A Legal, Constitutional, and Historical Defence of the Stewart Succession: A Critical Edition of Edmund Plowden's *Treatise of Succession* (1567)

Volume 1: Thesis

Daniel Haywood

St John's College,
University of Oxford

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Abstract

This thesis provides the first scholarly edition of a landmark treatise on the Elizabethan succession, written in 1567 by the eminent common lawyer, Edmund Plowden. In it, Plowden set out to prove that Mary Queen of Scots' foreign birth did not invalidate her hereditary claim to the English throne, as her Protestant opponents in England had alleged. Circulating widely in manuscript, Plowden's treatise proved highly influential in the fierce legal and political debates of the late-sixteenth and early-seventeenth centuries. Although multiple scribal copies survive, Plowden's treatise has never appeared in print, nor has it received a proper critical edition. Due to its relative inaccessibility, the significance of Plowden's treatise has been largely overlooked and underexplored. This thesis therefore offers a timely, authoritative edition, based on a thorough collation of all known manuscript witnesses of the treatise, as well as a comprehensive, interdisciplinary study of Plowden's arguments.

The thesis comprises two volumes. Following a contextual analysis of the debate over the Elizabethan succession in the mid-1560s, the first volume explores Plowden's legal, constitutional, and historical arguments in defence of the Stewart succession. Throughout this analysis, I demonstrate the integral function of the doctrine of the king's two bodies in Plowden's refutation of the legal ignoramuses who had previously intervened in the succession debate. The first volume concludes by attesting to the lasting impact of Plowden's arguments in the half-century following its initial composition.

The second volume contains an editorial introduction — in which I justify my editorial principles, describe the various manuscript witnesses of Plowden's treatise, and elucidate the order of composition and relationships among the scribal copies — followed by the edition proper. Ultimately, this thesis aims to stimulate further research and exploration of Plowden's influential treatise, not only by legal scholars but also by historians and literary critics.

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Acknowledgements

It has been an immense privilege to have spent three uninterrupted years working on this thesis in the most prestigious and inspiring of environments. Walking in the land of Edmund Plowden's ideas has been fascinating and frustrating by turns, but the project has always been pleasurable. I take this opportunity to thank the individuals and institutions who have made it so.

This project was made possible by the financial support of the Leverhulme Trust, which generously funded my three-year doctoral scholarship as part of the centre 'Publication Beyond Print'. My final term of study was sponsored by a bursary from the University of Oxford's English Faculty, for which I am very grateful. I would also like to express my gratitude to the Selden Society. In 2021 I was awarded the Sir James Holt Award, enabling me to travel to New York and consult the manuscript witness of Plowden's *Treatise* at the Morgan Library. This research trip was the highlight of this project. I am also grateful to St John's College, which has supported my research through innumerable grants. Most recently, a St John's College Special Grant facilitated a wonderful (and nostalgic) week in Wells-next-the-Sea and a valuable visit to Holkham Hall, where I was able to read Sir Edward Coke's copy of Plowden's reports.

No less an authority than Coke advised scholars that 'conference with others ... is the life of Studie'.[1] I count myself exceedingly fortunate to have had three superlative supervisors with whom to confer about this project. They have been generous, encouraging, and instructive throughout. This thesis would have been greatly diminished without the expert guidance of Lorna Hutson. Having encountered many of the challenges of Plowden's *Treatise of Succession* before me, Lorna has been unstintingly generous in helping me navigate the most complex aspects of his argument. The remarkable lucidity of Lorna's insights, as well as her patience and diligence as a supervisor, has made researching and writing about Plowden's *Treatise* a pleasure. I am also extremely grateful to Lorna for allowing me to read chapter drafts of her most recent book, *England's Insular Imagining*, and to lend a small hand in its preparation. The frequency with

which I reference this book in what follows gives some indication of the influence that reading Lorna's work has had on my project.

Paulina Kewes's unwavering belief in my scholarly abilities motivated me to pursue this course of study and has driven this thesis to completion. At every stage in between, I have benefited from Paulina's enthusiastic critical acumen. Over the course of this project, Paulina and I have trod many happy miles down the Thames Path. While these peripatetic supervisions were initially a necessity during the formative, pandemic-stricken stages of my research, they have latterly provided a pleasant escape from my often library-bound existence. I am also very grateful to Paulina for involving me in several research projects beyond this thesis. My work on these projects has always been rewarding and invigorating.

As a literary scholar by training, this project has required me to break disciplinary fences and trespass in several new fields of study.[ii] George Garnett's expertise has been invaluable. George has not only instructed me in medieval British history but also initiated me in the mysteries of English common law. I am very grateful to George for remaining good-humoured when I occasionally remained mystified. Moreover, the prospect of George's meticulous comments (never 'feedback') has also been an important discipline in my academic writing.

Several other scholars have freely given me use of their time and expertise. They have responded to obscure queries, shared insights on draft chapters, allowed me to read their unpublished work, and even invited me into their homes. For these generous acts, I would like to thank Sir John Baker, Susan Doran, Steven Gunn, Norman Jones, Keechang Kim, Adam Smyth, Dan Wakelin, Leah Whittington, and Henry Woudhuysen. Helen Moore and Ian Williams were rigourous and thoughtful examiners and made my viva a pleasurable experience. I have also unashamedly relied upon the expert advice of numerous librarians, archivists, and curators. I am particularly grateful to Andrea Clarke at the British Library; Emma Challinor at Longleat; Daniel Gosling at The National Archives; Andrew Honey at the Bodleian; Kathryn James at the Lillian Goldman Law Library; James Lloyd at the Royal College of Arms; María

Isabel Molestina at the Morgan Library; Laura Nuvoloni at Holkham Hall; and Mike Webb at the Bodleian.

I came up to Oxford as an undergraduate in October 2016, and St John's has been my second home ever since. I want to take this opportunity to thank all the people who have watched over me, kept me fed and watered, and made the college such a warm and stimulating place to live over the past eight years. I shall especially miss lunches in the dining hall, afternoons in the gardens, and evenings in the library. I also have nothing but the best memories of weekends spent at the college sports ground with teammates and friends. Without the friends I have made at St John's and the innumerable pleasures of collegiate life (to bastardise a phrase from P.G. Wodehouse), this thesis might have been completed in half the time.[iii]

As an undergraduate reading English at St John's, I was put on my mettle by four excellent tutors: Patrick Hayes, Michael Hetherington, Carolyne Larrington, and Noël Sugimura. Although she could not have known it at the time, Noël setting me a 6,000-word vacation essay on the *Faerie Queene* proved to be the most formative moment in my academic development. By introducing me to the rich delights of early modern literature and teaching me to 'read aright', Noël has made all of my subsequent academic achievements possible.[iv] As a tutor, college advisor, and friend, Noël is a passionate inspiration of what good scholarship can be.

I also want to take this opportunity to thank several of my closest and best friends: Alex Moffett, Amy Brook, Charlotte McLennaghan, Kaylen Mistry, Mae Kirkley, Max Jones, Nikhita Mistry, Louie Rowley-Stone, Bradley Stones, and Jesse Stevens. (It is testament to the strength and length of our friendship that I have no memory of a time before I was friends with Alex, Louie, or Bradley at primary school.) Their encouragement and confidence in me have been instrumental to the completion of this thesis. And while I am extraordinarily proud to have completed it, I remain even more proud to call them all my friends. To quote W.B. Yeats (and *Seinfeld*'s Kramer),

Think where man's glory most begins and ends,
And say my glory was I had such friends.[v]

My brilliant and infallible partner, Siobhán Pebody, has filled every day of this thesis with joy, silliness, and love. Many of my happiest memories of this project have been shared with Siobhán and I could not be more grateful to have her by my side. So long as she is with me, all things feel possible.

My greatest thanks are to my family. My grandparents have always been a constant source of kindness and inspiration. While, sadly, not all of them are still with me, I know that this achievement, like all the achievements of their grandchildren, has made them all extremely proud. My sister, Laura, is the most single-minded and dedicated person I know. I am very grateful to her for holding me to her high standards. Finally, I want to thank my parents. They have always made me feel loved and supported in every endeavour: no son could ask for more. I am especially grateful for our Sunday night phone calls. I always look forward to these catch-ups from home, and they have kept me going throughout the entirety of my time at Oxford. ('See you at 7.15!') I also want to take this august opportunity to properly thank my parents for all the hours spent reading to me. This thesis is dedicated to them, for their love and kindness, and for all the extra chapters.

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[i] Edward Coke, *The First Part of the Institutes of the Lawes of England* (London, 1628), sig. ¶¶2.
[ii] The metaphor is borrowed from Ernst Kantorowicz. See *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, NJ: Princeton University Press, 1957), p. xxxv.
[iii] P.G. Wodehouse, *The Heart of a Goof* (London: H. Jenkins, 1926), dedication to Leonora.
[iv] Edmund Spenser, *The Faerie* Queene, ed. A.C. Hamilton (revised 2nd edn., London: Routledge, 2013), I.ix.6.6.
[v] W.B. Yeats, 'The Municipal Gallery Revisited' (1937), *The Variorum Edition of the Poems of W. B. Yeats*, ed. Peter Allt and Russell K. Alspach (New York, NY: Macmillan, 1957), p. 604. 'The Deal', *Seinfeld* (season 2, episode 9). NBC. 2 May 1991.

Sigla

R: Bodleian Library, MS Rawlinson A. 124

H: British Library, Harleian MS 849

D: Bodleian Library, MS Don. c. 43

C: British Library, Cotton MS Caligula B IV, art. 1

M: Morgan Library and Museum, MS MA 0281

Y: Yale Law School, Lillian Goldman Law Library MssG P72, art. 1

Abbreviations and Conventions

BL	British Library.
Bodl.	Bodleian Library.
CCCC	Corpus Christi College Cambridge.
Co. Litt.	Edward Coke, *The First Part of the Institutes of the Lawes of England. Or, A Commentarie vpon Littleton*. London, 1628.
Co. Rep.	Edward Coke, *The Reports of Sir Edward Coke, Knt. In Thirteen Parts*, ed. J.H. Thomas and J.F. Fraser. 13 Parts in 6 vols. London: Butterworth and Son, 1826.
Commentaries	Edmund Plowden, *The Commentaries, or Reports of Edmund Plowden, of the Middle-Temple, Esq*. London, 1761.
CP	J.H. Baker, *Collected Papers on English Legal History*. 3 vols. Cambridge: Cambridge University Press, 2013.
CSP Scot	*Calendar of the State Papers Relating to Scotland and Mary, Queen of Scots 1547-1603*, ed. Joseph Bain. 13 volumes in 14. Edinburgh: Her Majesty's Stationery Office, 1898–1969.
CSP Spain	*Calendar of Letters and State Papers Relating to English Affairs Preserved Principally in the Archive of Simancas*, ed. Martin A. S. Hume. 4 volumes. London: Her Majesty's Stationery Office, 1892-1899.
EESQ	Mortimer Levine, *The Early Elizabethan Succession Question, 1558-1568* Stanford, CA: Stanford University Press, 1966.
EP	Geoffrey de C Parmiter, *Edmund Plowden: an Elizabethan Recusant Lawyer*. Southampton: Catholic Record Society, 1987.
IELH	J.H. Baker, *An Introduction to English Legal History*. 5th edition. Oxford: Oxford University Press, 2019.
L&L	Lorna Hutson (ed.). *The Oxford Handbook of English Law and Literature, 1500-1700*. Oxford: Oxford University Press, 2017.
ODNB	*Oxford Dictionary of National Biography* (www.oxforddnb.com)
OHLE	J.H. Baker, *The Oxford History of the Laws of England: Volume VI 1483-1558*. Oxford: Oxford University Press, 2003.
QTB	Marie Axton. *The Queen's Two Bodies: Drama and the Elizabethan Succession*. London: Royal Historical Society, 1977.

Statutes	*The Statutes of the Realm*, ed. John Raithby et al. 11 volumes. London: Record Commission, 1810-1828.
TNA	The National Archives.

Conventions:

Throughout this thesis, I refer to Plowden's tract as *A Treatise of Succession* (commonly abbreviated to *Treatise*). In referring to 'Plowden's *Treatise of Succession*', I allude to both his tract on the succession and his supplementary tract concerning the validity of Henry VIII's will. Following Plowden's lead, I treat these two documents as two parts of a single work. Distinction between the main treatise and the supplementary tract will be made obvious wherever necessary within the body of this thesis. All quotations from Plowden's *Treatise* are from my edition of that work in volume 2 of this thesis. Quotations are cited in-text, with foliation retained from my copy-text, BL Harley MS 849 (H).

The spelling and orthography of quotations from primary sources other than Plowden's *Treatise* have not been modernised or otherwise altered. When providing quotations from primary sources in manuscript, I have silently expanded abbreviations in accordance with the general practice of the scribe, but have otherwise not altered spelling, capitalization, or punctuation.

All quotations from Plowden's *Commentaries* are taken from the first English translation, published in 1761. This reliable translation is quoted to provide ease of reference for lay readers of this thesis and to avoid potential mistranslation of the original law-French.

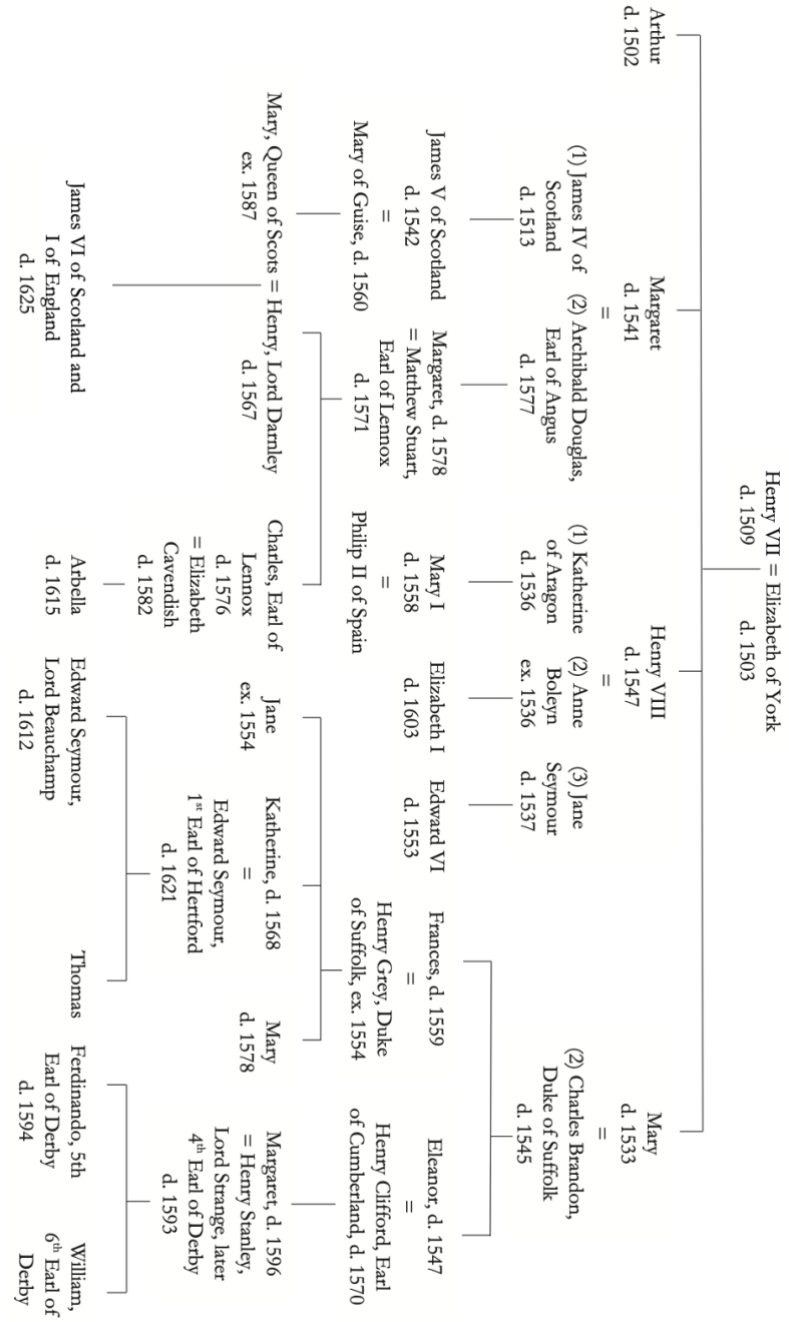
In referencing books published before 1800, I do not provide information regarding publishers. Instead, I merely cite the date and place of publication.

All dates in this thesis are given in New Style, with the year commencing on 1 January instead of 25 March.

Unless otherwise indicated, all Year Book cases are cited from the 2007 reprint of the 1678-1680 Vulgate edition of Year Books, with introductory material and tables by David J. Seipp and Carol F. Lee, published by The Lawbook Exchange.

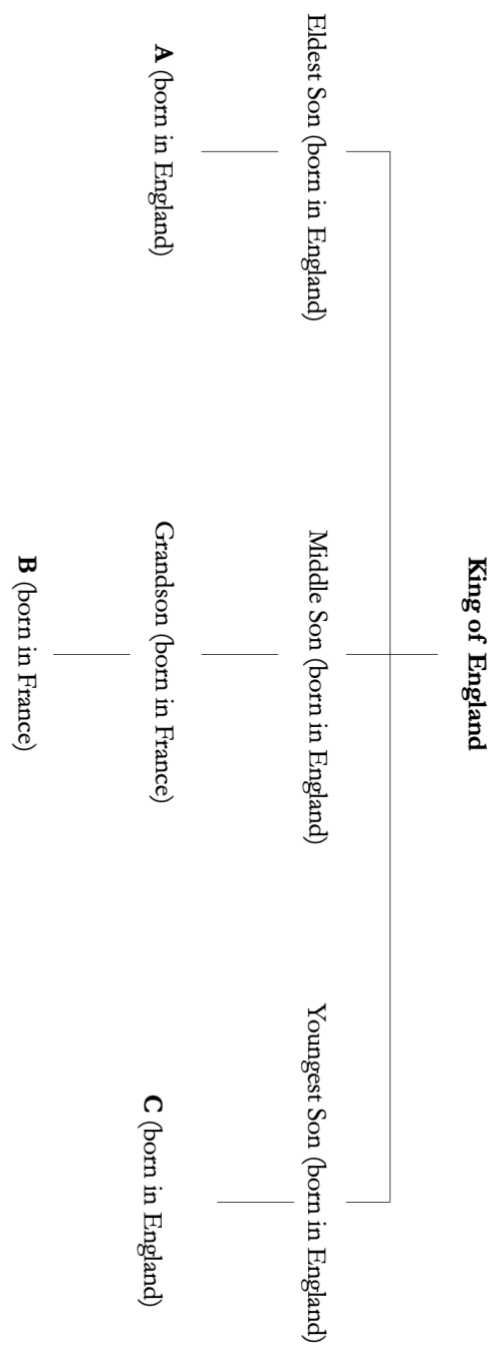
Genealogical Charts

Chart 1*



*This genealogical chart was originally drawn by Susan Doran. It can be found in Doran and Paulina Kewes (ed.), *Doubtful and Dangerous* (Oxford: Oxford University Press, 2014), at p. xiv. I am very grateful to Professor Doran for permitting me to reproduce this chart in my thesis.

Chart 2


King of England
Eldest Son (born in England)
Middle Son (born in England)
Youngest Son (born in England)
A (born in England)
Grandson (born in France)
C (born in England)
B (born in France)

Introduction

In the Christmas vacation of the Inns of Court, 1566-67, the eminent common lawyer, Edmund Plowden, composed a substantial treatise on the Elizabethan succession. Over the course of his nearly fifty-two-thousand-word treatise, Plowden set out to prove that Mary Queen of Scots' foreign birth did not invalidate her hereditary claim to the English throne. So much is indicated by the full title of Plowden's work, 'A treatise proving that if our Soveraigne Lady quene Elizabeth (whom god blesse with long lyffe & many children) shoulde dye without issue, that the Quene of Scottes by her birth in Scotlande is not disabled by the lawe of England to receive the Crowne of Inglande by discent' (1r).

By the end of 1566, concern for the future security of the Tudor dynasty had reached a point of crisis. Despite receiving some dozen marriage proposals since her accession in November 1558, Elizabeth I was still unmarried and childless. In the absence of an immediate heir to the English throne, public and private debate turned to confront the question of who had the best right to succeed the queen. Of the rival claimants, Mary Stewart had the strongest hereditary claim (being descended from Henry VIII's elder sister Margaret by her first husband, James IV of Scotland), but suffered the disadvantages of being born in Scotland and being a Catholic.[1] In an effort to forestall the accession of the Queen of Scots, Protestant polemicists maintained that aliens (foreign-born persons) were prohibited from inheriting property in England and that Mary should consequently be excluded from the succession. Regarding this as an audacious and ignorant misinterpretation of the common law, Plowden advanced a twofold refutation in his *Treatise of Succession*.

In the first part of his *Treatise*, Plowden used the nascent legal fiction of the king's two bodies — of which his *Treatise* provides an elaborate exposition — to advance a constitutionally

[1] For Mary Stewart's claim, see Genealogical Chart 1.

ambitious argument that personal legal disability (including that of foreign birth) does not affect the succession of the English crown. In the second part of his *Treatise*, Plowden asserted that Mary's birth in Scotland could not, after all, be judged as 'foreign birth'. Building on a mixture of legendary and dubious historical evidence which had long been alleged to prove English suzerainty over Scotland, Plowden tendentiously argued that the kings of Scotland had long owed and performed homage to their English overlords. If Mary owed homage and allegiance to Elizabeth, as Plowden argued, she was neither an alien nor disabled from succeeding to the English throne. Plowden supplemented these historico-legal arguments with a postscript, declaring the invalidity of Henry VIII's last will and testament. Henry's will had disregarded the principle of primogeniture and privileged the otherwise inferior claims of Mary Stewart's cousins — descended from Henry VIII's younger sister, Mary, duchess of Suffolk — over her own.[2]

Since its 'discovery' in the 1970s, Plowden's *Treatise* has never received a critical edition, nor has it been printed in full.[3] It survives in six manuscript witnesses. Two of these witnesses are at the Bodleian Library and two are at the British Library.[4] Two further manuscripts, which have hitherto been overlooked by scholars attending to Plowden's *Treatise*, survive in the collections of the Morgan Library in New York City, and in the Lillian Goldman Law Library at Yale University.[5] Perhaps due to its relative inaccessibility in manuscript, Plowden's *Treatise* has attracted limited scholarly attention. Whilst Plowden's intervention in the succession debate is often briefly acknowledged in historical accounts of the Elizabethan succession and is

[2] See Genealogical Chart 1.
[3] On the 'discovery' of Plowden's *Treatise*, see Marie Axton, 'The Influence of Edmund Plowden's Succession Treatise', *Huntington Library Quarterly*, 37 (1974): 209-226. A transcription of the final chapter of Plowden's *Treatise* appears in Robert Miola, *Early Modern Catholicism: An Anthology of Primary Sources* (Oxford: Oxford University Press, 2007), pp. 55-58.
[4] Bodl. MS. Don. c. 43; Bodl. MS. Rawlinson A. 124; BL Cotton MS Caligula B IV; BL Harley MS 849.
[5] Morgan Library MS MA 281; Yale Law School, Lillian Goldman Law Library MssG. P72.1. These manuscripts were discovered by J.H. Baker, *English Legal Manuscripts in the United States of America: A Descriptive List*, (2 vols., London: Selden Society, occasional publication, 1985-1990), II. 327, 368. Hereafter, the six manuscript witnesses of Plowden's *Treatise* are cited by their sigla.

occasionally gestured to in literary criticism relating to the king's two bodies, only a handful of scholars have attended to the *Treatise* itself.[6] However, these studies have focused narrowly upon the first part of Plowden's tract and on his deployment of the king's two bodies as an expedient legal fiction for the Queen of Scots' case. As such, much of Plowden's *Treatise* remains unexplored. Nonetheless, scrutiny of Plowden's wide-ranging tract opens several original perspectives on and approaches to the legal and political crisis of the Elizabethan succession, as well as the debates over nationhood and naturalization thrown up by the looming possibility of a Scottish succession to the English crown. This thesis therefore offers an authoritative critical edition of Plowden's *Treatise*, as well as a comprehensive study of its arguments, with the aim of stimulating further exploration of this influential document. The present volume examines Plowden's legal, constitutional, and historical arguments in defence of the Stewart succession. Volume 2 contains my critical edition of Plowden's *Treatise*. The edited text in volume 2 is preceded by a brief editorial exordium which describes the six manuscript witnesses of Plowden's tract, outlines the relationship between the scribal copies, and justifies my editorial principles and choice of copy-text.

The remainder of this introduction sets out important preliminary information relating to three key areas of this study. First, I offer a concise biography of Edmund Plowden. Second, I offer a précis of each of the six chapters of this thesis, outlining the scope of their analysis and identifying some of their key findings. Finally, I describe the key differences between the two versions of Plowden's *Treatise*, 'Recension 1' and 'Recension 2'.

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[6] Marie Axton, *The Queen's Two Bodies: Drama and the Elizabethan Succession* (London: Royal Historical Society, 1977, hereafter *QTB*); Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (Cambridge: Cambridge University Press, 2000); Alan Cromartie, *The Constitutionalist Revolution: An Essay in the History of England, 1450-1642* (Cambridge: Cambridge University Press, 2006); Christopher W. Brooks, *Law, Politics and Society in Early Modern England* (Cambridge: Cambridge University Press, 2008). Lorna Hutson provides the most comprehensive study of Plowden's *Treatise* to date: 'On the Knees of the Body Politic', *Representations*, 152 (2020): 25-54. See also, Lorna Hutson, *England's Insular Imagining: The Elizabethan Erasure of Scotland* (Cambridge: Cambridge University Press, 2023).

First, however, a disclaimer. In his inaugural lecture as Downing Professor of the Laws of England, F.W. Maitland argued that 'a thorough training in modern law is almost indispensable for any one who wishes to do good work on legal history' and that 'any one who aspires to study legal history should begin by studying modern law'.[7] With Maitland's strictures in mind, it behoves me to acknowledge that I am not a lawyer but a literary scholar by training and faculty affiliation. Whilst editing Plowden's *Treatise* has served as an apprenticeship in the history of English common law, there will undoubtedly be aspects of Plowden's tract and of this thesis that suggest themselves to lawyers as worthy of further comment and analysis — just as aspects of the same will suggest themselves more keenly to medieval historians or classicists.[8] Although the edition and analysis of Plowden's *Treatise* provided in this thesis is first and foremost a work of legal history, it is written by a non-lawyer and with a non-legal audience in mind. The purpose of this interdisciplinary study is to provide a reliable edition of Plowden's text and to suggest the various ways in which that critical edition might be interpreted and studied: not least by lawyers, but also by historians and literary critics.

Biography: 'An Apprentice of the Common Law'

Plowden was born *c.* 1518 of an 'ancient if not distinguished' Catholic family in Shropshire.[9] Little is known about his upbringing and early education, but it is commonly accepted that he studied for three years at the University of Cambridge before beginning his legal studies.[10] By his

[7] F.W. Maitland, 'Why the History of English Law is not Written', in *The Collected Papers of Frederic William Maitland*, ed. H.A.L. Fisher (3 vols., Cambridge: Cambridge University Press, 1911), I. 480-97, at pp. 493-94.
[8] Baker notes that one method by which students of legal history 'might learn their craft' is by producing editions of legal literature. See 'Editing the Sources of English Legal History', in *CP*, III. 1528-43, at p. 1543.
[9] *EP*, p. 1. The following biography is indebted to Parmiter's generally reliable account of Plowden's life and work.
[10] Anthony Wood attested that Plowden went on to study medicine at the University of Oxford, see *Athenae Oxonienses*, ed. Philip Bliss (4 vols., Oxford: J.H. Parker, 1813-20), I. 503. Plowden's biographers have since rejected this suggestion, highlighting its incompatibility with the known

own account, Plowden's legal education began in 1538 when he joined one of the Inns of Chancery: likely either New or Strand Inn.[11] In the studious environment of either inn, Plowden would have spent eighteenth months acquainting himself with Littleton's *Tenures*, 'the wording of writs, and master[ing] the forms and rudiments of pleading', before he joined the Middle Temple to continue his studies.[12]

Plowden's professional career began in 1547 when Edward VI permitted utter barristers who had been fellows of one of the Inns of Court for eight or more years to plead in England's superior courts.[13] During his early instruction in the law Plowden had cultivated a fierce reputation for assiduity: legend has it that Plowden was so studious that he did not leave the Inn once in three years.[14] Unsurprisingly, given this reputation, Plowden quickly established a lucrative practice under Edward VI and was appointed to give a reading at New Inn in Easter 1550.[15] Although there was less status associated with giving a reading at one of the Inns of Chancery compared to the four Inns of Court, the responsibility was still significant; in the mid-sixteenth century, it was usual for barristers and readers from the Inns of Court to attend readings in the lesser houses, which evidently constituted learned 'exercises for the whole legal community'.[16] That Plowden did not have the usual seniority to be appointed for this significant responsibility in 1550 indicates the esteem in which he was already held by fellow innsmen.[17]

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facts of Plowden's early legal career. See *EP*, pp. 5-6. See also Christopher W. Brooks, 'Plowden, Edmund (*c.* 1518-1585), law reporter', *ODNB*.

[11] Plowden briefly outlines his early career in the preface to his reports, see *Commentaries*, p. iii. Both New and Strand Inn were satellites of the Middle Temple in the mid-sixteenth century. See J.H. Baker, *The Inns of Chancery 1340-1640* (London: Selden Society, supplementary series, xix, 2017), p. 12.

[12] *OHLE*, p. 459.

[13] *EP*, pp. 18-19. On the ranks of membership at the Inns of Court, see Baker, 'The Degree of Barrister' in *CP*, I. 104-11.

[14] Wood, *Athenae Oxonienses*, I. 504.

[15] J.H. Baker, *Readers and Readings in the Inns of Court and Chancery* (London: Selden Society, supplementary series, xiii, 2002), p. 210. Notes on Plowden's 1550 reading are extant, see BL Hargrave MS 89, ff. 38-47.

[16] Baker, *Inns of Chancery*, p. 84.

[17] *EP*, p. 26.

In 1550 Plowden began to record legal proceedings at Westminster Hall, compiling reports of the arguments and judgments given by 'men of the greatest note and reputation for learning'.[18] Plowden continued to compile reports over the next twenty years, and the value of his manuscript reports was instantly recognised by the judges, barristers, and clerks to whom they were loaned.[19] In 1571, corrupted copies of his reports were circulating so widely that Plowden found himself 'forcibly compelled' to print accurate copies.[20] Admittedly, early modern authors frequently (and often disingenuously) complained that the unauthorised manuscript proliferation of their texts obligated them to publish in print.[21] However, A.W.B. Simpson has argued that there is no reason to doubt Plowden's honesty in describing the conditions by which his *Commentaries* came to the press.[22] It is no overstatement to say that the publication of Plowden's *Les Comentaries, ou les Reportes de dyvers Cases* in 1571 inaugurated a new phase in legal reporting.[23] Plowden introduced two influential and novel premises to the genre: reporting only adjudged cases, and interpolating transcripts of the corresponding official records into his reports.[24] Plowden's *Commentaries* were also the first reports to be published by their author within his lifetime. The printed volumes of Plowden's reports immediately became essential reading for students and practitioners.[25] For instance, the influence of Plowden's *Commentaries*

[18] *Commentaries*, p. iii.
[19] *Commentaries*, p. iv. Plowden's notebooks are not extant, see *Reports from the Notebooks of Edward Coke*, ed. J.H. Baker (5 vols., London: Selden Society, annual series, cxxxvi-cxl, 2019-2023), I. vii.
[20] *Commentaries*, p. iv.
[21] Thomas Nashe's dedication to Elizabeth Carey in *The Terrors of the Night* (1594) is perhaps the most famous. See H.R. Woudhuysen, *Sir Philip Sidney and the Circulation of Manuscripts, 1558-1640* (Oxford: Clarendon Press, 1996), p. 53.
[22] A.W.B. Simpson, 'Source and Function of the Later Year Books', in *Legal Theory and Legal History, Essays on the Common Law* (London: Hambledon Press, 1987): 67-93, at p. 90.
[23] Baker, 'Case Law in Medieval England', in *CP*, II. 537-568, at pp. 565-68. A second edition of the first part of Plowden's *Commentaries*, supplemented by an index by William Fleetwood, was printed in 1578. The second part of Plowden's *Commentaries*, containing additional cases, was published in 1579. Plowden's *Commentaries* were reprinted five times between 1579 and 1599 and regularly thereafter. Peter Glazebrook, 'Plowden, Edmund', in *Biographical Dictionary of the Common Law*, ed. A.W.B. Simpson (London: Butterworths, 1984): 415-418.
[24] Baker, 'Case Law in Medieval England', in *CP*, at p. 566.
[25] L.W. Abbott, *Law Reporting in England, 1485-1585* (London: Athlone, 1973), pp. 217-218.

over the young Edward Coke, who was enrolled at Clifford's Inn in 1571, was such that 'every case in Plowden was engrained in the student's memory'.[26]

By the time that Mary I acceded to the English throne, Plowden had developed a well-established and prosperous practice. The change of sovereign also instigated rapid political advancement for Plowden, whose energies were no longer solely confined to the law.[27] In 1553 Plowden was appointed to the Council of the Marches in Wales and was also made a member of the commission of the peace for Gloucestershire, Herefordshire, Shropshire, and Worcestershire. In the October 1553 Parliament, Plowden was returned for Wallingford and sat in the House of Commons on two further occasions, returning for Reading in November 1554 and Wootton Bassett in 1555. In 1557 Plowden was also made deputy chief steward for the south parts of the duchy of Lancaster.

In May 1557, Plowden was appointed autumn reader at the Middle Temple. In the event, Plowden's reading was postponed (likely due to an outbreak of plague) but he eventually gave his reading on the Statute of Westminster II, c. 4 in Lent 1558.[28] Plowden's professional career looked set to advance even further when, in October 1558, he received a writ ordering him to prepare to take up the degree of serjeant-at-law the following Easter.[29] However, this writ abated upon Mary's death shortly thereafter. Whilst similar writs of appointment were promptly renewed by Queen Elizabeth, Plowden's was not among them and it is likely that he was passed over on account of his Catholicism.[30] Plowden's omission from the new list of serjeants coincided with the demotion of the Catholic Chief Justices of the Queen's Bench and Common

[26] Baker, *Coke*, I. lxxx.
[27] *EP*, p. 31.
[28] Baker, *Readers and Readings*, p. 161. Plowden became a double-reader in Lent 1561, but no evidence survives of the statute discussed.
[29] *EP*, pp. 53-55.
[30] For an account of the writs issued by Mary, see J.H. Baker, *The Order of Serjeants at Law: A Chronicle of Creations, with related texts and a historical introduction* (London: Selden Society, supplementary series, v, 1984), p. 170.

Pleas, Sir Edward Saunders and Sir Anthony Browne.[31] As only serjeants could be appointed to judgeships or to commissions of assize, Elizabeth's decision forestalled Plowden's chances of further promotion within the law.[32] Today, fellows of the Middle Temple might claim that Elizabeth's decision operated to the immense benefit to his Inn, affording Plowden the freedom to devote himself to the office of Treasurer (for an unusually long period, 1561-67) and, in that capacity, to the construction of a magnificent new hall.[33] Nonetheless, Plowden must have been considerably frustrated by the abatement of his writ of appointment: the doors he had opened through ability and dedication to his profession were now closed because of his confessional allegiance.[34] Yet we must be cautious of overstating the disabilities of Plowden's Catholicism under Elizabeth I. Whilst Plowden was excluded from judicial office, he continued to hold office in the duchy of Lancaster, he also served as a justice of the peace and was appointed to the commission of sewers.[35] As I explain below, Plowden maintained a thriving practice under Elizabeth and, in 1576, was described as both 'very learned and of good living'.[36]

At least for the first decade of Elizabeth's reign, Plowden followed the course of many of his co-religionists who were willing to attend church on the days prescribed by the Elizabethan settlement and remained outwardly conformist. As Alexandra Walsham has argued, 'full or partial compliance with […] the Church of England epitomised lay response to the Elizabethan settlement for at least a generation'.[37] Plowden's compliance was admittedly only partial, for although he attended church he did not receive Anglican communion, as the Bishop of Salisbury

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[31] See Richard O'Sullivan's autumn reading at the Middle Temple, 1952, reprinted as 'Edmund Plowden: Master Treasurer of the Middle Temple', *Law and Justice*, 136/137 (1998): 19-34, p. 26.
[32] *IELH*, p. 176.
[33] See Andrew Longmore's autumn reading at the Middle Temple, 2010, reprinted as 'Edmund Plowden and the Rule of Law', *Law and Justice*, 167 (2011): 5-11, p. 6. Plowden's role in managing the construction project is described in *EP*, pp. 61-70.
[34] Of course, in 1558 Plowden would not have known that Elizabeth would reign for forty-five years, and so he may well have continued to hope for further advancement.
[35] Brooks, 'Plowden, Edmund', *ODNB*.
[36] Glazebrook, 'Plowden, Edmund', in *Dictionary of the Common Law*, p. 416.
[37] Alexandra Walsham, *Church Papists: Catholicism, Conformity and Confessional Polemic in Early Modern England* (Woodbridge: Boydell Press, 1993), p. 21.

recorded when reporting on the religious reliability of the justices of the peace for Berkshire in 1564.[38] Nonetheless, this does not seem to have counted against him. Indeed, the Elizabethan Act of Uniformity did not expressly stipulate any penalty for abstention.[39] Whilst some Catholics were tormented by the necessity of church-going, Plowden (as far as we know) was not one of them.[40] Furthermore, although we cannot retroactively make a window into his soul, Plowden seems to have felt no scruples about purchasing former monastic lands.[41]

In the first decade of Elizabeth's reign, Plowden was retained by several prominent public figures, including Robert Dudley, the earl of Leicester, and Dean Goodman of Westminster.[42] It is striking that Plowden's services were sought out by Dudley and Goodman in the 1560s, considering his prominent role as counsel to Edmund Bonner, the former bishop of London who was infamous for his attempts to restore Catholicism and eliminate heresy under Mary I. Plowden's defence of Bonner 'called into question the validity of the whole Elizabethan episcopate' and forced Elizabeth to introduce statutory legislation to retrospectively legalise the consecrations of her bishops.[43] That Plowden advocated for Bonner and advised Dean Goodman within the space of two years underscores his professional standing.

Remarkably, even after Plowden refused to sign a declaration in 1569 that obliged him, as a Justice of the Peace for Berkshire, to observe the Act of Uniformity and receive the sacrament, his career did not seem to suffer.[44] Nor did Plowden's apparently staunch efforts to

[38] *EP,* p. 57.
[39] *EP,* p. 57.
[40] Alexandra Walsham, *Catholic Reformation in Protestant England* (Farnham: Ashgate, 2014), p. 110
[41] *EP,* p. 36, p. 122. Contemporary casuistical manuals struggled to justify the spiritual legality of Catholics purchasing former monastic lands. See Walsham, *Catholic Reformation*, p. 107.
[42] *EP*, p. 82.
[43] *EP,* p. 82.
[44] For refusing to subscribe, Plowden was fined 200 marks and was compelled to sign a bond assuring his good behaviour. This bond was voided by the privy council after a year, during which time Plowden was allowed to continue in his office. Norman Jones has argued that the privy council were reluctant to remove Catholic Justices of the Peace, recognizing the risk of alienating local leaders. See *The Birth of the Elizabethan Age: England in the 1560s* (Oxford: Blackwell, 1993), p. 74.

resist the purge of papists at the Inns of Court seem to detract from his professional standing.[45] Throughout the 1570s, Plowden represented various members of the Protestant political nation, including: Sir Thomas Bromley, the Lord Chancellor; Edmund Grindal, the archbishop of Canterbury; and even Queen Elizabeth herself in 1573.

It was whilst representing the Queen in 1573 that Plowden was reportedly offered the Lord Chancellorship upon condition that he renounce his Catholicism. Tradition has it that Plowden refused, informing Elizabeth that 'I should not have in charge your Majesty's conscience one week before I should incur your displeasure, if it be your Majesty's royal intent to continue the system of persecuting the retainers of the Catholic faith'.[46] Plowden's biographers agree that it is unlikely that such an offer was ever made, that it is simply one of a series of apocryphal stories in which Queen Elizabeth supposedly offered positions of importance to well-known Catholics, such as Edmund Campion, John Feckenham, and Francis Tregian, in return for their conversion and compliance.[47] Nonetheless, as Brooks puts it, that the story carries any weight whatsoever is testament to Plowden's evident reputation and standing despite his recusancy.[48] As the Earl of Northampton recollected, 'my lord Burghley, Lord Treasurer did retain Mr Plowden as one of his counsell, though hee and euery one knew him to bee a papist, hee retayned him as a lawer and not a professor of any religion'.[49] Likewise, during the Jesuit Henry Garnett's trial for treason in 1606, Coke noted that, 'excepting his recusancy', Plowden

[45] For a detailed account of this purge, see Geoffrey de C. Parmiter, *Elizabethan Popish Recusancy at the Inns of Court* (London: Institute of Historical Research, 1976).
[46] Humphry W. Woolrych, *Lives of Eminent Serjeants-at-Law of the English Bar* (2 vols., London: W.H. Allen, 1869), I. 115.
[47] *EP*, p. 138. Glazebrook, 'Plowden, Edmund', in *Dictionary of the Common Law*, p. 418.
[48] Brooks, 'Plowden, Edmund', *ODNB*.
[49] Reported in a letter of William Wentworth to Sir William Wentworth, February 1614, printed in *Wentworth Papers, 1597-1628*, ed. J.P. Cooper (London: Royal Historical Society, 1973), p. 61, quoted in *EP*, p. 163.

was otherwise an example of a 'learned and good' Catholic who was capable of political circumspection and obedience to the crown.[50]

Plowden remained practising into his sixties and was still active in an important case in the Exchequer in Trinity term 1583.[51] He died, most likely in his chamber in the Middle Temple, on 6 February 1585.[52] As per the instructions in his will, Plowden was later buried beside his wife, Katherine, in the Temple Church.[53] A monument and effigy of Plowden remain there today. Inscribing the title page of his prime copy of the *Commentaries*, Coke summarised Plowden's distinguished career and pre-eminence in the sixteenth-century common law thus:

> By learning he whiche else hathe naught
> From lowe estat to highe is broughte
> and ofte the rude which treasures haue
> of cresus riche, becom a knaue.[54]

Plowden was also remembered by Thomas Egerton (later Baron Ellesmere), as an oracle of the law, and by William Camden as one whose professional integrity and knowledge of common law were second to none.[55] In granting certain estates in Oxford and Berkshire to Plowden's nephew and to his sons in December 1585, Queen Elizabeth was reported to have recognised Plowden as 'the greatest and most honest lawyer of his age'.[56] Echoing these sentiments, Sir William

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[50] 'Life of Father Henry Garnett', *Records of the English Province of the Society of Jesus: Historic Facts Illustrative of the Labours and Sufferings of its Members in the Sixteenth and Seventeenth Centuries*, ed. Henry Foley (7 vols., London: Burns and Oates, 1875-83), IV. 168, quoted by David Chan Smith, 'Sir Edward Coke: Faith, Law and the Search for Stability in Reformation England', in *Great Christian Jurists in English History*, ed. Mark Hill and R.H. Helmholz (Cambridge: Cambridge University Press, 2017): 93-114, p. 99.
[51] *EP*, p. 154.
[52] *EP*, p. 156.
[53] TNA, PROB 11/68/650.
[54] Holkham Hall, BN 8017. As well as the poem quoted above, this book contains sparse marginal annotations, mostly in Coke's hand, as well as a table of contents written in Coke's hand.
[55] *EP*, pp. 135-36. William Camden, *Annales Rerum Anglicarum et Hibernicarum regnante Elizabetha* (London, 1615), p. 365.
[56] O'Sullivan, 'Plowden: Master Treasurer', p. 34.

Holdsworth remembered Plowden as 'perhaps the most learned lawyer in a century of learned common lawyers'.[57] Certainly, Plowden was responsible for intellectually and materially shaping the discipline to which he devoted his life; his innovative volumes of reports were still being used as a textbook in the eighteenth century, and the hall Plowden constructed for the benefit of his fellow Middle Templars remains today, having survived the Great Fire of London and two World Wars.

Outline of Chapters

The present volume of this thesis — consisting of six substantive chapters and a coda — offers a comprehensive analysis of Plowden's legal, constitutional, and historical arguments in support of the Stewart succession. To make the best sense of Plowden's complex and unfamiliar text, these chapters follow the progression of Plowden's argument, addressing distinct sections of the *Treatise* in order.

My thesis begins by providing an overview of the dynastic crisis precipitated by Queen Elizabeth's failure to marry and produce an heir to the throne during the first decade of her reign. Chapter 1 uses the critical perspective provided by the preface to Plowden's *Treatise* to examine how various succession polemicists reacted to this dynastic crisis, identifying the key tracts to which Plowden responded. This chapter goes on to hypothesise that Plowden investigated the Queen of Scots' right to succeed to the English throne at the behest of Queen Elizabeth and her Privy Council during a period of détente between the royal cousins in the latter half of 1566.

Chapters 2 and 3 address the first part of Plowden's *Treatise*, in which he argues that various maxims of the common law, including the disability of alien birth, do not apply to the hereditary succession of the crown. Chapter 2 examines the first five chapters of Plowden's

[57] William Holdsworth, *A History of English Law* (13 vols., London: Methuen, 1922-52), V. 372.

Treatise, in which he systematically expounds the doctrine of the king's two bodies. Hitherto, it has gone entirely unacknowledged how substantially the first five chapters of Plowden's *Treatise* overlap with Plowden's reports of contemporary cases in which the fiction of the king's two bodies was disputed. By comparing the *Treatise* and *Commentaries* for the first time, I demonstrate how Plowden was able to transform contemporary debates and often countervailing ideas relating to the legal implications of the king's corporate status into a systematic, compelling doctrine. Throughout this thesis, I suggest that it is Plowden's ingenious capacity to apply the nascent doctrine of the king's two bodies to resolve thorny matters of legal and political dispute that constitutes his novel intervention in the succession debate.

In chapter 3, I examine how Plowden uses the doctrine of the king's two bodies to prove that the legal disability of foreign birth could not be reasonably applied to the succession of the crown. Exploring the often-digressive nature of Plowden's argument in chapters VI to XI of his *Treatise*, much of which seems extraneous to Mary Stewart's case, I stress that Plowden's predominant concern was to prove the legal ignorance of previous succession polemicists. In doing so, I suggest that Plowden develops a constitutionally ambitious case that deliberately goes beyond what was necessary for the Queen of Scots.

Chapters 4 and 5 attend to the second part of the *Treatise*, in which Plowden argues against the foreignness of Mary Stewart's Scottish birth. Chapter 4 offers an original account of the historical sources of Plowden's argument in part II, chapter I, of the *Treatise*. I demonstrate how Plowden used the manuscript chronicles of Thomas Walsingham, Matthew Paris, and William of Newburgh, alongside contemporary printed histories, and polemical documents to construct a tendentious history of English suzerainty over Scotland. The latter part of chapter 4, and much of chapter 5, is then given over to Plowden's efforts to prove that Mary Queen of Scots could still be regarded as being within the allegiance of her royal cousin, despite the problematic realities that no Scottish monarch had done homage to his English counterpart since the early-fifteenth century and that earlier homages were not necessarily performed for the realm

of Scotland itself. In chapter 5, I address the concluding chapters of Plowden's *Treatise*. I first consider Plowden's symbolic description of the ceremony by which a tenant becomes his lord's man, reading the ceremonial gestures of performing homage (as described by Plowden) as an allegory of Anglo-Scottish relations. Chapter five closes by considering why Plowden concludes his *Treatise* by repeating Polydore Vergil's report of Henry VII's providential thoughts on a potential Scottish succession to the English throne.

Chapter 6 addresses Plowden's *Brief Declaration*, the postscript he added to his *Treatise* to dispute the validity of Henry VIII's will. Henry's will had advanced the claims of Mary Stewart's Suffolk cousins at the expense of her more compelling hereditary claim. In chapter 6 I investigate the various strategies by which Plowden attempted to disprove the validity of the king's will and offer a novel analysis of the political circumstances under which this refutation was produced. This chapter also engages with the procedural differences between matters of law and matters of fact to compare the *Treatise* proper and its supplement.

Throughout the six chapters of this thesis, I highlight points of comparison between Plowden's *Treatise* and several subsequent tracts on the Elizabethan succession. Perhaps the most significant of these works is John Leslie, bishop of Ross's *A defence of the honour of the right highe, mightye and noble Princesse Marie Quene of Scotlande*, which, I shall demonstrate, adapted many of Plowden's pro-Stewart arguments for the press when first printed in 1569. I also look ahead to two substantial manuscript refutations to Plowden and Leslie's pro-Stewart arguments written in the early- to mid-1580s: an *Answer to the bishop of Ross's book* by Robert Glover, the Somerset herald; and the dialogue known as *Certaine errors*, written by William Fleetwood, the common lawyer and Recorder of London.[58] Whilst particular aspects of these three tracts are illuminated

[58] For the dating and attribution of the *Answer to the bishop of Ross's book* to Glover, see Nigel Ramsay, 'Glover, Robert (1543/4–1588)', *ODNB*. Glover's tract is available in three manuscript witnesses: Bodl. MS Carte 105 (cited in this thesis); Northampton Record Office, MS F. (M.) P. 223; and BL Stowe MS 273 (a redacted and rearranged version of the text). For the dating and attribution of *Certaine errors* to Fleetwood, see J. H. Baker and J. S. Ringrose, *A Catalogue of English Legal Manuscripts in Cambridge University Library* (Woodbridge: Boydell Press, 1996), pp. 652-53.

in comparison to Plowden's *Treatise*, there is not scope within this thesis to comprehensively review the literature of the later succession debate, nor of the early Stuart union proposals. In lieu of this, the coda to this thesis accounts for the afterlife of Plowden's *Treatise* following the Queen of Scots' forced abdication from the Scottish throne in June 1567 and attests to the influence of Plowden's arguments in the legal and constitutional debates of the succeeding half-century. In suggesting further directions for study, this coda reflects the wider ambitions of this project: to bring Plowden's influential arguments to wider scholarly attention and to facilitate future research by providing an authoritative edition of his *Treatise*. The coda will also recapitulate the key findings of the thesis, explaining how my analysis of Plowden's *Treatise* might reframe scholarly understanding of English legal and political culture during the Elizabethan succession crisis, as well as the debates over Anglo-Scottish history and nationhood occasioned by the possibility of a Scottish succession.

Recensions 1 and 2

In the six chapters that follow, I shall frequently refer to textual differences between the manuscript witnesses of 'Recension 1' and 'Recension 2' of Plowden's *Treatise*. Although the editorial exordium in volume 2 describes the individual witnesses in detail, it is worth outlining the major differences between the two versions of Plowden's tract at this preliminary juncture. Recension 1, found in witnesses H and R, is very likely an early version of the *Treatise*, possibly as it was composed in 1567. The witnesses of Recension 1 can be regarded as copies of a 'working manuscript': the recension includes several telling references to the *Treatise* as work-in-progress and numerous passages directly address a specific influential reader and patron.[59] That is not to

See also Brooks, *Law, Politics and Society*, p. 75. Fleetwood's autograph copy of this tract is extant: CUL Add. MS 9212. However, this holograph is so heavily corrected and revised that a fair copy of Fleetwood's treatise in the Bodleian has been cited in this thesis: Bodl. MS Rawlinson C 85.

[59] The identity of this individual is discussed below, pp. 41-49.

say, of course, that Recension 1 is the earliest possible version of Plowden's text or that H and R are identical with the author's holograph; there may have been previous versions of the *Treatise* but they have since been lost or destroyed.

At some point after Recension 1 had been completed, substantial revisions to the *Treatise* were made: Recension 2. These revisions can be discovered in witnesses D, C, M, and Y. There are three principal differences between the two recensions. First, Recension 2 removes all references to the *Treatise* as a work-in-progress and reworks those passages from Recension 1 which previously addressed a specific reader, instead addressing a wider audience. Hence, the revisions between Recensions 1 and 2 are particularly pronounced in the preface to the *Treatise*, which explains how and why Plowden's tract came to be written. So different is the preface in Recensions 1 and 2, that I provide a separate transcription of the revised preface from witness D in my appendices.[60] Secondly and more generally, Recension 2 frequently adds words and short passages to Recension 1 to make Plowden's argument more coherent. Such additions have been interpolated into my edition. Third and finally, in part two of Plowden's *Treatise* there are several instances in which Recension 2 does not include substantial passages found in Recension 1. For instance, Plowden's description of the rebellion of John Balliol, King of Scots, against English overlordship, replete with gory details of the violence committed by Scottish raiding parties in the north of England, is drastically abbreviated in Recension 2 by comparison to Recension 1. Likewise, Recension 2 does not include Plowden's discussion of several Year Book cases relating to the enemy status of the Scots which can be seen in Recension 1. Interestingly, there are far fewer revisions between Recensions 1 and 2 in part I of Plowden's *Treatise* by comparison to part II.

In the absence of compelling evidence to the contrary, I operate from the assumption throughout this thesis that Plowden was responsible for the revisions found in Recension 2. I

[60] I also transcribe other significant prefatory materials found in D. See volume 2, appendix 2.

address when (and why) these revisions were probably made in chapter 1. It is important to acknowledge that in calling this recension Recension 2, I do not wish to imply that it was directly revised from Recension 1; other versions of the *Treatise* may well have been produced in the interim but are simply no longer extant.

Chapter 1. A Knot of Harebrains: The Early Elizabethan Succession Debate

1.1. Aesop's Frogs and Grasshoppers

'[F]or warre we have peace; for feare securitie [...] for scarcitie we have reasonable plentie, for bras mony, good silver; for servitude, libertie; what can a common Wealth require more'? [1] So the character Spitewed compared the reigns of the late Queen Mary and Queen Elizabeth in Sir Thomas Smith's *Dialogue on the Queen's Marriage* (1561).[2] Smith's *Dialogue* —a conversation between four gentlemen in an anteprandial lull — weighed the merits of Queen Elizabeth remaining single, marrying a foreigner, or wedding an Englishman. It 'combined the popular arguments for and against marriage in general with large measures of English and ancient history, and theory about the function of princes and women's roles'.[3] As his name suggests, Spitewed argues against the necessity of the Queen's marriage, demanding whether his companions can find any fault in her governance that indicates the need for a royal consort. Emphasizing Elizabeth's successes in overcoming the financial, political, and religious distresses of Marian England, Spitewed likens those Englishmen who urged the Queen to marry to the discontented frogs of Aesop's fable who begged Jupiter to send them a king.[4] In Aesop, Jupiter throws a log into the frog pond to rule over its amphibious inhabitants, but after some time the creatures overcome their awe and ask Jupiter for a new king. Granting their request, Jupiter sends the frogs a stork monarch who terrorises and devours them. In one of the least flattering encomiums of her reign, Spitewed thus likens Elizabeth to Aesop's inoffensive log-king, with whose rule

[1] Bodl. MS Ashm. 829, f. 5r. This manuscript contains numerous tracts relating to the Elizabethan succession, several of which are quoted in this thesis. For an extensive discussion of this manuscript, see F.J. Routledge, 'Manuscripts at Oxford Relating to the Later Tudors, 1547-1603', *Transactions of the Royal Historical Society*, 8 (1914): 119-159.
[2] Smith's *Dialogue* was one of the most widely copied manuscript tracts in Elizabethan England, circulating widely at court. See Mary Dewar, *Sir Thomas Smith: A Tudor Intellectual in Office* (London: Athlone, 1964), pp. 4, 83.
[3] Jones, *Elizabethan Age,* p. 128.
[4] Bodl. MS Ashm. 829, f. 5r.

Englishmen should be contented, rather than demanding another monarch who might deprive the realm of its peace and security.

By contrast, Lovealien, who proposes a foreign match, warns that present prosperity should provide 'the more cause to feare, the greater occasion to forsee, the iuster warninge to provide that this estate maie continewe'.[5] Central to Lovealien's oration is a foreboding sense that the successes of Elizabeth's early reign 'standeth but on tickle and fraile grounde' and that, out of the uncertainty of her succession, 'all the world shold returne to the old Chaos'.[6] Lovealien likens Spitewed's disregard for the Tudor dynasty to Aesop's careless grasshoppers, who spent their summer singing and dancing but, having failed to provide 'wherwithall to live', repented their careless cavorting come winter.[7]

The comic debate between Spitewed and Lovealien as to whether early Elizabethan Englishmen were ungrateful frogs or ignorant grasshoppers offers an instructive way of characterizing the serious anxieties of the period from Elizabeth's accession in November 1558 to the Christmas vacation of the Inns of Court in 1566 when Plowden began to research his *Treatise*. This chapter contextualises Plowden's *Treatise* by exploring the political and religious climate of Elizabeth's early reign and the dynastic crisis precipitated by the Queen's reluctance to marry or otherwise settle the succession in the absence of a direct heir. It also analyses the significance of the largely anonymous succession polemics of the 1560s, using the critical perspective provided by Plowden's preface to his *Treatise*. Finally, this chapter outlines the scope and structure of Plowden's argument as described by the author in his preface.

[5] Bodl. MS Ashm. 829, f. 13r.
[6] Bodl. MS Ashm. 829, f. 15v.
[7] Bodl. MS Ashm. 829, f. 13r.

1.2. From Accession to Parliament: 1558-1559

Although 'all sixteenth-century dynastic changes in England were marked by upheaval', Susan Doran has argued that Elizabeth 'had the easiest accession of all' her Tudor forbears.[8] Whilst Elizabeth had (according to contemporary reports) inherited a diseased, disordered, and divided realm from Mary I, her accession was at the least unchallenged and non-violent.[9] Nonetheless, Elizabeth's bastardy posed an immediate threat to her royal authority in England and in Europe. Like Mary I, Elizabeth claimed the throne on the legal basis of Henry VIII's Third Act of Succession (35 Hen. VIII, c. 1) and by his last will.[10] Passed as a precaution against the king's death whilst waging war in France, this succession act had enabled Henry to maintain that although neither Katherine of Aragon nor Anne Boleyn had been his lawful wives, his illegitimate issue by them could nonetheless be inserted into the succession by the backdoor.[11]

In France, the Guise monarchy immediately challenged Elizabeth's title to the English throne on the grounds of her bastardy. Henry II, along with his brothers-in-law, the Cardinal of Lorraine and the Duke of Guise, encouraged the Dauphin Francis and his new bride, Mary Queen of Scots, to style themselves the monarchs of France, Scotland, England and Ireland and ordered that the arms of England be blazoned with those of France and Scotland on the armorial badges and escutcheons belonging to the Dauphin's household: effectively 'establishing a rival monarchy in exile'.[12] Mary was eventually prohibited from using the style, title, and arms

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[8] Susan Doran, '1603: A Jagged Succession', *Historical Research,* 93 (2020): 443-465, at pp. 464-65.
[9] An analysis of the 'Distresses of the Commonwelth' upon Elizabeth's accession in 1558 was provided by Armigal Waad, a veteran civil servant. See SP 12/ 1, ff. 147-54.
[10] For evidence of the 'great store' both Tudor Queens placed in their parliamentary titles, see Howard Nenner, *The Right to Be King: The Succession to the Crown of England, 1603-1714* (Basingstoke: Macmillan, 1995), p. 3.
[11] See *Statutes*, III. 955-58. For discussion, see Eric Ives, 'Tudor Dynastic Problems Revisited', *Historical Research,* 81 (2008): 255-279, at p. 264. A previous succession act of 1536 (28 Hen. VIII, c. 7), passed after Anne Boleyn's execution, had already empowered the king to assign the crown by letters patent or by his last will if he produced no legitimate heirs. See *Statutes*, III. 655-62.
[12] John Guy, *My Heart is My Own: The Life of Mary Queen of Scots* (London: Fourth Estate, 2004), p. 96.

of England under the 1560 Treaty of Edinburgh.[13] Nonetheless, Sir Nicholas Throckmorton's alarmed report of these events was repeatedly invoked by Sir William Cecil throughout Elizabeth's reign when preparing partisan memoranda about the Queen of Scots.[14]

Where Mary I's first Parliament had sought to repeal the statutory declarations of her illegitimacy (1 Mary, Stat. II, c. 1), Elizabeth wisely followed the advice of Sir Nicholas Bacon and never attempted to amend her father's legislation to achieve the same.[15] Instead, Parliament produced a recognition of Elizabeth's title to the English throne under Henry VIII's 1544 succession act and declared that her father's limitation of the succession should 'stande bee and remayne the Lawe of this Realme for ever' (1 Eliz. I, c. 3).[16] A companion act restored Elizabeth's legal position as her mother's heir (1 Eliz. I, c. 23).[17] Rather than repeal her bastardy, then, Elizabeth's first Parliament of January 1559 convened with the main purpose of establishing 'an uniforme order of religion' and overturning the religious status quo in England.[18] The Act of Supremacy (1 Eliz. I, c. 1) declared Elizabeth to be 'Supreme Governor' of the Church of England as well as reviving most of the Henrician anti-papal acts and reversing Mary's

[13] The treaty of Edinburgh brought an end to the conflict between English and French forces in Scotland after Elizabeth had lent military aid to the Scottish Protestant rebels who had deposed Mary Stewart's mother, the regent Mary of Guise. The response of Elizabeth and her ministers is discussed in Jane E. A. Dawson, 'William Cecil and the British Dimension of Early Elizabethan Foreign Policy', *History*, 74 (1989): 196-216, at pp. 204-10. Mary's reluctance to ratify the Treaty of Edinburgh is explored below.

[14] See Andrea Clarke, 'The False Arms of Mary Queen of Scots and the French Dauphin', in *Elizabeth & Mary: Royal Cousins, Rival Queens*, ed. Susan Doran (London: The British Library, 2021), p. 76.

[15] See *Statutes*, IV. 200–01. Reversing Elizabeth's bastardy would have proved more complicated than Mary I's. Henry VIII's marriage to Anne Boleyn, Elizabeth's mother, had been formally pronounced null and void by Thomas Cranmer before Anne's execution in 1536. Cranmer's nullity judgment, as a Protestant archbishop of Canterbury, prevented Elizabeth from simply enacting a law declaring her legitimacy as her half-sister had done.

[16] *Statutes*, IV. 359.

[17] *Statutes*, IV. 397.

[18] The words are those of Sir Nicholas Bacon, quoted by Susan Doran and Karen Limper-Herz in 'The Act of Supremacy 1559', in *Elizabeth & Mary*, ed. Doran, p. 71. The historiographical debate surrounding the vexed passage of the Elizabethan religious settlement is examined by Michael Questier, *Dynastic Politics and the British Reformations, 1558-1630* (Oxford: Oxford University Press, 2019), p. 19.

religious settlement.[19] Furthermore, the Act of Uniformity (1 Eliz. I, c. 2) compelled the use of a new Book of Common Prayer and established penalties for those who refused to comply with the novel form of worship.[20]

This religious settlement, along with the 'rapid clearing out of many of Mary's councillors and court officials', and the signing of the Treaty of Cateau-Cambrésis in April 1559, enabled Elizabeth's government to project its image as the antithesis to the Marian regime in both religion and international politics.[21] However, as much as was achieved in the first months of her reign, Elizabethan Englishmen had also hoped that she might achieve a great deal more by marrying and producing an heir to the throne. Besides asking what the Queen might do about religion, the next question on the lips of early Elizabethans, argues Jones, was 'whom will she marry?'[22]

1.3. A Matter Too Big for Weak Folks and Too Deep for Simple

Although the ambitions of Elizabethan parliamentarians for a rapid settlement of the succession were (Cecil later put it in a memorandum) 'most natural, most easy, most plausible' to all the people, such a settlement proved particularly difficult 'to be obtained' owing to Elizabeth's 'lothsomeness' to discuss the matter.[23] Elizabeth's answer to a delegation from the House of Commons at her first Parliament made it clear that her marriage was chief amongst the *arcana imperii* (or, mysteries of state) of which she would not tolerate public discussion.[24] Whilst Susan

[19] *Statutes*, IV. 350-55.
[20] *Statutes*, IV. 355-58.
[21] Questier, *Dynastic Politics*, p. 15. Amongst other diplomatic negotiations between England, France, and Spain, the peace settlement of Cateau-Cambrésis brought about a face-saving solution to Mary I's loss of Calais, which would be returned to England after eight years, or the French would pay a sum in compensation.
[22] Norman Jones, *Faith by Statute: Parliament and the Settlement of Religion, 1559* (London: Royal Historical Society, 1982), p. 10.
[23] SP 12/40, f. 195r.
[24] See BL MS Lansdowne 94, f. 29v, quoted by Amy Blakeway, 'The Succession', in *Elizabeth & Mary*, ed. Doran, p. 108.

Doran has demonstrated that Elizbeth's rejection of some dozen marriage proposals in her early reign should be attributed to pragmatic concern as much as personal pride, it was nonetheless evident that the longer Elizabeth remained unmarried, the more insecure the Tudor dynasty and the future of English Protestantism seemed.[25]

There was no clearer reminder of this instability than Elizabeth's near-fatal bout of smallpox in October 1562. As John Neale has proven, there was a very real fear, precipitated by the queen's illness, that England would imminently face the kind of religious civil war which was presently devastating France and had put such pressure on Anglo-Scottish relations.[26] Even amongst Elizabeth's Privy Council there were 'as many opinions about the succession as there were councillors' and no unanimous decision could be reached on the appropriate action to be taken should the queen die prematurely.[27] Whilst most parties debated the relative merits of the Protestant pretenders to Elizabeth's throne, a minority urged that England would be 'divid[ed] and ruin[ed] unless they summoned jurists of the greatest standing in the country to examine the rights of the claimants'.[28] However, appealing to the Inns of Court was felt to be as good as a determination of the succession in favour of the Catholic claimants, Mary Stewart or Countess Margaret Lennox, for the lawyers who would be called upon to decide the matter were perceived to share their confessional allegiance.[29]

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[25] Susan Doran, *Monarchy and Matrimony: The Courtships of Elizabeth I* (London: Routledge, 1996), pp. 21, 211.
[26] John Neale, *Elizabeth I and Her Parliaments, 1559-1581* (London: Cape, 1953), p. 88. The impact of the French civil war on Anglo-Scottish relations, sidelining a proposed meeting between Elizabeth and Mary in York in autumn 1562, is discussed by Mark Loughlin, 'The Career of Maitland of Lethington, c. 1526-1573' (Unpublished PhD thesis, University of Edinburgh, 1991), pp. 153-56.
[27] *CSP Spain*, I. 262.
[28] *CSP Spain*, I. 263.
[29] *CSP Spain*, I. 263. The Countess of Lennox was the daughter of Henry VIII's elder sister, Margaret, by her second husband. The countess's son, Henry, Lord Darnley, therefore also had a strong claim to the English throne. See Genealogical Chart 1. Darnley would go on to marry Mary Stewart in 1565.

Although Elizabeth recovered by the end of 1562, 'the fears engendered by the queen's illness were fresh in every member's mind' when Parliament met in January 1563 and once again petitioned the queen to marry.[30] Echoing the warnings provided by Thomas Norton and Thomas Sackville's Senecan tragedy, *Gorboduc* (performed before the queen at Whitehall in January 1562) both houses invoked England's mythical and recent history to urge Elizabeth to consider the chaos, civil war, and lawlessness which would result should she die without issue.[31] Whilst the Lords and Commons did manage to wring out an admission from the queen that she ought to marry, Elizabeth's answer to their respective petitions made it clear she reserved the right to decide when (and, indeed, to whom) she would make this commitment.[32]

With the possibility of the queen marrying and producing a direct heir to the throne growing ever slimmer, it became necessary for her councillors (as Cecil remarked in his aforementioned memorandum) to confront the possibility of her dying childless and to 'procede to discussion of the right of the successor'.[33] 'All agreed', argue Doran and Kewes, that 'to avoid civil war, usurpation or a foreign invasion [...] an heir presumptive needed naming, both as an interim measure until Elizabeth bore a child and as a fall-back position in case she never did'.[34] But if there was unanimity that an interim measure was necessary, divisions soon arose as to how to bring this about. Doran and Kewes identify four critical points of contention: '[1)] what principles of succession should be followed; [2)] who had the best right according to those

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[30] *EP*, p. 87.
[31] For the Commons' petition, see *Proceedings in the Parliaments of Elizabeth I*, ed. T.E. Hartley (3 vols., Leicester, 1981-1995), I. 90-93. For a discussion of this petition, see Patrick Collinson, 'The Elizabethan Exclusion Crisis and the Elizabethan polity', *Proceedings of the British Academy*, 84 (1994), 51-92. For the Lords' petition, see SP 12/ 27, ff. 136-137, discussed by Stephen Alford, *The Early Elizabethan Polity: William Cecil and the British Succession Crisis, 1558-1569* (Cambridge: Cambridge University Press, 1999), pp. 108-9.
[32] BL MS Lansdowne 94, f. 30r, quoted in Andrea Clarke, '*Nunc Dimittis*', in *Elizabeth & Mary*, ed. Doran, p. 113.
[33] SP 12/ 40, f. 195r.
[34] Susan Doran and Paulina Kewes, 'The Earlier Elizabethan Succession Question Revisited', in *Doubtful and Dangerous: The Question of Succession in Late Elizabethan England*, ed. Susan Doran and Paulina Kewes (Manchester: Manchester University Press, 2014): 20-44, at p. 21.

principles; [3)] who should make the decision; [4)] and finally, how to implement it'.[35] Plowden's *Treatise*, and the succession polemics to which Plowden responded, were predominantly concerned with the first two of these four questions. Specifically, these tracts considered 'whether the crown ought to pass automatically at the death of Elizabeth to the next in the hereditary line'— i.e., Mary Stewart — or 'whether the next in line might be passed over because of a "legal" incapacity to rule' and whether the crown might therefore descend to Lady Katherine Grey: Mary Stewart's English cousin, descended from Henry VIII's younger sister, Mary, by her second marriage to the Duke of Suffolk.[36] It is to the respective claims of Mary Stewart and Katherine Grey that I shall now turn. The following analysis can be elucidated by consulting 'Genealogical Chart 1', which illustrates the Stewart and Suffolk claims to succeed Elizabeth I.

As had been immediately asserted by the Guise monarchy upon Elizabeth's accession, Mary Stewart had a strong hereditary claim to the English crown as a direct descendant of Henry VII. Margaret Tudor, Henry VII's elder daughter, had married James IV of Scotland (Mary's grandfather) in 1503. After the death of her first husband, Francis II, Mary returned to Scotland in August 1561. Within fifteen days of her arrival at Leith, Mary dispatched her Secretary, William Maitland of Lethington, on an embassy to London to pursue her claim to be recognised as Elizabeth's successor. During his three interviews with Elizabeth in September 1561, Maitland (in Elizabeth's words) 'dyd ringe all wayes her knele in her eares, tawlkynge of nothynge but of her succession', pushing her to recognise Mary as her successor in return for Mary ratifying a

[35] Doran and Kewes, 'Earlier Elizabethan Succession Question', p. 21. Debate over the latter two points of contention ventured into 'radical constitutional territory', as Cecil and other prominent political figures considered Parliament's right to determine the outcome of the succession or perhaps even to elect a favourable candidate. See Paulina Kewes, 'Parliament and the Principle Elective Succession in Elizabethan England', in *Writing the History of Parliament in Tudor and Early Stuart England*, ed. Paul Cavill and Alexandra Gajda (Manchester: Manchester University Press, 2018): 106-132, at p. 106.

[36] Nenner, *Right to be King*, p. 13. There were, of course, other pretenders to the throne. However, as Mortimer Levine has succinctly outlined, the Elizabethan succession quickly became a two-horse race. See *EESQ*, pp. 5-12.

modified Treaty of Edinburgh.[37] Mary had hitherto refused to ratify this treaty but offered to do so if a prejudicial article pertaining to her right to lay a future claim to the English throne was revised. Elizabeth, meanwhile, was insistent that Mary accept the 1560 treaty as it stood.[38]

Although Maitland's first English embassy was characteristic of what Mark Loughlin has aptly styled the 'stop-go-amity' of Anglo-Scottish relations in the 1560s, Elizabeth did seem to favour Mary's claim.[39] Maitland optimistically wrote that Elizabeth 'liked better of the queen of Scotland's title next herself than of all others; and failing of her own issue, could best be content that she should succeed'.[40] In a highly revealing comment, Elizabeth also told Maitland that she had 'always abhorred to draw in question the title of the crown' but that whoever had 'most right' — however ambiguously defined 'right' might be — would succeed her. If her royal cousin was that person, Elizabeth vowed to 'never hurt her'. However, Elizabeth warned that 'if any other ha[d] better right' than Mary, or 'if there be any law against' the Stewart succession, she was bound 'not to alter the laws'. [41] Intriguingly, Elizabeth declared herself to be 'not curious to inquire' into the legality of Mary's right to succeed to her throne.[42] Levine has speculated that Elizabeth's disinclination to inquire into the law of succession was a prudent policy of 'letting sleeping dogs lie' — that by investigating the legality of Mary's claim, Elizabeth might have been forced to exclude her royal cousin against her desires.[43] However, Levine's argument is contradictory, as he argues elsewhere that Elizabeth's lawyers and judges would very likely have

[37] *CSP Scot*, II. 101-2.
[38] Susan Doran, *Elizabeth I and her Circle* (Oxford: Oxford University Press, 2015), p. 66.
[39] Loughlin, 'Maitland of Lethington', p. 124.
[40] *Elizabeth I: Collected Works,* ed. Leah Marcus et al. (Chicago, IL: University of Chicago Press, 2000), p. 67.
[41] Martin Philippson, *Histoire du règne de Marie Stuart* (3 vols., Paris: Bouillon, 1891-92), III. 448, quoted in *EESQ*, p. 32.
[42] Elizabeth liked to represent herself as a supporter of justice and law. Several notable legal figures, including Christopher Wray, Chief Justice of the Queen's Bench, and Sir Edward Coke, Elizabeth's attorney-general from 1594, praised her willingness to respect judicial independence. See J.H. Baker, *English Law Under Two Elizabeths: The Late Tudor Legal World and the Present* (Cambridge: Cambridge University Press, 2021), pp. 82-86.
[43] *EESQ*, p. 33.

been sympathetic to the Stewart claim, sharing the queen of Scots' confessional allegiance.[44] It is more plausible that Elizabeth pragmatically wished to forestall such a legal inquiry until it could be leveraged politically over her Scottish cousin, or, indeed, until she had settled the English succession herself, when Mary's title would be merely academic.

If Elizabeth was professedly incurious about the legal barriers to Mary's succession, then much of the Protestant political nation took the firmly opposite view. Whilst Mary's Catholicism was the predominant concern for the authors of anti-Stewart succession tracts in the 1560s, no case could stand, as Kristen Walton points out, for excluding a claimant on the sole cause of religion.[45] Therefore, anti-Catholic sentiment was tethered to common law precedent and statutory interpretation to forestall the Stewart succession. Mary had been born in Linlithgow Palace, near Edinburgh, and it was asserted that common law prohibited aliens (foreign-born persons who did not owe allegiance to the English crown) from inheriting property — including the crown — in England. A statute of 1351, which excluded those born outside of the faith and allegiance of the king of England from the legal benefits of natural-born persons, was interpreted to illustrate the law against Mary.[46]

Henry VIII's will was understood to forestall the possibility of a Stewart succession. During a terminal period of illness in December 1546, Henry VIII ordered that his existing will be changed, with the main aim of revising the names of the men who would make up the future King Edward VI's regency council. Although not altering the place of his two illegitimate daughters in the limitation of the succession (as had been set out in his Third Act of Succession), Henry did make a significant amendment. Contrary to the principle of heredity, Henry's will favoured the issue of his younger sister, Mary, Queen of France, over the issue of his elder sister, Margaret, Queen of Scotland. In the limitation of the succession, Mary Stewart — gestured to

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[44] *EESQ,* p. 177.
[45] Kristen Walton, *Catholic Queen, Protestant Patriarchy: Mary Queen of Scots, and the Politics of Gender and Religion* (Basingstoke: Palgrave Macmillan, 2007), p. 53.
[46] The significance of this statute is discussed in detail in chapter 3.

only implicitly as amongst 'the next rightful heyres' — languished in place after Prince Edward and his issue; any heirs who might subsequently be born to Henry VIII; Mary Tudor and her heirs; Elizabeth and her heirs; the heirs of the Lady Frances Grey (Mary, Queen of France's elder daughter); and the heirs of Eleanor Clifford (the Queen of France's younger daughter).[47] Henry VIII's changes to the limitation of the succession have been interpreted as a punitive act against Mary Queen of Scots and her mother, Mary of Guise. Since 1542, Henry had aggressively sought a dynastic union between England and Scotland but consistently failed in his diplomatic and military aims. Henry's advancement of the heirs of his nieces, Frances and Eleanor, at the expense of the Stewarts was thus a retaliatory snub.[48]

Mary Queen of Scots' supporters, Plowden included, later disputed the validity of Henry VIII's will, asserting that it had been stamped with an impression of the royal signature and not signed by the king's hand. Since September 1545, the king's signature had been stamped on around one hundred grants, payments, licenses, and other state papers each month, relieving the king of the loathed chore of signing documents.[49] Whilst many anti-Stewart polemicists argued that the distinction between stamped and signed documents was inconsequential, the suggestion that Henry's 1546 will had been stamped was highly significant. Not only had the Third Act of Succession stipulated that Henry had plenary power to assign the crown only by his letters patent or by his last will 'signed with his most gracious hand', but the impressing of the stamp could potentially have been done after the king had become mentally or physically incapacitated, or (perhaps) after he was dead.[50] Nonetheless, by asserting the validity of Henry VIII's will and by

[47] TNA, E 23/ 4, f. 14. It is unclear why Henry overlooked his nieces, Frances and Eleanor, in favour of their heirs. In a 1590s treatise in defence of King James VI of Scotland's title to succeed Elizabeth I, Irenicus Philodikaios argued that the absurdity of Henry VIII limiting the crown to his nieces' heirs and not directly to them was indicative of the king not being of his right mind at the time of making his will. See *A treatise declaring, and confirming the just title and righte of Iames the sixt* (Edinburgh, 1599), sig. B4r.

[48] Doran, *Elizabeth I and her Circle*, p. 43. Guy, *My Heart is My Own*, p. 53.

[49] Eric Ives, 'Henry VIII's Will — A Forensic Conundrum', *The Historical Journal,* 35 (1992): 779-804, at p. 783.

[50] *Statutes*, III. 955.

upholding the common law barriers against the Stewart claim as absolute, English Protestants urged the exclusion of the Catholic Mary, with some going as far as to encourage Elizabeth to emulate her father's statutory legislation, to designate the order of succession to best protect their religion and the state.[51]

The candidate most favourable to English Protestants in the early 1560s was Lady Katherine Grey. However, Katherine's claim was genealogically inferior to the Queen of Scots' and there were persistent concerns about the legitimacy of Katherine's parents' marriage and her own marriage to the Earl of Hertford in 1560. When Elizabeth discovered that Katherine had clandestinely married the earl and was pregnant with their child in May 1561, she suspected a conspiracy and imprisoned Katherine. As Doran notes, Katherine's marriage to a Protestant nobleman 'strengthen[ed] her claim to the succession against the Catholic Queen of Scots, an outcome Elizabeth simply did not want'.[52] Moreover, Elizabeth had been inherently mistrustful of the Grey family after the coup on behalf Lady Jane Grey (Katherine's elder sister) in July 1553.[53] In May 1562 an ecclesiastical high commission confirmed Elizabeth's 'predetermined political decision', declaring that Katherine's marriage to Hertford was invalid and that their son, Edward, was illegitimate.[54] Despite these substantial blemishes on her claim and Elizabeth's *froideur* towards her, Katherine had the substantial legal advantage over Mary of having been born in England as well as being favoured by Henry VIII's will. Whilst the adherents of Katherine's claim therefore relied on statute and common law to assert her claim, Mary's supporters upheld the primacy of hereditary descent, arguing that the disqualification of alien

[51] Kewes, 'Elective Succession', pp. 107-08.
[52] Doran, *Elizabeth I and her Circle*, p. 47.
[53] On this coup, see Dale Hoak, 'The Succession Crisis of 1553 and Mary's Rise to Power', in *Catholic Renewal and Protestant Resistance in Marian England*, ed. E. Evenden and V. Westbrook (Farnham: Ashgate, 2015), pp. 17-42. On its Elizabethan legacy, see Paulina Kewes, 'The 1553 Succession Crisis Reconsidered', *Historical Research*, 90 (2017): 465-85.
[54] Doran, *Elizabeth I and her Circle*, p. 52.

birth did not apply to the crown. The result was a legal morass in which the English succession lay entangled.

The intervening years between the first (1563) and second (1566) sessions of Elizabeth's second Parliament did little to clarify the confused situation. In fact, the succession debate was aggravated by fierce quasi-legal pamphlet literature, as well as by Mary's marriage to her cousin, Henry, Lord Darnley in July 1565. To the English Protestant political nation, this marriage indicated that Mary was preparing to challenge for the English throne and that she planned to pursue her strengthened claim with the military assistance of a continental Catholic cabal.[55] These fears were not assuaged when, in August 1565, Mary assured Elizabeth that she would 'do nothing to prejudice' her title to the crown, nor enter into any league with a foreign state but only on condition that Elizabeth name her as heir presumptive 'by Act of Parliament'.[56] Meanwhile, Elizabeth faced near-constant pressure from her Protestant advisors to hamstring Mary's hereditary claim by marrying Charles II, Archduke of Austria, and produce an heir of her body, or else exclude the Queen of Scots by statute.[57] Although almost certainly biased in favour of her royal cousin's right of succession, Elizabeth was not prepared to settle the debate by statutory legislation in either direction. Reportedly, Elizabeth regarded the appointment of any successor as 'a troublesome and dangerous thing': the bitter experience of her half-siblings' reigns having taught her that in nominating a successor she might establish a figurehead for rebellions and 'disturb the common peace' whilst she yet lived.[58]

Elizabeth made her disinclination to nominate a successor clear during the Parliament of 1566. She responded furiously to requests that she exclude Mary, reminding her rebellious

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[55] Mary's marriage to Darnley 'eliminated the rivalry between the claimants and gave the couple the undivided support of the English Catholics'. See Jane E.A. Dawson, 'Mary Queen of Scots, Lord Darnley, and Anglo-Scottish relations in 1565', *International History Review*, 8 (1986), 1-24. Although Darnley's hereditary claim to the English throne was weaker than Mary's, the disability of alien birth could not be alleged against him as he was born in West Yorkshire.
[56] *CSP Scot*, II. 192-93.
[57] Doran, *Monarchy and Matrimony*, pp. 73-99.
[58] *CSP Scot*, I. 583, 595.

councillors and pertinacious parliamentarians that the prince is head of the body politic and rebuking the monstrous imposition of the feet trying to direct their head.[59] Elizabeth vented particular wrath on the Duke of Norfolk, banning him (along with the Earls of Leicester and Pembroke, the Marquess of Northampton and the Lord Chamberlain, William Howard) from her presence, and branding him a traitor and a conspirator.[60] Ultimately, Elizabeth declared the succession to be of 'too great importance to be declared by a knot of harebrains' and announced her intention to 'take counsel' on the matter from 'half a dozen of the most able' lawyers in her kingdom.[61]

Typically, Elizabeth's intention to seek the advice of her foremost lawyers has been dismissed as an empty threat, designed to deter the Protestant commons from further discussion of the succession.[62] Certainly, Elizabeth's announcement of intent marks a radical departure from her previous aversion to inquire into the legality of Mary's claim in September 1561. However, there is a substantial body of evidence to suggest a significant diplomatic rapprochement between Elizabeth and Mary in the latter half of 1566. This rapprochement, I argue, should prompt historians to view Elizabeth's announcement as sincere and wholly serious. In fact, I contend below that Plowden's *Treatise* was the direct result of this inquiry.

The birth of Prince James in June 1566 acted as the catalyst for a sustained period of détente between Elizabeth and Mary, which lasted until the assassination of Darnley in February 1567. Concomitant with James's birth, Elizabeth first offered to recognise Mary as heir presumptive, provided that Mary cede all claim to the English throne during Elizabeth's lifetime.[63] Although no agreement was reached, there nonetheless followed a period in which

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[59] Neale, *Parliaments*, p. 150.
[60] Neale, *Parliaments*, pp. 142-43.
[61] Letter sent by La Forêt to Charles IX on October 27, 1566, quoted by Neale, *Parliaments*, p. 142.
[62] *EESQ,* p. 178.
[63] Negotiations stalled because Elizabeth was unwilling to recognise Mary as her heir presumptive in writing, consenting only to convey such a recognition by word of mouth. See *CSP Spain*, I. 557-58.

'peace and amity' was widely perceived to exist between the two queens. In July 1566 Elizabeth was reported to be unusually 'pleased and tranquilized' by her Scottish diplomacy and predicted that relations with her royal cousin would now 'quiet down' to the mutual benefit of their realms.[64] Elizabeth did not personally attend James's christening in November 1566 but sent an experienced diplomatic envoy, the Earl of Bedford, to Stirling with express instructions to assure Mary that 'she should not finde herself forgotten in frendship' and that her hereditary claim would be given the fullness of 'iustice or equity' were the succession to be discussed.[65] Admittedly, Bedford was also instructed to complain about a birth-poem for James by Patrick Adamson, which predicted that the prince would unite Britain into one kingdom: amounting to a 'thingly disguised tract of Anglo-Scottish union on Stewart terms'.[66] Nonetheless, as Mary held an extravagant fête to celebrate her son's Catholic baptism in mid-December, amity between the two queens arguably reached its highest point. Certainly, the Spanish ambassador, Diego Guzman de Silva, understood that some agreement had been reached between the two queens by 16 December 1566, by which Elizabeth would formally adopt Mary as her heir presumptive, in return for Mary's recognition of Elizabeth as the legitimate queen of England.[67] Acknowledging that her father's statutory legislation and his last will and testament stood against this proposed re-determination of the succession, Elizabeth also promised to examine 'certen persons while they now do live' concerning the signing of Henry VIII's will.[68] In January 1567, Mary thanked Elizabeth for her 'equitie' and 'affection', demonstrated in her 'examining of the will supposed maid by the king your fader which some wold lay as a bar in our way'.[69] Significantly, in December 1566, a case was put to Elizabeth's judges, 'apparently with the

[64] *CSP Spain*, I. 560, 568.
[65] See BL Cotton MS Caligula B X, f. 400r.
[66] Michael Lynch, 'Queen Mary's Triumph: The Baptismal Celebrations at Stirling', *Scottish History Review*, 69 (1990): 1-21, p. 13. See also Hutson, *England's Insular Imagining*, p. 128.
[67] *CSP Spain*, I. 601.
[68] *CSP Spain*, I. 601-2.
[69] SP 52/ 13, f. 1.

queen's personal authority', asking whether it was treason to perform any action prejudicial to the king's limitation of the succession in his will, such as advancing Mary's claim at the expense of her Suffolk cousins.[70] As the year came to a close, then, it seemed that Elizabeth 'was closer than she had ever been to acknowledging Mary's rights as heir presumptive in England' and that the wheels of the law had been set in motion to endorse such a settlement of the succession.[71] The murder of Mary's husband, Darnley, saw these wheels grind to a halt in February 1567. Nevertheless, we should, I argue below, read Plowden's *Treatise* as a product of Elizabeth's determination to establish Mary as her successor during this period of détente. To explain Plowden's commission and the proposed intentions of his *Treatise*, the remainder of this chapter will examine the preface to that tract.

1.4. 'I knowe not whether were greater their audacitie or their ignorance'

Before Plowden's manuscript *Treatise* in 1567, the literature of the succession debate was generated from outside of the Inns of Court and was, at least to Plowden's mind, 'verie insufficient in learning of the lawe of this realme to treate of that matter' (1r). Of course, succession debates did take place at the Inns during the 1560s. After a formal complaint by the Queen of Scots, William Thornton of Lincoln's Inn was imprisoned in October 1566 for his part in an infamous moot, which had found Mary to be incapable of succeeding to the English crown on the basis of her foreign birth.[72] Whilst legal debates over the succession and the various rights of the pretenders to Elizabeth's throne were evidently taking place, then, the preface to Plowden's *Treatise* suggests that he certainly thought himself the first 'temporall' or common lawyer to commit pen to paper on the matter (1r). Helpfully, Plowden provided a critical review

[70] See *Reports from the Lost Notebooks of Sir James Dyer*, ed. J.H. Baker (2 volumes, London: Selden Society, annual series, cix-cx, 1994), I. xlix. This case is discussed at length in chapter 6.
[71] John Guy, 'Introduction', *Elizabeth & Mary*, ed. Doran, pp. 15-21, at p. 18.
[72] Neale, *Parliaments*, p. 133. Mary and her councillors were clearly satisfied by this result, writing several letters expressing their gratitude to Cecil in November. See *CSP Scot*, II. 304.

of contemporary succession literature in the preface to his *Treatise*, alongside an explanation of the principal 'causes of the wryting of this present treatise' (1r). It is important to understand the parameters of the succession debate prior to Plowden's intervention if one is to appreciate his innovative legal approach.

Plowden's account of the production of his *Treatise* begins with the arrival of a 'printed boke conteigning among other thinges certeigne allegations and reasons subposed to be the commen lawe made in disability of the quene of Scottes to receive the Crowne of Ingland' (1r). Although it is impossible to be assured as to the attribution of any such anonymous work, this book was almost certainly *Allegations against the Surmisid Title of the Quine of Scots and the Fauourers of the Same* (hereafter, *Allegations against*) first printed in December of 1565. Plowden recounts that he then received 'the boke of Mr Hales' — undoubtedly the manuscript tract, entitled *A Declaration of the Succession of the Crown Imperial of England* (1563), written by the militant Protestant MP, John Hales —which 'treatith of the same matter and concludeth of the disabilitie of the Scottishe Quene, by reason of her forrayn birthe even as the other dothe' (1r).[73] Plowden rightly perceived that despite the order in which he received these two anti-Stewart tracts, Hales's 'was the first made' and that the anonymous 'printed boke' was written by his 'follower', summarising and 'muche relying' upon Hales's legal framework (1r). Accordingly, this section will first analyse Hales's *Declaration* as the earlier and more systematic tract against Mary's succession.

As various scholars have pointed out, Hales's *Declaration* closely resembles the form of a parliamentary speech, despite never being delivered as such.[74] Nonetheless, we should, as Levine has suggested, think of Hales's manuscript tract as designed to urge his fellow parliamentarians to push for a settlement of the succession in favour of Lady Katherine Grey.[75] Hales praised

[73] Hales's *Declaration* was not printed until 1713 when it appeared in the appendices of George Harbin, *The Hereditary Right of the Crown of England Asserted* (London, 1713). In this thesis, I cite the manuscript copy found in Bodl. MS Ashm. 829, ff. 32r-42v.
[74] Neale, *Parliaments*, p. 130; *EESQ,* p. 64; Kewes, 'Elective Succession', p. 112.
[75] *EESQ*, p. 64.

Henry VIII as a 'prudent prince', who 'forsaw the danger, the realme might fall in, for vncertayntie of succession' and who accordingly 'procured authoritie & power by parlament to establish it'.[76] His tract encourages Elizabeth to follow in her father's footsteps and to designate the order of succession in favour of Katherine whilst cautiously avoiding any comparison to Edward VI's failed machinations to divert the succession from his Catholic half-sister Mary (and also from Elizabeth) to Lady Jane Grey.[77]

Hales devoted the first, and most substantial, part of his tract to establishing the validity of Henry VIII's will. Hales asserted that the original document of the will had been destroyed by Mary I in order to deprive the Suffolk claimants of their lawful 'right to the crowne'.[78] Memorably, Hales likens the destruction of the will to the desecration of Henry's grave and the posthumous burning of his bones, which, he says, 'some thinke' that Mary had ordered.[79] Hales unequivocally concludes that the limitation of the succession in Henry VIII's legislation and in his will favoured the Suffolk-line and was 'a bar and conclusion to all others, be they nearer of bloode if any be'.[80]

In contrast to his extensive discussion of Henry VIII's will, Hales touches only briefly on Mary Stewart's claim. Regardless of the strength of Mary's hereditary right, Hales argues that a common law maxim against alien inheritance prohibited her accession. Hales derived the maxim against alien inheritance from a 1351 statute (25 Edw. III, Stat. I), which, he argues, 'expowndeth the lawe in [Mary's] case'.[81] As chapter three of this thesis demonstrates, Hales's reading of this statute would become conventional in nearly all Suffolk partisan tracts and prompted an

[76] Bodl. MS Ashm. 829, f. 36v.
[77] Paulina Kewes, 'The Exclusion Crisis of 1553 and the Elizabethan Succession', in *Mary Tudor: Old and New Perspectives*, ed. Susan Doran and Thomas S. Freeman (Basingstoke: Palgrave Macmillan, 2011): 49-61, p. 53.
[78] Bodl. Ashm. MS 829, f. 35r.
[79] Bodl. Ashm. MS 829, f. 35r.
[80] Bodl. Ashm. MS 829, f. 33v.
[81] Bodl. Ashm. MS 829, f. 37v.

extensive and innovative refutation from Plowden.[82] Having also summarily dismissed the claims of the Countess of Lennox and her son, Darnley, Hales concluded his tract by asserting the legitimacy of the marriage between Katherine Grey's parents, asserting that seditious allegations of her bastardy were tantamount to incitement of 'civil warres in this realme'.[83]

Whilst Plowden would later assert the insufficiency of Hales's legal learning and his general ignorance of the succession, his *Declaration* was to prove immensely influential: all subsequent debates were conducted within the framework laid out by Hales's tract.[84] The influence of Hales's tract was doubtless aided by the notoriety of its author who, when his authorship came to light in early 1564, was swiftly imprisoned by Elizabeth on charges of sedition and was held in the Tower.[85] Investigations into Hales's *Declaration* implicated several prominent members of the Elizabethan regime, including Bacon and Cecil.[86]

During his last diplomatic embassy to England in the spring of 1565, Maitland of Lethington actively sought out a copy of Hales's *Declaration.* Guzman de Silva reported that Maitland had sought copies from both the Queen and from Leicester, 'thinking that they might desire to have it answered', but that having been rebuffed by them both, had ultimately obtained a private copy.[87] Maitland was evidently frustrated that Elizabeth refused him permission to refute the tract, as a letter to Cecil from January 1567 bears out. Maitland accused Elizabeth and her Privy Council of failing to provide 'effectual reparation' against the 'manye and sondrie traverses and disfavourings committed' against Mary, of which he cited what he felt to be their

[82] See pp. 108-18, below.
[83] Bodl. Ashm. MS 829, 42v.
[84] Kim, *Aliens,* p. 161.
[85] Baker notes that Hales was not formally punished for writing his succession treatise, but for orally challenging the invalidity of Katherine Grey's marriage to the Earl of Hertford. See Baker, *Dyer*, I. xlix.
[86] *EESQ*, pp. 68-85.
[87] *CSP Spain*, I. 424, 427.

'secreate embracing of John Hales booke' as a prime example.[88] I shall return to Maitland's 1567 letter, which puts forward a number of 'prouffes and reasons' which 'may declare and fortifie' the Queen of Scots' right to succeed Elizabeth, later in this thesis.

As well as bemoaning the 'secreate embracing of John Hales booke' in this letter, Maitland also points to a printed anti-Stewart text, sent by Mary to Elizabeth in 1566 in the hope of satisfaction.[89] In correspondence between the two queens, this tract was recognised by Elizabeth as '*si scandaleux pour vous, si injurieux a moy, si fol en soy*' — as scandalous and insulting to both monarchs — and she promised to investigate its authorship in December 1566.[90] This anonymous printed tract was certainly *Allegations against*.[91]

As Plowden acknowledged in the preface to his *Treatise*, *Allegations against* summarised Hales's anti-Stewart case from two years prior. Like Hales, the anonymous author attests to the primacy of the common law maxim against alien inheritance over hereditary right through a reading of the same 1351 statute.[92] Despite 'muche relying upon [Hales's] reasons', it is worth outlining two crucial (if overlooked) differences between the two tracts (1r). The anonymous author added a further component to Hales's legal framework against alien inheritance, arguing that English juries were incapable of inquiring into the title of individuals born beyond the sea.[93] Plowden devotes an entire chapter of his *Treatise* to refuting this argument.[94]

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[88] *The Egerton Papers: A Collection of Public and Private Documents, Chiefly Illustrative of the times of Elizabeth and James I, from the Original Manuscripts, the Property of the Right Hon. Lord Francis Egerton* (London: Camden Society, 1840), p. 48.
[89] *Egerton Papers*, p. 48.
[90] *CSP Scot*, II. 307. Elizabeth cunningly promised to punish the author of this tract on condition that Mary renounce her claim to the English throne whilst Elizabeth still lived. See Catherine Chou, 'The Parliamentary Mind and the Mutable Constitution', *Historical Research*, 89 (2016): 470-85, pp. 474-75.
[91] Maitland's 1567 letter implies that Elizabeth's promises of reparation were never fulfilled. Nor, according to Chou, do any records of an investigation survive. 'Parliamentary Mind', p. 475.
[92] *Allegations against the Surmisid Title of the Quine of Scots and the Fauourers of the Same* (London, 1565), p. 9.
[93] *Allegations against*, pp. 15-16.
[94] See pp. 103-08, below.

However, the most overt difference between the two tracts is the exaggerated threat posed by a possible alien accession to the English throne. Where Hales's *Declaration* had despaired 'if ye will put strangers & right englishmen in one case, what avayleth the libertie of England and what profiteth to be an englishman born?', the anonymous author of *Allegations against* provided a fervent anti-Catholic and anti-Scottish tirade by way of answer.[95] Its author argued that if Mary (or any of her heirs) should inherit the throne, then England would be 'bound & subiecte to a foraine Nacion' and Englishmen made strangers in their own land.[96] Not only would Englishmen be overruled by 'a people by custome & almost by nature our enemyes, thurstie of our blood, poer & myserable by their countrie, & envious of our welfare' but, looking across the channel to France, he prophesied 'greate & terrible tumults' of religious civil war.[97] The author thus rehearsed a familiar motif from the reign of King Edward VI, evident in Hugh Latimer's 1549 Lenten sermons. As Kewes argues, Latimer amplified the terrifying prospect of popish rule if Edward were to die prematurely and the succession were allowed to pass along the line of hereditary descent to the king's Catholic sister, Mary. Just as Latimer had done nearly two decades prior, the anonymous author of *Allegations against* consequently urged a settlement of the succession that would best protect Protestantism, even at the expense of the normal rules of hereditary descent.[98] For good measure, *Allegations against* concludes with a lengthy invective against Catholic worship, which he perceives to have blinded Englishmen to the peril of their nation should Mary accede.[99] In this sense, *Allegations against* offers an exception to the rule identified by Doran and Kewes, that religion, whilst often explaining the position taken by Elizabethan succession tract writers, was omitted in the tracts themselves.[100] As the high-water

[95] Bodl. Ashm. MS 829, ff. 37r-37v.
[96] *Allegations against,* pp. 3-4.
[97] *Allegations against*, p. 29.
[98] Paulina Kewes, *Contesting the Royal Succession in Reformation England: Latimer to Shakespeare* (forthcoming, Oxford University Press). I am very grateful to Professor Kewes for sharing chapter drafts of her forthcoming monograph with me.
[99] *Allegations against*, p. 31.
[100] Doran and Kewes, 'Earlier Elizabethan Succession Question', p. 22.

mark of anti-Scottish and anti-Catholic vitriol amongst the extant polemics of the Elizabethan succession debate, it is unsurprising that the Queen of Scots requested that the author of *Allegations against* be punished and that Plowden found the printed tract necessary to be confuted.

Having read both *Allegations against* and Hales's *Declaration*, and marvelling 'at the audacytie of their aucthores' and their ignorance of common law, Plowden recevied a 'wrytten treatise made in confutation of the printed boke' (1r). Plowden diplomatically determined that the author of this unnamed tract was 'furnished with muche good learning in other sciences' but lacked 'sufficient knowledge in our temporall lawe' to refute *Allegations against* (1r). The attribution of this 'wrytten treatise' (1r) has been disputed. Early scholarly consensus was that Plowden referred to a manuscript tract of equivocal title, generally known as *Answer to Allegations against Mary*, that circulated in early 1566.[101] However, Plowden's biographer, Geoffrey Parmiter, has since argued that Plowden was referring to the tract entitled *Allegations in Behalf of the high & mightie princes Ladie Marie now Quenee of Scots*, which circulated in manuscript in 1565.[102] Parmiter's attribution has been recently reiterated by Catherine Chou.[103] Strangely, Parmiter and Chou's break with prior consensus is unsubstantiated and seems rather obviously inconsistent with Plowden's description of the 'wrytten treatise' as a 'confutation of the printed boke'; *Allegations in Behalf* circulated prior to *Allegations against*, whereas *Answer to Allegations against* is (as its title suggests) an explicit answer to the earlier printed tract.

Allegations in Behalf should properly be considered a confutation of Hales's *Declaration*, for it concerns itself nearly exclusively with refuting the legitimacy of the marriage of Lady Katherine Grey's parents and asserting her promiscuity. On the grounds of her bastardy and supposed 'whoredome', the author declared that Katherine had 'stayned her selfe & her issue' and was thus 'vnworthy of the crowne'.[104] Its anonymous author accordingly urged Parliament

[101] *EESQ*, pp. 93-94; Axton, 'Influence', p. 214.
[102] *EP*, p. 91.
[103] Chou, 'Parliamentary Mind', p. 482.
[104] Bodl. MS Ashm. 829, f. 49r.

to act decisively against the possibility of her accession. Whilst unashamedly anti-Suffolk, *Allegations in Behalf* cannot be said to favour Mary Stewart — in fact, Tricia McElroy has identified its anti-Catholic overtones.[105] Likewise, Levine has argued that *Allegations in Behalf* was very likely written for another possible Protestant pretender to the English crown — most likely Henry Hastings, third earl of Huntington — and was retroactively (and clumsily) retitled in Mary Stewart's behalf.[106] Certainly, it would be strange for Plowden to commend the author of such a tract, and even more strange for him to refer to this early tract as a confutation of *Allegations against*.

Parmiter and Chou's confusion provides a salutary reminder of the difficulty of attributive work involving the 1560s succession tracts. It is arguably the difficulty of attributing authorship that explains why historical studies of the succession tracts of this period have proved so generative for critical revision. It is surprising given the extent of these critical studies, that *Answer to Allegations against* has been largely ignored. Historians have tended to take Plowden's dismissal of the tract as lacking 'sufficient knowledge in our temporall lawe' as an indication that he set little stock by this document and have followed suit (1r).[107] However, in the chapters below, I demonstrate that Plowden paid close attention to the arguments put forward on behalf of the Queen of Scots in this anonymous tract, occasionally reiterating aspects of his argument, particularly as it concerned historical precedents for an alien accession to the English throne. Although less capable than Plowden's *Treatise of Succession*, this anonymous tract certainly bears

[105] Tricia McElroy, 'Executing Mary Queen of Scots: Strategies of Representation in Early Modern Scotland' (Unpublished DPhil Thesis, University of Oxford, 2005), p. 159.
[106] *EESQ*, p. 96.
[107] Levine regarded *Answer to Allegations against* as 'somewhat unimpressive' and offered scant analysis of the arguments put forward by its author, merely stating that his refutation of the case against the Queen of Scots was unsatisfactory and deficient. See *EESQ*, pp. 91-92. Likewise, Margaret Beckett acknowledged the tract to be 'distinctly muted' and passed over its contents without comment. See 'The Political Works of John Lesley, Bishop of Ross (1527–96)' (Unpublished PhD thesis, University of St Andrews, 2002), p. 96.

reading and offers instructive insight into the common stock of arguments used by English partisans of the Stewart succession before Plowden intervened in the debate.

Throughout this thesis, I shall demonstrate the importance that Plowden placed on proving the legal insufficiency of previous interventions in the Elizabethan succession debate. Plowden's desire to 'overthrowe the allegations of Mr Hales and the printed boke' (i.e. *Allegations against*) cannot be overstated and must be understood as a primary function of his *Treatise*. Often, I shall prove, Plowden's advocacy of the Stewart succession is waylaid by his compulsive desire to refute each and every argument put forward by Hales and his follower. As legal ignoramuses, their audacity in intervening in a matter of English common law evidently incensed Plowden.

1.5. An Earnest Request

Having read the aforementioned succession tracts, Plowden reportedly received an 'earnest request' from an individual who requested that Plowden help him 'conceive the righte way in this darke myste': to unravel the mysteries of the law as it pertained to the Elizabethan succession (1r). The identity of this individual has long been a matter of contention.

It was previously assumed, most prominently by Marie Axton, that Plowden wrote his *Treatise* at the behest of his fellow Middle Templar, the puisne judge of the Common Pleas, Sir Anthony Browne.[108] The identification of Browne principally derives from a marginal note in the preface to H alongside the mention of Plowden's receipt of the 'earnest request': 'S^{r} Anth: Browne Justice'.[109] It is also likely that Browne was sympathetic to the Stewart succession, as indicated in a telling comment made by Cecil in November 1566, that he had been 'hardlie used by meanes of Judge Browne' with respect to the succession.[110] More recently, Parmiter and

[108] *QTB,* p. 19. For a succinct overview of Browne's legal career see J.H. Baker, *The Men of Court 1440-1550: a Prosopography of the Inns of Court and Chancery and the Courts of Law* (2 vols., London: Selden Society, supplementary series, xviii-xix, 2012), I. 377-78. There, Baker argues that Browne 'helped Plowden compose his treatise on the succession'.
[109] H, f. 1r. See Axton 'Influence', p. 214.
[110] BL Harley MS 36, f. 353r, quoted by Baker, *Dyer*, I. l.

Beckett have respectively argued that Browne was unlikely to be the intended recipient of Plowden's *Treatise*. Both Parmiter and Beckett emphasise that it is difficult to comprehend why Plowden devoted such a large part of his *Treatise* to expounding the theory of the king's two bodies if writing for Browne.[111] This is a reasonable argument. Browne, after all, had been among the judges who presided over the *Case of the Duchy of Lancaster* (1561) and *Willion v. Lord Berkley* (1562) in which the corporate status of the king had been discussed. More generally, Parmiter and Beckett have suggested that Plowden's *Treatise* was written for an audience relatively unfamiliar with English common law, certainly not for one of Browne's 'profound Learning and great Eloquence'.[112] Whilst both are doubtless right to suggest that Plowden's *Treatise* was unlikely to have been written with the primary aim of helping Browne to personally understand the legal parameters of Mary's title, this by no means precludes Browne's involvement in the commissioning of Plowden's research, nor the *Treatise* being written with his encouragement. In fact, I suggest below that Browne played an integral intermediary role in the *Treatise*'s production.

Historians have also struggled to situate Plowden's *Treatise* alongside another succession tract, supposedly written by Browne.[113] This tract was previously believed to predate Plowden's *Treatise* and to be the first common law response to Hales's *Declaration*.[114] However, this argument presents significant difficulties, foremost among which is that Plowden does not mention any tract associated with Browne in his review of contemporary succession tracts provided in the preface to his *Treatise*. Given the close professional and personal relationship between the two men it is all but inconceivable that if Browne had written such a tract before Christmas 1566, Plowden would not have read it, or at least known of its existence. With this in

[111] Geoffrey de C. Parmiter, 'Edmund Plowden as Advocate for Mary Queen of Scots', *The Innes Review,* 30 (1979): 35-53, at pp. 44-45; Beckett, 'Political Works of John Lesley', p. 100.
[112] Plowden eulogised his colleague's 'profound Learning and great Eloquence' in his *Commentaries*, p. 356.
[113] The so-called 'Browne tract' is extant in three manuscript copies: BL Harley MS 555; BL Lansdowne MS 254; Bodl. MS Rawlinson B 7.
[114] Neale, *Parliaments*, p. 130. See also *EESQ*, pp. 94-95.

mind, Axton has argued that the so-called 'Browne tract' was written by Browne in early 1567 as an accessible digest of Plowden's *Treatise*.[115] Justifiably, Parmiter and others have taken issue with Axton's interpretation. Whilst the research for his tract took place over Christmas, Plowden claims to have started writing his *Treatise* after the dissolution of Parliament in January 1567 (1r). Browne died only a few months later in April 1567. Whilst the contents of the so-called 'Browne tract' resemble Plowden's *Treatise* in a number of instances, it is highly unlikely that Browne would have been able to condense Plowden's lengthy and complex *Treatise* during the final months of his life, whilst actively continuing in his judicial duties.[116]

In contrast to the contested evidence of Browne's involvement, there are several compelling indications that Plowden's *Treatise* was written at the 'earnest request' of Thomas Howard, fourth duke of Norfolk. The strongest markers of Norfolk's association with the *Treatise* are to be found in witness D — the seventeenth-century presentation copy of Plowden's text, dedicated to James I by Plowden's son.[117] In his dedication to the king, Francis Plowden described how 'it pleased the Duke of Norffolke a prince of singuler pyetie and love to his Countrey, to require the opynion of [his] late father Edmonde Plowden (a Counsellor at lawe) in this ymportaunt matter' during the 1566 Parliament.[118] The duke, Francis reports, 'was satisfyed by waye of discourse of speache' with his father, who was further encouraged to commit his opinion to the page after 'sundry sedicious pamphletts' impugned Mary Stewart's title to the English crown.[119] On the basis of witness D, it was previously assumed that Francis Plowden amended his father's original preface to identify the Duke of Norfolk as the individual from

[115] Axton, 'Influence', p. 209.
[116] The most compelling account of the authorship of this mysterious tract is Tricia McElroy's. McElroy argues that the tract is very likely a late-sixteenth-century abbreviated copy of the second book of the 1571 edition of John Leslie's treatise in defence of the Queen of Scots, to which a pro-Elizabethan ending has been added. See 'Executing Mary Queen of Scots', pp. 161-62.
[117] For an account of this witness, see volume 2, pp. vii-ix.
[118] D, f. 2r. For a transcription of this dedication, see volume 2 of this thesis, appendix 2.
[119] D, f. 2r. Francis is likely referring to *Allegations against*, which was brought to the attention of Elizabeth and her Privy Council during the 1566 Parliament.

whom the earnest request came: 'an earnest Request from my most honourable good Lorde the duke of Norfolke was made vnto me'.[120] Crucially, however, the same identification of the Duke of Norfolk also appears in the previously overlooked witnesses of Plowden's *Treatise* at the Morgan Library in New York (M) and at Yale Law School's Lillian Goldman Law Library (Y). As neither M nor Y appears to be copied directly from D, it is more likely that Plowden named the Duke of Norfolk when revising the earlier recension of his text himself.

Evidence given by John Leslie, bishop of Ross, corroborates the evidence of Norfolk's involvement in the production of Plowden's *Treatise*. Loquacious under threat of torture in October 1571, after he was implicated in the Ridolfi plot, Leslie claimed that Plowden had been reluctant to assist him in producing his own pro-Stewart treatise 'yf the Duke of Norfolk were privie to it, for bycawse the Duke had procured hym Displeasure of the Counsel, by cawse he had declared his Opynion in this Mater to the Duke'.[121] In light of this textual and circumstantial evidence it would seem evident that Norfolk had almost certainly encouraged Plowden to produce his *Treatise*. Hitherto, however, the question of why Norfolk did so has not been adequately answered.

In hypothesizing the genesis of Plowden's *Treatise*, Parmiter urged historians to bear in mind that the 1566 Parliament proved disastrous for the Duke of Norfolk.[122] As outlined above, the deputation of the House of Lords led by Norfolk had been emphatically rebuked by Elizabeth in October 1566 and Norfolk had been branded 'a traitor or conspirator' by the queen.[123] Aggrieved by this treatment, Parmiter implied that Norfolk acted independently of Elizabeth and the rest of her Privy Council in covertly encouraging Plowden to write his *Treatise*. Parmiter's rather vague account implies that Norfolk commissioned Plowden's *Treatise* to try and

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[120] Parmiter, 'Plowden as Advocate', p. 46. See also *EP*, p. 95. D, ff. 3v-4r. For a transcription of the preface from D, see volume 2 of this thesis, appendix 2.
[121] *A Collection of State Papers Relating to Affairs in the Reign of Queen Elizabeth, from the year 1571 to 1596*, ed. William Murdin (London, 1759), p. 29.
[122] Parmiter, 'Plowden as Advocate', p. 50.
[123] See pp. 30-31, above. Neale, *Parliaments*, p. 142.

force the queen's hand, as though the presentation of compelling legal arguments in the Queen of Scots' favour might induce Elizabeth to recognise her royal cousin as heir presumptive to the English throne.[124] For the last four decades, Parmiter's hypothesis has gone unchallenged, despite relying on a number of unsound assumptions.[125]

In suggesting that the duke operated underhandedly against the queen, Parmiter overstated the significance of Norfolk and Elizabeth's spat, erroneously interpreting the events of October 1566 through the lens of the duke's scheme to marry the Queen of Scots, which began a year later.[126] It is highly unlikely that Elizabeth's stern words would have driven Norfolk to conspire against her. Moreover, there is compelling evidence to suggest that the duke was a confirmed advocate of the Suffolk claimants in the mid-1560s and had been for some time.[127] It therefore makes very little sense to imagine Norfolk privately commissioning a treatise on the succession by a crypto-Catholic common lawyer, which he could surely have predicted to have been favourable to the Queen of Scots.[128] Rather than imagine Norfolk acting alone, as a covert defector to the Stewart cause who sought to push Elizabeth into recognizing the Queen of Scots as her heir presumptive, it makes more sense to interpret his actions as those of a loyal (if possibly disgruntled) agent of the queen. I suggest as much in the practical hypothesis of the

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[124] Parmiter, 'Plowden as Advocate', p. 50. Recently, Peter Lake has suggested that members of Elizabeth's Privy Council occasionally encouraged the production of controversial position papers 'to bounce the queen into taking action' or to otherwise accept a policy they favoured. See *Bad Queen Bess? Libels, Secret Histories, and the Politics of Publicity in the Reign of Queen Elizabeth I* (Oxford: Oxford University Press, 2016), p. 166.

[125] Parmiter is similarly vague as to Norfolk's intentions in commissioning the *Treatise* in his biography of Plowden. See *EP*, pp. 93-94.

[126] On the proposed Norfolk–Stewart marriage, see Alford, *Early Elizabethan Polity*, pp. 199-206.

[127] During Elizabeth's near-fatal bout of smallpox in 1562, Norfolk was known to favour Katherine Grey's claim. See Neville Williams, *Thomas Howard Fourth Duke of Norfolk* (London: Barrie and Rockliff, 1964), pp. 84-85. In October 1566, the Spanish ambassador reported that Norfolk still favoured Katherine's succession. See *CSP Spain*, I. 586. Michael Graves confirms that during the 1566 Parliamentary session, Norfolk continued to favour the Suffolk claim. See 'Howard, Thomas, fourth duke of Norfolk (1538-1572), nobleman and courtier', *ODNB*.

[128] I have demonstrated above that Elizabeth's Privy Council feared that appealing to the Inns of Court in the matter of the succession was tantamount to nominating either Mary Stewart or Countess Margaret Lennox, owing to the perceived popery of the Inns. See p. 23, above.

Treatise's production that follows. In this account, I argue that Plowden's *Treatise* was written as part of the process of legal consultation that Elizabeth announced that she intended to carry out in October 1566. This novel hypothesis allows us to make sense of the previously countervailing motivations of the various actors involved in the *Treatise*'s production.[129]

During the final months of the Parliament of 1566, while seriously contemplating officially recognizing Mary as her heir presumptive, Elizabeth may well have asked her Privy Councillors to find a lawyer willing to conduct an exigent review of the Queen of Scots claim to succeed her. Norfolk's judicial connections, as Earl Marshall and a member of the Court of Star Chamber, made him aptly placed to commission such a work.[130] It is likely that Norfolk approached his judicial colleagues for assistance in the matter of the succession, one of whom evidently nominated Plowden for the task in his stead. The preface to Plowden's *Treatise* (at least as it appears in witnesses of Recension 1 of his tract) and the preface to his *Brief Declaration* state that the 'earnest request' to write his *Treatise* came from a friend and colleague 'greatly occupyed in Juditiall causes' whose 'leisure to study the poynte [was] so lytle' that he entreated Plowden to help him (1r, 31r).[131] Whilst any number of judges might have suggested to Norfolk that Plowden 'take delyberacion' in the matter, there is no reason to doubt the confident assertion of Plowden's contemporary who wrote in the margin of witness H that this man was Sir Anthony

[129] I am very grateful to Professor Norman Jones for his illuminating advice and comments on the following analysis of the political conditions under which Plowden's *Treatise* might have been produced.

[130] On the development of the Star Chamber and its relationship to common law courts, see *OHLE*, pp. 195-200. Consultation of the Star Chamber's diet book for the years immediately preceding Plowden's *Treatise* has revealed that Norfolk was often in attendance at the court: sitting frequently in 1565, if less so in 1566. See TNA E 407/ 53. On the importance of these diet books as records of attendance at the court, see Daniel Gosling, 'The Records of the Court of Star Chamber at The National Archives and Elsewhere' in *Star Chamber Matters: an Early Modern Court and its Records*, ed. Krista J. Kesselring and Natalie Mears (London: Institute of Historical Research, 2021), pp. 20-41. I am very grateful to Dr Gosling for his advice on interpreting the evidence of these diet books.

[131] Whilst the Duke of Norfolk could also be said to be involved in 'Juditiall causes', sitting at the Court of Star Chamber and exercising jurisdiction over the High Court of Chivalry, Plowden was highly unlikely to refer to Norfolk as a close friend. No reference to this judicial colleague survives in witnesses D, M, or Y, all of which explicitly identify Norfolk as Plowden's addressee.

Browne.[132] Plowden then met with the Duke of Norfolk, offering him a satisfactory precis of his opinion and receiving encouragement to either begin or continue writing his treatise.

In summary, I incline to the view that Plowden wrote his *Treatise* at the behest of (and initially addressed the document to) a judicial colleague — most likely Browne — but that it was commissioned by Norfolk, on behalf of Elizabeth and her Privy Council. Elizabeth authorised Plowden's comprehensive justification of the Queen of Scots' right of succession to the English throne, I believe, to lend exigent legal authority to her plans to recognise Mary as her heir presumptive. Although Recension 1 of the *Treatise* was addressed to a fellow lawyer, Plowden's tract was therefore written to convince a wider, lay readership — the political nation at large — of the validity of the Stewart succession. Whilst this hypothetical account of the *Treatise*'s genesis is, of course, unprovable, it makes good sense of the circumstantial and textual evidence surrounding the production of Plowden's tract. It should be acknowledged that Marie Axton previously suggested a similar hypothesis, arguing that Norfolk 'supplied the impetus' for Plowden's tract, which was then written with the assistance of Browne.[133] Crucially, however, Axton did not venture any explanation of why Norfolk would have wanted Plowden to produce a treatise on the succession, nor any indication of the part played by Browne, rendering her account rather unconvincing.[134]

The theory of the *Treatise*'s production advanced in this thesis allows us to make practical sense of several other points that have previously vexed historians. Firstly, this hypothesis explains (at least in part) why Plowden found it necessary to provide such an elaborate exposition of the king's two bodies in the first five chapters of the *Treatise*. Although the legal

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[132] In his capacity as puisne judge of the Common Pleas, Browne often attended the Court of Star Chamber alongside Norfolk during the mid-1560s and would have been well known to the Earl Marshall. See TNA E 407/ 53. On the role of puisne judges in the court, see John Guy, *The Court of Star Chamber and its Records to the Reign of Elizabeth I* (London: Her Majesty's Stationery Office, 1985), p. 8.

[133] Axton, 'Influence', p. 217.

[134] Interestingly, when later describing the production of Plowden's *Treatise* in her monograph, Axton does not mention Norfolk's involvement. See *QTB*, p. 19.

fiction was certainly familiar to Browne and the other judges who had been involved in the handful of cases in which the corporate status of the king had been disputed, it was almost certainly unfamiliar to the lay readership for whom Plowden's *Treatise* was ultimately intended.[135] Moreover, this theory also explains why Plowden's *Treatise* was written in English and not in law-French: the language traditionally used for common law literature, including Plowden's reports.[136] Finally, Plowden's curiously impersonal reference to 'the late Duke of Norfolke deceased, grandfather to the duke that nowe is' (32r) — which Parmiter previously struggled to reconcile with the evidence of Norfolk's involvement — can be resolved by imagining that the early recension of the *Treatise* in which that reference appears was written for a judicial colleague and not directly for Norfolk.[137]

The 'Displeasure of the Counsel' that Plowden reportedly invoked when Norfolk submitted the *Treatise* for consideration potentially complicates this hypothesis. Why, if Queen Elizabeth and her Privy Council had commissioned the work, would Plowden have subsequently incurred their disapproval and why would Plowden have felt such hostility towards Norfolk that he was latterly unwilling to assist Leslie in the production of his own pro-Stewart tract?

This crux might be resolved by suggesting that by the time Norfolk presented Plowden's *Treatise* to the Privy Council, naming Mary as heir presumptive was no longer a plausible option. As outlined above, the rapprochement between the royal cousins had come to a dramatic end when Mary was implicated in her husband's murder in February 1567. Therefore, it may well

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[135] I demonstrate in subsequent chapters of this thesis that there are several other compelling reasons for Plowden to set out the theory of the king's two bodies in such detail.

[136] When early modern lawyers intended a non-legal audience for their works, they often avoided law-French and wrote in English or Latin: the prefaces to Coke's reports, written in English (with a Latin translation) as well as Coke's report of *Calvin's Case* (printed in English) are commonly cited examples. See George Garnett, '"The ould fields": Law and History in the Prefaces to Sir Edward Coke's Reports', *Journal of Legal History,* 34 (2013): 245-284, at p. 247. See also Ian Williams, 'Law, Language and the Printing Press in the Reign of Charles I: Explaining the Printing of the Common Law in English', *Law and History Review*, 38 (2020): 339-71, at pp. 346-47.

[137] Parmiter, 'Plowden as Advocate', pp. 52-53.

have been the timing of the *Treatise*'s delivery, and not its contents *per se*, that incurred the displeasure of the council. This hypothesis also explains why the 'Displeasure of the Counsel' did not result in Plowden being punished for writing his *Treatise*. If the tract had not been encouraged by the Queen and her Council but had been clandestinely commissioned by the Duke of Norfolk, it is difficult to see how Plowden and Norfolk would have escaped punishment. Parmiter's suggestion that Plowden's 'commanding position' at the Inns helped him evade reprisals is unconvincing.[138] It is far more likely that Plowden's *Treatise* was simply delivered by Norfolk too late for the Queen to make use of its exigent legal arguments.

1.6. The Scope, Structure, and Style of Plowden's *Treatise*

Having explained 'the causes of the wryting of this present treatise', the latter part of Plowden's preface outlines the scope, structure, and rhetorical style of his argument. Plowden states that the first part of his *Treatise* will prove that foreign birth does not disable the 'nexte of bloude to the Crowne' from succeeding by hereditary descent (1v). As subsequent chapters of this thesis demonstrate, part I of Plowden's *Treatise* advances a constitutionally ambitious case for any individual (if proximate in blood) to succeed to the English throne, whether 'borne in France Spaine or any other place whatsoever out of the lygeance of the Crowne of Inglande' (1v). Whilst, of course, this comprehensive argument encapsulates that of Mary Stewart, I argue below that the Queen of Scots is peripheral to these first eleven chapters. Interestingly, Plowden indicates as much in his preface. Admitting that readers might find the first part of his *Treatise* to be controversial, and its expediency for the Queen of Scots' case to be 'doubtfull', Plowden indicates that the second part of his tract will unambiguously clarify the law specifically as it relates to Mary (1v). Although Plowden does not reveal as much in his preface, the second part of the *Treatise* undertakes to prove that Scotland is not, after all, foreign and that birth in

[138] Parmiter, 'Plowden as Advocate', p. 52.

Scotland does not impart the disabilities common to other aliens in English common law. The question of how these two parts of the *Treatise* relate to one another — the latter part seemingly rendering the former unnecessary and redundant — is integral to the analysis of Plowden's argument in the chapters that follow.

At least in Recension 1 of his *Treatise*, Plowden declared himself to be exclusively concerned with Mary's capacity 'by the lawes of Inglande to receive the Crowne of Inglande by discent if ther be non other impediment to the contrary' (1v). Asserting the sufficiency of his bipartite *Treatise* to resolve the legal debate over the succession, Plowden vowed to have no intention to 'meddle' in, or otherwise discuss the 'impediment' of Henry VIII's will: which, as outlined above, had favoured the Suffolk over the Stewart line (1v). Plowden stated that 'if tytle of the Crowne in defaulte of heires of the quenes highnes bodye be by testament and laste will of kyng Henry the eighte or otherwise geven to any, it shall not be by me impugned' (1v). On the evidence of the witnesses of Recension 1, it was not until Plowden's judicial colleague had read his *Treatise* and instructed him that it was futile to prove that Mary's Scottish birth did not disable her to succeed to the the crown if Henry VIII's will privileged the succession of another claimant, that Plowden set out to investigate the validity of that document. The resultant supplementary tract, known as the *Brief Declaration*, is examined at length in chapter 6. However, it is important to note here that when revising his *Treatise* Plowden emended his preface to characterise the two tracts as one coherent whole, as two sections of the same work. In witnesses D, M, and Y, any mention of Plowden's reticence to 'meddle' with Henry VIII's will is expunged and Plowden suggests instead that it was always his intention to supply a 'second book' containing a 'declaration of the invaliditie of the last will and testamment of king henry the eight'.[139] Accordingly, in D, the exordium previously attached to the *Brief Declaration* — in which Plowden explained the circumstances by which it was retrospectively added to the *Treatise* — is

[139] D, f. 4v; M, f. 3r; Y, f. 3r. Although it follows Recension 2, C does not include the preface to the *Treatise*, nor does it include Plowden's *Brief Declaration*.

omitted.[140] Although the prefaces in witnesses M and Y indicate that a second book relating to Henry VIII's will should be attached to the *Treatise*, neither witness includes the *Brief Declaration*. At the conclusion of part II of the *Treatise* in both M and Y there is a declarative '*Finis*' and a short statement that 'this treatise was compiled by Edmund Plowden. Esquier of the Middle Temple'.[141] As this conclusive statement of authorship is in the same hand as the preceding *Treatise*, it is unlikely that either M or Y were ever supplemented by the *Brief Declaration*. Although Plowden clearly intended to retroactively portray the two distinct investigations — the *Treatise*'s investigation of the legal principles of the succession of the crown and the *Brief Declaration*'s examination of the validity of Henry VIII's will — as continuous with one another, the available witnesses of his work belie his revision. From the fact that three of the six extant witnesses of the *Treatise* do not contain the *Brief Declaration*, it seems far from clear that Plowden's subsequent readers interpreted the two tracts in the way Plowden intended: as two books of the same work.

It is nonetheless striking that Plowden latterly felt encouraged to claim continuity between the two works, indicating that he had likely received some assurance that it was permissible to investigate Henry's will by the time that he came to revise his *Treatise*.[142] A sense of reassurance is palpable in other revisions to the *Treatise*'s preface. In H and R, Plowden cautiously attested to the great danger (especially to a subject) 'in dealing of tytles of kyngdomes' and remarked that the 'surest waie is to be sylent, for in silence there is saefftie but in speache there is perill, and in wryting more' (1r-1v). Indeed, he would not have written at all, Plowden declares, were he not 'urged' to do so by his colleague (1v). At the same time, Plowden defended his right to intervene in such a matter of national significance, especially considering what he felt to be the failure of Parliament to settle the matter. Plowden argued that in the 'corporation' of the realm — in which the 'prince is the heade & the subjectes the members'— the members or

[140] The preface to the *Brief Declaration* is extant in H and R.
[141] M, f. 105v; Y, f. 115v.
[142] The possible circumstances under which such reassurances might have been made are discussed in chapter 6.

limbs 'oughte to have care for the dirrection of the heade' and are even licensed to direct it, 'for if the heade do not well the body dothe not well for the diseas of the one is the grieffe of the other' (1r). Plowden thus implicitly replied to Elizabeth's speech, delivered in response to a pertinacious petition from the Commons in the 1566 Parliament, in which the queen had rebuked the monstrous imposition of the feet trying to direct the head. In the revised version of the *Treatise*'s preface — extant in D, M, and Y — any mention of Plowden's reluctance to deal with the dangerous subject of the succession is removed, and his 'dutie and zeale' for the Stewart cause is emphasised.[143] In these witnesses Plowden appears significantly emboldened — perhaps by assurances from the Duke of Norfolk or the Privy Council that there was, in this authorised case, no danger of reprisal for the imposition of 'dealing in tytles of kyndomes' (1r).

In the dedication to James I found in witness D, Francis Plowden echoes his father's emendations, emphasising Plowden senior's compelling desire to 'expresse his zeale vnto his countrey'.[144] In the same dedication, Francis offers some insight into when and why his father potentially revised his *Treatise*.[145] Francis makes the striking claim that the *Treatise* had been revised 'ready for the printe' but that when the 1571 Treason Act (13 Eliz. c. 1) was passed, 'inhibitinge under moste severe ponishment [...] all speache of any successor to this ymperiall Crowne', publication became impossible.[146] Francis's account of the *Treatise*'s textual history thus contradicts the statement in Plowden senior's original preface, that his tract was written 'not to the intent to publishe the same' (1r). However, Plowden senior evidently found it expedient to remove this disclaimer when revising his text, for no mention is made of the disinclination to print the *Treatise* in the witnesses of Recension 2. What, then, are we to make of Francis Plowden's claim?

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[143] D, f. 4r; M, f. 2r; Y, f. 2r.
[144] D, f. 2r. See volume 2, appendix 2. Disingenuously, Francis also presented his father's desire to express James I's 'undoubted title in writing this treatise' (f. 2v) — despite Plowden senior not so much as mentioning the Scottish prince's birth.
[145] D, f. 2v.
[146] D, f. 2v.

I incline to the view that Francis likely invented this aspect of the *Treatise*'s textual history, deliberately overstating his father's ideological fervour for the Stewart succession in an effort to return to the king's favour after being implicated in the Bye Plot in August 1603.[147] It seems especially unlikely that Plowden's revisions were made with print publication in mind, especially not in 1571 as Francis intimates. At this point, with Mary incarcerated in England and becoming a figurehead (although not an instigator) of conspiracy and rebellion, threatening Elizabeth's authority, it would have been uncharacteristically reckless for 'a man of such caution and circumspection as Plowden' to contemplate printing a treatise in defence of Mary's succession.[148] Moreover, we must recall that Plowden had already invoked the displeasure of the Privy Council upon the initial delivery of his *Treatise*. Having avoided any punishment then, Plowden was unlikely to push his luck by publishing the *Treatise* in print.

Nonetheless, given that revisions were definitively made to the *Treatise* (almost certainly by Plowden himself), the time frame suggested by Francis Plowden may well be accurate, even if the reasons he suggests for the revision seem doubtful. In fact, I think that there are two moments in the period between the commissioning of the *Treatise* in late 1566 and the enactment of Elizabeth's Treasons Act in early 1571 when Plowden might plausibly have revised his text.[149] First, it is possible that the two distinct extant recensions of Plowden's text reflect revisions made during the period of the *Treatise*'s initial composition. That is to say, that H and R are copies of an early draft of the *Treatise*, prepared for Browne or another judicial colleague, and

[147] The Bye Plot was an ill-conceived conspiracy by Catholic priests to kidnap James and extort a guarantee of religious toleration from him. See Mark Nicholls, 'Treason's Reward: the Punishment of Conspirators in the Bye Plot of 1603', *The Historical Journal*, 38 (1995): 821-42.
[148] *EP*, p. 95. On Mary's status as a focus of conspiracy during her imprisonment in England, see Doran, *Elizabeth I and her Circle*, pp. 78-83.
[149] Of course, it is also possible that Plowden revised his *Treatise* after 1571 and that the timeframe for revision suggested by Francis Plowden is entirely inaccurate. As Parmiter points out, Francis was only an infant in the late 1560s and potentially confused his father's work on the succession with his *Commentaries*, the first part of which was in fact published in 1571. See Parmiter, 'Plowden as Advocate', p. 47.

that witnesses D, C, M, and Y are copies of a revised text, prepared only a few months later in 1567 for presentation to the Privy Council.

It is also plausible that Plowden revised his *Treatise* later in the 1560s when lending cautious assistance to Leslie. Threatened with the rack in 1571, Leslie claimed that Plowden, along with Nicholas Harpsfield, Sir Nicholas Throckmorton, Sir Robert Melville and Maitland of Lethington, had read and advised upon early drafts of his defence of Mary's title to the English throne, first printed in 1569.[150] Leslie goes as far as to suggest that Plowden questioned whether Leslie's defence of gynocracy should be included in the printed volume, feeling that he would do a better job if he were to 'write a Book of it himself'.[151] It is certainly not hard to imagine, then, that Plowden was induced to revise his *Treatise* when presenting a manuscript copy to Leslie, who would later shape Plowden's legal arguments into a more accessible polemic in defence of the Queen of Scots. Indeed, Beckett has argued that Plowden very deliberately passed on his ideas to Leslie, ensuring their legacy in print.[152] Whilst this hypothesis offers a compelling reason for Plowden to have revised his *Treatise*, which makes good sense of the testimony later given by Francis Plowden, it is of course impossible to determine categorically why or when these revisions were made.[153]

In three extant witnesses of the *Treatise*, Plowden's preface concludes with a striking comment on the rhetorical style of the tract. In these witnesses — H, R, and D — Plowden declares that his *Treatise* employs the 'forme of locution called gradation going from stepp to stepp untill I come to my conclusions' (1v).[154] *Gradatio* (or 'climax') refers to the rhetorical figure for an ascending series, usually of phrases or clauses concatenated together and leading to a

[150] Murdin, *State Papers*, p. 29. Leslie's testimony is cogently analysed by McElroy, 'Executing Mary Queen of Scots', pp. 169-70.
[151] Murdin, *State Papers*, p. 29.
[152] Beckett, 'Political Works of John Lesley', p. 113.
[153] It is also, of course, impossible to be certain that these revisions were made by Plowden himself.
[154] It is striking that D follows witnesses H and R here, rather than witnesses M and Y in which no reference is made to the rhetorical style of the *Treatise*.

summative conclusion, often compared to the ascent of a staircase or ladder. [155] In the examples of *gradatio* employed by Wilson, Puttenham, and the authors of other early modern rhetorical manuals, *gradatio* is commonly used in combination with *anadiplosis* (the repetition of the last word or phrase or clause or sentence at the beginning of the next).[156] For instance, Wilson gives this example: 'Of slouthe cometh pleasure, of pleasure cometh spendyng, of spendyng cometh whoryng, of whoryng cometh lacke, of lacke cometh thefte, of thefte cometh hangyng, and there an ende for this world'.[157] Given the characteristic examples of this figure offered in contemporary rhetorical manuals, it is surprising to find Plowden professing to use *gradatio* in his *Treatise*. The distinctive tightness of the poetic construction, relying on reduplication and verbal repetition to achieve its effect over relatively few lines or stanzas seems incongruously applied to fifty-two thousand words of complex legal and historical analysis.

Plowden's professed use of *gradatio* seems even more peculiar in the context of early modern legal rhetoric. That is, so far as early modern rhetoric can be deduced from readings given at the Inns of Court. Owing to the 'virtual absence of treatises or monographs' on English common law from the sixteenth century, Inns of Court readings offer the best available guide to the style and structure of contemporary legal argument.[158] Indeed, Baker argues that readings 'supplied the place of' common law treatises and that many readings can be 'regarded as dictated

[155] *Renaissance Figures of Speech*, ed. Sylvia Adamson, Gavin Alexander and Katrin Ettenhuber (Cambridge: Cambridge University Press, 2007), p. 9.
[156] Alex Davis, 'Revolution by Degrees: Phillip Sidney and Gradatio', *Modern Philology*, 108 (2011): 488-506, at p. 491.
[157] Thomas Wilson, *The arte of rhetorique for the vse of all suche as are studious of eloquence* (London, 1553), sig. Ee.i.
[158] *OHLE*, p. 501. Although treatises were not as prominent in English common law as they were in contemporary European legal systems, Plowden's fellow Middle Templar, William Fleetwood did produce several legal and historical treatises. Some of these treatises are discussed by J.H. Baker, *The Reinvention of Magna Carta 1216-1616* (Cambridge: Cambridge University Press, 2017), pp. 216-48. Unfortunately, except for his treatise on admiralty jurisdiction, Fleetwood's treatises remain unedited. See *Hale and Fleetwood on Admiralty Jurisdiction*, ed. M.J. Prichard and D.E.C. Yale (London: Selden Society, annual series, cviii, 1992).

treatises' which 'certainly influenced the style and content of the books which eventually displaced them'.[159]

The first step in a reading at the Inns of Court was for the statute under discussion to be read aloud.[160] The reader would then deliver an introductory speech (typically in English, rather than law French), decrying his ability, acknowledging his gratitude to his colleagues and patrons, and remarking on the intellectual and financial burdens entailed by giving his reading. This preamble would also explain the reader's choice of statute and its relevance for students and practitioners, often 'accompanied by a detailed account of the origins and purpose of the act'.[161] The reader would also announce the principal elements of the statutory text to be examined in each of his forthcoming lectures. In some ways, then, we might think of the reader's introduction as a condensed treatise on the statute under discussion. [162] The reading proper consisted of a series of lectures (or 'divisions') upon the statute, given over the course of approximately three weeks. Each division 'consisted of exposition followed by disputation': the reader read a clause of his statute, commented upon it, and illustrated the operation of the statute with a series of imaginary factual instances, known as 'cases'.[163] The barristers, benchers, serjeants, and judges present at the reading then challenged the reader's cases.

Throughout the latter half of the sixteenth century, lawyers complained of a decline in the standard of readings.[164] As Baker remarks, the divisions gradually became 'more concerned with showing off the reader's dexterity, or stirring the students out of their natural state of

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[159] *IELH*, pp. 197-98. See also Matthew Mirow, 'The Ascent of the Readings: Some Evidence from Readings on Wills', in *Learning the Law: Teaching the Transmission of English Law 1150–1900*, ed. Jonathan Bush and Alain Wijffels (London, 1999): 227–54. See also Ian Williams, 'Common Law Scholarship and the Written Word', in *L&L*: 61-79, at pp. 66-71.
[160] After 1563, the reader also took the Oath of Supremacy. See Baker, *Readers and Readings*, p. 299.
[161] Wilfrid R. Prest, *The Inns of Court Under Elizabeth I and the Early Stuarts, 1590–1640* (2nd edn., Cambridge: Cambridge University Press, 2023), p. 160.
[162] Interestingly, Baker notes that these records of these prefatory speeches occasionally circulated independently from notes on the reading proper. See *Readers and Readings*, p. 229.
[163] *OHLE*, p. 464.
[164] Baker, *Readers and Readings*, p. 237.

inattention, than with authoritative legal restatement'. [165] The overall tendency, Baker adds, was for readers to elaborate upon ever more complex and diverse cases, 'and to indulge in complexity for its own sake', rather than to concentrate on exposition of the statutory text.[166] In many cases, the words of the statute were 'mere verbal pegs' upon which the reader might hang an obscure, excursive analysis of a particular point of law that interested him.[167] In the 1620s, Coke lamented that readings had become 'long, obscure, and intricate, full of new conceits, liker to riddles than lectures' and that readers were concerned only with finding 'nice evasions out of the statute' than educating their audience. [168]

Whether Plowden's two readings at the Middle Temple were 'liker to riddles than lectures' or consisted of 'evasions out of the statute' is difficult to determine. Notes on Plowden's first reading, delivered in Lent 1558 on the Statute of Westminster II, c. 4 (1285) are extant in Exeter College, Oxford.[169] Whilst these notes point to Plowden giving a somewhat unusually lengthy reading for the period — giving fifteen lectures on the statute, each illustrated by an average of twenty cases — they offer no other insight into the style of Plowden's reading, nor whether he followed those of his contemporaries who delighted in diversions from the statute and in showing off their dexterity.[170]

However, upon reading Plowden's *Treatise*, it is evident that Plowden shared the excursive rhetorical tendencies of his fellow innsmen. Despite declaring that his argument would proceed systematically, using 'the forme of locution called gradation', Plowden's *Treatise* provides

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[165] Baker, *Coke*, I. lxxix.
[166] Baker, *Readers and Readings*, p. 237.
[167] J.H. Baker, *The Reinvention of Magna Carta 1216-1616* (Cambridge: Cambridge University Press, 2017), p. 82.
[168] *Co. Litt.* 186v. Coke was similarly scathing about the decline in the quality of readings in his own reading in 1592. See Baker, *Coke*, I. lxxix.
[169] Exeter College, Oxford, MS 108, ff. 130r-157r.
[170] Ten or eleven lectures was common for the mid-sixteenth century whilst the number of cases varied considerably from reader to reader, see Baker, *Readers and Readings*, pp. 228-29. The challenges of studying manuscript records of readings are outlined by Margaret McGlynn, 'Idiosyncratic Books and Common Learning: Readings on Statutes at the Inns of Court', in *L&L*: 41-60.

a series of legal and historical digressions, often only tangentially related to Mary Queen of Scots or her succession to the English throne. In several instances, Plowden expounds a complex hypothetical argument, only to later admit this argument to be extraneous or excessive in his case for the Stewart succession. Indeed, as I shall demonstrate in the next chapter, the Queen of Scots is conspicuous by her absence for the first five chapters of Plowden's *Treatise*. It is to these five chapters, and to Plowden's abstract exposition of the doctrine of the king's two bodies provided therein, to which I shall now turn.

Chapter 2. Plowden's Fiction of the King's Two Bodies

2.1. '[T]wo bodies of two severall natures and qualities'

Chapter I of Plowden's *Treatise* opens with the declaration that 'the lawe of the Realme doth adjudge in the king of this realme two bodies of two severall natures and qualities' (2r). As Plowden explains, the king has both a body natural — the corporeal body with which he is born and which is subject to physical infirmity, illness, and death — and a body politic, described as an immortal body which is

> not visible nor tangible a body impassible not subjecte to force or violence, and is voyde of infancy and of age, and of all imbecilities and defectes that the body naturall susteigneth and wanteth visible Substance. (2r)

The legal fiction of the king's two bodies will almost certainly be familiar to modern readers, having been enshrined in critical thought by Ernst Kantorowicz's magnum opus, *The King's Two Bodies: A Study in Mediaeval Political Theology* (1957) and the plethora of interdisciplinary studies inspired by Kantorowicz's defining image of the doubled royal body.[1] Plowden's *Treatise*, which provides the earliest and (arguably) most elaborate extant account of that doctrine is, by contrast, almost entirely unknown. The first five chapters of this *Treatise*, in which Plowden sets out the legal implications of the king's two bodies, are the focus of this chapter.

Owing to the unfamiliarity of Plowden's *Treatise*, it is worth outlining his argument in these five chapters. Chapters I and II explain the differences between the two bodies and the nature of their conjunction: '*corpus corporatum in corpore naturali et corpus naturale in corpore corporato*'

[1] For an analysis of the king's two bodies as a legal fiction, see J.H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford University Press, 2001), chapter 2. On the interdisciplinary studies inspired by Kantorowicz, see Brett Edward Whalen, 'Political Theology and the Metamorphoses of *The King's Two Bodies*', *American Historical Review*, 125 (2020): 132-145.

('the corporate body in the natural body, and the natural body in the corporate body', 2r). Chapter III proves that despite the consolidation of these two bodies into 'one body indivisible', the legal capacities of the body natural and body politic remain distinct (2v). Chapter IV elaborates upon this distinction, demonstrating that the body politic's 'amplenes in preheminence, lyberties and prerogatyves' is not confounded by its conjunction with the 'body naturall whiche is but base' (3r-3v). Finally, chapter V (by far the longest) describes how 'the body naturall is extolled by the conjunction with the body politicke' (3v). Plowden's exposition concludes with a striking analysis of Ovid's *Metamorphoses*. The purpose of this exposition, I shall argue, is twofold. Firstly, Plowden asserts the universality of the king's two bodies as a maxim of sixteenth-century legal thought. Secondly, Plowden demonstrates that the king's pre-eminent body politic is capable of miraculously purging any personal disability from his body natural.

Throughout Plowden's description of the king's two bodies, the vexed matter of the Elizabethan succession and the Queen of Scots' claim to succeed her royal cousin on the English throne are conspicuous by their absence. It is not until chapter IV, when reviewing the argument of the preceding chapters, that Plowden alludes to their polemical purpose. His account of the legal fiction, Plowden explains, was devised to make his reader's mind

> apter and therby framed and haulffe won already to yelde to the subsequentes tending to prove that the quene of Scottes is not disabled by her birthe to receive the crowne of Inglande if our Soueraigne Lady Quene Elizabeth [...] shoulde dye without issue. (7r)

The question of how exactly Plowden's abstract exposition of the king's two bodies prepares the intended audience of his tract — a lay readership, uninitiated in the common law — for his defence of the Stewart succession is fundamental to this thesis. However, before attempting to answer this question, it is essential to consider how Plowden constructed his account of the king's two bodies in the first place.

2.2. Metaphysical Nonsense? Plowden's *Commentaries* (1571)

Plowden's contribution to the development of the doctrine of the king's two bodies was first recognised by F.W. Maitland. In a series of essays written late in his career, Maitland addressed an anomalous development in sixteenth-century common law: the introduction of the 'corporation sole'.[2] That artificial, juristic personality might be ascribed to certain groups of individuals — styled 'corporations aggregate' — was acknowledged by Maitland as a familiar and useful legal fiction.[3] However, Maitland found it to be an untenable absurdity for corporate personality to be attributed to those who would otherwise be identified as a single (sole) natural person: that is, to speak to the parish parson (in the classic example) as though he were two persons in the eyes of the law.[4] Not only was the idea of a corporation sole self-contradictory, Maitland argued, but it failed to serve the practical purpose for which it was brought into being, leading Maitland to describe it as a 'juristic abortion'.[5]

If this 'curious freak of English law' had perished within the ecclesiastical sphere in which it was brought to life, Maitland argued, it would hardly be worth acknowledging.[6] However, Maitland found that during the sixteenth century the medieval idea that England

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[2] These essays, first published between 1900-04, have since been reprinted under the editorship of David Runciman and Magnus Ryan: *State, Trust and Corporation* (Cambridge: Cambridge University Press, 2003). Of these essays, see especially 'The Corporation Sole' and 'The Crown as Corporation'. Maitland was also exercised by the issue of corporate personality in his introduction to Gierke in *Political Theories of the Middle Age* (Cambridge: Cambridge University Press, 1900).

[3] Maitland discussed the medieval origins of corporations aggregate in a lecture given to Liverpool Law School in 1893. See *The Corporation Aggregate: The history of a legal idea* (Liverpool: Privately Printed, 1893). The Year Book cases discussed in Maitland's lecture, along with other medieval reports relating to the nature of corporations, have been revisited by David Seipp, 'Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural', in *Judges and Judging in the History of the Common Law and Civil Law*, ed. Paul Brand and Joshua Getzler (Cambridge: Cambridge University Press, 2011): 37-50.

[4] 'Editors' Introduction', *State, Trust and Corporation*: ix-xxix, at p. xi, n. 3.

[5] 'The Corporation Sole', *State, Trust and Corporation*: 9-31, at p. 30.

[6] 'The Crown as Corporation', *State, Trust and* Corporation: 32-51, at p. 32. The corporation sole was formulated in response to legal disputes surrounding the wealth of the parish church. See 'Editors' Introduction', pp. xiv-xv.

might be concieved of as a body politic ('a corporation aggregate of many') of which the king was the head gradually gave way to the notion that the king had two bodies: that he was both a natural man and a corporation sole.[7] In 'The Crown as Corporation', Maitland identified Plowden's *Commentaries* as the locus of much 'clumsy' thinking about the corporate personality and legal capacities of the king.[8] In the cases reported by Plowden, Maitland discovered 'much curious argumentation' and 'disputation' concerning the king's two bodies and remarked that he did 'not know where to look in the whole series of our law books for so marvellous a display of metaphysical – or we might say metaphysiological – nonsense'.[9] Maitland, it must be admitted, did not have a high regard for the sixteenth century in general, liking 'most centuries better', but was particularly dismissive of the 'abortive' and 'mischievous' notions of Plowden's contemporaries concerning the king's corporate status.[10] Nonetheless, Maitland found an occasional 'gleam of light' among the 'darkness' of Plowden's reports upon discovering that 'the thought that in one of his two capacities the king is only the "head" of a corporation has not been wholly suppressed'.[11] Maitland thus recognised that there was, in Plowden's day, some contention about the corporate status of the king and debate over the incipient notion of his two bodies. Rather than being a fixed or orthodox idea, that legal fiction was used and interpreted differently according to the exigencies of the case at hand. Whilst this might seem obvious to legal historians familiar with Plowden's *Commentaries* and sixteenth-century common law, the long

[7] 'Crown as Corporation', pp. 34-35. Of course, the commonwealth continued to be described as a body politic after this point. One needs only to consider the frontispiece of Thomas Hobbes's *Leviathan* (London, 1651) to witness the enduring currency of the image of the corporation aggregate in the seventeenth century.
[8] 'Corporation Sole', p. 30. Maitland admits that it is not clear whether 'this kind of talk was really new about the year 1550, or whether it had gone unreported until Plowden' but that, either way, the discussion of the king's two bodies in Plowden's reports did not have any precedent in the Year Books. See 'Corporation Sole', p. 35.
[9] 'Crown as Corporation', p. 35.
[10] 'Crown as Corporation', p. 36. On Maitland's distaste for the sixteenth century, see his letter to J.H. Round, 29 December 1898, in *The Letters of Frederic William Maitland*, ed. C.H.S. Fifoot and P. N. R. Zutshi (2 vols., London: Selden Society, supplementary series, i and xi., 1965-95), I. p. 187.
[11] 'Crown as Corporation', p. 36.

shadow cast by Ernst Kantorowicz's influential reading of Plowden's reports in *The King's Two Bodies* has often obscured Maitland's limpid observations.

It is unsurprising that Kantorowicz — whose work undoubtedly brought the king's two bodies to wider critical attention — was far less concerned by the juristic context of that doctrine than Maitland.[12] Although Plowden's *Commentaries* were seized upon by Kantorowicz as a convenient starting point for his study, he was content to cite selectively from Plowden to 'illustrate the leading idea' of the king's two bodies and exemplify the 'pith of the doctrine'.[13] Having characterised the king's two bodies as 'part of the ordinary and conventional terminology of English jurists of that period', Kantorowicz traced the antecedents of the doctrine through the *ius commune*, medieval Christian theology, and political theory.[14]

Lorna Hutson and Paul Raffield have both identified how Kantorowicz's selective use of quotations from Plowden's *Commentaries* has created an influential, if inaccurate, picture of the ubiquity of the king's two bodies in sixteenth-century common law.[15] The influence of Kantorowicz's inaccurate portrayal of the king's two bodies, Hutson and Raffield argue, was particularly evident in New Historicist criticism of the 1980s and 1990s but also endures in more recent scholarship, where it is still common to find those passages from Plowden's *Commentaries* first quoted by Kantorowicz recycled to illustrate a seemingly universal legal doctrine. Having been persuaded by Kantorowicz that 'all judges of the common law were uniformly wedded to the theory of the king's two bodies', scholars have tended to invoke the notion of the king's corporate personality without engaging with, or even acknowledging, the legal debates which

[12] Kantorowicz admitted that he was unfamiliar with Tudor common law in his preface to *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, NJ: Princeton University Press, 1957), p. xxxvx.
[13] Chapter 1 of *The King's Two Bodies* is entitled, 'The Problem: Plowden's Reports' and begins by quoting 'some of the most telling passages from the arguments and judgments made in the king's courts and epitomized in [Plowden's] *Reports*'. See *King's Two Bodies*, pp. 3, 16.
[14] Kantorowicz, *King's Two Bodies*, p. 20.
[15] Lorna Hutson, 'Imagining Justice: Kantorowicz and Shakespeare', *Representations*, 106 (2009): 118-142. Paul Raffield, 'Time, Equity, and the Artifice of English Law: Reflections on the King's Two Bodies', *Law, Culture and the Humanities*, 13 (2017): 36-45.

informed its emergence.[16] These debates over the corporate status of the king, as Maitland first recognised, are evident in Plowden's *Commentaries*.

My analysis of Plowden's exposition of the king's two bodies in his *Treatise* begins from a basic observation regarding the relationship between his polemical tract and his reports. Hitherto, it has not been critically acknowledged just how substantially the first five chapters of Plowden's *Treatise* overlap with his reports of contemporary cases in which the fiction of the two bodies was advanced. Throughout his *Treatise*'s exposition of the king's two bodies, there is almost nothing that does not also appear in the *Commentaries*. In fact, most of Plowden's material for these five chapters is derived from just two reports, the *Case of the Duchy of Lancaster* (1561) and *Willion v. Lord Berkley* (1562). Given how obvious this comparative point about Plowden's two major works seems, we might wonder why it has not previously been recognised. Since Marie Axton first characterised the *Treatise* as a 'fresh document, which Kantorowicz did not use, expounding the concept of the king's two bodies' which might 'shed light on the history of the legal metaphor', there has been no attempt to place Plowden's exposition in its legal context by comparing his *Treatise* and his *Commentaries*.[17] For her part, Axton intimated that the doctrine may not have been as ubiquitous amongst Elizabethan jurists as Kantorowicz implied, but largely ignored the juridical context of Plowden's *Treatise*.[18] Indeed, after providing an important but somewhat cursory outline of Plowden's arguments, Axton's monograph predominantly focuses upon the Elizabethan Inns of Court masques and public plays which his exposition of the king's two bodies arguably influenced. Despite its shortcomings as an analysis of Plowden's *Treatise*, Axton's work continues to exert an enduring influence in literary criticism; it is not uncommon to find literary scholars making passing mention of Plowden's *Treatise*, usually per Axton, as an important exegesis of the king's two bodies in discussions of that legal fiction as a literary

[16] Raffield, 'Artifice of English Law', p. 42.
[17] *QTB*, p. 19.
[18] *QTB*, pp. x, 15.

device.[19] However, by taking Axton's account as authoritative, many of these critics seem to have assumed that Plowden's use of the king's two bodies in his *Treatise* was boringly straightforward — 'the body politic purges defects in body natural proving foreign-born Mary Stewart's right of succession to the throne of England – end of story' — and that his exposition of that doctrine not worth consulting.[20] Even amongst the scholars who have attended to Plowden's *Treatise* in more depth, there has been a tendency to focus on the significance of that legal fiction within the wider polemical context of his tract, rather than taking the first five chapters of his *Treatise* — in which that doctrine is expounded — as a point of departure. In the analysis that follows, I shall redress this neglect by uncovering how Plowden constructed his abstract exposition of the king's two bodies and explaining how he used his nascent manuscript reports as a rich source of precedents and authorities for his *Treatise*. In doing so, I shall demonstrate how Plowden transformed an incipient and contested theory into something resembling a compelling and pervasive legal maxim for the purpose of advancing the case for the Stewart succession.[21]

[19] See, for example, David Lee Miller, *The Poem's Two Bodies: The Poetics of the 1590 Faerie Queene* (Princeton, NJ: Princeton University Press, 1988), pp. 74, 109-11; Jonathan Locke Hart, *Theatre and World: The Problematics of Shakespeare's History* (Boston, MA: Northeastern University Press, 1992), pp. 57-61; Constance Jordan, *Shakespeare's Monarchies: Ruler and Subject in the Romances* (Ithaca, NY: Cornell University Press, 1997), p. 21; Andrew Zurcher, *Spenser's Legal Language: Law and Poetry in Early Modern England* (Woodbridge: D.S. Brewer, 2007), p. 217; Carolyn Sale, '"The King is a Thing': the King's Prerogative and the Treasure of the Realm in Plowden's Report of the *Case of Mines* and Shakespeare's *Hamlet*', in *Shakespeare and the Law*, ed. Paul Raffield and Gary Watt (London: Bloomsbury, 2008): 137–157, at pp. 144-46; Doyeeta Majumder, *Tyranny and Usurpation: The New Prince and Lawmaking Violence in Early Modern Drama* (Liverpool: Liverpool University Press, 2019), pp. 113-135.

[20] Hutson, 'On the Knees', p. 38. I should make it clear that Hutson is summarizing previous critical opinion on the *Treatise* in the quotation above, not stating her own view of Plowden's text.

[21] The incontrovertibility of maxims is discussed below, p. 122.

2.3. Constructing the King's Two Bodies

No doubt it may seem peculiar, if not self-contradictory, to suggest that Plowden's *Treatise* (written during the Christmas vacation of the Inns of Court, 1566-67) incorporated arguments and precedents found in his *Commentaries*, first printed in 1571. Although Plowden's reports were printed four years after his *Treatise* was completed, the cases upon which Plowden drew for his *Treatise*'s exposition of the king's two bodies were nonetheless heard before 1567. In the preface to his *Commentaries*, Plowden made much of the fact that he had produced his reports near-immediately after judgment was given in Westminster Hall and that the contents of these reports had been corroborated by the lawyers and judges involved.[22] Having been verified by the participants involved, Plowden's manuscript reports circulated throughout the Inns of Court, where they were in high demand by law students and judges alike — the latter of whom reportedly urged Plowden to prepare a printed edition.[23] By 1571 Plowden was 'forcibly compelled' to print an authorised version of his reports after he learned that corrupted copies of his manuscripts (prepared by unscrupulous private 'Clerks and other ignorant Persons who did not perfectly understand the Matter') were set to be printed.[24] With the early manuscript history of Plowden's *Commentaries* in mind, then, we can speak of Plowden's reports forming the basis for his *Treatise*. Regrettably, as Plowden's original notebooks have long since disappeared, it is impossible to compare the *Treatise*'s exposition of the king's two bodies directly to the manuscript materials from which it was evidently compiled.[25] Instead, in comparing Plowden's

[22] *Commentaries*, p. v.
[23] *Commentaries*, p. iv. Ian Williams has argued that in claiming that servants of the crown — the justices of both benches and the barons of the Exchequer — urged him to print his reports, Plowden asserted a form of imprimatur for the publication of his *Commentaries*. See "'He Creditted More the Printed Booke": Common Lawyers' Receptivity to Print, c.1550–1640', *Law and History Review*, 28 (2010): 39-70, at pp. 63-64.
[24] *Commentaries*, p. iv. These corrupted reports were set to be printed without transcripts of the corresponding official records, thus omitting one of the crucial innovations of Plowden's reporting.
[25] Baker, *Coke*, I. vii.

abstract exposition of the king's two bodies in his *Treatise* to contemporary debates concerning the king's corporate personality in the courts of common law, I rely on the reports of those cases subsequently printed in Plowden's *Commentaries*. In doing so, I work on the assumption that Plowden's *Commentaries* closely resembled his original reports.[26]

Parmiter and Hutson have respectively characterised Plowden's exposition of the king's two bodies in his *Treatise* as 'far more elaborate than the account which subsequently appeared in his *Reports*' and as 'the most elaborate theoretical account of the King's Two Bodies in the Elizabethan period'.[27] The analysis of the relationship between the *Treatise* and *Commentaries* that follows casts some doubt on these portrayals of the relationship between Plowden's major works. Whilst it is fair to claim that Plowden's account of the king's two bodies within his *Treatise* is more coherent than the occasional references to that fiction within his reports, I demonstrate below that it is entirely wrong to suggest that the *Treatise* enlarges our understanding of the function of the king's two bodies within Tudor courts of law. In fact, I argue that the opposite might be true. Reading Plowden's *Commentaries* offers an invaluable insight into the debates which surrounded the king's corporate status in the 1560s. However, when Plowden collated and parcelled up selective arguments and precedents from the legal cases in which the king's two bodies was originally disputed, placing this evidence within the relatively coherent structure of his *Treatise*, he obscures and ignores the relative merits of these arguments and precedents within their procedural context. In constructing his five-chapter exposition, I argue, Plowden deliberately conceals all contestation about the corporate status of the king. Instead, he portrays the king's two bodies as though a maxim of the common law. Plowden does so, I shall argue, to convince the lay reader of his tract, uninitiated in the law, that his subsequent application of the doctrine of the king's two bodies to the vexed succession of the crown was consonant with

[26] If, as Plowden claimed, his reports were corroborated by the best witnesses shortly after judgment was given, there is no reason to believe that the content of the original manuscript reports would be significantly different when first published in 1571.
[27] *EP*, p. 91; Hutson, 'On the Knees', p. 28.

established common law principles and practice, rather than an ingenious innovation.[28] By turn, Plowden also suggests that the failure of previous succession polemicists to identify and account for the king's two bodies betrays their ignorance of the common law and their incapacity to dispute the Stewart succession.

Plowden's method of prising relevant authorities and precedents relating to the king's two bodies from their procedural context is evident in his incorporation of various countervailing arguments from the *Willion v. Lord Berkley* into his *Treatise*.[29] Plowden's most extensive discussion of this case appears in chapter three of his *Treatise*, in which he argues that the 'conjunction' of the king's 'two bodyes together and the making of them one does not confound their capacities' (2v). The issue at law in this case has been cogently summarised by Paul Raffield. As the arguments made by the counsel for both parties, as well as the statements and judgments of the bench, are extensively used by Plowden in his *Treatise*, Raffield's precis bears quoting in full.

> The subject of dispute in *Willion v. Berkley* was an entailed estate, the tenants in tail of which were King Henry VII and the male heirs of his body. If the King were to die without such heirs then the land would revert to the heirs of the Marquis of Berkley, whose descendant was the defendant in the present case. After the death of Henry VII, the land passed to his son, Henry VIII; upon his death, it passed to his son, Edward VI, who granted the fee simple to the Earl of Pembroke. Pembroke then granted the fee simple to one Henry Cock. After the death of Edward VI, Henry Cock leased the land to the plaintiff, Henry Willion, for a period of seven years. The day after the lease was granted, the defendant entered the land and forcefully ejected Willion, who brought an action for trespass against Berkley. The issue at law was relatively simple. Edward VI died without an heir to his natural body. Having an entailed interest in the estate, the

[28] Although Plowden was the first to apply the theory of the king's two bodies to the Elizabethan succession, he was certainly not the last to do so. For instance, the relevance of the corporate status of the English crown to the law of succession was later debated in William Fleetwood's manuscript dialogue, *Certaine errors*. Fleetwood also incorporated a discussion of the king's two bodies into another manuscript dialogue, a defence of gynocracy and Elizabeth I's royal authority, *Itinerium Ad Windsor* (1575). See *The Name of a Queen: William Fleetwood's Itinerarium Ad Windsor*, ed. C. Beem and D. Moore (London: Palgrave Macmillan, 2013), pp. 36-38. The significance of the king's two bodies in the succession debate after Plowden's *Treatise* is discussed in the coda to this thesis.

[29] Dyer briefly summarised this case in his notebook. An addendum to Dyer's report identifies Plowden's report as a more comprehensive account of the case. See Baker, *Dyer,* I. 63, n. 1.

> grant of land by Edward VI was valid only if the entail was held by the body politic of the king.[30]

As indicated by Raffield, the legal capacities of the king's two bodies was fundamental to the issue at hand. The counsel for the defendant — Serjeants Harper, Southcote, Walsh, and Chomley — argued that 'the King has two Capacities, for he has two Bodies' and asked the judges to consider in which of these two capacities 'King *Henry* 7 took the Remainder'.[31] The defence argued that the two capacities of the king do not confound one another, but remain distinct, meaning that the king might take or purchase lands in the capacity of his body politic or his body natural. They argued consequently that Henry VII took the remainder in the capacity of his body natural and, as there were no living male heirs remaining of Henry's body natural after the death of his grandson, Edward VI, then the title of the estate should revert to the descendants of the donor: i.e., to the defendant, Lord Berkley.[32] The counsel for the plaintiff — Serjeants Puttrell, Bendloe, and Carus — concurred that 'the King has a double Capacity' but argued that the capacities of each body were not distinct, maintaining that the king's body politic takes pre-eminence in gifts of land and that, ergo, the remainder was held by Henry VII in the capacity of his body politic, which could be proven to have living heirs.[33]

Plowden begins from this point in his discussion of the case in chapter III of his *Treatise*. There, Plowden argues that the conjunction of the king's two bodies 'doth not confounde the capacities of the bodies but preserveth the capacity of eche body' and presents 'the late argued case of the Lord Barkley' as an example of the discrete capacities of the king's two bodies in the eyes of the law (2v). '[T]he Judges in the late argued case', Plowden states, 'toke it that king Henry the seventhe receaved the same in the capacitie of his naturall body', finding for the

[30] Raffield, 'Artifice of English Law', pp. 42-43.
[31] *Commentaries*, pp. 233-34. The definition of the king's body politic put forward by these serjeants is discussed below, p. 75.
[32] Plowden, *Commentaries*, p. 234.
[33] *Commentaries*, p. 238.

defendant, Lord Berkeley (2v). This is an accurate summary of the decision reached by the judges and would be unremarkable were it not for the fact that Plowden omits to mention that Richard Weston disagreed with his fellow justices, Sir Anthony Browne and Sir James Dyer, on this issue. In his dissenting judgment, Weston argued that

> the land which [the king] takes in the capacity of his body natural he has not meerly as a common person, but as a natural man and as a king also, and as to such land he shall have the prerogatives of king, because the royal estate is conjoined to the person who holds the same.[34]

Importantly, in their *obiter dicta* (the passing opinions of a judge, separate from his judgment and therefore not binding as precedent) Browne and Dyer were willing to admit as much. Both judges averred that the king's body politic does typically have 'Pre-eminence over the body natural' and that generally in the purchase or gift of lands the body politic would exert its prerogative.[35] However, in their judgments both Browne and Dyer resolved that the entail was not vested in Henry VII's body politic but in his body natural, as indicated by the precise limitation of the inheritance 'to the Heirs Males of [Henry's] Body begotten'.[36] Finding that the king's body politic (as a non-corporeal artificial person) could not produce heirs, Browne and Dyer agreed that the land must have been limited to the male heirs of Henry VII's natural body 'whiche can begett such heires'.[37] Ultimately, then, Browne and Dyer's equitable decision in this case proves (to Plowden's mind) that 'the conjunction of those two bodyes together and the making of them one doth not confound their capacities' (2v).[38] Plowden goes on to argue that that distinction is 'fully proved' by a 'case in the Boke of Assises' concerning Henry III's gift of a manor to the Earl of Cornwall and the ultimate reversion of that land to Edward III.[39] Although

[34] *Commentaries*, p. 242.
[35] *Commentaries*, pp. 244, 250.
[36] *Commentaries*, p. 250.
[37] *Commentaries*, p. 250.
[38] 'Equity' in judicial decision-making is discussed in detail below, p. 115-18.
[39] 'The Boke of Assises' refers to the *Liber Assisarum*, a volume of reports of cases from Edward III's reign, first printed by John Rastell in 1513. The reports in this volume are cited by regnal

he does not say as much, Plowden is simply reiterating one of the precedents put forward by the counsel for the defence in *Willion v. Lord Berkeley* as proof that 'no confusion of the Capacities by the consolidation of the two bodyes in one' (2v).

Elsewhere in his exposition of the king's two bodies, however, Plowden maintains that the king's body politic generally takes pre-eminence over the body natural. To prove the 'amplenes' of the king's body politic 'in preheminence, lyberties and prerogatyves' in chapters IV and V of his *Treatise*, Plowden revisits *Willion v. Lord Berkeley* and repurposes various precedents previously put forward unsuccesfully by Henry Willion's counsel.[40] For obvious reasons, Plowden does not acknowledge the source for these precedents. With a more subtle sleight of hand, Plowden also refashions the *obiter dicta* of Browne and Dyer, recorded in his manuscript report of *Willion v. Berkeley*, presenting their incidental statements as though reasoned judgments in favour of the plaintiff. For instance, in chapter IV, Plowden argues that 'the Justices toke it in the Lord Barkeleys said case' that the king's body politic, as the 'greater and worthier' of his two bodies, takes 'preheminence in the receipte' of land (3r). This is quite simply an outright contradiction of Plowden's former (largely faithful) account of the resolution reached in *Willion v. Lord Berkley* only one chapter before. There, Plowden stated that 'the Judges [...] toke it that king Henry the seventhe receaved the same in the capacitie of his naturall body' (2v). On the basis of Plowden's *Treatise* alone, it would thus be impossible to determine whether the judges found for the plaintiff or for the defendant in *Willion v. Lord Berkeley*, nor would it be possible to ascertain that the judges were not, in fact, of one mind in this case: for Plowden only ever refers to them as an anonymous collective ('the Judges' or 'the Justices'). By reframing the *obiter dicta* of Browne and Dyer as judgments for the plaintiff, Plowden could disguise the fact that only

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year followed by case number (unlike the Year Books in which reports are also divided into terms). The case to which Lord Berkeley's counsel (and latterly Plowden) referred is 45 *Lib. Ass.* pl. 6, ff. 298-98b.

[40] Per Serjeants Putterell and Walsh, Plowden discusses the Year Book case, Hil. 10 Hen. IV, pl. 5, f. 7-7b, as well as a statute made in the first year of Richard III's reign, 1 Ric. III. c. 5. See *Commentaries*, p. 238-39.

Weston had judged that the king's body politic took the pre-eminence in the receipt of the entail from Berkeley. For example, 'in the argument of the said case', Plowden reports one of the judges (whom he crucially does not identify), argued that

> if a man had the kingdome by discent on the parte of the mother and after he purchased landes by his charstien name & the name of king to him & to his heires and dyed without issue, so as the kingdom discended to the heires of the mothers syde, that heire should have the said purchased lande: and not the heires of the fathers syde. (3r).

Upon comparing this anonymised account in Plowden's *Treatise* to the report of *Willion v. Lord Berkeley*, we find to our surprise that this judge was, in fact, Sir Anthony Browne. As outlined above, Browne indicated in his *obiter dicta* a willingness to accept the pre-eminence of the body politic (at least in principle), but ultimately found that the necessity of considering the intent of the donor in limiting the estate to Henry VII to supersede the typical pre-eminence of the body politic. If, as I have previously suggested, Browne very likely read an early recension of Plowden's *Treatise*, then he would have found in this chapter a rather brazen mischaracterization of his incidental statements in the earlier case, reconstructed as though a resolved judgment.[41] 'By Plowden's time', Baker has argued, the distinction between *obiter dicta* and reasoned judgments was 'fully recognized': disguising the former as the latter was, therefore, to credit Browne's incidental remarks with undue authority.[42]

Such deliberate disingenuousness is also evident in chapter II of the *Treatise*. There, Plowden argued that when the bodies politic and natural are made 'one body indivisible', the surname used by the king as a natural man is replaced 'by the name of his body politicke declaring his function', such as '*Henricus Rex* [...] which name conteigneth his body naturall and politicke' (2r). In demonstrating as much, Plowden proves the pre-eminence of the king's body

[41] See pp. 53-54, above.
[42] *IELH*, pp. 209-10.

politic. To support this argument, Plowden claims that he 'mislyke[d] not the opinion of the Judge' (once again unnamed) in *Willion v. Lord Berkley*, who argued that

> if landes were geven to king Edward the sixte or king Henry the eighte by the name of Edward the sixte or Henry the eighte omitting the name of king, that they should take nothing by that gyfte because their name of king whiche is the name of substance was omitted (2r).

The same judge was also said to have argued that if lands were given to the king, omitting his forename, then the gift was nonetheless valid because the 'worde kinge conteigneth his full bodye' (2r). Tracing these judicial statements back to Plowden's report of *Willion v. Lord Berkeley* reveals Plowden to be conflating curial remarks made by both Browne and Dyer in their *obiter dicta*: remarks that their later judgments rejected.[43] By thus obscuring the procedural context of *Willion v. Lord Berkley*, anonymising the bench and eliding their judgments with their preliminary remarks, Plowden was able to have his cake and eat it. Plowden at once implies that all the judges involved in this case agreed that the king's two bodies have distinct legal capacities and that all the judges concurred that the body politic takes pre-eminence over the body natural in receipts of goods, gifts, and lands. Where reading Plowen's report of *Willion v. Lord Berkley* reveals disagreement as to the legal effect of the king's corporate status, his *Treatise* cleverly displaces the opposing interpretations of the serjeants and judges involved in this case in such a way as to suggest that they unanimously agreed on this issue. Plowden thus transforms the king's two bodies from a source of contestation and debate into an axiomatic legal fiction about which there was general agreement.

Plowden's reframing of the precedents offered by his report of *Willion v. Lord Berkeley* is not necessarily surprising. To a certain extent, untethering precedents from their former procedural context(s) and repurposing them to solve novel disputes is what all good present-

[43] *Commentaries*, pp. 244, 250.

minded legal advocates do. Milsom's comment on the logic of authority in early modern common law, embodied by Coke, is instructive

> if the books tell us that Sir Edward Coke distorted his authorities to present new ideas as ancient principles, or if the reader feels entitled to despise the shifts employed, it is well to remember this is how the common law has lived.[44]

More recently, Ian Williams has demonstrated that the late-sixteenth century saw a gradual breakdown of traditional categories of the forms of action, and that, consequently, common lawyers learned to accommodate forms of wisdom from one form of action to another.[45] By the early-seventeenth century, Williams has argued, substantive legal ideas from earlier materials (such as reports, court records, and the stock of common learning) could be divorced from their former procedural contexts and precedents could be treated as though a 'free-standing source of general ideas'.[46] We might say, then, that Plowden's repurposing of those precedents put forward unsuccessfully by the counsel for the plaintiff in *Willion v. Lord Berkley* is indicative of what all common lawyers were gradually learning to do. Nonetheless, Plowden's disingenuous elision of *obiter dicta* and reasoned judgments from *Willion v. Lord Berkeley* is still remarkable. I will return to the intended effect of Plowden's efforts to present the king's two bodies as though an established mid-sixteenth-century maxim and its consequences for his polemic, below.

In chapter I of his *Treatise*, Plowden attempts to amalgamate theoretically opposite ideas about the king's corporate status. Specifically, in introducing the king's two bodies and their 'severall natures and qualities' (2r), Plowden combines two different concepts of the king's body politic from *Willion v. Lord Berkeley* and from the *Case of the Duchy of Lancaster*. The latter was a

[44] S.F.C. Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 1969), p. 52, quoted in George Garnett, 'The Logic of Authority, and the Logic of Evidence', in *Time, History and Political Thought*, ed. John Robertson (Cambridge: Cambridge University Press, 2023): 67-83, p. 81. As Garnett notes, this passage did not survive in the second edition of Milsom's work.
[45] Ian Williams, 'Early Modern Judges and the Practice of Precedent', in *Judges and Judging*: 51-66.
[46] Williams, 'Practice of Precedent', p. 55.

'great matter of state', which concerned a contested lease of land granted by Edward VI during his minority.[47] The thirteen distinguished lawyers who gathered at the queen's behest in 1561 (including Plowden himself) disputed whether Elizabeth was bound by her predecessor's lease or whether it was voidable by reason of Edward's nonage. These same lawyers 'unaminously agreed', Plowden reported, 'that the King has in him two Bodies', describing his body politic in metaphysical terms as a 'Body that cannot be seen or handled [...] utterly void of Infancy, and old Age, and other natural Defects and Imbecilities which the Body natural is subject to'.[48] This juristic person, Plowden reported in his *Commentaries*, was acknowledged to have been first 'constituted for the Direction of the People, and the Management of the public-weal'.[49]

Whilst the counsel for the defence in *Willion v. Lord Berkeley* also argued that the king has two capacities and two bodies, they related the king's body politic to the medieval conception of the realm as a corporation aggregate of which the king was the head: 'he and his Subjects together compose the Corporation [...] and he is incorporated with them, and they with him, and he is the head, and they are the Members, and he has the sole Government over them'.[50] In this case, the king was imagined as the head of a corporation, rather than as a corporation himself. For Maitland, who found the judgement given in the *Case of the Duchy of Lancaster* to be marvellously nonsensical, the argument of the counsel for the defence in *Willion v. Lord Berkeley* represented a 'gleam of light' in Plowden's *Commentaries*.[51]

Recently, Marie-France Fortin has seized upon these conflicting models of the king's corporate status to argue that Plowden's reports do not produce any 'definite concept of the

[47] Seipp, 'Formalism and Realism', p. 47.
[48] *Commentaries*, p. 213. Plowden's metaphysical description of the king's two bodies in this case would later be incorporated wholesale into Fleetwood's *Itinerarium ad Windsor* as part of the Recorder's defence of gynocracy. See *Name of a Queen*, ed. Beem and Moore, pp. 36-38.
[49] *Commentaries*, p. 213.
[50] *Commentaries*, p. 234.
[51] Maitland, 'Crown as Corporation', p. 36.

king's body politic' and that Plowden 'failed to fully theorise the doctrine'.[52] Whilst this is an accurate assessment of the *Commentaries*, it is unfair to express this evaluation as a failing on Plowden's part. The two concepts of the king's body politic were offered up in different cases by present-minded advocates pleading for their clients: we may therefore expect inconsistency. Again, we must keep in mind Maitland's limpid recognition that Plowden was not reporting upon orthodox doctrine but upon a new and adaptable idea that was shaped by the exigencies of the case at hand. It is therefore unsurprising that his reports do not produce any coherent or definite concept of this legal fiction. However, Fortin's criticism of Plowden's *Commentaries* might be levelled more fairly at his *Treatise*, in which Plowden does attempt to define the king's two bodies and the legal status of his body politic. Whereas in the *Case of the Duchy of Lancaster* and in *Willion v. Lord Berkeley* it was expedient for the parties involved to argue the king to be the head of a corporation or a corporation himself, Plowden attempts to combine these discrete ideas in his *Treatise*.[53]

Following the report of the *Case of Duchy of Lancaster* verbatim, Plowden begins chapter I by describing the king's body politic in metaphysical terms as an invisible, impassible body 'voyde of infancy and of age, and of all imbecilities and defectes that the body naturall susteigneth' (2r). As in his report, Plowden describes the king's body politic to have been 'constituted and devysed by reason and pollicy and of mere necesseitie for preservation of the people whose exercyse is in goverment and direction of his subjectes' (2r). Crucially, however, Plowden develops the judgment reached in *Case of Duchy of Lancaster* by explicitly attributing the creation of the king's body politic to the common law, claiming that 'other action then good goverment and direction the lawe of the realme doth not ascrybe or appointe to the body

[52] Marie-France Fortin, 'The King's Two Bodies and the Crown a Corporation Sole: Historical Dualities in English Legal Thinking', *History of European Ideas*, online (2021): <DOI: 10.1080/01916599.2021.1914934>, p. 5, p. 13.
[53] Whilst Fortin acknowledges the existence of Plowden's *Treatise*, she does not analyse the way in which the *Treatise* theorises between these opposite concepts of the king's body politic.

politicke of the king of this Realm' (2r). In thus describing the king's body politic to have been first created by the common law, and the actions of the king to be determined by the same for the purpose of effective government, Plowden introduces a fundamental theme of his *Treatise*. That is, the monarch is a 'creature of the law' and the prerogatives of the king extend only so far as the common law was willing to grant.[54] Christopher Brooks went as far as to suggest the 'central constitutional argument' of Plowden's text was that 'the corporate character of the English throne' — created and governed by the common law — 'effectively placed restraints' on the English monarch.[55] I shall return to Brooks' concept of the king's restraint by the common law and the responsibilities of kingship later in this chapter.

Having developed the account of the king's metaphysical, juristic person from the *Case of the Duchy of Lancaster,* Plowden also describes the relationship between the king and his subjects as a physiological corporation, per the counsel for the defence in *Willion v. Lord Berkeley*:

> And as the body naturall hathe members of dyverse & sundry sortes, so hath this body politicke. For his subjectes who be of dyvers degrees and sortes be his members, and they be incorporate to him and he to them. And they bothe make a perfecte Corporation. (2r)

The medieval thought, which 'conceived of the nation as a community and pictured it as a body of which the king was head' is thus brought into alignment with the novel sixteenth-century concept of the king as a corporation sole.[56] Plowden thus suggests that these ideas were not inimical, but that England might be imagined as a corporation aggregate, with a corporation sole as its head. The remainder of the *Treatise* bears this out. In several instances, Plowden describes the realm as a body politic (or corporation aggregate) of which the queen was the head and her subjects the members (1r, 6r, 17r, 32v). Meanwhile, he maintains that the queen herself was a

[54] Cromartie, *Constitutionalist Revolution*, pp. 95, 109.
[55] Brooks, *Law, Politics and Society*, p. 74.
[56] Maitland, 'Crown as Corporation', p. 34.

corporation, with two bodies (one corporeal and one metaphysical) and two different legal capacities. As Cromartie points out, Plowden's theorisation between these two concepts of the king's body politic is potentially confusing, not least in chapter I of his *Treatise* where the two seemingly opposite ideas are expressed so closely to one another. [57]

The potential for a certain amount of conceptual confusion was perhaps always an inherent risk given the construction of Plowden's exposition of the king's two bodies. As demonstrated above, Plowden's efforts to portray the king's two bodies as a universally accepted concept (or maxim) required a reframing of contemporary legal debates over this fiction. This involved reconfiguring countervailing ideas and precedents to be viewed as complementary and possessing equal procedural efficacy and authority. Not once does Plowden even hint that the application of this legal fiction might be challenged in England's courts of common law. Plowden thus risks this potential for confusion, I suggest, to credit the king's two bodies with the authority of a maxim. If the king's two bodies could be presented as an established legal principle, rather than a new and adaptable concept, then Plowden's subsequent application of the two bodies doctrine to the Queen of Scots' case might be more readily accepted: the reader of his *Treatise* having been 'framed and haulffe won already to yelde' to Plowden's innovative use of that legal fiction (7r).

The reader of Plowden's *Treatise* is predisposed to 'yelde' to his subsequent argument that the disability of foreign birth does not affect the succession of the crown on the basis of the vast array of precedents and authorities presented in chapter V. These precedents, principally drawn from *Willion v. Berkeley*, the *Case of the Duchy of Lancaster*, and a 1559 Exchequer case concerning the recovery of Sir William Cavendish's debts, emphatically demonstrate that the body politic extols and magnifies the legal status of the natural body to which it is joined. Plowden speaks to

[57] Cromartie, *Constitutionalist Revolution*, p. 95.

the range and intended rhetorical effect of these precedents in the conclusion to chapter five, describing that chapter as constructed to make it self-evident that

> the majestie of the state Royall setled in the body naturall dothe make the same body naturall more precious. So as to kill it, yea to attempte to kyll it is treason, and it taketh from it all imperfection of infancy, it delyvereth him from actes resting in Corporall action as making of lyvery, making of demandes of rentes: and imparteth to him for thinges injoyed in his capacyty amplenes and fullnes of power, as lybertie of distresse in other landes and other lyke. And altereth him in qualitie so as therby it severeth all joyntures with others. And extolleth him so highe that it will not suffer him to beare base tytles, as duke or other lyke. And so altereth him in qualitie that he will not suffer him to have landes to others use but dischargeth him of the use. It maketh him so stately that he [**6v**] shall receive nothing nor gyve nothing no not Jeowells or goodes but by wryting or matter of recorde.[58] It altereth him so in effecte that he can make no testament. (6r-6v)[59]

Plowden's summary of the precedents put forward in this chapter speaks to its disarming or otherwise overwhelming effect, repeatedly insisting that the crown of England is a corporation and that the king's body politic is capable of miraculously overcoming the personal and legal disabilities of his body natural. Again, it is pertinent to recall that Plowden's disquisition is constructed chiefly to convince a general lay audience, rather than fellow lawyers, of the remarkable prerogatives of the king's body politic.

The construction of chapter V of Plowden's *Treatise* may put us in mind of the advice latterly given by Coke, that

> whensoever a man is enforced to yield a reason of his opinion or judgement, that then he set downe all authorities, precedents, reasons, arguments, and inferences whatsoever that may be probably applied to the case in question; for some will be persuaded, or drawn by one, and some by another, according as the capacity or understanding of the hearer or reader.[60]

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[58] In *Calvin's Case*, Coke similarly asserted that the king's body politic meant that he 'cannot give or take but by matter of Record for the dignitie of his person'. See 7 *Co. Rep.* 12a. See also, *The Second Part of the Institutes of the Lawes of England* (London, 1642), p. 186, quoted by Ian Williams, 'Edward Coke', in *Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham*, ed. Denis Galligan (Oxford: Oxford University Press, 2015): 86-107, at p. 95.

[59] Plowden's argument that the king is incapable of making a testament had significant implications for the validity of Henry VIII's will. I discuss these implications in chapter 6, at pp. 220-21.

[60] 3 *Co. Rep.* vi.

As has been indicated elsewhere, Coke's advice on the handling of authorities and precedents to produce what seems like a series of hypothetical, probable forms of proof seems indebted to forensic rhetoric.[61] We might, for instance, compare Coke's advice to that given by Quintilian in his discussion of the forms of proof that might be used to producing a convincing argument.[62] Defining argument as 'proof-giving reasoning, by which one thing is inferred from another', Quintilian demonstrated how enumerating a vast range of proofs enables the forensic orator to cast the event in question into a hypothetical or subjunctive mode, out of which the audience selects those potential proofs which they find to be most convincing.[63] In this model, the accurate presentation of facts is secondary to the construction of a compelling argument, compiled from as many sources of potential proof as possible. The influence of classical forensic rhetoric on sixteenth-century common law has been extensively debated. Whilst, in a substantive or 'narrow technical sense', English law was impervious to classical and humanist scholarship, it is now generally accepted that rhetorical ideas (or 'attitudes of thought') nonetheless infiltrated the Inns of Court and influenced sixteenth-century lawyers' approaches to legal method and argument.[64] Having been introduced to rhetoric, particularly via Cicero's *De Inventione* and Quintilian's *Institutio Oratoria*, at grammar school or university, it is not surprising to find that the Inns were 'saturated in rhetoric' or that the young men studying there were eager to flex their

[61] Williams, 'Practice of Precedent', p. 62. On Coke's persuasive strategy, see also Bernadette Meyler, *Theatres of Pardoning* (Ithaca, NY: Cornell University Press, 2019), p. 214.
[62] Coke owned a copy of Quintilian's *Institutio Oratoria*. See *A Catalogue of the Library of Sir Edward Coke*, ed. W.O. Hassall with a preface by Samuel E. Thorne (New Haven, CT: Yale University Press, 1950), p. 62.
[63] Quintilian, *The Orator's Education*, ed. and trans. Donald Russell (5 vols., Cambridge, MA: Harvard University Press, 2001), II. 371-73. For an analysis of Quintilian's hypothetical method of argument see Lorna Hutson, *Circumstantial Shakespeare* (Oxford: Oxford University Press, 2015), pp. 79-80.
[64] For quotations, see *OHLE*, p. 17. On the attitude of sixteenth-century common lawyers to rhetoric, see Joanna McCunn, '"An Art Obscured with Difficult Cases": Interpretation and Rhetoric in Fulbecke's Direction', in *Reasons and Context in Comparative Law: Essays in Honour of John Bell* (Cambridge: Cambridge University Press, 2023): 94-112. See also Lorna Hutson, 'Rhetoric and Law', in *The Oxford Handbook of Rhetorical Studies*, ed. Michael MacDonald (Oxford: Oxford University Press, 2014): 397-408.

rhetorical skills.[65] As McCunn points out, Plowden himself explicitly identified Aristotle and Cicero as authorities on interpretation in his *Commentaries*.[66] And whilst I would stop short of suggesting that Plowden was consciously applying Quintilian's rhetorical ideas concerning the construction of a compelling argument in his *Treatise*, I nonetheless believe that we might think of Plowden as deliberately producing the kind of hypothetical, potential argument that Quintilian recommended to forensic orators and which Coke would later advocate to seventeenth-century lawyers.

In summary, then, the reader of the *Treatise* is induced to 'yelde' to Plowden's two-fold argument that the crown is a corporation and the king's body politic purges defects in his body natural, in large part due to the sheer accumulative force of the examples and precedents Plowden puts forward to that effect (7r). The 'disarming certainty' with which Plowden enumerates the 'miracles performed by the body politic' is, as Axton intimates, purposefully designed to overwhelm his audience: impressing upon his lay reader the vital significance of the fiction of the king's two bodies.[67] Plowden's abstract five-chapter exposition of the king's two bodies frames his subsequent arguments on behalf of the Queen of Scots in two significant ways. Firstly, Plowden's exaggerated presentation of the pervasive acceptance of the king's two bodies amongst common lawyers points up the ignorance of John Hales and other Protestant succession polemicists who overlooked the legal fiction in their tracts: a cunning way of invalidating their common law arguments against the Queen of Scots' by asserting their lack of awareness of a fundamental legal principle. As I shall demonstrate in the next chapter, proving the ignorance of Hales and previous succession tract writers is fundamental to Plowden's approach in chapters VI to XI of part one of his *Treatise*. Secondly, by insisting upon the capacity

[65] On the teaching of rhetoric in English grammar schools and of the centrality of rhetorical ideas to early modern intellectual life, see Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996), pp. 19-65. See also Kathy Eden, 'Forensic Rhetoric and Humanist Education' in *L&L*: 23-40.
[66] McCunn, 'Interpretation and Rhetoric', p. 113.
[67] *QTB*, pp. 32-33.

of the pre-eminent body politic to magnify the body natural, Plowden suggests that his subsequent application of the fiction of the two bodies to Mary Stewart's case was consonant with the way in which it had already been used by his legal contemporaries. The reality, of course, was that Plowden's application of that doctrine to the right of aliens, such as the Queen of Scots, to succeed to the English throne was entirely unprecedented.

Before addressing Plowden's ingenious application of that doctrine to a possible alien accession in chapters VI to XI of his *Treatise*, we must first consider the striking reading of Ovid's *Metamorphoses* which concludes chapter V. As well as analysing Plowden's literary excursus in the section that follows, I also examine what is at stake in Plowden's characterization of abstract legal capacities in arresting metaphors of human emotion and embodiment.

2.4. 'To playe the Wanton': Plowden, Ovid, and the Bereavement of the King

Having recapitulated the various ways in which 'the majestie of the state Royall setled in the body naturall dothe make the same body naturall more precious', Plowden evidently felt by the end of chapter V that he had sufficiently demonstrated the pervasive potency of the king's two bodies in English law (6r). Announcing a new departure in his argument, Plowden declares that 'philosphers and others that have wrytten of comen wealthes' concur with common lawyers and likewise 'dothe acknowledge in the king two bodyes of distincte natures' (6r). With a mind to 'avoyd tediousnes by shewing many' examples from these sister disciplines, Plowden selects Ovid's *Metamorphoses* to illustrate his antecedent legal argument (6v). In the witnesses of Recension 1, Plowden introduces the poetic ornamentation of his argument by admitting that he finds poets to be his 'sporting companions' when 'disposed to playe the Wanton' (6v).[68] Interestingly, Recension 2 omits this admission of a playful delight in poetry, expressing in a

[68] On the literary culture of the sixteenth-century Inns of Court, see Jessica Winston, *Lawyers at Play Literature, Law, and Politics at the Early Modern Inns of Court, 1558–1581* (Oxford: Oxford University Press, 2016).

more serious tone that the reading of poetry explicates 'many deepe pointes both of naturall and morall philosophie'.[69] Nonetheless, the wantonness of Plowden's Ovidian discussion is equally apparent in all witnesses of the *Treatise*. As I shall argue, Plowden's literary excursus proves to be 'wanton' and unstable in its imaginative resonances, resting its initial status as a tidy form of illustrative proof.

If we are at all surprised by the inclusion of a classical poet in a legal treatise on the succession, our surprise may be lessened upon discovering that the poet in question is Ovid. As Colin Burrow has remarked, Ovid was the most imitated and influential classical author in early modern England; in fact, 'if one wanted to construct a league table of the classical poets who meant most to all English writers in the sixteenth century, then [Ovid's] name would come at the top'.[70] And although there were significant doubts about teaching Ovid in grammar schools and universities, the scholarly labours of European humanist editors and philologists, such as Raphael Regius, and intellectuals, such as Sir Thomas Elyot and Erasmus, had at least partially rescued Ovid's poetry from being labelled 'wanton smut'.[71] By the early-sixteenth century, the *Metamorphoses* was almost universally required in English grammar schools, to be read in conjunction with at least one or more of Ovid's *Fasti*, *Epistolae Herodium* or *De Tristibus*.[72]

When reading Ovid's poetry at school, university, or perhaps later at the Inns of Court, Plowden would have encountered the biographies of Ovid which commonly prefixed editions of his work. Building upon autobiographical information given by Ovid in his poetry, these humanist biographies frequently relayed that he was a reluctant pupil, who rebelled against a

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[69] See volume 2, appendix 1, p. 26. Plowden's exposition of the king's two bodies is otherwise largely consistent across the six witnesses.
[70] Colin Burrow, 'Re-embodying Ovid', in *The Cambridge Companion to Ovid*, ed. Phillip Hardie (Cambridge: Cambridge University Press, 2002): 301-319, at p. 301. See also Colin Burrow, *Shakespeare and Classical Antiquity* (Oxford: Oxford University Press, 2013), p. 92.
[71] Heather James, 'Ovid and the Question of Politics in Early Modern England', *English Literary History,* 70 (2003): 343-373, at p. 344.
[72] T.W. Baldwin, *William Shakspere's Small Latine and Lesse Greeke* (2 vols., Urbana, IL: University of Illinois Press, 1944), II. 418-19.

career in Rome's centumviral courts and who disappointed his father by turning from the law to poetry.[73] Ovid had referred to his aversion to legal study in four separate autobiographical tableaux, consistently distinguishing the freedom of writing verse from the drudgery of his legal education. This biographical narrative of Ovid's rebellion against his legal training evidently had significant cultural capital in the early modern period, for it was incorporated into Ben Jonson's *Poetaster* (1601).[74]

Jonson's play opens with a young Ovid quite literally balancing poetry and the law as he sits working in his chamber — alternately picking up and setting down the books of each discipline.[75] Finding to his dismay that he unwittingly takes his legal notes in verse, Jonson's Ovid bears out the poet's autobiographical claim in the *Tristia* that his poetry flows unbidden.[76] Moreover, in Jonson's play the audience witnesses Ovid composing the *recusatio* of a legal career for the sake of love poetry which stages and translates a passage found in Ovid's *Amores.*[77] An intriguing aspect of Ovid's *recusatio* in the *Amores* (and in Jonson's translation of the same in *Poetaster*) is that Ovid's rejection of a career in the law employs the formal diction of courtroom rhetoric: as Ionnis Ziogas puts it, 'Ovid says no to Roman law while assuming the pose of a defendant countering the accusations of a plaintiff'.[78] Therefore, although Ovid's autobiographical rejection of law for poetry (which so captured the imagination of his early modern readers and biographers) may seem to pitch the two disciplines against one another, his verses reveal that even the wanton poet might find recourse to legal discourse or procedure to

[73] Burrow, 'Re-embodying Ovid', p. 304.
[74] All references to Jonson's *Poetaster* are from Gabriele Bernhard Jackson's edition in volume II of *The Cambridge Edition of the Works of Ben Jonson*, ed. David Bevington, Martin Butler, and Ian Donaldson (7 vols., Cambridge: Cambridge University Press, 2012).
[75] Jonson, *Poetaster*, 1.1.28.1.
[76] Jonson, *Poetaster*, 1.3.7-9.
[77] Compare Jonson, *Poetaster,* 1.1.37-44 to Ovid, *Amores*, 1.15. See *Heroides; and Amores*, ed. and trans. Grant Showerman (2nd edn., revised by G.P. Goold, Cambridge, MA: Harvard University Press, 1977), pp. 376-79.
[78] Ioannis Ziogas, *Law and Love in Ovid: Courting Justice in the Age of Augustus* (Oxford: Oxford University Press, 2021), p. 33.

playfully express himself. Conversely, we find Plowden self-consciously excusing a wanton foray into poetry when utilising Ovid's *Metamorphoses* as an ornamental conclusion to his explication of the king's two bodies.

In books twelve and thirteen of Ovid's *Metamorphoses*, Plowden finds the perfect exemplar of the distinct capacities of the monarch in the ethical dilemma of the Mycenean King and commander-in-chief, Agamemnon. Plowden's account of the mythological narrative bears a brief gloss. Agamemnon catches and kills a deer sacred to the goddess Diana. The offended goddess holds his fleet wind-bound at the port in Aulis, preventing them from sailing to Troy and leaving the army to starve. The prophet Calchas informs Agamemnon that in retribution for his offence, Diana requires the sacrifice of Agamemnon's daughter, Iphigenia. Agamemnon must then weigh his love for his daughter against his responsibilities as a king and commander. After much eloquent persuasion by Ulysses, Agamemnon ultimately consents to commit the heinous act of slaughter. As I shall demonstrate below, Plowden interprets Agamemnon's dilemma as a schism between his two bodies.

The narrative of Agamemnon's sacrifice of Iphigenia dates back to the lost epic cycle, the *Cypria*, and was retold many times prior to Ovid's *Metamorphoses*: the Greek tragedians, Sophocles, Euripides and Aeschylus all dramatised the sacrifice. Dramatic adaptations of Iphigenia's sacrifice were also popular within Plowden's lifetime.[79] Although the marginal annotations to Plowden's *Treatise* — consistent across all witnesses — explicitly acknowledge Ovid's *Metamorphoses* as Plowden's source for this narrative, there is nothing especially Ovidian about Plowden's account. Indeed, when quoting passages from the *Metamorphoses*, Plowden only ever refers to Ovid as 'the Poet'. Structurally, Plowden flits freely between the narrator's third-

[79] See Penelope Meyers Usher, 'Greek Sacrifice in Shakespeare's Rome: *Titus Andronicus* and *Iphigenia in Aulis*', in *Rethinking Shakespeare Source Study: Audiences, Authors and Digital Technologies*, ed. Dennis Britton and Melissa Walter (London: Routledge, 2018): 206-224, at pp. 206-8. Euripides' account was dramatised in 1555 by Lady Jane Lumley and later in the 1580s by George Peele. A version of Iphigenia's sacrifice was also performed before Queen Elizabeth at Whitehall in December 1571.

person account of the sacrifice in book twelve and Ulysses's perspective on the same from book thirteen — citing passages from both books to summarise the ethical dilemma without any obvious disjuncture or acknowledgement. Plowden is also highly selective in his retelling: he ignores all the extraneous symbolic imagery given by Ovid in book twelve pertinent to the Trojan war and entirely omits to mention Ulysses's persuasion of Clytemnestra (Iphigenia's mother) in book thirteen. Plowden was also seemingly uninterested in the fate of Iphigenia. In certain retellings of the myth, Iphigenia was rescued from the sacrificial altar. In these versions, Diana intervened at the critical moment, rescuing Agamemnon's innocent daughter by substituting her with a hind.[80] It is this *deus ex machina* version of the myth that Ovid gives in book twelve of the *Metamorphoses*.[81] For his part, Plowden was content to conclude with the rather laboured pun that Agamemnon 'delyvered his deere dougter [...] to slaughter', and there is no indication that Iphigenia might be spared her gory fate as per his Ovidian source (7r). This is perhaps unsurprising. In much the same way as Plowden cautiously omitted curial details regarding the precedents for his exposition of the king's two bodies, Plowden only takes exactly what he needs from Ovid's epic in order to think through his main interest in the sacrifice of Iphigenia — that is, how it came to be that 'Agamemnon as kinge overcame himself as father' (7r).

To make legible the multifaceted ethical dilemma faced by Agamemnon, Plowden applies the conceit of the two bodies to the Mycenean king. Plowden describes how Agamemnon's 'body politicke respecting the armyes comoditie' compelled him to sacrifice his daughter, whilst his 'body naturall whiche begatt her and loved her inteerely' willed him to spare her life: 'the scepter moved her slaughter earnestly, but nature impugned it vehementlye' (6v). The difficulty of this ethical dilemma, Plowden describes, was only enhanced by the fact that Agamemnon is

[80] Timothy Gantz, *Early Greek Myth: A Guide to Literary and Artistic Sources* (Baltimore, MD: Johns Hopkins University Press, 1993), pp. 582-588.
[81] Ovid, *Metamorphoses*, ed. and trans. Frank Justus Miller (2nd edn., revised by G.P. Goold, 2 vols., Cambridge, MA: Harvard University Press, 1984), II. 182-83.

bound not only to consider the lives of his soldiers, but also 'the honor of his brother *Menelaus*, for whose sake the warres were taken in hande', as well as the 'shame he and his shoulde have in preferring his private affection before the publicke cause' (6v). Plowden reports that this sense of shame was played upon by the 'eloquent *Ulisses*', who also stressed 'the glory [Agamemnon] shoulde wyne' which might 'double recompence' the loss of his daughter (6v). Despite Ulysses's emphasis on the 'generall utilitie whiche should be preferred before any singuler comoditie', Plowden reports that 'nature without sounde of wordes did vehemently counterplead him in every pointe' (6v–7r). Plowden allows the 'contention in this sely king' to build to a crescendo of tension before revealing that 'the comen cause prevayled before the private' and that 'Agamemnon as king overcame himselffe as father' (7r).

Axton's characterization of Plowden's analysis of Iphigenia's sacrifice as 'a tragedy of the conflict between the kings two bodies' thus seems apt.[82] However, Axton is perplexingly dismissive of Plowden's use of Ovid, pejoratively describing his literary excursus as an example of 'parochial classicism at the Inns of Court' and claiming that 'Plowden was more concerned with the political sagacity of Agamemnon's sacrifice than with the suffering it caused'.[83] I am better placed to address Axton's criticism of Plowden's use of Ovid in his *Treatise* than her denunciation of the unsophisticated classical culture at the Inns of Court — which has already been refuted elsewhere.[84] As I have demonstrated above, Plowden's analysis of Ovid's epic, uses the fiction of the king's two bodies to offer new legibility to Agamemnon's ethical dilemma and lends pathos to the 'sely' or pitiable king. The moral difficulty faced by the king is foregrounded by Plowden, who describes the king rent asunder by the competing desires of his two bodies — 'as faste as the one body willed, so faste the other willed' (6v). Reading Plowden's account of the

[82] *QTB*, p. 26. Axton's characterization deliberately echoes Kantorowicz's description of Shakespeare's *Richard II* as 'the tragedy of the King's Two Bodies'. See Kantorowicz, *King's Two Bodies*, p. 26.
[83] *QTB*, pp. 27, 47.
[84] Winston, *Lawyers at Play*, p. 175.

sacrifice of Iphigenia, it certainly seems inappropriate for Axton to suggest that Plowden urged the mortification of the monarch's body natural for the sake of his body politic.[85] Even if that mortification is ultimately effected, Plowden's reading of Ovid highlights the tragic consequences of the negation of the body natural. Indeed, the conclusion to which Plowden's Ovidian analysis leads — that the 'the appetyte of the one body, may be contrary to the appetite of the other' — describes the mortification of the body natural as visceral, bodily suffering. '[T]he sentence or other action' of the body politic, Plowden explains, 'may grieve the other' (7r). This unexpectedly affective conclusion seems dissonant from his foregoing legal analysis, which emphasises the body politic's miraculous, abstract purgation of legal and physical disabilities in the body natural (7r). We might well deem Plowden's Ovidian foray 'wanton', then, for it seems that in attempting to use poetry to ornament his legal argument, Plowden finds his case altered.[86]

However, as the following analysis bears out, Plowden's Ovidian analysis calls attention to (and perhaps helps to exemplify) the surprisingly emotive embodied metaphors with which Plowden describes the capacities of the king's two bodies in the preceding five chapters. In particular, the grief of the body natural expressed in Plowden's literary excursus recalls Plowden's arresting characterization of the bereavement of the body natural's legal liberties earlier in the *Treatise*.

In chapters IV and V, Plowden set out the manifest legal prerogatives supplied by the king's body politic and the exalted legal capacity of his natural person. Plowden described how 'unseamely' and 'impertinent' it would be for the king 'to do so base a thing as to go to the ground and to make lyvery' of seisin as natural persons do in the conveyance of land (3v). Owing to the 'amplenes' of his body politic in 'preheminence, lyberties and prerogatyves', Plowden

[85] *QTB*, p. 37.
[86] 'The case is altered' was a popular early modern English aphorism: it is found in Shakespeare's *King Henry VI Part 3*, used by Jonson for the title of a 1597 comedy, and was supposedly spoken by Queen Elizabeth on her deathbed. The aphorism has been attributed to Plowden. See *EP*, p. 55.

argues that the king cannot convey land by livery of seisin but must use his letters patent to do so instead (3v). Moreover, it is described to be 'unfitt' for the king, 'having a body politicke & naturall being together', to make demands of 'rent and reentree as a comen person' might in seeking to recover a lease of land (3v). Likewise, Plowden attests to the ridiculous impossibility of the king performing the feudal ceremony of homage or swearing an oath of fealty to one of his subjects of whom he holds land (5r).

In these instances, Plowden expresses how the exaltation of the king's body natural by its conjunction to the pre-eminent body politic prevents the king from abasing himself in performing the seemingly ignominious legal actions common to other natural men. Plowden's summary of these changes in the king's legal capacity is noteworthy. When 'the body politic draweth to him from the body naturall all the effects' with respect to the holding and giving of land, Plowden argues, the king's body politic 'bereveth him of suche power and liberties as other bodyes naturall have' (5r). In describing the abstract transformation of the king's legal status as a form of dispossession (or death) of his former liberties, Plowden's striking metaphor of bereavement points up the way in which the king's corporate status restricts his actions. We encounter a similarly emotive embodied metaphor in chapter IV, when Plowden repeatedly describes the king's abandonment of former English titles, such as dukedoms, as the 'drowning' of his body natural by the pre-eminent body politic (4r-v). Furthermore, when Plowden goes on to describe the king's inability to make a testament of his goods and property as other natural persons might, he expresses this in the language of physical disability (6r). In chapter V, the 'denyall of the lawe to the kyng to make a testament' acquires the surreal symbolic force of physical restraint or, perhaps, amputation; 'althoughe his naturall body [has] handes', Plowden argues, the king 'can not gyve or delyver with them by order of the comen lawe' (6r).[87] Plowden's description of the constraint of the king's hands 'by order of the comen lawe' is a vividly

[87] The suggestion of amputation is highlighted by Hutson, 'On the Knees', p. 41.

embodied reminder that the prerogatives of the king are subject to the law. More generally, the embodied metaphors by which Plowden describes the abstract alteration of the king's legal capacity might be understood as the literalization of Brooks' reading of Plowden's *Treatise*; that is, that 'the corporate character of the English throne effectively placed restraints on whoever occupied it'.[88] Plowden's exposition of the king's two bodies at once expresses the exaltation of the king's natural body by his body politic and presents that altered legal status in terms redolent of bodily disability, dispossession, and constraint. We can thus see how the seemingly discordant conclusion of Plowden's literary excursus — indicating the tension between the requirements of the king as a King and the king as a man — is, in fact, anticipated by the surprisingly emotive metaphors Plowden uses to express the king's adjusted legal capacity. The explicit wantonness of Plowden's Ovidian analysis therefore exposes and helps frame the implicit wantonness of aspects of his preceding legal argument.

How, in conclusion, might we summarise the depiction of the king's two bodies as expounded by chapters I to V of Plowden's *Treatise*? In the first part of this chapter, I have demonstrated how Plowden seized upon the resource potential of his nascent manuscript reports of contemporary legal cases to construct a doctrine of the king's two bodies utterly void of contestation and debate. What emerges from Plowden's exposition is an overwhelming sense of the potency of the king's two bodies, constructed to convince the *Treatise*'s non-legal audience of the legal fiction's status as a maxim. I have also indicated how, from the very outset of his *Treatise*, Plowden renders the monarch a creature of the common law. The exalted providence of the founders of the common law who prudently invested the king with two bodies is, as the next chapter of this thesis sets out, integral to Plowden's refutation of the legal ignoramuses, notably John Hales, who had previously intervened in the Elizabethan succession debate but neglected to consider the legal fiction.

[88] Brooks, *Law, Politics and Society*, p. 74.

In the second part of this chapter, I have analysed Plowden's striking reading of Ovid's *Metamorphoses* together with his embodied metaphors of legal capacity, drawing out the ambivalent status of the king's prerogatives. As much as Plowden indicates the manifest privileges that corporate personality confers on the king, including the miraculous purgation of his former legal disabilities, Plowden also hints at the concomitant restraint or deprivation of the king's body natural. The legal fiction of the king's two bodies, as Plowden figures it in the early chapters of his *Treatise*, therefore both exalts and restrains the legal and constitutional powers of the king. In later chapters of this thesis, I shall explore the effect of this Janus-faced juristic construct for the right of Mary Queen of Scots to succeed Elizabeth I on the English throne. On one hand, the hereditary descent of the crown to Mary might purge her of her legal disabilities to receive the same, as Plowden argues in chapters VI to XI of part I of his *Treatise*. On the other, the corporate character of the English throne might also compel Elizabeth, as Plowden concludes in part II of his *Treatise*, to accept her royal cousin's succession. Whilst Plowden's polemical use of the king's two bodies in part I of his *Treatise* has attracted a great deal of scholarly attention from historians of English common law, historians of political thought, and literary critics alike, the significance of the legal fiction in part II has been largely ignored.[89] I aim to remedy this limited scholarly perspective on Plowden's *Treatise* in chapters 4 and 5 of this thesis. However, before turning to part II of Plowden's tract, the next chapter of this thesis shall suggest that previous studies of Plowden's tract have tended to mistake or overlook the polemical import of chapters VI to XI. In what follows, I shall argue that Plowden's argument in these chapters is more constitutionally ambitious than has hitherto been recognised. Specifically, I shall demonstrate that Plowden advances a remarkable case for any alien-born person (if proximate in blood) to succeed to the English throne, which deliberately goes beyond what is necessary for the Queen of Scots.

[89] As I shall demonstrate in chapters 4 and 5, recent work by Lorna Hutson is an exception. See 'On the Knees'.

Chapter 3. The Disability of Foreign Birth: The King's Two Bodies and the Succession of the Crown

3.1. A Thorough Confutation

Chapter VI of Plowden's *Treatise* marks a significant shift in his argument. Having devoted the five previous chapters to a theoretical exposition of the king's two bodies, chapters VI to XI pragmatically refute the objections to Mary Queen of Scots' succession to the English throne. Specifically, Plowden repudiates the arguments concerning the disability of Mary's foreign birth found in Hales's *Declaration* and the anonymous printed tract, *Allegations against*.[1] It is worth reiterating just how important the desire to 'overthrowe the allegations of Mr Hales and the printed boke' was to the undertaking of Plowden's *Treatise*. The 'audacytie' of those Protestant polemicists, reckoned by Plowden to be 'verie insufficient in learning of the lawe of this realme', was unequivocally identified by Plowden as the stimulus for his 'wryting of this present treatise' (1r). In chapters VI to XI, Plowden demonstrates how the failure of Hales and the anonymous author of *Allegations against* to 'understande, or at the leastewyse marke the two bodyes of the kyng' led them to mistakenly 'measure the Crowne and the discent of this bodye politicke [...] after the measure of discentes of landes from naturall bodyes only' (17v). 'There was', Plowden insists, 'never greater error' (17v). Building upon his antecedent exposition of the king's two bodies, Plowden sets out to prove that the legal disability of foreign birth had no reasonable basis to apply to bodies politic and that, *a fortiori*, Mary Stewart's Scottish birth would not prevent her succession to the English throne, should Elizabeth I die without issue (7r).[2]

[1] For a précis of these Protestant polemics, see pp. 34-39, above.
[2] Plowden admits that the efficacy of this argument was conditional upon there being 'non other impediment' (7r) to a Stewart succession than Mary's foreign birth. Plowden's disclaimer is a pointed reminder of the impediment of Henry VIII's will, which he had deliberately ignored in Recension 1 of his *Treatise*.

It would be wrong, however, to assume that Plowden's refutation of these polemicists produces a straightforward or coherent argument for the Stewart succession. As I shall demonstrate, chapters VI to XI of Plowden's *Treatise* are frequently digressive and much of his argument seems extraneous to Mary's case. What, then, is Plowden doing in these chapters if not squarely addressing Mary's right to succeed her royal cousin on the English throne?

The key to comprehending these chapters of Plowden's *Treatise* lies in his telling — if previously overlooked — comments on the bipartite structure and argument of his text. In the preface to his *Treatise* and in the brief exordium to the second part, Plowden evinces that the first part of his tract advances a general argument that 'the nexte of bloude to the Crowne is not disabled to receive by discent by his birthe althoughe he were borne in France Spaine or any other place whatsoever out of the lygeance of the Crowne of Inglande' (1v). As I shall demonstrate in my analysis of these chapters, this amounts to a justification for an alien succession to the English throne *tout court*, not simply for the Queen of Scots' right to succeed. Plowden characterises the second part of his *Treatise* as less 'doubtfull' by comparison, in distinguishing between the general case of all other alien pretenders to the English throne and Mary's specific case, which is pronounced to be far clearer owing to what he takes to be England's jurisdictional superiority over Scotland (1v, 18v). Plowden thus conceptualises chapters VI to XI of his *Treatise* as an extensive hypothetical proposition: the chief concern of which is to refute Hales and his follower, and to prove that they fundamentally misunderstood the principles of the succession. Whilst Plowden's comprehensive argument for the capacity of any alien, if proximate in blood, to succeed to the English crown encapsulates Mary Queen of Scots, she is peripheral to these chapters. We might, therefore, consider the two parts of Plowden's *Treatise* as providing two interrelated answers to two subtly different questions. Part I, I shall demonstrate below, answers the legal-constitutional question of who has the right to succeed to the English throne, leaving the question of whether Mary Stewart had the right to succeed Elizabeth for part II.

3.2. Proximity of Blood, Attainder, and the Interruption of Descent

Plowden's analysis of why criminal attainder does not prohibit the inheritance of the English crown in chapter VI is indicative of the tangential relationship between this section of his *Treatise* and the effort to 'prove that the quene of Scottes is not disabled by her birthe to receive the crowne of Inglande' (7r). Rather than directly addressing the disability of foreign birth, Plowden analyses Henry VII's attainder and accession, challenging the interpretation of the same in *Allegations against* by applying the doctrine of the king's two bodies to the devolution of the English crown. *Prima facie*, this may seem an incongruous or obtuse way to begin. However, this chapter introduces the core components of Plowden's argument as it relates to foreign birth in the chapters that follow.

Chapter VI opens with an emphatic statement of the exceptional nature of the king's body politic. Whereas all other corporations sole, such as bishops and mayors, were 'firste made by lettres patentes' and pass by 'election, presentation, donation and other lyke meanes', Plowden asserts that the king's body politic was 'founded without lettres patentes by commen lawe only' and passes uniquely by descent in blood (7r).[3] As a 'body politicke of inheritaunce and discendyble in bloude', the king's body politic is described to descend in the same manner as other inheritances in England and abroad, to 'suche of the bloude as our lawe and all other lawes accepte moste worthie: that is to the males before the females, and to the males of the eldest before the youngest' (7v).[4] Despite these principles of patrilineage and primogeniture being comparable with the principles of inheritance among subjects, Plowden adds that 'suche thinges

[3] '[I]f there be none of the bloude remayning', Plowden adds, 'then is the kyng eligyble by the people of the realm' (7r). Importantly, Plowden does not indicate how such a process might operate. Nonetheless, as Brooks argues, Plowden's statement could 'with some further manipulation be made to yield an argument that in the event of a "vacancy", the succession to the throne of England could be determined by parliament'. See *Law, Politics and Society*, p. 74.
[4] Comparison between English common law and 'all other lawes' is a predominant feature of these chapters of Plowden's *Treatise*. Plowden's references to *ius gentium* are discussed below, pp. 119, 129-30.

as be interruptions of the discentes to subjectes for their inheritaunce in fee simple' do not interrupt the descent of the crown.[5]

To prove that the disabilities of inheritance affecting subjects 'differ utterly' from those affecting the descent of the crown, Plowden outlines a land tenure case in which a subject has two sons and the elder is attainted (7v). If the father dies seised of land in fee simple, Plowden argues, the land 'shall not discende to the eldest because he is atteinted', thus corrupting the blood 'betwene him and his father' and disabling him 'to receive the inheritance by discent'. Neither, Plowden argues, can the younger son inherit the land because his elder brother (whilst living) is still 'worthiest in bloude'. Consequently, the land must 'escheate to the Lorde of whome it is holden' (7v).[6] However, comparing this case to the succession of the crown of England, Plowden argues that escheat could not possibly occur, demanding

> to whom shoulde it escheat? Of whom is it holden? And who first gave the kingdom to him & his heires? Surely none, nor is it holden of none, nor it hath not any Lorde paramount, & therefore it can not escheat. (7v).[7]

What then, Plowden exclaims, if the kingdom cannot pass to either son or escheat 'is the realm destitute of a kyng?' with 'none to correct ravyn, spoyle and enormities' or to uphold the rule of law (7v)? Plowden responds to these rhetorical questions by asserting the 'provident' quality of the common law (7v). Anticipating and abrogating the threat of an acephalous kingdom, Plowden argues, the common law prudently provided that the body politic descends to the heir nearest in blood immediately upon the king's death. In a striking metaphor, Plowden describes how the body politic 'doth swepe the howse cleane where he cometh and graunteth pardon to

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[5] On the rules of inheritance, see A.W.B. Simpson, *A History of The Land Law* (2nd edn., Oxford: Clarendon, 1986), pp. 56-63. See also *IELH*, pp. 285-88.
[6] On escheat, see *IELH*, p. 260.
[7] As Hutson argues, Plowden goes on to answer the question of who first gave the kingdom of England to its kings by invoking the myth of Brutus's gift of the kingdom to his son, Locrine, as historical truth in part II of his *Treatise*. See 'On the Knees', p. 43. The Brutus myth is discussed in chapter 4.

the naturall body by operation in lawe as fully as he coulde to an other body by Charter' (7v). The legal fiction of the king's corporate status is thus figured as the juristic instrument by which England's 'provident' caretakers — the common lawyers who first endowed the king with a body politic —ensure the political stability of the realm.[8] The 'provident' foresight of the common law, first made explicit here in chapter VI, is fundamental to the chapters concerning foreign birth that follow.

This hypothetical case also establishes another fundamental tenet of Plowden's rhetorical strategy: the exaggerated absurdity of arguments contrary to Plowden's understanding of the law. 'What Judge', Plowden derides, 'may commande [the king] to execution or officer putt him to execution?', emphasizing the ridiculous consequences of the proximate hereditary heir not being discharged of his attainder despite the crown descending to him. (8r). Surely, Plowden adds, no man could obtain a 'warrant from the kyng to putt the kyng to death' (8r). As he later contends, 'a man could not fynde so unskilfull a lawyer' who would hopelessly contend the 'verie absurde' notion that the king, 'from whom all lawe is derived shoulde be disabled in his owne lawe' (9r). It is the 'necessitie of reason', therefore, that dictates that the 'disabilitie of the body naturall' (in this case, the disability of attainder) 'is washed away by accesse of the body polityke to it' (8r). In later chapters of his *Treatise*, Plowden frequently emphasises the legal absurdity and 'inconvenience' of the arguments of Hales and the anonymous author of *Allegations against*, whilst asserting the law's reasonable and providential principles as the basis of his own argument.[9] In doing so, Plowden casts the succession debate into a framework of absurdity and ignorance versus reason and legal ingenuity.

This tactic is evident in Plowden's analysis of Henry VII's attainder and accession. As Plowden explains, Henry summoned a Parliament in the first year of his reign so that he might reverse the attainder of his supporters at Bosworth. During this Parliament, it became necessary

[8] Hutson, 'On the Knees', pp. 42-43. See also *England's Insular Imagining*, p. 170.
[9] Legal 'inconvenience' is discussed below, see p. 118.

to clarify the legal effect of Henry's own attainder. Plowden reports that it was unanimously agreed 'by all the Justices' that Henry's attainder was automatically discharged 'at the instante that he toke upon him to be king' (8v). In summarizing the fifteenth-century case in which Henry's attainder was disputed, Plowden places the fiction of the king's two bodies into the mouths of the presiding judges, arguing that those 'greate learned men [...] right well understode the nature & operation of the body politicke' of the king and that his body politic 'purged and clensed the bodye naturall [...] from all treasons and atteinders' (8v). This is an arresting, if perhaps anachronistic, interpretation of the judges' decision — there is no mention of the king's two bodies in the Year Book record of this case.[10] Nonetheless, Plowden was not the first to retrofit the legal fiction to the fifteenth-century case. In doing so, he followed the example of the serjeants in *Willion v. Lord Berkley*. In that case, the plaintiff's counsel used Henry VII's case as a precedent for the indivisible consolidation of the king's two bodies and their legal capacities and argued that it was

> agreed by all the Justices, that *eo instante* that he took upon him to be King, he was a Person able, and discharged of the Attainder. And the Reason thereof is, because the Body natural and the Body politic are consolidated in one, and the Body politic wipes away every Imperfection of the other.[11]

By following the example of the serjeants in *Willion v. Lord Berkley*, Plowden refutes the interpretation of Henry's attainder found in *Allegations against* and argues that those legal disabilities affecting the inheritances of subjects and natural persons do not affect the hereditary descent of the crown.

[10] Mich. 1 Hen. VII, pl. 5, f. 4.
[11] *Commentaries*, p. 238. Kantorowicz later cited Plowden's report of the judges' unanimous decision on Henry VII's attainder as evidence that the theory of the king's two bodies had already emerged in the late-fifteenth century. See *King's Two Bodies*, pp. 11–12, n. 9.

In *Allegations against* it was suggested that partisans of the Queen of Scots' claim had had some limited success in using Henry VII's accession as a precedent for the Stewart succession.[12] As Levine put it, a 'promising case could be made by maintaining that the crown had its own rules of inheritance' and that Henry's accession despite his attainder indicated as much.[13] Whilst the anonymous author of *Allegations against* perforce accepted the factual circumstances of Henry's case — that Henry became King of England in 1485 despite being attainted by Richard III — he dismissed the significance of Henry's accession as a precedent for the Stewart succession by arguing that Henry's attainder was only discharged after he was formally accepted as King of England.[14] The author of that tract argued that once Henry had been accepted as king, his attainder was necessarily discharged, for (as the author puts it) Henry's 'offence was then to himself'.[15] As it was impossible that 'the king can comit treason vnto him selfe' or 'cut of his owen head', then 'of necessitie' Henry's attainder could not stand.[16] The author of *Allegations against* thus understood the cessation of Henry's attainder to be a *post facto* accommodation of his undoubtedly awkward legal position — what else to do with an attainted man who seized the throne in battle and claimed his title through divine judgment? By contrast, Plowden argues that Henry was never disabled to receive the crown, because, immediately upon receiving it his attainder was discharged by his body politic.

Plowden's argument requires some explanation. With not a little conceptual confusion, Plowden suggests that the action of Henry seizing the crown upon the death of Richard III is coterminous with Henry becoming a corporate person — his body natural being newly conjoined with a body politic, which miraculously and instantaneously purges the disability of attainder which would otherwise prevent his lawful receipt of the crown. To accept Plowden's

[12] Henry's attainder was not discussed in Hales's *Declaration*.
[13] *EESQ*, pp. 107-8.
[14] *Allegations against*, p. 14.
[15] *Allegations against*, p. 14.
[16] *Allegations against*, p. 14.

argument here, that the assumption of the crown purges the attainder *ipso facto*, is to concede to a circular formula: Henry was capable of the crown because he has two bodies, whilst Henry has two bodies because he has received the crown. Although some readers of Plowden's *Treatise* might baulk at this logical fallacy, Plowden's assertion that Henry's attainder was purged *ipso facto* via the miraculous prerogative of his body politic does nonetheless help to resolve a potential legal-constitutional paradox.

If, Plowden argues, we accept that Henry's attainder was only discharged after he became king — as the author of *Allegations against* suggested — then we run up against a procedural difficulty, that is that Henry VII was 'no kyng in the lawe' but a usurper (8v).[17] As Baker explains, 'if the attainder incapacitated [Henry] in law', then he could not lawfully summon Parliament to reverse his attainder, nor could he appoint judges to rule on the effect of that attainder.[18] He would, therefore, be held in a 'vicious circle'.[19] As Plowden evidently recognised, the same problem was faced by Edward IV who had been attainted by Henry VI but nonetheless took the throne after Henry's deposition in 1461. Plowden enquires whether Edward IV could have summoned Parliament to have repealed the attainder of his supporters (or have repealed his own attainder) if he were not already lawfully king: 'the acte of repeale made in the firste yere of his raigne is no Acte unles the parliament were sommoned and called by a kyng. And if he were no kyng then was there no parliament' (9r). The only way to avoid Edward and Henry's potentially paradoxical positions — as occupying the throne but being incapable of ridding themselves of the disabilities which prevented their being the lawful king — was to accept, as the judges in

[17] John Leslie reiterated Plowden's argument in his *Defence*, stating that 'yf there were any disabilitie in [Henry] before to receaue and take the same by lawfull succession, then muste ye saie that he was not lawfull kinge but an vsurper'. Consequently, Leslie argued that to accept Henry VII as the lawful king was to concede that his attainder had been discharged *ipso facto* and did not prevent his 'lawfull succession'. See *A Defence of the Honour of the Right Highe, Mightye and Noble Princesse Marie Quene of Scotlande* (Rheims, 1569), ff. 60v-61.
[18] *OHLE*, p. 58.
[19] *OHLE*, p. 58.

Henry VII's case had done, that their attainder had been discharged *ipso facto* upon their assumption of the crown.[20]

Plowden's innovative (if not unprecedented) application of the doctrine of the king's two bodies to Edward and Henry's respective cases thus makes good legal sense of their accessions and demonstrates how that legal fiction prevents the absurd notion of a legally impotent monarch. In doing so, Plowden indicates the incongruity of measuring the descent of the crown by the common law as it otherwise applies to subjects and bodies natural (8v). In chapters VII to XI of his *Treatise*, Plowden further draws out the fundamental difference between the descent of the crown and the inheritance of natural persons, explaining why the law against alien inheritance 'hathe not the reason for the Crowne as it hath for others' (18v).

3.3. The Disability of Foreign Birth

In sixteenth-century England, the legal division of natural-born subjects and aliens was manifest in the disability of aliens to own a freehold estate (save by the king's favour) or to inherit land.[21] Although unable to inherit land, aliens could nonetheless take leases of shops and tenements, their wills could be proven in England, their executors could bring suits for the collection of their outstanding debts, and their heirs could inherit their personal property.[22] Generally, they

[20] Subsequent legal commentators similarly accepted that 'if the heir to the crown were attainted of treason or felony, and afterwards the crown descend to him, this would purge the attainder *ipso facto*'. For quotation, see William Blackstone, *Commentaries on the Laws of England*, ed. Wilfrid Prest et. al. (4 vols., Oxford: Oxford University Press, 2016), I. 160–61 (Book I, chapter VII, p. 240). See also Henry Finch, *Law, or a Discourse Thereof, in foure bookes. Done into English* (London, 1627), p. 82; Bacon's speech in *Calvin's Case* (1608), printed in *Complete Collection of State Trials, and Proceedings for High-Treason and Other Crimes and Misdemeanours*, ed. W. Cobbett, T.B. Howell and T.J. Howell (34 vols., London: R. Bagshaw, 1809-1828), II. 597; Bacon, *The historie of the raigne of King Henry the Seventh and other works of the 1620s*, ed. Michael Kiernan (Oxford: Oxford University Press, 2012), p. 13.

[21] If an alien acquired lands through the favour of the king, those lands escheated to the king upon the alien's death. Plowden cites Sir William Hankford's opinion to this effect at f. 14v: Hil. 14 Hen. IV, pl. 23, ff. 19b-20a.

[22] Alice Beardwood, *Alien Merchants in England 1350-1377: Their Legal and Economic Position* (Cambridge, MA: The Mediaeval Academy of America, 1931), pp. 61-62.

were entitled to the protection of the law whilst in England and could, at least by the mid-sixteenth century, bring and defend personal actions.[23] Furthermore, 'to guard against xenophobic prejudice if they found themselves in court', aliens were entitled to the privilege of a half-alien jury.[24] As Blackstone points out, these rights were extended to 'alien friends only, or such as whose countries are in peace with ours'; 'alien-enemies', by contrast, had 'no rights, no privileges, unless by the king's special favour'.[25]

In chapters VII and VIII of his *Treatise*, Plowden explains why aliens were unable to inherit lands in England despite their various other legal rights. In doing so, Plowden admits that he perhaps establishes a 'case moste stronge against [him] selffe' which might satisfy those 'who saithe that this lawe of disabilitie for persons borne out of the obedience of Englande to take any inheritance in England is a maxime' (9v, 16r). Why, I want to ask, does Plowden go to such lengths to corroborate the disability of alien birth and the reasons underlying that disability, if only to argue subsequently that the same law cannot reasonably apply to the succession of the crown?

Throughout his analysis of the disability of foreign birth, Plowden recasts the Elizabethan succession debate into a hypothetical case involving two pretenders to the English throne. As Plowden insistently returns to this case, his exposition of the notional titles of the claimants in chapter seven bears a brief gloss. 'Genealogical Chart 2' illustrates my explanation.

Plowden asks his reader to imagine that the King of England has three sons. The eldest son becomes king of England after his father, begets his own son (A) and dies. The second son travels to France, where he fathers a son and dies. The son of the second son continues in

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[23] *OHLE*, pp. 611-612. As explored below, the capacity of aliens to bring personal actions was a vexed point of law.
[24] Baker, *Two Elizabeths*, p. 42. See also Marianne Constable, *The Law of the Other: the Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago, IL: University of Chicago Press, 1994).
[25] Blackstone, *Commentaries*, ed. Prest, I. 239 (I. x, 360). Of course, Blackstone is writing from a later period, but his observations concerning alien rights are nonetheless relevant to the sixteenth century.

France as a subject to the French king and marries a French woman with whom he has his own son (B) before he also dies. The youngest son remains in England, fathers a son (C) and dies. When A dies without issue, only B and C remain as claimants to the throne. '[T]he question is', therefore, 'whether the frenche borne sonne of the sonne of the seconde brother [B] or whether the sonne of the therde brother [C] shall be kyng'? (9v) Resembling this hypothetical case to the Elizabethan succession would place Henry VII as the original king, Elizabeth I as A, Mary Queen of Scots as B, with the various heirs to the Suffolk line represented by C.[26] However, Plowden is less than eager to push any explicit contemporary comparison, stating only that 'if the lawe in this case be evident that the French man [B] shall inherit the Crowne of Inglande then is the Case more strong for the quene of Scottes' (9v). This comment is indicative of the chapters that follow, in which the Stewart succession is rarely mentioned and only ever advanced by proxy of the pretender, B.

Plowden hypothesises that 'if the lawe of the realme should disable' B's inheritance of the crown, then 'it is for one of these two causes, or else for both' (9v). The first possible cause, extrapolated from *Allegations against*, is that those born in foreign realms 'can not be knowne or tryde within Ingland' owing to the logistics of jury inquest (9v).[27] That is to say, because English juries were 'not bounde to enquyre of any thinges beyonde the Seas' there was no way 'to trye or knowe' whether B, having been born in France, was rightfully descended of the former king (9v). The second, and ultimately more compelling, barrier to B's claim is that 'he was borne in the allegiance of an other prynce to whom he is subject' and 'to whom he oweth faith and ligeaunce' (9v). The significance of the concepts of faith and allegiance in the law of personal status will be explored below.

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[26] Of course, the comparison is not exact. Plowden's hypothetical case also resembles the *casus regis*, the contested Plantagenet succession of 1199. The *casus regis* was frequently discussed in the context of the 1560s succession debate. See pp. 127-29, below. In this comparison, the original king would be Henry II, Richard I would be A, Arthur, duke of Brittany, would be B, and John Lackland (latterly King John) would be C.

[27] *Allegations against*, pp. 15-16.

Plowden examines these two possible causes of B's disability in turn, beginning in chapter seven by refuting the argument that English juries could not take cognizance of events beyond the sea. Plowden contends that juries in fact frequently inquire of acts perpetrated beyond England's geographical jurisdiction, from marriage beyond the sea (10r); promises made by merchants beyond the sea (10r); deaths beyond the sea (10r-10v); testaments made beyond the sea (10v); religious appointments made beyond the sea; as well as convictions of heresy in papal courts (10v). Although very few of Plowden's precedents pertain to matters of royal succession — and, significantly, none deals with Scottish birth— Plowden deploys this flurry of precedents as evidence that 'birthe beyonde the sea, yea and many other thinges inumerable chansing beyonde the sea maie be tryed and understode in Inglande' (11r).[28] This was not an orthodox argument. As Hulsebosch has argued, when Coke assured Parliament in 1628 that the 'common law meddles with nothing that is done beyond the seas', he affirmed a longstanding jurisdictional concept.[29] Moreover, it is one of the central tenets of Kim's study of alien status that the prohibition against alien inheritance in England first arose owing to the requirement that juries were self-informing (i.e., that jurors had direct knowledge of the matter in hand). As Kim has it, the 'legal predicament' of aliens and their inability to inherit property in England was 'simply the other side of the brilliant success story of the inquest procedures'.[30] Plowden's insistence that 'birthe beyonde the sea [...] maie be tryed and understode in Inglande' was therefore a contentious interpretation of the common law (11r).

[28] The question of whether Scotland counted as 'beyond the sea' is discussed below, pp. 106-07.
[29] *Commons Debates, 1628*, ed. Robert C. Johnson (6 vols., New Haven, CT: Yale University Press, 1977-83), III 487, quoted by Daniel J. Hulsebosch, 'The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence', *Law and History Review*, 21 (2003): 439-82, at p. 439.
[30] Kim, *Aliens*, p. 116. In response to Kim, Paul Brand argues that the disability of foreign birth was not purely the result of procedural developments. See 'The Origins of "Alien Status" in the English Common Law', *Journal of Legal History*, 39, (2018): 18-28, at p. 23.

Kim provides a sceptical analysis of the precedents put forward in chapter seven of Plowden's *Treatise*.[31] For instance, Plowden cites an action of *quare impedit* brought by Edward III against the bishop of Lincoln in 1345, in which 'avoydaunce was alleaged by means the laste incumbent was made Bisshop of Urton beyonde the Sea' (10v). Exception was taken to this on the ground that 'suche cause' of vacancy 'coulde not be tryed' (10v). In the event, however, 'the exception was disalowed by judgement' suggesting, to Plowden's mind, that the jurors were capable of inquiring into the creation of the Bishop of Utrecht (10v).[32] As summarised by Plowden, this case seems positive proof of his argument that English juries can take cognizance of things done beyond the sea. However, as Kim points out, in this case and others like it, there was a critical proviso added by the judges that 'avoidance shall be tried generally, and not a special avoidance for a certain cause'; that is to say, the English jurors could try whether or not the benefice was vacant, but could not investigate the reasons for that vacancy.[33] Only by omitting this proviso, which restricted the inquiry of the jurors, could Plowden argue that it is 'an objection voyde of trueth & not warranted by lawe' that an English jury could not take cognizance of B's birth beyond the sea (11r). Likewise, Plowden asserted that if a man possessed of lands in fee simple goes 'beyonde the sea on pilgrimage' and dies 'before his retorne into Inglande' then a jury in an action of *mort d'ancestor* were required to take cognizance of his foreign death before determining his heir (10v). However, as Kim points out, Plowden carefully ignored the fact that this procedural difficulty was exactly why a special type of writ was devised in which the demandant was allowed to state that his ancestor was in possession of the land on the day he

[31] Kim, *Aliens,* pp. 166-69.
[32] Pasch. 19 Edw. III, pl. 27. See *Year Books of the Reign of King Edward the Third: Year XIX*, ed. and trans. Luke Owen Pike, Rolls Series no. 31, part B, vol. 13 (London: His Majesty's Stationery Office, 1906), pp. 76-79.
[33] Kim, *Aliens*, p. 166. For quotation, see David J. Seipp's commentary on this case (Pasch. 19 Edw. III, pl. 27, ff. 77–79) in his digital *Index and Paraphrase of Printed Year Book Reports, 1268-1535*.

embarked on his pilgrimage, rather than on the day he died, as recorded in *Glanvill* (*c.* 1187–89) and *Bracton* (*c.* 1220-30s).[34]

As in the first five chapters of his *Treatise*, in which Plowden reconfigured contemporary judgments pertaining to the king's two bodies, careful examination of the precedents put forward by Plowden in chapter VII reveals a similarly resourceful re-interpretation of legal authority. However, as in chapters one to five of the *Treatise*, there is something compelling (at least for the reader uninitiated in the common law) in the accumulative force of these precedents. The confident rhetoric of Plowden's argument only adds to this fact; throughout chapter VII, Plowden works from a self-evident assumption that 'inumerable [things] chansing beyonde the sea maie be tryed and understode in Inglande' and rejects any argument to the contrary as an audacious attack on the common law (11r). For instance, when Plowden argues that juries are 'bounde to take knowledge' of birth beyond the sea, he provides the striking caveat, 'or else the lawe should be unperfecte and wante tryall in many cases' (10r). This kind of dramatic rhetoric runs throughout the chapter, which is cleverly constructed so as to suggest that the alternative to agreeing with Plowden — conceding that the common law can and does take cognizance of things done beyond the sea — is to regard the law itself as 'unperfecte', or to accept that juries would willingly 'geve a false verdicte', or that they would be 'so defectyve' as to ignore the available testimony of witnesses (10v). Concomitantly, Plowden emphasises the ridiculousness and inconvenience of any argument contrary to his own. If, for instance, an English jury were unable to inquire into the death of Sir Thomas Hoby, Elizabeth I's ambassador to France, then, Plowden argues, 'we muste take him still to lyve' and his widow could not consequently take her dower, nor the Queen have wardship over Hoby's son (10r). More generally, Plowden argues that if the death of soldiers and other loyal agents of the crown beyond the sea 'can not be

[34] Kim, *Aliens*, p. 111. See *The Treatise on the Laws and Customs of the Realm of England, Commonly Called Glanvill*, ed. G.D.G. Hall (London: Nelson 1965), p. 150 (XIII.4). See also Bracton, *On the Laws and Customs of England*, ed. George E. Woodbine, translated with revisions and notes by Samuel E. Thorne (4 vols., Cambridge MA: Belknap, 1968-77), III. 250 (f. 254).

understode in Inglande, then the children that the wyves of suche husbandes have had by their seconde husbandes be all bastardes' (10r). Fortunately, Plowden argues, 'our lawe is not so defectyve' to permit these inconsistencies and instead permits jurors to 'take knowledge of thinges that witnesses may geve and so death in a foreyne realme maie be understode in this realme' (10v). Having implied that the author of *Allegations against* — and all others who likewise argued that aliens could not be known or tried by the common law — had put the law on trial, suggesting it to be 'unperfecte' or 'defectyve' in its operations, Plowden strengthens his own position by appearing as a bravura advocate for the common law: asserting its exalted capacity to avoid such inconveniences and absurdities.

However, simply arguing that English juries can take cognizance of foreign birth and other events beyond the sea can only take Plowden so far (11r). Even if one accepts Plowden's argument — and it is far from clear that Plowden's unorthodox precedents would have been accepted, despite their cumulative heft — then the disability of the hypothetical alien pretender B would simply be 'grounded [...] upon an other reason' as evinced in chapter VIII of the *Treatise* (11r). Viewed from this perspective, chapter VII of Plowden's *Treatise* might seem an extraneous digression, which does very little to advance Plowden's argument for B's inheritance of the crown and even less for the Stewart succession, except to provide a somewhat contentious confutation of what merely amounted to a subsidiary argument in *Allegations against*.[35] And yet, chapter VII also performs imaginative work which helps establish later arguments more pertinent to the Stewart succession. This perhaps goes some way towards explaining the length of this chapter and the extent of the precedents given therein.

As Hutson has argued, one effect of chapter VII of Plowden's *Treatise* is insistently to define foreign as 'beyond the sea'.[36] Indeed, that expression is remarkably used thirty-six times

[35] Per Hales's *Declaration*, the author of *Allegations against* also relied on the fourteenth-century statute, *De Natis Ultra Mare*, to erect a stronger barrier against the Stewart succession.
[36] Hutson, 'On the Knees', p. 43.

within the chapter. With respect to the Stewart succession, the equivalence of foreign and 'beyond the sea' begs the question of whether Scotland was considered a foreign kingdom or whether birth in Scotland presented the same kinds of jurisdictional difficulties. Although never stating as much outright, chapter VII of Plowden's *Treatise* seems to respond to the question of Scotland's foreignness in the negative. This chapter thus anticipates the second part of the *Treatise*, in which Plowden asserts that Scotland was, in fact, within the allegiance of the English crown.

It should also be acknowledged that Plowden blurs the lines between cases in which jury inquest was necessary to determine actions or events perpetrated beyond the sea and cases in which such an inquiry would be superfluous. For example, Plowden argues that Edward III only pretended to the French throne because he was able to take cognizance of the death of his cousin, Blanche, the only child of King Charles IV of France. Plowden argues that if Edward could not have known of his cousin's death, then he 'did yll to make tytle to that kyngdom for which he fought so many blouddy battells, and which did coste so many mens lyves' (10v). Developing a now-familiar theme, Plowden exaggerates the irrationality of any contrary interpretation; if one argues that Englishmen cannot take cognizance of death beyond the sea, then, Plowden asserts, one must necessarily accept that Edward III went to war with France for a title he could not prove and the 'many blouddy battells' would have been fought in vain. By ignoring the seemingly obvious fact that Edward's title to the French crown was unlikely to have faced the same logistical hindrances as, say, a subject trying to recover her dower after her husband died beyond the sea, Plowden homogenises the two putatively different circumstances to make a general point that Englishmen can, and do, learn of events taking place overseas. Likewise, Plowden argues that 'the Realme could not knowe that John of Gaunte [...] was sonne to the same kyng Edward the therde', had his birth in Gaunt (Ghent) not been knowable in England (11r). Even as Plowden thus tries to elide the differences between that 'of the prynce & his subjectes', it becomes evident that the kinds of logistical hindrances that affected English

subjects were less relevant when applied to the case of monarchs and successions. Subtly, Plowden thus paves the way for his ultimate argument in this section of the *Treatise*, that 'the case of the subjecte Alien, and the king alien differ' (14v). Before making this case, however, Plowden addresses a more compelling cause of the disability of alien inheritance in England: birth outside the faith and allegiance of the king.

3.4. Faith and Allegiance, *De Natis Ultra Mare* (1351)

Chapter VIII of Plowden's *Treatise* provides 'marveilous expositions' (13r) upon the fourteenth-century statute, *De Natis Ultra Mare* (25 Edw. III, St. II). The 1351 statute became integral to the mid-1560s Elizabethan succession debate after it was seized upon by Hales in his *Declaration* as expounding the law against alien inheritance in England.[37] The statute arose from a parliamentary debate in 1343 as to whether children born overseas were capable of inheritance in England, triggered by concerns about the foreign birth of two of Edward III's sons. Whilst the right of the king's children to inherit the crown was unanimously accepted, the legal status of the heirs of Edward's loyal magnates and soldiers fighting in France required further consideration.[38] The matter was revisited in 1351, when Edward instructed his lords, prelates, and others of his council to address the challenges experienced by his subjects' heirs. The resultant statute reiterated that '*les enfantz des Roi*' were always (and had always been) capable of inheritance (including the inheritance of the crown), irrespective of their place of birth. It also crucially affirmed the future inheritance rights of children born beyond the sea, provided their parents were of 'the Faith and Ligeance of the King of England'.[39] In providing this legal remedy for the inheritance rights of the children of the king's subjects fighting in the Hundred Years' War, the

[37] Bodl. MS Ashm. 829, f. 37v.
[38] Brand, 'Origins of "Alien Status"', p. 26.
[39] *Statutes*, I. 310. The phrase '*les enfantz des Roi*' was hotly contested in the sixteenth-century succession debate.

statute tacitly suggested a novel distinction in the law of personal status: that faithful allegiance to the king determined whether or not an individual could enjoy legal benefits and advantages within England.[40] The corollary was that individuals outside of the faith and allegiance to the English king should be disqualified from the enjoyment of legal liberties common to natural-born subjects, such as the capacity to inherit land. In an immensely influential interpretation of the statute, Hales argued that it proved that all foreign-born persons, whose parents were not of the faith and allegiance of the English king, were subject to a blanket disability.[41] Mary Queen of Scots, born near Edinburgh, could thus be excluded from the English succession on the basis that

> the Scottishe Quene is not the Kinge of Englands childe, nor was borne in ye kinge of Englands legeaunce; nor came of father and mother in faithe & legeance of ye kinge of England [...] wherefore by the lawes of England she can not enherite in this realme.[42]

According to Hales, it was therefore 'very plaine that the Scottish Quene can not by the lawes of this Realme of Englande make eny iust clayme to the crowne'.[43] Hales's interpretation of the statute proved enormously influential; 'all subsequent debates', argues Kim, 'were conducted within the framework laid out by [Hales's] tract' and all authors accepted that foreign birth automatically conveyed legal disability, which could only be removed if one's parents were of the faith and allegiance of the king.[44] It therefore became necessary for Stewart partisans to try to reinterpret the 1351 statute to demonstrate that Mary was exempt from the blanket disability conveyed by her Scottish birth. The author of *Allegations against* suggested that, in the intervening

[40] Kim, *Aliens*, pp. 143-44.
[41] Kim's monograph contends that this was a radically new idea in the sixteenth century, demonstrating that there was no presumption of ubiquitous legal liberties associated with being born within medieval England, nor an equivalent legal disability common to all those born beyond the kingdom.
[42] Bodl. MS Ashm. 829, f. 38r.
[43] Bodl. MS Ashm. 829, f. 38v.
[44] Kim, *Aliens*, pp. 161-62.

years between the manuscript circulation of Hales's tract and the printed publication of his own polemic, Stewart partisans appealed that the phrase '*les enfantz des Roi*' in the statute could be stretched to include all lineal descendants of the king, rather than just his immediate offspring. As Henry VII's great-grandaughter, Mary Stewart might thus be relieved from the blanket disability of foreign-born persons.[45] Largely, however, as Maitland and Levine have argued, the efforts of these Stewart partisans 'hardly offered convincing proofs' to refute Hales's argument and it remained 'highly doubtful whether English law would give the crown to an alien who was the child of two aliens'.[46] The author of the pro-Stewart tract, *Answer to Allegations against*, lamented that, 'being a man not skilfull in the lawes of this realme', he was incapable of confuting Hales's interpretation of the 1351 statute. Nonetheless, he tellingly observed that one more 'grave & lernid in ye lawes' than himself might be able to determine the 'thoughtes and intentes' of those who had made the statute and accordingly evaluate its pertinence to the Queen of Scots' case.[47]

The anonymous author thus anticipated (and potentially inspired) Plowden's twofold refutation of Hales's interpretation of *De Natis Ultra Mare* as an exposition of the common law disability of aliens. Firstly, Plowden provides a scrutinizing analysis of the statute, limiting its significance in the law of personal status. Secondly, and far more compellingly, Plowden provides an equitable reconstruction of the intention behind the law against alien inheritance. In his equitable analysis, Plowden innovatively explains why the law against alien inheritance 'lacketh utterly his effecte and reason' when applied to the succession of the crown (14v). Surprisingly, Plowden's ingenious efforts to evade the 1351 statute have been heretofore entirely ignored.

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[45] *Allegations against*, pp. 18-19.
[46] *EESQ,* p. 125; F.W. Maitland, 'The Anglican Settlement and the Scottish Reformation', in *Selected Historical Essays of F.W. Maitland*, ed. Helen M. Cam (Cambridge: Cambridge University Press, 1957): 152-210, at p. 164.
[47] Bodl. MS Ashm. 829, f. 65r.

The crux of Plowden's argument in the first part of chapter VIII is that *De Natis Ultra Mare* merely represented a confirmation of the pre-existing law of alien status and that undue significance had been lent to this statute by Hales. Echoing the opinion of the former Chief Justice of the King's Bench, William Huse, Plowden insists that there was 'noe newe thing enacted' in 1351 'for the lawe was so before in everie of these poyntes' (11v).[48] Unsurprisingly, Plowden thus asserts the primacy of judge-declared law over statutory legislation — the latter of which, he depicts as simply a gloss on the unwritten, accumulated wisdom of the common law.[49] In order to prove that common law 'is and always hathe ben' against the inheritance of aliens and that the statute was but an affirmation of this fact, Plowden carefully distinguishes between those tasked with clarifying the law by Edward III — his prelates, earls, barons and other wise men of his counsel (dubbed 'delyberators') — from the lords and commons of Parliament who had the executive power to pass legislation ('enactors'). Plowden argues that the pronoun 'they', as used throughout the statute, referred exclusively to the 'delyberators' and not to the 'enactors'. Drawing this distinction is important; if 'they' referred only to the deliberators, as Plowden insists, then the statute can only 'be but a declaration of the lawe that was before', whereas, if 'they' were to refer to the enactors and deliberators together, then it was possible that 'newe lawe' was 'made by the act' (12r).

Plowden also refutes the notion that an alteration in the common law was indicated by the telling use of 'henceforth' within the original statute (12r). Plowden claims it to be a 'principle in exposition of Statutes' that when the preamble thereof 'sheweth doubte to be before [...] in comen lawe' (as was the case in 1351) and 'and after dothe enacte that from henceforth this it shall be ...' *et cetera*, then one should not take this literally to mean that the legislators 'have ordeyned it otherwise then the lawe was before', for 'that were not the office of expositors of

[48] Plowden cites Huse's opinion on the statute from a Year Book case of 1483: Mich. 1 Ric. III, pl. 7, f. 4a.
[49] On the perceived inferiority of legislation, see Baker, *Two Elizabeths*, pp. 94-95.

doubtes' (12r). The 1351 statute, Plowden goes on to assert, includes 'no worde of enacting' whatsoever, but exclusively of 'declaration' and clarification of common law (12r). In support of this scrutinizing semantic analysis, Plowden employs a now-familiar tactic, arguing that if one claims that the law was altered by the 1351 statute, then one perforce also accepts that Edward's deliberators had failed to execute 'all that was comytted to them' (12r). Plowden asserts that 'it is not mete to thinke them so careles or necligent' to have thus abnegated their duties, finding it more 'convenient' to assume that the statute was merely a clarification of pre-existing common law (12r).

Ultimately, and rather ironically given his extensive wrangling over the terms of the legislation, Plowden goes so far as to argue that *De Natis Ultra Mare* is, in fact, 'no statute at all' and that the terms of the statute should not 'be pinched at as the wordes of a statute' (13r). From this point onwards, Plowden exclusively refers to the statute as a treatise. Rather than interrogate isolated phrases within the 1351 'treatise' as authors on both sides of the Elizabethan succession had done in Hales's wake, Plowden urges his reader to 'loke what was lawe before is lawe in that poynte sithens and what was not lawe before is not lawe sithens' (13r). By nominally erasing the significance of this statute in the history of the disability of alien inheritance, Plowden provides a direct challenge to Hales and his followers' reliance upon the statute as an irrevocable barrier against the Stewart succession. Furthermore, Plowden's assumption that the law is best determined through the accumulated wisdom of the common law, rather than through statutory legislation, implicitly challenges those who urged Elizabeth to emulate her father's various succession acts to exclude Mary Stewart from the succession.

However, we must admit that Plowden's 'marveilous expositions' upon the statute were only partially successful in advancing the case for an alien succession to the English crown. First, although Hales had asserted that *De Natis Ultra Mare* 'expowndeth the lawe in this case' of alien inheritance, he had also cited Bracton as an anterior authority on the incapacity of aliens in the

common law.[50] Hales had, then, already anticipated Plowden's advice that one needed to contextualise the 1351 statute by comparing it to antecedent authorities pertaining to the status of foreign-born persons. Second, irrespective of whether the statute represented a novel enaction or mere clarification of pre-existing law, or whether Hales had overstated the significance of the statute, the law against alien inheritance was still operative. As such, Plowden ultimately concedes that his hypothetical alien pretender, B — the 'Frencheman borne in France sonne of one borne in France' living under the faith and allegiance of the French king (13v) — was 'utterly disabled and adjudged as an alien & not capable to his owne use of any pryvate inheritance in england by discent or purchase' (14r). Upon reading this admission, Plowden's reader might despair as to the polemical value of his 'marveilous expositions' upon the statute. What good was it, one might ask, to dispute the minutiae of Hales's understanding of that statute, if his overarching argument pertaining to the disability of foreign birth remained? If the hypothetical alien pretender B was, as Plowden concedes, 'utterly disabled' and incapable of 'pryvate inheritance in england' then does it not follow that he would be 'lykewise disabled to recieve the Crowne?'

Plowden responds to the latter question in the negative by introducing an extraordinary caveat. He states that the 'lawe of disabilitie of foreyne birthe is a lawe only to inferiors to the crowne and not the Crowne it selffe' (14r). To explain this disclaimer, the remainder of chapter eight provides an equitable reconstruction of the first 'reasons of the lawe' against alien inheritance, setting the stage for later chapters of the *Treatise* to evince that this law cannot reasonably be applied to the succession of the crown (14r).

Plowden explains that the 'founders of our lawe' first permitted aliens into England and 'imparted with them [...] the benefit of our lawes' out of commerical necessity: encouraging the economic benefits that foreign merchants could bring to England by extending legal liberties 'as

[50] Bodl. MS Ashm. 829, f. 37v. Adding further weight to his argument, Hales also cited Littleton as an alternative authority on the incapacity of aliens in English common law.

farr as necessitie or reason requyreth' (14r). He describes how aliens were allowed to rent a house or shop 'to lye in and kepe their wares', protecting their bodies and goods from harm, and were likewise entitled to bring personal actions to the king's courts (14r).[51] In staking this claim, Plowden provides an inventive gloss on Littleton's *Tenures*. Previously, Hales had quoted Littleton to substantiate his claim that aliens were disabled in common law, claiming that 'as litleton saieth [...] in action reall or personall brought by one born out of the kinges legeaunce, yt is a good plea for the defendant to saye that the plaintiff was born out of the kinges legeaunce'.[52] Littleton had indeed claimed that if an alien 'will sue an action real or personal, the tenant or defendant may say, that he was born in such a country, which is out of the king's allegiance, and ask judgment if he shall be answered'.[53] For his part, Plowden argued that one 'must intende Lytleton to meane' that aliens were only incapable of suing real actions for land, but that 'yf his action personall be for goodes or chattles, then he shall not be disabled' (14r). Plowden thus anticipated Coke's 'very bold treatment' of Littleton, for Coke was to similarly claim that aliens had the capacity to bring and maintain personal actions (if not real or mixed actions) as part and parcel of their ability to trade in England.[54] Evidently, then, the common law had modified its attitude towards aliens in the intervening period.[55] However, for Plowden and Coke to suggest that Littleton meant to say that aliens could always bring personal actions is still remarkable.

Despite being extended limited legal prerogatives, Plowden explains that the 'founders of our lawe' prohibited 'all strangers borne that be of the ligeance of any other prince [...] to have to their owne use estate of inheritance' in England (14v). This prohibition amounted to protection

[51] Plowden explains that only foreign-born persons 'not under the ligeaunce of any that is enemy to the realme' were extended these benefits (14r).
[52] Bodl. MS Ashm. 829, f. 37v.
[53] *Littleton's Tenures in English*, ed. Eugene Wambaugh (Washington, D.C.: Byrne, 1903), p. 93 (II. xi. §198)
[54] *Co. Litt.* 129v. Coke's treatment of Littleton has been deemed to be 'very bold'. See Frederick Pollock and F.W. Maitland, *The History of English Law Before the Time of Edward I*. 2nd edn., reissued with a new introduction and select bibliography by S.F.C. Milsom (2 vols., Cambridge: Cambridge University Press, 1968), I. 442.
[55] On this modification of legal attitudes towards aliens, see *IELH*, p. 500.

of national security; 'if subjectes of other princes [...] might be permitted to have or purchase [twenty] acres in this lande', Plowden states, 'the same reason woulde serve they might purchase and haue 100 yea a thousande and so [twenty] thousand' (14v). 'By this meanes', Plowden argued, 'revenues of the lande of this realme shoulde be conveied out of this realme' to the benefit of alien kings (14v). Moreover, were subjects of alien monarchs allowed to inherit lands in England's coastal towns and ports, a foreign king might 'have ready havens' from which to launch an invasion (14v).[56] It was 'to avoyde this inconvenience' of an alien invasion, Plowden argues, that the provident founders of the common law 'utterly disabled' persons born outside of the allegiance of the king of England to inherit in England: creating an enduring legal maxim. The foremost cause of this maxim and the predominant concern of the common lawyers who established that law, as Plowden adduces it, was to 'avoyde the decaye of this realme & streingthining of others by the hereditamentes of this realme or by the revenues of the same' (14v). This argument is entirely consistent with Plowden's previous characterization of the common law as, above all else, anxious to preserve the safety of the realme and as capable of anticipating and abrogating threats to the same.

Plowden explains his motivation in thus reconstructing the first principles of this maxim against alien inheritance on the grounds that 'the reason of the law is its soul', to quote:

> *Ratio legis est anima legis*, and he that understandeth the wordes of the lawe, & understandith not the reason of the lawe dothe not understande the lawe perfectly. (14v)

The equitable notion that the true principles of the law lie in its soul, rather than the letter, as influenced by Aristotelian ideas of *epieikeia*, will doubtless already be familiar to legal scholars.[57]

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[56] In *Calvin's Case*, Coke would later adduce similar reasons 'wherefore an alien born is not capable of inheritance within England', suggesting that alien landholders might form a 'Trojan horse', 'ready to set fire on the common-wealth'. See *State Trials*, II. 640, quoted in Hulsebosch, 'Ancient Consitution', p. 454.

[57] On the influence of Aristotelian ideas of equity in sixteenth-century common law, see J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore, MD: Johns

In a now-famous lengthy note appended to his report of *Eyston v. Studde* (1573), Plowden makes the same claim almost verbatim.[58] Although his report of *Eyston v Studde* has since become the focal point for Plowden's understanding of equity, his *Commentaries* represent a veritable 'stoarehowse' of knowledge concerning the equitable interpretation of the law.[59] Given the centrality of equitable interpretation to Plowden's *Commentaries*, it is all the more striking that his early expression of these ideas in his *Treatise* has not previously been discussed.

In his note to *Eyston v Studde*, Plowden advanced an innovative test for establishing the intention of the lawmaker and for reaching an equitable understanding of the law. The judge must 'suppose the Law-maker is present', and imagine that he is conversing with him about his intention in constructing the relevant point in law. The judge 'must give [himself] such an answer', Plowden writes, 'as you imagine he would have done, if he had been present' and by this method, 'you shall easily find out what is the equity in those cases'.[60] In doing so, Plowden declares, one must work from the presumption that the lawmaker was an 'upright and reasonable man' and that his actions would be conversant with rational principles.[61] As Tubbs argued, this method of interpretation grants 'enormous discretion to judges' to determine the meaning of the statute in such a way they themselves find 'reasonable' for the matter in hand.[62] As Baker puts in, appealing to legislative intent was rarely a a 'genuine exercise in recovering factual information'

Hopkins University Press, 2000), pp. 80-128. See also Alan Cromartie, '*Epieikeia* and Conscience' in *L&L*: 320-36.

[58] *Commentaries*, p. 465.

[59] Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts*, ed. D.C. Yale (New Haven, CT: Yale University Press, 1953), p. 108. On the centrality of equity in Plowden's reports, see Georg Behrens, 'Equity in the *Commentaries* of Edmund Plowden', *Journal of Legal History*, 20 (1999): 25-50, p. 29. See also Lorna Hutson, 'Not the King's Two Bodies: Reading the "Body Politic" in Shakespeare's *Henry IV*, parts 1 and 2', in *Rhetoric and Law in Early Modern Europe*, ed. Lorna Hutson and Victoria Kahn (New Haven, CT: Yale University Press, 2001): 166-98.

[60] *Commentaries*, p. 467.

[61] *Commentaries*, p. 467.

[62] Tubbs, *Common Law Mind,* p. 125.

but a clever way of justifying the judge's desired understanding of the law.[63] Plowden's *Treatise* is a case in point.

It was certainly not by coincidence that the 'reasons of the lawe' adduced by Plowden against the inheritance of aliens corresponded to the deep-rooted fears that 1560s Protestant polemicists had regarding the Stewart succession. The author of *Allegations against*, for instance, had argued that if Mary inherited the throne, England would be 'bound & subiecte to a foraine Nacion', and Englishmen would be overruled by their natural 'enemyes'.[64] Although markedly less vitriolic than *Allegations against*, Hales argued in his *Declaration* that there ought 'by nature [...] to be a greate difference between strangers and English men' — positing a fundamental distinction that the Stewart succession threatened to dissolve.[65] In the event of an alien succession, Hales demanded what would become of 'the libertie of England' and 'what profiteth it to be an englishman borne?'.[66] Not only would Mary's accession thus bring about the subjugation of the English state, but the very principle of her doing so would impinge upon an abstract idea of the common law liberties of an 'englishman born'. The exact same apprehensions were later voiced by English opponents of James I's early proposals for union, c. 1603-1608, who saw the naturalization of the Scots as a threat to internal English security and trade.[67]

Strikingly, Plowden's equitable reconstruction of 'the reasons of the lawe' against alien inheritance in England supports the view that the disability of foreign-born persons to inherit land is integral to insulating English legal liberties and the personal freedoms of Englishmen.

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[63] *OHLE*, p. 80.
[64] *Allegations against*, p. 4.
[65] Bodl. MS Ashm. 829, f. 37v.
[66] Bodl. MS Ashm. 829, f. 37v.
[67] Lorna Hutson discusses the resistance to the prospect of union, naturalization, and mutual free trade between England and Scotland in *England's Insular Imagining*, pp. 174-187. Hutson's analysis develops Bruce Galloway's formative account of the union proposals in *The Union of England and Scotland 1603-1608* (Edinburgh: John Donald, 1986). The import of Plowden's *Treatise* in the context of these debates is discussed in the coda of this thesis.

Thus, Plowden might seem to further entrench the case against an alien succession to the English crown. However, by establishing that the founders of the law were cognizant of the serious threat posed by aliens inheriting lands in England, Plowden sets the stage for an ingenious argument that an alien succession does not threaten the liberty of Englishmen. As Plowden argues in chapters IX to XI of the *Treatise*, the accession of an alien (if proximate in blood) to the English throne is co-extensive with the essential aim of the common law as adduced in the antecedent chapters: the avoidance of decay and destabilization of the realm. The law against alien inheritance, Plowden proceeds to argue, 'lacketh utterly his effecte and reason' when applied to the crown, positing a fundamental difference between 'the subjecte Alien, and the king alien' (14v).

3.5. 'That lawe or maxime hath not the reason for the Crowne as it hath for others'

In chapter IX, Plowden argues that all former allegiances are discharged *ipso facto* when the subject of a foreign king becomes a monarch in his own right, preventing the 'inconvenience intollorable' of one realm becoming subjected to another upon the accession of an alien monarch (15r). Here, and elsewhere in the *Treatise*, 'inconvenience' is principally used as a term of art to describe national disasters: an alien invasion, the jurisdictional subjugation of England by a foreign monarch, even civil war.[68] To explain how such an undoubted 'inconvenience' might come about, Plowden returns to the case of his hypothetical alien pretender, B. If, Plowden explains, his 'Frenche born' pretender succeeded to the English throne but remained a 'subjecte to the Frenche kyng' and continued within his faith and allegiance, then England would be

[68] Plowden's use of 'inconvenience' is indicative of an important linguistic change in the common law. In the medieval period, inconvenience was synonymous with inconsistency and denoted a result that was inconsistent with established practice. However, by the turn of the seventeenth century, inconvenience was used by legal practitioners to describe circumstances prejudicial to the commonwealth. See Ian Williams, 'English Legal Reasoning and Legal Culture, c. 1528 – c. 1642' (Unpublished PhD thesis, University of Cambridge, 2008), p. 143.

mediately 'made subject to the French kyng' (15r).[69] If there were no remedy for this eventuality, Plowden suggests that the law should be adjudged to be 'of lytle providence' and that Englishmen might legitimately baulk at the possibility of an alien succession (15r). However, Plowden responds to this undoubtedly 'greate inconvenience' by assuring his reader that the 'naturall body' of B would be 'magnified and extolled' when the body politic of the crown descends upon him. He would, therefore, be 'discharged by reason of his highe function of all duety due to his naturall body in respecte of his former ligeance' representing a 'lesse[r] inconvenience' to the French king who must 'lose his interest in this case in the bodie naturall of the said subject' (15r).[70] The 'providence' of the common law is thus reassuringly affirmed through the capacity of the king's body politic to effect a miraculous transformation from a former subject and 'vassall' to a 'brother' king and sovereign companion (15r).

Interestingly, Plowden suggests that the *ipso facto* dischargement of former allegiances is not simply a provident 'consideration' of English common law but is a universal legal principle of the law of nations: 'per *ius gentium*' (15v).[71] To convince his reader that all civilised nations concur that 'where a whole realm hath interest in the body of one' (i.e. the body politic of their king) it is reasonable for that public interest to supersede the 'pryvate interest' of a rival king, Plowden offers two twelfth- and thirteenth-century examples (15v).

Plowden's first example is that of Richard, earl of Cornwall who, according to his reading of Polydore Vergil's *Anglica Historia*, was 'chosen and made Emprerour, and crowned at

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[69] The subjects of one nation owing mediate allegiance to the king of another nation is suggested by Plowden in part II of his *Treatise* with respect to the legal status of Mary's Scottish subjects. See chapter 4.

[70] Plowden's argument that the inconvenience of the French king losing his interest in his former subject is 'lesse' than the 'greate inconvenience' of England being subjected to the French king might be compared to Coke's dictum that it is preferable to suffer a mischief that is peculiar to one than an inconvenience that may prejudice many. See *Co. Litt.* 97v. Of course, Plowden's argument relies on his reader judging the relative inconvenience from an English perspective.

[71] For a lucid discussion of *ius gentium* see Brian Tierney, 'Vitoria and Suarez on *ius gentium*, natural law, and custom', in *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, ed. Amanda Perreau-Saussine and James B. Murphy (Cambridge: Cambridge University Press, 2007): 101-24.

Aquesgrane in Germany by the bisshop of Coleine' and was thereby 'discharged of his ligeance towerde the king of Ingland', his brother, Henry III (15v).[72] In fact, although Richard had been made King of the Romans ('Rex Romanorum' being the title used by the King of Germany after his election but prior to his papal coronation as Emperor of the Romans) in 1257, Richard remained an unsuccessful aspirant to the imperial crown.[73] Nonetheless, Plowden's general point that the 'greatnes of [Richard's] crowne discharged him of his obedience to the kyng of England' stands; his responsibilities as Rex Romanorum 'possessed [Richard] wholly' and his former allegiance to 'the king of England nothing at all' (15v).

Plowden offers the succession of Stephen of Blois to the English throne in 1135 as a further example. After 'king Henry the firste was dead', Plowden argues, Stephen was transformed from being 'the Frenche kynges subjecte' to 'his fellowe, and therfore was dischardged of his obedience and ligeance to the frenche King' (15v). Plowden admits that it still 'stode with [Stephen's] estate to do homage to the frenche kyng for the erledome of Bloys', potentially undermining his argument that the descent of the body politic discharges former allegiance in the body natural.[74] However, Plowden is careful to stress that Stephen's homage (or that of his 'estate') to the French king was only for the 'duety of lande due to him' and not for any general interest in his capacity as king of England, which, Plowden argues, neither 'lawe nor reason suffereth not' (15v).

Irrespective of the strength of these two medieval precedents and the relative success Plowden might be judged to have in using the fiction of the king's two bodies to explain why the inconvenience of former allegiances is discharged by the hereditary descent of the crown to an alien pretender, he freely admits that the entirety of chapter IX of his *Treatise* is irrelevant to the

[72] Plowden's use of Vergil's *Historia* is discussed below, pp. 136-37.
[73] Richard was deadlocked in an imperial election dispute with King Alfonso of Castille. See Nicholas Vincent, 'Richard, first earl of Cornwall and king of Germany (1209-1272)', *ODNB*.
[74] On the homage performed by English kings for lands held in France, see John Gillingham, 'Doing Homage to the King of France', in *Henry II: New Interpretations*, ed. Christopher Harper-Bill and Nicholas Vincent (Woodbridge: Boydell, 2007): 63-84.

Stewart succession. As Mary was a sovereign queen in her own right 'and not a subjecte' of any foreign state, the inconveniences which might arise from the accession of an alien subject to the English throne would not trouble her succession (16r). Plowden thus makes it absolutely clear that these chapters of his *Treatise* are not primarily intended to 'prove that the quene of Scottes is not disabled by her birthe to receive the crowne of Inglande' (7r) but that they are excessive for that polemical purpose.

In a further telling comment in chapter X, Plowden calls into question whether Scotland was even properly a foreign kingdom, beyond the faith and allegiance of the king of England. Even 'if Scotlande had ben out of the ligeance of the king of England', Plowden conditionally concedes, the case 'touching [Mary] is clearer by so muche' than that of the hypothetical alien pretender, B, owing to her status as a sovereign queen (16r). In admitting that Scotland might not, after all, be 'out of the ligeance of the king of England' and that Mary Stewart might not therefore be disabled to succeed to the crown as an alien, Plowden both anticipates the argument of part II of his *Treatise* and simultaneously indicates the subjunctive nature of his preceding attempts to refute the disability of foreign birth in part I. That Plowden should outright admit this possibility and thus bring to light the possible redundancy of his preceding chapters before offering a further lengthy chapter exploring exceptions to legal maxims in the case of the crown — pertinent to overcoming the disability of foreign birth — is indicative of the ambition of the argument of part I of this text. In short, Plowden could not be any clearer that this section of his *Treatise* is not chiefly concerned with the Queen of Scots but with justifying an alien *tout court*, demonstrating that this eventuality would not restrict the liberties of Englishmen as previous polemicists had contended. Chapter XI, which concludes part I of Plowden's *Treatise*, must, accordingly, be read with his acknowledgement of the wider significance of his text in mind.

In chapter XI, Plowden makes a final effort to refute the applicability of the maxim against alien inheritance to the succession of the crown by appealing to the lawmakers' provident capacity to anticipate and avoid inconveniences in the kingdom. To support his innovative

dismissal of this maxim against alien inheritance, Plowden attests to an 'innumerable' number of other common law maxims which likewise cannot be reasonably applied to the king (17r). Perhaps less effectively, Plowden also offers several medieval historical examples of successful alien successions to the crown and other corporations sole.

Although maxims in early modern law were generally regarded as incontrovertible, Plowden was not alone in challenging the applicability of a maxim with reference to reason and the avoidance of inconvenience.[75] This tradition ostensibly began with Serjeant Morgan in the case *Colthirst v. Bejushin* (1549-51). Per Plowden's report on the case, Morgan acknowledged that 'Maxims are Foundations of the Law' and could not be 'impugned'. However, Morgan also argued that 'Maxims may by the Help of Reason, be compared together, and set against one another', finding that 'reason' might dictate 'that a Thing is nearer to one Maxim to another'.[76] Eighty years later, John Dodderidge expanded upon Morgan's statement, arguing that the application of the 'Rules, Axioms, and Propositions of the common Law' to a particular case could be disputed by 'some other Rule or Ground of Law, which seems to encounter the Ground or Rule proposed' to prevent 'absurdity or contradicition' in the law.[77] This was closely tied to Dodderidge's argument that equity might also serve as a basis by which to prevent the wrongful application of a maxim which may well lead to an inconvenience in the law. Although Plowden does not propose an alternative maxim against which the maxim against alien inheritance might be compared and dismissed, his assertion of the irrationality of applying that maxim to the succession of the crown — derived from his equitable deduction of the reason for

[75] See Ian Williams, 'The Role of Rules: Maxims in Early-modern Common Law Principle and Practice', in *Law in Theory and History: New Essays on a Neglected Dialogue*, ed. Maksymilian Del Mar and Michael Lobban (Oxford: Hart 2016): 188-205. See also Peter Stein, *Regulae Iuris: from Juristic Rules to Legal Maxims* (Edinburgh: Edinburgh University Press, 1966), pp. 153-179.
[76] *Commentaries*, p. 27. Morgan's argument that maxims were 'conclusions of reason' would later be echoed by both Coke and Bacon. See Williams, 'Role of Rules', p. 191.
[77] John Dodderidge, *The English Lawyer* (London, 1631), pp. 209-10. Dodderidge identified Morgan's argument as inspiration for his own; *idem*, p. 229.

the first creation of the law against alien inheritance— might thus be said to anticipate Dodderidge's theoretical writings.

This strategy is evident in Plowden's argument that the maxim of coparcenary between female co-heiresses (if there was no surviving male heir) does not apply to the descent of the crown.[78] '[I]f the king that hath the crowne in fee simple hathe no sonne but dyvers doughters', Plowden argues, then 'the Crowne shall discende only to the eldeste & the other shall have no parte of the inheritance therof' (16r). What is particularly striking about this example is Plowden's explanation of why the maxim is inapplicable to the royal succession. If the king's daughters shared the crown as parceners, Plowden argues, then the subjects of England would 'have dyvers rules, and then woulde one rule one waie, and an other an other waye' (16v). Citing the Gospel of Matthew 6: 24, '*Et nemo potest duobus dominis servire*' ('no man can serve two masters'), Plowden reasons that the divided allegiances of the subjects to their respective monarchs would 'devyde the realme into vj or vij partes' (16r).[79] To avoid the indisputable 'inconvenience' of civil war, Plowden argues that the 'Crowne goeth not after the maxime' (16v).

This is, in effect, the same argument that Plowden had previously made with respect to the disability of criminal attainder in chapter VI. There, he had argued that if the law was so 'verie defective' as to apply the typical rules of escheat to the descent of the crown as they applied to subjects, then the realm would be 'destitute of a kyng' and, consequently, 'ravyn,

[78] On coparcenery, see Simpson, *Land Law*, p. 58. The inapplicability of the maxim of coparcenary — along with other examples of common law rules of inheritance that did not apply to the crown also discussed by Plowden, such as the rule of tenancy by courtesy and the rule of dower (16v) — were later recycled in the second book of Leslie's *Defence*.

[79] All of Plowden's scriptural quotations are given in Latin, corresponding with the Vulgate. It is impossible to definitively establish the exact edition of the Vulgate to which Plowden had access. However, it is likely that the authoritative 1547 edition of the Vulgate, sponsored by the theological faculty at Louvain, was available to Plowden in 1567. The 1547 Louvain Bible drew heavily upon work done by Robert Estienne, who issued a Latin Vulgate Bible in 1528 and republished the same several times throughout the second quarter of the sixteenth century. See Bruce Gordon and Euan Cameron, 'Latin Bibles in the Early Modern Period', in *The New Cambridge History of the Bible, Volume 3: From 1450–1750*, ed. Euan Cameron (Cambridge: Cambridge University Press, 2016): 187–216. Plowden's scriptural quotations correspond to Estienne's 1528 edition and to the 1547 authoritative Louvain edition.

spoyle and enormyties' would go uncorrected (7v). Just as the providence of the law was evidenced in chapter VI in the capacity of the worthiest in blood to succeed to the crown regardless of the disability of attainder, chapter XI emphasises that not applying the maxim of coparcenary to the succession of the crown avoids the egregious inconvenience of England having 'sixe or seven Lordes or soveraignes' (16r). Rather, the consequences of adhering to that maxim are rendered so ominous and contrary to what Plowden equitably adduced to be the fundamental desire of the common law in chapter VIII — the avoidance of the 'decaye of this realme' (14v) — that Plowden's reader is confronted by the perilous perversity of 'measuring the Crowne by maximes of Comen lawe provyded for subjectes' (16v). On this basis, Plowden concludes that 'there was never greater error' than that committed by Hales and the author of *Allegations* against, who made the descent of the crown 'subjecte to the lawes and maximes ordeigned for subjectes' (17r). Ingeniously, Plowden's argument suggests that the efforts of Hales and his follower to exclude Mary Queen of Scots by measuring the descent of the crown after the typical rules of descent amongst subjects might (ironically) bring about the national upheaval and legal chaos that they feared the accession of an alien monarch would produce. Their ignorance of the law — notably their failure to 'understande, or at the leastewyse marke the two bodyes of the kyng' (17r) — is thus rendered constitutionally significant as well as a professional affront: should their works mislead those in power as Plowden purported to fear (1r), and Mary's hereditary claim was overturned, then Hales and the anonymous author of *Allegations against* might be responsible for a total collapse of civic peace. By contrast, Plowden's insistence that the descent of the crown to the closest hereditary heir — irrespective of all personal legal disabilities — avoids the inconveniences of lawlessness, factionalism, and civil war. It is with this emphatic statement of the grievous deception of Hales's *Declaration* and the anonymous *Allegations against*, that Plowden's legal argument in chapters VI to XI comes to a compelling conclusion.

However, Plowden supplements this conclusion by enumerating a series of examples from English medieval history which purportedly bear out his argument. As I demonstrate below, Plowden's contemporaries had already extensively debated many of these precedents, creating a quagmire of countervailing interpretations. Plowden's rather lacklustre contribution largely fails to add new legibility to these contested examples.

Although unique among the literature on the succession, Plowden's first historical precedent for the accession of an alien to the English crown is particularly unconvincing. Despite being born in Normandy — beyond the allegiance of the king of England at the time of his birth — Plowden argues that William Rufus 'was kyng after the deathe of his father and not disabled by his foreine birthe' (17v). It is not hard to see why Rufus's accession had not been previously discussed in the extant succession tracts. As Plowden admits, the English crown was 'limitted to [Rufus] by his fathers testament' and did not pass by the rules of inheritances as set out in chapter VI. In other words, Rufus had no recognizable claim to the kingdom other than his father's deathbed nomination. The Conqueror's bequest of the kingdom of England accorded with the permissive convention of Norman customary law that patrimony be divided from acquisitions: Robert, the Conqueror's eldest son, inherited the patrimonial Duchy of Normandy whilst Rufus, a younger son, received England.[80] It therefore seems bootless for Plowden to cite Rufus's succession as a precedent for the descent of the English crown to an alien.

A potentially stronger, if more contested, precedent for an alien succession was that of Henry II: 'a frenche man borne and sonne of a frenche subject' who, Plowden argued, nonetheless succeeded to the English crown 'by discent' (17v).[81] Hales's *Declaration* reveals that even before the 1563 Parliament, Henry II's accession was already being leveraged by Stewart

[80] George Garnett, *Conquered England: Kingship, Succession, and Tenure 1066-1166* (Oxford, 2007), pp. 173-180.
[81] Henry was the eldest son of Geoffrey Plantagenet, count of Anjou and the Empress Matilda. He was born in Maine.

partisans hoping to prove that the maxim against alien inheritance did not apply to the succession of the crown. For his part, Hales maintained that Henry II's case was an unconvincing precedent for a possible alien succession, as Henry 'came in rather by Election, and Consent of the Realme, then by Inheritaunce'.[82] The anonymous author of *Allegations against* similarly argued that Henry's accession was not 'by the order of the comon course of law' but in fact resulted 'by force & vertue of certaine capitulacions' and extra-legal determinations formalised between King Stephen and Duke Henry.[83] In 1153, the Treaty of Winchester had indeed established that Henry, Duke of Normandy, should be Stephen's successor.[84] In return, Henry did homage to Stephen and offered 'surety to the king on oath that he would be *fidelis* to him and would protect his life and *honor*'.[85]

Echoing the example set by the author of *Answer to Allegations against*, Plowden argued that the 'chieffe poynte' of the 1153 settlement was to give the 'unjuste usurper', Stephen, the status of 'lawfull kinge for liffe' (17v).[86] The same settlement, Plowden argued, only confirmed Henry's pre-existing right to succeed Stephen, not as a 'straunger but as one that was heire apparant to the Crowne': his mother, Matilda, being 'contente to geve place' (17v).[87] However, Hales had anticipated this counter-argument, adding that if Stephen was considered a usurper,

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[82] The manuscript copy of Hales's *Declaration* in Bodl. MS Ashm. 829, contains a significantly abbreviated version of Hales's interpretation of Henry II's succession compared to the first printed version of that document. For the quotation above, see Harbin, *Hereditary Right*, appendix VII, p. xxxiii.

[83] *Allegations against*, p. 16.

[84] On the 1153 settlement, see Garnett, *Conquered England*, pp. 262-99. See also J.C. Holt, '1153: The Treaty of Winchester' in Holt, *Colonial England, 1066-1215* (London: Hambledon, 1997): 271-290.

[85] Garnett, *Conquered England*, p. 267.

[86] Bodl. Ashm. 829, f. 64v. Unlike other partisans of the Stewart succession, including Leslie, Plowden did not use Stephen's succession as proof that the law against alien inheritance did not apply to the succession of the crown, recognizing the objection that Stephen was a usurper. However, as discussed above, Plowden was content to use Stephen's accession as an example of the purgation of former allegiances belonging to the king's body natural in chapter IX of his *Treatise*.

[87] The English crown passing over Matilda to her son, Henry, furnished a clear precedent for the exclusion of Mary Queen of Scots in favour of her son, James, in Robert Glover's succession tract. See Kewes, 'Elective Succession', p. 122.

then Matilda was *de iure* Queen of England and, consequently, Henry II's capacity to succeed to the crown was the direct result of his being the Queen's child. As evidenced by the statute *De Natis Ultra Mare*, the common law had always held the direct descendants of the monarch to be exempt from the general law against the inheritance of aliens.[88] Either, then, Henry II's was an elective title and could thus be entirely discounted as a precedent for the alien inheritance of the crown or it was the result of a recognised exception to the common law rule against alien inheritance and could not, accordingly, be of much use to the partisans of the Stewart succession, Mary not being a child of the king of England. With respect to Henry II's accession, we might therefore consider Plowden incapable of refuting the Hales.

Plowden similarly fails to add fresh insight to the contemporary disputes over King John's accession in 1199. Richard I died leaving 'no legitimate heir and hence the succession lay within the legitimate progeny [...] of his father Henry II'.[89] The claimants to Richard's throne were Arthur, duke of Brittany, and John Lackland. 'The eldest surving male line was represented by Arthur', who was the only legitimate son of Richard I's deceased brother, Geoffrey.[90] Under the rule of representation, Arthur's claim was thus superior to that of his uncle, John, the fourth son of Henry II and Richard I's youngest brother. Nonetheless, it was John who succeeded to Normandy and England in 1199. The anonymous author of *Allegations against* alleged that Arthur, despite being 'next of bloode' was 'excluded' on the basis that he had been 'borne oute of the realme'.[91] 'This allegacion', responded the author of *Answer to Allegations against*, 'is true concerninge the facte, but not concerninge the cawse', arguing instead that John came to the crown 'by might & vsurpation' and by virtue of Hubert Walter, archbishop of Canterbury's 'deciptfull perswasions'.[92] In the archbishop's 'perswasions', the author of *Answer to Allegations*

[88] Harbin, *Hereditary Right*, appendix VII, p. xxxiii.
[89] J.C. Holt, 'The *Casus Regis*: The Law and Politics of Succession in the Plantagenet Dominions, 1185-1247', in *Colonial England*: 307-326, at p. 307.
[90] Holt, '*Casus Regis*', p. 307.
[91] *Allegations against*, p. 18.
[92] Bodl. MS Ashm. 829, f. 65r.

against puts in, 'the place of Arthurs birth was not mencioned but onlie that Arthur was a childe & Iohn a man'.[93] As was the case with respect to the contested precedent of Henry II's accession, Plowden follows the author of *Answer to Allegations against* closely, arguing

> John toke the kingdome upon him unjustly by the helpe and meane of Huberte bisshopp of Canterbury and woulde neuer ceasse untill he had founde the meanes to distroy Arthure having in dede righte and tytle to the kingdome, whiche he neded not so diligently to have practised if Arthure had ben an alien and disabled to the kyngdome by Lawe (18r).

The only disability faced by Arthur, Plowden declares, was his nonage (18r). Whilst, as Holt and Levine have argued, John's age and experience certainly made him a more obvious candidate to succeed than the infant Arthur, it proved impossible for Plowden or the author of *Answer to Allegations against* to demonstrate conclusively that Arthur's foreign birth was not also a contributing factor in John's eventual succession.[94] Potentially compelling evidence to this effect was later put forward Leslie, who demonstrated that, in 1190, Richard had recognised Arthur as his heir. As Leslie argues, this recognition could not have been made 'yf [Arthur] had bene taken to be vnhable to receaue the crowne by reason of foren birthe'.[95] Unfortunately, it would appear that neither Plowden nor the author of *Answer to Allegations against* were unaware of this, and we might, accordingly, say that their rather muted interventions left the significance of John's accession very much in the eye of the beholder: Stewart partisans might legitimately deny that Arthur's foreign birth was significant, whilst those who sought Mary's exclusion could continue to argue the opposite without proof to the contrary.[96] At best, then, Plowden's *Treatise* merely added to the pre-existing morass of countervailing interpretations of historical precedents. Set

[93] Bodl. MS Ashm. 829, f. 65r.
[94] Holt, '*Casus Regis*', p. 313. *EESQ*, p. 102.
[95] Leslie, *Defence*, ff. 63v, 78r. Richard's recognition of Arthur is discussed by John Gillingham, *Richard I* (New Haven, CT: Yale University Press, 1978), pp. 136–37.
[96] Regarding Richard's recognition of Arthur as his heir in 1190, Leslie cites Roger Howden's chronicle history of England from the time of Bede to 1201. See *Defence*, f. 63v. As I shall demonstrate in the following chapter, Plowden does not seem to have read Howden.

against the remarkable ingenuity of his preceding argument, Plowden's treatment of these precedents is a rather unconvincing way to conclude the first part of his *Treatise*.

In concluding this section of his *Treatise*, Plowden evidently also thought it important to demonstrate that alien status similarly did not interrupt the hereditary descent of the crown in France, offering one final historical example. Reiterating that Edward III claimed the French crown after the death of his cousin, Blanche (10v), Plowden argues that although 'the lawe of foreyne birthe holdeth place' in France, 'yeven as it dothe here', the French never objected to Edward's title to their throne because of his foreign birth (18r). Plowden declares that although the French 'soughte by all meanes to resiste' Edward's claim, they understood that challenging his title on the grounds of his foreign birth was 'voyde of all sense and reason' (18r). This is undoubtedly a bold claim and Plowden does not offer any evidence to support this conclusion. Nonetheless, Plowden confidently concludes from this single example, that it is a 'generall lawe for kynges throughte the worlde' that 'proximitie of bloude' supersedes the 'lawe or maxime of disabilitie of foreyne birth' (18r, 18v). In other words, it was not only English common law which saw fit to exempt bodies politic, including that of the king, from the disability of foreign birth but that the exceptional status of bodies politic was a principle of *ius gentium*. Plowden's previous reference to the *ius gentium* in chapter IX had stopped short of this striking conclusion, writing only that it was universally recognised that former allegiances belonging to the body natural were discharged by the descent of the king's body politic. In chapter XI, however, Plowden suggests the possibility of alien successions throughout all civilised nations. This remarkably bold assertion regarding the *ius gentium* has been previously overlooked in studies of Plowden's *Treatise* but doubtless bears further consideration.

Ultimately, Plowden resolves that 'no more then [Edward's title] to Fraunce was taken away by forreine birthe out of the ligeance of France, no more shall this Frenche mans tytle or a Scottishe mans tytle to the kingdome of Inglande be taken away by forreyne birthe out of the ligeance of England' (18r). '[T]he cause of the firste making of that lawe or maxime' against alien

inheritance, Plowden reiterates, 'hath not the reason for the Crowne as it hathe for others' and thus foreign birth is not 'accompted any disabilitie in our realme, or in any other Realme' (18v). On this basis, Plowden concludes that his hypothetical alien pretender, B, 'oughte to have the kyngdom of England' (18v). As though remembering the polemical purpose of his *Treatise*, Plowden adds that Mary Queen of Scots is 'in no worse case' and ought to 'receive the Crowne of Inglande if in bloude she shoulde be next in discent' (18v).

That Mary proves to be 'in no worse case' after chapters VI to XI of Plowden's *Treatise* is a telling description of these chapters (18v). As the foregoing analysis has borne out, these chapters categorically do not offer a systematic case for the Stewart succession; insofar that Mary's case is advanced in this section of the *Treatise*, it is only by implicit extension of Plowden's ambitious, comprehensive argument for the capacity of any individual, proximate in blood, to succeed to the English crown, irrespective of their disability to receive the same. This comprehensive argument emerges, as I have argued, from Plowden's predominant concern in these chapters to refute the audacious and legally ignorant tracts, Hales's *Declaration* and the anonymous *Allegations against*, and to prove that there was 'never greater error' than their failure to comprehend the two bodies of the king (17v).

By no means do I wish to suggest that Plowden's argument in these chapters, although ambitious in its legal and constitutional scope, was always convincing or even clear. As evidenced above, the digressive nature of Plowden's argument, led by his desire to refute even incidental details in the former succession tracts, occasionally threatens to confuse the case at hand. Certainly, Plowden's response to the countervailing interpretation of medieval historical precedents fails to convince. Nonetheless, Plowden was alert to the potential failings of his argument, observing that some would find his analysis 'doubtfull' and that the case established in these chapters might be perceived as 'cleare againste' his French-born pretender, B. By contrast, Plowden anticipates that part two of his *Treatise*, which directly addresses the Queen of Scots' title, will seem far less doubtful by comparison (1v, 18v). Whether part II of Plowden's *Treatise*

does in fact deliver a coherent case for the Stewart succession is explored in the chapters that follow.

Chapter 4. Subjection by Homage: Plowden's Historico-Legal Argument

4.1. A Mutual Dilemma

In contrast to the ambitious and wide-ranging argument for a hypothetical alien accession to the English throne ventured in part I of Plowden's *Treatise of Succession,* part II purports to offer a direct and unambiguous clarification of Mary Queen of Scots' right to succeed Elizabeth (18v). Irrespective of the cogency or plausibility of Plowden's antecedent argument that the disability of alien birth did not apply to the succession of the crown, part II of his *Treatise* contends that the Scots were not, in fact, aliens but owed allegiance to the king of England.

It is 'wrytten and beleved clerely', Plowden declares, 'that Scotlande is holden of the kyng of England' and that 'homage hath ben don by the kinges of Scottes to the kinges of Englande' ever since the legendary first division of Britain (18v). A substantial portion of the second half of Plowden's *Treatise* is dedicated to justifying this widely-held English belief. In chapter I, Plowden presents a mixture of legendary and dubious historical evidence which had long been alleged to prove English feudal overlordship of Scotland. Building upon this evidence, Plowden argues that Scotland's '[s]ubjection by homage' brings the Queen of Scots and her subjects within the allegiance of the king of England and therefore makes the Scots capable of receiving inheritance (including the crown) within England (29r, 18v). How Plowden attempts to overcome the problematic fact that no Scottish monarch had performed homage to his English counterpart since James I of Scotland did homage to Henry VI of England shall be explored below.

Plowden admits that despite the expediency of this argument for the Stewart succession, he would win 'lytle thankes of the Scottes in making their realme subjecte to Inglande' (18v).[1]

[1] In Recension 2, Plowden argues that suppressing the proofs of Scottish subjection and insisting upon Scottish independence would be 'prejudiciall vnto' the Stewart succession. See volume 2, appendix 1, p. 76.

From a purely logistical perspective, Plowden's argument that being born in Scotland was legally equivalent to being born in England threatened to make a mockery of the letters of denization acquired by numerous Scots in an attempt to obtain some of the legal privileges of natural-born Englishmen.[2] Naturally, many contemporary Scots also had legitimate ideological concerns about admitting English overlordship.

William Maitland's letter to Cecil in January 1567 is indicative of this reticence. In putting forward 'soch prouffes and reasons as may declare and fortifie' his Queen's right to succeed Elizabeth, Maitland attested to numerous English proclamations, treatises and histories written in support of various Anglo-imperialist projects which 'labored moch to prove the homage and fealtie of Scotland to Englond'.[3] Maitland's letter went on to suggest the hypocrisy of Englishmen denying that same Scottish subjection when it might help advance the possibility of a Stewart succession.[4] However, Maitland was a strong believer in Scotland's autonomy and ancient sovereignty and so stopped short of asserting outright that Scotland was within the allegiance of England, adding that such an argument was fitter for Cecil's assertion than his own.[5] Leslie shared Maitland's caution when it came to mounting a defence of the Stewart succession based on English suzerainty over the Scots. In the second book of his *Defence*, Leslie attested to the existence of 'diuers histories, registers, recordes, and instrumentes of homage' which demonstrate Scotland to be 'within the allegiance of Englande'.[6] Notwithstanding his

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[2] Kim, *Aliens,* p. 169. Despite the legal benefits of denization, denizens were still prohibited from inheriting land. See Pollock and Maitland, *History of English Law*, I. 443. In their succession tracts, Glover and Fleetwood both used the letters of denization obtained by Scotsmen as evidence that Scotland was outside of the allegiance of England. Bodl. MS Carte 105, f. 48r (Glover); Bodl. Rawlinson MS C 85, f. 9r (Fleetwood).

[3] *Egerton Papers*, p. 43.

[4] *Egerton Papers*, p. 43.

[5] *Egerton Papers*, p. 43. Although Maitland was unlikely to have known this, Cecil had previously drawn on that historical and archival evidence in asserting England's title to Scotland in private memoranda. Lorna Hutson, 'Forensic History: and Scotland', in *L&L*: 687-708, at p. 703. After Mary had fled to England, Cecil again alleged these historical 'recordes, examples and presidentes' in asserting Elizabeth's right to 'decide any controversy for the crown of Scotland'. See Loughlin, 'Maitland of Lethington', p. 242.

[6] Leslie, *Defence*, f. 66v.

pragmatic acceptance of these records as 'trewe', Leslie acknowledges that English overlordship of Scotland 'is comonlie denied by all Scottes men' — perhaps explaining why this historical argument was underdeveloped in his *Defence*.[7] As a device to further the Stewart succession, ceding suzerainty to the king of England was therefore both politically expedient and ideologically unconscionable: placing Mary's Scottish supporters in an invidious position.

Meanwhile, the Englishmen who sought to forestall the Stewart succession faced a dilemma of their own. These Englishmen simultaneously attempted to uphold their historical right of overlordship of Scotland whilst insisting that Scots did not have the same legal liberties as natural-born Englishmen. Hales, for instance, argued in 1563 that 'although Scotland of right belonge to the crowne of England yet it is no sufficient cawse to prove that the people born in Scotlande be in the kinge of Englands legeaunce', dismissing this argument as a 'mere cavillacion ... more worthy to be laughed at then requiringe any answer at all'.[8] Similarly, in his succession tract, *Certaine errors*, Fleetwood acknowledged the historical record of homage performed by the kings of Scotland to their English suzerains whilst maintaining that neither Mary Stewart nor her Scottish subjects owed allegiance to Elizabeth as Queen of England.[9]

Glover's manuscript succession tract, *Answer to the bishop of Ross's book*, cogently expresses the mutual dilemma created by the supposed feudal relationship between England and Scotland. Glover admitted that it was near-impossible for Englishmen to maintain 'the righte of soueraigntye which our kinges pretende to have over that realme [Scotland]' whilst affirming the Queen of Scots to be a stranger.[10] To forestall Mary Stewart's succession, Glover concedes, was to 'overthrowe' the 'superioritye' of English kings over Scotland and to 'preiudyce their righte' to

[7] Leslie, *Defence*, f. 66v. The assertion that the records of Scottish homage were 'trewe' may well reflect the fact that Leslie's *Defence* masqueraded as the work of an Englishman.
[8] Bodl. MS Ashm. 829, ff. 37v-38r.
[9] Bodl. Rawlinson MS C 85, ff. 7v-9v. Fleetwood objected that Plowden had confused allegiance and homage and provided a disambiguation of those bonds in his 1580s tract. See Kim, *Aliens*, pp. 169-73; Brooks, *Law, Politics and Society*, pp. 75-76.
[10] Bodl. MS Carte 105, f. 47v.

homage and obedience from the kings of Scots.[11] However, Glover also puts the case 'that yf' Scottish advocates of the Stewart succession wanted to make Mary

> inheritable to the crowne of England they must confesse the superioritye of our kinges on them, therby to bringe Scotland within the allegance of England and theire Queene to be borne within the Allegance of this realme and yf they denye the superioritye [...] then they make their Queene a stranger borne and so vtterly overthrowe her Title.[12]

Although this dilemma first became apparent during the Elizabethan succession, it certainly did not disappear after James VI and I's accession to the English throne in 1603. During James's early proposals for union, English tract writers such as Sir Henry Spelman and Sir Henry Saville struggled to reconcile their belief in English overlordship of Scotland with their desire to exclude the Scots from English legal liberties.[13] By the time of *Calvin's Case* (1608), Englishmen largely shrank from invoking the history of England's feudal tenure of Scotland for fear that it might permit mutual naturalization and freedom of trade between the two kingdoms.[14]

The challenge faced by Plowden, then, as an Englishman advocating for the Stewart succession in 1567, was to convince his countrymen that their historical right of overlordship of Scotland made the Queen of Scots capable of succeeding to the English crown, whilst maintaining, as he had done in part I of the *Treatise*, that the Scottish succession would not restrict or erode the liberties of natural-born Englishmen. This chapter and its sequel will evaluate whether Plowden successfully negotiates this challenge.

In this chapter, I shall examine the historical sources of Plowden's argument in chapter I, part II of his *Treatise*. I explore how and why Plowden used medieval manuscript chronicles to build upon the narrative of Anglo-Scottish relations he otherwise derived from contemporary

[11] Bodl. MS Carte 105, f. 47v.
[12] Bodl. MS Carte 105, f. 47v.
[13] Hutson, *England's Insular Imagining*, pp. 174-87. James's union proposals and *Calvin's Case* are discussed in the coda to this thesis.
[14] Hutson, *England's Insular Imagining*, p. 175.

printed histories and polemical documents. I shall also assess how Plowden integrates this historical evidence with matters of law.

Chapter 5 of this thesis shall then examine Plowden's strikingly symbolic account of the ritual ceremony of homage in chapter II, part II. I shall uncover how Plowden's allegorization of homage affects his portrayal of the legal-constitutional relationship between England and Scotland as well as the bond between Elizabeth and Mary. I shall also demonstrate how Plowden brings the legal fiction of the king's two bodies to bear upon the history of England's feudal tenure of Scotland, suggesting that the two-bodies doctrine comes into its own in the conclusion part II. Finally, I shall consider how Plowden uses Polydore Vergil's account of Henry VII's providential thoughts on a future Scottish accession to the English throne to clinch the argument of his *Treatise*.

4.2. Printed and Manuscript Histories

In part I of his *Treatise*, Plowden's historical reading only ever extends so far as Polydore Vergil's *Anglica Historia*. That Plowden should have selected Vergil's *Historia* as his chief historical source is unsurprising: Vergil's humanist, Latin study of England had become 'indispensible' by the 1560s.[15] Whilst passing reference is occasionally made to chronicle histories in the first eleven chapters of the *Treatise*, Plowden suggests that chronicles only corroborate Vergil's *Historia* and therefore quotes from the more-readily citable text (15v, 18r). For instance, Plowden finds the *Historia* particularly useful in proving that numerous aliens had attained bishoprics in medieval England. In the case of each foreign-born bishop listed in chapter XI, Plowden provides direct references to Vergil, citing chapter and page numbers and adding that he 'wryteth of many more oute landishe men to have ben Abbottes and bishopps in this realme', thus characterizing Vegil

[15] Denys Hay, *Polydore Vergil: Renaissance Historian and Man of Letters* (Oxford: Clarendon, 1952), p. 160.

as a practicable reference guide to medieval history (17r-17v). Although Plowden helpfully provides full citations for his quotations from Vergil, it is impossible to determine the exact edition of the *Historia* to which he had access.[16] Whilst we can establish that Plowden was not using the first edition of 1534, the internal evidence of the *Treatise* offers no indication as to whether Plowden had a copy of the 1546 or 1555 edition of the *Historia*: Plowden's quotations appear on the same pages and are word-for-word identical in both later editions.[17]

Plowden continues to make frequent use of Vergil's *Historia* in part II of his *Treatise*. However, the order of priority established between Vergil's printed work and manuscript chronicles in part I is now inverted. To substantiate the historical record of English overlordship of Scotland found in Vergil's *Historia* (and in other printed histories and polemical documents), Plowden draws extensively on the chronicles of William of Newburgh, Matthew Paris, and Thomas Walsingham to substantiate significant moments in Anglo-Scottish relations. How and why Plowden augments his printed historical sources by consulting largely inaccessible chronicles is explored below.

First, however, it is worth drawing attention to the potential incongruity of Plowden including Vergil's *Historia* within his historico-legal argument. Vergil was notorious for rejecting the myth of British origins found in Geoffrey of Monmouth's *Historia Regum Britanniae* (c. 1137), which told of the founding of the island of Britain by the exiled Trojan Prince, Brutus.[18] For his part, Plowden embraces this Galfridian mythology, and the legendary division of the island kingdom of Britain amongst Brutus's three sons is fundamental to Plowden's legitimization of English suzerainty over Scotland. That Plowden should have so wholeheartedly embraced this

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[16] That Plowden gives chapter and page numbers suggests that he was referring to a printed edition of Vergil's *Historia*. However, manuscript abridgements of Vergil's history were in circulation. See Hay, *Polydore Vergil,* p. 84.

[17] For an account of the alterations between the 1534 and 1546 editions of Vergil's *Historia*, see Hay, *Polydore Vergil*, pp. 82-83. The 1555 edition of Vergil's history included a final book on Henry VIII's reign (up to 1537) but was otherwise consistent with the 1546 edition.

[18] Antonia Gransden, *Historical Writing in England II: c. 1307 to the Early Sixteenth Century* (London: Routledge, 1982), p. 436.

myth is surprising, especially in light of evidence put forward by Baker and Garnett, which suggests that sixteenth-century lawyers were 'prominent among the sceptics who questioned the Trojan Brut legend'.[19] It was natural, suggests Baker, 'for lawyers to adopt a critical approach to historical questions' in the knowledge that 'legends were not evidence'.[20] Whilst the opposite seems to be true of Plowden's *Treatise*, the analysis that follows contends that Plowden exploits the historical significance of the Galfridian originary myth in a manner fundamentally consistent with the ways in which his legal contemporaries read and used historical materials to meet the exigencies of the case in hand. Plowden use of (occasionally dubious) historical evidence in his *Treatise* affirms a tendency observed in other early modern common lawyers, who used 'history in the same way as they used legislation and reports of cases', not necessarily as sources of fact, but as a record of expedient propositions and ideas.[21]

Before examining the significance of the Brutus myth in Plowden's argument, it is also important to offer some introductory remarks on Plowden's chronicle sources. If only by a few years, Plowden's *Treatise* pre-dates what Daniel Woolf has characterised as an 'Indian Summer' or efflorescence of interest in medieval English chronicles in the mid-sixteenth century.[22] During this period, all three of Plowden's chronicle sources were printed for the first time. William of Newburgh's *Historia Rerum Anglicarum* was printed in 1568 and Matthew Parker, archbishop of Canterbury, published editions of Matthew Paris's *Chronica Maiora* in 1571 and of Thomas Walsingham's *Historia Anglicana* in 1574. It is almost certain, then, that Plowden relied on manuscript witnesses of these medieval chronicles when researching his *Treatise* in 1566/67. This makes identifying the exact sources of Plowden's historical argument challenging. The difficulty is compounded by the lack of extant personal papers belonging to Plowden or a record of his

[19] *OHLE*, pp. 22-23. Garnett, 'Prefaces to Sir Edward Coke's Reports', p. 260.
[20] *OHLE*, p. 23.
[21] Baker, *Magna Carta*, p. xi, 443. See also Garnett, 'Logic of Authority', pp. 78-79.
[22] Daniel Woolf, 'From Hystories to the Historical: Five Transitions in Thinking About the Past, 1500-1700', in *The Uses of History in Early Modern England*, ed. Paulina Kewes (San Marino, CA., 2006): 31-68.

library.[23] Moreover, during the period of Plowden's membership, the Middle Temple had no formal library, adding to the challenge of tracing his historical argument back to specific sources.[24]

Nonetheless, an instructive insight into the survival and availability of manuscript chronicles and historical materials in the mid-sixteenth century can be gleaned from the records produced by Parker and his circle.[25] Throughout this chapter, I take the records of extant historical materials produced by this knowledgeable and influential coterie as indicative of the manuscripts available to Plowden in 1567.[26] Although I take the records of the Parker circle as indicative of the survival of historical records in mid-sixteenth-century England, there is no evidence to suggest that Parker directly assisted with Plowden's historical research, nor that the two men ever met or even corresponded. Rather, I contend that Plowden's access to such relatively inaccessible historical materials further corroborates the novel contention of this thesis — that Plowden's research was commissioned by Elizabeth's Privy Council as part of an official investigation into the right of Mary Queen of Scots to succeed her royal cousin. Plowden's remarkable access to these historical sources was almost certainly the result of his influential patrons encouraging their antiquarian friends and colleagues to open their collections to the common lawyer engaged on state business.

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[23] *EP*, p. iii.
[24] Renae Satterley, 'The Libraries of the Inns of Court: An Examination of their Historical Influence', *Library History*, 24 (2008): 208-219.
[25] Parker was at the epicentre of a small group of connected individuals responsible for the preservation of English historical materials in the sixteenth century. See George Garnett, *The Norman Conquest in English History. Volume I, A Broken Chain?* (Oxford: Oxford University Press, 2021), pp. 286-332.
[26] Given that Parker had been awarded a 'one-man Royal Commission on Historical Manuscripts' by the Privy Council in 1568, empowering him to obtain the historical records dispersed by the Reformation, I think it especially unlikely that Plowden would have accessed historical sources of which Parker and his colleagues were unaware. On Parker's commission, see R. I. Page, *Matthew Parker and His Books* (Kalamazoo, MI: Medieval Institute Publications, 1993), pp. 43-44, at p. 44. See also Garnett, *Broken Chain*, pp. 286-89.

4.3. The First Division of Britain

Bruce Galloway has argued that 'the average Elizabethan saw the old assertions to suzerainty over Scotland as simple fact'.[27] Roger Mason concurs, adding that, in early modern England, the prospect of 'an independent Scotland was quite simply a political freak which flew in the face of all that was known about the glorious British past'.[28] At the core of these fundamentally held English beliefs was Brutus's mythological first division of Britain, popularised by Geoffrey of Monmouth's *Historia Regum Britanniae*. It is with Brutus's division of his eponymous island kingdom amongst his three sons that Plowden's historical argument begins. Scotland, Plowden states,

> was first gyven to Albinacte seconde sonne of Bruite the firste king that possessed this realme, to holde of Locryne his eldeste brother king of Englande, and ever sithence it hathe bene holden of Englande as by the Cronicles and recordes & other testimony it may appere. (18v)

Although Brutus's first division of the kingdom was introduced to the English historical popular consciousness by Geoffrey, Plowden's account of the originary gift of the Scottish kingdom to Albanact is not derived directly from the *Historia Regum Britanniae* but is a result of what has been called the 'feudalization of Geoffrey' or Geoffrey's 'Edwardian Emendation'.[29] Both phrases describe the same phenomenon: Edward I's tendentious appropriation of the Brutus myth as an 'ideological weapon [...] when charged by Pope Boniface VIII to explain his attempted

[27] Galloway, *Union of England and Scotland,* p. 11.
[28] Roger Mason, 'Chivalry and Citizenship: Aspects of National Identity in Renaissance Scotland', in Mason, *Kingship and the Commonweal: Political Thought in Renaissance and Reformation Scotland* (East Linton: Tuckwell Press, 1998): 78-103, at p. 83.
[29] The 'feudalization of Geoffrey' is Lorna Hutson's term, *England's Insular Imagining*, p. 15. The 'Edwardian Emendation' was coined by Scott Dempsey, 'The Evolution of Edward I's "Historical" Claim to Overlordship of Scotland, 1291-1301', in *Fourteenth Century England XI*, ed. David Green and Chris Given-Wilson (Suffolk: Boydell and Brewer, 2019): 1-30, at p. 20.

subjugation' of Scotland at the turn of the thirteenth century.[30] While various scholars of Edward's 'appeal to history' have noted the departures that Edward's Brut narrative took from its Galfridian original, the most important change was Edward's novel suggestion that Brutus reserved overlordship of Britain to Locrine.[31] Whereas in Geoffrey's account, the three kingdoms of Britain were divided (if not equally) between Brutus's three sons with no explicit mention of Locrine's overlordship, the 'Edwardian Emendation' instituted a formal hierarchy between Locrine and Albanact.[32] By establishing Locrine's suzerainty over his brothers, the 'Edwardian Emendation' imagined Anglo-Scots relations in feudal terms, in which the vassal kings of Scots were bound to perform homage to their English overlords in requital of the originary gift of their kingdom. It was entirely justifiable, Edward's emendation also implied, for English kings to demand recognition of their feudal superiority and to correct the wrongful withholding of homage and service through punitive military action.

When Henry VIII sought to justify his brutal invasion of Scotland in 1542, he needed to do little more than repeat Edward I's pseudo-historical model of English overlordship.[33] He did so through the printed tract *A Declaration, conteyning the iust causes and consyderations of this present warre with the Scottis, wherin also appereth the trewe and right title, that the kinges most royall maiesty hath to the soueraynytie of Scotland* (1542).[34] Henry's manifesto justifying his invasion of Scotland was

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[30] Roger Mason, 'Scotching the Brut: Politics, History and National Myth in Sixteenth-Century Britain', in *Scotland and England, 1285-1815*, ed. Roger Mason (Edinburgh: John Donald 1987): 60-84, at pp. 62-63.

[31] On Edward's appeal to history, see Laura Keeler, *Geoffrey of Monmouth and the Late Latin Chroniclers 1300-1500* (Berkeley, CA: University of California Press, 1946), pp. 52-54; E.L.G. Stones, 'The Appeal to History in Anglo-Scots Relations Between 1291 and 1401: Part One', *Archives*, 9 (1969): 11-21; Dempsey, 'Overlordship of Scotland', pp. 20-22.

[32] Mason notes that Locrine's seniority was always implied in Geoffrey's account, even if it was not formalised until Edward's emendation. See 'Scotching the Brut', p. 62.

[33] On Henry VIII's military activity in Scotland see Gervase Phillips, *The Anglo-Scots Wars 1513-1550* (Woodbridge: Boydell, 1999) and Marcus Merriman, *The Rough Wooings: Mary Queen of Scots 1542-1551* (East Linton: Tuckwell, 2000).

[34] Although Henry VIII's *Declaration* is written in the first person, authorship has been attributed to the antiquary John Leland. See James Carley, 'Arthur and the Antiquaries', in *The Arthur of Medieval Latin Literature: The Development and Dissemination of the Arthurian Legend in Medieval Latin*, ed. Siân Echard (Cardiff: University of Wales Press, 2011): 149-78, pp. 159-60. J.D. Mackie and

reprinted in full in Edward Hall's *The Union of the Two Noble and Illustre Famelies of Lancastre & Yorke* (1548). It is very likely that Plowden first discovered Henry's *Declaration* in one of the three editions of Hall's chronicle published between 1548 and 1560.[35] The significance of the *Declaration* in part II of Plowden's *Treatise* should not be understated: the printed tract provides the framework for Plowden's historical narrative of Anglo-Scottish relations, into which supplementary evidence from manuscript chronicles was inserted. To understand why this manifesto was so useful to Plowden, it is important to take a closer look at the *Declaration*.

Like Plowden's *Treatise*, Henry's *Declaration* was a work of two distinct parts. Its first half provides a tendentious account of how England had been 'enforced to the warre, which we haue always hitherto so moch abhorred and fled, by our neighbour and Nephieu the kyng of Scottis'.[36] The *Declaration* offers a myopic view of James V's supposedly un-nepotic 'doings and behauiour in proucation of this war' and insists that the present conflict 'hath not proceded of any demaund of our right of superioritie' or of any desire to demand homage from James V.[37] Strikingly, however, the *Declaration* adds that 'if' Henry 'had minded the possession of Scotland' then his right was undeniable. No king, the *Declaration* states, 'had more iuste title, more euident title, more certayn title, to any realme that he can clayme' than Henry had, as King of England, to Scotland.[38] The certainty of Henry's title to Scotland is justified at length in the second half of the *Declaration*, which provides a summary history of twenty-two acts of homage performed by

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Marcus Merriman also attest to the involvement of the Archbishop of York and Bishop of Durham. See Mackie, 'Henry VIII and Scotland', *Transactions of the Royal Historical Society*, 29 (1947): 93-114, pp. 111-12; Merriman, *Rough Wooings*, pp. 62-63.

[35] See Graham Pollard, 'The Bibliographical History of Hall's Chronicle', *Historical Research*, 10 (1932): 12-17.

[36] *A Declaration, conteyning the iust causes and consyderations of this present warre with the Scottis, wherin also appereth the trewe and right title, that the kinges most royall maiesty hath to the soueraynytie of Scotland* (London, 1542), sig. A2r.

[37] *Declaration ... of this present warre with the Scottis*, sigs. A2v-A4v.

[38] *Declaration ... of this present warre with the Scottis*, sig. B3v.

Scottish kings to their English overlords since Brutus's first division of Britain.[39] As Hutson argues, the hypothetical argument of Henry's *Declaration* is 'at once absolute and disparaging, justif[ying] the military assertion of title, while disavowing motivation, interest and desire' to subjugate Scotland and its people.[40] Moreover, by disingenuously characterizing the present conflict as the result of Scottish resistance to English suzerainty, the *Declaration* places James V's actions within 'a history of regular "transgression" by Scots kings and "chastisement" by their English superiors'.[41] Through this history of transgression, the *Declaration* retroactively justifies previous Anglo-imperialist military projects as reluctant but necessary correctives to the wrongful denial of English suzerainty by the perfidious Scots. The *Declaration* even goes so far as to portray the violent English chastisement of the Scots as an exercise of divine right — as the English being 'inforced and compelled to vse the sworde, which god hathe put in [their] hande as an extreme remedy' to counteract Scottish treachery.[42] The Anglo-imperialist case of Henry's *Declaration* was repeated *ad nauseam* in the propagandistic tracts produced during the Somerset Protectorate and the 'Rough Wooings'.[43] Yet, if Plowden had read either of the late-1540s tracts recently attributed to Sir Thomas Smith — *An Epistle or exhortacion, to .... the inhabitauntes of the Realme of Scotlande* (1548) or *An Epitome of the title that the Kynges Maiestie of Englande, hath to the souereigntie of Scotlande* (1548) — then he chose to omit them from his *Treatise*.[44] Evidently, Plowden was satisfied to rely on the Henrician model for these later works.

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[39] As well as drawing on the records produced during Edward I's appeal to history, the *Declaration* also relied upon John Hardyng's forged archival documents of English suzerainty. See Hutson, *England's Insular Imagining*, p. 38.
[40] Hutson, *England's Insular Imagining*, pp. 35-36.
[41] Hutson, *England's Insular Imagining*, p. 37.
[42] *Declaration ... of this present warre with the Scottis*, sig. B2v.
[43] On the 'Rough Wooings', see M.L. Bush, *The Government Policy of Protector Somerset* (London: Arnold, 1975). See also Merriman, *Rough Wooings*, chapters 10 and 11 especially.
[44] The case for Smith's authorship of these tracts is offered by Dale Hoak, 'Sir William Cecil, Sir Thomas Smith and the Monarchical Republic of Tudor England', in *The Monarchical Republic of Early Modern England* ed. John F. McDiarmid (Aldershot: Ashgate, 2007): 37-54.

The influence of Henry's *Declaration* is especially evident in the opening of Plowden's historical argument. Plowden's brief history of Anglo-Scots homage from Albanact and Locrine to James I of Scotland and Henry VI of England is effectively an abridgement of the second half of Henry's manifesto. The obvious debt is acknowledged by Plowden, who states that 'who soe ever is desyrous to see the certainty of the names of the said kynges of Scottes that did the homage [...] lett him reade the prynted boke late sett forthe by our late kyng & soveraigne Lorde king Henry the eighte' (19r). However, Plowden does make one notable adaptation to the *Declaration*'s record of England's feudal tenure of Scotland. Henry's *Declaration* described how, after the death of Edward III, 'seditions and insurrections' began in England, which afforded the Scots 'some leisure to play their vagues, and follow their accustomed manner'.[45] The Scots playing their vagues most likely refers to the 'Mammet' controversy, in which the Scots claimed that Richard II was not dead, but had fled to Scotland, where a pretender known as Mammet was maintained for two decades at court.[46] Feudal relations were only restored, Henry's *Declaration* claims, when the crown of Scotland 'descended to the house of the Stewardes': James I doing homage to Henry VI in 1423. For his part, Plowden ignores this fifty-year interruption of homage, skipping from Edward III's reign to that of Henry VI. Rather than explain the suspension of homage in the intervening period as per Henry VIII's *Declaration*, Plowden instead draws attention to Edward III's invasion of Scotland and slaughter of an 'infinite nombre of Scottes' because of King David II's 'denyall of homage' (19r).[47] The implication of Plowden's account is that homage was then duly paid to Edward III and throughout the intervening period until 1423. The notion that the continual performance of Scottish homage is contingent upon active and violent English pressure is evident in the remainder of Plowden's historical argument.

[45] *Declaration ... of this present warre with the Scottis*, sig. C4r.
[46] See Chris Given-Wilson, *Henry IV* (New Haven, CT: Yale University Press, 2016), pp. 204-5.
[47] Plowden cites Vergil's *Historia* for evidence of David's denial of homage to Edward III in 1332 (19r).

4.4. English Chronicles

Having used the second half of Henry VIII's *Declaration* to outline a history of Anglo-Scottish relations since the first division of Britain, Plowden then turns to English medieval chronicles to elucidate specific performances of homage. In this section, I explore what was at stake for Plowden in substantiating the record of England's feudal tenure of Scotland, suggesting that he was motivated by a desire to explain that homage was consistently performed for the entire kingdom of Scotland and not simply for lands held by the Scottish king in England. The significance of this distinction is explored below.

The first two instances of Anglo-Scottish homage elucidated by Plowden were both performed by William I, nicknamed "the Lion", King of Scots from 1165-1214. The first instance, dated to 1175, was paid by William to his '*principali dominum*', Henry II of England (19r). For this first example, Plowden quotes 'the wordes of *Newbrigensis* whiche he wryteth in the very laste ende of his second booke of his Cronicle of Ingland' (19r): William of Newburgh's *Historia Rerum Anglicarum*.

Plowden emphasises Newburgh's geographical and temporal proximity to William's performance of homage at the cathedral church of St Peter in York 1175, using this closeness as a way of authenticating the Augustinian canon's account. '[B]eing a northerne man himselffe and lyving in that tyme', Plowden argues that Newburgh 'could not be well ignorant' of William's homage (19r).[48] Although Plowden's later examples of Anglo-Scottish homage derived from the chronicle record do betray a preference for contemporary accounts where available, a more

[48] Newburgh's chronicle did in fact pay particular interest to events occurring in the north of England. See John Taylor, 'Newburgh, William of (b. 1135/6, d. in or after 1198), Augustinian canon and historian', *ODNB*. Roger Howden also provided a contemporary account of this homage and was very likely a witness to its performance. See E.L.G. Stones, *Anglo-Scottish Relations, 1174-1328: Some Selected Documents* (Oxford: Oxford University Press, 1970), p. 11 n. 2. However, as explained below, Plowden appears not to have had access to Howden's chronicle.

prosaic reason for his citation of Newburgh's chronicle may well have been its relative accessibility.

The list of historical sources and the individuals and institutions which held them, compiled by Parker's chaplain and Latin Secretary, John Joscelyn, attests to the existence of several copies manuscript copies of Newburgh's chronicle in circulation *c.* 1567.[49] Joscelyn's list echoes information supplied by the former Carmelite friar, John Bale in his catalogue of books collected and examined during the early years of Elizabeth I's reign.[50] Bale's personal library list confirms that he owned a copy of Newburgh's chronicle and his private notebook suggests that he knew of the whereabouts of four other witnesses.[51] Moreover, Richard Howlett's Rolls Series edition attest to the survival of at least nine manuscript witnesses of Newburgh's chronicle.[52] Therefore, although Newburgh's chronicle was not printed until 1568, it was unlikely to have been difficult for Plowden to access, especially by comparison to Paris and Walsingham's chronicles.

Having verified Newburgh's credentials as a 'wryter lyving in that age', Plowden quotes a lengthy passage from the *Historia Rerum Anglicarum* which depicts William I's homage to Henry II (19r). The public act of submission was required as part of the negotiated terms of William's release from English captivity, having revolted against Henry II and been captured at Alnwick Castle, Northumberland in 1174. To regain his freedom, the Treaty of Falaise stipulated that

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[49] Joscelyn's list is edited in Timothy Graham and Andrew G. Watson, *The Recovery of the Past in Early Elizabethan England: Documents by John Bale and John Joscelyn from the Circle of Matthew Parker* (Cambridge: Cambridge Bibliographical Society, 1998), pp. 81-2 (J2.60).
[50] John Bale, *Scriptorum illustrium maioris Brytanniae, quam nunc Angliam & Scotiam vocant: Catalogus; Posterior pars, quinque continens Centurias ultimas* (2 vols., Basle, 1557–59), I. 247. Joscelyn and Parker's reliance on Bale's research is discussed in Graham and Watson's introduction to *The Recovery of the Past*.
[51] *Index Britanniae Scriptorum: John Bale's Index of British and Other Writers*, ed. Reginald Lane Poole (Woodbridge, 1990), p. 144. For an analysis and transcription of Bale's library list, see Honor McCusker, 'Books and Manuscripts Formerly in the Possession of John Bale', *The Library: Transactions of the Bibliographical Society*, 4th series 16 (1935): 144-165, at p. 150.
[52] *Chronicles of the Reigns of Stephen, Henry II, and Richard I*, ed. Richard Howlett (4 vols., London: Longman, 1884-89), I. xxxix-l.

William should perform homage to Henry II, for Scotland and all his other lands, and that various Scottish earls and barons would perform homage and fealty to the English king.[53] It was also required that several royal castles in Lothian — including Berwick, Jedburgh, Roxburgh, Edinburgh, and Stirling — were placed under English protection.

The Treaty of Falaise represented a humiliating and unprecedented undermining of the authority of the Scottish king over his subjects.[54] Specifically, Henry's demand for homage from the Scottish earls and barons 'spelled out' that the Scottish political community 'owed a greater allegiance' to Henry as an overlord than they did to their own king.[55] Plowden recognises as much in his analysis. The homage performed by William's nobility was, Plowden argues, 'neded not, for they be not imediate homagers to Englande, but they are imediate homagers their kyng, and their kyng imediate homager to England' (19r).[56] Whilst recognising that it was not, therefore, legally imperative for the Scottish nobility to perform their allegiance to the English king, Plowden adds that there was 'pollicy' if not 'necessitye' or 'nedfullnes' in Henry II demanding it (19r). If William were to renege on the treaty by rebelling against England, then the fealty sworn by the Scottish nobles and prelates bound them to remain loyal to Henry and bring William to terms.[57] Having performed homage to Henry II 'for the whole kyndome of Scotlande' Plowden asserts that neither William I nor his nobility could 'denye but that Scotlande is holden of Englande' or attempt to claim that their homage was only for parcels of land in northern England (19r). In each of the examples of Anglo-Scottish homage discussed below, Plowden

[53] On the Treaty of Falaise, see A.A.M. Duncan, *The Kingship of the Scots 842-1292: Succession and Independence* (Edinburgh: Edinburgh University Press, 2002), pp. 99-101. The Scottish prelates who accompanied William to York were exempted from performing homage but not from swearing fealty to Henry II.
[54] Dauvit Broun, 'Britain and the Beginning of Scotland', *Journal of the British Academy*, 3 (2015): 107-137, at p. 116.
[55] Duncan, *Kingship of the Scots*, p. 101. See also Richard Oram, *Domination and Lordship: Scotland 1070-1230* (Edinburgh: Edinburgh University Press, 2011), p. 136.
[56] This distinction between immediate and mediate homage and allegiance is crucial later in Plowden's *Treatise*. See p. 175-83, below.
[57] Oram, *Domination and Lordship*, p. 136.

emphasises this critically important point. Proving that homage was done by the Kings of Scots for the entirety of their kingdom (reflecting that Scotland was held as a fief of the English king) should be considered the primary function of Plowden's appeal to chronicle history.

That Plowden should have selected William I's homage to Henry II in 1175 as the starting point for his historical record of England's feudal tenure of Scotland is striking given the importance that historians have attributed to William's submission. Richard Oram regards 1175 as a 'defining episode' in Anglo-Scottish relations which formalised a feudal relationship between the two kingdoms and established a 'benchmark against which English kings down to Henry VIII defined their relationship with the Scots'.[58] Although the Treaty of Falaise was formally rescinded by Richard I, Dauvit Broun argues that treaty helped establish a new pattern in Anglo-Scottish relations which would 'haunt Scottish claims to independence for centuries to come': post-1175, the kings of Scots would be continually subjected to intrusive claims of English feudal overlordship.[59]

Plowden turned to 'Mathewe Parys monke of Saint Albons in his Cronicle of England' to elaborate upon two further instances in which English suzerainty was recognised by the kings of Scots (19r–19v): William I's homage to John in 1200 and the settlement arranged between Alexander II and Henry III in 1244. From Plowden's quotations of Paris in both instances, we can deduce that the work Plowden refers to as Paris's 'Cronicle of England' was almost certainly the *Chronica Maiora*, which covered the period from the creation to 1259; neither of the major abbreviated editions of Paris's *Chronica Maiora* — the *Flores Historiarum* or the *Historia Anglorum* — contain the passages that Plowden quotes in his *Treatise*.[60] Having established this fact, and by considering the known sources of Matthew Parker's 1571 edition of Paris's chronicle — entitled

[58] Oram, *Domination and Lordship*, p. 136.
[59] Dauvit Broun, 'The Church and the Origins of Scottish Independence in the Twelfth Century', *Scottish Church History*, 31 (2002): 1-35, at p. 20.
[60] On the relationship between Paris's major works, see Richard Vaughan, *Matthew Paris* (Cambridge: Cambridge University Press, 1958).

Historia maior by Parker — it is possible to suggest two extant manuscript copies of the *Chronica Maiora* that Plowden might have consulted during his research.

In compiling his edition of Paris's chronicle, Parker accessed the autograph original of the *Chronica Maiora* in two volumes.[61] The first part of this autograph covers the period from the Creation to 1188.[62] The second part, covering the period 1189-1253, was loaned to Parker by Sir Henry Sidney, Lord Deputy of Ireland.[63] Parker reportedly corrected deficiencies in the Sidney MS using a further manuscript (now BL Cotton MS Nero D V) formerly belonging to Robert Glover and John Stow.[64] It is certainly possible that Plowden might have consulted either CCCC MS 16 or BL Cotton MS Nero D V in 1567, with the assistance of one or more of the influential noble patrons of his research.[65] Certainly, the Duke of Norfolk, as Earl Marshall of England with supervisory powers over the Royal College of Arms, would not have had any difficulty in locating the historical materials necessary for Plowden's argument. If Sir Henry Sidney was already known to possess the relevant part of the autograph original of Paris's *Chronica Maiora*, then it makes good sense for Norfolk (or another of Plowden's patrons) to have secured Sidney's manuscript, especially given that the Lord Deputy of Ireland was already acquainted with Plowden.[66] However, it would have posed no substantial difficulty for the duke, or any of

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[61] *Matthaei Parisiensis, monachi Sancti Albani, Historia Anglorum, sive, ut vulgo dicitur, Historia minor*, ed. F. Madden (3 vols., London: Longmans, Green, Reader, and Dyer, 1886-89), I. xxx-xi. Although Madden's edition is of Paris's *Historia Anglorum*, not Paris's *Chronica Maiora*, his introduction is nonetheless helpful in elucidating the availability of manuscript copies of Paris's chronicles in the sixteenth century.

[62] CCCC MS 26. This manuscript was loaned to Parker by Edward Aglionby. It has been argued that Aglionby was a fellow of the Middle Temple. See McKisack, *Medieval History in the Tudor Age* (Oxford: Clarendon, 1971), p. 39. See also Garnett, *A Broken Chain*, p. 328. Whilst the connection to Plowden's Inn is tantalising, there is no evidence of Aglionby's membership.

[63] CCCC MS 16. Graham and Watson have speculated that this manuscript was formerly in the possession of John Bale — identifying it as the volume described as 'Matthaei Parisij igens Chronicorum opus' in Bale's 1553 library list. See Graham and Watson, *Recovery of the Past*, p. 89. It was likely that Sidney acquired the manuscript after Bale fled Ireland for the Low Countries in the mid-1550s.

[64] Paris, *Historia Anglorum*, ed. Madden, I. xxxi.

[65] Whilst Plowden may also have consulted CCCC MS 26, that manuscript covers too early a period to be directly quoted by Plowden in his *Treatise*.

[66] On the relationship between Plowden and Sidney, see *EP*, pp. 121-22.

Plowden's noble patrons, to have induced either Glover or Stow to loan their manuscript witness of the *Chronica Maiora* to Plowden.[67]

We must also, of course, accept the possibility (however slight) that Plowden privately obtained a copy of Paris's chronicle — perhaps from a colleague at the Inns of Court, or from one of the numerous noblemen to whom he gave counsel — which was otherwise unknown to his antiquarian contemporaries, record of which has since been lost. Nonetheless, Plowden's extraordinary access to such a rare historical document as Paris's chronicle makes the most sense, especially given the speed at which his *Treatise* was researched and written, as the result of the efforts of his patrons in the Privy Council.[68]

Having secured access to Paris's *Chronica Maiora*, how did Plowden use it? First, Plowden describes the homage performed by William I of Scotland to King John outside Lincoln in November 1200. This homage was limited in its nature, being performed in recognition of the lands held by William of John in Northumbria, Cumberland, and Westmoreland. Whilst the 'limited nature of [William's] homage [...] was well recognized' by contemporaries 'in the know' and has been recognised in modern historical accounts, King John carefully cultivated (or 'stage managed') a false impression that the homage he received of William was for the entirety of the kingdom of Scotland.[69] Paris's retrospective account of William's homage helped propagate John's public relations coup. Indeed, the passage from the *Chronica Maiora* quoted by Plowden explicitly states '*Rex Scotiae fecit homagium Regi Johnni de omni jure suo*' ('the King of Scots did homage to King John for all his right', 19v) — indicating that homage was done to John as

[67] It is not clear when this manuscript was passed from Glover to Stow, or, indeed, whether either individual definitively owned this manuscript during the period of Plowden's research in 1567.
[68] On the scarcity of copies of Paris's *Chronica Maiora*, see Paris, *Historia Anglorum*, ed. Madden, I. xxxi.
[69] See *Edward I and the Throne of Scotland, 1290–1296: An Edition of the Record Sources for the Great Cause*, ed. E. L. G. Stones and G. G. Simpson (2 vols., Oxford: Oxford University Press, 1978), I. 151; R.R. Davies, *The First English Empire* (Oxford: Oxford University Press, 2000), pp. 15-16; Duncan, *Kingship of the Scots*, p. 110; Oram, *Domination and Lordship*, p. 165; Hutson, *England's Insular Imagining*, p. 165.

suzerain over Scotland.[70] Interestingly, Paris's chronicle directly contradicted Roger Howden's contemporary report which clearly indicated the limited nature of William's homage.[71] It is possible that Plowden was unaware of the mendacity of Paris's account; English propagandists of the 1290s and 1540s alike had repeated Paris's distortion as truth, and it is plausible that Plowden was convinced that William had indeed done homage to John at Lincoln for the kingdom of Scotland in 1200.[72] Nonetheless, it is striking that in substantiating the record of William's homage found in Henry VIII's *Declaration*, Plowden consulted Paris's misleading retrospective account rather than Howden's more-faithful contemporary report: the former better fitting Plowden's argument that Scotland was held of England and that the kings of Scots owed homage and allegiance to the kings of England as their feudal overlords.[73] Plowden's choice (conscious or otherwise) is especially striking when we recall his professed preference for contemporary historical accounts earlier in the *Treatise*.

Per Paris's *Chronica Maiora*, Plowden recounts that a crisis in Anglo–Scottish relations arose in the spring of 1244 after Alexander II married Marie de Coucy, the daughter of a powerful French nobleman and a kinswoman of Louis IX. The Scottish king's marriage exaggerated underlying English fears of an alliance between Scotland and France.[74] Alexander was also reputed to have denied that Henry had any right to exercise any overlordship of Scotland and to have underhandedly harboured enemies of the English king.[75] As Paris puts it, in

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[70] See *Matthaei Parisiensis, Monachi Sancti Albani, Chronica Majora*, ed. Henry Richards Luard (7 vols., London: Longman, 1872-83), II. 472.
[71] *Chronica Magistri Rogeri De Houedene,* ed. William Stubbs (4 vols., London: Longman, 1868-71), IV. 141.
[72] On the propagandistic use of Paris's chronicle, see Davies, *First English Empire*, p. 16. See also Hutson, *England's Insular Imagining*, p. 165.
[73] Henry VIII's *Declaration* said only that 'Wylliam did homage to our progenitour kynge IOHN, vpon a hyll besides Lincoln' and does not mention why this homage was performed. See *Declaration ... of this present warre with the Scottis*, sig. C3r.
[74] On the significance of the de Coucy marriage see A.A.M. Duncan, *Scotland: The Making of the Kingdom* (Edinburgh: Oliver & Boyd, 1975), pp. 534-35.
[75] Michael Brown, *The Wars of Scotland, 1214-1371* (Edinburgh: Edinburgh University Press, 2004), p. 41.

a passage quoted by Plowden, Alexander's actions were those of a man who wished to renege on his feudal obligations to the English king: '*quasi conniventer voluit subtrahere sibi homagium quod ei tenebatur*' (19v).[76] In preparation for an English advance on the Scottish border, both Alexander and Henry mustered substantial forces. In the event, however, there was no bloodshed, with the two kings agreeing terms at Ponteland, near Newcastle in early August. As part of this peace settlement, Alexander promised that he and his heirs would be faithful to Henry and that he would not enter any alliance with England's enemies or otherwise stir up trouble for his liege lord.[77] Alexander's promises were testified in a charter issued by the king, the entirety of which can be found in Paris's chronicle.[78] Quoting the initial part of the 'Charter of the king of Scottes' in his *Treatise*, Plowden explains the significance of the 1244 settlement, and of Alexander's promise to bear faith to Henry and his heirs, for the legal-constitutional relationship between England and Scotland.

Interestingly, Plowden interprets the 'Charter of the king of Scottes' as an implicit testimony of Alexander II having performed homage to Henry III in August 1244. Glossing the charter, Plowden asserts that Alexander bound himself to the terms of the peace settlement 'by oathe upon his homage' (19v). Paris's chronicle describes how senior Scottish noblemen (including Alexander's 'chief officer', Alan Durward) and clergymen swore to ensure their king's observation of the peace agreement.[79] However, there is no explicit mention of Alexander doing homage to Henry in either Paris's reproduction of Alexander's charter or in his general account

[76] Alexander had given homage to Henry III in December 1217. This was explicitly done for the lands in the north of England. See Duncan, *Making of the Kingdom*, p. 524.
[77] Paris records that Alexander promised that he would not enter any alliance with England's enemies or wage war on England 'unless [Henry or his heirs] should unjustly oppress us'. As David Carpenter has argued, this striking qualification rendered Alexander's pledge almost worthless. See *The Struggle for Mastery: Britain 1066-1284* (London: Penguin, 2004), p. 336. See also Richard Oram, *Alexander II, King of Scots 1214-1249* (Edinburgh: John Donald, 2012), p. 172.
[78] Paris, *Chronica Majora,* ed. Luard, IV. 381-82.
[79] The oaths of the Scottish nobility and clergy are discussed by Oram, *Alexander II*, p. 173.

of the dispute between the English and Scottish kings.[80] In fact, David Carpenter and Richard Oram both assert that Alexander II did not perform this ceremony of submission to Henry III in 1244.[81] Oram distinguishes Alexander from his father on this basis: William I having done homage to Henry II in 1175 and to John in 1200 (as we have seen above).[82]

Whilst it seems unlikely, then, that Alexander's promise to bear faith to Henry III and his heirs was tendered as part of a performance of homage, as Plowden believed, Plowden proceeds to argue that Alexander undoubtedly owed homage 'to the kyng [of England] and his heires for their tennure of Scotlande' (19v). To Plowden's mind, Alexander was obliged to keep good faith with Henry and to observe all due affection to him and his heirs because Scotland was held of the king of England and was subject to his jurisdiction and overlordship (19v). In an admittedly indirect fashion, Plowden deduces as much from Alexander addressing Henry as his 'liege Lorde'.

Plowden asserts that if Alexander simply owed homage to Henry 'but for a parte [of Scotland], or for any lande in England' then 'he shoulde not have called him generally his liege Lorde' (19v). He explains that 'this worde (liege) is more than a homager is bounde to use to his lorde' because the bond between a liege lord and his man is greater than that which exists between any other lord and his tenant. This interpretation of liege lordship is (at least partially) warranted by early medieval authorities on homage. As John Hudson explains, the term 'liege' was applied in situations of multiple lordship to denote the superior lord from whom a man's

[80] We should not read too much into the fact that homage was not mentioned in the charter itself, where one would not expect the ceremony to be mentioned. However, the lack of any mention of the ceremony in Paris's general description of the peace settlement is telling.
[81] Carpenter, *Struggle for Mastery*, p. 336; Oram, *Alexander II*, pp. 173–74. In their respective contributions to the authoritative Edinburgh History of Scotland series, both A.A.M. Duncan and Michael Brown analyse the 1244 peace settlement. Notably, neither makes any mention of Alexander II having performed homage to Henry III. Duncan, *Making of the* Kingdom, pp. 535–6; Brown, *Wars of Scotland,* pp. 41-2.
[82] Oram, *Alexander II*, p. 174.

'oldest or most important tenement derived'.[83] Although a man might perform homage to multiple different lords for different fees, Hudson writes, he could have only one liege lord and it was to his liege that he owed his greatest obligation.[84] For his part, Plowden specifically states that a liege lord was owed allegiance of his man: 'a liege lorde' he observes matter of factly, 'oughte to have allegiance of him of whom he is liege lorde' (19r). The authority upon which Plowden makes this striking claim is unclear. Going one step further, Plowden argues that since 'allegiance is the bonde and duety of him that is a subject to his prynce', then a man who acknowledges another as his liege lord (implying that he owed his liege his allegiance) 'admittethe himelffe to be his [lord's] subject' (19r). If this gloss on Plowden's explanation of liege lordship is confusing, this is due in no small part to the inherently diffuse and unresolved nature of the common lawyer's account: the circuitous explanation comes to a rather abrupt end and is never properly concluded. Nonetheless, we might grasp Plowden's leading point, such as it relates to the 1244 settlement between the kings of Scotland and England. Plowden implies that when Alexander II addressed Henry III as his liege lord, he revealed himself to be a subject of the English king and acknowledged his allegiance to Henry and his heirs. To Plowden's mind, the fact that Alexander should have thus acknowledged his solemn 'bonde and duety' of allegiance to Henry and his heirs was positive proof that the entirety of his kingdom was a fief of the English king. At least in Plowden's rather tendentious reading, then, Paris's chronicle record of the 1244 peace settlement between Alexander and Henry confirmed England's suzerainty over Scotland and the subjection of the Scots to the English king.

[83] John Hudson, *The Oxford History of the Laws of England: 871-1216* (Oxford: Oxford University Press, 2012), p. 432.
[84] In elucidating the superiority of a man's obligation to his liege lord over the other lords to whom he has done homage, Hudson quotes from both the *Leges Henrici Primi* (*c.* 1108 x 1118) and from *Glanvill*. See Hudson, *Laws of England: 871-1216*, p. 432.

4.5 Thomas Walsingham and Anglo-Scottish Relations under Edward I

Whilst Plowden makes sagacious use of Newburgh and Paris's chronicles, as he 'take[s] in hande to prove' that 'Scotlande is holden of the kyng of England', he uses Thomas Walsingham's *Historia Anglicana* to an even greater degree.[85] Walsingham's chronicle is extensively quoted by Plowden as he recounts a particularly fraught period in Anglo-Scottish relations, beginning with the death of Alexander III of Scotland in 1286.

Plowden writes that Walsingham's chronicle began 'the firste daye of the raigne of king Edwarde the firste where Mathewe Parys ended' and continued 'untill the sixth yere of the raigne of kyng Henry the fyffthe' (19v): i.e., 1272-1419. This intriguing comment is illuminating for the present investigation into the historical sources of Plowden's *Treatise*. Plowden's assertion that Walsingham began 'where Matthewe Parys ended' is consonant with contemporary opinion regarding the two chroniclers. In the prefaces to his late-sixteenth-century editions of Paris and Walsingham, for instance, Matthew Parker described Walsingham 'zealously' continuing Paris's chronicle and picking up where the 'true and faithful history of Matthew of Paris left off'.[86] Walsingham had quite deliberately represented himself as the heir to Matthew Paris at St Albans, characterizing his chronicle history as the continuation of Paris's work, even going so far as to imitate Paris's style and tone.[87] It was 'to bridge the gap left by his predecessor' that Walsingham added a retrospective section to his chronicle, covering the period 1272-1376.[88] It was this section of Walsingham's chronicle, covering the reigns of Edward I – Edward III, with which Plowden was concerned in his *Treatise*. As this retrospective section only appears in three extant

[85] I favour the title *Historia Anglicana* for Walsingham's chronicle (otherwise known as *Chronica maiora and, by Parker, Historia Brevis*) to avoid confusing Walsingham's chronicle with Paris's *Chronica maiora*.
[86] Matthew Paris, *Historia maior*, ed. Matthew Parker (London, 1571), sig. †iiiir; Matthew Paris, *Historia brevis Thomae Walsingham, ab Edwardo primo, ad Henricum quintum* (London 1574), sig. ¶iir..
[87] *The St. Albans Chronicle 1406-1420, edited from Bodley MS. 462*, ed. V.H. Galbraith (Oxford: Clarendon 1937), p. xlvii. See also Vaughan, *Matthew Paris*, p. 152.
[88] *St. Albans Chronicle*, ed. Galbraith, p. xlvii.

manuscript witnesses, it is possible to narrow down which (if, indeed, any) of the extant witnesses of Walsingham's *Historia Anglicana* Plowden may have consulted.[89]

The first of these possible witnesses is BL Royal MS 13 E IX: the 'major contemporary surviving manuscript' of the *Historia Anglicana*, containing text from 1272-1392.[90] Although not Walsingham's autograph, this manuscript was 'undoubtedly supervised and corrected by him'.[91] The second witness potentially available to Plowden was CCCC MS 195. This is a hybrid manuscript, following Walsingham's *Historia Anglicana* — transcribed from BL Royal MS 13 E IX — so far as 1392, and Walsingham's so-called 'Short Chronicle' thereafter to 1422.[92] CCCC MS 195 was used by Matthew Parker for his edition of Walsingham's chronicle in 1574 and bears the signs of having been marked up 'like copy for a printer'.[93] In preparing this edition, Parker corrected defects in CCCC MS 195 from Royal College of Arms MS Arundel 7.[94]

In summary, then, there are three extant manuscript witnesses of the retrospective section of Walsingham's *Historia Anglicana* (1272-1376): BL Royal MS 13 E IX; CCCC MS 195; Royal College of Arms MS Arundel 7. It would seem plausible that Plowden might have consulted any of these manuscripts in his account of Anglo-Scottish relations in the fourteenth century, were it not for his peculiar assertion that Walsingham's chronicle terminates in 1419. This assertion precludes any straightforward identification of any of the three witnesses described above as the source for his *Treatise*. The Royal manuscript ends in 1392, and both the

[89] Regarding the availability of manuscript copies of the latter part of Walsingham's chronicle (1372–) see Joscelyn's list in Graham and Watson, *Recovery of the Past*, p. 106 (J2.114). See also Bale, *Scriptorum illustrium maioris*, I. 573; Bale, *Index Britanniae Scriptorum*, p. 459.
[90] See the introduction to *The St Albans Chronicle: The Chronica Maiora of Thomas Walsingham*, ed. John Taylor, Wendy Childs and Leslie Watkiss (2 vols., Oxford, 2003-2011), I. xxviii. From 1392-1420, the complete text is found only in Bodl. MS 462.
[91] *St Albans Chronicle*, ed. Taylor, Childs, and Watkiss, I. xxviii.
[92] Walsingham's 'Short Chronicle' was an abridged version of his *Historia Anglicana*. Galbraith has argued that the latter part of CCCC MS 195 (from 1392–) was copied from CCCC MS 7 (3), the earliest manuscript witness of Walsingham's 'Short Chronicle'. See *St. Albans Chronicle*, ed. Galbraith, p. xi.
[93] *St. Albans Chronicle*, ed. Galbraith, p. xi.
[94] *St. Albans Chronicle*, ed. Galbraith, p. xi.

Corpus and Royal College of Arms manuscripts continue until 1422. There are two possible solutions to this problem.

The first possibility is that Plowden had access to a manuscript witness of Walsingham's chronicle which did exclusively cover the period 1272 – 1419, which escaped the attention of Plowden's antiquarian contemporaries and is not extant today.[95] A second possibility is that Plowden merely overlooked the evidence of whichever manuscript witness sat before him and perhaps confused the end-date of the *Historia Anglicana* with another of Walsingham's historical works, the *Ypodigma Neustriae*, an epitome of English (and select Norman) history from 911-1419.

If we accept the second possibility, then we can reasonably suggest that Plowden consulted any one of the three extant witnesses of the retrospective section (1272-1376) of Walsingham's history. As it appears that the Royal MS was not widely known to antiquaries in the mid-sixteenth century, it is more likely that Plowden consulted either of the two fifteenth-century copies of the St Albans original — CCCC MS 195 or Royal College of Arms Arundel MS 7 — which were latterly used by Parker for his 1574 edition of Walsingham's chronicle. Interestingly, historians have linked the College of Arms manuscript with the commissioner of Plowden's *Treatise*, the Duke of Norfolk.

In H.T. Riley's Rolls Series edition of Walsingham's *Historia Anglicana*, the Royal College of Arms manuscript is described as having been 'once in the possession of Lord William Howard of Naworth': one of the leading aristocratic antiquaries of the late-sixteenth and early-seventeenth centuries and, significantly, the third son of the fourth duke of Norfolk.[96] When

[95] Interestingly, CCCC MS 7 (3) — the source for the latter portion (1392- 1422) of CCCC MS 195 and the Arundel manuscript — includes a clear change of hand in July of 1419 and it is plausible that someone producing a scribal copy of CCCC MS 7 (3) might have interpreted this change of hands to indicate an end of Walsingham's chronicle proper. Importantly, however, neither CCCC MS 195 nor the Arundel manuscript contain any indication of the chronicle ending in 1419.

[96] *Thomae Walsingham, quondam monachi S. Albani, Historia Anglicana*, ed. H.T. Riley (2 vols., London, 1863-4), I. xi. On Lord William's activities as a collector see Richard Ovenden, 'The

exactly the Royal College of Arms manuscript came into Lord William's possession has been the subject of some confusion. McKisack suggested that it was not the Royal College of Arms manuscript but CCCC MS 195 that belonged to Lord William and that he loaned this manuscript to Parker at some point before the publication of the archbishop's edition of Walsingham's *Historia Anglicana* in 1574.[97] McKisack's claim falls down on two counts. Firstly, it makes far better sense for Lord William to have owned the Royal College of Arms manuscript than the Corpus manuscript; Lord William was the uncle of Thomas Howard, fourteenth earl of Arundel, from whom MSS 1-54 in the Arundel collection at the Royal College of Arms were derived.[98] Secondly, as Lord William was only eleven years old when Parker's edition of Walsingham was published in 1574, it is difficult to believe that he was in any position to be loaning manuscripts to the archbishop.[99] Therefore, it makes better sense to interpret Riley's declaration that the Royal College of Arms manuscript was 'once in the possession of Lord William' as referring to William acquiring the manuscript after Parker had already made use of it for his edition. Indeed, Ovenden demonstrates that Lord William's library was significantly augmented when Matthew Parker's son, John, distributed some of his father's collection of manuscripts in the late-sixteenth century.[100] As tantalising as it is, then, to imagine that Plowden was loaned a manuscript witness of Walsingham's chronicle from the Norfolk's family collection, this course of events seems implausible. Nonetheless, it is still likely that the duke's assistance would have been instrumental in helping Plowden to obtain whichever witness (whether extant today or otherwise) of Walsingham's *Historia Anglicana* he consulted in 1567.

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manuscript library of Lord William Howard of Naworth', in *Books and Bookmen in Early Modern Britain, ed.* James Willoughby and Jeremy Catto (Toronto: Pontifical Institute of Mediaeval Studies, 2018): 278–318.

[97] McKisack, *Medieval History*, pp. 41-42.

[98] W.H. Black, *Catalogue of the Arundel Manuscripts in the Library of the College of Arms* (London, Privately Printed, 1829), p. v.

[99] On McKisack's probable error, see Ovenden, 'William Howard', p. 297.

[100] Ovenden, 'William Howard', pp. 297-8.

Plowden's account of Anglo-Scottish relations during the reign of Edward I begins in September 1290 with the death of Margaret, the infant daughter of Eric II of Norway and Margaret of Scotland. Margaret was the sole heir to her grandfather, Alexander III of Scotland, and was set to succeed him after his death in 1286. However, Margaret died in Orkney on her way to be crowned. With no clear successor to the Scottish throne after her death, Scotland was thrust into a constitutional crisis.[101] As Plowden writes, per Walsingham, Edward I seized upon this crisis, proclaiming himself 'Chiffe Lord of Scotland' and requiring that the Scots 'stande to his judgemente in decyding the right of the kyngdome' (19v). When the Scots claimed to be 'ignorant that the kyng of Inglande had suche superioritie', Plowden reports that Edward 'caused a serche to be made in all the monasteries of England Scotlande and Wales to knowe his righte in that behalffe' (19v-20r): articulating a claim to overlordship of Scotland by attesting to historical documents and archival evidence. Edward and his clerks' trawl through Britain's monastic archives has attracted a great deal of analysis.[102] It will suffice here to outline the extent of the returns submitted to the king during the Great Cause (the name given to the late-thirteenth-century competition for the Scottish crown). The monastic returns covered the period 901-1252 and drew on the chronicles of Marianus Scotus, Roger Howden, William of Malmesbury, Henry of Huntingdon, Ralph de Diceto, and Matthew Paris.[103] For his part, Plowden summarises the monastic returns near exactly as given in Walsingham's chronicle, listing various significant homages and submissions performed by the kings of Scots to their supposed English suzerains from the days of Edward the Elder to the reign of Henry III.[104]

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[101] Brown, *Wars of Scotland*, pp. 157-78. See also Ranald Nicholson, *Scotland: The Later Middle Ages* (Edinburgh: Oliver & Boyd, 1974), pp. 27-44.
[102] See Stones, 'Appeal to History'. See also *Edward I and the Throne of Scotland*, ed. Stones and Simpson, I. 137-62; R. James Goldstein, *The Matter of Scotland: Historical Narrative in Medieval Scotland* (Lincoln, NB: University of Nebraska Press, 1993), pp. 57-78; Chris Given-Wilson, *Chronicles: The Writing of History in Medieval England* (London: Hambledon, 2004), pp. 65-70; Dempsey, 'Overlordship of Scotland'.
[103] *Edward I and the Throne of Scotland*, ed. Stones and Simpson, I. 148-49.
[104] *Historia Anglicana*, ed. Riley, I. 34-35.

Edward presented this 'formidable body of historical evidence supporting his claim to the overlordship of Scotland' before an adjudicatory body of English and Scottish representatives gathered at Norham in May 1291.[105] Subsequently, as Plowden explains, the contenders to the Scottish crown recognised Edward's 'superioritie and Seigniorie over the kyngdome of Scotlande' and submitted to abide by his judgment (20r). It was also agreed that 'sasine of the land and custody of the royal castles should be delivered to Edward so that he could restore them to the person adjudged to be the rightful king as soon as that person did homage to him as lord superior'.[106]

Walsingham's chronicle recorded that Edward's seigniory over Scotland and his seisin of the kingdom was acknowledged in two letters written by the competitors to the Scottish throne.[107] Plowden recounts that Edward 'sent bothe the said letteres [...] to dyvers monasteries of Englande to be entred into their Cronicles *ad perpetuam rei memoriam*' ('for permanent record of the matter', 20v) and reproduces them both in full in his *Treatise*. Edward's use of chronicle histories to help establish substantive evidence for his right to overlordship of Scotland, and his desire to see the acknowledgement of his right to Scotland recorded in chronicles, indicates that the king recognised the creditworthiness of chronicles as 'the most reliable source of historical evidence' which might be 'consulted about matters of the highest significance in the political life of the English nation'.[108] Interestingly, then, Plowden's reconstruction of Anglo-Scottish relations in the late-thirteenth century, via Walsingham's chronicle, lends authority to his own use of English chronicles to derive historical precedents for his claim to English suzerainty over Scotland three centuries later.

[105] Given-Wilson, *Writing of History*, p. 65.
[106] Nicholson, *Later Middle Ages*, p. 37. Edward also ordered the arrest of any Scots who refused to take an oath of fealty, recognising his temporary control of the Scottish kingdom; *idem*, p. 38.
[107] *Historia Anglicana*, ed. Riley, I. 35-37.
[108] Given-Wilson, *Writing of History*, pp. 67, 73.

We have seen above how Plowden uses Newburgh's and Paris's chronicles not only as evidence that homage had been performed by the kings of Scots since the first division of Britain but also to explain the reason why that homage was owed. It was critically important, as I have demonstrated, to Plowden to prove that homage was performed for the entirety of Scotland, held as a fief of the English king, and to negate any counterargument that the kings of Scots simply owed homage for land(s) held in England. Plowden's account of John Balliol's homage to Edward I, derived from Walsingham's *Historia Anglicana*, drives this argument home.

On 17 November 1292 Edward I gave judgment on the Scottish succession dispute, awarding the kingdom to John Balliol. Balliol was crowned king of Scots a fortnight later (on St Andrew's Day) at Scone, before travelling south to Newcastle to spend Christmas with the king of England. On Boxing Day, Balliol did homage to Edward, saying (as Plowden recorded, per Walsingham), 'I John Balliol, king of Scotland, recognize myself as your man for the whole kingdom of Scotland' ('*ego Johanes de Baliolo rex Scotiae me hominem vestrum cognosco de toto regno Scotiae*', 20v). The words '*de toto regno Scotiae*', Plowden argues, 'doth so full prove that Scotlande is holden of Inglande' that it would be useless for any Scot to argue that Balliol did his homage for 'lesse or other than the whole kyngdom of Scotlande' (21r).[109] When Balliol rebelled against Edward later in the 1290s, he did exactly that, claiming that his former homage was performed 'by reason of the lands which are held of you in your realm'.[110]

Before discussing Balliol's rebellion, Plowden digresses from his historical narrative, comparing the cases of Margaret, the aforementioned Maid of Norway, and Mary Queen of Scots. Plowden states that when Alexander III of Scotland married his daughter to Eric II of Norway, he accepted that the issue of their marriage might succeed to the Scottish throne

[109] Plowden repeats the words of John Balliol's homage to Edward I later in this chapter of his *Treatise*, see f. 26r.
[110] The letter in which Balliol renounced his homage has been reprinted and translated into English by Stones. See *Anglo-Scottish Relations, 1174-1328: Some Selected Documents*, no. 23, pp. 140-45. The quotation given above is at p. 145.

regardless of their birth outside of the kingdom (21r).[111] That Margaret was not disabled by her foreign birth 'to receive by discente the kyngdome of Scotlande' prompts Plowden to ask

> why is not the quene of Scottes borne in a foreyne realme as well inheritable to her great grandfathers realme of Englande [...] as this Margaret to her grandfathers realme of Scotlande? (21r)

Plowden proceeds to argue that it would be 'folyshe and unreasonable' if the foreign-born offspring of dynastic marriages were prohibited from inheritance in their grandfathers' kingdoms (21r). If such a ridiculous law were found to exist, Plowden argues, then the royal houses of early modern Europe should suddenly 'have greate cause of grieffe' (21r): one of the most effective and frequently used diplomatic tools in their arsenal would be blunted.[112] Plowden's argument here is particularly compelling, as Leslie recognised when similarly asserting the 'absurditie' of such an unnatural and unreasonable disinherison of the offspring of dynastic marriages in his *Defence*.[113] Tellingly, both Glover and Fleetwood struggled to combat this argument effectively in their refutations of Leslie.[114]

Despite the efficacy of this argument for the Stewart succession, it is nonetheless incongruously situated within part II of Plowden's *Treatise*. Plowden's comparison between the Maid of Norway and the Queen of Scots, and his assertion that contemporary European dynastic marriages made a nonsense of the supposed incapacity of aliens to inherit their grandfathers' crowns, would be more effective if sequestered in part I, where Plowden argues that it was unreasonable to apply the maxim against alien inheritance to the succession of the crown. By comparing Margaret's case (as an alien who would have succeeded to the Scottish

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[111] Margaret's right to succeed her grandfather was not as uncontested as Plowden implies. See Nicholson, *Later Middle Ages*, pp. 27–31.
[112] On the significance of dynastic marriage in early modern Europe, see Paula Sutter Fichtner, 'Dynastic Marriage in Sixteenth-Century Habsburg Diplomacy and Statecraft: An Interdisciplinary Approach', *The American Historical Review*, 81 (1976), 243-265.
[113] Leslie, *Defence*, f. 71v.
[114] Bodl. MS Carte 105, f. 57v (Glover); Bodl. Rawlinson MS C 85, ff. 16r-16v (Fleetwood).

throne were it not for her untimely death) to Mary Stewart's case (as a Scottish-born pretender to the English throne), Plowden undermines the chief argument of part II of his *Treatise* — that birth within Scotland was birth within the allegiance of the English king and that Scots were not prohibited from claiming inheritance within England. To make the comparison, then, is to acknowledge Mary as an alien in England, just as Margaret was in late-thirteenth-century Scotland. For this reason, Plowden backtracks. Whilst a law disinheriting the foreign-born offspring of dynastic marriages would be 'folyshe and unreasonable', Plowden goes on to state that the 'matter in hand' (i.e. Mary Stewart's case) is 'more cleare then the case of the said Margaret by meanes the quene of Scottes & her father were borne within the aligeance of Englande' (21r). Plowden's digression is indicative of the excursive rhetorical construction of his *Treatise*. The effect of reading his tract is to be confronted with multiple hypothetical arguments and to never be entirely sure of how seriously Plowden puts them forward.

Apologising that he 'intended to have ben shorte' in this digression, Plowden returns to Walsingham's *Historia Anglicana* to continue his historical narrative of Anglo-Scottish relations under Edward I, briefly summarising John Balliol's revolt (1295-96) as follows.

> John Baylioll and his prelattes earles and Barons contrary to their oathes had conspyred and rebelled against the kyng of Inglande, and had invaded Englande with fyre and sworde and distroyed inummerable townes and people, kylled women in chyldbede and the englishe children in their Cradells, fyred scoles, and burned a great nombre of Scolars in the same, distroyed the monasteries of Inglande, and fyred the kynges shippes, and did other most horrible actes. The kyng of Inglande forced therto gathered his army and so defended his people and realme and revenged his injuries as the Scottes had no cause to enjoye. (21v)

Plowden's account of the 'horrible actes' perpetrated by Balliol and his raiding parties in the north of England is an agglomeration of Walsingham's descriptions of the Scottish siege of Carlisle and subsequent Scottish incursions in Northumberland.[115] Significantly, Plowden omits

[115] *Historia Anglicana*, ed. Riley, I. 55, 57-58. On the siege of Carlisle, see G.W.S. Barrow, *Robert Bruce and the Community of the Realm of Scotland* (4th edn., Edinburgh: Edinburgh University Press, 2005), p. 92.

to mention that the Scottish incursions he describes were reprisals for the English army having stormed Berwick and massacred thousands of its citizens.[116] Where Walsingham's chronicle describes the bloodshed of this period as tit-for-tat, Plowden's tendentious account portrays Edward I as restrained until provoked into a retributive defence of 'his people and realme' (21v). The influence of Henry VIII's *Declaration*, which insistently characterises Anglo-imperial violence as a divinely justified corrective to Scottish treachery, is particularly evident here. It is also important to acknowledge that Plowden's description of the burning alive of English schoolboys and the murder of women in childbed was not derived from Walsingham. The Scottish atrocities Plowden describes were likely concocted by English propagandists in the thirteenth century, who sought to persuade Philip IV of France of his error in contemplating an alliance with the Scots.[117] That Plowden expunged all reference to the murder of schoolboys and babes-in-arms in Recension 2 of his *Treatise* perhaps indicates that he considered his former assertion of Scottish bloodthirstiness to be counterproductive to his case. After all, the Scots could only appear so monstrous in a *Treatise* advocating for the succession of their Queen to the English throne. This revision provides a salutary reminder of the difficulty of Plowden's endeavour: at once, he was required to empower Mary Stewart to succeed to the English throne, whilst maintaining that a Scottish Queen would not restrict the personal freedoms and liberties of her English subjects. Moreover, the historical evidence which bears out the jurisdictionally subordinate status of the Scots and might help Plowden make a Stewart succession conceivable to the English political nation also provides frequent and potentially frightening reminders of the Scottish desire to reject English overlordship. I shall return to the difficulty of this balancing act below.

To conclude his historical narrative of Anglo-Scottish relations under Edward I, Plowden moves seamlessly from John Balliol's enforced abdication in 1296 to Pope Boniface VIII's condemnation of the English interference in Scotland in 1299. Contrary to Edward's claim of

[116] Barrow, *Robert Bruce*, pp. 92-93.
[117] Barrow, *Robert Bruce*, p. 93, n. 8.

overlordship of Scotland, the pope's letter (known as *Scimus*, *fili*) asserted that 'Englande had no superioryty over Scotlande', arguing instead that Scotland was a papal fief (21v).[118] Convinced that his right to Scotland was indefeasible and that *Scimus, fili* was an egregious overreach, Edward was determined to respond. He did so, not by sending proctors and envoys to a Papal Curia at Anagni as Boniface suggested in his letter, but through two letters in reply.

The first, signed by the king himself, traced Edward's claim to suzerainty over Scotland back to the first division of Britain. The 'Edwardian Emendation' has already been discussed in this chapter and need not be recapitulated here, save only to say that in Edward's pseudo-historical account, Albanact's homage to Locrine inaugurated and justified the claims to overlordship of Scotland made by English kings thereafter. Edward's reply, Plowden argues, also demonstrated how previous popes had not only 'allowed the subjection of Scotlande to Englande' but had 'commanded' that English feudal superiority 'shoulde be firmely kepte' and homage 'performed' (21v). As Ullmann has argued, Edward thus utterly dismantled Boniface's tenuous claim to papal overlordship of Scotland by using 'the very same weapon of "historical" precedent which [the papacy] always knew how to wield so masterly'.[119] Although Plowden recommends that his reader 'take paine to reade' Edward's reply to the pope — claiming that the reply contains 'fullnes of mater and certainty of tymes, places and other circumstances and varietie delectable to the reader' — he states that the letter is too long to recite 'worde by worde' in his *Treatise* (21v).[120] Interestingly, Plowden does recite the second letter to Boniface, signed by sixty-four of Edward's barons, in full.

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[118] Plowden does not reproduce the pope's letter in his *Treatise*, but it can be found in Stones, *Anglo-Scottish Relations, 1174-1328: Some Selected Documents*, no. 28, pp. 162-175.

[119] Walter Ullmann, 'On the the Influence of Geoffrey of Monmouth in English History', rept. in Ullman, *The Church and the Law in the Earlier Middle Ages* (London: Variorum, 1975): 257-276, at p. 267.

[120] Representing the interests of the Scots at the Papal Curia, the Scottish cleric, Master Baldred Bisset, responded to Edward's historical claim to suzerainty over Scotland by attesting to a more ancient origin myth for the Scots. This counter-mythology was later developed by John of Fordun in his *Chronica gentis Scotorum* (c. 1363-87). Bisset's counter-mythology drew on pre-existing originary myths recorded by Richard Vairement (or 'Veremundus') over a century

The so-called 'Barons' Letter' has been largely overlooked in historical accounts of Edward I's reign — perhaps owing to speculation that it never reached Rome — but upon reading the letter it is not hard to see why its contents might have appealed to Plowden.[121] Edward's barons informed the pope that even if the king wanted to submit to papal adjudication in the matter of Scotland, they would not permit him to do so, considering it their responsibility to preserve the abstract 'royal dignity' of the crown of England ('*regiae dignitatis*', 22r). Although Plowden does not explicitly draw out these themes from the Barons' Letter, the distinction drawn between the private desires of the king and his public responsibility to preserve the welfare of the crown and dignity of the state would surely have caught his eye as an expert proponent of the king's two bodies. Indeed, the argument of the Barons' Letter is entirely consistent with Brooks' estimation of the crucial constitutional idea underpinning the *Treatise*'s account of the king's two bodies, 'that the corporate character of the English throne effectively placed restraints on whoever occupied it'.[122] As Dempsey's analysis attests, the Barons' Letter exploits the idea of the king being constrained for political effect: by characterizing the king as an entirely passive agent, the Barons' letter attempts to absolve Edward of any responsibility for rejecting Boniface's claims to papal suzerainty over Scotland.[123] It was perhaps natural, then, for Plowden to want to recite the Barons' Letter in full, for it demonstrates one way in which the legal conceit of the king's two bodies might prove significant in matters of the highest political importance. The vital significance of the corporate character of the English throne restraining the monarch within the context of Plowden's homage argument is explored in the following chapter.

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before. See Dauvit Broun, *Scottish Independence and the Idea of Britain: From the Picts to Alexander III* (Edinburgh: Edinburgh University Press, 2007), pp. 215-70. See also Nicola Royan, 'Hector Boece and the Question of Veremund', *Innes Review*, 52 (2001): 42-62.

[121] Recent work by Dempsey is the exception. See 'Overlordship of Scotland', pp. 15-18.

[122] Brooks, *Law, Politics and Society*, p. 74.

[123] Dempsey, 'Overlordship of Scotland', p. 17.

However, rather than focus on the apposite rhetoric of the Barons' Letter for his doctrine of the king's two bodies, Plowden indicates how the letter reaffirms the familiar refrain of his historical narrative: 'that the kynges of Englande have full superioritie over Scotlande, and that the kynges of Scotlande be tenantes and homagers of Inglande for all the Realme of Scotlande' (22v). Having explicated Edward I's claim to overlordship of Scotland at the turn of the fourteenth century, Plowden skips ahead three decades to examine Edward Balliol's homage to Edward III in 1334. Quoting Walsingham, Plowden describes how Edward, the eldest son of John Balliol, the former king of Scots, did 'homage to the kyng of Englande for all the kyngdom of Scotlande, and the Isles lying to Scotland' (22v). The terms of Balliol's homage, Plowden adds, prevented the Scots from arguing that 'homage was don for any landes that the kyng of Scottes had in Englande' and from evading their feudal responsibilities (22v).

Plowden's omission of Edward II's reign from his account of early-fourteenth-century Anglo-Scottish relations, skipping from 1301 to 1334, is striking although perhaps not surprising. On June 24, 1314, Edward II's army was routed by Robert Bruce's forces at Bannockburn: an unspeakably humiliating defeat which expedited Bruce's campaign for Scottish independence.[124] Bruce's ambitions were later realised during Edward III's minority, when the treaty of Edinburgh–Northampton (1328) recognised Bruce as king of Scots, and the right of Scotland to be free from subjection to the king of England.[125] In return, the Scots would pay £20,000 for the peace. Ultimately, the treaty only brought a brief cessation of Anglo-Scottish hostilities, with Edward III exerting his grandfather's claim to overlordship of Scotland shortly after Bruce's death.[126] Nonetheless, it is hardly surprising that Plowden omitted Bannockburn and the so-called 'shameful peace' of 1328. Henry VIII's *Declaration*, which, I have argued above, provided

[124] See Barrow, *Robert Bruce*, pp. 266–303.
[125] See Ranald Nicholson, *Edward III and the Scots: The Formative Years of a Military Career 1327–1335* (Oxford: Oxford University Press, 1965), pp. 42–57.
[126] Edward III later advanced the dubious claim that the treaty was invalid on account of his minority. See Nicholson, *Edward III and the Scots*, p. 55.

the framework for Plowden's historical argument, similarly ignored the campaign for Scottish independence: the *Declaration* passes directly from John Balliol's homage to Edward I to Edward III's defeat of Robert Bruce's son, David, altogether ignoring Edward II.[127]

In the revised version of his *Treatise* (Recension 2), Edward Balliol's homage to Edward III concludes Plowden's historical disquisition. In Recension 1, however, Plowden follows Balliol's homage with a summative comment on the treachery of successive Scottish kings throughout the thirteenth and fourteenth centuries. Plowden identifies the withdrawal or renunciation of homage by Scottish kings as the 'Chiffe cause' of conflict between England and Scotland throughout this period and characterises the kings of Scotland as 'rebells' whom 'god hathe not prospered ... but hathe suffered them to be scourged for their mutabilitie and unconstancy in their duetys & service towerds Englande' (22v). In portraying the kings of England and their armies as instruments of divine chastisement, Plowden recalls the potent imagery of Henry VIII's *Declaration*, which imagined various kings of England to have been 'compellyed to vse the sworde, which god hath put in our hande as an extreme remedy' to counteract Scottish treachery.[128] At least in Recension 1 of his *Treatise*, then, Plowden's historical disquisition is bookended by two descriptions of the Scots being scourged for attempting to deny their subjection to England (19r, 22v).[129]

Having used Newburgh, Paris, and Walsingham's chronicles to expand upon the record of England's feudal tenure of Scotland found in Henry VIII's *Declaration*, asserting 'that Scotlande was holden of Inglande, and the kyng of Inglande is supreme Lorde therof', Plowden next addresses the instruments and records of Scottish homage found in the English Exchequer and Chancery (23r, 26v). Plowden is almost certainly alluding to John Hardyng's forged

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[127] *Declaration ... of this present warre with the Scottis*, sig. C4r, quoted in Hutson, *England's Insular Imagining*, p. 198.
[128] *Declaration ... of this present warre with the Scottis*, sig. B2v.
[129] As discussed above, Plowden previously described how Edward III invaded Scotland and slew an 'infinite nombre of Scottes' because of King David II's 'denyall of homage' (19r). See p. 144, below.

documents, presented to successive English governments during the mid-fifteenth century, which constructed a 'seamless history of the submission of Scottish kings' and stressed the English 'right to overlordship' over Scotland.[130] Although Plowden does not claim to have seen these records himself, he attested that the veracity and importance of the documents had previously been alleged by the aforementioned Chief Justice William Huse. In a Year Book case of 1486, Plowden suggests that Huse had referenced Hardyng's documents of Scottish homage in recapitulating Edward I's response to the papal bull, *Scimus*, *fili*, in 1301 (22v).[131] In doing so, Plowden strikingly argues, Huse lent 'greater Credit' to Walsingham's chronicle account of Edward's claim to historical overlordship of Scotland (22v). The implication here, that Huse's legal opinion held greater authority than Walsingham's historical narrative, is indicative of a transition in Plowden's argument from this point onward. Hereafter, Plowden sets aside chronicle histories, returning to legal matters.

Readers of his *Treatise* in the mid-1560s would have appreciated the necessity of this transition. As the opponents of the Stewart succession had pointed out, it was all well and good for Plowden to use medieval chronicles to demonstrate that the kings of Scotland had historically performed homage to the kings of England, but what of the problematic fact that homage had not been done since James I became Henry VI's man in 1423? How could Mary Stewart be considered of the allegiance of England and therefore capable of succeeding to the English throne if neither she nor any of her recent forbears had performed this ceremony? Evidently, then, Plowden needed to find some cunning legal response to these questions if he were to use the historical record of England's feudal tenure to advance the case for the Stewart succession.

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[130] Alfred Hiatt, *The Making of Medieval Forgeries: False Documents in Fifteenth-Century England* (London: British Library 2004), pp. 102-135, at p. 103.
[131] Hil. 1 Hen. VII, pl. 10, f. 10a.

4.6 Scotland's Sovereignty

Plowden begins the latter portion of chapter I of the second part of his *Treatise* by explaining the reasons for the recent delinquency of Scottish homage. Glossing Henry VIII's *Declaration*, Plowden suggests that the 'staye of doing homage' was initially the result of 'cyvill warres within' England which had distracted successive English kings from demanding feudal service from their Scottish counterparts (23r). More recently, the 'affinitie betwene [Englande] and Scotlande' and the 'proximitie of bloude' between the royal households, created by the marriage of Margaret Tudor to James IV of Scotland in 1503, had created a 'wante of demande' of homage (23r).[132] Regardless of the causes of neglect, Plowden contends that recent delinquency was irrelevant, for the failure to perform homage

> dothe not take away the tenure or superioritie due to this realme nor doth discharge nor take away the lygiance of them, no more then if there be Lord tenante & the Lord demandeth not his rent or his service, or if he demandeth it, & the tenant refuse to paye it, yet that dischargeth not the tenant, nor maketh not the lande out of the fee & seignorye of the Lorde (23r).[133]

Only a 'very badd Lawier', Plowden proceeds to argue, would possibly suggest that the failure of a tenant to pay his rent discharges him of the obligation to do so, or would plead that such a recalcitrant tenant was '*hors de son fee*' ('out of his lord's fee', 23r). In staking this claim, Plowden seems to set the stage for a much-needed explanation of how exactly Mary could still be adjudged to be of the allegiance of England despite never performing homage. What follows,

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[132] *Declaration ... of this present warre with the Scottis*, sig. B4r.

[133] In his *Defence*, Leslie similarly states that bond of allegiance between a tenant and his lord is not discharged by neglect of homage. See *Defence*, f. 67r. Unsurprisingly, Glover and Fleetwood roundly rejected Plowden and Leslie's claims, with Fleetwood invoking Bracton to prove that the Scots' denial of homage comprehensively put them beyond English allegiance. Bodl. MS Carte 105, f. 49r (Glover); Bodl. Rawlinson MS C 85, ff. 9r-9v (Fleetwood).

however, is a lengthy and somewhat convoluted refutation of a series of arguments put forward in Hales's *Declaration*.

In 1563 Hales had conceded that 'Scotland of right belonge[d] to the crowne of England' and that 'the kinges of Scotland haue sometyme done their homage therefore to the kinges of England'.[134] However, he also insisted that England's historic feudal tenure of Scotland was 'no sufficient cawse to prove that the people born in Scotlande be in the kinge of Englands legeaunce'.[135] To elucidate this point, Hales compared Scotland to Normandy. Like Scotland, Hales argues that 'Normandie belongeth of right to the crowne of England', however he adds that

> it followeth not therefore that Normandie be in the legeaunce of the crowne of England; no albeit Normandy belongeth to the crowne of England yet becawse the people thereof did declyne from their faith & legeaunce that they owe to the kinge of England and became subiectes and gave their faith & legeaunce to ye ffrench king ther lands were excheated[136]

On the basis of this comparison, Hales argues that the Scots had similarly 'forsaken their faith & legeaunce to England' by pretermitting the homage they owed to the English king. Consequently, Hales dismisses any assertion that Mary Stewart was 'born in the kinges legeaunce', and therefore capable of succeeding to the English crown, as 'a mere cavillacion … more worthy to be laughed at then requiringe any answer at all'.[137] Responding to Hales in his *Treatise*, Plowden rejects the entire basis of the comparison between Scotland and Normandy, arguing that England's loss of Normandy was 'nothing lyke' Scotland's neglect of homage (23r).

Plowden explains that 'the contrey and Soyle of Normandy, Gasconye and Callice' rightfully belonged to the 'kynges of Inglande' but had latterly been taken 'awaye by Conquest'

[134] Bodl. MS Ashm. 829, f. 38r.
[135] Bodl. MS Ashm. 829, f. 37v.
[136] Bodl. MS Ashm. 829, f. 38r.
[137] Bodl. MS Ashm. 829, f. 38r.

by the French king (23r). Plowden likens the French 'Conquest' of these English territories to a 'disseysen in our Lawe' (23r). '[U]ntill the contrey and soyle' of those former territories 'be recovered by the princes of England', Plowden acknowledges that 'the people borne there be the subjectes of the french kyng' and 'must nedes yelde obedience' and allegiance to the French king, rather than to the king of England (23r). Plowden argues that the case was entirely different in Scotland. Unlike their direct claim of possession to Normandy, Plowden asserts that the kings of England had no lawful claim to the 'soile & contrey of Scotlande', having given the land to the kings of Scots 'to holde of the Crowne of Inglande by homage and fealty' (23r). Whilst the king of England could thus lay claim to 'superioritie and seignorye' over Scotland, he had 'no ryghte' to the 'soyle or freholde' of that country (23r).[138] Plowden's argument that Scotland was not a physical possession of the English crown, but that the kings of Scots were under English superiority is critically significant to his confutation of Hales. Whilst the French king's conquest of the land formerly possessed by England discharged the Normans of their allegiance to the English king, Plowden asserts that the Scottish kings recently pretermitting to perform their homage did not so straightforwardly discharge them of their allegiance to England. In fact, Plowden concludes that the recent 'staying of homage' did not alter the fact that Scotland remained in England's fee, meaning that the Scots still owed allegiance to the English king (23r). One might object, of course, that for the kings of Scotland to owe homage to the king of England was not the same as their performing that ceremony and explicitly recognizing their subjection to England, making Plowden's assertion of Scotland's continued allegiance somewhat

[138] In Recension 1, Plowden admits that his striking contention that England does not lay any claim to possess Scotland might appear to be contradicted by recent attempts to 'invade Scotland and to take the Countrey from them' (23r). However, Plowden contends that these invasions of Scotland should properly be understood as lawful acts of retaliation for 'the keping of homage and service from us', rather than any exercise of right to direct possession of the 'soyle or freholde' of Scotland (23r). Plowden thus recycles one of the rhetorical tactics used by English propagandists during Henry VIII and Protector Somerset's respective invasions of Scotland.

doubtful. However, Plowden does not elaborate further on the matter, turning instead to address a second objection put forward by Hales.

In his *Declaration*, Hales had argued that the fact that Scotland sent ambassadors to England and that Scottish prisoners of war were ransomed as 'enemyes to England' and not executed as rebellious subjects was compelling evidence that the Scots were beyond England's allegiance.[139] Whilst Plowden concedes the premise of Hales's argument and even, I shall demonstrate below, provides legal evidence to support his view that the Scots were reputed enemies of England and that Scotland was a 'distincte realme from Inglande', he disputes Hales's conclusion. Contrary to Hales, Plowden argues that the Scots were not mere aliens, subject only to the authority of the Scottish king; instead, Plowden argues that the Scots held a dual allegiance, recognizing both the Scottish and English kings. To best elucidate Plowden's remarkable and seemingly unprecedented case for the dual allegiance of the Scots, it is essential to start by examining the evidence he puts forward to prove that Scotland was 'a distincte realme from Inglande' (23v).

The legal evidence proffered by Plowden in support of this view varies across the manuscript witnesses of his *Treatise*, with Recension 1 offering the fullest range of authorities. To prove that Scots 'be usually ransomed upon their taking lyke enymies' during 'tyme of warres', Plowden first draws attention to a writ of trespass *vi et armis* contained 'in the register' (23v).[140] As quoted by Plowden, this writ describes how an individual had broken into A's house and released a Scottish prisoner, H, whom he had been holding captive in exchange for a ransom of one hundred pounds: implicitly proving that the Scots were treated as aliens and not as natural-born Englishmen (23v). In a further action of trespass, alleged by Plowden as 'sett forth in the new boke of entrees', a 'defendant pleaded that the plaintiff was an alien borne in Scotlande

[139] Bodl. MS Ashm. 829, f. 38r.
[140] Unusually, Plowden does not give any marginal citation for this writ in the register, which appears in William Rastell's *Registrum Omnium Brevium* (London, 1531), f. 102v.

whiche was of the enymitye of the kyng', who had 'come into the kyngdome of England' without documents of 'sauffe Conducte' (23v).[141] The defendant thus argued that he had entered the plaintiff's house and taken his 'goodes to his owne use' and 'drove away' his livestock such as 'he lawfully mighte do' to one of the king's enemies (23v). For good measure, Plowden also describes a Year Book case pertaining to a prison break in Southwark in 1455. Significantly, the defendant, the prison's marshall, argued that 'foure thousand of Scottes *and other enymyes of the kynge*' were responsible for the prison break (23v, emphasis added).[142] In the witnesses of Recension 1 of Plowden's *Treatise*, then, we find Plowden trawling through the Year Books, registers of writs and books of entries to prove that English common law judged those born in Scotland to be enemies of the king of England. In the witnesses of Recension 2 of the *Treatise* this evidence is all but entirely excised. Witness C contains no reference to these precedents whatsoever, whilst witness D includes citations to these authorities in the margin but no discussion of the cases themselves in the main body of the text. Witnesses M and Y fall somewhere in between, stating that the enemy status of the Scots could be 'sufficiently proued both by the Register of the book of Entryes fol: 549. And by the case in 33. h. 6: fol. 10', but offering no further comment on these authorities.[143]

Strikingly, however, all the extant witnesses of Plowden's *Treatise* include Plowden's subsequent discussion of the case *Okore v. Stathum* (1384). In this action of novel disseisin, the plaintiff's delay in suing (of a year and a day) was found not to bar his claim because he had been in Scotland, which was judged to be 'an other lande, and an other Realme by it selffe' (24r).[144] In leading Plowden to the conclusion that 'Scotlande is a distincte realme of it selffe', this 1384 case

[141] William Rastell, *A Colleccion of Entrees* (London, 1566), f. 549v.
[142] Hil. 33 Hen. VI, pl. 3, ff. 1-1b.
[143] See volume 2, appendix 1, p. 94.
[144] Mich. 8, Ric. II, pl. 30. See *Year Books of Richard II: 8-10 Richard II (1385–1387)*, ed. L.C. Hector and Michael E. Hager (Cambridge, MA: Ames Foundation, 1987), pp. 141-42. *Okore v. Stathum* (1384), was referenced, per Dyer, in Plowden's report of *Stowell v. Lord Zouche* (1565). See *Commentaries*, p. 376.

communicates a subtly different idea than those discussed above, which underscored the status of the Scots as enemies of the English king. This difference perhaps goes some way towards explaining why, when revising his text, Plowden retained his analysis of the 1384 case, whilst removing much of the evidence of the previously discussed cases pertaining to the enemy status of the Scots. We might speculate that Plowden realised it was imprudent to excessively emphasise the enemy status of the Scots in a treatise advocating for their queen's succession to the English throne.

Having lent legal authority to Hales's argument that Scotland was a 'distincte realme from Inglande', Plowden refutes the conclusion subsequently drawn by Hales — that if the Scots owed 'lygeance & faithe' to the king of Scotland, then they could not also be of the king of England's allegiance (24r). Plowden's explanation of why such a conclusion was unreasonable is worth quoting in full:

> Scotlande was lawfully geven to Albinacte first kyng of Scottes to holde of Locryne his eldest brother king of Englande by homage and service therto due, and so dothe king Henry the eighte affirme in his said boke, and the Cronicles of Inglande also. But whether that be true or not is doubtful, yet certaine it seemeth that Scotlande was geven away by the kyng of Inglande, for the tenure and homage declare that. For no tenure can be made but upon the firste gyffte of the thing geven for whiche the tenure is. And because the kyng of Scottes holdeth the realme of Scotlande of the Crowne of Inglande there maie be therof justicly deduced this conclusion, *ergo* the realme of Scotlande firste cam from and was geven by the Crowne of Inglande to holde of the Crowne of Inglande: if it so be then is the whole and everie parte therof (not withstanding whatsover particuler estate sithence made) holden of the Crowne of Inglande, and therof foloweth it that althoughe the subjectes of Scotlande be in the lygeance of the king of Scottes imediatly, yet be all they mediatly, and the king himselffe imediatly within the ligeance of Englande because they be borne & be within the fee and seignorie of Englande. (24r)

The first point to be noted here is the surprising way in which Plowden 'cheerfully dispenses with' the fundamental premise of his antecedent historical argument by casting doubt upon the veracity of the mythological first division of Britain and of Albanact receiving Scotland as a fief

from his elder brother, Locrine.[145] Whilst the historical accuracy of that particular originary gift might be considered 'doubtful', Plowden nonetheless insists 'that Scotlande was geven away by the kyng of Inglande' at some other, undefined point in British history (24r). So much is proven, he argues, by the homage done by successive kings of Scotland to their English counterparts, indicating a tenurial relationship between the two kingdoms. As 'no tenure can be made but upon the firste gyffte of the thing geven for whiche the tenure is', Plowden argues that the doing of homage indicates that 'the realme of Scotland firste cam from and was geven by the Crowne of Inglande to holde of the Crowne of Inglande': albeit not necessarily by Brutus to Albanact (24r). We may observe that Plowden's circular argument for the certainty of English overlordship of Scotland thus turns upon an assumption that the homage done by successive kings of Scotland was for the 'whole and everie part' of their kingdom, rather than for land held of the king of England in the north of England. In this argument, the importance of Plowden's antecedent historical narrative — using Newburgh, Paris, and Walsingham's chronicles to argue that homage was always done 'for all the Realme of Scotlande' (22v) — is manifest.

Why Plowden found it necessary to dispense with the myth of Brutus giving Scotland to Albanact, to hold of Locrine, at this late stage in his *Treatise* is less obvious. On the one hand, we might credit Plowden with attempting to future-proof the historico-legal argument for English overlordship of Scotland given the growing scepticism towards the Brutus myth, likely shared by many of his fellow innsmen.[146] As Hutson has summarised, the consequence of Plowden's argument was that the 'English can dispense with subscribing, as an article of faith, to the myth of Brutus giving Scotland to Albanact [...] because "whether that be true or not," something like it may be "justlie deduced" from the English belief in overlordship'.[147] On the other hand, however, Plowden's disavowal of the Brutus myth might be considered to undermine the

[145] Hutson, 'On the Knees', p. 45.
[146] See pp. 137–38, above.
[147] Hutson, 'On the Knees', p. 45.

soundness of his argument for the Stewart succession. If England's overlordship of Scotland — and the case for Mary Queen of Scots having been born within the allegiance of England — relies on Scotland having been given as a fief held of the English king, then Plowden's readers might justifiably ask when such a gift was first made, if not during the days of Brutus? The failure to provide an answer to this question qualifies the coherence of Plowden's historical case — demonstrating, as Baker has argued, that 'it is one thing to demolish an inveterate tradition and quite another to replace it with something more acceptable'.[148]

Setting aside Plowden's disavowal of the Brutus myth, we might recall that the purpose of the circular argument quoted above was to dispute Hales's contention that because the subjects of Scotland owed faith and allegiance to the king of Scotland they must consequently be outside of the king of England's allegiance. To defeat Hales's objection, Plowden contends that the Scots have a dual allegiance, suggesting that 'althoughe the subjectes of Scotlande be in the lygeance of the king of Scottes imediatly, yet be all they mediatly, and the king himselffe imediatly within the ligeance of Englande because they be borne & be within the fee and seignorie of Englande' (24r). Such a distinction between the immediate allegiance of the king of Scots and the mediate allegiance of his subjects was hinted at, if not fully explored, in Plowden's analysis of the Treaty of Falaise.[149] In order that the distinction between immediate and mediate allegiance will be 'better perceaved', Plowden surprisingly turns to the tenurial changes which took place in England following the Norman Conquest (24r).

In the years following the Norman Conquest, a tenurial revolution all but completely transferred the landed wealth of Edwardian England's leading families to King William's Norman co-conquerors.[150] One important consequence of this redistribution of land was a novel dependency upon the king as the fount of all tenure. Garnett has argued that, in post-Conquest

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[148] Baker, 'Case Law in Medieval England', in *CP*, at p. 548.
[149] See pp. 146-47, above.
[150] Robin Fleming, *Kings and Lords in Conquest England* (Cambridge: Cambridge University Press, 1991), pp. 105-231.

England, all land came to be understood as an acquisition held precariously of the king, whether one was a newly established Norman tenant-in-chief or an English survivor of the Conquest who found oneself in reduced circumstances as a subtenant.[151] The dependent nature of all tenure is integral to Plowden's account of post-Conquest England. Plowden describes how William, in advancing his co-conquerors to earldoms and other positions of nobility, granted them 'great quantitie[s] of lande', in exchange for homage and other services (24r). A Norman tenant-in-chief might redistribute some portion of his 'greate territory' to his kinsmen or soldiers, 'to holde of him by certain rente & service' (24v). After this fashion, Plowden argues that the tenant-in-chief acts as a 'meane', so named after his intermediary status between his subtenants and the 'king from whom the lande first came' (24v). The 'meane' was then responsible for doing homage and other services to the king on behalf of all his subtenants. Many more 'meanes' were created, Plowden adds, as further parcels of land are apportioned by subtenants, but the king remained 'Lord paramount' (or '*Dominus*') over them all (24v). Plowden goes on to assert that the king who first gave the land could 'distraigne all the tenants', or take back the land without legal process, if the requisite homage and service was not performed by the tenant-in-chief (24v). Under such a tenurial system, Plowden concludes, that 'tenantes oughte to beare favour to their Lorde, and by the same reason to the Lorde of their Lorde: for they holde of their lord imediatly, and of the lorde of their lorde mediately' (24v). Plowden concludes that there thus existed 'two favors here, two faythes, and two ligeances' (24v). That is to say, in post-Conquest England where all land was understood to be held of the king, all landowners owed faith and allegiance to the *Dominus*. For this reason, in August 1086 'all the landholding men of any account throughout England, whosoever men they were' were required to perform homage and

[151] Garnett, *Conquered England*, pp. 45-135. See also Hudson, *Laws of England: 871-1216*, pp. 333-75.

offer fealty to William I at Salisbury: indicating a direct bond between the king and his subtenants.[152]

Plowden goes on to liken the status of contemporary Scottish subjects to subtenants in post-Conquest England. '[W]hen the kyng of this noble islande of Englande and Scotlande', Plowden attests, 'had lande ynoughe in England to place his owne people in', he 'gave Scotlande to some other noble man or Captaine to inhabite and place his people in, and to holde of the kyng of England by homage' and other services (24v). Whilst Plowden does not venture to say when this gift was made, the salient point is that the king of Scots became a tenant-in-chief of the English king.[153] Moreover, the subjects of Scotland — the 'dyvers Earles, Barons, knightes & others' who inhabit 'estates infinyte' in return for services done to their immediate lord, the king of Scots — are equated to subtenants of the English king (24v). These subtenants 'oughte to do their service to the king of Scottes', who, in turn, ought then to perform homage 'for them all' to the king of England who acts as the liege lord (24v-25r).[154] By force of the homage performed by the king of Scots, the subjects of Scotland are adjudged by Plowden to have a dual allegiance: to owe 'imediate faithe to the kyng of Scottes and a mediate faithe to the kyng of Englande' (25r).

Despite the ahistoricity of Plowden's account of the first division of 'this noble Islande' might be, his concept of the dual allegiance of the subjects of Scotland allows him to innovatively refute Hales's argument that the Scots cannot be enemies to the English king and be capable of receiving an inheritance in England. Plowden explains that if the Scottish king commands his subjects 'to invade England, and to use againste it sworde and fyer' then the immediate allegiance which they owe to their king compels them to obey (25r). They must,

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[152] Holt, '1086', in *Colonial England*: 31-58, at p. 31. See also Garnett, *Conquered* England, pp. 84.
[153] Plowden's reader might be excused for thinking that he believed that the English gift of Scotland was coterminous with the redistribution of land after the Norman Conquest. However, Plowden had previously given examples of homage done by kings of Scots 'before the tyme of William Conqueroure' (18v).
[154] This recalls Plowden's earlier discussion of Henry III's role as liege lord over Alexander II in 1244. See pp. 153-54, above.

therefore, be accounted as enemies in times of war for 'our lawe punisshethe none as traytors but subjectes or obedientes imediate whiche the Scottes be not, for they can not be subjectes or lieges imediate to two kynges' (25r). Nevertheless, Plowden finds that the superiority of their immediate allegiance to the Scottish king 'dothe not utterly take away their ligeance to Englande, but bothe stande together' (25r). In respect of their 'mediate faithe to the kyng of Englande', Plowden argues that birth in Scotland 'dothe not dissable persons to receive inheritance in Englande' (25r). Chapter I, part II of Plowden's *Treatise* accordingly concludes with an array of Year Book cases which prove that Scottish subjects can be adjudged within the allegiance of the king of England without any inconvenience.

The subject of dispute in the first of these Year Book cases, Lord Beaumont's case (1368), was whether a living coheir, born in Scotland, needed to be named in a writ of *scire facias* for judgment to be given.[155] The defendant in the said case claimed that 'all Scotland was holden of the king of England and within his ligeance' and that her Scottish coheir thus needed to be named in the writ (25r). As the judges in this case 'did not knowe whether all Scotlande or but parte therof were within the ligeance of the king of Englande', they instructed the counsel for 'the partie that woulde soneste spede the matter to sue a cerificat out of the Rolles to certifye them whether all Scotlande were within the ligeance of the king or without' (25v). Plowden contends that this decision was tantamount to judgment in favour of the defendant because the records to which the court appealed for certification were 'the Recordes of the escheker of the homage of the Scottishe kyng' (25v) — i.e., Hardyng's forged documents which proved that Scottish kings acknowledged English kings as their overlords. Plowden argues that it might therefore be 'justly collected' from Lord Beaumont's case that because 'all Scotlande were within the ligeance of the king of Inglande then [...] the people there borne are not to be disabled here in Englande by their birthe there, but that they may receive here inheritance by discent' (25v).

[155] Hil. 42, Edw. III, pl. 9, ff. 2b-3a.

That 'all Scotlande is holden of the Crowne of Inglande' and that 'the people so borne within ... be not accompted, nor disabled as aliens or adjudged as strangers' is further proved (at least to Plowden's mind) by two further Year Book cases. Both concern the abatement of an action if a party was not properly named in the writ. In the first case, Plowden describes how the court refused to abate the writ of dower brought by Alice Boseville against John, Earl of Richmond despite the defence's claim that judgment ought not be given on the grounds that Richmond was not given his proper title in the writ as Duke of Brittany.[156] As Plowden explains, it was immaterial that Richmond was not named as Duke of Britanny, for 'the lawe of this realme forceth not a man to call the duke of Briteigne duke because that dukedome was not of the ligeance of the kyng of this realme' (26r). By contrast, the writ of ravishment brought against Gilbert Umfraville did abate because he was not named Earl of Angus, which was judged to be within the allegiance of the king of England (26r).[157] Thus, Plowden concludes that although 'Scotlande is a distincte realme of it selffe and so ussed by Ambassadors and leagues as other realmes be', the people born there must nonetheless be considered 'within the ligeance of Inglande'. If Scotland was (whether mediately or immediately) within the allegiance of England, as Plowden asserts, then Hales and his fellow pro-Suffolk polemicists in the mid-1560s had no legal basis to exclude the Queen of Scots from the succession of the crown.

If considered purely as an academic refutation of Hales's argument, the legal analysis appended by Plowden to his historical account of English overlordship of Scotland is highly effective. Hales had argued that Scotland was an independent kingdom and that those born there must be judged to be beyond the allegiance of the English king and therefore incapable of inheritance. Plowden's innovative concept of the dual allegiance of the subjects of Scotland allows him to cede the undeniable premise of Hales's argument — that Scotland was a 'distincte

[156] Pasch. 11 Edw. III, pl. 13. See *Year Books of the Reign of King Edward the Third: Years XI and XII*, ed. and trans. Alfred J. Horwood. Rolls Series no. 31, part B, vol. 1 (London: Longman, 1883), pp. 74-81.
[157] Mich. 39 Edw. III, pl. 43, f. 35b.

realme of it selffe' and that the subjects of Scotland were under the immediate allegiance of their king — whilst maintaining that the homage done by the king of Scotland to his feudal overlord in England made the subjects of Scotland mediately within the allegiance of the English king and granted the Scots certain legal liberties in England.

However, there are two salient points which qualify the polemical significance of Plowden's repudiation of Hales when it comes to advancing the case for the Stewart succession. The first is that Plowden has yet to provide a satisfactory legal explanation of why the delinquency of Anglo-Scottish homage since 1423 did not affect the legal status of the Queen of Scots and her subjects in 1567. Despite capably proving that homage was certainly still owed, Plowden has thus far failed to demonstrate that owing homage was equivalent to being within the allegiance of the one to whom that homage was due. Consequently, the fact that Mary and her Stewart ancestors had neglected to perform homage to successive kings of England since James I had done homage to Henry VI threatens to make a nonsense of Plowden's concept of the mediate allegiance of the Scots to the king of England; mediate allegiance can only exist between the subjects of Scotland and the English king if the Scottish monarch does homage on their behalf.

The second, and potentially more concerning, issue with Plowden's dual allegiance argument is that it is entirely extraneous for Mary Stewart's right of succession. Plowden admits as much when he acknowledges that his foregoing analysis would prove the Queen of Scots capable of receiving 'the Crowne of Inglande or any pryvate inheritance [in England] *if she were as a comen Scott is*' (26v, emphasis added). The fact remained, of course, that Mary was not 'a comen Scott' and that her legal position was entirely different than that of her subjects because she 'oweth not mediate ligeance to the Crowne of [England] but imediate' (26v). So much is suggested by the revealing title to the next chapter of Plowden's *Treatise*: 'That the quene of Scottes is not out of ligeance of the Crowne of Englande albeit it were granted that the subjectes of Scotlande were' (26v). Furthermore, the opening lines of chapter two admit that the Queen of

Scots' 'case is of muche more clearnes howsoever it be for the subjectes' of Scotland, owing to the exalted circumstances of Mary's 'byrthe' and 'present estate' (26v). The title and opening sentence of this chapter thus imply that Plowden's lengthy and complex exposition of the dual allegiance of the Scots advanced in the previous chapter of the *Treatise* will now be disregarded, as though an irrelevant, digression from Mary Stewart's case. The sense of frustration a reader of the *Treatise* might justifiably feel upon reading this is intensified by recalling Plowden's previous assurance that the second part of his text would offer a coherent and unambiguous clarification of the Queen of Scots' right to succeed Elizabeth I (18v). Once again, then, Plowden admits to postponing the exigent clarification of Mary's legal position in favour of a tangential, hypothetical argument, designed first and foremost to 'overthrowe the allegations' of Hales. Whether the concluding chapters of the *Treatise* deliver upon Plowden's promise to finally provide a straightforward justification of Mary's right to succeed Elizabeth is explored in the following chapter.

Chapter 5. The Ceremonies, Circumstances, and Effects of Homage.

5.1. A Case 'of muche more clearnes'?

'[N]owe touching the quene of Scottes her selffe', Plowden promises that chapter II, part II, chapter II of his *Treatise* will finally offer definitive proof of the Queen of Scots' right to succeed Elizabeth I (26v). The case for the Stewart succession put forward in this chapter is declared to be 'of muche more clearnes' than the wide-ranging and hypothetical argument for an alien accession to the English throne *tout court* advanced in part I of the *Treatise*, and to be more transparent than the previous chapter's innovative (if seemingly extraneous) assertion that the subjects of Scotland owed mediate allegiance to the king of England. The Queen of Scots' right of inheritance in England is more evident than that of her subjects, Plowden explains by way of introduction, because unlike the people of Scotland, she 'oweth not mediate ligeance to the Crowne of [England] but imediate' (26v). Plowden adds that it would be 'too too strange' for an immediate 'homager to the Crowne of Inglande' to be considered 'out of the ligeance and obedience of the Crowne of Inglande' (26v). Thus, Plowden claims that objecting to Mary's right to succeed her royal cousin on the English throne would require 'passing great ignorance and folly' (26v).

How exactly Plowden sets about to prove that Mary Queen of Scots was within the immediate allegiance of the crown of England, despite neither her nor any of her recent forbears on the Scottish throne having performed homage, shall be explored in this chapter. I begin by examining Plowden's extraordinarily symbolic description of the ceremony by which a tenant becomes his lord's man. Although Plowden's lengthy, abstract account of the performance of homage might seem extraneous to the Stewart succession, I shall argue that Plowden transforms the ritual gestures of the homager and his lord into an allegory of Anglo–Scottish relations. After evaluating the significance of this allegory in Plowden's case for the Stewart succession, I shall

then address his explanation of the service of homage ancestral. It is at this juncture of his *Treatise*, I shall suggest, that Plowden makes a particularly compelling case for Mary's succession by returning to the doctrine of the king's two bodies and ingeniously applying that legal fiction to the record of feudal tenure between England and Scotland. Finally, I shall examine why Plowden uses Polydore Vergil's report of Henry VII's providential assurances regarding a Scottish succession to the English throne to conclude his *Treatise*.

5.2. 'Foure pointes or ceremonies or signes of humbleness'

'[T]o the ende that it maie fully appeare that an homager to the king of Inglande is a subjecte to the king of Inglande within his ligeance and protection and so capable of inheritance in Inglande', Plowden devotes much of chapter II to describing the 'cerimonies circumstances and effectes of homage' (27r). This amounts to an extensive analysis of the requisite physical gestures done by the homager and the reciprocal actions of his lord.

There was good reason for Plowden to explain the gestures by which a lord and his tenant were mutually bound through homage. By the mid-sixteenth century, public performances of homage were rare and the feudal ceremony was largely obsolete. As Major puts it, in the century and a half between Littleton's *Tenures* and Coke's *Commentarie Upon Littleton*, homage 'apparently disappeared altogether in England'.[1] Quite possibly, then, a lay reader of Plowden's *Treatise* may have been unaware of the ritual gestures of homage and ignorant to the significance of each aspect of the solemn ceremony. Nevertheless, in seeking to impress the significance of the ceremony upon his reader, Plowden was not content merely to recapitulate preexisting legal

[1] J. Russell Major, '"Bastard Feudalism" and the Kiss: Changing Social Mores in Late Medieval and Early Modern France', *Journal of Interdisciplinary History*, 17 (1987): 509-535, at p. 526. Despite the general cessation of homage in early modern England, it continued to be an integral aspect of the coronation ceremony. Interestingly, the coronation of Charles III in May 2023 departed from this tradition.

accounts of homage. Instead, Plowden offers an unusual and entirely innovative description of that ceremony. The general outline of the 'cerimonies circumstances and effectes of homage' such as Plowden may have found in *Glanvill*, *Bracton*, *Britton*, or Littleton's *Tenures*, are invested with symbolic meaning in his *Treatise* as Plowden draws from a range of extra-legal registers, including (but not limited to) physiology, theology, and literature. How Plowden's uniquely symbolic account of homage serves the polemic purpose of his tract shall be explored below.

Before turning to Plowden's description of the 'cerimonies circumstances and effectes of homage', I should acknowledge that the following analysis is greatly indebted to, and seeks to build upon, Lorna Hutson's seminal analysis of the same in the journal *Representations*.[2] There, Hutson analysed Plowden's account of the ritual gestures of homage as an embodied allegory of the legal-constitutional relationship between the kingdoms of England and Scotland. I shall expand on Hutson's radical reading of Plowden's *Treatise* and weigh its merits in the analysis below.

The first point to be noted in the ceremony of homage, Plowden argues, is that the 'homager oughte to knele on bothe his knees' before his lord (27r). Although the kneeling of the homager was not described in *Glanvill*, *Bracton*, or *Britton*, this certainly does not mean that kneeling did not take place during twelfth- and thirteenth-century homages, but simply that the authors of these treatises were more interested in the legal solemnities than the physical aspects of the ritual.[3] Indeed, when Littleton described the homager's kneeling in his *Tenures*, Maitland

[2] Hutson, 'On the Knees'. An abbreviated version of this article is given by Hutson in *England's Insular Imagining*: 154-188.

[3] Although kneeling to perform homage is not described in these legal treatises, accounts of homage from the early medieval period describe tenants bowing down before their lord. For instance, when homage was done by all the landholding men in England to William I at Salisbury in 1086, the homagers were described to have 'bowed down' to the king. See Holt, '1086', p. 31. It is unclear at what point kneeling became preferable to bowing, or, indeed, whether a firm distinction was upheld between the two gestures in the early medieval ceremony.

argued that he was describing an ancient trait.[4] To Littleton's description that the 'lord shall sit, and the tenant shall kneel before him on both his knees', Plowden appends an analysis of the significance of this genuflection, as a corporeal abasement of the tenant's power and a sign of the tenant 'disabling himselffe' (27r).[5] Plowden goes on to explain that the physical awkwardness of kneeling and the diminished strength of bent joints places the tenant in a position to be easily 'overthrowen' by his Lord if he should so choose (27r). Aside from the enforced physical abasement of the tenant, Plowden adds that kneeling represents a sign of 'humilitie to him to whom the knee is bowed' (27r). To prove this, Plowden cites St Paul's epistle to the Phillippians, '*in nomine Iesu omne genu flectatur celestium terrestrium et infernorum*' ('at the name of Jesus, every knee shall bow in heaven, on earth, and in hell', Philippenses 2: 10 (Vulgate), 27r). Plowden explains that whilst men on earth might literally kneel upon hearing Jesus's name, neither 'the angells or Saints in heaven, nor the dyvells in hell' have knees to bend, and that their kneeling is a metaphor for the submission of their cosmic power: not a literal act of genuflection (27r).[6] Indeed, as ubiquitous as the concept of kneeling for prayer was in post-Reformation England, genuflection in religious practice could sometimes be an 'entirely metaphorical action'; as inward attitude was considered more significant than outward posture, elderly or infirm religious devotees might prefer to pray 'on the knees of the heart' whilst reposing in bed rather than resting on stiff joints.[7] Whilst, of course, no medieval English tenant ever performed homage to

[4] Pollock and Maitland, *History of English Law*, I. p. 297. It is worth noting that, in the body of my thesis, I refer to Maitland as the author of the *History of English Law* on the grounds that Pollock was only responsible for the survey of Anglo-Saxton law with which the work begins.
[5] *Littleton's Tenures*, ed. Wambaugh, p. 39 (II. i. §85).
[6] Plowden does not indicate whether he understood angels as incorporeal and non-material beings (a Thomist view held by many of his contemporaries), or whether he idiosyncratically assumed that the bodies of angels and devils simply did not have joints. On early modern angelology, see Joad Raymond, *Milton's Angels: The Early-Modern Imagination* (Oxford: Oxford University Press, 2010).
[7] Alec Ryrie, *Being Protestant in Reformation Britain* (Oxford: Oxford University Press, 2013), p. 173. The practice of kneeling to pray in Elizabethan England fell into the category of *adiaphora* (or, things indifferent) to God's worship — to be performed as the individual saw fit rather than being of any doctrinal necessity. There was, however, significant ecclesiastical and political

his lord whilst a-bed, the example of kneeling bears out a general pattern in Plowden's symbolic analysis of the 'cerimonies circumstances and effectes of homage', whereby the literal and metaphorical performance of ritual action are continually blurred. At once, the kneeling of the tenant is both the cause of his literal bodily disability and a sign of his inward submission and humility — the gesture is, then, both symbolically and somatically significant. Whilst stressing the necessity of performing the ritual action of a tenant kneeling before his lord, Plowden also highlights the fundamental importance of the tenant conforming to an inward state of 'humilitie to his Lorde' (27r). In a recent and instructive study of religious gestures in Reformation England, Arnold Hunt speaks to a similarly reciprocal relationship between ritual gesture and mental state. At the same moment as the condition of a man's spirit was thought to be discernable in his corporeal actions, Hunt finds that a man's bodily gestures were also thought to stimulate his soul to greater devotional piety.[8] We can observe this reciprocal dynamic at work throughout Plowden's account of homage.

The second aspect of the ceremony of homage, Plowden explains, is that 'the homager oughte to be ungyrded' (27r). As with kneeling, Maitland argues that the ungirding of the tenant is another ancient trait — albeit the gesture is not described in extant legal treatises relating to homage prior to Littleton.[9] In Coke's *Commentarie Upon Littleton*, he ventures a practical explanation as to why 'the tenant when he doth his homage is discinctus, disarmed or unguarded'. According to Coke, the tenant's act of removing his girdle and weapons signifies that he must 'never be armed or opposite to his lord'. To be ungirt, Coke explains, is to be incapable of doing one's lord harm.[10] Rather than focus on such practical reasons for a tenant

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dispute over kneeling to receive communion. See Leah Whittington, *Renaissance Supplicants: Poetry, Antiquity, Reconciliation* (Oxford: Oxford University Press, 2016), pp. 163-170.

[8] Arnold Hunt, 'Gesture, Meaning and Memory in the English Reformation', in *Memory and the English Reformation*, ed. Alexandra Walsham et. al. (Cambridge: Cambridge University Press, 2020): 371-387.

[9] Pollock and Maitland, *History of English Law*, I. p. 297. *Littleton's Tenures*, ed. Wambaugh, p. 39 (II. i. §85).

[10] *Co. Litt.,* 65r.

removing his belt and weapons before kneeling to perform homage to his lord, Plowden offers a peculiar pseudo-physiological explanation for the requirement that the tenant ungird his loins:

> A man hathe in his waste in whiche parte his loynes be (as I have hearde of Credit) twelve lytle bones or Joyntes whiche be partes of his loynes, and if they be gyrded straitly, then therby they be strongly united and therby is the steingthe in his backe the greater and he able to carry the greater burthen: but if he be ungerded then be those bones or Joyntes more loose & dissipated, and therby is his backe the weaker and his streingthe the lesse, and not able to Carry so muche as in the other case. (27r)

Although supposedly 'of Credit', Plowden does not acknowledge his source for this osteological description of the twelve bones in a man's loins and the increased strength of an individual's back if these bones be 'gyrded straitly' and strongly. Instead, Plowden expands on the description of the waist-bones by referring to the Gospel of Luke and to (a version of) the Parable of the Faithful Servant.[11] Reiterating Jesus's instruction in the gospel that the faithful servant must girdle his loins ('*sint lumbi vestri praecincti*'), Plowden explains that the girding of the loins is a metaphor for preparedness — of one's physical and mental readiness to 'endure any labor or burthene stoutly that shoulde be layde upon them for virtues sake, and to do suche worke as shoulde be acceptable to god' (27r). Returning to the performance of homage, Plowden explains that when the tenant ungirds his loins, he should therefore 'transffer that ceremonye of the body to the inwarde mynde and remember by that utwarde acte once done the inwarde obeidyence and humilitie alweis that therby he professeth alwayes to his lorde in mynde' (27r–v). The reciprocity between ritual action and mental state is particularly evident here. Not only does the tenant's disarmament render him less capable of resisting or doing bodily harm to his lord, as Coke would later indicate, but, as Plowden interprets the ceremonial action, the disarmament must also turn inward. In Plowden's account, personal disarmament functions as a prompt for the tenant to conform himself to the requisite state of humility and obedience necessary for

[11] See Lucas 12: 35-48 (Vulgate).

doing homage. Plowden's analysis of bent knees and loosened loins thus demonstrates that ritual gestures are both physically and symbolically significant.

The third aspect of the ceremony of homage described by Plowden — that 'the homager oughte to holde bothe his handes together stretched out betwene the Lordes knees' — has been suggested as Plowden's own invention (27v).[12] Whilst the clasping of the tenant's hands between those of his lord was regarded by Maitland to be 'the very essence of the transaction of homage', the placement of the tenant's hands between the lord's knees is not found in any extant legal works preceding Plowden's *Treatise*.[13] However, the gesture does appear in the anonymous seventeeth-century tract, *The Use of the Law, Provided for the Preservation of Our Persons, Goods and Good Names*, where it is stated that 'homage is to be done kneeling holding his hands between the knees of the Lord'.[14] This tract was first printed anonymously as part two of *The Lawyer's Light* by Sir John Dodderidge in 1629 but was later attributed to Bacon when it was reprinted in *The Elements of the Common Lawes of England* (1630). Although the author of this tract may plausibly have read Plowden's *Treatise*, it is more likely that the description of the tenant's hands outstretched between the lord's knees found in *The Use of the Law* derives from a source in common with Plowden which is no longer extant. The reference to the placing of the tenant's hands between the lord's knees in *The Use of the Law* perhaps therefore implies that the gesture was not Plowden's invention. In fact, the gesture may well have always been implicit in the physical mechanics of doing homage; if the lord was seated and his tenant was kneeling before

[12] Hutson, 'On the Knees', p. 47.
[13] Pollock and Maitland, *History of English Law*, I. p. 297. The symbolic clasping of a homager's hands between those of his lord was described by *Bracton*, ed. Thorne, II. p. 232 (f. 80). The ritual handclasp was also described by the Flemish chronicler, Galbert of Bruges, in his account of homage done to William Clito in 1127. See Galbertus notarius Brugensis, *De multro, traditione et occisione gloriosi Karoli, comitis Flandriarum*, ed. J. Rider (Turnhout: Brepols, 1994), pp. 105-06. The importance of the handclasp is also implied in the anonymous mid-thirteenth-century French legal treatise, *Li livres de jostice et de plet*, ed. Pierre N. Rapetti (Paris: Firmin Didot, 1850), p. 254.
[14] *The Use of the Law, Provided for the Preservation of Our Persons, Goods and Good Names*, first printed in John Dodderidge, *The Lawyer's Light: or, a due direction for the study of the law* (London, 1629), quotation at p. 38.

him, then the clasping of their hands together (almost universally described in accounts of homage from *Bracton* onwards) almost certainly took place in the region of the lord's knees. Nonetheless, it is striking that Plowden should have entirely omitted to mention the handclasp and focused instead on the abasement of the tenant's power by his stretching out his fingers.

Plowden regards hands to be 'the Chiffe agents in mans actions', writing that if a man's hands are bound or his use thereof is otherwise restricted, then the rest of his bodily strength 'serveth to lytle purpose' (27v). When the tenant stretches out his fingers and hands between the lord's knees, Plowden argues that he 'dothe mervelously enfeble himselffe' — or least displays the peaceable antithesis of a fist, which 'hathe greate streingthe' and might 'geve a great blowe' to the lord (27v). Thus, the stretching out of his hands compounds the physical abasement and disability of the tenant as established in the gestures of kneeling and ungirding. However, the primary function of this action is evidently symbolic: as a demonstration of the tenant's humility and powerlessness.

To prove that 'handes by a resemblance signify power' and that the 'restrainte of them purporteth imbecylity and lacke of power', Plowden gives three diverse examples (27v). First, Plowden addresses the metaphorical language of letters patent, in which non-tangible offices and titles, as well as extraordinarily large material things such as estates of land are figuratively said to be within the king's hands to grant and bestow: '*iam in manibus nostris existunt*' (27v). Plowden goes on to cite the pseudo-Augustinian tract, *De Essentia Divinitatis* and the gloss its author provides on God's words as found in the Book of Jeremiah: 'Behold, as the clay is in the potter's hand, so are ye in mine hand, O house of Israel' ('*sicut lutum in manu figuli, ita in manu mea domus Israel*', 27v).[15] Plowden further ornaments his depiction of the metaphorical relationship between

[15] *De Essentia Divinitatis* was first attributed to Augustine in the 1531 edition of a patristic handbook. See Robert Peters, 'Who Compiled the Sixteenth-Century Patristic Handbook *Unio Dissidentium*?', *Studies in Church History*, 2 (1965): 237-250.

hands and power by quoting the proverbial expression that kings have long hands.[16] Plowden explains that the poet who coined this commonplace did not literally mean that 'kynges had longer handes then others' but sought to imply that a 'kynges power raughte farr' (27v). Given the proverbial status of the king's long hands in sixteenth-century England, it is striking that Plowden identifies a specific source for the metaphor in his *Treatise*. A marginal annotation in witness H, and consistent across all but one of the other extant manuscript witnesses of Plowden's *Treatise* (and therefore presumed to be authorial in my edition of the text), correctly identifies the source of this commonplace as Helen's epistle to Paris, as can be found in Ovid's *Heroides*. We have seen above how Plowden ornamented his exposition of the doctrine of the king's two bodies by turning to Ovid's *Metamorphoses*, confessing to taking a wanton delight in classical poetry.[17] It is somewhat ironic, then, that when returning to poetry to elucidate the metaphorical elision of hands for power, Plowden misattributes Ovid's authorship of Helen's epistle to Paris to one Sabinus: '*Sabinus in epist. helone*' (27v).[18]

Sabinus is mentioned twice in Ovid's corpus as a friend or pen-pal of sorts, who had written epistles in response to the *Heroides*. In the *Amores*, Ovid wrote that Sabinus had sent him six answering epistles to the lovelorn heroines of his *Heroides*: from Ulysses to Penelope; Hippolytus to Phaedra; Aeneas to Elissa; Demaphoon to Phyllis; Jason to Hypsipyle; Phaon to Sappho.[19] Of the six answering epistles catalogued by Ovid, Ulysses and Demaphoon's letters, along with a further letter from Paris to Oenone (not mentioned by Ovid in the *Amores*), were attributed to 'Aulus Sabinus, a celebrated Roman knight and poet' in a fifteenth-century edition

[16] The expression is cited as an Elizabethan commonplace by Heather James, *Ovid and the Liberty of Speech in Shakespeare's England* (Cambridge: Cambridge University Press, 2021), p. 40. See also F.P. Wilson, *The Oxford Dictionary of English Proverbs* (3rd. edn., Oxford: Clarendon, 1970), p. 428.
[17] See pp. 82-88, above.
[18] Witness C does not include any marginal citation of Helen's epistle, nor to the author 'Sabinus'. All other extant manuscript witnesses correspond to the citation as found in H.
[19] *Amores*, 2.17.27-34, in *Heroides and Amores*, p. 436-37. In 'To an Enemy', Ovid also references Sabinus having written a reply from Ulysses to Penelope: *Ex Ponto*, 4.16.13-16. See *Trista; Ex Ponto*, trans. Arthur Wheeler and G.P. Goold (Cambridge, M.A., 1988), pp. 486-87.

of the *Heroides*.[20] Until the nineteenth century, Sabinus's authorship of these epistles was taken as authentic. Their author was, in fact, the Italian humanist poet and editor, Angelo Sani Di Curi.[21] In taking up the challenge of responding to and re-imagining Ovid's *Heroides*, it was unlikely that Di Curi set out deliberately to deceive readers. Di Curi's responses to Ovid were composed at a 'moment in the trajectory of Renaissance humanism when the quest to fill out the incomplete corpus of ancient texts was being conducted with the greatest convergence of fervor and efficacy': when reconstruction, imitation and interpretation were closely related.[22]

The real Sabinus's responses to Ovid's *Heroides* (which do not survive) inspired Ovid to compose a series of three epistolary exchanges — between Leander and Hero; Ancontius and Cydippe; and Paris and Helen — now known as the double epistles. Classical scholars generally agree that these double epistles (*Heroides* 16-21) were almost certainly written by Ovid, most likely during his exile, and that they probably formed a separate volume from the single epistles.[23] To my knowledge, there is no extant evidence to suggest that Ovid's double epistles (including Paris and Helen's letters) were ever attributed to Sabinus by early modern classical editors or scholars. We might, therefore, consider Plowden's misattribution of the '*epist. helone*' to Sabinus as the result of a straightforward idiosyncratic confusion between which aspects of

[20] Peter Knox, 'Lost and Spurious Works', in *A Companion to Ovid*, ed. Peter Knox (Chichester: Wiley-Blackwell, 2009): 207-216, at p. 215.
[21] Knox, 'Lost and Spurious Works', p. 216
[22] Leah Whittington, '*Qui Succederet Operi*: Completing the Unfinished in Maffeo Vegio's *Supplementum Aeneidos*', *I Tatti Studies* 21 (2018): 217-44, pp. 6-7. The Renaissance culture of literary continuation, gap-filling and imitation is explored in Leah Whittington's forthcoming monograph, *Antiquity Made Whole: Completion and the Classical Past in Renaissance Literary Culture* (Johns Hopkins University Press). I am very grateful to Professor Whittington for discussing her research with me.
[23] V.A. Tracy, 'The Authenticity of *Heroides* 16-21', *Classical Journal,* 66 (1971): 328-330. Grant Showerman's edition of the *Heroides* observes that 'these epistles, neither in matter nor in language, appear to offer a sufficient number of anomalies to make it necessary to disallow their Ovidian authorship'. See *Heroides and Amores*, p. 197. Likewise, Kenney's edition contends that the double epistles 'read more like Ovid than any other surviving Latin poet' and that their 'diction, syntax, expression and versification conform in general to Ovidian usage'. See *Heroides XVI-XXI*, ed. E.J. Kenney (Cambridge: Cambridge University Press, 1996), p. 20.

contemporary editions of the *Heroides* were written by Ovid and which by Di Cure (posing as Ovid's friend, Sabinus).

The fourth and final point to be observed in the ceremony of homage, Plowden argues, was that the tenant 'must be bare headed' (27v). The removal of one's hat is a universally accepted sign of respect, but it was especially potent 'in a period in which most people generally kept their heads covered'.[24] It was perhaps because of the obviousness of this gesture as an indication of the tenant's 'abasing of himselffe and substraction of all power from himselffe in the presence of his lorde & his humilitie towardes him' that Plowden does not venture any scriptural or literary allusion to the gesture (27v). However, by way of explaining how being bare-headed demonstrates 'humilitie', Plowden draws a striking comparison between salletted soldiers and coiffed serjeants at law. Irrespective of 'howsoever they be armed in other places', Plowden explains that soldiers are always armed with a sallet to protect their heads, that being 'the chiffe parte of their body' (27v). Only by adequately protecting his head, Plowden asserts, will a soldier be emboldened to battle. In emulation of soldiers, Plowden suggests, the order of serjeants at law adopted their distinctive white silk coif as a symbolic reminder to the wearer that 'as Sallatted souldiars oughte to be bolde in warr so oughte they in theire clyentes cause' (27v).[25] It is possible that Plowden was making an intra-fraternal joke here, one partly at his own expense. The mock-heroic comparison Plowden draws between soldiers and serjeants-at-law could be read as a send-up of the grandiosity of the order of serjeants, which Plowden had famously been prevented from joining on account of his religion.[26] However, parallels between the coif and the sallet were also drawn in more solemn circumstances. In a speech made at the creation of new serjeants in 1623, Sir James Ley, Lord Chief Justice of the King's Bench informed the newly-coiffed serjeants

[24] Ryrie, *Being Protestant*, p. 185. Ryrie describes how men generally wore their woollen caps during religious service, only doffing them at the mention of Jesus' name. Controversy arose in 1604 when men were ordered to be bareheaded throughout the service.
[25] For a description of the serjeants' coif and habit, see Baker, *Order of Serjeants*, chapter 5.
[26] See pp. 7-8, above.

that 'you have a quoife as an helmett, to make you remember to be pure and unspotted, white and innocent, and yett an helmet to be stronge and bould in your clyent's case and to speake the law and to be constant and firme for your clyent'.[27] Although I have been unable to locate further examples, is possible that comparing the soldier's sallet to the serjeant's coif was a popular motif in the early modern Inns of Court.[28]

Having drawn this amusing comparison to establish that the protection of one's head might inspire confidence and courageousness, Plowden goes on to conclude that, in leaving his 'head bare & uncovered or undefenced' when doing homage, the tenant demonstrates to his lord that he is unprepared to act temerariously against him (27v). When compounded, then, the four ritual gestures described by Plowden create an exaggerated depiction of the humility and subjection of the tenant doing homage before his lord — emphasizing that the homager 'dothe abase himselffe all he maie and renownce in respecte of the lorde all power and force and humble himselffe to him as lowly as he can' (27v-28r).

Plowden goes on to describe how these ritual gestures of subservience on the homager's part are complemented by a solemn oath in which he vows to become his lord's man and to be faithful and loyal to him. To explain the legal obligation of the tenant's promise, Plowden quotes two passages from book IX of *Glanvill* — the author of which Plowden interestingly acknowledges to be 'the eldest wryter in our Lawe' — which express that a tenant is 'bounde by his homage to desiste from offending or greving his Lorde, and not to do any thing to his disinherison or to his shame' (28r).[29] Plowden also cites two Year Book cases to further corroborate the legal significance of the words 'I become your man'.[30]

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[27] Baker, *Order of Serjeants*, p. 354.
[28] It is, of course, possible that Ley had read Plowden's *Treatise*.
[29] *Glanvill* was first printed by Richard Tottell in 1554, commencing a rehabilitation of interest in the treatise. See Sarah Tullis, '*Glanvill* after *Glanvill*: The Afterlife of a Medieval Legal Treatise', in *Laws, Lawyers and Texts: Studies in Medieval Legal History in Honour of Paul Brand*, ed. Susanne Jenks, Jonathan Rose, and Christopher Whittick (Leiden, 2012): 327–359.
[30] The first case cited by Plowden is 14. Hen. VI, pl. 43, ff. 11b-13a. The second case cited by Plowden, '*h. 33. E. 3. titlo gr. in fitz. p. 83*', can only be located in Fitzherbert and not in extant

To accept his tenant's promise, and to take him into 'his favour frendshipp & protection', Plowden explains that the lord should then kiss his man (28r). This important gesture, as Plowden portrays it, signifies the 'reciprocitie or mutuall connexion' between the two men and the mutual obligations they owed to one another (28v).[31] To bear out the significance of this symbolic kiss, Plowden refers to a second pseudo-Augustian tract, *Liber de Amicitia*, in which the difference between corporeal and spiritual kisses was explained.[32] Plowden's first quotation from the *Liber de Amicitia* describes when corporeal kisses might be appropriately exchanged, as a sign of reconciliation, peace, or love: licensing the apposite nature of a kiss betwen a lord and his newly-sworn man (28v).[33] The second quotation from Rievelaux portrays the spiritual kiss, which takes place not through the impression of lips but through the affection of the heart and the mingling of spirits (28v).[34] The lord's kiss as described by Plowden seems to fall somewhere between Rievelaux's two descriptions, as the embodiment or 'outwarde Ceremony' of the bond of faith between the two men created by homage. The physical 'conjunction of their mowthes together in the kysse', Plowden explains, 'is a signification of their hartes in amytie' (28r). To further prove that 'kyssing is a ceremony signifyeng a conjoyning of love and frendshipp', Plowden offers two scriptural examples of homosocial kissing (28v).

Plowden describes how 'when Judas kyssed Criste' in the garden of Gethsemane, 'he presented frendshipp to him in apparance' whilst in fact signalling Christ's identity to those who

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volumes of reports, either in print or manuscript. As Baker explains, '[t]here are no printed reports for 31–7 Edw. III (1356–63)' and manuscript reports for only two of those years (31 and 36 Edw. III). See 'Case Law in Medieval England', in *CP*, at p. 555, n. 98. Fitzherbert's *Abridgment* contains many such unique reports.

[31] In describing the mutual obligations between lord and tenant, Plowden offers a third and final quotation from book IX of *Glanvill*.

[32] Despite being attributed to Augustine in sixteenth-century editions of his collected works, the *Liber de Amicitia* was, in fact, an abbreviated version of the twelfth-century Ciceronian dialogue, *De Spirituali Amicitia*, by Aelred of Rievaulx. See Liz Carmichael, *Friendship: Interpreting Christian Love* (London: T&T Clark International, 2004), p. 99.

[33] For an authoritative text in translation, see *Aelred of Rievaluax: Spiritual Friendship*, trans. Lawrence C. Braceland, ed. Marsha L. Dutton (Collegeville, MN: Cistercian Publications, 2010), p. 76.

[34] *Spiritual Friendship*, p. 76.

subsequently arrest and crucify him (28v). Plowden then goes on to describe how Absalom, when plotting or 'pretending to rebell against his father David', promised the Israelites that he would bring them justice if he were king.[35] In a pretence of good faith, calculated to 'wyn their hartes', Plowden recalls how Absalom kissed his father's malcontented subjects, thereby convincing them to support his rebellion.[36]

Prima facie it may seem peculiar for Plowden to have thus chosen the two most obvious and egregious examples of disloyalty in scripture to illustrate his argument that the kiss exchanged between a lord and tenant was a sign of bond of faithfulness and loyalty created by homage. Given the abundance of genuinely friendly kisses between male companions in the Bible, we might well question why Plowden opted for two examples where the kiss was not a sincere expression of 'love and frendshipp in the hartes of them whose lypps were joyned' but was instead a feigned or manipulative gesture. One might argue that by selecting two examples in which betrayal was facilitated by the sign of a kiss, Plowden emphasises the strength and perceived credibility of that gesture as a token of friendship and amity. That is to say that these two examples demonstrate that a kiss represents a proof of trust and friendship so compelling that one might need only to perform that gesture to cunningly disguise an ulterior, perfidious motive, as Judas and Absalom both did. However, the implicit significance of these two examples — that the perceived credibility of ritual gestures, such as (but not limited to) kissing, makes them easily exploited or feigned — is concerning in the context of Plowden's depiction of homage. As we have seen above, Plowden's analysis of the 'cerimonies circumstances and effectes of homage' repeatedly stresses the congruence between outward gesture and inward

[35] In describing Absalom's rebellion, Plowden cites '*2° Regio ca 15*'. Prior to the Clementine edition of the Vulgate in 1592, many sixteenth-century Vulgate Bibles — including Estienne's 1528 publication and the 1547 authoritative Vulgate, discussed above at p. 123, n. 79 —referred to the Books of Samuel as I and II Regum, with the books commonly known as Kings I and II becoming III and IV Regum respectively.

[36] Previously in the second book of Samuel, David had welcomed his son back from exile and signalled their reconciliation by kissing him: 2 Samuel 14: 33. The contrast between the sincerity of David's gesture and Absalom's feigned kisses exaggerates the son's betrayal of the father.

condition; Plowden consistently portrays the ritual gestures of obedience and subordination performed by a homager as genuine manifestations of his humility and affection towards his lord. If only perhaps to a small degree, the betrayals of Judas and Absalom threaten to disturb or undermine the coherency of Plowden's elucidation of the significance of the ritual gestures of doing homage.

5.3 Ritual Gesture as Political Allegory

Whilst Plowden's analysis of the symbolic significance of the ceremonial rituals of performing homage is certainly academically interesting, we must ask how it serves the polemical purpose of his *Treatise*. Specifically, how does Plowden's discussion of the 'cerimonies circumstances and effectes of homage' serve Mary Stewart's case or advance the possibility of a Scottish succession (27r)?

Firstly, and most straightforwardly, Plowden's exposition of the ceremony of homage adds important colour to his antecedent historical narrative of England's feudal tenure of Scotland. By explaining exactly what performing homage entailed to those of his readers who may well have been ignorant of the ceremony, Plowden invites readers to imagine successive Scottish kings undressing and kneeling with their hands outstretched before their respective English suzerains since 'tyme out of mynde' (28v).[37] To visualise the king of Scots performing these humbling gestures — as he 'renownce[s] in respecte of [his] lorde all power and force and humble[s] himselffe to him as lowly as he can' — is to comprehend his 'subjection' to his

[37] Coke would later define the term 'time out of mind' as that 'whereof no man then knew the contrary either out of his own memory, or by any record or other proof'. See *10 Rep.* p. xxiv. Although the limit of legal memory was officially set at Richard I's coronation, 3 September 1189, Coke and others used the phrase 'time out of mind' to describe the continuity of English common law since before the Conquest. See Garnett, 'Prefaces to Sir Edward Coke's Reports', p. 258. Plowden's use of the term of art is appropriate here, as he had previously contended that homage had been done by successive kings of Scotland since 'before the tyme of William Conqueroure' (18v).

English overlords (28r). In this sense, Plowden's exaggeration of the abasement inherent in performing homage supplements the central point of part II of his *Treatise*, that their '[s]ubjection by homage' brought the kings of Scots within the allegiance of England (29r).

In a compelling reading of Plowden's tableau, Lorna Hutson takes this idea further.[38] Hutson contends that we might interpret Plowden's exaggerated portrayal of the homager's submission and abjection as an allegory for what he and many of his English contemporaries perceived as Scotland's jurisdictional subordination to England. In Hutson's persuasive interpretation, Plowden's account of the 'cerimonies circumstances and effectes of homage' does not merely invite readers of the *Treatise* to imagine individual Scottish kings performing their homage but creates a 'vivid fiction of Scotland's permanent elision and abjection as a body politic'.[39] That is to say, we come to visualise the state of Scotland on its knees before the superior power of England. When thus interpreted as a legal-constitutional allegory, Plowden's abstract disquisition on the ceremony of homage has profound implications for the Queen of Scots' right of succession. If Scotland's body politic had been reduced to 'a permanent state of weakened genuflection' by generations of Scottish kings performing homage to the English king, then it might not matter that neither Mary nor any of her Stewart forebears since her great-great-great-grandfather James I had performed that ceremony.[40] If generations of homages performed by her distant forebears on the throne had made Mary Queen of Scots's subjection and allegiance to the crown of England irrevocable, then she might be considered to have an inalienable right of succession. Clearly, this is a radical interpretation of the effect achieved by Plowden's exposition of the ceremony of homage. However, its validity as a reading of the *Treatise* is lent significant support when, immediately after his exposition of homage is concluded,

[38] Hutson, 'On the Knees', pp. 45-48. See also *England's Insular Imagining*, pp. 171-74.
[39] Hutson, 'On the Knees', p. 46.
[40] Hutson, 'On the Knees', p. 48.

Plowden ingeniously established Mary's alienable right of succession by asserting that she held 'the Realme of Scotland by homage ancestrall' (28v).

5.4. Homage Ancestral

Since Plowden's elucidation of what is meant by homage ancestral is essentially a gloss on Littleton's comprehensive account of that feudal tenure, it is worth quoting the relevant passage from the *Tenures* in full. Littleton explains that tenancy by homage ancestral exists

> where a tenant holdeth his land of his lord by homage, and the same tenant and his ancestors, whose heir he is, have holden the same land of the same lord and of his ancestors, whose heir the lord is, time out of memory of man, by homage and have done to them homage. And this is called homage ancestral, by reason of the continuance which hath been, by title of prescription, in the tenancy in the blood of the tenant, and also in the seignory in the blood of the lord.[41]

The bond created by homage ancestral, Plowden goes on to explain, obligates the lord 'to warrant and defende the homageor against all former pretences and tytles made to his lande' (28v); that is to say, the lord had an obligation to defend his tenant's possession of the land.[42] If a lord 'can not defende [his tenant's] tytle, then he muste recompence him' with a tenement at least equal in value to that which the tenant has lost (28v).[43] Having explained (per Littleton) what homage ancestral was, Plowden contends that Scotland was a fief held by Mary Queen of Scots of Elizabeth I by homage ancestral — Scottish kings having performed homage to their English overlords since 'tyme out of mynde' (28v). On this basis, Plowden contends that Elizabeth was 'bounde by her lawe to warrant' or uphold Mary's title to rule Scotland: effectively acknowledging her royal cousin as her tenant-in-chief (28v). Upon first appearance, this may well seem a tendentious interpretation of the lord's obligations as set out in Littleton's description of

[41] *Littleton's Tenures*, ed. Wambaugh, p. 71 (II. vii. §143).
[42] *Littleton's Tenures*, ed. Wambaugh, p. 71 (II. vii. §143).
[43] *Littleton's Tenures*, ed. Wambaugh, p. 72 (II, vii. §145). On the Lord's obligation to warrant his tenant, see Pollock and Maitland, *History of English Law*, I. 306.

homage ancestral. As Plowden admits in his *Treatise*, it was only after the lord had received homage of his tenant (or of any of his tenant's ancestors), that he was bound to warrant their tenancy.[44] As Elizabeth had not received homage of Mary, her father, James V, or any of her Stewart ancestors, then according to Littleton and Plowden's descriptions of homage ancestral, she might 'disclaim in the seigniory' — renouncing her feudal overlordship over Scotland and relinquishing her obligation to acknowledge Mary's allegiance to England via homage (28v). This was, in effect, what tracts such as Hales's *Declaration* and the anonymous *Allegations against* urged Elizabeth to do: to admit that the recent neglect of homage had put Scotland beyond the allegiance of England, thus preventing Mary from succeeding to the English crown as an alien. However, Plowden seizes upon a significant caveat made by Littleton in his account of homage ancestral to prove that Elizabeth was, in fact, incapable of disclaiming her seigniory over Scotland. Although Elizabeth had not received homage of Mary or her ancestors, Plowden argues,

> yet she can not disclayme in the Seignory because she enjoythe the seignory of Scotlande in the righte of the Crowne of Inglande whiche she enjoyeth and hathe in the capacyty of the body politicke, & none that injoyeth any hereditamentes in the Capacitie of a Corpation or bodye politicke can disclayme as Littelton and many other bokes tell us. (28v)[45]

Littleton had indeed argued that 'if an abbot or prior be vouched by force of homage ancestral', they were unable to disclaim in the seigniory, even if they had not received homage themselves, because they were incapable of giving away or divesting 'a thing in fee, which had been vested in their house'.[46] Coke's commentary on Littleton speaks to the logic of this incapacity. 'The wisdome of the lawe', writes Coke, 'would neuer trust one sole person with the disposition of the inheritance of his house or church', thus 'sole corporations' were incapable of disclaiming.[47]

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[44] *Littleton's Tenures*, ed. Wambaugh, p. 72 (II. vii. §145).
[45] It has not been possible to establish what these 'other books' referred to by Plowden were.
[46] *Littleton's Tenures*, ed. Wambaugh, p. 72 (II. vii. §146).
[47] *Co. Litt.* 103r.

As I demonstrate below, Plowden's masterstroke was in recognising that the exception provided by Littleton — that abbots and priors were bound to warrant their tenants by homage ancestral even if homage was not performed — could be applied to Elizabeth's legal position with respect to Scotland. Although Maitland regarded the parsonification of the English monarch as 'abortive', Plowden's *Treatise* demonstrates the expediency of the legal fiction of the king as a corporation sole.[48] By ingeniously combining Littleton's concept of homage ancestral with the theory of the king's two bodies, Plowden renders the recent neglect of homage entirely irrelevant to the possibility of a Stewart succession.

It 'is no matter' that 'homage were not don by the queen of Scottes father, or her selffe', Plowden explains, because 'the not doing it is equivalent in this case to the doing it' as the 'doer and he to whom it oughte to be don be both bodyes politicke' (29r). That is to say, because Elizabeth's right to overlordship over Scotland was held in the capacity of her body politic, she was unable to disclaim her seigniory over Scotland — at least, not 'without the assent of the Realme' (29r).[49] Elizabeth must, accordingly, warrant the tenancy of the Queen of Scots even though neither Mary nor her father had done homage to her for the kingdom they held of her as a fief. Ergo, Plowden declares that Elizabeth was 'bound by her lawe' to accept that 'the quene of Scottes and her father were homagers to Inglande, and borne within the fee and seignory of England' (29r). Plowden's striking depiction of Elizabeth being 'bound by her law' once again evidences Christopher Brooks' claim that 'the central constitutional argument' of Plowden's *Treatise* was that 'the corporate character of the English throne effectively placed restraints on whoever occupied it'.[50] By proving that Mary's status as a tenant-in-chief of the English crown was inalienable, Plowden thus confidently dismisses any suggestion that she was a 'mere stranger' or alien, incapable of inheritance in England, as faintly ridiculous. In the witnesses of Recension

[48] Maitland, 'Crown as Corporation', p. 33.
[49] Unfortunately, Plowden does not expand upon this interesting qualification.
[50] Brooks, *Law, Politics and Society*, p. 74.

1 of his *Treatise*, Plowden refers to this suggestion as 'too farr oute of the way' (29r). In later revisions, Plowden contends that it would be 'senseles and voyd of all reason' to suggest that 'the chieffe homageor of England hath noe socieitie nor affinitie with England'.[51] In all manuscript witnesses, Plowden concludes that Mary's 'subjection by homage counter pleadeth' any objection to her succession to the English crown (29r).

It is particularly arresting that, in Plowden's concluding argument in behalf of the Queen of Scots, the theory of the king's two bodies comes into its own as a way of proving Elizabeth's incapacity to resist Mary's claim to succeed her on the English throne, rather than, as we perhaps might expect, a way of affecting a miraculous transformation of Mary's legal status. Plowden's theory of the king's two bodies thus performs entirely different functions in the two distinct parts of his *Treatise*. In the constitutionally ambitious first part of Plowden's *Treatise*, the theory of the king's two bodies was integral in proving that any individual (if proximate in blood) might succeed to the English crown, irrespective of their supposed disability to receive the same. Upon the hereditary descent of the crown, any disability formerly belonging to the heir's body natural (including the disability of foreign birth) was described to be discharged *ipso facto* by the prerogatives of his body politic. However, scholars attending to the *Treatise* have commonly erred in assuming that this is all that the fiction of the king's two bodies achieves in Plowden's argument. Although the corporate status of the monarch is less frequently mentioned in part II of the *Treatise*, the fiction of the king's two bodies is nonetheless critical to Plowden's conclusion and his ultimate judgment in favour of the Queen of Scots' right to succeed Elizabeth. Indeed, the success of the entirety of Plowden's argument for Mary's 'subjection by homage' in part II of the *Treatise* hinges upon his canny use of the king's two bodies to overcome the problematic non-performance of homage by Mary and her Stewart forebears (29r). The two distinct parts of Plowden's *Treatise* thus demonstrate the Janus-faced quality of the two bodies doctrine, as set out

[51] See volume 2, appendix 1, p. 113.

in chapter 2 of this thesis; the theory is equally important in his *Treatise* as a way of empowering Mary as a would-be monarch and as a way of constraining the prerogatives of Elizabeth as a reigning monarch. Plowden's ability to adapt his theory of the king's two bodies to help resolve various exigent points of dispute in the Elizabethan succession debate indicates that there was, as Plowden suggested, 'never greater error' committed by the anti-Stewart succession tract writers than their failure to 'understand, or at the leastewyse marke the two bodyes of the kyng' (17r). As this thesis has continually demonstrated, it is when appealing to the theory of the king's two bodies that Plowden's *Treatise* offers its most potent contributions to the succession debate.

5.5. A Subjunction: Henry VII

Plowden aptly describes chapter III of the second part of his *Treatise* as a 'subjunction' to his antecedent legal and historical arguments (29r). The title of this chapter — '[t]he opinion of king Henry the seventh touching the Comodities or incomodities that this Realme should have if it discended to the quene of Scottes' — indicates how appropriately the arguments of this chapter might have been incorporated within chapters VIII and IX of part I of the *Treatise*. We may recall that in those chapters Plowden squarely confronts the perceived 'inconvenience' of the Stewart succession and addresses the fears expressed by Protestant polemicists about England's political future and the legal liberties of Englishmen if England should be ruled by a Scot. There, Plowden refutes the objections to a Scottish succession by exposing the greater 'inconvenience' and dangerous legal absurdity of contravening the hereditary descent of the English crown. As in these earlier chapters, Plowden acknowledges that chapter III, part II of his *Treatise* responds to 'the provocation of the author of the prynted boke' (i.e. *Allegations Against*), who foretold that England would 'be bound to a forreine nation', 'put to a generall sacke', and that Englishmen would 'lyve in servitude and bondage' and suffer other 'myseries' if Mary Stewart should succeed to the English throne (29r). Why then, we must ask, did Plowden omit 'the opinion of king

Henry the seventhe', predicting a Scottish succession and admitting its advantages, from these earlier chapters, reserving that evidence instead for the conclusion of his *Treatise*?[52]

Plowden found Henry VII's prediction of the commodities which 'shoulde ensue to this realme if the same shoulde come to the quene of Scottes' in the twenty-sixth book of Polydore Vergil's *Anglica Historia*. In this book, Vergil reported the negotiations for the marriage between James IV of Scotland and the infant English princess, Margaret Tudor. At the encouragement of Richard Fox, the bishop of Durham and *de facto* proconsul of the Anglo-Scottish border, Henry received an official Scottish delegation from James, asking for Margaret's hand in marriage, before referring the proposals to his Privy Council. The council feared that it might come to pass that the issue of this prospective marriage would one day inherit the English throne and made their discomfort with this prospect evident. Henry VII responded to these objections, as Plowden translates Vergil, as follows:

> If it shoulde so chance (as god forbede)[53] I see it wolde not come to passe that our kyngedome should take any hurte therby: because therby Englande shoulde not come to Scotlande, but Scotlande to England as the most noble head of the whole Isle, sythens always the lesse is wonte for his honor and renowne to be adjoyned to the greater (29v).

With the king's prognostication ringing in their ears, Henry VII's Privy Council unanimously agreed to support the dynastic match and commended his wisdom (29v).

Crucially, Henry VII's assurances regarding a prospective Scottish succession did not appear in the first printed edition of the *Anglica Historia*. When it was later included in the 1546 and 1555 editions of Vergil's history, it was frequently held to be Vergil's apocryphal invention.[54]

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[52] Plowden might also have incorporated Henry VII's predictions in chapter I, part II, where he pointed out the 'folyshe and unreasonable' nature of a law that would disinherit the foreign-born offspring of dynastic marriages in their grandfathers' realms (21r). See pp. 161-63, above.

[53] It is worth noting that the betrothal of Margaret Tudor and James IV took place before the death of Prince Arthur. Henry VII's 'god forbede' should thus be understood as a reflection that, if the crown descended to Margaret and her heirs, then both of his sons would have died without producing issue.

[54] McElroy, 'Executing Mary Queen of Scots', p. 163.

The authenticity of Vergil's account of the negotiations for the Anglo-Scottish match was the subject of particular dispute during the Elizabethan succession debate.[55] Henry VII's insistence that a dynastic union with Scotland would not jeopardise future English sovereignty had first been put forward in favour of the Stewart succession by William Maitland. In October 1561, Maitland wrote to Cecil arguing that 'the Contract off Mariage' between Margaret and James IV, as reported 'by your own [i.e. English] histories', proved that Henry VII 'meant not by the same Mariage to debarre her [Mary Queen of Scots], nor the Issue of her Body, from the Succession of his Crowne perpetually, bot rather the plat contrary'.[56] In January 1567, Maitland once again referred Cecil to Vergil's *Historia* and the contract of marriage between Margaret and James as one of the 'prouffes and reasons as may declare and fortifie' the Queen of Scots' title to succeed Elizabeth.[57] Undoubtedly following Plowden's *Treatise*, Leslie would later recount Henry VII's prognostication that a Scottish succession 'wolde be no thinge preiudiciall to Englande' in his 1569 *Defence*.[58] In their rebuttals of Leslie's tract, Glover and Fleetwood both disputed the authority and authenticity of Vergil's account, claiming that Vergil had not been present in England at the time of the marriage contract and that he had been taken in by a 'Scottishe enchaunter' in relaying a second-hand apocryphal report.[59]

Vergil's account of the marriage contract between James IV and Margaret Tudor and of Henry VII's assurances to his Privy Council was lent credibility in the early-seventeenth century when John Speed and Francis Bacon repeated the king's prediction that a dynastic union with Scotland would not inconvenience England as the larger and *de facto* superior of the two

[55] *EESQ*, p. 37; 'Executing Mary Queen of Scots', p. 163.
[56] *A Collection of State Papers Relating to Affairs in the Reigns of King Henry VIII. King Edward VI. Queen Mary, and Queen Elizabeth, from the year 1542 to 1570*, ed. Samuel Haynes (London, 1740), p. 373.
[57] *Egerton Papers*, p. 45.
[58] Leslie, *Defence*, ff. 80v-81r.
[59] Bodl. MS Carte 105, f. 59v (Glover); Bodl. Rawlinson MS C 85, quotation at f. 19r (Fleetwood).

kingdoms.[60] Speed and Bacon's repetition of this passage from Vergil's *Historia* was perhaps a result of the emphasis that James I had placed upon his 'descent lineally out of the loins of Henry the Seventh', whom he significantly dubbed 'the first Uniter'.[61] Just as Henry VII's marriage to Elizabeth of York had united 'the Two princely Roses of the Two Houses of Lancaster and York' and had put an end to the 'civil and bloody dissension betwixt these two Houses', James declared in his first English Parliament that a similar union, 'of the Two ancient and famous Kingdoms' of England and Scotland, was 'made in [his] blood' and had been expedited by Henry VII as the 'groundlayer' of peace between the two kingdoms.[62] Meanwhile, panegyrists celebrating James's accession in 1603 had been quick to point out the significance of the marriage between James IV and Margaret Tudor exactly one hundred years before.[63]

Plowden, then, was neither the first nor the last to recognise the significance of Henry VII's willingness to arrange a dynastic match between England and Scotland and his acceptance of a Scottish succession to the English throne as a method of justifying Mary Stewart's succession. However, Henry VII's assurance that 'it wolde not come to passe that [England] should take any hurte' by a Scottish succession — warranted on the basis of England's *de facto* superiority over Scotland as the bigger and economically stronger of the two nations — is as a particularly apt way of summarizing the second part of Plowden's *Treatise* (29v). As we have seen above, chapters I and II of the second part of Plowden's tract insistently depict Scotland as lesser than England. The jurisdictional superiority of England is writ large in Plowden's historical account of successive Scottish kings performing homage to their English suzerains. Furthermore, Plowden's innovative concept of the dual allegiance of the subjects of Scotland —

[60] John Speed, *The history of Great Britaine* (London, 1611), p. 747. Bacon, *The historie of the raigne of King Henry the Seventh*, ed. Kiernan, p. 145.
[61] *Journal of the House of Commons, vol. 1, 1547–1629* (London: His Majesty's Stationery Office, 1802), p. 143, quoted by R. Malcolm Smuts, *Political Culture, the State, and the Problem of Religious War in Britain and Ireland, 1578-1625* (Oxford: Oxford University Press, 2023), p. 451.
[62] *Journal of the House of Commons*, *vol. 1,* p. 143.
[63] Smuts, *Political Culture*, p. 452-53.

whom, he argues, owe mediate allegiance to the king of England by proxy of their king being a tenant-in-chief of the English king — has already established a sense that 'the whole Island' of Britain is one body politic, with the king of England as its 'most noble head' (29v).[64] In this way, we might think of Henry VII's assurance to his Privy Council (reported by Vergil) as providing a succinct and authoritative encapsulation of that which Plowden had laboured to prove in the preceding two chapters of his argument; that is, that in the event of a Scottish succession to the English throne, England would remain jurisdictionally superior over Scotland. If Plowden had merely incorporated Vergil's account of the marriage contract between James IV and Margaret Tudor earlier in his *Treatise*, the grounds upon which Henry VII explained that England would not 'take any hurte' by a Scottish succession might have been far less certain. Of course, many sixteenth-century Englishmen would have believed that Scotland was lesser than England, but the second half of Plowden's *Treatise* provides an extensive historico-legal justification of this belief and its constitutional significance in the Elizabethan succession debate. Thus, by reserving Henry VII's justification of an Anglo-Scottish dynastic union for the conclusion of his *Treatise*, where it functions as an encapsulation of that which has already been proven, Plowden emphasises the 'kynges wysdome' and provident regard for the future prosperity of England and Britain (29v).

To accentuate the authority of Henry's determination, Plowden attests that various extant histories and laudatory verses had compared the king to 'Saloman for wisdom and to Vlisses for worldlye policye' (29v). Whilst Henry was repeatedly praised as a second Solomon, comparisons between the Tudor king of England and the legendary king of Ithaca were far less common.[65] The telling comparison to Ulysses potentially indicates that Plowden was recalling an

[64] Famously, in a speech to the English Parliament in March 1604, James I described himself as the singular head of 'the whole Island' of Britain, which he imagined to be one unified body politic. See *Journal of the House of Commons*, *vol. 1,* p. 143.
[65] For a list of contemporary works in which Henry VII was compared to Solomon, see Sydney Anglo, 'Ill of the dead: The posthumous Reputation of Henry VII', *Renaissance Studies*, 1 (1987): 27-47, at p. 29, n. 8. In the early-seventeenth century, Bacon famously described Henry VII as

anonymous elegy printed by Wynkyn de Worde in 1509. To my knowledge, this is the only work in which Henry is likened to both 'Salomon in wysdom' and to 'vlyxes in polecy'.[66] Plowden also adds that Henry VII's Privy Council, who were persuaded to accept the dynastic match by force of the king's providential opinion, were 'as grave a Councell as any prynce in those days had' (29v).[67] By demonstrating that the significance of his antecedent historico-legal arguments had been anticipated by Henry VII and his grave councillors, Plowden ensures that his *Treatise* appears not as a captious piece of legal cavillation, but as a wholly orthodox account of English constitutional and legal fact. In doing so, Plowden presents a final straightforward choice to his reader. One can either agree with Henry VII and his council that the threat posed to England and its subjects by a possible Stewart succession was negligible and that England stood to gain by a union with Scotland. Alternatively, one can agree with Hales and his followers, whose legal ignorance in the matter of the succession had been insistently proven throughout the *Treatise*.

Aside from using Henry VII's providential opinion on the Stewart succession to exemplify, and to lend authority to his antecedent historico-legal arguments, there was another possible benefit in Plowden returning to the fifteenth century to conclude his *Treatise*. I suggest that Plowden wistfully recalls Henry VII's reign as a period as a period of relative simplicity regarding the succession to the English crown. In this period, long before Henry VIII's statutory limitation of the succession complicated matters, the legal, historical, and constitutional arguments of Plowden's *Treatise* might have been sufficient on their own merits to justify a Scottish succession to the English crown. In the event, however, Henry VIII's will favoured the descendants of his younger sister, Mary, Queen of France, over the issue of his elder sister,

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'this Salomon of England'. See Bacon, *The historie of the raigne of King Henry the Seventh*, ed. Kiernan, p. 162.

[66] The elegy is sometimes erroneously attributed to John Skelton. See G.V. Scammel and H.L. Rogers, 'An Elegy on Henry VII', *Review of English Studies*, 30 (1957): 167-70.

[67] The wisdom and gravitas of Henry VII's counsellors was frequently stressed in Vergil's *Historia* and in Hall's *Chronicle*. See Steven Gunn, *Henry VII's New Men and the Making of Tudor England* (Oxford: Oxford University Press, 2016), p. 325.

Margaret, Queen of Scotland. Accordingly, Mary Stewart languished in the order of succession after her Suffolk cousins, such as Katherine Grey. For proponents of the Stewart succession in the 1560s, then, Henry VIII's limitation of the succession in his will was a significant barrier.[68] Without a way of invalidating the will, it was largely immaterial whether or not the Queen of Scots' 'foreign' birth excluded her from the succession.

Plowden admits this to be the case at several junctures throughout his *Treatise*; in the preface to the tract, as well as in the beginning of chapter VI, Plowden admits that the case he advances on Mary's behalf was conditional upon there being 'non other impediment' (1v, 7r) to her succession than her supposed alien status. Likewise, in chapter IV of the second part of his *Treatise*, Plowden concedes that the success of his efforts to prove that 'the Quene of Scottes is not by her birthe disabled to receive by discente the Crowne of Inglande' was contingent upon there being 'none other obstacle' in her path (30r). Despite professing himself to be entirely unwilling to dispute Henry VIII's limitation of the succession in the preface to his *Treatise* then, Plowden evidently recognised that he risked leaving his tract incomplete and ineffective without venturing some comment on the king's will.[69] For this reason, he was ultimately compelled to supplement the ingenious arguments of his *Treatise* with a 'briffe Declaration of the invaliditie of the laste will of the late kyng of famous memory King Henry the VIIIth' (30v). Plowden's *Brief Declaration* is the focus of the next chapter of this thesis.

[68] In a letter to Elizabeth from January 1567, Mary acknowledged that Henry's will 'lay as a bar in our way'. SP 52/ 13, f. 1.
[69] As I shall discuss in the next chapter, Plowden's statement that he was unwilling to discuss Henry's will only appears in Recension 1.

Chapter 6. Matter in Deed: the Validity of Henry VIII's Last Will and Testament

6.1. A New Motion

Following the completion of an early recension of his *Treatise*, and after an undefined 'long pause' in which his correspondent examined and extolled the worthiness of his arguments, Plowden reportedly received a 'newe motion' (31r). That was, to provide a postscript to his *Treatise* in which he should give his 'opinion touching the validitie or invaliditie of the laste will of king Henry the eighte' (31r). 'A briffe Declaration of the invaliditie' of Henry VIII's will appears in three of the six extant witnesses of Plowden's *Treatise* (30v).[1] In this chapter, I shall examine the strategies by which Plowden demonstrates the invalidity of Henry VIII's will and offer a novel analysis of why Plowden felt confident in dealing with this contested document despite his previous reticence to do so. I shall also consider the relationship between the *Treatise* and the *Brief Declaration*, exploring the fundamental differences between Plowden's analysis of matters of law in the former, and his exposition of a matter of fact in the postscript.

Before analysing the 'cause of the wryting of this declaration' as laid out in Plowden's preface to the *Brief Declaration*, it is worth recapitulating the legal muddle that Henry VIII's will had created (31r). Henry made the final amendments to his will in December 1546, with the main aim of revising Prince Edward's regency council and the list of his executors. Among the responsibilities of these executors was to judge the suitability of any future consort of his daughters, Mary and Elizabeth. The written consent of the surviving executors to any future marriage was a condition irrevocably 'knitt and invested' to the future accession of the illegitimate princesses to the throne.[2] Upon breach of this condition, Henry VIII instructed that

[1] The *Brief Declaration* does not appear in witnesses C, M, or Y.
[2] Although nominated in the limitation of the succession, both Elizabeth and Mary remained officially illegitimate. Henry's Third Succession Act (1544) previously indicated that their accession would be contingent upon their meeting 'suche condicions as by his Highnes shalbe

the crown should pass over his daughters to the heirs of his nieces, Frances and Eleanor.[3] Not only did Henry's will override the disabilities of bastardy by establishing conditions by which his illegitimate daughters might succeed to the throne, but it also bypassed the ordinary course of hereditary descent by advancing the claims of his younger sister, Mary, over his elder sister, Margaret. The Queen of Scots, descended from Margaret Tudor by her marriage to James IV, was consequently left to languish in the order of succession behind her Suffolk cousins. So strongly did Henry VIII's will seem to forestall the Queen of Scots' claim to the English throne that, in December 1566, Mary was willing to acknowledge Elizabeth as the legitimate Queen of England and renounce her own claim to the same (at least whilst her royal cousin was still alive) in return for a judicial inquiry into the validity of the document.[4] Specifically, Mary asked Elizabeth to interrogate surviving witnesses of the signing of the will to determine whether it had been signed with the king's hand, or merely stamped with an impression of the royal signature.[5] As the Third Act of Succession (35 Hen. VIII, c.1) had stipulated that Henry had plenary power to assign the crown only by his letters patent or by his last will 'signed with his most gracious hand', Mary and the proponents of her succession alleged that a stamped will could have no effect.[6] It was imperative that they proved the invalidity of the king's will; so long as it remained valid, there was little point in arguing (as Plowden set out to do in his *Treatise*) that Mary's Scottish birth did not prevent her succession. '[I]f the laste will of kinge Henry the eighte conveied away the Crowne to others', Plowden admits, then all disputation surrounding the possibility of the Stewart succession was moot (31r).

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lymitted by his letteres patentes under his great Seale, or by his Majesties laste Will in writinge signed with his most gracious hande'. See *Statutes*, III. 955.

[3] It remains unclear why Henry overlooked his nieces in favour of their heirs. See, p. 28, n. 47, above.

[4] *CSP Spain*, I. 601.

[5] The procedure of stamping the king's signature on official documents is described above, p. 28.

[6] *Statutes*, III. 955.

6.2. 'The Cause of the Wryting of this Declaration'

It is necessary to say something here of the three extant manuscript witnesses of the *Brief Declaration*: H, R, and D. I have argued above that witnesses H and R are copies of an early recension (Recension 1) of the *Treatise*, addressed to a judicial colleague — possibly Sir Anthony Browne — who entreated Plowden to write a tract on the succession on behalf of the Duke of Norfolk and Elizabeth's Privy Council.[7] In both H and R, a short exordium to the *Brief Declaration* sets out the 'cause of the wryting of this declaration' and describes the long pause between the submission of the *Treatise* to this judicial colleague for review, and the addition of a necessary postscript relating to Henry VIII's will (31r). Although the *Brief Declaration* also appears in witness D, this exordium was omitted. This omission was necessary to ensure consistency with the revised preface to the *Treatise* proper as found in witness D (and in the other witnesses of Recension 2). In the revised preface, Plowden figured the *Treatise* and *Brief Declaration* as two books of one coherent document rather than discrete investigations.[8] In what follows, I shall use the exordium to the *Brief Declaration* as it appears in witnesses H and R to explain why Plowden was eventually persuaded to dispute the validity of Henry VIII's will, despite having previously disclaimed all intention of doing so. I shall also suggest why Plowden retroactively claimed continuity between the two distinct works when revising his *Treatise*.

Having but 'lytle leasure to buyse [himself] in serche' of evidence and testimony regarding the validity of Henry VIII's will — being 'greatly occupyed in Juditiall causes' — Plowden's correspondent reportedly urged him to add a postscript to his *Treatise* in order that his sophisticated historico-legal arguments 'should not be in vaine' (31r). Without this auxiliary analysis, Plowden's judicial colleague exclaimed, his 'former treatise [was] to non effecte' (31r).

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[7] See pp. 53-54, above.

[8] Notably, whilst witnesses M and Y indicate that a 'second book' containing a 'declaration of the invaliditie of the last will and testament of king henry the eight' should append the *Treatise*, no such book appears in either of these witnesses. See M, f. 3r; Y, f. 3r.

We might well question whether Plowden would not have always recognised as much when writing his *Treatise*. It must have been obvious to Plowden from the outset that if Henry VIII's will had 'conveied away the Crowne to others after our quenes deathe without yssues' then any debate as 'to whom it oughte to discende is nedeless' (31r). Why, then, did Plowden originally reject all 'intente to meddle' with the will in his *Treatise* (1v)?

In answering this question, the great danger in disputing the validity of Henry VIII's will must first be admitted. Like her half-sister, Mary, Elizabeth had claimed her title to the throne via her father's will and legislation on the succession. 'An Acte of Recognition' (1 Eliz. c. 3) passed in the first year of Elizabeth's reign declared that Henry VIII's Third Succession Act — by which she claimed her parliamentary title — should 'remayne the Lawe of this Realme for ever'.[9] Although, as Plowden's *Brief Declaration* ultimately bears out, a case could be made to dispute the validity of Henry VIII's will without invalidating the antecedent statutory acts which had enabled the limitation of the succession via that will, there was nonetheless great peril in challenging one of the key components of Elizabeth's title to the crown. Moreover, Henry VIII's various succession acts (25 Hen. VIII, c. 22; 28 Hen. VIII, c. 7; 35 Hen. VIII, c. 1) had all included explicit stipulations that any person, including their 'aydours counsaillors maynteyners and abettors', who disturbed the king's limitation of the succession 'shall suffer paynes of Death and lossess and forfeytures as in cases of Highe Treason'.[10] That Henry's penal provisions were still regarded as a threat in the mid-1560s is indicated by in a largely overlooked manuscript succession tract: 'a "letter" chastising one of Mary's supporters for participating in extra-parliamentary meetings on the succession', likely written in early 1567.[11] The anonymous author of this 'letter' twice counsels his addressee that his machinations on Mary's behalf come 'within

[9] *Statutes*, IV. 359.
[10] See *Statutes*, III. 473, 655, 958.
[11] For an introduction to and transcription of this letter, see Mortimer Levine, 'A "Letter" on the Elizabethan Succession Question, 1566', *Huntington Library Quarterly*, 19 (1955): 13-38. For a recent revision of Levine's analysis, see Chou, 'Parliamentary Mind', pp. 481-85, quotation at p. 481.

the compass of high treason' as set out by Henry VIII's Succession Acts.[12] The aforementioned 'Acte of Recognition' (1 Eliz. c. 3) had effectively confirmed Henry's penal provisions in 1558 and made any potential challenge to the king's limitation of the succession an especially dangerous task.[13] Under such circumstances, it is not hard to see why Plowden originally declared that 'if tytle of the Crowne in defaulte of heires of the quenes highnes bodye be by testament and laste will of kyng Henry the eighte or otherwise geven to any it shall not be by me impugned' (1v).

It is also possible that Plowden felt that he was not aptly suited for the task of evaluating the validity of Henry VIII's will and hoped that upon finishing his *Treatise* someone else might otherwise resolve the matter. In the preface to the *Brief Declaration* Plowden points out that the validity of the will could be easily determined by consulting the various witnesses of its signing and by examining the extant instrument. Plowden thus recognises that the validity of Henry VIII's will 'resteth upon matter in dede, and not upon matter in lawe' (31r). '[M]atters in dede', Plowden writes, 'belongeth to witnesses' and required none of the professional learning or common erudition which 'belongeth to men of [his] science' (31r).[14] Plowden thereby gestures to an important distinction in English common law, between matters of law and matters of fact.[15] This procedural distinction was already well established by the mid-sixteenth century.[16] Matters

[12] Bodl. MS Ashm. 829, ff. 37v, 38v.
[13] Extant reports of a December 1566 case suggest that Elizabeth's leading judges certainly considered her 1588 Act of Recognition to have confirmed Henry VIII's penal provisions. See 'The Coppie of a case received of the Queenes Majestie 28. Dec: 1566', BL Hargrave MS 9, f. 34r. This case is discussed in detail below.
[14] Common erudition — the settled learning of the inns of court — is discussed in *OHLE*, pp. 467-72. See also Baker, *Law's Two Bodies*, pp. 59-91.
[15] We can regard a 'matter in dede' to be a particular type of matter of fact, which is to be proven on the evidence of a deed or record. It was not unusual for matter in deed and matter in fact to be used synonymously or interchangeably, as distinct from a matter in law, as Plowden does in his *Treatise*. See *Co. Litt.* 393v.
[16] Sir Thomas Smith observed the established distinction between matters of law and fact in his influential account of the English commonwealth and judicial system; *De Republica Anglorum*, ed. Mary Dewar (Cambridge: Cambridge University Press, 1982), pp. 95-96. The earliest example of the distinction between matters of law and fact is Sir Thomas More's *Debellacyon of Salem and Bizance* (1533). However, More's description of the division seems to suggest 'common use and

of fact concern 'what has or has not happened or what is or is not the factual situation' in a given legal dispute and are determined by lay jurors.[17] Meanwhile, matters of law depend 'not on what has or has not happened or what is or is not the factual situation, but on the state of the law' and are determined by professional judges via the interpretation of statutes, court decisions and legal principles.[18] Whereas, then, Plowden's professional expertise made him well placed to examine whether Mary Queen of Scots' foreign birth disabled her from succeeding to the English throne (a matter of law) in his *Treatise*, he admits in the extant preface to the *Brief Declaration* that he can only recapitulate the evidence of others relating to the signing of Henry VIII's will (a matter in deed or matter of fact). Acting as a layman, evaluating the evidence pertaining to the king's signature, was perhaps less stimulating a prospect for Plowden than using his expertise to interpret the principles of English common law as they related to the succession of the crown. I return to the distinction between matters of law and matters of fact below to illuminate the fundamental differences between Plowden's *Treatise* and *Brief Declaration*.

Whilst Plowden may have regarded investigating Henry VIII's will as a less intellectually rewarding exercise than the writing of his *Treatise*, I nonetheless think it unlikely that he would have contemplated leaving his substantial tract incomplete by ignoring the will entirely. As suggested above, it is also all but impossible that Plowden required external prompting before recognizing that his *Treatise* would be ineffectual without also proving the invalidity of Henry VIII's will. However, if we accept (as I think we must) that Plowden always intended to include an examination of Henry VIII's will in his treatise on the succession, we must ask why he chose to write the *Brief Declaration* as a separate, supplementary work, rather than incorporating it directly into the *Treatise* proper?

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widespread understanding rather than innovation'. Barbara Shapiro, *A Culture of Fact: England, 1550-1720* (Ithaca, NY: Cornell University Press, 2000), p. 10.

[17] 'Issue of Fact', *Jowitt's Dictionary of English Law*, ed. Daniel Greenberg and Klara Banaszak (5th edn., 2 vols., London: Sweet and Maxwell, 2019), I. 1345.

[18] 'Issue of Law', *Jowitt's Dictionary of English Law*, I. 1345.

The most plausible explanation for the 'long pause' separating the two works is that during the composition of his *Treatise* he was awaiting the verdict of a judicial interrogation regarding the legacy of Henry VIII's Third Succession Act. As Baker has summarised, a case was put before the judiciary in December 1566 — apparently with the Queen's personal authority — which enquired whether it was treason to do anything to prejudice the limitation of the succession as set out in Henry VIII's succession acts and subsequent will.[19] Surviving reports of this case have been attributed to Sir Edward Saunders, the Chief Baron of the Exchequer and former Chief Justice of the King's Bench.[20] Saunders' extant reports of the case were previously thought to be the only extant record of this overlooked enquiry and do not reveal the ultimate decision of the judges. However, as explored below, Plowden's *Brief Declaration* potentially offers hitherto unrecognised evidence concerning the judicial determination and its hugely significant legal-constitutional consequences in 1566/67.

I think it is very likely that Plowden was aware of this investigation as a matter of ongoing judicial debate when originally writing his *Treatise*, and prudently decided to await the decision of (or at least further information from) the judges before adding a postscript relating to the validity of Henry VIII's will. That is to say that Plowden always contemplated an investigation of Henry's will, but that an abundance of caution persuaded him to separate the *Brief Declaration* from his *Treatise*. In respect of the ongoing case, an early recension of Plowden's *Treatise* (as it appears in witnesses H and R) prudently declared that he had no intention to meddle with the legal instrument, and conceded that his legal arguments in favour of a Scottish succession would only stand 'if non other obstacle ther were to the contrary': i.e. if Henry VIII's will had not successfully advanced the Suffolk line at the expense of the Stewarts (1v, 7r, 30r). By the time that he came to write his *Brief Declaration*, Plowden evidently received some assurance that disputing the will's validity was permissible — or, at the very least, unlikely to be punishable

[19] Baker, *Dyer*, I. xlix.
[20] Baker, *Dyer*, I. xvii.

as treason. Reassurance on this matter very likely came directly from the same individual to whom the early recension of the *Treatise* was addressed: Plowden admits that this individual had superior knowledge of the December 1566 investigation (37v). Plowden's disclaimer lends credence to the view that his *Treatise* was originally prepared at the behest of a judicial colleague, very likely Sir Anthony Browne. It is possible that Browne, who remained active as a puisne judge of the common pleas until his death in May 1567, was amongst the judges consulted by Elizabeth regarding her father's succession act. It is also possible that Browne learned of Elizabeth's enquiry from Saunders, the only individual whom we know for certain was involved in the December 1566 case.[21] It was almost certainly after the judges reached a decision in this case that Plowden's correspondent urged him to write about the will, now recognising that it was not only imperative but safe, for Plowden to do so (31r). When retroactively revising his *Treatise* and *Brief Declaration*, after the December 1566 case had concluded, Plowden was therefore confident in placing his analysis of the validity of Henry VIII's will as continuous with his historico-legal arguments on the succession.

Having declared the 'cause of the wryting of this declaration', Plowden concluded the exordium to his *Brief Declaration* by outlining the 'devision of the matter treated upon' and explaining the 'order of [his] proceding' (31r-31v). Plowden first describes how he will lay the foundation of his argument by establishing the credibility of the witnesses upon whose evidence he relies in refuting the validity of Henry VIII's will. Having done so, Plowden claims that he will 'confute the assertions and objections made to oppunge' the evidence of the will's invalidity. In what follows, I shall analyse Plowden's *Brief Declaration* in chronological order: first addressing the credibility of the evidence used by Plowden to prove the invalidity of the will, before turning

[21] It is also possible that Plowden heard of the case directly from Saunders. The two men had a personal and professional relationship through their mutual acquaintance, Sir Francis Englefield. See *EP*, p. 101.

to his refutation of prior succession polemics in which Henry VIII's limitation of the succession and advancement of the Suffolk line was fervently upheld.

6.3. A Foundation of Credit

The first chapter of Plowden's *Brief Declaration* positions his argument extremely carefully by accepting two incontrovertible truths regarding Henry VIII's limitation of the succession. The first is that Henry's succession acts gave him 'power and aucthoritie' to

> gyve dispose and lymitt by his graces lettres patentes under the greate Seale or else by his highnes laste will made in wryting & signed with his moste gracious hande [...] to suche person in remaynder or revercion as shoulde pleas his highnes (31v)

Levine has argued that the reluctance of Stewart polemicists ('who would not have left a promising stone unturned') to 'dispute Parliament's right to authorize Henry to settle the succession by will is clearly indicative' that Plowden's contemporaries 'saw nothing unconstitutional about such an authorisation'.[22] Even Maitland of Lethington, perhaps Mary's staunchest supporter in the mid-1560s, begrudgingly conceded that 'full power and authoritie was given unto the sayd King Henrie to give, dispose, appoint, assign, declare, and limite [...] the imperiall crowne of that realme' and that Henry's right to do so could not 'be made voyde onlesse some circumstances materiall doe adnihilate the sayd limitation and disposition of the crowne'.[23] The exception to Levine's rule is the anonymous tract, *Allegations in Behalf* (1565). Whilst accepting Henry's statutory right to limit the succession, the author of *Allegations in Behalf* questioned whether 'a Turk, an infidell, an infamous approbrious person, or a foole, or a mad man' might be given the crown of England against the 'honour & dignitie' of the same.[24] The

[22] *EESQ*, pp. 150-151.
[23] *Egerton Papers*, pp. 45-46.
[24] Bodl. MS Ashm. 829, ff. 50-50v.

author indicated that Katherine Grey, against whom the tract was written, was of such opprobrious ilk and thus could not be accepted by Parliament as Elizabeth's successor, regardless of Henry VIII's limitation of the succession. However, the anonymous author of *Allegations in Behalf* erred when he argued that Parliament would not have granted Henry 'power or aucthoritie to give or leave the crowne to eny person not legittimate born'; it was precisely Henry VIII's authority to limit the succession to his illegitimate daughters that had granted Queens Mary and Elizabeth their parliamentary rights to the throne.[25] For his part, Plowden avoided such an imprudent line of argument in his *Brief Declaration*, accepting as a second incontrovertible truth that Henry VIII's will did 'gyve and lymitt the imperiall Crowne of this realme [...] to the heires of the body of the lady Frances [Henry VIII's] sister Maryes doughter in tayle with remaynder over to the heires of the Ladye Elinor' (31v). Having accepted that Henry did have 'power and aucthoritie' to designate the succession via his will and that his will favoured the Suffolk claim, Plowden found scope to challenge the limitation of the succession on the ground that 'the acte that geveth power to the king to dispose of the Crowne by his will in wryting signed with his hande is not pursued when his laste will is made and not sygned with his hande' (32r). That Henry VIII's will had not been signed manually but impressed with the dry stamp was the kind of material circumstance that might 'adnihilate the sayd limitation and disposition of the crowne' to which Maitland had gestured in his contemporary letter.[26] Plowden's preliminary explanation of why Henry's will was invalid if it were not signed with the king's hand is indicative of the fundamental differences between the *Brief Declaration* and the *Treatise*.

In chapter V, part I of his *Treatise*, as part of his systematic exposition of the king's two bodies, Plowden explained at length why it is that kings, and other corporations sole, cannot make testaments (5v-6r). As part of this lengthy explanation, Plowden recalled a 1559 Exchequer

[25] Bodl. MS Ashm. 829, f. 50v.
[26] *Egerton Papers*, p. 46.

case, concerning the posthumous recovery of Sir William Cavendish's debts.[27] In this chapter, Plowden also delivers one of the most striking metaphors of his *Treatise*, describing the 'denyall of the lawe to the kyng to make a testament' as a kind of restraint or (perhaps) amputation: 'although his naturall body [has] handes', Plowden argues, 'he can not gyve or delyver with them by order of the comen lawe' (6r).[28] In contrast to the comprehensive analysis of the monarch's incapacity to make testaments offered in the *Treatise*, Plowden matter-of-factly states in the *Brief Declaration* that Henry VIII 'coulde make no will by comen lawe of the Crowne whiche he enjoyeth in his body politicke' and was only 'therunto aucthorised by the acte [35 Hen. VIII, c. 1] using a certaine order and forme' and 'must of necessititie followe the same order and forme if he will execute the power geven him by the acte' (31v). Pointedly, the *Brief Declaration* does not engage the questions of why Henry VIII could only make his will under extraordinary statutory licence or why he was therefore bound to follow a precise mechanism in making his will. Whilst recalling the relevant passage from earlier in the *Treatise* doubtless enriches the argument being made in the *Brief Declaration*, Plowden does not trouble to refer readers back to chapter V, nor to recapitulate the incapacity of corporations sole to make testaments. He merely adds that 'a man may putt cases infinite' to prove why Henry VIII could not make a testament without statutory licence, but remarks that in this clear-cut case 'to bring examples is nothing nedefull' (32r). Whilst gesturing implicitly to a matter of law, then, Plowden confines the parameters of his argument exclusively to 'matter[s] in dede' and to bare facts (31r).

Plowden remarked that he had clear 'cause to thinke that the said laste will made in wryting [...] was not signed with the hande of the said late kyng, but the stampe was only putt therto' after having consulted surviving witnesses of the signing of the will (32r). The first witness called upon by Plowden is Henry VIII's chief secretary and, at the time of the king's

[27] This case is discussed, per Attorney-General Gilbert Gerard, in Plowden's report of *The Case of Mines* (1568). See *Commentaries*, p. 231.
[28] The suggestion of amputation is highlighted by Hutson, 'On the Knees', p. 41.

death, his 'most intimate confidant', William Paget.[29] Plowden recounts how, in the first year of Queen Mary's reign, Paget came before the Commons to 'testify his knowledge touching kyng Henrye the eightes assent by letteres patentes to the pretendid acte of the surmysed atteinder of the late Duke of Norfolke deceased grandfather to this Duke that nowe is' (32r). In his 1553 testimony, Plowden recalls, Paget also boldly stated the invalidity of Henry VIII's will.

In January 1547, Thomas Howard, third duke of Norfolk, confessed to conspiring with his son, Henry Howard, earl of Surrey, in a treasonous plot to overthrow Henry VIII and assume control over England.[30] Norfolk was attainted later that month and remained in the tower awaiting execution. Henry VIII's death, the night before Norfolk was scheduled to be executed, spared his life. Norfolk remained a prisoner in the Tower for the entirety of Edward VI's reign, before eventually being pardoned by Mary I in August 1553. Despite being restored to the peerage by Mary, Norfolk's attainder remained a personal embarrassment and legal constraint, and the duke eventually brought a bill into Mary's first Parliament in October 1553 to declare the act invalid.[31] During discussion of this bill, William Paget testified that Henry VIII's assent by letters patent to Norfolk's attainder had not been subscribed by the king's hand but had merely been stamped: invalidating the attainder. During this testimony, Plowden reports Paget to have also affirmed 'on his honor that he was privey to the beginning, proceding, and ending of the said laste will' and that he could confirm 'that the same was not subscrybed by the hande of the said kyng, but the Stampe only putt therto' (32r). In this attestation, Paget reportedly referred to the testimony of William Clerk — the aptly named clerk of the privy seal in Henry VIII's reign and one of the individuals responsible for stamping documents with an impression of the king's signature. Clerk could confirm, Plowden reports Paget to have testified in 1553, that Henry's will

[29] See Ralph Houlbrooke, 'Henry VIII's Wills: A Comment', *The Historical Journal*, 37 (1994): 891-899, at p. 892.
[30] David Head, *The Ebbs and Flows of Fortune: The Life of Thomas Howard, Third Duke of Norfolk* (Athens, GA: University of Georgia Press, 1995), p. 226.
[31] Head, *Ebbs and Flows*, pp. 235-238.

was indeed stamped and not signed by Henry's hand (32r). Indeed, Henry VIII's will had been entered in Clerk's official list of stamped documents.[32] In a seemingly private subsequent conference with Paget, Plowden claims that he was informed that Paget 'wrote the will it selffe or the first draughte therof with his owne hande, and sawe the same prosecuted to the ende' (32r).[33] He therefore states that Paget was aptly placed to speak to its stamping (32v). Plowden was not alone in recognizing the significance of Paget's testimony for the Stewart succession. In January 1567, Maitland reminded Cecil of the 'attestation of the late Lord Pagett' amongst his 'prouffes and reasons [that] may declare and fortifie' the Queen of Scots' title to the English throne.[34] Furthermore, in December 1566, Guzman de Silva reported that it was 'on account of' Paget's assertion that Henry VIII's will 'had not been signed by his own hand' that the Queen of Scots asked Elizabeth to 'have some of the witnesses to the will examined in support of her claims inasmuch as the document does not fulfil the conditions laid down by Parliament'.[35]

Having recapitulated Paget's testimony, Plowden attests to the credibility of his account. In a series of rhetorical questions, Plowden asks why a man of such credit as Paget, a baron of the realm at the time of his testimony and described as one in whom no 'neede, menasse, or feare' was to be presumed, would lie about the will (32r). It is striking that although Plowden claims that Paget's noble 'estate augmenteth his Creditt', his gentlemanly status is insufficient to put his testimony beyond reproof, and the credibility of Paget's account requires other sources of validation (32r). For instance, Plowden adds that there was no reason for Paget to lie in this

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[32] That Clerk did not enter Henry VIII's will into his register of stamped documents for December when the will was made, but in the January register, has often been taken as evidence that the will was forged after the king's death. See Ives, 'Henry VIII's Will'.
[33] It is unclear when such a conference between Plowden and Paget might have occurred. Paget died in 1563, so this conference could not have taken place during Plowden's research concerning the *Brief Declaration* in 1567. As Plowden returned for Wallingford in the 1553 Parliament, it is plausible that he spoke with Paget immediately after his testimony was given before the Commons in October 1553. If this were the case, it is remarkable that Plowden anticipated the constitutional significance of Paget's testimony for the debate over the Elizabethan succession a decade later.
[34] *Egerton Papers*, p. 47.
[35] *CSP Spain*, I. 601.

matter given that there was 'then no question made of the Succession of the Crowne' since it was hoped that Mary I would produce heirs of her natural body to whom the English crown would pass. Moreover, Plowden asks why, if Paget's testimony was suspected to be untrue, those who were set to lose out if the will was invalidated (the heirs of Frances and Eleanor) had not sought to challenge Paget's claims? Why, Plowden asks, had the Suffolk claimants not discredited Paget by investigating the other living witnesses of the signing of Henry VIII's will if they suspected him of spreading malicious falsehoods (32r)?

In fact, Plowden argues that consulting the other surviving witnesses of the 'signing' of Henry VIII's will would only 'verifye the former testimony of the Lorde Pagett' (32v). For instance, Plowden reports that he and 'dyvers others' were reliably informed of the stamping of the will by Sir Henry Neville, one of the grooms of Henry VIII's privy chamber and another of the witnesses of the king's will. As a knight 'discended of a noble house' and one in 'great Credit in his contrey', whose testimony could be corroborated through further investigation, Plowden forbids any to think that Neville, like Paget, would fail to tell the truth regarding the will (32v).

Plowden adds that 'there were many others present as witnesses' to the signing of Henry VIII's will, but that most of these men had since died, 'saving two with whom as yet [he had] not spoken' (32v). It is unclear whether Plowden genuinely intended to consult these two witnesses at some later date, but he certainly encourages other interested parties to seek out their testimony. In fact, Plowden claims that those concerned by the succession debate might 'demande [their] testimony', as a right belonging to 'everie subjecte of the realme being a member of the Corporation of the Crowne wherof the quene is heade' (32v). In this, Plowden recalls his justification for inquiring into the legality of Mary's right to succeed to the throne in the preface to his *Treatise*, where he had stated that 'if the heade do not well the body dothe not well for the diseas of the one is the grieffe of the other' and that 'the members ought to have care for the dirreccion of the heade' (1v). As in his *Treatise*, therefore, Plowden likens his investigation in the *Brief Declaration* to a public duty to the body politic.

Until these two surviving witnesses could be examined, however, Plowden argues that the strength of Paget and Neville's testimonies — each adding credit and 'faith to the other' — is sufficient to prove the invalidity of Henry VIII's will. Plowden adds that 'the testimony of two is in all lawes sufficient for prouffe of the matter in controversie' (32v). Plowden's assertion may well raise eyebrows amongst legal historians. Whilst Biblical injunctions provided an explicit justification for a two-witness rule in contemporary European ecclesiastical and civil law, English juries did not require any particular number of witnesses to prove a fact.[36] Indeed, as Plucknett has argued, English common law trials 'were by jury and not by witnesses — and no witnesses were needed to support the jury's verdict'.[37] The existence (or lack thereof) of a two-witness rule in English common law had been disputed in a 1550 case, *Reniger v. Fogossa*, reported by Plowden. In *Reniger v Fogossa*, the Attorney General Henry Bradshaw argued, on behalf of the prosecution, that it was an ancient English law that 'in every Trial there shall be two Witnesses at least', in accordance with the law of God, specifically 'the Book of Deuteronomy'. Bradshaw argued that as 'the Defendant ha[d] but one Witness which proves for him' then this testimony alone was consequently 'not sufficient'.[38] On behalf of the defendant, the Recorder of London and soon-to-be Chief Justice of the Common Pleas, Robert Brooke, along with one Atkins, argued to the contrary. Brooke and Atkins claimed that whilst 'it is true that there ought to be two Witnesses at least where the matter is to be tried by Witnesses only, as in the civil law, but here the Issue was to be tried by twelve Men, in which Case Witnesses are not necessary'.[39] The judges ultimately found for the defendant, upholding the sufficiency of one (or no) witness.

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[36] John Wigmore, 'Required Numbers of Witnesses: A Brief History of the Numerical System in England', *Harvard Law Review*, 15 (1901): 83-109. See also *OHLE*, pp. 361-64.
[37] T.F.T. Plucknett, *A Concise History of the Common Law* (5th edn, London: Butterworth, 1956), pp. 435-36. Although there is not space to discuss these statutes in detail, it should be noted that during the sixteenth century, several legislative enactments relating to trials for treason did stipulate certain numbers of witnesses (or accusers) to prove the guilt of an accused party. However, judges disputed how this legislation was to be interpreted in practice and the requirements were repeatedly revised and repealed. See *OHLE*, pp. 518-19.
[38] *Commentaries*, p. 8.
[39] *Commentaries*, p. 12.

Plowden's statement, that 'the testimony of two is in all lawes sufficient for prouffe of the matter in controversie' — which implies the insufficiency of fewer than two witnesses to prove a fact — therefore seems incongruous in relation to contemporary English common law (32v). Plowden would surely have recognised as much and his generalisation therefore seems uncharacteristically careless. However, this generalisation is perhaps permissible in the context of the *Brief Declaration*, confined as it was to matters of fact. We might suggest that Plowden simply found it expedient to refer in the most general of terms to the sufficiency of two concurrent witness testimonies to prove the facts of a case to illustrate his leading point: that the agreement between Paget and Neville's testimonies made the invalidity of the will even more convincing.

Feeling that he had sufficiently established the credibility of his witnesses of the stamping of the will, Plowden moves on to discuss the document itself. He reports that an examination of that document took place during the recent parliamentary session. Plowden claims that 'dyvers of the nobles of this realme being of the privey Counsell to the quenes highnes' (along with 'dyverse others') were shown the original instrument by the Lord Treasurer, William Paulet, marquess of Winchester (32v). Those who 'diligently & circumspectly' examined the will, Plowden reports, could attest that 'it sheweth it selffe plainly to be signed with the stampe, and not with the hande of the said kynge' (32v). Plowden was not alone in suggesting that a private examination of Henry VIII's will had taken place during the 1566 Parliament. The aforementioned 1567 succession tract in the guise of a 'letter' also reports that an inspection of the will took place in the winter of 1566. The author of this 'letter' recounts that when his addressee 'brought diverse of the noblemen to see the King's will some of them said that they knew not the signing thereof from King Henry VIII's own hand' — thereby contradicting the conclusions drawn by Plowden in his *Brief Declaration*.[40] Despite their countervailing conclusions, it is nonetheless illuminating to find reports that Elizabeth's privy councillors and premier

[40] Bodl. MS Ashm. 829, f. 38r.

noblemen had (if only informally) consulted Henry VIII's will in the latter months of 1566, preempting the official investigation requested by Mary Queen of Scots.[41] Although it might not surprise us to discover that such informal investigations were taking place, especially given the constitutional significance of Henry VIII's will, historians have nonetheless largely overlooked these important manuscript sources which record the curiosity of Elizabeth and her Privy Council.

Yet as evidence of the will's invalidity, Plowden's assertion that members of the Privy Council had seen the will and thought it likely to have been stamped was certainly less persuasive than the creditable testimony of the witnesses of the signing of the same. Indeed, Plowden's assertion that private consultation of the will had led some (significantly unnamed) individuals to believe it invalid might be considered more effective as a riposte to Hales' assertion that Henry VIII's will had been destroyed by Mary I. In his *Declaration* Hales had argued that only constats from the enrolment of the will during the reign of Edward VI survived after the original document had been 'defaced and destroyed' during the campaign of Mary I to 'undoe that whiche [Henry VIII] had done; to deface and dishonour him in all Thinges'. Hales even went so far as to allege that Mary had ordered the burning of her father's bones.[42] By asserting that the original will was still extant — specifically that it was kept safe by the Lord Treasurer in a 'rownde box or bagg of blacke velvett' — and had been examined by the Privy Council, Plowden could retort that Hales 'exclaymeth marveillously and accuseth he knoweth not whom' and could emphasise the 'temerarious rashness' of his opponent (32v). The importance Plowden placed on demonstrating the audacity and ignorance of Hales in his *Treatise* — continually emphasised above — is no less evident in his *Brief Declaration*. In fact, as I shall demonstrate

[41] It is, of course, possible that the letter writer and Plowden both invented their reports of the investigation of the will. However, as Levine has argued, 'it is difficult to believe' that Elizabeth and her Privy Council would not have privately examined it before promising a formal investigation to the Queen of Scots in December 1566. See *EESQ*, p. 160.
[42] Bodl. MS Ashm. 829, ff. 34v-35r.

below, the latter half of Plowden's postscript is almost entirely devoted to confuting Hales' attempts to uphold the validity of the will.

Before addressing Plowden's refutation of Hales's 'assertions and objections made to oppunge' the evidence of the will's invalidity, we might first consider a peculiar tangent taken by Plowden at the conclusion of the first chapter of his *Brief Declaration*. In this digression, Plowden addresses a certain '*presumptio violenta*' made against Queen Mary I (33r). As discussed above, Henry VIII's Third Succession Act had stipulated that if the king had no further offspring and his son, Edward, failed to produce an heir, then the crown should pass to the Princess Mary 'withe suche condicions as by his Highnes shalbe lymitted by his letteres patentes under his great Seale, or by his Majesties laste Will in writinge signed with his most gracious hande'.[43] The king's will subsequently stipulated the necessity of Mary (and Elizabeth) obtaining 'the consent and agreement of the pryvey Counsaillours [...] or the moost part of such of them as shall thenne be alyve' before getting married, or else the crown should pass over them as though they were 'dead without any yssue'.[44] This proved an immediate source of tension in Mary's reign, as the queen ignored her father's restrictions by marrying King Philip II of Spain without the approval of her father's surviving executors. Plowden recalls that sundry seditious 'pamphlettes and prynte[d]' texts consequently alleged that Mary's failure to obtain the 'assent and consente' of her father's executors for her marriage to Philip voided her right to the English crown (33r-33v).

Plowden may well have been remembering such tracts as *A Trewe Mirrour or glase wherin we maye beholde the wofull state of thys our Realme of Englande* (1556) or John Bradford's *The Copye of a lettre sent …to the… Erles of Arundel Darbie, Shrewsburye and Pembroke* (1556) which had indeed claimed that Mary's marriage to Philip had violated her statutory title to the throne. As Plowden correctly identified, the presumption of the invalidity of Mary's title in these tracts was used to justify anti-Marian conspiracies and violence against the Catholic queen. For instance, Henry Dudley

[43] *Statutes*, III. 955.
[44] TNA E 23/ 4, f. 14.

planned publicly to proclaim Henry VIII's will to lend 'an aura of legality' to his March 1556 rebellion.[45] Furthermore, having seized Scarborough Castle in April 1557, Thomas Stafford utilised Bradford's 1556 pamphlet to claim Mary was 'unrightful and unworthy' of the English throne. Drawing verbatim on Bradford's text, Stafford argued that 'both by the will of hir father, Kinge Henrye the viijth, and by the lawes of this noble realme of England, [Mary] hathe forfette the crowne, for marriage with a straunger'.[46] Yet why did Plowden feel so strongly that he needed to refute this '*presumptio violenta*' in his *Brief Declaration*, nearly a decade after Mary I's death? On one hand, Plowden's repudiation of these pamphleteers and rebels might be interpreted as him seizing an opportunity to defend the Catholic monarch to whom he owed much of his public advancement. Yet on the other hand, we might also understand Plowden's reproval of this '*presumptio violenta*' as an innovative, if highly outlandish, method of corroborating the invalidity of Henry VIII's will. This bears some explanation.

Plowden admits that Mary 'righte well understode of that condition' irrevocably knit to her title to the throne. However, he ventures that Mary also 'understode that' her father's will which placed those conditions upon her 'was of no validytie because of the wante of the signing with the proper hande of her father' (34r). Plowden states that it is 'beyonde all conjecture' to argue the contrary. If Mary felt she had required it, Plowden asserts, she might easily have gained the assent of her father's surviving executors, many of whom she retained in her employment and were 'dayly attendant upon her person' (34r).[47] Furthermore, Plowden outright dismisses any suggestion that Mary should have, even if she knew it to be unnecessary, sought the approval of her father's executors simply to clear 'all quarells and objections that mighte be made' against her

[45] D.M. Loades, *Two Tudor Conspiracies* (Cambridge: Cambridge University Press, 1965), p. 196.
[46] John Strype, *Ecclesiastical Memorials* (3 vols. in 6 parts, Oxford, 1822), volume III, part II, p. 516, quoted by Paulina Kewes, *Contesting the Royal Succession in Reformation England: Latimer to Shakespeare* (forthcoming, Oxford University Press)
[47] In constructing this argument, Plowden lists the executors of the king and the witnesses of the signing of his will. The former list in both H and R is incomplete — missing Thomas Bromley and Sir Edward North. These names were later supplied in the list found in D, f. 77r.

title (34r). It is here that Plowden surprisingly converts Mary Tudor — who during her five-year reign actively pursued several means of preventing the accession of her Protestant half-sister — into Elizabeth's benefactor.[48] By refusing to obtain the consent of her father's executors and capitulate to the terms of the will she knew to be invalid, Plowden argues, Mary refused to 'credit' those who stood to benefit by the 'revercion of the Crowne [...] for lacke of issues of the body of her & her sister Lady Elizabeth': i.e., the heirs of Lady Frances Grey and of Lady Eleanor Clifford.[49] By pretermitting the condition placed upon her title 'of purpose and not of ignorance', Plowden not only attests that Mary knew she did not need the permission of her father's executors to marry Philip (knowing the will to be invalid) but that in doing so she had created a powerful precedent for her sister to similarly disregard their father's will (34v). Plowden contends that Mary's foresight in refusing to 'geve Creditt to that that oughte not to have Creditt' is indicative of the 'purenes of [her] conscience' (34r). He implies that Elizabeth was free to follow her sister's precedent and ignore Henry VIII's invalid will. If she so chose, Elizabeth might thus recognise the Queen of Scots as her heir apparent. Although undoubtedly a creative argument, and one with the double advantage of repudiating the seditious pamphlets of the previous decade, the precedent set by Mary I in ignoring her father's will was unlikely to convince the Protestant political nation that Elizabeth should do the same. Perhaps recognising as much, Plowden reiterates the strongest evidence that Henry VIII's will was invalid: Paget and Neville's testimonies to that effect. It is with an affirmation of Paget's 'honour & Creditt' that Plowden concludes the first chapter of his *Brief Declaration*, deeming the 'foundation' of his argument to have been 'sufficiently layde' (34v).

[48] On Mary's efforts to prevent her half-sister's accession, see Kewes, *Contesting the Royal Succession in Reformation England: Latimer to Shakespeare* (forthcoming, Oxford University Press)
[49] Plowden omits to mention that the crown would have passed to Elizabeth and not immediately to the heirs of the Suffolk line if Mary I's title was judged invalid.

6.4. Objections and Confutations

The second half of Plowden's *Brief Declaration* is comprised of three concise chapters in which Plowden confutes the arguments made in previous succession tracts — principally Hales's *Declaration* — which upheld the validity of Henry VIII's will and the king's limitation of the succession in favour of the Suffolk line. In chapter II, Plowden denounces the arguments of those who claimed that 'it is not nowe questionable whether the will were signed with the kynges hand or not' on the basis of three points: first, that the text of the will describes it to have been signed by the king's hand; second, that the will had been enrolled during Edward VI's reign; third, that exemplifications of the will had been made (34v). These three objections, Plowden argues, would result in the succession of the crown by 'estoppell, and not by truth' (34v). In this fall-out of events, Plowden argues, 'truth must be murdered' and a new monarch would be instituted 'without righte or tytle' (34v). To begin, Plowden asserts that 'the wordes of the will can be no witnes to the signing of it with the kynges hande' (34v). Just as a witness in a trial is incapable of testifying 'of a thing to come', Plowden argues that the words of Henry VIII's will — written antecedent to the act of signing — 'can not testify an acte coming after the wordes'. He therefore concludes that despite the words of Henry VIII's last will — declaring 'we have signed it with our hand' — the will itself cannot 'testifye the facte after' as Hales had argued (35r).[50] Memorably, Plowden argues that the individual who composed Henry VIII's will did so with the 'intent that the king should have signed it with his hande' and 'to that intente he wrote in dyvers places that the will was signed with his hande' (34v). However, Plowden argues that as so frequently happens to many 'connyng lawiers', the draftsman's 'good and apte wordes' were subsequently foiled by the 'negligence or slacknes' of the client: Henry VIII.[51] Not only is this an

[50] TNA E 23 / 4, f. 28. Bodl. MS Ashm. 829, f. 36r.
[51] Previously Plowden reported that Paget was the author of Henry VIII's will, or at the very least of an early draft thereof (32r). Strangely, Plowden does not repeat that claim here.

amusing insight from an eminent lawyer regarding the counsel-client relationship, but it is striking that Plowden lays the blame for not having manually subscribed the will squarely at Henry VIII's feet (35r). Plowden seems to delight in pointing out that it was the king's 'neclygence' that 'made frustrate' his proposed 'lymitation of the Crowne' and might allow Mary Queen of Scots to succeed to the English throne.

Next, Plowden dismisses the arguments that the enrolment of Henry VIII's will in the Chancery during Edward VI's reign and the subsequent exemplifications of that enrolled will, authenticated under the Great Seal, proved the validity of the original will.[52] Plowden asserts the irrelevancy of the enrolment and exemplification of Henry VIII's will, arguing that 'the inrolement or exemplification doth not make it a matter of recorde, nor alter the qualitie of it, and is conclusion to no man, more then if it were not enrolled nor exemplyfyed' (35v). Plowden argues that any document, such as Henry VIII's will, is 'still good or badd as it was before', regardless of whether authenticated exemplifications are made upon it, and therefore claims that the enrolment of the will does not provide a 'conclusion to non to deny the signing' (35v). Plowden's cursory response to these two interrelated objections might be explained by the fact that previous succession tract writers had already thoroughly rebutted these arguments. Maitland as well as the anonymous author of *Allegations in Behalf* had both previously argued that the enrollment of the will and the subsequent exemplifications thereof were not evidence that it the will was definitively valid because it was signed with the king's hand.[53] It was very possible, as Levine has argued, that those who enrolled and exemplified the will 'were under the impression that a stamped will was sufficient' or simply did not recognise the will to have been stamped.[54] Whilst it should be admitted that there is no evidence to suggest Plowden had read either

[52] Both arguments were previously made by Hales. See Bodl. MS Ashm. 829, ff. 33r, 34v. To enrol is to enter or copy the text of a document as an official record; see *Jowitt's Dictionary*, I. 809. An exemplification refers to an official attested copy of an enrolment or record, which bears the seal of a court or public functionary; see *Jowitt's Dictionary*, I. 877.
[53] Bodl. MS Ashm. 829, ff. 52-52v. *Egerton Papers*, p. 47.
[54] *EESQ*, p. 152.

Allegations in Behalf or Maitland's 1567 letter, we might take these documents as indicative of the common stock of arguments used to resist the attempt to secure a Suffolk-settlement of the succession by proxy of Henry VIII's will. Plowden's curt dismissal of these objections is, therefore, more than likely an indication that much of the work of refuting this aspect of Hales's tract had already been done.

By contrast, chapter III of Plowden's *Brief Declaration* provides the only extant account (at least to my knowledge) of exactly why Henry VIII's manual signature was a 'matter of great weighte and importance, and not a thing only of forme without effecte' as Hales had argued (36r). In his *Declaration*, Hales claimed that even if Henry's will had not been manually subscribed the stamping of the will was 'not a sufficient cause that we should reject it' as invalid. [55] Hales maintained that 'caveling' over the manner of the will's signing threatened to upset the future prosperity of Protestant England and suggested that the stamping of the king's signature was consonant with the 'true Meaninge of the Statute'.[56] Plowden, for his part, accused Hales's argument of being 'fynely sponn' (i.e., insubstantial and unconvincing) and advocated for strict adherence to the words of the 1544 statute which had granted the king plenary power to designate the succession in his will (36r). Ironically, Hales and Plowden seem here to reverse the roles they respectively assumed regarding the interpretation of the 1351 statute, *De Natis Ultra Mare*. Whereas Hales had relied on a strict letter-by-letter interpretation of this statute as 'expownd[ing] the lawe' in the case of alien inheritance, Plowden applied the logic of equity to reinterpret the intentions of the makers of the statute in Mary Stewart's favour (23r).[57] Although adhering strictly to the letter of the law with respect to Henry VIII's Third Succession Act and will, Plowden nonetheless appeals once again to the intentions of the lawmakers to explain why the statute stipulated that the king's will must be signed by his gracious hand.

[55] Bodl. MS Ashm. 829, f. 33v.
[56] Bodl. MS Ashm. 829, f. 34r.
[57] Bodl. MS Ashm. 829, f. 37v. See pp. 115-18, above.

Beginning from first principles, Plowden explains that man's natural body is comprised of both body and soul. Quoting Sallust, Plowden describes the soul to be the 'governor or director of the body' which is 'the baser' of the two (36r).[58] Just as the body is made up of limbs, Plowden argues, the soul is comprised of various 'partes and members', most notable among which are memory, understanding and will (36r). It is these three component aspects of the soul, Plowden suggests, which direct the movements and 'determinations' of the body's limbs (36r). On the basis of this pseudo-physiological description, Plowden argues that 'the makers of the acte of 35 Henry 8' stipulated the manual signature of the king's will as a test of the soundness of his memory, understanding, and will (36v). The king's signature, he contends, could 'playnly and manifestly prove that the kyng at the making of suche laste will should have full and perfecte sense, and of abilitie of body and mynde' (36v). In order to subscribe to the will, Plowden suggests the king must first have sufficient 'intelligence' to recognise the document before him and to appreciate his purpose in signing it, as well as a 'memory of the letters silables and forme of signing' (36v). His ability to hold a pen, form letter shapes, and even identify the right part of the document to sign, are understood by Plowden to 'purporte sense of body and mynde' (36v). Simply stamping a will, Plowden argues, requires no such intelligence or proprioception and thus cannot similarly express soundness of mind. Even the king's express bidding for another to stamp his will 'is not equivalent to the kinges proper doing', Plowden argues, for a man that is half-dead, mad, or otherwise 'wantinge intelligence or memory' may bid another to act without fully understanding the consequences of that action (36v). It is thus, Plowden argues, that 'the makers of the acte' stipulated Henry VIII's manual subscription to the will as 'a matter of substance and appropriate to the proper hands of the kyng only' (36v). If that statute granted

[58] Although Plowden does not cite his source explicitly, his quotation from Sallust is from the *Bellum Catilinae*: one of the most popular histories of ancient Rome read in early modern Europe. See Freyja Cox Jensen, 'Ancient Histories of Rome in Sixteenth-Century England: A Reconsideration of their Printing and Circulation', *Huntington Library Quarterly*, 83 (2020): 415-440.

Henry extraordinary statutory licence to 'convey away the kyngdome out of his righte course' via his will, Plowden argues, then its makers did at least have the foresight to ensure that the king was to be possessed of 'full and perfecte sense' when disposing of the crown (36v). Plowden's argument is therefore not simply that the exact stipulations of the Third Act of Succession must be followed in this instance, but that the foresight of the statute-makers was writ large in their inclusion of such stipulations. As in chapter VIII, part I of his *Treatise*, Plowden thus appeals to legislative intent and stresses the lawmakers' fundamental concern for the safety of the realm in order to outmanoeuvre Hales. Although the *Treatise* and *Brief Declaration* are in many ways very different works — one concerned with complex matters of law and the other with relatively straightforward matters of fact — Plowden's desire to prove Hales's ignorance of the common law is nonetheless continuous across both tracts.

In the fourth and final chapter of his *Brief Declaration*, Plowden refutes contemporary assertions that challenging Henry VIII's limitation of the succession was a capital offence. Cautiously, Plowden concedes that Henry VIII's Third Act of Succession had established strict penal measures for any person(s), as well as 'their aydors, counsellors, maignteiners and abettors', who, 'by wordes wrytinges prynting' or other nefarious actions, sought to interrupt the king's limitation of the succession (37v).[59] Importantly, the act expressly stipulated that these penal measures would also apply to individuals seeking to interrupt or disturb any future limitation of the succession as set out in either the king's letters patent or in his will.[60] Plowden also admits that these measures had been 'made good' in 1558, when 'An Acte of Recognition of the Quenes Highnes Title to the Imperyall Crowne of this Realme' declared that Henry VIII's statute shall 'shall stande bee and remayne the Lawe of this Realme for ever'.[61] It was very likely in recognition of these penal measures, I argue above, that Plowden hesitated to investigate the

[59] As indicated above, similar measures were also included in Henry's previous succession acts: 25 Hen. VIII, c. 22 and 28 Hen. VIII, c. 7. See p. 214, above.
[60] *Statutes*, III. 957.
[61] 1 Eliz. c. 3, *Statutes*, IV. 359.

validity of Henry VIII's will in his *Treatise*. However, in the denouement of his *Brief Declaration*, Plowden makes a compelling case as to why these penal measures did not apply to the limitation of the succession as set out in Henry VIII's will, drawing on a contemporary judicial investigation into the legacy of the Henrician succession acts in doing so.

Plowden declares that it had long been alleged by polemicists in favour of Katherine Grey's claim, that it was a matter of high treason to dispute Henry VIII's advancement of the Suffolk line in his will. The 'inventor of this objection', Plowden's intimates, was Hales (37v). In his 1563 *Declaration* Hales had insisted that Englishmen were 'bound to accept them that be declared by [Henry VIII's] will in remaynder or revercion, that is the heires of the Ladie Fraunces and the Ladie Elenor' as the next in line to the English throne after Elizabeth I and any children she might have, having sworn oaths to Henry VIII to accept his establishment of the succession.[62] Each of Henry VIII's succession acts had indeed provided that all the king's subjects were to take an oath 'for the more sure establishement of the succession'.[63] These oaths required the swearer to promise to maintain and defend the contents of the respective act and to be loyal to whomever Henry VIII limited the succession of the crown. Although most of the oath provided in Henry's Third Succession Act relates to the rejection of Papal authority, its preamble significantly required the swearer to declare that he would 'beare faithe trouth and true allegeaunce to the Kinges Majestie and to his heires and successors, declared or hereafter to be declared by aucthoritie of the Acte'.[64] A noteworthy clause in the oath also required the swearer to promise he would 'in noe wyse doe nor attempte, nor to my power suffer or knowe to be

[62] Bodl. MS Ashm. 829, ff. 33r, 37v, 42v.
[63] 25 Hen. 8, c. 22, clause 9; *Statutes*, III. 474. 28 Hen. 8, c. 7, clause 15; *Statutes,* III. 661-62. 35 Hen. 8, c. 1, clause 7; *Statutes*, III. 956-57. On the oaths provided in Henry's first and second succession acts, see Jonathan Michael Gray, *Oaths and the English Reformation* (Cambridge: Cambridge University Press, 2012), chapter two. See also, Geoffrey Elton, *Policy and Police: the Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge: Cambridge University Press, 1972), pp. 222-27.
[64] Hen. 8, c. 1, clause 7; *Statutes*, III. 957. The 1544 oath's rejection of papal authority is discussed by Gray, *Oaths and the English Reformation*, pp. 80-81.

done or attempted, directlye or indirectlye any thinge or thinges prively or aptly to lett hindrance damage or derogacion' to the king's limitation of the succession.[65] Hales thus cited the swearing of this oath as evidence that Englishmen were 'bound' to accept the succession of the heirs of Lady Frances Grey and Lady Eleanor Clifford, as had been set out in Henry VIII's will.[66]

In Plowden's assessment, Hales had 'roved at the matter' and was 'a farre from the marke, as ever Archer was from the marke he shotte at' (37v). As Henry's will had not been manually subscribed, Plowden affirms that any potential challenge to the limitation of the succession set out in that invalid deed did not come under the protections of the antecedent legislation. Therefore, it was not a capital offence to dismiss the title of Lady Katherine Grey outright, nor to advocate for the Queen of Scots' right to be nominated as Elizabeth's heir presumptive.

Nonetheless, Plowden discloses that Hales's argument had found 'such favorers' that the Queen had been compelled to set the matter before her judges in December 1566: requesting that they determine whether it was still treason to do anything to prejudice Henry's limitation of the succession to the Grey family in his will (37v).[67] Two near-identical sets of notes on this 'case' can be found in Sir Edward Saunders' manuscript reports.[68] Previously, Saunders' reports were assumed to be the only extant evidence of the case and, unfortunately, do not give the ultimate decision of the judges (if indeed a final judgment was reached). The case notes found in Saunders' reports offer a precis of Henry VIII's succession acts, a summary of the penal measures provided in that legislation, and a brief description of the king's limitation of the succession to the Grey family. Interestingly, the case notes in both witnesses are followed by

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[65] Hen. 8, c. 1, clause 7; *Statutes*, III. 957.
[66] In contrast to the 'Herculean' administrative effort to ensure that the 1534 oath was tendered throughout England, both Gray and Elton note that there is no evidence to suggest that anyone took the oaths of 1536 or 1544. See Gray, *Oaths and the English Reformation*, p. 77; Elton, *Policy and Police*, p. 226.
[67] See Baker, *Dyer*, I. xlix.
[68] 'The copie of a case receyved of the queenes majestie 28 die Decembris 1566'. BL Hargrave MS 9, ff. 34r-34v. See also BL Lansdowne MS 1057, ff. 17r-17v.

brief 'Notes out of Hales booke': summarizing the main points of his argument and proving that his *Declaration* retained an enduring influence in the Elizabethan succession debate, three years after its initial dissemination in 1563. Although Maitland complained of the 'secreate embracing of John Hales booke' at the English court, Saunders' reports offer previously overlooked evidence that Elizabeth had sought out a professional examination of Hales's arguments.[69] The case notes found in Saunders' reports conclude by stating that 'whosoeuer shall do anything in preiudice of the foresaid limitacion is a traitor', but adds that 'yf there was no will made by H. 8 according to the statute of 35 H 8' then the penal measures of the antecedent legislation would not apply to the Suffolk pretenders who claimed their title via the king's will.[70] The whole case turns, then, on the validity or invalidity of Henry VIII's will. It is unclear from the extant evidence whether this was as far as the judicial enquiry investigated, or whether a more conclusive decision was ever given with respect to the validity or invalidity of the will. However, it is plausible that when the case notes collected in Saunders' reports were put together, the judges were awaiting the result of the formal examination of the will's surviving signatories, as had been requested by the Queen of Scots earlier in the same month.

For his part, Plowden evidently felt that this December 1566 case and the judges' decision gave him sufficient scope to dispute Henry VIII's limitation of the succession on the basis that the king's will was invalid. The very fact of the *Brief Declaration*'s existence is testament to that fact; it is inconceivable that Plowden would have written his tract if his correspondent, seemingly a judge involved in the case (or at least well acquainted with its ongoing developments), had not assured him that his colleagues on the bench believed that a case such as Plowden's could be put forward without risk of execution for high treason. Plowden mentions

[69] *Egerton Papers*, p. 48. I am unaware of any historical studies of Elizabethan England which recognise the significance of this December 1566 case, despite Baker identifying the case notes three decades ago. I am very grateful to Professor Sir John Baker for an instructive and insightful conversation about this 'case' and the novel evidence provided by Plowden's *Brief Declaration*.
[70] BL Hargrave MS 9, f. 34v.

the 'resolution' of the judges in this 'case' twice in the conclusion to his *Brief Declaration*. In both instances he implies that Hales's argument had been soundly rebutted. In the first instance, Plowden writes that Hales had 'receive[d] smale rewarde for his invention and labour' at the hands of the judges (37v): likely an ironic comment on the militant MP getting his just deserts for having meddled in legal matters beyond his comprehension. Secondly, Plowden concludes his *Brief Declaration* by boasting that he had 'quyte overthrowne' Hales' case, adding that 'so (as is said) the Judges did resolve with whiche I truste he [Hales] will be satisfyed' (38r).

It is impossible to determine whether the judges in this December 1566 'case' had, in fact, rebutted the argument of Hales's *Declaration* as Plowden suggests, or whether Plowden merely deduced as much. If the judges had only gone so far in their enquiry as is recorded in Saunders' manuscript reports — that it was only a matter of treason to prejudice Henry's limitation of the succession as set out in his will if (and only if) that will was valid — then Plowden's suggestion that Hales had been comprehensively routed hardly seems justified. Indeed, Hales had conceded that Englishmen were only 'bound to accept' Henry VIII's limitation of the succession in favour of the Suffolk line, 'if this will were made according to the statute'.[71] It is therefore possible that whilst the December 1566 case gave Plowden sufficient scope to challenge Henry's limitation of the succession on the basis of the invalidity of his will, that he was also mendacious in stating that Hales had been soundly confuted by the judges. Equally, however, it is also possible that Plowden's judicial colleague was able to assure him of the bench's dim view of Hales's argument and that Plowden simply knew far more about the case than the evidence collected in Saunders' reports reveals to us today.

Irrespective of whether Plowden perhaps overstated the extent of the judges' dismissal of Hales's argument, the evidence of the conclusion to Plowden's *Brief Declaration* alongside Saunders' reports is certainly worthy of greater attention from historians. Together, these largely

[71] Bodl. MS Ashm. 829, f. 33r. Of course, Hales maintained that Henry's will was valid.

overlooked manuscript documents lend authority to the view that Elizabeth seriously contemplated recognizing the Queen of Scots as her heir apparent and had laid crucial legal groundwork to support such a recognition. The various investigations commissioned by Elizabeth form a coherent picture of her willingness to accept her royal cousin's accession. Whilst Plowden was preparing his *Treatise*, very likely at the behest of the Duke of Norfolk and the Privy Council, Elizabeth was busy ensuring that her father's legislation and his will did not stand in her way. All that remained was to commence an official investigation into the signing of Henry VIII's will. This investigation seemed an imminent reality in January 1567, with Mary writing to Elizabeth thanking her for commencing proceedings.[72] The consequences of this impending investigation were enormous, not least for Plowden. If it were proven that Henry VIII's will had been stamped and not signed by the king's hand, then his *Treatise* might well have been published or otherwise disseminated to the Protestant political nation as an official and authoritative legal justification of the Scottish succession to the English throne.

In the event, however, the assassination of Henry, Lord Darnley in February 1567 scuppered all hope of an investigation of Henry VIII's will. Within a matter of weeks, it became impossible for Elizabeth to recognise the Queen of Scots as her successor, owing to the accusations of conspiracy which surrounded her royal cousin. The coda that follows summarises the disastrous events of the months after Darnley's murder which eventually led to Mary's forced abdication in favour of her son and her escape to England as a political prisoner. It then addresses the afterlife of Plowden's *Treatise* during Mary's nineteen years of house arrest in England, after her execution in February 1587, and after her son, James's accession to the English throne in 1603. The aim of this coda is to explain why scribal copies of Plowden's *Treatise* continued to be produced decades after it was originally written in 1567. Finally, its conclusion recapitulates the key findings of this thesis, reiterating the benefits that legal

[72] SP 52/ 13, f. 1.

historians and scholars of other disciplines might derive from reading and investigating Plowden's *Treatise* in greater detail.

Coda

The First Act of the Tragedy

At two o'clock in the morning on 10 February 1567, the citizens of Edinburgh were startled awake by a 'tremendous noise', equal to the volley of thirty cannon or the clap of thunder.[1] As their 'confusit' and 'feirfull outcryis' filled the city's streets, it was discovered that the dreadful blast was the result of an explosion at the Old Provost's Lodging and adjacent buildings at Kirk o'Field.[2] The former collegiate church, just beyond the city's boundaries, was the temporary lodging of Henry, Lord Darnley, the Queen of Scots' husband, as he recovered from syphilis. Whilst the mutilated remains of several of Darnley's household servants were found buried in the rubble, there was no sign of the king. Three hours later, Darnley and his valet, William Taylor, were discovered dead in a garden at least forty feet from the lodging, on the opposite side of the town wall, wearing just their nightshirts. Remarkably, the king and his servant were unburned and unbruised, indicating that their deaths were not the result of the gunpowder explosion.[3] Thus began 'one of the most celebrated historical whodunits', the fall-out of which proved catastrophic for Mary Stewart, both as the Queen of Scots and as a candidate to succeed to the English throne.[4] As James Beaton, archbishop of Glasgow, observed in March 1567,

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[1] CSP Scot, II. 313. See also John Maxwell Herries, *Historical Memoirs of the Reign of Mary Queen of Scots, and a Portion of the Reign of King James the Sixth*, ed. Robert Pitcairn (Edinburgh: Abbotsford Club, 1836), p. 84. Several contemporary reports of the explosion are quoted by Robert Stedall, *Mary Queen of Scots' Downfall: The Life and Murder of Henry, Lord Darnley* (Barnsley: Pen and Church Books, 2017), pp. 202-3.

[2] George Buchanan, *Ane Detectioun of the duinges of Marie Quene of Scottes* ... (London, 1571), sig. B2v.

[3] As there is not scope in this coda to theorise how Darnley was killed, nor to explain the motivations of the plotters involved in blowing up the Old Provost's Lodging, I defer to the account provided by Guy, *My Heart is My Own*, pp. 218-313.

[4] Jane E.A. Dawson, *Scotland Re-Formed 1488-1587* (Edinburgh: Edinburgh University Press, 2007), p. 260.

Darnley's murder was 'onlie the beginning and first act of the tragedie' of the Queen of Scots' downfall.[5]

Just two days before Darnley's murder, Mary had sent Robert Melville to the English court to 'conclude the longed-for settlement with Elizabeth'.[6] In the preceding chapter, I demonstrated that Mary's recognition as heir presumptive to the English throne seemed imminent in January 1567 after Elizabeth had sedulously prepared the necessary legal justifications for such a recognition. However, a fortnight after the explosion at Kirk o'Field, Elizabeth wrote a stinging letter to Mary, criticising her for prevaricating and 'look[ing] through [her] fingers' rather than bringing her husband's murderers to justice.[7] Elizabeth also stipulated revised terms for a political settlement between the two queens. Pointedly ignoring Mary's claim to the English throne, Elizabeth demanded that Mary ratify the 1560 Treaty of Edinburgh. For the past seven years, Mary had refused to confirm the original terms of the treaty and was only willing to give her formal approval if a prejudicial article pertaining to her claim to the English throne was removed. In January 1567, Elizabeth eventually agreed to a renegotiation, protecting their mutual interests.[8] However, her *volte-face* in February indicates that Darnley's murder had set back diplomatic relations between the two queens by several years.

The 'disastrous way in which [Mary] handled her husband's murder' in the ensuing months confirmed to Elizabeth that recognizing the Queen of Scots as her heir presumptive was no longer a plausible option.[9] Mary's failure to show appropriate grief for her husband and her growing dependence on the prime suspect in Darnley's murder, James Hepburn, the earl of Bothwell, resulted in her being pilloried in the court of public opinion as a murderer and adulteress. A proliferation of satirical broadside poems, lewd drawings, handbills, and printed

[5] *Selections from unpublished manuscripts in the College of Arms and the British Museum illustrating the reign of Mary Queen of Scotland*, ed. Joseph Stevenson (Glasgow: Maitland Club, 1837), p. 174.
[6] Guy, *My Heart is My Own*, p. 300.
[7] *CSP Scot*, I. 316.
[8] Doran, *Elizabeth I and Her Circle*, p. 75.
[9] Dawson, *Scotland Re-Formed*, p. 260.

proclamations of Mary's culpability were disseminated throughout Edinburgh and continental Europe at the encouragement of Mary's half-brother, the earl of Moray and a cabal of Scottish Protestant noblemen, known as the Confederate Lords.[10] The propaganda offensive against Mary was overseen from England by William Cecil who had formed a covert alliance with Moray.[11]

Although Elizabeth remonstrated with Mary about her imprudent relationship with Bothwell, the earl was summarily acquitted of any involvement in Darnley's murder in April, created Duke of Orkney in May, and married the Queen of Scots at Holyrood shortly thereafter. Only a month later, the incensed Confederate Lords confronted Mary and Bothwell at Carberry Hill, where she surrendered in exchange for Bothwell's safe conduct. Mary was imprisoned at Lochleven castle and forced to abdicate in favour of her son, James. Hereafter, Scotland was governed in James's name by a succession of English-compliant regencies. Upon discovering that Mary had been deposed, Elizabeth threatened the Confederate Lords with war. In the event, however, when Mary escaped Lochleven in May 1568 and fled to England, seeking military and diplomatic support for her restoration, Elizabeth faced a dilemma. On Cecil's advice, Elizabeth placed Mary under house arrest in the north, at least until a tribunal could decide whether the Confederate Lords were justified in their rebellion and could prove their accusations against Mary.[12] After this tribunal reached an impasse, Mary remained a prisoner in England for the remaining nineteen years of her life. Mary's presence in England provided a focal point for plots and conspiracies against Elizabeth and she was eventually executed in February 1587 for her part in the Babington Plot.[13]

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[10] McElroy, 'Executing Mary Queen of Scots', pp. 16-86. See also McElroy, 'Imagining the "Scottish Natioun": Populism and Propaganda in Scottish Satricial Broadsides', *Texas Studies in Literature and Language*, 49 (2007): 319-339.
[11] McElroy, 'Scottish Satricial Broadsides', p. 327.
[12] The response of William Cecil and the English political regime to the Queen of Scots' detention in England in the late 1560s is examined by Alford, *Elizabethan Polity*, pp. 163–81.
[13] See Jonathan McGovern, 'Publicity and Persuasion in Early Modern England: The Babington Plot and its Aftermath, 1586-88', *Parergon*, 40 (2023): 131-155.

Given Mary's fall from grace and its aftermath, one might be forgiven for assuming that Plowden's *Treatise* was a dead letter shortly after its completion. Indeed, as this thesis has shown, it was very likely the inopportune presentation of Plowden's *Treatise* after Darnley's murder that resulted in Plowden incurring the displeasure, although not the official censure, of the Queen and her Privy Council.[14] Nonetheless, whilst Plowden's arguments on behalf of the Queen of Scots could not be used for their original purpose — probably to Elizabeth's chagrin — his *Treatise* nonetheless remained pertinent in the later Elizabethan period, as the possibility of James VI's succession to the English throne waxed and waned. In fact, five of the six extant copies of Plowden's tract were likely produced after Mary's death, in the period *c.* 1590 – c. 1640. Even after the putative aim of the *Treatise* had been realised, with a Stewart seated on the English throne in 1603, Plowden's tract evidently continued to be copied and circulated among networks of coterie readers. Given that scribal copies of his *Treatise* were still being produced as late as the mid-seventeenth century, we must ask how Plowden's succession tract achieved such longevity despite never appearing in print. By way of answer, this coda shall identify several moments of legal, political, and constitutional crisis for which Plowden's *Treatise* afforded crucial conceptual resources.

1567–1587

In chapter 1, I argued that Plowden likely revised his *Treatise* in the late 1560s, when, along with a handful of other lawyers and statesmen, he assisted John Leslie in his campaign to restore Mary Stewart.[15] In the autumn of 1568, Leslie served as one of the Queen of Scots' representatives at

[14] See pp. 48-49, above.
[15] See p. 54, above.

the York tribunal which set out to determine the legality of her deposition.[16] At this tribunal, the Confederate Lords mounted a series of scathing attacks against Mary, formulated by Scotland's premier humanist, George Buchanan.[17] In response to Buchanan, Leslie surreptitiously published *A defence of the honour of the right highe, mightye and noble Princesse Marie Quene of Scotlande*... in 1569. The second book of his *Defence* attempts to prove Mary's right to succeed to the English throne if Elizabeth were to die without issue, relying on many of the arguments first put forward by Plowden in his *Treatise*. I have endeavoured to draw connections between Plowden and Leslie's justifications of the Stewart succession wherever possible throughout this thesis. Like Plowden, Leslie argued that the descent of the crown was not subject to the same maxims as the inheritances of private persons, not least the maxim against alien inheritance, because the crown 'goethe by succession as other corporations do'.[18] Most, if not all, of the precedents put forward by Leslie in support of this argument can be found in Plowden. Notably, however, Leslie does not go as far as Plowden in describing the king as having two bodies. Leslie also follows Plowden in asserting that Scotland might be considered within the allegiance of England by way of the homage historically performed by the kings of Scotland to their English suzerains. Furthermore, Leslie's efforts to disprove the validity of Henry VIII's will closely resemble Plowden's. Regardless of whether Plowden revised his *Treatise* for Leslie, it is self-evident when reading the *Defence* that Leslie had access to one of the recensions of Plowden's tract. Leslie's printed popularisation of Plowden's argument in favour of the Stewart succession, argues Beckett, is testament to 'the success with which Plowden's learning was very deliberately passed

[16] Whether England had the right to decide the legality of the Queen of Scots' deposition proved controversial among Scotland's governing classes. See Hutson, *England's Insular Imagining*, pp. 119-20.
[17] Buchanan's narrative of Mary's guilt was later published as *Ane Detectioun of the duinges of Marie Quene of Scottes* ... (London, 1571). Buchanan also prepared a defence of the Confederate Lords' right to depose a tyrannical monarch which circulated in manuscript for over a decade before publication in 1579.
[18] Leslie, *Defence*, f. 68v.

down'.[19] That Leslie should have leant so heavily upon Plowden's advice in the second book of his *Defence* is unsurprising: although the bishop had a doctorate in civil and canon law, he was unfamiliar with English common law. The extent of Plowden's assistance to Leslie and the involvement of other English common lawyers in Leslie's justification of the Stewart succession certainly warrants further scholarly investigation.

In 1580, a revised Latin edition of Leslie's *Defence* was published at Rheims.[20] An English translation of this edition was then published as part of a 'Catholic propaganda offensive' in the spring of 1584.[21] Leslie's revised tract was issued alongside the anonymous libel *Leicester's Commonwealth* (perhaps written by the Jesuit Robert Persons) and a tract on the papal deposing power by Cardinal William Allen.[22] The reissue of Leslie's *Defence* in the 1580s provoked two competent refutations, likely commissioned by Cecil. The first was written by Robert Glover, the Somerset herald.[23] Although Glover was not a trained lawyer, his substantial tract — of nearly thirty-eight thousand words —addresses each point of the second book of Leslie's *Defence* in turn, refuting Leslie's legal and historical precedents for the accession of an alien monarch to the English throne. Shortly after the preparation of Glover's tract, William Fleetwood, the Recorder of London and common lawyer, further repudiated the case for a foreign succession in an equally long manuscript treatise on the succession.[24] Fleetwood's treatise, *Certaine errors*, takes the form of a dialogue between Serjeant Browne — who propounds many of the arguments previously advanced by Plowden and Leslie in their pro-Stewart tracts — and Serjeant Fairfax,

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[19] Beckett, 'Political Works of John Lesley', p. 113.
[20] A second, substantially altered, edition of Leslie's *Defence*, had been published in 1571, coinciding with the Ridolfi plot against Elizabeth.
[21] Kewes, 'Elective Succession', p. 121. On the publication history of Leslie's *Defence* see Beckett, 'Political Works of John Lesley', p. 87. Beckett also describes the differences between the 1580 Latin edition and the 1584 English translation.
[22] Lake, *Bad Queen Bess*, pp. 116-152.
[23] On the attribution of this tract to Glover, the dating of the tract, and the extant witnesses thereof, see p. 15, n. 59, above. Glover initially replied to the Latin edition of Leslie's text, before revising his tract in response to the 1584 English edition. See Lake, *Bad Queen Bess*, p. 207.
[24] On the attribution of this tract to Fleetwood, the dating of the tract, and the extant witnesses thereof, see p. 15, n. 59, above.

Fleetwood's mouthpiece, who asserts that the common law prohibits succession of aliens to the English throne. In much the same way as Plowden's *Treatise* responded to arguments printed in the anonymous tract *Allegations against*, which had first been put forward by Hales in his manuscript tract, we might consider Glover and Fleetwood's responses to Leslie as an indirect rebuttal of Plowden. Although his *Treatise* is not mentioned explicitly in either of their refutations of Leslie's *Defence*, both Glover and Fleetwood had very likely read it; Fleetwood was certainly well-placed in the Inns of Court to have acquired a copy and was familiar with Plowden's work, having provided an analytical index to his reports in 1578. Although Glover and Fleetwood's respective refutations of Plowden's case for the Stewart succession have been broached by Kim and Brooks, both tracts certainly bear further examination.[25] Whilst there is not space in this coda to evaluate Glover and Fleetwood's responses to Plowden, the handful of particular points of rebuttal identified in preceding chapters of this thesis nonetheless speak to the indisputable currency of Plowden's arguments in the turbulent political climate of the 1580s, as Mary's presence in England continued to unsettle the Elizabethan political regime.

1587–1603

When the Babington Plot was unmasked in August 1586, Mary Stewart was found guilty of conspiring to assassinate Elizabeth and was sentenced to death. However, neither the possibility of a Stewart succession, nor the currency of Plowden's *Treatise*, died on the block with Mary in February 1587. Although Mary's execution left her son, James, as the claimant with the best title to the English crown, his right of succession was far from incontrovertible. Not only did he have many rivals, but he also suffered the disadvantage of being born in Scotland and thus

[25] Kim, *Aliens*, pp. 169-73. Brooks, *Law, Politics and Society*, pp. 75-76. Critical editions of both Glover and Fleetwood's tracts would be of immense benefit to scholars. Meanwhile, a stop-gap preliminary transcription can be made available on request by contacting the author of this thesis.

experienced many of the same legal impediments arising from foreign birth as his mother. Moreover, as Doran and Kewes have both demonstrated, many Englishmen were suspicious of James's commitment to Protestantism and wary of his perceived untrustworthiness.[26] In many ways, then, the Elizabethan succession was just as vexed after the Queen of Scots' execution as it had been when Plowden wrote his *Treatise*.

The impediments against James's title to the English succession were comprehensively set out by the Jesuit Robert Persons in *A Conference About the Next Succession to the Crown of England* (1594). Persons' tract was composed of two parts. The first argued that it was lawful to resist tyrannical rule and applauded theories of elective monarchy.[27] The second part of Persons' tract is presented as a disinterested analysis of the various rights of the sixteen claimants to succeed Elizabeth but, in fact, promotes the title of the Spanish Infanta, Isabella, the daughter of Philip II. Meanwhile, Persons also demonstrated numerous economic, legal, and political inconveniences of a dynastic union between England and Scotland.[28] Ironically, in demonstrating that union with Scotland would end in 'slaughter, bloodshed, and infinyt losses and charges of Ingland', Persons repeats many of the anti-Scottish sentiments found in the virulently anti-Catholic tract, *Allegations against*.[29] In urging James's exclusion, Persons also returned to the longstanding barrier of Henry VIII's will. However, Persons did not simply rehash the arguments first made by the anti-Stewart polemicists of the 1560s. He alleged a further serious

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[26] Doran, 'Polemic and Prejudice: A Scottish King for an English Throne', in *Doubtful and Dangerous*: 213-36. Kewes, 'The Puritan, the Jesuit and the Jacobean Succession', in *Doubtful and Dangerous*: 47-71.

[27] James responded to the first part of Persons' tract in the *Trew Law of Free Monarchies* (1598). In 1603, the civil lawyer and historian John Hayward also refuted the first part of Persons' tract, producing an apology for hereditary monarchy and James's natural-law authority. See *An Answer to the First Part of a Certaine Conference, Concerning Succession, Published Not Long Since under the Name of R. Dolman* (London, 1603).

[28] Although Persons asserted that, in the opinion of many English lawyers, a foreign-born pretender such as James might be excluded from the succession, his advocacy of the foreign-born Infanta prevented him from labouring this point.

[29] Robert Persons, *A Conference About the Next Succession to the Crowne of Ingland* (Antwerp, 1594), p. 119.

impediment against James's title, contending that certain mid-1580s statutory provisions should disqualify him from the succession. Persons's argument relied on a mendacious conflation of the Bond of Association (1584) and a subsequent Act for the Queen's Surety (1585). The former bond had stipulated that the heirs of individuals convicted of plotting the queen's death (the offence for which Mary was executed) would forfeit their claim to the crown, regardless of their innocence in said conspiracy. However, on Elizabeth's express order, the official act removed that provision and only punished those directly involved in the crime. Persons neglected to mention the crucial removal of that clause in 1585, cunningly maintaining that James should be outlawed from the succession because of his mother's actions.[30]

In much the same way as Hales's *Declaration* provided a framework within which all succession tracts of the 1560s judged Mary Stewart's right of succession, the profusion of succession tracts written by James's supporters in England and Scotland throughout the late-1590s all directly responded to Persons' *A Conference*. As the largely Protestant adherents of James's claim throughout Britain set out to refute Persons, they looked, perhaps with some embarrassment, to rehabilitate many of the arguments originally put forward on behalf of the Queen of Scots by Plowden and Leslie. Originally written to convince the Protestant political nation of the legality of the Catholic Queen of Scots' title to the English throne in 1567, Plowden's *Treatise* ironically came to be reanimated in the 1590s by those who preferred the succession of a Protestant Scottish king to the Catholic Infanta. Whilst the responses to Persons in print and manuscript are too numerous to discuss in detail, we might nonetheless outline some of their prevalent themes, which attest to the enduring influence of Plowden's arguments throughout the final decade of the sixteenth century. The most substantial refutation of Persons' *A Conference* was written by James VI's propagandist, Alexander Dickson. In this coda, we might

[30] Paulina Kewes, '"The Idol of State Innovators and Republicans": Robert Persons's *A Conference About the Next Succession* (1594/5) in Stuart England', in *Stuart Succession Literature: Moments and Transformations*, ed. Paulina Kewes and Andrew McRae (Oxford: Oxford University Press, 2019): 149-185.

take the arguments put forward by Dickson as indicative of the pro-Stewart case put forward in the various tracts published by the Scottish royal printer, Robert Waldegrave, in the late 1590s.[31] Following the example set by Plowden and Leslie, Dickson's manuscript tract contends that the English crown was a corporation and that consequently the maxim against alien inheritance did not apply to the succession of the crown.[32] Dickson also alleges English suzerainty and jurisdictional superiority over Scotland to prove that James was not an alien, having been born within the allegiance of the English king. With respect to the validity of Henry VIII's will, Dickson follows Leslie's lead closely, asserting that even if the will had been manually signed by the king's hand, then it was still nonetheless invalid on the basis that it made an unreasonable donation of the crown.[33] The pro-Stewart case put forward by Dickson and others was later revisited in substantial Latin and English tracts by Sir Thomas Craig and Sir John Harington.[34] The influence of Plowden's *Treatise* is no less evident in these early-seventeenth-century works; Harington, for instance, argued that 'the subjection of Scotland by way of homage to the Crowne of England' brought the subjects of Scotland within the faith and allegiance of the English king, just as Plowden had argued four decades prior.[35] Following the polemical foundation laid down by Plowden and Leslie, Harington also described the English crown to be 'a thing incorporate'

[31] Waldegrave also printed influential tracts on the Stewart succession by Peter Wentworth and Irenicus Philodiakaios in 1598 and 1599 respectively. For discussion of Wentworth and Philodiakaios's works, see Doran, 'Three Late-Elizabethan Succession Tracts', in *The Struggle for the Succession in Late Elizabethan England: Politics, Polemics and Cultural Representations*, ed. Jean-Christophe Meyer (Montpellier: Université Paul-Valéry Montpellier 3, 2004): 91–117.
[32] In several of the 1590s tracts in defence of James VI's succession, deference was paid to earlier treatises on the succession which were recognised as having already refuted many of the objections against James's title. Although none of the authors mention Plowden by name, they may have been aware of his tract by reputation.
[33] Dickson's arguments in favour of James VI's succession are systematically described by Doran, 'Late-Elizabethan Succession Tracts', pp. 101–4.
[34] Thomas Craig, '*De Jure Successionis Regni Angliae, Libri Duo*' (c. 1602), translated and published as *A Treatise Concerning the Right of Succession to the Kingdom of England* (London, 1703). John Harington, *A Treatise on the Succession to the Crown (AD 1602)*, ed. C. R. Markham (London: Nichols and Sons, 1880).
[35] Harington, *A Treatise on the Succession*, p. 61, quoted by Doran, 'Polemic and Prejudice', p. 222.

which 'descendeth not according to the common source of other private inheritances, but goeth by succession as other incorporations do'.[36]

So long as the succession to the English crown remained a live issue, then, — and it is clear that it did right up until James's accession in 1603 — it appears that the pro-Stewart arguments originally expounded in Plowden's 1567 *Treatise* continued to hold sway. It hardly mattered that Plowden resolutely ignored James's birth or his title to the English throne as latter-day Elizabethans looked back to his *Treatise* to defend a dynastic union between England and Scotland and to justify the Stewart succession. When these ambitions were eventually realised in March 1603, Plowden's *Treatise* took on new meaning. His analysis of the historico-legal subjection of Scotland, which had proved so prescient in justifying the Stewart succession, suddenly proved problematic for those Englishmen who sought to resist James VI and I's proposals for a formal union between his kingdoms.

1603–1608

When Queen Elizabeth died on 24 March 1603, her nephew James 'was pretty much the only suitable person left standing with a viable or acceptable claim' to succeed her.[37] Notwithstanding his peaceful and unopposed accession, many Englishmen remained uncertain as to the legal basis of James's title. In the long shadow cast by Persons' scathing attack on James's title in *A Conference,* lingering doubts remained over the suitability of a Scottish-born monarch and the inconveniences of a dynastic union between the two kingdoms.[38] To counteract this uncertainty, poets, preachers, and politicians elucidated James's title in press and in the pulpit — celebrating

[36] Harington, *A Treatise on the Succession*, p. 57, quoted by Rei Kanemura, 'Kingship by Descent or Kingship by Election? The Contested Title of James VI and I', *Journal of British Studies*, 52 (2013): 317-342, at p. 334. Kanemura also discusses the influence of Plowden's corporation theory in Wentworth's tract, as well as in Thomas Wilson's tract, *The State of England Anno Dom. 1600*.
[37] Doran, 'Jagged Succession', p. 445.
[38] Kewes, "'Idol of State Innovators'", pp. 154-56.

his accession as the provident realization of his inviolable hereditary right. Two days after Elizabeth's death, Robert Cotton prepared a defence of James's title, in which he traced James's hereditary title back to the Saxon Kings and celebrated the benefits of union between England and Scotland.[39] Cotton won considerable favour from this tract, being knighted later in 1603 and latterly being appointed to lend support to James's proposals for a political union between England and Scotland.[40] It was almost certainly during the preparation of his defence of James's title, or during the succeeding five years in which Cotton argued for the naturalization of the Scots in England and for a mutual trading agreement and a common system of laws between the two kingdoms, that Cotton made practical use of his copy of Plowden's *Treatise*. The marginal annotations found in Cotton's copy of the *Treatise* (witness C) certainly indicate that he and/or the individuals to whom it was loaned were interested in using Plowden's tract to adduce the legal and constitutional effects of England's feudal relationship with Scotland.[41]

It may well have been the rewards given to Robert Cotton for defending James's title in March 1603 that prompted Francis Plowden to commission a presentation copy of his father's *Treatise* for James I. Although Francis cannot have hoped for a knighthood nor for the political favour bestowed upon Cotton, the presentation of his father's tract potentially offered an expedient way of saving his skin after he was implicated in the Bye plot in August 1603.[42] Interestingly, Francis escaped punishment for his involvement in the conspiracy and, only a few months after he was examined and placed in custody by Sir Richard Lewkenor, Chief Justice of Chester, he was granted a royal licence to travel abroad for three years.[43] We might accordingly

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[39] Cotton's tract was almost certainly commissioned by Henry Howard, who had promoted James's claim during the last years of Elizabeth's reign and staked his career on the Scottish succession. See Kevin Sharpe, *Sir Robert Cotton, 1586-1631: History and Politics in Early Modern England* (Oxford: Oxford University Press, 1979), pp. 114-115.
[40] Sharpe, *Robert Cotton*, pp. 115-16, 152-54.
[41] For an account of this scribal copy, and Cotton's ownership, see volume 2, pp. ix-xii.
[42] On this conspiracy, see p. 53, n. 147, above.
[43] See *Calendar of State Papers, Domestic Series, of the Reign of James I, 1603-1625, Preserved in the State Paper Department of Her Majesty's Public Record Office* (5 vols., London: Longman, Brown, Green, Longmans, & Roberts, 1857-1872), I. 26-28, 110. On Francis's period in custody, see *EP*, p. 95.

speculate that Francis Plowden's presentation of his father's *Treatise* was a successful attempt to curry favour with the new king.

If witness D was indeed presented by Francis Plowden during the first year of James's reign, then his decision to include a copy of his father's *Brief Declaration* alongside the *Treatise* makes good sense. As I have demonstrated above, this supplemental tract is otherwise not extant in other seventeenth-century witnesses of Plowden's *Treatise*; no doubt it seemed bootless to reproduce Plowden's arguments proving the invalidity of the king's will as an obstacle to the Stewart succession after James was established on the English throne. However, in the first year of his reign, as Susan Doran and David Cressy have both demonstrated, James's authority was challenged on the grounds that Henry VIII's will had privileged the respective titles of other, Englishborn, claimants to the throne.[44] In such a climate of insecurity, Francis Plowden may well have felt that the new king might bolster his title by using the arguments of his father's *Treatise* and *Brief Declaration*.

After James I was more firmly established on his throne, he 'moved gradually to promote the idea and reality of union' between the kingdoms of England and Scotland.[45] In 1604 the king appointed Commissioners from both kingdoms to devise the legal and political basis for their union. This Commission consisted of forty-eight Englishmen and thirty-one Scots, who represented 'in miniature all of the groups that would normally be found in an English or Scots Parliament'.[46] As Galloway and Hutson have outlined, the Commissioners debated four limited proposals: the abrogation of hostile statutory laws between England and Scotland; new provisions for the exercise of justice over the Borders (now to be called the 'Middle Shires'); the lifting of trade restrictions and customs duties between the two kingdoms; and the possibility of

[44] Doran, 'Jagged Succession', p. 447. David Cressy, *Dangerous Talk: Scandalous, Seditious and Treasonable Speech in Pre-Modern England* (Oxford: Oxford University Press, 2010), pp. 91-4.
[45] Galloway, *Union of England and Scotland*, p. 18.
[46] Galloway, *Union of Scotland and England*, p. 62.

mutual naturalization of English and Scottish subjects.[47] Although the issue of mutual naturalization 'begat more Debate and Contestation than all the rest', there was general unanimity between the Commissioners.[48] An Instrument containing their proposals was delivered to James and to the Lord Chancellors of both England and Scotland, ready to be endorsed and approved by the respective national Parliaments. With respect to the naturalization question, this Instrument acknowledged that those born after James's accession (the 'post-nati') were already *de jure* naturalised — Crown Law Officers having confirmed as much in November 1604 — and should be declared as natural subjects. The Instrument also proposed that the 'ante-nati' (the subjects of England and Scotland born before James's accession) should similarly be naturalised by act of Parliament but should be prohibited from holding public office. Although the Commission was 'dissolved under the assumption of immediate action', their proposals proved immediately contentious.[49] In both the Commons and in contemporary polemical tracts, English opponents of union argued that the naturalization of the Scots threatened English legal liberties and that the removal of trade restrictions would destabilise the economic and political security of the realm.

The proposals discussed by the 1604 Commission 'revived the age-old controversy concerning English suzerainty over Scotland' and brought new significance to the second half of Plowden's *Treatise*.[50] In the context of the union debates, the widespread English belief in overlordship — as had repeatedly been justified by Plowden, Maitland, and Leslie in support of the Stewart succession in the 1560s, and had been reproduced by pro-Stewart partisans in the 1590s and early-1600s — proved problematic. Hutson's analysis of influential tracts by Sir Henry

[47] Galloway, *Union of Scotland and England*, pp. 62-76. Hutson, *England's Insular Imagining*, pp. 157-58.
[48] Sir Ralph Winwood, *Memorials of Affairs of State* (3 vols., London: 1725) II. 37, quoted by Hutson, *England's Insular Imagining*, p. 158.
[49] Galloway, *Union of Scotland and England*, p. 79.
[50] Galloway, *Union of Scotland and England*, p. 51.

Spelman and Sir Henry Savile (both published in 1604), bears this out.[51] Many authors continued to subscribe to the idea of English overlordship over Scotland — citing much of the same legendary and dubious historical evidence as alleged by Plowden — to deny the economic and cultural value of what Scotland might bring to a prospective union between the two kingdoms.[52] The union debates reveal that early-seventeenth-century Englishmen were unable (or unwilling) to shake off their deep-rooted sense of superiority over the Scots, whom they stereotypically viewed as primitive in their manners, poverty-stricken and envious of England's liberties and welfare. Meanwhile, however, Hutson has demonstrated that these same authors needed to suppress Plowden's suggestion that English overlordship over Scotland, and the subjection of the Scots via homage, might qualify the subjects of Scotland for English legal liberties. Like the opponents of the Stewart succession in the 1560s, these authors insisted that Scotland was a sovereign state and its subjects were aliens in England. In attempting to accommodate the belief that Scotland was held as a fief of England, whilst rejecting that Scotland was within the allegiance of England, English opponents of union 'produced shifting and incoherent accounts of Scottish nationhood'.[53] Although there is not scope to discuss Spelman or Savile's arguments in any detail here, Hutson's research proves that future scholarly investigation of the early Stuart union proposals must reckon with the legacy of the 1560s succession debate. The key to understanding the legal and constitutional problems brought about by James's union proposals, as well as the tracts that responded to those proposals, is to engage with the presentation of Scottish nationhood in tracts such as Plowden's which had indirectly helped seat a Scottish king on the English throne in the first instance.

Despite the incoherent picture of Scottish nationhood painted by these anti-unionist tracts, their arguments helped to forestall the proposals of the Commission. In their wake, the

[51] Spelman and Savile's tracts are reprinted in *The Jacobean Union: Six Tracts of 1604*, ed. Bruce Galloway and Brian Levack (Edinburgh: Clark Constable, 1985).
[52] Hutson, *England's Insular Imagining*, p. 157.
[53] Hutson, *England's Insular Imagining*, p. 185.

English Parliament of 1606-7 proved 'an almost unmitigated disaster for James's plans for union of England and Scotland'.[54] By July 1607, the Commons had even rowed back on the naturalization of the post-nati, about which there had previously been general agreement. To resolve the disputed status of the post-nati without recourse to Parliament, a test case was contrived. The facts of *Calvin's Case* (1608) are straightforward.[55]

Two separate estates of land in England were conveyed to a post-natus Scottish infant, Robert Colville. Colville's guardians then initiated two civil suits in the King's Bench and Chancery, claiming that Robert had been forcibly dispossessed of both estates. The defendants in both cases pleaded that the writs of novel disseisin were inadmissible because the plaintiff was an alien. Owing to the gravity of the cases, both were adjourned to the Exchequer Chamber, where they were heard by a total of fourteen justices, as well as the Lord Chancellor and Barons of the Exchequer. The verdict of this case was never seriously in doubt and, by a majority of twelve to two, it was determined that Colville was not an alien but a natural subject of James I of England, despite being born in Scotland. Thus, *Calvin's Case* confirmed that the post-nati could bring and maintain suits in the common law courts for lands held in England. Despite its outcome being somewhat of a foregone conclusion, the legal and constitutional arguments put forward in *Calvin's Case* are nonetheless noteworthy, not least as they revitalised legal and public interest in the theory of the king's two bodies, as advanced by Plowden in his *Treatise* and in his reports.[56]

The counsel for the defence, Serjeants Laurence Hyde and Richard Hutton, invoked the theory of the king's two bodies to argue that those born in Scotland and England owed separate allegiance to King James VI and I's distinct bodies politic, rather than to his singular body

[54] Galloway, *Union of Scotland and England*, p. 127.
[55] The following overview is indebted to the account provided by Polly Price, 'Natural Law and Birthright Citizenship in *Calvin's Case* (1608)', *Yale Journal of Law and the Humanities*, 9 (1997): 73-145.
[56] Public interest in this case is attested by Galloway, *Union of Scotland and England*, p. 149.

natural.[57] Interestingly, Colville's defence also repeated an argument originally made to forestall the accession of the Queen of Scots in the anonymous printed tract, *Allegations against*; that the common law could not enquire as to the birth of those outside the jurisdiction of English law. Representing the plaintiff, Francis Bacon, James's Solicitor General, rejected the notion that James had two separable bodies or capacities to which allegiance might be due, and argued instead that the post-nati subjects of England and Scotland owed their allegiance to James as a singular, natural person, rather than as two corporate figureheads. Although the majority of judges upheld Bacon's case, finding for the plaintiff, the extant judgements of Coke and Lord Ellesmere reveal that there was no unanimity between the judges as to the corporate character of the English crown and that the legal fiction of the king's two bodies was no more settled or clear-cut in the early-seventeenth century than it had been when first reported upon by Plowden in the mid-sixteenth century. Whilst there is not space here to elucidate the difference between the various judgments in *Calvin's Case* and the disparate way in which the judges responded to the two-bodies argument, we might nonetheless conjecture that the case may well have drawn contemporary lawyers and political theorists to the manuscript copies of Plowden's *Treatise* then in circulation and to the abstract, systematic account of the king's two bodies found therein. Plowden's *Treatise* was thus no less pertinent to the legal and constitutional challenges of the early Stuart period as it had been in the years preceding Elizabeth's death. Even after the Elizabethan succession had been settled, with the putative ambition of Plowden's tract realised in James's accession, Plowden's *Treatise* remained expedient as the king sought to legitimise his title and pursue a legal and political union of his kingdoms.

In the 1670s, over a century after the *Treatise* was first written, Sir Matthew Hale cited 'Mr. *Plowden's* learned tract touching the right of succession of *Mary* queen of *Scotland*' as an invaluable resource for those interested in the succession of the crown and the insignificance of

[57] Hutton was certainly familiar with the king's two bodies from Plowden's reports. His annotated copy of Plowden's *Commentaries* is extant at St John's College, Oxford: W.2.5.

personal legal disability to its descent.[58] Apart from affirming that Plowden's was still a name to conjure with a century after his death, Hale's reference implies that readers of his treatise on English criminal law were expected to be aware of Plowden's work on the succession and indicates that his *Treatise* was readily available for consultation. Indeed, reading Hale in the mid-nineteenth century, the lawyer Ralph Thomas mistakenly assumed that Plowden's *Treatise* must have been printed for Hale to have thus encouraged his contemporaries to consult it.[59] Hale's reference, tacitly indicating the accessibility of Plowden's *Treatise* in manuscript, thus bears testament to the remarkable longevity of Plowden's tract and its survival through scribal networks.

Likely prepared at the behest of Elizabeth and her Privy Council in the winter of 1566/67, Plowden's *Treatise* might have become obsolete when Darnley's murder frustrated the queen's plans to recognise Mary Stewart as her heir presumptive. As we have seen, however, Plowden's arguments remained expedient throughout the latter part of the sixteenth century as the succession remained a live issue right up until Elizabeth's death. At least in part, we might credit Plowden with some responsibility for ensuring the legacy of his *Treatise*. By lending support to John Leslie, and the cabal of pro-Stewart lawyers and statesmen who surrounded the bishop in the late 1560s, possibly revising his *Treatise* for their benefit, Plowden oversaw the popularization of his arguments in Leslie's influential *Defence*. Meanwhile, scribal copies of Plowden's *Treatise* evidently continued to circulate and to attract coterie audiences as the possibility of a Stewart succession waxed and waned in the late-sixteenth century. Its readership was neither fixed nor stable during this period. Plowden's arguments were just as useful to the Protestants who sought to install James VI on the English throne after his mother's execution, as

[58] Matthew Hale, *Historia Placitorum Coronae* (2 vols., London, 1736), I. 324. Although first published posthumously in 1736, Hale's treatise on English criminal law was written in the early 1670s.
[59] Ralph Thomas, 'Edmund Plowden', *Notes and Queries*, Volume 11, Issue 270 (1867), p. 184. Thomas's investigation into Plowden's *Treatise* is discussed in volume 2, p. ix.

they previously were to Catholic partisans of Mary's restoration in the late-1560s. Even after Mary's son, James, eventually succeeded to the English throne in 1603, scribal copies of Plowden's tract continued to be produced; the importance of Plowden's treatment of Scottish nationhood and his regard for the legal status of the Scots in England gained new significance in light of the king's plans for legal and political union between the two kingdoms and for mutual naturalization of his subjects. Although it is remarkable to find that Plowden's *Treatise* was cited by Matthew Hale in the 1670s as though of equal accessibility and authority as contemporary printed legal literature, despite never being printed, its continued pertinence to the central political issues of the late-sixteenth and early-seventeenth centuries goes some way in explaining why it was preserved through scribal networks and coterie readerships.

Conclusions

Patently, much more remains to be said about the legacy of Plowden's *Treatise*. In this coda, I have provided an overview of the four decades (1567–1608) after it was first written, identifying a handful of moments in which Plowden's arguments afforded crucial conceptual resources in an effort to explain why the *Treatise* continued to be copied after the downfall of the Queen of Scots. That is not to say, of course, that the *Treatise* did not remain pertinent after 1608. Scribal copies of Plowden's tract continued to be produced after this point and the *Treatise* remained sufficiently in the legal consciousness for it to be referenced by Hale in the 1670s. I hope that my critical edition of Plowden's *Treatise* will expedite much-needed further research into the afterlife of this influential tract, building upon the directions for further study intimated by this coda.

I also hope that my contextual analysis of the debate over the Elizabethan succession in the mid-1560s will bring about a renewed and readjusted interest in the political culture of this period. In chapters 1 and 6 of this thesis, I have advanced a novel argument that Plowden's *Treatise* was very likely written at the bidding of Queen Elizabeth and her Privy Council. Rather

than being a clandestine tract written to convince a cabal of crypto-Catholic common lawyers of the validity of the Queen of Scots' title, or to prompt Elizabeth into acting in the succession, Plowden's *Treatise* should, I have proposed, be read as the product of a crown-authorised investigation into the succession. His succession tract was likely commissioned to justify a prospective recognition of the Queen of Scots' title and to convince the political nation at large of her right to succeed Elizabeth. In staking this claim, I have suggested that scholars attending to Plowden's *Treatise* have hitherto mistaken the intended readership of his succession tract and misjudged the likely circumstances under which it was produced. I have also demonstrated that Plowden's *Treatise* contains important and previously overlooked evidence of how close the Elizabethan regime came to recognising the Queen of Scots' title. In my analysis of Plowden's woefully neglected *Brief Declaration*, for instance, I have uncovered fresh evidence of a case put to the judges by the Queen in December 1566. This case enquired whether it was still treason to do anything to prejudice Henry VIII's limitation of the succession in his will.[60] Plowden's *Brief Declaration* also reveals that members of the Privy Council had already privately examined Henry's will, long before Elizabeth promised an official examination of the document to Mary in January 1567. By attending to previously overlooked aspects of Plowden's *Treatise*, and by reconsidering the circumstances under which it was written, my thesis has revealed just how sedulously Elizabeth prepared for a recognition of Mary's title. In the wake of influential studies by Patrick Collinson and Stephen Alford, historians of the mid-1560s succession debate have tended to focus on the efforts of statesmen such as William Cecil to forestall the Queen of Scots succession, often neglecting Elizabeth's efforts to settle the succession by comparison.[61] Whilst some recent studies have identified the possibility of a public recognition of Mary's title in the latter part of 1566, the rapprochement between the two queens is typically only read as a short

[60] Edward Saunders' reports on this case were discovered by Baker. See p. 217, above. However, the response of the judges, indicated in Plowden's *Brief Declaration*, was previously unknown.
[61] Collinson, 'Elizabethan Exclusion Crisis'. Alford, *Early Elizabethan Polity*.

and curious prelude to the extinction of mutual amity after Darnley's murder.[62] As such, the extent of Elizabeth's commitment to this resolution to the succession is yet to be fully explored. A closer engagement with Plowden's succession tract — as both the product of, and an understudied source of evidence for Elizabeth's willingness to settle the succession with the help of her leading lawyers — would thus be immensely valuable to Tudor historians and might help reframe the central political issue of the mid-Elizabethan period.

Between chapters 1 and 6, which elucidate the political culture of the mid-1560s, my analysis of Plowden's argument has revealed that the handful of scholars who have attended to his *Treatise* have largely oversimplified and misjudged his argument. Heretofore, the tendency has been to privilege part I of Plowden's *Treatise*, in which he argues that no personal legal disability could affect the corporate succession of the crown, over part II, relating to Scotland's subjection to England; the former part has commonly been regarded as the 'essence of Plowden's argument' whilst the latter has largely been neglected.[63] For instance, in Parmiter's biography of Plowden, the initial part of his *Treatise* is thoroughly explained, whereas the latter part receives scant attention. As characterised by Parmiter, the second part of Plowden's *Treatise* is subsidiary to the first, written to allay any lingering apprehension about Mary's capacity to succeed to the English throne ('should any doubt remain') after the conclusive assertion of her title in part I.[64] Even in Christopher Brooks's account, which recognises that Plowden provides a 'two-fold answer to the question of whether or not a foreigner like Mary might be allowed to succeed to the throne', the first part of the *Treatise* is construed as the 'more subtle legal and constitutional

[62] Doran and Kewes, 'Succession Question Revisited', p. 26. See also Doran, *Elizabeth I and her Circle*, pp. 74–75.
[63] Baker, *Dyer*, I. xlix-l. Although Baker acknowledges that 'Plowden added a postscript dealing with Henry VIII's will', he overlooks Plowden's historico-legal analysis of Anglo-Scottish relations. Similarly, Cromartie's analysis of Plowden's *Treatise* reduces the entirety of his argument down to the first eleven chapters, failing to mention the second part of the tract. See *Constitutionalist Revolution*, pp. 95, 109.
[64] *EP*, p. 92.

argument'.[65] Likewise, Keechang Kim depicts the former part of Plowden's *Treatise* as the more 'sophisticated' of the two and to be worthy of extensive elucidation.[66] In fact, both Brooks and Kim only examine the second half of Plowden's *Treatise* and his argument that Scotland's '[s]ubjection by homage' brought the Queen of Scots and her subjects within the allegiance of England (29r), in so far as that argument was later disputed by William Fleetwood in his 1580s tract, *Certaine errors*.[67] Meanwhile, the various literary critics who have alluded to Plowden's *Treatise* in their analyses of the king's two bodies in contemporary public plays and poems have all but exclusively focused on the first five chapters of his tract.[68]

The scholarly emphasis on part I of Plowden's *Treatise* is unsurprising. When it was first 'discovered' in the 1970s, Marie Axton characterised Plowden's tract as 'a locus classicus, unrecognised by Ernst Kantorowicz, for the theory of the king's two bodies'.[69] Given that Plowden's exposition of the king's two bodies takes place in the first five chapters of his *Treatise*, and the doctrine is then used in the remainder of part I to explain that personal legal disabilities (such as foreign birth) belonging to the body natural of the heir to the throne are purged by the body politic of the crown when it descends upon them, it is perhaps natural that scholars interested in his *Treatise* should have gravitated to the first part of the tract. However, the unfortunate consequence is that readings of Plowden's succession tract have tended to be unduly truncated.

Recent work by Lorna Hutson offers an exception. In a seminal article of 2020, Hutson was the first to highlight the significance of the king's two bodies in the second half of Plowden's *Treatise*, revealing how Plowden yoked that legal fiction to the record of England's feudal tenure of Scotland that he derived from English chronicles.[70] Building on Hutson's

[65] Brooks, *Law, Politics and Society*, p. 74.
[66] Kim, *Aliens*, p. 164.
[67] Brooks, *Law, Politics and Society*, pp. 75–6; Kim, *Aliens*, pp. 169–70.
[68] See p. 65, n. 19, above.
[69] Axton, 'Influence', p. 209.
[70] Hutson, 'On the Knees'.

research, my thesis has made the case that far greater attention ought to be paid to the historico-legal argument of the second part of Plowden's *Treatise*, contending that it is in these final four chapters of his succession tract that Plowden makes a particularly compelling case for the Stewart succession. As I have explained in chapters 3 and 4, Plowden himself placed greater weight and authority on the second part of his work. In the preface to his *Treatise* and in his opening remarks in part II, Plowden remarked that the first half of his tract amounted to an abstract and general justification of an alien accession to the English throne *tout court* (1v). Meanwhile, he observed that the second half of his *Treatise* was less doubtful by comparison, offering a specific case for the Stewart succession by 'tak[ing] in hande to prove that the Scottes by meane of their subjection to the Crowne of Inglande be not disabled by birthe to receive inheritance in Inglande' (18v). My analysis has borne out Plowden's intimations about the two parts of his *Treatise*. I have revealed that the first part of the tract should be read and interpreted as a compelling but abstract legal-constitutional disquisition on the two bodies of the king and on the principles of the succession of the English crown. Whilst this ambitious disquisition was occasioned by the debate over the Elizabethan succession and denounces the ignorance of previous interventions in the debate, I have argued that it is a fundamental error to mistake these chapters as directly advancing the case for the Stewart succession. That polemical endeavour is explicitly reserved for the second part of the *Treatise*.

Whilst the two parts of Plowden's *Treatise* perform different functions, then, addressing two subtly different questions — part I asking who has the right to succeed to the English throne; part II asking whether Mary had the right to succeed Elizabeth — that is not to say that there is no conceptual continuity between them. As chapter 5 of this thesis has demonstrated, the ingeniousness of Plowden's case for the Stewart succession consists of his use of the doctrine of the king's two bodies (as expounded in the beginning of part I) to elucidate the concept of homage ancestral and to prove the inalienability of Mary's right of succession.

Plowden's use of the fiction of the king's two bodies at this critical, conclusive juncture of his *Treatise* brings his succession tract full circle.

Going forward, it is imperative that the end of the first part of Plowden's *Treatise* is no longer mistaken as the terminus of his argument and that his succession tract is not unduly simplified and reduced to its first movement. Chapters 4 and 5 of this thesis have elucidated how Plowden uses a mixture of legendary and dubious historical evidence to justify the English belief in overlordship over Scotland and have examined his allegorization of homage with respect to Anglo-Scottish relations. Yet the ingenuity of Plowden's historico-legal efforts to prove the Queen of Scots capable of succeeding her royal cousin is still ripe for further investigation. I greatly hope that the scholarly edition of Plowden's *Treatise* provided in volume 2 of this thesis, and the comprehensive introduction to his arguments provided in the thesis proper, will encourage scholars to venture into the second half of Plowden's *Treatise* and properly engage with the polemical meat of his argument in defence of the Stewart succession.

One of the challenges of writing this thesis has been that scholarly interest in Plowden's *Treatise*, whether as an exposition of the king's two bodies or as evidence of the political and constitutional crisis precipitated by the uncertainty of the Elizabethan succession in the mid-1560s, has emanated from at least three disciplines: English literary criticism, English political history, and the history of the English common law. The systematic analysis of Plowden's arguments and detailed engagement with the various manuscript witnesses of his *Treatise* provided in this thesis will, I hope, have something to offer to all three disciplines in ways that might make each more fruitfully aware of what they have to offer one another.

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