1916

Shylock v. Antonio

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Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol4/iss8/3

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The trial scene in the Merchant of Venice is, even among laymen, one of the most popular passages in Shakespeare's plays. To lawyers, it has a peculiar appeal. At a time when public attention is directed to everything Shakespearean by reason of the tercentenary, some comments upon this trial scene from a lawyer's viewpoint may prove not without interest.

When a practicing lawyer re-reads the play after having neglected it for several years, he is struck by the informality of the trial. The conversations between the spectators and the parties, bluff Gratiano's frank expressions of his opinion of the Jew, the by-play about the loyalty of the newly wedded husbands to their brides, Antonio's touching farewell to his friend Bassanio, make up too large a part of the scene to be merely the undertone comment which might be made in a modern court room during the progress of a trial. Moreover, no skillful dramatist would use so many and so long "asides." These interruptions and Portia's eloquent plea for mercy (addressed not to the Court but to the plaintiff) remind one of the loose Continental procedure which was so forcibly brought to the attention of American lawyers by newspaper accounts of the trial of Mme. Caillaux some two years ago. Shakespeare may have been familiar with the Continental procedure of his day; but informal interruptions of the same sort are to be found in his other famous trial scene, where, in "Richard II," the Duke of Norfolk and the Duke of Hereford enter the lists to try an appeal by wager of battle. Quaere: Did the practice in the English courts more nearly resemble the informality of the Continental courts in the sixteenth century than does the present practice? Perhaps, if the poet had only held the mirror up to contemporary English procedure, the reflection would have been too dull to please the audience and he injected unnatural liveliness for dramatic effect.

Again the American lawyer is struck by the fact that Portia was less a representative of Antonio than a legal adviser to the court. It is undoubtedly true that the tendency of the lawyer to become a mere hired tool of his client is modern. Our ancient brethren were officers of the court in a truer and fuller sense than we are. The lawyer's fee was not a wage, it was a gratuity from a grateful litigant. The Duke suggests that Antonio "Gratify this gentleman."
What is a lawyer to think of Portia’s legal argument? The present commentator knows absolutely nothing whatever of the laws of medieval Venice. At that, he probably knows as much Venetian law as Shakespeare did. Shakespeare seems even to have had an idea that Venice had a municipal charter which might be revoked for abuse, cf. the passage where Shylock says to the Duke:

“By our holy Sabbath have I sworn
“To have the due and forfeit of my bond:
“If you deny it, let the danger light
“Upon your charter and your city’s freedom.”

The Duke’s court in the play was more English than Venetian. Notice the legal expressions: “If thou canst rail the seal from off my bond.” “Is he not able to discharge the money? Yes, here I tender it for him in the court.” “’Twill be recorded for a precedent.” “Thy lands and goods.” “He will let me have the other half (of his wealth) in use, to render it upon his death unto the gentleman that lately stole his daughter.” “In christ’ning shalt thou have two god fathers: Had I been judge, thou shouldst have had ten more, To bring thee to the gallows, not the font,” (meaning a trial jury of twelve). The poet must undoubtedly have expected his audience to do what every court does, i. e. to presume that the foreign law is the same as the law of the forum unless informed to the contrary.

But Portia’s statement of rights and liabilities was sadly deficient, if it was an attempt to state the English law. She thought that Shylock had a right enforceable in a court of law to take one pound of Antonio’s flesh, and that in so doing he would not incur criminal liability unless he took a slightly different quantity of flesh or incidentally shed blood. She was absolutely wrong on her main proposition. A contract for maiming a man would be unenforceable in a court of law because against public policy. Furthermore, that an act was done in pursuance of a contract, would not prevent it from being a crime. Both of her distinctions were equally unsound. If I had a valid contract right to cut a pound of meat from your roast beef, I would be guilty of no wrong in doing what was necessarily incidental, as releasing some of the gravy in the beef. Nor would I be a wrong doer because the meat I took weighed more or less than a pound “by
the twentieth part of one poor scruple.” The parties would be presumed to have intended something humanly possible and the language would be so construed.

Chancery enjoins the enforcement of a forfeiture of property for failure to pay money on the exact date when due. This doctrine was well developed before the Merchant of Venice was written. A real lawyer would not have failed to cite that rule and argue that a fortiori the forfeiture of a pound of human flesh should be prevented.

I know there is a popular superstition to the effect that the plays of Shakespeare exhibit unerring legal learning. This superstition has been fostered by able lawyers from Lord Campbell down. Most assuredly, technical legal terms are used with remarkable accuracy here as in the other Shakespearean plays; but Portia’s argument was pitifully lacking in the application of legal principles to the case at bar, as I have just shown.

We might hastily conclude that the author of the play knew little law and thus completely silence any suspicion that the Baconian theory is correct. The omission of any reference to the prevention of forfeiture by Equity is particularly noticeable. Altho Bacon did not become Lord Chancellor until several years after the publication of the Merchant of Venice, he had been an ardent champion of equity jurisdiction before ascending the woolsack. Coke, the strongest advocate of restricting equity jurisdiction, was his personal rival. I suggested to a Professor of English a few days ago the idea that Portia’s failure to refer to legal and equitable principles logically applicable to the case, proved that the author of the play could not have been a person learned in the law. His answer was: “Whether Shakespeare knew law or not, he knew human nature. Therefore, he made Portia argue not logically but like a woman.” For obvious reasons the name of the Professor of English is withheld. To his answer there are two replies. First, women are sometimes disconcertingly logical. Second, Portia had been coached by Bellario, a man very learned in the law.

Perhaps the true explanation is to be found in the fact that the author of the play was primarily a dramatist. Even if he knew as much law as Bacon, he would not write a scene which was not dramatic. The audience had to be kept in suspense. The point which saved Antonio had to be intelligible to the layman, had to be obscure at
first, clever and surprising when disclosed. Imagine the snores in stage-boxes and the inattentive confusion in the pit, if Portia had made a learned argument with elaborate citation of authority on the doctrine of equitable relief against forfeiture. The plausible technically used is more appropriate to the theatre. This explanation has at least the ‘virtue of offending neither the women nor the Baconians. To point out that a lawyerlike argument is devoid of dramatic thrills, ought not to offend even the lawyers.

I cannot bring these rambling comments to a close without calling attention to the words which immediately follow the adjournment of court in the play. “Sir, I entreat you home with me to dinner.” How natural a touch! How dramatic a contrast! The case is decided, the merchant’s life has been saved, the Jew deprived of his revenge, Bassanio’s anxiety relieved, and then comes a prosaic invitation to dinner. Every practicing lawyer has many times seen the same thing occur. When great issues of property or life are at stake and court adjourns, the judge makes some such commonplace remark to counsel. Here indeed the poet is holding the mirror up to nature as well as exhibiting the skill of a dramatic genius.

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