


## Did Tudor Succession Law Permit Royal Bastards to Inherit the Crown?

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ome advocates of the theory that Queen Elizabeth the First had a secret illegitimate child argue that Parliamentary legislation paved the way for such a child to succeed to the throne. To support this theory, they cite a 1571 statute<sup>1</sup> that refers to the Queen's "natural issue" as possible heirs to the throne. The phrase "natural issue" could refer to an illegitimate child, whereas "lawful issue" would designate only persons born in wedlock. Dr. Paul Altrocchi argues that the 1571 statute no longer required that a successor to the throne be "lawfully" begotten:

The . . . Act of Succession had specified that a legal royal heir must be "issue of her body lawfully to be begotten." In 1571, "lawfully to be begotten" was struck by Parliament, permitting royal bastards to be legal heirs to the Crown.<sup>2</sup>

Paul Streitz also maintains the possibility of an illegitimate child becoming the monarch, saying that the 1571 Act "specifically reversed the previous Act of Succession" and "opens up the possibility for an heir to the throne from Queen Elizabeth, even an illegitimate one."<sup>3</sup> Charles Beauclerk, while not asserting that the Act expressly allowed bastards on the throne, echoes this theme:

By means of this extraordinary clause [in the 1571 Act], Elizabeth was opening the door to the possibility that even if she refrained from naming an illegitimate child as her successor, others might in time take the opportunity to do so.<sup>4</sup>

These writers are not the first to interpret the 1571 Act as clearing a path for bastard kings. Indeed, as William Camden wrote, the wording of the statute became the subject of general mirth around the time it was enacted:

But incredible it is what jests lewd catchers of words made amongst themselves by occasion of that Clause, Except the same be the Natural issue of her body; forasmuch as the Lawyers term those Children natural, which are gotten out of Wed-lock . . . .<sup>5</sup>

Additionally, in 1584, the anonymous *Leicester's Commonwealth*<sup>6</sup> accused the Earl of Leicester, Queen Elizabeth's longtime "favorite," of scheming to get the words "natural issue" placed in "the statute of succession" so that, after the Queen's death, Leicester could have one of his bastard children made king by pawning him off as his and Elizabeth's illegitimate child. But did the 1571 statute actually allow for this?

In this article, I examine the theory that the 1571 statute allowed royal bastards on the throne and find that it does not stand up to scrutiny. In doing so, I first explore, as background, English common law and ecclesiastical law regarding bastardy, especially as this subject relates to the royal succession. This article discusses the role of Parliament in determining the succession and explains how statutes are interpreted and how they are revised and repealed.

The article also analyzes the changes made in the succession law by the three Acts of Succession of Henry VIII. Finally, the article examines the 1571 Act cited above, which is actually a treason statute, and demonstrates that it does not alter the requirement laid down in the Third Act of Succession that for any children of Elizabeth to inherit the crown, they would have to be her lawful issue.

### **Caution: Bastards**

It is difficult to imagine an illegitimate person ascending the throne when, under the common law, a bastard was *filius nullius*, or "child of no one." Bastards could not inherit real property,<sup>7</sup> let alone kingdoms.<sup>8</sup> Otherwise, bastards had the same rights as other free persons.

The common law of bastardy and the ecclesiastical, or church, law were often in conflict. Church courts decided disputes about the validity of a marriage; but the common law, or secular, courts decided disputes about the inheritance of real property, which were often intertwined with decisions about the validity of marriages.

Under church law, children of adulterous relationships were bastards. The common law, however, had a strong presumption that a child born to a married woman was legitimate, even if the child was the result of an adulterous affair. For example, a legal standard often used to determine legitimacy was the "Four Seas" test:

as long as the husband was not impotent and he was *in the kingdom at any time at all during the pregnancy* then the child was legitimate.<sup>9</sup>

Shakespeare's *Richard III*, in fact, refers to the "Four Seas" test when Richard, then still Duke of Gloucester, argues his claim to the throne based on the theory that his late brother, King Edward IV, had actually been a bastard:

Tell them, when that my mother went with child  
Of that insatiate Edward, noble York,  
My princely father, then had wars in France.<sup>10</sup>

It is significant that Richard points to the time when his mother "*went with child*," which covers the whole pregnancy, not merely when she *was got* with child, which would refer only to Edward's conception. In order for Edward to be a bastard under the "Four Seas" test, his father would have had to be out of the kingdom for the entire pregnancy, not just the time of conception—biological facts be damned. Richard methodically establishes the other significant fact necessary to make his brother illegitimate by saying that their father "had wars in France" during the pregnancy: in other words, he was outside the kingdom.

A 1406 Year Book, an early collection of law reports, memorably summarized the ramifications of the "Four Seas" test as "Whosoever bulleth my cow, the calf is mine."<sup>11</sup> The test was abandoned in 1732, however, "on account of its absolute nonsense."<sup>12</sup> Paradoxically, the church law, which so strongly disfavored the legitimacy of children of adulterous unions, allowed for "special bastardy," which was the legitimizing of a bastard child after the fact, if his parents should later marry. The common law, however, still held such a child illegitimate and incapable of inheriting real property.

But the common law did not consider a child illegitimate if the parents had married in good faith and the marriage later had to be annulled because of the discovery of consanguinity (a blood relationship) or affinity (a familial relationship through marriage) between the parents.<sup>13</sup>

A possible basis for bastardy under the common law was that the parents' marriage turned out to be invalid due to a "precontract," such as those found in Shakespeare's *Measure for Measure*. One kind of "precontract" was an oral agreement between a couple that they would marry at some time in the future. This agreement was binding on both parties and neither one could marry someone else without first obtaining the agreement of the original betrothed to dissolve the contract.<sup>14</sup> *Measure for Measure* contains two examples of precontracts: one between Claudio and Juliet, who are engaged and living together while awaiting their dowry; and another between Angelo and Mariana, which Angelo had managed to dissolve through a legal loophole, namely, Mariana's alleged lack of chastity.

The principle that a valid precontract nullifies a later marriage was yet another legal tool that became useful to Richard III on his way to the throne. Richard

argued that when Edward IV married his queen, Elizabeth Woodville, Edward was already precontracted to another woman. This would make the children of the marriage illegitimate. In the *Titulus Regius* (Title of the King), an act passed by Parliament in 1484, Richard received after-the-fact legislative blessing on his kingship based on Edward's invalid marriage and the consequent bastardy of Edward's sons:

[A]t the time of the contract of the same pretended marriage [to Elizabeth Woodville] . . . King Edward was and stood married and troth plight to one Dame Eleanor Butler . . . with whom the said King Edward had made a precontract of matrimony . . . Which premises being true, as in very truth they been true, it appears and follows evidently, that the said King Edward during his life, and the said Elizabeth, lived together sinfully and damnably in adultery, against the law of God and his Church . . . Also it appears evidently and follows that *all the issue and children of the said King, been bastards, and unable to inherit or to claim anything by inheritance*, by the law and custom of England.<sup>15</sup>

This proclamation is grounded in the longstanding common law principle that illegitimate children could not inherit real property, including, of course, the kingdom.<sup>16</sup>

### **Parliament and the Succession**

The *Titulus Regius*, in which Parliament endorsed Richard III's claim to the throne, was not the first instance of Parliament involving itself in the succession. Even before King John signed the Magna Carta in 1215, English kings were not absolute rulers.<sup>17</sup> The king's Great Council, which had the power to prevent the king from raising taxes, eventually evolved into what we now call "Parliament" and officially assumed that name in the 1230s. While the monarch was, as Sir Thomas Smith said, "the life, the head, and the authority of all things that be done in the realm of England,"<sup>18</sup> Parliament was always looking over the monarch's shoulder and gradually growing in power.

When it came to the succession to the crown, there was no set formula for determining the next monarch: heredity played a large role, but considerations such as popular support, military strength, and administrative ability also mattered.<sup>19</sup> Succession was "determined by politics more than law when the choice of a successor was complicated by the absence of a direct and competent heir."<sup>20</sup> Parliamentary approval might then become the decisive factor, although in some cases Parliament did little more than meekly ratify the results achieved on the battlefield.<sup>21</sup>

Even before the *Titulus Regius*, Parliament had often taken an important role in determining the succession. For example, in 1327, Parliamentary pressure was a factor in the forced abdication of Edward II.<sup>22</sup> In 1377, when Richard II succeeded his grandfather, Edward III—skipping over Edward's still-living son, John of Gaunt—

Richard's right to the throne had already been validated by his having been made Prince of Wales, at Parliament's request, the previous year.<sup>23</sup> By 1399, Richard II had come full circle, as Parliament accepted his coerced resignation and allowed Henry IV to become king, despite an arguably stronger claim by Henry's cousin, Edmund Mortimer.<sup>24</sup> In 1460, during the Wars of the Roses, when Richard, Duke of York, claimed a superior right to the throne to that of Henry VI, he presented his case to Parliament, which decided that York's claim was stronger, but voted that Henry VI should remain as king. Parliament then passed the Act of Accord, a compromise that kept Henry as king but recognized York as his successor and disinherited Henry's son.<sup>25</sup>

The Wars of the Roses placed a premium on Parliamentary approval as a way to inject a sense of legitimacy into one's occupying the throne. Sure enough, when Henry Tudor, the Second Earl of Richmond, ended the Wars by overthrowing Richard III in 1485 to become Henry VII and begin the Tudor dynasty, a preamble to the new statutes enacted in his reign proclaimed him the true king, even though it gave no explanation as to how or why he was entitled to that position.<sup>26</sup> Succession statutes would become a feature of the Tudor era, with Henry VIII promulgating three different succession acts that changed the course of history.

Before delving into these statutes, let me offer a few words of advice about reading these, or any other statutes:

(1) Read a statute very carefully.<sup>27</sup> English statutes from this period tend to use excessive verbiage and often repeat the same idea several times using slightly different words, just to be sure all bases are covered. This results in extremely long sentences, in which one needs to carefully identify subjects, verbs, objects, and supporting clauses in order to understand the legal effect of the statute. In this article, I have made liberal use of ellipses when quoting statutes in order to focus on the significant, operative words of a statute. I have also modernized the spelling and typography.

(2) Start with the text itself.<sup>28</sup> If the meaning of the statute is clear from the plain language of the statute, one need not look any further.

(3) If any doubt remains about the effect of the statute, consider whether your interpretation of it harmonizes with other laws, such as the common law, ecclesiastical law, or other statutes.<sup>29</sup>

(4) If one is still uncertain, only then does one look at the legislative history for clues to a statute's meaning. This method of interpretation is only a last resort because what a few legislators may have stated at the time of a statute's enactment may not represent the understanding of all the legislators.<sup>30</sup> A well-written statute should be clear from the text itself, without resorting to other interpretive methods.<sup>31</sup>

### **First Act of Succession, 1533–34**

With these thoughts in mind, let's look at the First Act of Succession under Henry VIII, enacted by Parliament and the King in 1533–34.<sup>32</sup> Although it is entitled, "An Act for the establishment of the King's succession," it touches on many subjects, including treason law<sup>33</sup> and laws regarding marriages between people who were already related.<sup>34</sup>

In creating these statutes, the monarch and Parliament were not merely creating new laws; they were creating propaganda. They provided not only rules to be followed, but also justifications to explain why these rules were for the good of the kingdom. Little, if any, emphasis was placed on the possibility that these laws might also be good for the monarch personally, although that was likely to be the case. The First Act of Succession begins with a preamble that purports to explain the reason for the statute:

calling to our remembrance the great divisions which in times past hath been in this Realm by reason of several titles pretended to the imperial Crown . . .

.<sup>35</sup>

This evokes memories of the civil wars that had racked England since Richard II was deposed in 1399 and had continued through the Wars of the Roses, which ended in 1485—the very subjects of Shakespeare's two great tetralogies of English history.<sup>36</sup> This provided a plausible public relations reason for the statute: preventing further internal strife by clearly laying out the path of succession. The preamble does not mention another motive for the statute: Henry's recent marriage to Anne Boleyn and his desire to obliterate any trace of legitimacy in his marriage to Katherine of Aragon. As the Act explained:

The marriage heretofore solemnised between your Highness [Henry VIII] and the Lady Katherine, being before lawful wife to prince Arthur, your elder brother, which by him was carnally known, shall be definitively, clearly, and absolutely declared, deemed, and adjudged to be against the laws of Almighty God, and also accepted, reputed, and taken of no value nor effect, but utterly void and [annulled].<sup>37</sup>

This passage leaves no doubt as to its meaning. This is an example of the principle that, when the plain text of a statute is clear, one need not look further to understand it. The Act went on to validate the already-consummated marriage between Henry and Anne Boleyn:

The lawful matrimony had and solemnized between your Highness and your most dear and entirely beloved wife Queen Anne shall be established, and taken for undoubtful, true, sincere, and perfect ever hereafter.<sup>38</sup>

In this case, “ever hereafter” turned out to be only a few years. The Act soon went on to do its main business of defining the succession to the crown:

First the said imperial Crown . . . shall be to . . . the first son of your body between your Highness and your said lawful wife Queen Anne begotten, and to the heirs of the body of the same first son *lawfully begotten* . . . And for default of such sons of your body begotten . . . that then the said imperial Crown . . . shall be to the issue female between your Majesty and . . . Queen Anne begotten . . . That is [to] say: first to the eldest issue female, which is the Lady Elizabeth, now princess, and to the heirs of her body *lawfully begotten* . . .<sup>39</sup>

Note that the phrase “lawfully begotten” appears frequently. The message is clear: bastards need not apply. It was not necessary, however, for the statute to repeat “lawfully begotten” at every opportunity. For example, when the Act says, “then the said imperial Crown . . . shall be to the issue female between your Majesty and . . . Queen Anne begotten,” it was not necessary to place “lawfully” before “begotten” because the Act had already established that Anne was Henry’s lawful wife; therefore, any children of that marriage would necessarily be legitimate.

## Revising and Repealing Statutes

The First Act of Succession was as short-lived, alas, as the marriage of Henry and Anne and was replaced by the Second Act of Succession in 1536. But before looking at the Second Act, let us consider the methods by which a statute may be revised or repealed. This will be helpful later on, when we consider whether acts of Parliament allowed the illegitimate children of a monarch to inherit the crown.

In order to illustrate the basic principles, I will use the traditional law school method of presenting hypothetical statutes from a mythical U.S. state, in this case, the state of “Calizona.” There are three methods of changing a statute: (1) revision, (2) repeal, and (3) conflict (repeal by implication). Following are examples of, and variations on, each method:

**Revision.** Suppose the Calizona legislature enacts the following statute:

Section 310.17, Laws of Calizona (1978): Everyone must wear green on Wednesdays (effective July 1, 1978).

This seems clear. After July 1, 1978, everyone in Calizona must wear something green on Wednesdays. They don’t have to wear *all* green, just *something* green. (For our purposes, we will ignore whether this statute would be constitutional.) Suppose, however, that the legislature passes the following statute fourteen years later:

Section 310.17, Laws of Calizona (1992): Everyone must wear red on

Wednesdays (effective July 1, 1992).

Notice that both statutes have the same number, 310.17. That means that the later one is a revised version of the first and completely replaces the old version. The upshot for people in Calizona is that they must now wear something red on Wednesdays, but they don't have to wear green on Wednesdays anymore.

**No revision.** Let's consider a different scenario. We'll start again with the older version of the statute:

Section 310.17, Laws of Calizona (1978): Everyone must wear green on Wednesdays (effective July 1, 1978).

And let's say that the legislature passes another statute that reads as follows:

Section 312.145, Laws of Calizona (1992): Everyone must wear red on Wednesdays (effective July 1, 1992).

Notice that the second statute has a different section number than the first statute. It therefore is not claiming to be a revision of the first statute. Rather, it is a separate statute that stands on its own. It has no effect on the first statute, even though they address the same subject (what color people must wear on Wednesdays). This means both statutes are in effect, and people in Calizona must wear something red as well as something green on Wednesdays. (Now we're ignoring fashion considerations as well as the Constitution!)

**Repeal.** To illustrate repeal, let's begin again with our original 1978 statute about wearing green on Wednesdays:

Section 310.17, Laws of Calizona (1978): Everyone must wear green on Wednesdays (effective July 1, 1978).

Fourteen years later, the legislature passes a different statute *expressly repealing* the first:

Section 621.03, Laws of Calizona (1992): Section 310.17, Laws of Calizona, is hereby repealed (effective July 1, 1992).

This means that the rule about wearing green on Wednesdays is now, as Henry VIII's Parliament would have said, "accepted, reputed, and taken of no value nor effect, but utterly void and annulled." In other words, Calizonans don't have to wear green on Wednesdays anymore.

**Conflict (Repeal by Implication).** To illustrate conflict, we'll begin again with our 1978 statute about wearing green on Wednesdays:

Section 310.17, Laws of Calizona (1978): Everyone must wear green on Wednesdays (effective July 1, 1978).



Later, the legislature enacts the following statute:

Section 312.145, Laws of Calizona (1992): Everyone must wear only red on Wednesdays (effective July 1, 1992).

Note that the second statute has a different number than the first, so it doesn't purport to be a revision of the first. It would seem, at first glance, that citizens of Calizona would be required to follow both statutes.

There's only one problem: it is physically *impossible* to follow both statutes at the same time. If one follows the second statute and wears *only* red on Wednesdays, it is impossible to wear *anything* green. Here we have a true "conflict." While the second statute doesn't say that it is repealing the first, the two are *irreconcilable* (a key word when considering conflict).

Whenever a direct conflict exists, so that two statutes cannot both be followed at the same time, the later statute prevails over the earlier one.<sup>40</sup> Thus, even though the legislature never said it was revising or repealing the rule about wearing green on Wednesdays, a court interpreting the two statutes would hold that the later rule effectively repeals the earlier rule by implication.

**Partial Conflict.** Courts do not favor repeal by implication and will find a way to reconcile two statutes if it is at all possible. Conflict is narrowly interpreted, and a court will find that a statute is repealed by implication *only to the extent of the conflict and no further*. Let's illustrate this by starting with a slightly different version of the 1978 statute:

Section 310.17: On Wednesdays, everyone must wear green and must whistle "Dixie" (effective July 1, 1978).

This law requires everyone to do two things on Wednesdays: wear something green and whistle "Dixie." (It doesn't say you have to whistle "Dixie" all day, so once would be enough. For our purposes, we'll ignore difficulties with enforcement.)

Later, the legislature enacts the following statute:

Section 312.145, Laws of Calizona (1992): Everyone must wear only red on Wednesdays (effective July 1, 1992).

As we've discussed, the part about wearing only red is irreconcilable with wearing anything green. So the later statute trumps the earlier one, and the rule is that everyone has to wear only red on Wednesdays.

But do you still have to whistle "Dixie"? The answer is yes, because there is no conflict between wearing all red and whistling "Dixie": one can easily do both things at the same time (assuming one can whistle at all). Therefore, the conflict between the two statutes is partial, and only the part of the first statute that is in conflict with the second is repealed by implication.

## **Second Act of Succession, 1536**

Now, with an understanding of how statutes are revised and repealed, let's look at how Parliament changed the First Act of Succession, which had designated Henry's lawful issue by Anne Boleyn as heirs to the throne. The Second Act of Succession, passed in 1536, was entitled, "An Act for the establishment of the succession of the Imperial Crown of this Realm."<sup>41</sup> It expressly repealed the entire First Act of Succession:

By authority of this present Parliament [the First Act of Succession]<sup>42</sup> . . . from the first day of this present parliament shall be repealed, annulled, and made frustrate and of none effect.<sup>43</sup>

The Second Act of Succession soon got to its primary purpose of invalidating the King's marriage to Anne Boleyn, who had been executed for treason,<sup>44</sup> and the bastardizing of her only child, Elizabeth:

The said Marriage between your Grace and the said Lady Anne was never good, nor consonant to the laws but utterly void and of none effect. . . . And that all the . . . children, born . . . under the same marriage . . . shall be taken . . . [to] be illegitimate....and barred to claim . . . any inheritance as lawful . . . heirs to your Highness by lineal descent.<sup>45</sup>

Again, the "no bastards" message is clear. The Second Act also reaffirmed the invalidity of Henry VIII's marriage to Katherine of Aragon. Interestingly, the First Act had not expressly stated that Lady Mary, the daughter of Katherine and Henry, was illegitimate, but the Second Act remedied this oversight by specifically bastardizing Mary along with Elizabeth. The Second Act also provided, as the First Act had done, that it was treason for anyone to contradict the Act as to who was the lawful successor to the throne.<sup>46</sup>

Additionally, the Second Act of Succession made Henry's lawful issue by his new wife, Jane Seymour (or any lawful wife he should have in the future), heirs to the throne. It also gave Henry the remarkable power to name anyone he chose as successor to the crown in the event that his family line should fail.<sup>47</sup> He could designate such successors through his will or through letters patent, a kind of executive order.<sup>48</sup>

The Second Act ended with an odd provision stating that the Act had to be interpreted exactly as written and that it could not be repealed. I call this provision "odd" because, as a practical matter, one parliament may not prevent a later parliament from revising or repealing an act made by the earlier parliament.<sup>49</sup> This practical reality is demonstrated by the Third Act of Succession, which came along to punch some holes in the Second Act.

### Third Act of Succession, 1543–44

The Third Act of Succession, enacted in 1543–44 and entitled, “An Act concerning the establishment of the King’s Majesty’s Succession in the Imperial Crown of the Realm,”<sup>50</sup> perhaps gave some deference to the idea that the Second Act of Succession could not be repealed by declining to nullify the Second Act in its entirety. Therefore, anything in the Second Act that was not in direct conflict with the Third Act remained valid law. In fact, the Third Act made only a few changes in the law, although the ones it made had enormous impact.

The Third Act proclaimed that Henry’s son Edward (later Edward VI) would succeed him as king. This is what the law calls a “declaratory act.” That is, it was not making new law, but simply restating or clarifying what had long been the default rule under the common law and was reaffirmed by the Second Act of Succession: the eldest legitimate son gets the crown on his father’s death.

But the Third Act had some provisions that were in direct conflict with the Second Act and therefore overrode the earlier provisions. Henry was by this time married to his sixth wife, Katherine Parr, who had persuaded him to reconcile with his daughters, Mary and Elizabeth. The Third Act therefore declared that if both Henry and Edward should die without other lawful heirs, the crown would default to Lady Mary “and to the heirs of the body of the same Lady Mary *lawfully* begotten.” Furthermore, if Mary should die without heirs, the crown would default to Lady Elizabeth “and to the heirs of the body of the said Lady Elizabeth *lawfully* begotten . . .”<sup>51</sup>

If Edward VI had lived to adulthood and produced offspring, as most people probably hoped and expected that he would, the provisions placing his two half-sisters in the line of succession would have made an interesting historical footnote. But since Edward died childless at age 15, these provisions had major consequences. Mary and Elizabeth were the first two women to be sole rulers of England, and Elizabeth’s reign was one of the most remarkable in all of English history.

Although the Third Act of Succession put Mary and Elizabeth in line for the crown, it didn’t expressly say that the two daughters were Henry’s legitimate children. Furthermore, it said nothing about the validity of Henry’s marriages to their mothers, Katherine of Aragon and Anne Boleyn. One may look at this in either of two ways: (1) since the Second Act expressly invalidated both marriages and the Third Act didn’t contradict that, the marriages were still invalid and the daughters still bastards; or (2) making Mary and Elizabeth legitimate successors to the crown was irreconcilable, under most views of English law, with their being the bastard fruits of invalid marriages.<sup>52</sup>

The second interpretation is probably the better one because statutes that deviate from the common law must be construed narrowly.<sup>53</sup> The first interpretation would have implicitly turned the common law upside down by allowing the bastard child of an unlawful marriage to become the monarch. Since the Third Act of Succession didn’t explicitly say that it intended to make such a drastic change in

the common law, rules of statutory interpretation suggest that we shouldn't read that meaning into it. Most likely, Henry could not bear to officially proclaim his first two marriages valid and did not want to dredge up the unpleasant fact that he had bastardized his two daughters, so he and Parliament simply ignored the anomaly.

The Lady Mary, however, could not abide the anomaly, and when she became Queen in 1553 on the death of Edward VI, one of the first acts of Parliament declared Mary legitimate and reinstated Katherine of Aragon's marriage to Henry VIII, describing it as lawful, perfect, and blessed by God.<sup>54</sup> The statute also declared the First Act of Succession void (a complete waste of ink, as the Second Act of Succession, which was still largely in force, had already done this) and declared void those parts of the Second Act that had bastardized Mary.

When Elizabeth became Queen in 1558, a so-called "Act of Recognition" stated that "Your Majesty . . . is and . . . ought to be . . . our most rightful and lawful Sovereign liege Lady and Queen."<sup>55</sup> This part of the Act was, again, a "declaratory" act, which didn't say anything new but simply reaffirmed and restated the law of succession that was already in place. As mentioned earlier, this was a part of the function of English statutes, to create good public relations, along with legislation that benefited the monarch.

The statute did go on to say something new, however, when it declared that "your Highness is rightly, lineally, and lawfully descended and come of the Blood royal of this Realm of England . . ."<sup>56</sup> Use of the phrase "lawfully descended" cured an omission in the Third Act by expressly un-bastardizing Elizabeth. But Anne Boleyn's marriage to Henry VIII, unlike Katherine of Aragon's, was not posthumously recognized as valid.<sup>57</sup>

### **The Treason Act of 1571**

We now arrive at the 1571 Treason Act,<sup>58</sup> which some have claimed allowed for, or at least set the stage for, the ascension of a royal bastard to the throne. In those days, it was not uncommon for succession and treason to be discussed in the same statute because the two were often intertwined. Tudor succession law was so problematic that Tudor monarchs liked to add in provisions making it treason (the most serious and severely punished crime) for anyone to question the laws of succession that they established. Nevertheless, the fact that the statute was labeled a treason act suggests that it cannot be viewed as a mere revision of one of the previous acts of succession.

Neither can the 1571 Treason Act be an express repeal of a previous succession act because it contains no language stating that it is repealing *any* previous law, either of succession or treason or any other type of law. Thus, it added to the law but did not overtly subtract anything from it. Therefore, the only possible way that the 1571 Treason Act could alter the law of succession would be if some provision in it were in direct conflict with a succession provision in the Third Act of Succession.

Queen Elizabeth and her advisors were so wary of plots to overthrow her that Parliament passed a variety of treason statutes during her reign—ten of them

by the year 1581.<sup>59</sup> The 1571 Act declared, among other things, that anyone who pretended to the crown was a traitor. Furthermore, anyone who denied the right of the Queen and Parliament, jointly, to name her successor would be held a traitor. This was perhaps a subtle hint that the Queen and Parliament did not feel bound to follow Henry VIII's will, which had already laid out a course of succession in the event that Elizabeth should die childless.<sup>60</sup> It also declared anyone a traitor who should state that any person was the Queen's rightful successor, unless Parliament and the Queen had so decreed. But this last provision contained a peculiar exception:

Whosoever shall hereafter . . . declare . . . at any time before the same be by Act of Parliament of this Realm, established and affirmed, that any one particular person . . . is or ought to be the right Heir & Successor to . . . the Queen's Majesty . . . except the same be the natural issue of her Majesty's Body . . . shall for the first Offence suffer imprisonment . . .<sup>61</sup>

The peculiar exception is the phrase "natural issue of her Majesty's Body." The "natural" issue of the Queen's body, as opposed to the "lawful" issue, could include an illegitimate child. This is the phrase that leads to assertions that the succession law was changed in 1571 to allow royal bastards on the throne.

But, as stated earlier, the treason statute did not purport to be a revision of any succession act, nor did it expressly repeal any succession act. Therefore, the Treason Act could only affect the laws of succession if it were *irreconcilable* with some succession provision— that is, if the two provisions simply could not coexist simultaneously. Therefore, let us take a look at the relevant provision from the Third Act of Succession, which was still operative during Elizabeth's reign, and compare it to the provision in the 1571 Treason Act that is said to allow royal bastards to inherit the crown:

Third Act of Succession, 1544

For default of [Mary's] issue the . . . Crown . . . shall be to the Lady Elizabeth . . . and to the heirs of the body of the said Lady Elizabeth *lawfully begotten*.

Treason Act, 1571

Whosoever shall hereafter . . . declare . . . at any time before the same be by Act of Parliament of this Realm, established and affirmed, that any one particular person . . . is or ought to be the right Heir & Successor to . . . the Queen's Majesty . . . except the same be the *natural issue* of her Majesty's Body . . . shall for the first Offence suffer imprisonment.

Are the two provisions in direct conflict?

The 1544 provision states that if Mary should die without children, the crown

would then go to Elizabeth and to the heirs of her body *lawfully* begotten. According to this passage, children of Elizabeth could inherit the throne only if they were born in wedlock.

The 1571 provision states that anyone commits treason who says that any person is the successor to the Queen, unless that person has been designated the successor by the Queen and Parliament. It contains an exception: namely, that it is all right to say that a person is the successor to the Queen if that person is the Queen's *natural* child. Therefore, the 1571 Act, at most, allowed a person to *say* that a natural child of the Queen (which could include a bastard) should be her successor without the speaker being punished for saying so.

The 1544 Act controlled who could ascend the throne. The 1571 Act defined what one could say about the succession, which was very little indeed. But the 1571 Act has no language that expressly provides that an illegitimate child has a place in the line of succession. It contains nothing that directly conflicts with the 1544 Act, so it is possible for the two acts to coexist. One could require that any of the Queen's children be born in wedlock before they would be eligible for the crown without having to punish someone who said that any natural child of the Queen should be in the line of succession.

To use an analogy from modern law, the United States Constitution provides that, if one is to be President, he or she must be at least thirty-five years old.<sup>62</sup> But suppose you knew someone who you thought should be President despite his or her being only thirty. Could you state your opinion on this subject without being punished? Yes, because American law generally allows free expression of political opinions. But would your freedom to state your opinion change the rule that the President has to be thirty-five? No.

Likewise, it was the 1544 Act that defined who could inherit the crown: the Queen's lawful issue. The 1571 Act allowed a person to *express an opinion* that a royal bastard could inherit the crown, but it didn't go beyond that to provide that a royal bastard *actually could* inherit the crown. The two provisions are not irreconcilable. Those who argue that the 1571 Treason Act allowed a royal bastard to ascend the throne have simply misread the law.

Besides, as the foregoing historical and legal analysis has shown, Parliament and the monarch could simply declare a person a bastard or not. Parliament had bastardized and un-bastardized both Mary and Elizabeth. Parliament had declared that Elizabeth was "lawfully descended and come of the Blood royal" without ever explaining how that could be when her mother's marriage to the King was invalid. Indeed, Elizabeth's grandfather, Henry VII, the first Tudor king, would have had no plausible claim to royal blood had it not been for Parliamentary declarations of legitimacy on both sides of his family tree.<sup>63</sup>

Therefore, if Parliament and the Queen had wanted to put a particular illegitimate person in the line of succession, the first thing to do would have been to proclaim that person legitimate.<sup>64</sup> This would have been much more politically practical than declaring that bastards generally, even royal ones, could inherit the crown—a concept that went against some of the most deeply ingrained biases in

English law and custom.

Queen Elizabeth and her advisors did not propose the section of the treason statute that spoke of the Queen's natural issue. Thomas Norton, a Puritan member of Parliament, proposed this language.<sup>65</sup> The Queen had at first disliked the treason bill and thought it unnecessary because she already felt herself protected under the law as it existed.<sup>66</sup> When the bill was discussed in Parliament, the most hotly debated issue was whether the treason provisions should be enforced retroactively; eventually, Parliament determined that they shouldn't.<sup>67</sup> None of this suggests that the Queen and her closest advisors had an ulterior purpose for the bill of paving the way for royal bastards to be kings.

But was there any significance to Parliament's referring to the Queen's "natural issue" in the treason statute, rather than her "lawful issue"? Probably not. The drafters of the statutory language were still probably imagining a scenario in which the Queen would marry and produce children. They may have thought it presumptuous to suggest that any natural child of Her Majesty would be anything other than a lawful child.

Besides, since the operative language dealt only with which topics of written and spoken speech were treasonous, not with who could inherit the throne, it made little difference in that context whether one said "natural" or "lawful." Theoretically, the statute allowed one to say that if the Queen had an illegitimate child (hypothetically, of course), that child could become king or queen.

If one were to assert, however, that a certain person *was* the Queen's illegitimate child and therefore had a right to the throne, that might be going too far. Although accusing the Queen of actually having borne an illegitimate child might not violate the 1571 statute, it might make one guilty of sedition under the common law. Sedition laws, which were among the vaguest criminal laws ever devised, were used to punish people who defamed a member of the royal family or the government.<sup>68</sup> These would serve quite well to justify punishing anyone who was foolish enough to declare that the Virgin Queen had borne a bastard child.<sup>69</sup>

## **Conclusion**

The choice of the phrase "natural issue" over "lawful issue" in the 1571 Treason Act had almost no practical effect. It didn't allow for bastards to inherit the crown; all it did was to leave a little wiggle room about what one could say about the succession. Most of those who have found great significance in the wording, both then and now, have done so because they have read much more into the statute than it actually says.

### Endnotes

- <sup>1</sup> 13 Eliz., c. 1. [Citation of a statute consists of (1) year of the monarch's reign during which the statute was enacted, followed by (2) name of the monarch, followed by (3) chapter number of the particular statute. Thus, *13 Eliz., c. 1* would be the first statute passed in the 13th year of Elizabeth's reign. Statutes cited in this article are found in *Statutes of the Realm*, an authoritative collection of acts of Parliament from its earliest days (c. 1235) up to 1714. It was published, at the behest of George III, between 1810 and 1825, as a series of nine volumes. Spelling and typography have been modernized for purposes of this article.]
- <sup>2</sup> Paul H. Altrocchi, MD, "A Royal Shame: The origins and history of the Prince Tudor theory," *Shakespeare Matters* 4, no. 4 (Summer 2005): 13.
- <sup>3</sup> Paul Streitz, *Oxford, Son of Queen Elizabeth I* (Darien, CT: Oxford Institute Press, 2001), 100–01.
- <sup>4</sup> Charles Beauclerk, *Shakespeare's Lost Kingdom* (New York: Grove Press, 2010), 40.
- <sup>5</sup> William Camden, *The Historie Of The Most Renowned And Victorious Princesse Elizabeth, Late Queene Of England* (1630), quoted in Christopher Paul, "The 'Prince Tudor' Dilemma: Hip Thesis, Hypothesis, or Old Wives' Tale?," *The Oxfordian*, 5 (2002): 57 (spelling modernized).
- <sup>6</sup> Originally entitled, *The copy of a letter written by a Master of Art of Cambridge to his friend in London* (1584). First published as *Leicester's Commonwealth* in 1641.
- <sup>7</sup> I.e., property consisting of land or buildings.
- <sup>8</sup> See B.J. Sokol & Mary Sokol, *Shakespeare's Legal Language* (London: Athlone Press, 2000) 23–31, for a discussion of the laws of bastardy and their use in Shakespeare's works.
- <sup>9</sup> Sokol, 25 (emphasis added).
- <sup>10</sup> William Shakespeare, *Richard III* (3.5.86–88), *Riverside Shakespeare*, ed. G. Blakemore Evans (Boston: Houghton Mifflin Co., 1974), 735. Nearly every Shakespeare play has some reference to bastardy, even if it is no more than a reference to some character as "bastard," "half blooded," "misbegotten," or "whoreson." Sokol, 26.
- <sup>11</sup> Sokol, 25.



- <sup>12</sup> Sokol, 25.
- <sup>13</sup> Sokol, 25.
- <sup>14</sup> See Sokol, 289–307, for a discussion of precontracts in Shakespeare’s works.
- <sup>15</sup> Quoted in Tracy Bryce, “*Titulus Regius*: The Title of the King,” <http://home.cogeco.ca/~richardiii/TitulusRegius.htm>, May 2008 (emphasis added). The *Titulus Regius* does not appear in the statute books because Henry VII, on supplanting Richard III as king, ordered it suppressed and all copies of it destroyed.
- <sup>16</sup> William I, or William the Conqueror (ruled 1066–1087), had been born illegitimate, but he gained the English throne through conquest (hence, the name) rather than inheritance.
- <sup>17</sup> The Charter of Liberties, promulgated in 1100 by Henry I, attempted to bind the king to certain laws regarding the treatment of church officials and nobles, although monarchs tended to ignore the charter.
- <sup>18</sup> Thomas Smith, *De Republica Anglorum* (1583), ed. L. Alston (Cambridge: Cambridge Univ. Press, 1906), 63.
- <sup>19</sup> Edna Zwick Boris, *Shakespeare’s English Kings, the People, and the Law: A Study in the Relationship Between the Tudor Constitution and the English History Plays* (Cranbury, NJ: Fairleigh Dickinson University Press, 1978), 36.
- <sup>20</sup> Boris, 38.
- <sup>21</sup> Boris, 38.
- <sup>22</sup> The first statute Parliament passed after Edward II’s son, Edward III, became king, detailed the evil influence that Edward II’s favorites, Hugh Despenser (Spenser), the Elder and the Younger, had had upon the former king. 1 Edw. III, St. 1, c. 1–3 (1326–27).
- <sup>23</sup> Nigel Saul, *Richard II* (New Haven: Yale University Press, 1997), 17. Richard’s father, Edward of Woodstock (known posthumously as the “Black Prince”—possibly because of his black shield), was Edward III’s eldest son. Before the Black Prince died in 1376, he wrung from his father a promise that Richard would be the next king. Thus, the crown bypassed Edward III’s still-living sons and went straight to his grandson.
- <sup>24</sup> Saul, 418–22. As historian G.R. Elton has said of the kingship, as of 1399 and after, “usurpation by force of arms had taken the place of legitimacy.” G.R. Elton, *The Parliament of England, 1559–1581* (Cambridge: Cambridge Univ. Press, 1986), 357.
- <sup>25</sup> John A. Wagner, *Encyclopedia of the Wars of the Roses* (Santa Barbara, CA: ABC-CLIO, 2001), 1.
- <sup>26</sup> 1 Henry VII, preamble (“[Be it] ordained . . . by authority of this Present parliament that the inheritance of the Crowns of the Realms of England and of France . . . be, rest, remain, and abide in the most Royal person of our now Sovereign Lord King Henry the VII and in the heirs of his body lawfully coming . . .”).
- <sup>27</sup> See Richard K. Neumann, Jr. & Sheila Simon, *Legal Writing* (New York: Aspen Publishers, 2008), 21–24, on analyzing statutes. Note that these rules for

interpreting statutes are still valid today.

- <sup>28</sup> See *American Jurisprudence* 73, 2nd ed. (2012), Statutes §§ 124, 126; Neumann & Simon, 60 (“Writing about a statutory question focuses on the *words of the statute* because a legislature signals its intent primarily through the words it enacts”).
- <sup>29</sup> Neumann & Simon, 60 (“Statutes on the same subject . . . are to be construed together”).
- <sup>30</sup> Neumann & Simon, 60 (“Because of the chaotic nature of legislative work, legislative history can be incomplete and internally contradictory”).
- <sup>31</sup> See William S. Jordan, “Legislative History and Statutory Interpretation: The Relevance of English Practice,” *University of San Francisco Law Review*, 29 (1994), 2 (noting the English practice of refusing to consider legislative history in interpreting statutes).
- <sup>32</sup> 25 Hen. VIII, c. 22.
- <sup>33</sup> The statute declared anyone a traitor who impugned Henry VIII’s marriage to Queen Anne or asserted that Henry’s children by Anne could not inherit the crown.
- <sup>34</sup> The statute prohibited marriage between people who were already related, either by blood or by marriage, as laid down in the Bible’s Book of Leviticus. This was clearly a retrospective attempt to justify the annulment of Henry VIII’s marriage to Katherine of Aragon, the widow of Henry’s elder brother, Arthur.
- <sup>35</sup> 25 Hen. VIII, c. 22.
- <sup>36</sup> One tetralogy consists of the plays *Richard II*; *Henry IV*, Parts 1 and 2; and *Henry V*; the other tetralogy consists of the plays *Henry VI*, Parts 1, 2, and 3; and *Richard III*.
- <sup>37</sup> 25 Hen. VIII, c. 22.
- <sup>38</sup> 25 Hen. VIII, c. 22.
- <sup>39</sup> 25 Hen. VIII, c. 22 (emphasis added).
- <sup>40</sup> Neumann & Simon, 43 (“If the two [statutes] cannot be reconciled, dates matter. A later statute prevails over the earlier one”).
- <sup>41</sup> 28 Hen. VIII, c. 7.
- <sup>42</sup> The Act also repealed 26 Hen. VIII, c. 2, which had ratified the form of the oath that the King’s subjects were required to take in vowing to obey the First Act of Succession.
- <sup>43</sup> 28 Hen. VIII, c. 7. Since the entire First Act had been repealed in its entirety, the Second Act contained new provisions on such subjects as treason and the rules of consanguinity and affinity, somewhat modified from their forms in the First Act to apply to the new circumstances.
- <sup>44</sup> Anne Boleyn’s treason was based on alleged adulterous acts.
- <sup>45</sup> 28 Hen. VIII, c. 7. The marriage to Anne Boleyn was considered “never good” because Henry had previously had sexual relations with Anne’s sister, Mary Boleyn, making the marriage to Anne incestuous from the start. This was a new, and rather tortured, interpretation of the laws of affinity, which had before deemed a marriage incestuous only when the couple were already

related due to a previous *marriage* (not previous non-marital intercourse). See Stanford E. Lehmberg, *The Later Parliaments of Henry VIII, 1536–1547* (Cambridge: Cambridge Univ. Press, 1977), 2, 22.

<sup>46</sup> “If any person or persons . . . by words . . . or act . . . do . . . any thing . . . for the interruption, repeal or [annulling] of this Act . . . or to the peril, slander, or [disinheritance] of any of the issues and heirs of your Highness, as being limited by this Act to inherit and to be inheritable to the Crown . . . then every such person or persons . . . shall be adjudged high traitors . . .” 28 Hen. VIII, c. 7.

<sup>47</sup> It has been suggested that Henry VIII might have used this power to make his acknowledged bastard son, Henry FitzRoy, Duke of Richmond (1519–1536), heir to the throne. But the possibility became moot when the young man died, probably of tuberculosis, at age 17, around the time the Second Act of Succession became law. See Lehmberg, 20.

<sup>48</sup> Henry VIII provided in his will that if his children, Edward, Mary, and Elizabeth, should all die without issue, the next in line for the crown would be the descendants of his younger sister Mary, who had been Queen of France. This went against the common law, which would have placed the descendants of his *older* sister Margaret, who had been Queen of Scotland, ahead of the younger sister’s line. Ironically, however, the older sister’s line prevailed when Margaret’s great-grandson, James VI of Scotland, succeeded Queen Elizabeth and became James I of England. This result was probably due more to political realities than to faithful adherence to the common law. Of course, Parliament immediately enacted a statute proclaiming James “our only lawful and rightful liege Lord and Sovereign . . .” 1 Jac. I, c. 1 (1603–04).

<sup>49</sup> This clause “was of very doubtful constitutional validity . . .” Lehmberg, 24.

<sup>50</sup> 35 Hen. VIII, c. 1.

<sup>51</sup> 35 Hen. VIII, c. 1 (emphasis added).

<sup>52</sup> Lehmberg interprets the statute as “tacitly” recognizing the legitimacy of both Mary and Elizabeth. Lehmberg, 194. Mary had a possible legal loophole that Elizabeth didn’t have, namely, that if the parents married in good faith and the marriage was later annulled because of consanguinity or affinity, the child was still legitimate under church law. Since Henry and Katherine’s marriage was annulled because of affinity (Katherine was the widow of Henry’s elder brother), it could be argued that Mary remained legitimate. See Lehmberg, 20; Sokol, 25.

<sup>53</sup> See Neumann & Simon, 60 (“Statutes in derogation of the common law are to be narrowly construed”).

<sup>54</sup> 1 Mary, St. 2, c. 1.

<sup>55</sup> 1 Eliz., c. 3.

<sup>56</sup> 1 Eliz., c. 3.

<sup>57</sup> A very short statute of the 1558–59 Parliament (1 Eliz., c. 23) restored Elizabeth “in blood” to her mother, Anne Boleyn, and thereby allowed Elizabeth to inherit from her mother. This was necessary because Anne Boleyn had

been convicted of treason, and children of traitors suffered “corruption of blood” and could not inherit from their traitorous parents. See *Black’s Law Dictionary*, 9th ed. (St. Paul: West Publ., 2009), 397. But the statute did not nullify Anne Boleyn’s treason.

<sup>58</sup> “An Act whereby certain Offences be made Treason,” 13 Eliz., c. 1.

<sup>59</sup> See John Bellamy, *The Tudor Law of Treason: An Introduction* (London: Routledge & Kegan Paul, 1979), 69.

<sup>60</sup> Henry VIII’s will would have placed the descendants of Henry’s sister Mary on the throne. See note 48, above.

<sup>61</sup> 13 Eliz., c. 1.

<sup>62</sup> U.S. Const., art. II, § 1.

<sup>63</sup> Henry VII’s claim to the throne came from his mother’s side of the family. Lady Margaret Beaufort, his mother, was a great-granddaughter of John of Gaunt, Duke of Lancaster (third son of Edward III) and his third wife Katherine Swynford. Katherine had been Gaunt’s mistress for about 25 years. When they married in 1396, they already had four children, including Margaret Beaufort’s grandfather, John Beaufort. Gaunt’s children by Katherine Swynford were legitimized by Richard II’s letters patent, an Act of Parliament, and a papal decree. Henry IV declared that the Beaufort line, while legitimate, could not inherit the throne. But by 1485, when Henry VII ascended the throne, John of Gaunt’s other legitimate descendants had died out. Henry VII’s father, Edmund Tudor, was the child of a secret marriage (some say an illicit union) between Owen Tudor and Henry V’s widow, Catherine of Valois. Edmund Tudor was created Earl of Richmond in 1452 by Henry VI, his half-brother, and formally declared legitimate by Parliament. See Neville Williams, *The Life and Times of Henry VII* (London: Book Club Associates, 1973), 17–18.

<sup>64</sup> Even then, it would have taken a specific act of Parliament to place such a person in the line of succession.

<sup>65</sup> Bellamy, 64.

<sup>66</sup> Elton, 182.

<sup>67</sup> Bellamy, 64.

<sup>68</sup> See *Black’s Law Dictionary*, 1479.

<sup>69</sup> John Stubbs was convicted of sedition for publishing, in 1578, his opinions that the Queen should not marry a Catholic foreigner and that she was too old to marry. The Queen was dissuaded from imposing the death penalty; instead, she punished Stubbs by having his right hand cut off.