

Shakespeare's Law

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It was at one time the fashion to credit Shakespeare with something approaching to universal knowledge. Ben Jonson's observation that he had small Latin and less Greek was unheeded or discounted as the ill-natured criticism of a competitor regardless of the lines on the same page that spoke of him as the incomparable dramatist, not of an age but for all time. Jonson might well have added that he had little history, less geography and still less law.

To-day it seems an absurdity to regard him as matching on their own ground Bacon and Coke, the lord chancellors of his time. We have only to read the plays to rate his legal knowledge at its true value.

Shakespeare never laid claim to any scholarship himself; he was far too modest for that. He dealt not in factual knowledge, but in imagination, in love of beauty, and in dramatic effect. As he said in *Love's Labour's Lost*,

Small have continual plodders ever won
Save base authority from others' books.
These earthly godfathers of heaven's lights
That give a name to every fixed star,
Have no more profit of their shining nights
Than those that walk and wot not what they are.

Henry the Fifth was the man after Shakespeare's own heart for the greater part of his life, as he was a man who could discuss any question intelligently without the necessity that an ordinary man might find of learning by study, whose knowledge of divinity, war, and public affairs had been gathered without formal training.

Which is a wonder how his Grace should glean it,
Since his addition was to courses vain,
His companions unletter'd, rude, and shallow,
His hours fill'd up with riots, banquets, sports,
And never noted in him any study,
Any retirement, any sequestration
From open haunts and popularity.

* Q.C.

It was only later that Shakespeare was drawn to such characters as Brutus and Hamlet, and at the end of the road that he would speak of a library as "dukedom large enough."

Shakespeare had some acquaintance with the everyday popular side of the law. Thus his Falstaff knows very well that the subject is not bound to answer a judge's letter, even if it comes from the Chief Justice himself. The letter sent by a judge inviting attendance in his chambers is sometimes a very useful method of bringing an offender to his senses without the necessity of harsher and more expensive proceedings, but it can be ignored with impunity. To compel attendance the offender must be summoned by the King's writ or arrested "I sent for you," says the Chief Justice of England, "when there was matter against you for your life, to come speak with me." To which the knight answers unabashed." As I was then advised by my learned counsel in the laws of this land-service, I did not come."

Of law of this sort Shakespeare was no doubt fairly well informed, either by his own experience or that of his companions. So too he had the popular knowledge of the law of common assault, as we see in the opening scene of *Romeo and Juliet*, in which the servants are careful to have the law on their side till excitement carries them away.

It is when he tries more ambitious flights that we can note his shortcomings, as for instance in the trial scene of *The Merchant of Venice*. Let it be said at once that the dramatic intensity of the scene is beyond all criticism. Shylock is encouraged to persevere in his revenge and to disclose himself as utterly merciless until he suddenly finds himself thrown on the defensive and his rights shown to be worthless.

But in any country in which law had reached the level of a science, and certainly in Venice where the Roman law was known, the short answer to Shylock was clearly that his bond was worthless, being contrary to public order and good morals. He might as well have claimed in the courts a promised reward for murder. At best he might get a judgment for his loan if the bond were treated as a mere accessory and its nullity did not carry with it the nullity of the principal obligation, as we find it laid down for instance in article 1227 of the Code Napoleon and other derivative laws such as Article 1132 of the Civil Code of Quebec.

It needed no fine-spun theories from Padua to dispose of such a case. Portia however accepts the penalty of the pound of flesh at its face value, and then defeats it by a piece of casuistry which should not impose on a petty magistrate, however it may fit in with

popular conceptions of law. Shylock may have his pound of flesh, granted, but must not take any blood with it. But the principal includes the accessories without which it is meaningless, and this part of Portia's judgment has no legal merit. She is on firmer ground when she restricts the creditor to an even pound, for a penal obligation is subject to restrictive interpretation, but here again the immorality of the contract provided the real defence.

Portia may be right in refusing to let Shylock take the proffered principal if we assume that he had sought before the court nothing but the penalty for default. Under Roman law principles the creditor cannot demand both the primary debt and the penalty unless the latter has been stipulated for a simple delay in performance. (Article 1229 Code Napoleon and 1133 of the Civil Code of Quebec.) The creditor must elect one or the other, and Shylock seems to have limited himself expressly to the penalty. Under our procedure and probably under that of the times he could not amend his proceedings if by so doing he altered the nature of his demand, and his action should have been dismissed saving any recourse he might have upon the principal obligation. We cannot be too precise as we have not the wording of the penalty before us. If he had sued later for payment of the loan he might have faced a defence that his election once made could no longer be altered.

I cannot see the logic in Portia's proceeding to find Shylock guilty of a crime if, as she states, the bond was one which the law must recognize. If he had acted within his legal rights in taking it and presenting it for judgment, if Portia could insist on its exact performance knowing that under her interpretation it was physically impossible, how could it be said that Shylock had made himself guilty of seeking the life of a Venetian citizen in a criminal manner?

It is certainly an extraordinary procedure by which a civil case against a defendant is converted into a criminal case against the plaintiff and judgment rendered and executed forthwith. It would be difficult to find a model for such proceedings in Venice or any civilized jurisdiction. Of course it was Shakespeare's habit to telescope the events of months into a single stage day, as in the opening scene of *Julius Caesar*, but here we have plainly the events of one day, with the law taking its course at lightning speed. And yet in a few years we shall find Hamlet groaning at the law's delays.

Portia has become a sort of patron saint of the feminine bar, but I confess my heart has never warmed to her at any stage of life. Perhaps she has been too much praised. Her perfect assurance at the trial scene is something I would admire in senior counsel,

but which I would not recommend to a beginner. Bellario must have had rare confidence or rashness to intrust such an important mission to a young advocate on her first case. The first court appearances of the best of barristers are not generally such triumphs, and I fear that Antonio stood in much greater danger than he suspected.

The great mistake of both parties to the suit which Shakespeare completely overlooks, is their failure to be represented by counsel. It is always a mistake to be your own lawyer, even if you expect to win your case by default.

I have said enough to show that *The Merchant of Venice* cannot be taken as evidence of Shakespeare's knowledge of law. I should hasten to add that he pretended to no such knowledge. Let us praise him for the right things. What we must ask ourselves is surely not how much law he really knew but rather whether he produced a good play for our entertainment. It is folly to test the worth of a fairy-tale of such delightful character by its adherence to any known system of law, and I have been writing merely to protest against any theory that converts one of the greatest of men into an insufferable know-all.

A much more interesting legal contribution is made in *King John* by the case between the Faulconbridge brothers. The younger brother is seeking to enforce his father's death-bed will by which he was made the heir. The father made some sort of declaration to the effect that during the whole time the elder son might have been conceived he was absent from the kingdom. Whether this was stated in the will or merely a verbal explanation of his action we are not told. King Richard was alleged to be the real father.

King John is not impressed with the merits of the claim and disposes of it with rough good humour, stating in general terms the law applicable much as it may be found in the Code Napoleon:

“Sirrah, your brother is legitimate;
Your father's wife did after wedlock bear him,
And if she did play false, the fault was hers;
Which fault lies on the hazards of all husbands
That marry wives. Tell me, how if my brother,
Who, as you say, took pains to get this son,
Had of your father claim'd this son for his?
In sooth, good friend, your father might have kept
This calf bred from his cow from all the world;
In sooth he might: then, if he were my brother's,
My brother might not claim him; nor your father
Being none of his, refuse him: this concludes;
My mother's son did get your father's heir;
Your father's heir must have your father's land.”

One of King John's more amiable tastes was the delight he took in hearing cases in person, and he impressed his contemporaries by his dispatch of business as well as by his soundness of judgment on the bench. While this case is imaginary, it probably does justice to the king's talents.

He states the law too absolutely, without exceptions, such as that suggested by the death-bed declaration, of the impossibility of the husband meeting the wife during the entire period of possible conception, from 180 to 300 days before the birth. Nor is any attention given to what one would expect to be the soundest reason for maintaining the elder as heir, the husband's failure to take action within the brief delays allowed by the law which Shakespeare seems to have had in mind, probably that applied in the ecclesiastical courts which would have followed Roman law principles. Faulconbridge should have taken action to disavow his son within two months after his return to England.

The interesting point about this case lies in the coincidence that Shakespeare's eldest child came into the world like Philip Faulconbridge "full fourteen weeks before the course of time." While it is always dangerous to seek for personal biography in the plays, the coincidence here is too striking to be dismissed, and we get a reflection of Shakespeare's early domestic tragedy.

Had he consulted the Stratford lawyer when he discovered that perhaps Anne had taken him in? Was he paraphrasing here the opinion he had received which might have disqualified him from objecting either because of his knowledge of the pregnancy before the marriage or by his presence at the baptism, and might not have touched at all on the question of delay. It may be that Shakespeare ignored the element of time because he had not heard of it when he got his information.

As I read the king's judgment I can almost see the village lawyer in his office laying down the law to the shy rustic youth with broad humour and country illustrations, oblivious to the fact that here before him sat one of the world's greatest men. Of course all this must remain conjectural, but surely Shakespeare could not have written about a child born fourteen weeks before its time without a thought of his own first-born, and it is at least suggestive to find him so well informed on some features of a law that touched him so closely.

There are other legal situations, most of which receive off-hand treatment. Consider the summary disposal of Othello's estate at his death and check this up against any law of inheritance which

might apply to the case. Baconians who base their belief on the dramatist's knowledge of the law may well ask themselves how Desdemona's uncle would succeed to Othello's estate. At most, if the law of Venice approximated to the Roman law he might succeed to any rights that Desdemona might have had in his property or in the community dissolved by her death. As far as we are told Othello had no blood relations. Surely no one would be better acquainted with the laws of inheritance than a lord chancellor who would have simply left the matter unmentioned. Murder and suicide would provide complications and the rights of the state would have to be reckoned with. The situation cannot have been quite as simple as Shakespeare sees it, nor is it easily conceivable that Lodovico would have the authority to grant possession without legal formality. The casual manner in which the incident is dismissed suggests that it did not originate in the mind of anyone accustomed to give close attention to legal problems, certainly not in the mind of a Lord Chancellor, if indeed any argument can be necessary on such a point.

Hamlet in the grave-diggers' scene has something that reads like a parody of the arguments submitted in the case of Sir James Hales, a judge who drowned himself in 1554 by walking into the river at Canterbury, but this does not justify an inference that Shakespeare was a careful reader of the law reports. He might have attended an inquest at which the case was referred to or heard about it in conversation, for he is giving no more than a popular notion of the law, the best part of which is the clown's comment "Will you ha' the truth on't? If this had not been a gentlewoman she should have been buried out o' Christian burial."

There is also in *Hamlet* the incident of the passage of troops through neutral territory which I have heard mentioned as an instance of a profound knowledge of international law, whereas in fact it merely describes the practice of the times without comment or question, exactly as any layman might as readily do. Grotius had not yet written, and when he did he treated the right of passage as one which could not be refused without just cause and otherwise could be taken by force. There is not a word in *Hamlet* to suggest any problem involved here. It is simply a courtesy extended by one king to another, and no one would have treated it very differently until the much later development of the law relating to the rights and duties of neutrals.

There are of course many references to the profession, generally derogatory, such as Hamlet's remarks on the grave-digger's turning up the possible skull of a lawyer, his mention of the law's delays the hatred of Jack Cade's rebels as they burst into London crying

"The first thing we do, let's kill all the lawyers," Cade's fear of setting his name to any legal document, "for I did but seal once to a thing, and I was never my own man since," Mercutio's talk of the fairy Mab galloping over lawyers' fingers "who straight dream on fees," (although I own I cannot recollect any dream turning on this subject, which was of some importance to me), King Lear's picture of judicial corruption, "Plate sin with gold, And the strong lance of justice hurtless breaks," and the favourable reception by Mr. Justice Shallow of his servant Davy's plea on behalf of a rascally friend "I have served your worship truly, sir, this eight years; and if I cannot once or twice in a quarter bear out a knave against an honest man, I have but a very little credit with your worship. The knave is my honest friend, sir; therefore, I beseech your worship, let him be countenanced." There are doubtless many other such allusions, but I cannot bring to mind one which indicates any close knowledge or appreciation of the lawyer's service.

Perhaps the most striking contribution of Shakespeare to legal science is that found at the beginning of the second act of *Julius Caesar*, where he gives us a remarkable picture of what we now call the "judicial process." It is Brutus' soliloquy as he walks up and down in his orchard, meditating as he had promised on the problem of how the state is to be saved from Caesar, and you must bear in mind that Brutus is at the moment the *praetor urbanus* or Chief Justice of Rome, appointed to that position by Caesar himself.

He reaches his conclusion at once. The opening words are "It must be by his death." Judgment is rendered. And then come other thoughts. Personally he has nothing against Caesar; it is only the general interest which requires consideration. There is no doubt of Caesar's wish to be crowned, and the question is how this may change his nature. As he is now, he does not deserve death. As he may become, it may be very different. This is therefore the view to be taken. As so often happens judgment has in reality been rendered at the outset of the case, and the judge's most serious concern is to find reasons to justify the decision. It is a mental dishonesty, though one of which he may not be fully conscious as such. He is anxious to render a judgment that will bear the scrutiny of lawyers or still more of judges in appeal.

And so Brutus concludes his meditation:

"And since the quarrel
Will bear no colour for the thing he is,
Fashion it thus; that what he is, augmented,
Would run to these and these extremities;
And therefore think him as a serpent's egg
Which, hatch'd, would, as his kind, grow mischievous,
And kill him in the shell."

These afterthoughts being the argument necessary to support the judgment, must be the ones adopted for the purpose. "Fashion it thus!" It is a remarkable tribute to Shakespeare's imaginative powers that he has put himself in the position of Brutus and laid his finger unerringly on what is so often a fatal flaw in judicial reasoning. He did not find this in Plutarch, from whom he took his facts, though in the course of his friendship with Southampton and acquaintance with Essex he may have met and conversed with great lawyers and observed their methods. Essex was the patron of Bacon who displayed the adaptability of his mind by his conduct of the prosecution of his friend for treason.

It is such a passage as the mediation of Brutus which gives us a truer measure of Shakespeare's greatness than any such legal knowledge as we find in *The Merchant of Venice*.
