

## Shakespeare and the Law

By: Gavin MacKenzie<sup>1</sup>

It was a civil action for a specific performance of a contract. The facts could not have been simpler and were not in dispute. The plaintiff loaned the defendant money, and the defendant failed to repay it. If it weren't for the penalty clause, the case would have been open and shut.

The plaintiff considered the case to be ripe for summary judgment. His motion came on for hearing before a recently appointed judge. The judge accepted the plaintiff's submission that the words of the contract must be interpreted in accordance with their ordinary and literal meaning. She rejected the defendant's submission that the court should decline to enforce the agreement. To do so, the judge held, would be "a bad precedent", would undermine the sanctity of contracts and discourage parties from doing business in the jurisdiction.

Emboldened by the ruling, the plaintiff rejected the defendant's offer to settle the claim, though the offer to settle was for appreciably more than the principal amount of the loan. But at that point, as often happens in litigation, the tide turned. "Tarry a little", the judge said ominously to the plaintiff, "there is something else." Bad sign. The plaintiff's reliance on a literal reading of the contract came back to haunt him. Spectators knew that the plaintiff was in trouble when the judge said to him: "For as thou urgest justice, be assured/Thou shalt have justice more than thou desir'st".

The penalty clause entitled the plaintiff, in the event of default in payment, to extract a pound of flesh nearest the defendant's heart. The judge held that the plaintiff was entitled to excise precisely one pound of flesh from the defendant, but that he must shed not a drop of blood—an obvious impossibility. Moreover, the judge held, the plaintiff had breached the jurisdiction's *Alien Statute*, which prohibited non-citizens from directly or indirectly contriving against the life of any citizen, and subjected offenders not only to the forfeiture of all their property but also to death by execution. The judge ordered that the plaintiff convert from Judaism to Christianity, that all his property be appropriated, and that he put to put to death.

The case, officially titled *Shylock v Antonio*, is better known by theatergoers as Shakespeare's *The Merchant of Venice*. I read it in grade nine. Three years of law school and 29 years of practice have caused me to read it differently today.

For most observers, the case symbolizes the triumph of the liberating spirit over the deadly letter of the law. This conventional view, in my respectful submission, ignores a prominent theme of the case: that things are not always as they seem. The judgment is

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<sup>1</sup> Gavin MacKenzie is the Treasurer of The Law Society of Upper Canada and a partner in the Toronto office of Heenan Blaikie LLP. This paper was presented at the Chief Justice of Ontario's Advisory Committee on Professionalism's Sixth Colloquium at the University of Toronto's Law School on March 10, 2006. Earlier versions of the paper were published in the *Law Times*.

more than 400 years old. I say the time has come for us to reconsider it. As Justice Paul Perell wrote in a paper he presented at an earlier colloquium, the court scene in Act IV of the *Merchant of Venice* is good theatre but bad law. In fact, I wish Shylock would retain me to launch an appeal. I acknowledge that we would need an extension of time. I would raise a number of grounds.

First, I would argue, to hold that Shylock could take a pound of flesh but no blood is to adopt an interpretation of the contract that leads to an absurdity. I would urge the court on appeal to adopt a purposive construction, on which the contract would implicitly authorize what was necessary to enable Shylock to obtain his pound of flesh, including the shedding of Antonio's blood.

Second, I would contend, Judge Portia's order that Shylock convert to Christianity, that his property be appropriated, and that he be executed, simply cannot stand. Antonio asserted no counterclaim, and the order deprived Shylock of his right to life, liberty and the security of the person without adherence to the principles of fundamental justice. Moreover, the order was made under a statute that not only breached his guaranteed right of freedom of religion, but which also deprived him of his guaranteed right to be treated equally under the law.

Finally, I would submit, the learned trial judge ought to have disqualified herself on the ground that she had a personal interest in the case. The purpose of the loan was to enable Antonio to help his friend woo Portia. The learned trial judge had an interest in the disposition of the case, which if disclosed, would have given rise to a reasonable apprehension of bias.

I would advise Shylock not to press his claim for specific performance on appeal; the Court of Appeal might decline to enforce the penalty clause on the ground that a provision calling for the death of one of the parties to a loan agreement is contrary to public policy. In the "Order Requested" part of our factum I would confine our request to repayment of the principal with interest, though I'd probably seek costs on the appeal and in the court below on a substantial indemnity scale.

The preoccupation with legal issues and knowledge of legal intricacies reflected in Shakespeare's plays are considered by some to provide compelling evidence in support of the theory that the plays were written by an author trained in the law. The interval from 1584, when Shakespeare was last heard from in Stratford, to 1595, when he surfaced in London, is referred to by Shakespeare's biographers as the Lost Years, because almost nothing is known about what he did during this period. The interval may be assumed to have been a major formative period in his life: he was 21 years old when it began, 31 when it concluded.

Two thirds—more than 20—of Shakespeare's plays have trial scenes; the one we discussed from the *Merchant of Venice*, is among the most memorable in all of literature. The themes explored include the extent to which the law should be used to enforce morals (*Measure for Measure*); how law can benefit society by channelling the passion

for revenge (*Hamlet*); the impartiality of the judiciary (*Henry IV, Parts I and II*); the role of the law in protecting one's reputation against slander (*Othello, Much Ado About Nothing, and the Winter's Tale*); the need to avoid rigid interpretation of formal rules and contracts that can have unjust results unless tempered by equity (*Measure for Measure and the Merchant of Venice*, again); and the principle that no one—not even the king—is above the law (*Richard II and King Lear*).

In addition to his affinity for trial scenes and knowledge of legal intricacies, Shakespeare's plays abound with dialogue that has special meaning for lawyers. The funeral orations of Brutus and Antony in *Julius Caesar* could be taught in advocacy courses to demonstrate what works, and what doesn't, in a closing address. The same is true of this lesser-known passage from *Richard II*: "His words come from his mouth; ours from our breast./He prays but faintly, and would be denied;/We pray with heart and soul, and all beside.../His prayers are full of false hypocrisy;/Ours of zeal and deep integrity."

Tranio's advice in the *Taming of the Shrew* captures the timeless meaning of professionalism: "Do as adversaries do in law/ Strive mightily, but eat and drink as friends." The same is true of Cardinal Wolsey's admonition to Cromwell in *Henry VIII*; "Corruption wins not more than honesty." From *The Winter's Tale*, we have a candid self-assessment that could apply to many witnesses: "Though I am not naturally honest, I am so sometimes by chance." The reason why judges prefer the testimony of disinterested witnesses could be summed up by Polonius's succinct observation about mothers, in *Hamlet*: "Nature makes them partial." Here is some constructive advice from *Henry V* that could be adapted to trial strategy: "In cases of defence 'tis best to weigh/The enemy more mighty than he seems."

The law and lawyers are the explicit subject of other Shakespearian dialogue, and much of it is unflattering, including Falstaff's well-known reference in *Henry IV Part I* to "Old father Antic the law", and the shepherd's son's dismissive declaration in *The Winter's Tale*: "Let the law go whistle.: Angelo's remark in *Measure for Measure* is only slightly more sanguine: "The law hath not been dead, though it hath slept." As for those who chose the law as their profession, we hear Hamlet say to Horatio, while examining skulls in a graveyard, "Why, may not that be the skull of a lawyer? Where be his quiddits [subtleties] now, his quilllets [evasions], his cases, his tenures, and his tricks?" And finally, of course, we have Dick the Butcher's notorious but ambiguous exhortation from *Henry VI Part II*: "The first thing we do, let's kill all the lawyers."

Many lawyers, including a sitting United States Supreme Court justice, have espoused the view that these famous words should be read as a compliment to the legal profession. In *Walters v National Association of Radiation Survivors*, 473 U.S. 305, 371, n. 24 (1985), Justice John Paul Stevens dissented because he rejected the majority's "apparent unawareness of the function of the independent lawyer as a guardian of our freedom." He added in a footnote heartening to lawyers that, "That function was, however, well understood by Jack Cade and his followers, characters who are often forgotten and whose most famous line is often misunderstood." Justice Stevens pointed

out that line was spoken “by a rebel, not a friend of liberty”, and that, “As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.”

But as Daniel J. Kornstein persuasively argued in his engaging 1994 book *Kill All the Lawyers?*, the evidence to support Justice Stevens’ reading of the famous line is far from compelling. Kornstein, a lawyer who practises in New York, contends that it is at least equally likely that Jack Cade’s rebels — who consisted of “infinite numbers” of peasants, labourers, weavers, tanners, sawyers, butchers—regarded lawyers as a professional elite who symbolized the inequities and oppression that may provoke a revolution. Then (as now) lawyers were more available to the wealthy and powerful who could afford to retain them, than to the poor and weak, who may well have considered them to be conservative defenders of the property rights of the privileged. The rebels, seeking redistribution of property, undoubtedly regarded lawyers with contempt, not because of their role in upholding the rule of law, but because of their role in upholding the status quo. In this light, Justice Stevens’ reading amounts to wishful thinking on the part of the legal profession.

The same must be said of the theory that Shakespeare was a lawyer. Just as lawyers want to tell themselves that when Dick the Butcher suggested killing all the lawyers he meant it as a compliment, they also want to tell themselves that the greatest English writer of all time was one of their own. Here too, though, the evidence in support of the theory is thin.

While it is true that Shakespeare’s plays abound with trial scenes and legal issues, the works of other Elizabethan playwrights often employed legal allusions as well. Shakespeare’s times were marked by great popular interest in legal proceedings. With few recreational activities to amuse them, people found attending trials to be a diverting pastime. The law was not remote from the experience of the people. Shakespeare would not have filled his plays with legal allusions if he had not expected them to be understood. Nor would his fellow playwrights. During Shakespeare’s career, more than a third of the plays performed in London had a trial scene. Law was a staple of Elizabethan drama.

And though we do not know what Shakespeare was up to in his twenties, we do know that his family was unusually litigious. By one account John Shakespeare, William’s father, was in court 67 times. Shakespeare himself was also involved in a number of legal proceedings, as a land buyer, a moneylender, a witness, and a plaintiff. It is likely that he wove into his literary works his family’s personal experiences with the law.

It is also likely that Shakespeare read voraciously. In an era in which the law had such an influence, it would be surprising if his reading did not include law books. He also had friends and acquaintances who were lawyers. Not only is it likely that Shakespeare acquired considerable second-hand legal knowledge from them, it is also likely that one or more of his lawyer friends vetted his legal allusions for technical accuracy.

So to the question “was Shakespeare a lawyer?” we must reluctantly answer, “probably not”. Nevertheless, Shakespeare has influenced the law for four centuries thus far, and will continue to do so, perhaps for eternity. I wouldn’t even mention the influence of those who were influenced by Shakespeare if I weren’t discussing eternity anyway. “Eternity is a terrible thought,” says Rosencrantz in Tom Stoppard’s *Rosencrantz and Guildenstern Are Dead*. “I mean, where’s it going to end?”

I’ve written about Shakespeare and the law before, and when I’ve done so I’ve elicited more than the usual response to my words. One of the letters I received was from Daniel Kornstein, the practicing lawyer in New York to whom I referred, who wrote a book on the same subject titled *Kill All The Lawyers?*

Kornstein captures Shakespeare’s eternal influence on the law and lawyers. “As I enter a courthouse”, Kornstein wrote, “I think of Shakespeare’s warning [from *The Merchant of Venice*] “You must take your chance”. A wise lawyer will also remember what Portia said to Shylock: “The law hath yet another hold on you.” We lawyers may think we have a pretty good grip on the law, but the Bard of Avon is smarter than we are, and he has news for us. The truth is that it’s the other way around.