

## SHAKESPEARE AND EQUITY

Norman Nathan

Webster's New International Dictionary, as part of its definition of "equity," says,

the term equity came to designate the settled and formal system of legal and procedural rules and doctrines according to which justice would be administered within certain well-defined limits of jurisdiction.

This modern concept of equity, however, is vastly different from that existing during the early development of equity and the court of chancery.

Apparently, during the fifteenth, sixteenth, and early seventeenth centuries, there existed among many Englishmen the feeling that the rigidity of the law did not always result in justice and that common and statute law must sometimes be modified when their application went against conscience. In general, English monarchs supported this principle and encouraged various chancellors to establish what was eventually to become known as the court of chancery. This court

...appealed openly to abstract justice. The king, as pater patriae, had a duty to see that none of his subjects was denied a remedy where conscience required that he should have one, and this duty he delegated to his chancellor who became the keeper of the king's conscience.....Hence the maxim that the king's bench was a court of law but the court of chancery a court of conscience.<sup>1</sup>

It was surely not intended that "conscience" be made a device whereby every judge could wrest the law to his personal ideas of justice.

The claims of equity in its earlier stages are well expressed in a little treatise called Doctor and Student, published in the reign of Henry VIII.: -- "Conscience never resisteth the law nor addeth to it, but only when law is directly in itself against the law of God, or law of reason."<sup>2</sup>

From the above it is clear that there was an awareness of the necessity of supplementing common and statute law -- but only when applying the law would itself violate either the will of God or that which was obviously reasonable. Of course, this new concept did not go unchallenged, and the man who has been referred to as the greatest common

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1. Encyclopaedia Britannica(Fourteenth Edition), s.v. Equity.

2. Ibid., s. v. Chancery.

lawyer of all time, Sir Edward Coke, strenuously opposed the growing importance of the chancellor's court. His most crushing defeat, at the hands of Lord Ellesmere, occurred in 1616, coincidentally the year of William Shakespeare's death.

The major point of this article is to show that Shakespeare was not unaware of the contemporary conflict between law and equity and that on at least one occasion he presented an aspect of the problem to Londoners from the stage of a public theater. The famous "Quality of Mercy" speech in The Merchant of Venice appears to have a direct connection with the struggle taking place within the judiciary of the time.

In The Merchant of Venice, Shylock and Antonio have entered into a contract. Antonio borrows 3,000 ducats for three months. If Antonio cannot repay the money on or before the due date, Shylock will have the right to remove a pound of flesh from any part of Antonio's person. It is clear from the rest of the play that Shylock can expect specific performance once the bond is defaulted.

As we know, the money is not paid back on time, and Shylock comes into court to demand his pound of flesh. Normally, the Duke of Venice would render judgment. But in this case he decides to rely on the legal knowledge of Belario, a famed jurist.

Meanwhile, Portia has persuaded Belario to let her appear in his place. She comes disguised as a clerk and presents her credentials. Whereupon the Duke permits her to try the case and recommend a decision which he, as Duke, will enforce. The situation is obviously much different from a modern courtroom. There are no lawyers present. The Duke, as an absolute sovereign of the city-state of Venice, in his own person may at any time serve as the supreme judge, or he may temporarily delegate this authority to another -- in this case Portia.

Shylock, therefore, finds that he must ask Portia for specific performance.<sup>3</sup> Portia at first agrees that Shylock is entitled to the pound of flesh. But she does ask that mercy supercede justice as she

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3. Today a court of equity is frequently resorted to in order to compel specific performance. In Shakespeare's day, however, common law courts could and did grant specific performance. The present writer is not equipped to show precisely when the letter of a contract had to be adhered to. But it is his impression that there was nothing unusual about a judge's granting specific performance (rather than appropriate monetary damages) to a plaintiff when such performance was at all possible. Note that in the play Shylock refuses an offer of damages many times the 3,000 ducats he lent. His refusal is based on the assumption that the court must award him a judgment in terms of the wording of the bond.

says to Shylock:

But mercy is above the scepter'd sway; It is enthroned  
in the hearts of kings; It is an attribute to God him-  
self; And earthly power doth then show likest God's  
When mercy seasons justice. (IV,i,193-197)

This is a plea for equity in words similar to those used later by King James:

...King James, in speaking in the Star Chamber, says:  
"Where the rigour of the law in many cases will undo a  
subject, then the chancery tempers the law with equity,  
and so mixes mercy with justice, as it preserves a man  
from destruction."<sup>4</sup>

Despite her plea, Portia appears to agree that Shylock is within his right in saying, "I crave the law." At this point Bassanio intercedes:

Wrest once the law to your authority; To do a great  
right, do a little wrong,.....

Portia replies by saying that if an established decree is altered,

'Twill be recorded for a precedent,  
And many an error by the same example  
Will rush into the state.

Up to this point in the trial scene, Portia, though urging the principles of equity on Shylock, is nevertheless basing her decision solely upon the common law. Her insistence upon maintaining the letter of the law, however, suddenly takes a surprising turn when she brings up an additional point. In taking the pound of flesh Shylock may not spill a drop of blood since the bond does not give him the right to any blood. Neither can he take a scruple more or less than a pound. Here Portia is on highly dubious grounds. Quite clearly, in the fulfillment of a contract, certain necessary actions and conditions not mentioned in the contract are understood. It is understood in the case of this particular contract that Shylock, in taking the pound of flesh, would kill Antonio. Yet, the contract said nothing about taking Antonio's life. So too, Shylock in cutting off the pound of flesh would of necessity be expected to spill or remove some minimum of blood. And if Shylock can take a pound, he is fully within his rights if he takes less than a pound. Portia apparently agrees that Shylock could kill Antonio but raises a quibble about much lesser considerations such as spilling a drop of blood or deviating in either direction from the precise weight. Had it been Shakespeare's purpose to maintain the

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4. Encyclopaedia Britannica, s. v. Chancery.

supremacy of the common and statute law and deny the claims of equity, he might well have had Shylock point out the legal error in Portia's restrictions.

It would seem, therefore, that Shakespeare's real point is to show that even the law is not always sufficient unto itself, that there are other considerations, and that when these other considerations violate the laws of God and reason, some discretionary power should be in the hands of the court. For when Shylock is suddenly willing to take the money instead of the flesh, Portia brings in another bit of law:

The law hath yet another hold on you.  
It is enacted by the laws of Venice,  
If it be prov'd against an alien  
That by direct or indirect attempts  
He seeks the life of any citizen,...  
All the offender's life lies in the mercy  
Of the Duke only,...  
Down therefore and beg mercy of the Duke.

Note that while Portia is quoting statute law, she is quoting a law that allows the Duke (who is also judge) wide discretionary powers. Thus, this statute law has the spirit of equity. But if there were no such statute law, a great injustice might have resulted without the application of equity. And since every law cannot allow discretionary powers or foresee all possible eventualities in the application of a specific law, the need for a court of equity becomes apparent.

At this point a modern trial lawyer might have said, "According to the contract, Antonio's life belongs to Shylock. However, by the law of Venice, Shylock's life is at the mercy of the Duke. My client Shylock is willing to agree to relinquish his right over Antonio's life if the Duke will agree to relinquish his right over Shylock's life. In that way the law will not be violated, and neither the defendant nor the plaintiff will suffer."

But Shakespeare here takes his definite stand in favor of equity. Shylock is not permitted to remember his claim to the life of Antonio. The Duke says,

That thou shalt see the difference of our spirit,  
I pardon thee thy life before thou ask it.

Portia has been most successful. Under the guise of adhering strictly to the common law, she has exposed its limitations. Without equity, that is, the Duke's using the discretionary powers in a statute law to ignore the provisions of a contract, there would have been no justice consonant with the laws of God and of reason. Certainly, it would have been abhorrent for Antonio to have lost his life, and even Shylock, whatever his intentions, has not actually succeeded in doing

anything that morally deserves so severe a punishment as hanging.

It would appear from the above that just a few years before Coke and Ellesmere finally tested the stability of the court of chancery, Shakespeare briefly presented an aspect of the problem, pointed out a possible inadequacy of common law, and indicated how equity could on occasion promote true justice. That equity was to develop into the relatively rigid legal code that it is today neither he nor Ellesmere anticipated. Equity once was "when mercy seasons justice."