow transformation of the king of the English into the king of England.[3] Long before the formal recognition of the territoriality of the English king, the descendant of Woden had become the vicar of Christ. Holy Church had its ideas of what kingship ought to be; and in undertaking to anoint and to crown kings, it learned not only to bless them with sacramental mystery, but also to bind

[1] *Domesday Book and Beyond*, 9.
[2] Sir James Frazer, *Lectures on the Early History of Kingship*, 1.
[3] The style *rex Angliae* was first used by Richard I, but only occasionally, in lieu of the traditional *rex Anglorum*. It became the usual form, however, under John. (*V.* J. E. W. Wallis, 'English Regnal Years and Titles', *English Time Books*, 1.)

them with sacred oaths. The time came when an uncrowned king was no king at all, and in receiving his crown from the hands of the Church, the king accepted an emblem, not only of his majesty, but also of the duties of his royal office. His moral responsibilities were asserted and defined in his coronation oath.

Likewise, we can see, a little more clearly, the process by which kingship became inextricably mingled with landlordship, by which *rex* became *dominus*—even, it seems, sometimes more *dominus* than *rex*. The fact of the Conquest by the Norman adventurer made his heirs the universal landlords. They became each in turn the apex of the feudal pyramid, the ultimate points in countless tenurial lines, the seigneurs of whom all land, immediately or mediately, was holden. The definition of the rights involved in such a position, in a world that was not stagnant, was the work of centuries.

But the history of the English monarchy, as an institution, has still to be written. The great length of that history, its extreme complexity, its profound ramifications into the very heart of English evolution—not to mention the parliamentary preoccupations of constitutional historians, and the Whiggish outlook of nearly all historians except the more recent—have seriously militated against its construction, in all its fullness. A great theme—one of the very few left—as rich in the play of personalities as in the subtleties of law and the machinations of politics, awaits its exponent; and he will need to be something of a Stubbs, of a Maitland, and of a Tout, all in one.

The contribution of the present study to that theme is infinitesimal. It aims merely at making some estimate of the extent to which the definition of kingship was carried during the fifteenth century.[1] It attempts to answer questions about the monarchy of which few, if any, were actually posed during that

[1] Mr Pickthorn's suggestion (*Early Tudor Government*, I, 15) that the 'rights and powers of the monarchy inherited by Henry VII were unlimited and indefinite' is surely an exaggeration. Actually, the king's rights were and always had been in some sense limited, and in part they were certainly defined.

century. At best, it gives an analytical account of the monarchy as an institution, in much the same sense as that in which the description of a slice of brain-tissue under the microscope may be called an account of a man's mental endowment.

§ 1. The conception of the kingship

Contemporary terminology is a matter of great importance when one examines past notions of something still extant, for only by understanding that terminology can our modern intellectual accretions be shorn away. No apology, therefore, is needed for some attention, at the start, to what may seem to be 'mere words'.

The phrase commonly used during the late fourteenth and the fifteenth centuries to designate the mass of traditions, attributes, rights, powers—and perhaps duties also—which were deemed to centre in the monarch was 'estate of king'. Thus, when in 1399 the task fell to Thirning, J., of informing Richard II that his abdication had been accepted by all the estates, he told him that he had been deposed and deprived of the 'Astate of Kyng', and of all the lordship, dignity, worship, and administration belonging thereto.[1] Thomas Hoccleve, the most indefatigable rhymester of the century, was thinking of this occasion when he wrote:

> Me fel to mynde how that, not long ago,
> ffortunës strok doun threst estaat royal
> Into myscheef;[2]

The Speaker in the sixth parliament of Henry IV—which to Stubbs seemed 'almost to stand for an exponent of the most advanced principles of mediaeval constitutional life'[3]—protested that he had spoken nothing against the 'prerogative or estate royal'.[4] Furthermore, Henry assented to the various pro-

[1] *Rot. Parl.* III, 424. Richard himself used the word in protesting against the proposal for household reform in 1397. He said (*ibid.* 338) that it was against his regality, estate, and royal liberty.

[2] *The Regement of Princes*, stanza 4, 2.

[3] *Const. Hist.* III, 59.

[4] *Rot. Parl.* III, 572.

posals for administrative reform which were put forward during the same parliament, 'sauvant toutfoitz a luy son estat et prerogative de son corone'.[1] It was for the better governance of the very excellent person and estate of their sovereign lord that the lords assembled after receipt of the news of the death of Henry V in 1422.[2] The duke of York in 1452 swore not to attack the 'Roiall Estate'.[3] At the time when the boy king Edward V was still living, his chancellor, Bishop Russell, wrote hopefully: 'who can thynke but that the lordes and commens of thys lande wylle as agreabilly pourvey for the sure maynetenaunce of hys hyghe estate as eny of their predecessours have done to eny other of the kynges of Englonde afore...?'[4] The king's estate, wrote Fortescue, is the highest estate temporal.[5]

There can be no doubt that to English minds in the fifteenth century this estate was a necessity. The idea that monarchy could be dispensed with appears only as the reverse of arguments on its necessity. Thus John Kemp, archbishop of York's parliamentary sermon in 1427, on the text 'Without the royal providence, it is impossible that peace be given',[6] was followed fifty years later by his successor Thomas Rotherham's, on 'The Lord reigns over me and I nothing lack', in which he showed that 'the royal majesty was not only right as if it were the hand and counsel of God, but was also established for the advantage of the kingdom'.[7] Again, in 1470, it was asserted —this time in court—*nem. con.* that 'it is necessary for the realm to have a king under whom the laws shall be held and maintained'.[8]

What the attributes—potent if vague—of this royal estate were thought to be was stated repeatedly but not exhaustively in the various transactions involved in Richard II's abdication

[1] *Rot. Parl.* III, 585. [2] *Rot. Parl.* IV, 170. [3] *Rot. Parl.* V, 346.
[4] *Grants of Edward V* (*v. infra*, Chapter II, Excursus VI, p. 176).
[5] *Governance*, viii. [6] *Rot. Parl.* IV, 316. [7] *Rot. Parl.* VI, 167.
[8] *Y.B.* 9 *Edward IV*, Pas. pl. 2 (App. no. 53 (i)). Fortescue's allusions to government without monarchy were very slight (*v.* Chapter IV, *infra*). Cf. Pecock's defence of monarchy, *Repressor*, II, iv, v.

and deposition. The value of these transactions as evidence of the admitted attributes of regality is enhanced by the fact that the documents which record them unquestionably represent—at least in the articles against Richard—the Lancastrian view, and thus indicate the notions of kingship admitted even by the party which for long had been in opposition to the Plantagenet monarchy.[1] Some ten years before those events of 1399, in the appeal put forward by the Lancastrian lords in the parliament of 1388, there appeared certain admissions of this kind. Thus, in the first three articles advanced against the archbishop of York, the duke of Ireland, and the earl of Suffolk, it was alleged that they had usurped royal power by 'disenfranchising' the king of sovereignty, and had degraded his royal prerogative by causing him to swear to be governed and counselled by them. They had done this, it was said, notwithstanding that the king ought not to take any oath unless it were at his coronation or for the common profit of himself and his realm. Though the king ought to be in a freer condition than his subjects, they nevertheless had put him in more subservience, against his honour, estate, and regality. Moreover, they had not allowed any of the great men or good counsellors to approach or to speak to him save in their presence, and thus had encroached upon the royal power, lordship, and sovereignty, to the great dishonour and peril of the crown and of the realm.[2]

The deposition documents of 1399, above mentioned, carried further this disclosure of Lancastrian ideas of regality. In his renunciation and cession, Richard declared, or was made to declare,[3] that he absolved all persons of whatsoever condition

[1] As Mr Pickthorn justly points out (*op. cit.* I, 6): 'It is always remembered, generally in a quite false sense, that the Lancastrian champion was especially bound to parliament; it should not be forgotten that the traditions of his House [*i.e.* Henry IV's] inclined him to take high views of kingship no less than of parliaments.'

[2] *Rot. Parl.* III, 230.

[3] *V.* M. V. Clarke and V. H. Galbraith, 'The Deposition of Richard II', *Bull. J.R.L.* (July 1930), XIV, 125–181; and G. T. Lapsley, 'The Parliamentary Title of Henry IV', *E.H.R.* (1934), XLIX, 423–449, 577–606. (Cf. *infra*, p. 106.)

from every oath of fealty and homage, and every bond of allegiance, regality, and lordship, by which they were bound to him, and absolved them also from every obligation or oath 'quantum ad suam personam attinet', and from every effect of law ensuing therefrom. He renounced likewise the royal dignity, majesty, and crown—renounced also lordship, power, rule, governance, administration, empire, jurisdiction, and the name, honour, regality, and highness of king.[1]

The ideas embodied in these large and high-sounding words—many of them with a tradition behind them stretching back into the remote origins of kingship—were certainly forces which have to be reckoned with in any assessment of monarchical conceptions during the century. There was little in some of these notions that was amenable to definitive legal ruling. It is possible to define legally such matters as oaths and obligations of fealty, homage, and allegiance; but it would, and did, require a long course of narrowing legal restrictions of 'prerogative' before the vague and ancient amplitude of notions such as majesty, rule, empire, and highness of king could lose their mysterious power and awe-inspiring significance. It was still possible, as late as 1460, for the judges to declare that the king's high estate and regality were above the law and passed their learning.[2] Five years before this, when the exercise of the royal power was for the first time put in commission during Henry's illness, the lords admitted explicitly that the 'high prerogative, pre-eminence, and authority of his majesty royal, and also the sovereignty of them and all the land was resting and always must rest in his most excellent person'.[3] Moile, J., ruled, in 1457, that a certain statute, though general, did not bind the king 'car le roy ne semble a un comon person'.[4] Marowe, in his Reading of the year 1503, thought of the king as the principal Head or Captain of the realm, though, indeed, he agreed that

[1] *Rot. Parl.* III, 417.
[2] *Rot. Parl.* V, 376.
[3] *Ibid.* 290.
[4] *Y.B.* 35 *Henry VI*, Trin. pl. 1 (App. no. 33 (ii)). The expression was of course common form with the lawyers.

treason against his person was to the prejudice of all his subjects.[1]

Despite all the vicissitudes of kingly fortune during the century, the continued tenacity of belief in the sacrosanctity and miraculous powers of regality is apparent. The large space allotted by the chroniclers to the anointing of Henry IV by the holy oil presented to St Thomas of Canterbury by the Virgin Mary during a vision—even if the story of the miracle were a hasty forgery—is a fair tribute to popular notions; and Richard declared that he could not renounce his spiritual honour.[2] Fortescue several times makes a point in the case against female succession to the crown, by insisting that a woman could not be anointed in the hands. This disability, according to him, not only prevented women from exercising power temporal and spiritual, but denied them that thaumaturgical potency which was such striking evidence of the divine favour upon English kings: 'Sithen', he said, 'the Kynges of England been enoynted in theyre hands and by vertue and meane thereof God commonlie healeth sickness, by putting to and touching the maladie, by thenontinge hands, and also gould and silver handled by them and so offred on Good Friday have ben the meane and causes of great cures, as it is knowne, and therefore such gold and silver is desired in all the world.'[3] Thus the most con-

[1] Putnam, *Early Treatises*, 331: 'Item, si home commytt ascun treson al person le Roie, serra dit vne enfreindre de le peas et vncore le recognisaunce est: quod ipse geret pacem versus cunctum populum domini Regis et precipue versus J. de T., et ne parle de le Roie. Mes purceo que lact que est fait encountre luy que est le principall Test (Capteyn) de le Roialme, est adiuge en preiudice a toutz ces subgettes et issint encountre le peas.'

[2] *Annales Henrici Quarti*, 286: 'Ubi vero Dominus Willelmus Thirnyng dixit ei quod renunciavit omnibus honoribus et dignitati Regi pertinentibus, respondit quod noluit renunciare spirituali honori characteris sibi impressi, et inunctioni, quibus renunciare nec potuit, nec ab hiis cessare.' Apparently Thirning was obliged tacitly to admit that this spiritual character had not been renounced by the cession.

[3] *Of the Title of the House of York*, Works, 498. Cf. *Defensio Juris Domus Lancastriae*, *ibid.* 508: 'Reges insuper Angliae in ipsa unctione sua talem coelitus gratiam infusam recipiunt quod per tactum manuum suarum unctarum, infestos morbo quodam qui vulgo Regius morbus appellatur, mundant et curant, qui alias dicuntur incurabiles. Item aurum et argentum sacris unctis manibus Regum Angliae in die Parascivae divinorum tempore, quemadmodum Reges Angliae annuatim facere

spicuous publicist of the century believed—or appeared to believe—in a miraculous power conferred by divine grace upon the person of the monarch. But, though unction was necessary to ensure this power for the king, it was effective only when given to the legitimate inheritor.[1] Even if Fortescue made use of the belief only as an argument to discredit the legitimacy of the Yorkist claimant, still it is at least evident that he did deem it an argument. As Lyndwood said, an anointed king is not merely a layman, but is a 'persona mixta'.[2] He is called *Rex et Sacerdos*.[3]

Other admitted attributes of regality may be discerned in the application to the king of the terms 'liberty', 'will', and 'grace'. The kings of England had 'libertas'. Richard, it was said in 1399, had understood the 'libertas' of his progenitors to mean that he could turn all the laws to his own will. The commons, notwithstanding, stated that they wished Henry IV to be 'en auxi graunde libertee roial come ses nobles progenitours furent devant luy'.[4] To this wish Henry replied that it was not his intent nor his will to turn the laws, statutes, or good usages, nor to take advantage by the grant of such liberty, but only to keep ('garder') the ancient laws and statutes ordained and used in the time of his noble progenitors, and to do right to all men in mercy and in truth, according to his oath. The king, then, had

solent, tactum devote et oblatum spasmaticos et caducos curant, quemadmodum per annulos ex dicto auro seu argento factos et digitis hominum morbidorum impositos multis in mundi partibus crebro usu expertum est; quae gratia Reginis non confertur, cum ipsae in manibus non ungantur.' On the whole of this subject M. Bloch's *Les Rois Thaumaturges* is exhaustive. (Cf. also F. Kern, *Gottesgnadentum und Widerstandsrecht*.) Bloch observes (111–112): 'Ainsi les Lancastriens refusaient aux princes de la maison d'York le don du miracle. Nul doute que leurs adversaires politiques ne leur rendissent la pareille. Chaque camp cherchait à discréditer le rite pratiqué dans le camp adverse. Comment un peu de ce discrédit n'eût-il pas rejailli sur le rite en général? Le roi légitime pensait-on, savait guérir; mais qui était le roi légitime?'

[1] *De Titulo*, 85.

[2] *Provinciale*, lib. III, tit. 2, cited by Pickthorn (*op. cit.* 6). The learned doctor's inference seems, however, to be distinctly unorthodox. Cf. Brian's observation in *Y.B.* 10 *Henry VII*, Hil. pl. 17 (App. no. 96).

[3] Fortescue, *Declaracion*, 531.

[4] *Rot. Parl.* III, 434. Cf. G. T. Lapsley, *op. cit.* 599.

liberty in order that he might keep the laws and do justice. He had, we may say, a discretionary power. But his discretion was to be used, not for his personal purposes, but in the interests of the laws and of justice.

Moreover, this liberty required will for its exercise. The king must *will*. Archbishop Arundel, in his conciliatory opening address at the first parliament of Henry IV's reign, declared that it was the king's will that the liberties of Holy Church and the liberties and franchises of lords, cities, and boroughs be maintained, and that there be equal justice and equity for all.[1] It was the king's liberty to will the maintenance of the liberties of others.

But the king also had grace. He might accept 'novellerie', not because the maintenance of good usages required it, but because of his good grace. Thus, in 1403, Henry assented to a consultation of the commons with some of the lords, but stated that he 'ne le vorroit faire de deuete ne de custume, mais de sa grace especiale a ceste foitz'.[2] Similarly, the request of the commons to have their petitions engrossed without alteration was assented to by Henry V only of his especial grace.[3]

The manner in which the king's rights were sometimes discussed in the courts obliges us to take account of the extent to which the kingdom was still being regarded as a piece of property belonging to the king. Fortescue has often been supposed to have held constitutional notions of a modern degree of enlightenment; and it is therefore especially significant to notice how deeply the lawyer-publicist was imbued with the real-property idea of kingship. In his writings—the bulk of which was devoted to the discussion of the succession question—this proprietary notion is most marked. The ideas which made this view possible are well illustrated in his work *De Natura*

[1] *Rot. Parl.* III, 415. The declaration frequently appears in later opening addresses, and headed the statute roll for many of the years in which there was a statute.

[2] *Ibid.* 486.

[3] *Rot. Parl.* IV, 22. Presumably an act of grace could not form a precedent.

Legis Naturae, the second part of which is by no means so dull as is sometimes said.[1]

In the long course of the first part of this work, the law of nature[2] is discussed, and concluded to be the only law in the light of which the succession to kingdoms can be decided. In the second part this conclusion is applied to a case in which the kingdom of a deceased monarch is claimed respectively by his brother, his daughter, and his daughter's son. The narrations, replications, and duplications run through more than fifty thousand words;[3] and the most diverse and unlikely arguments and authorities are brought to bear on the subject.[4] But it is in occasional distinctions drawn between different notions of the kingship that the chief interest of the work lies. Thus the son rebukes his mother for not recognising the difference between the rights of succession to a kingdom and those of succession to a private estate. Human law, he says, does not regulate an office as it does a field, nor a public office as a private function.[5]

By such a distinction as this between the king's capacity as public office-holder and his capacity as private proprietor, the son attempts to show that his mother might succeed to the patrimony but could not, as a woman, succeed to the kingship.

The late king's brother, in his argument, adopts this distinction, but turns it against the grandson. If the father's royalty cannot be inherited by the daughter, then she cannot be a medium for its inheritance by her son, though she might inherit and pass on his private estates.[6] The kingdom

[1] Cf. Winfield, *Chief Sources*; and Holdsworth, *Hist. Eng. Law*, III.
[2] Cf. Chapters III (§ 1) and IV, *infra*.
[3] Works, 115–248. [4] *V.* editor's list of quotations, *ibid.* 350–353.
[5] *Ibid.* II, iii: 'Ignorantia juris est non facti quae eam concitat ad hanc litem, non enim sine consule poterit simplicitas pia muliebris diversitatem noscere qualiter in regno, et qualiter in predio differunt jura succedendi. Non ut agrum ita officium, nec ut privatum ministerium, ita et publicum regulat lex humana.'
[6] *Ibid.* xxxvii, 155: 'Sic et in rege defuncto erat jus regni, quod publicum est et non potest ad filiam descendere; residebat etiam in eo jus hereditatis privatae, quam post eum hereditabit filia ejus; in cujus privatae hereditatis descensu ipsa medium est domesticum et naturale.'