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**“But none can drive him from the envious
plea / Of forfeiture, of justice and his bond”:
Shylock’s Bond, Playing Hardball, and the Law
of Remedies in *The Merchant of Venice***

Abstract

This paper submits that in Shakespeare’s *The Merchant of Venice*, „this merry bond” (1.3.169) becomes the central artery through which the fates of two friends, Antonio and Bassanio, become intertwined, and Shylock’s tragically falls, thereby illustrating how this written evidence functions to disassemble contractual relationships, rather than serve as a prohibition against the commercial corruption, as provided in the Fraudulent Conveyance Act (1571). The essay explores the nature of settlement negotiations and the disparate conditions of bargaining powers by the parties — those which represent the state’s interests and those which represent individual interests. Here, this analysis focuses on the attempts in the play to devalue the trustworthiness of written evidence, particularly contracts, presented at a time where the early modern courts emphasizes the reliability of such evidence, and demonstrates how interpersonal communications intervene as vital legal vehicles within this society.

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Introduction

In 1612, after the death of his elder son Prince Henry, King James I of England began efforts to negotiate a marriage between the new heir apparent, Prince Charles, and Maria Anna of Spain, the Spanish Infanta, and the younger daughter of Phillip III and Margaret of Austria. Such an alliance, or precontract, would align the two nations, England and Spain — much as King Henry VII of England intended in the marriage of young Arthur, his elder son, and Princess Katherine of Aragon more than one hundred years earlier¹. James envisioned this marriage as a way to usher forth peace. Just as that earlier union was tragically felled by the untimely death of Prince Arthur, the potential union of Prince Charles and Maria Anna was fraught with its own problems. Where the Treaty of Medina del Campo (the marriage contract) between King Ferdinand and King Henry VII was saved by supplanting Arthur with young Henry (later Henry VIII), in the matter of Charles and Maria Anna, more than 200,000 crowns and the promise of loyalty would be needed to forge this bond. Not only was the public against the match, but James I's court objected to this engagement. Like the Ferdinand-Henry treaty, the negotiations continued for more than a decade. In furtherance of such negotiations, in 1623, Charles sailed to Spain with one of James I's favorites, the duke of Buckingham. However, unlike the sixteenth century treaty, during the eight-month stay in Spain, Charles and Buckingham were unsuccessful at securing the hand of the Spanish Infanta. Arguably, the match between Henry and Katherine did not end well, so in its negotiations, Spain played hardball. In particular, there existed at least two terms by the Spanish which impeded the offer of marriage in this Spanish Match. First, Charles had to agree to convert to Catholicism. Second, after the wedding, Charles had to remain in Spain, as a hostage, to ensure that England would keep all terms to the treaty. Offended by such terms, Charles, upon his return to England, demanded that his father, James, declare war upon the Spanish nation. Though war was not declared, Charles and James I looked toward France for the next Queen of England, Princess Henrietta Maria, sister of Louis XIII (Farris 2007:149-151). Similarly, in Shakespeare's *The Merchant of Venice*, the bond becomes the central legal instrument through which to read the play for making and breaking agreements — those both romantic and tragic. Antonio promises to pay Shylock for the ducats borrowed so that Bassanio may marry Portia. Much like the failed agreement

¹ In *The Six Wives of Henry VIII*, Weir observes that „a formal betrothal was called a precontract; in the case of a royal union, its terms and conditions were set out in a formal marriage treaty. A precontract could be in written form, or consist of a verbal promise to marry made before witnesses. Once it had been made, only sexual intercourse was necessary to transform it into marriage, and many couples lived together quite respectably after having conformed to this custom” (6).

between Charles and Spain for Maria Anna's hand, the contractual terms become too steep, and the relationships, in terms that are financial, personal, and religious, dissolve. Although the contractual promises were important during this early modern era, an examination of the play and the law of remedies pierce the seemingly innate significance of the covenant between contracting parties. This article maintains that the courts, romantic and political figures like Sir Walter Raleigh, and the law become keys to interpreting these contracts.

One of the most important courts was the Court of the King's Bench, an English high court „superior to all” and whose decisions could only be supplanted by Parliament, has been in existence since the time of Henry I of England. Initially, the court handled cases „dealing exclusively with the King's business” (Lawson 1972: 259). Eventually, the jurisdiction included criminal and non-criminal matters and because of the legal work with new writs, procedures and other matters, the court was called the „Bench” and held term at Westminster, a sedentary court and the „sole central court of law” (Selden Society 2003: 229-230). Later, the Court of the King's Bench (or the Queen's Bench, depending upon the gender of the sitting ruler) included the Commercial Court, which handled commercial cases before a specialist judge (Baker 1990: 107). This Court became the premiere locale for seeking remedies in breach of contract actions (or *assumpsit*), where the requirement of proof was low because the courts inferred a promise where a debt lies (Barret 2010: 60-61)². Hence, particularly for contracts, the King's Bench became the standard bearer, modeling efficiency, innovation, and preeminence. This breadth of this court's jurisdiction where there exists an amalgam of the type of cases that came before this court and the reach of the court's legal power, identifiable authority, and unquestionable dominion was essentially incontrovertible. In one moment, this Court heard non-criminal matters, like contracts, where physical jeopardy was not at risk, yet there were other times where the King's Bench heard quite serious criminal matters where one's life or liberty might be taken. In the law, these matters are distinguished one from the other by „jurisdiction”, yet in literature these realms are distinguished by „genre”. Hence the locale and the type of legal matter become a way to read *The Merchant of Venice* as it shifts from comedy to tragedy, and Raleigh's case as it likewise gravitates from treason to contract. The King's Bench is just this kind of court which serves as a model for investigating how the Duke's Court navigates its winding sense of procedure, logic, and justice in Shakespeare's *The Merchant of Venice* and James I's King's Bench in the case against Sir Walter Raleigh.

To illustrate how the King's Bench at Westminster Hall functioned as a leading court in the early seventeenth century, the case against an explorer, merchant of the seas and knight, Sir Walter Raleigh serves as an instructive example to investigate the legal and theatrical stage. He epitomized the figure, which embodied both romantic and tragic sentiments. This early modern knight had been imprisoned by Elizabeth I of England for marrying Elizabeth Throckmorton without the queen's permission. As one of her favorites, the queen eventually released the knight. However, this time Raleigh was

² The litigants in the Court of Common Pleas had a higher burden; they were required to show proof of a subsequent promise (Barret 2010: 61).

incarcerated by James I, Elizabeth's successor, and the charges were much more egregious and led by Sir Francis Bacon, Attorney General, the successor to both Sir Edward Coke and Sir Henry Hobart, respectively. Raleigh stood accused of participating in two plots, the „Bye” and the „Main”, which were alleged to have been mounted to interfere with the accession of James I. The knight was convicted in 1603 and incarcerated for thirteen years³. Surprisingly, James I petitioned for the knight's release. Raleigh promised upon his life that he had seen a mine of gold in Guyana. Paul Sellin argues that Raleigh essentially lied to the king and the investors in the expedition (5-24). Hence, the crown financed a voyage to the said land upon the knight's word. James had no proof other than Raleigh's word and the speculation of other explorers to substantiate the claim that gold mines existed in Guyana. Spain had already established a significant presence in Guyana, and Raleigh's presence, along with naval support, could be construed as more than political interference. This voyage to Guyana could result in dire consequences to the relationship between Spain and England. Such were the arguments of Count de Gondomar, the Spanish Ambassador (Vaughan 1840: 95-106). Despite these significant reasons against a second expedition to Guyana, James's excessive spending required an infusion of funds that such a golden find would bring to bear for this beleaguered crown.

Such strong reasons against Raleigh's temporary release may have provided the impetus for the creation of the Articles of the Commission, the contract between Raleigh and King James. Before departing for Guyana, Raleigh was required to sign the articles, as Bacon outlines in a pamphlet concerning the conviction in 1618. In this contract, Raleigh was made to promise that gold mines were present in Guyana, he would not engage in a hostile manner with Spain, he had disclosed his true intention for this expedition with the king, and he had agreed on the financial shares of the found treasure. The Articles of the Commission also gave Raleigh the authority that he needed to act as governor and commander on this expedition. The articles also included a penalty clause which required Raleigh's surrender to Spain as a consequence of engaging with the Spanish while on this expedition. Raleigh, this imprisoned explorer, realized that the violation of this written oath to King James would have a significant impact on his current confinement, but he signed the document, and embarked upon this expedition for golden treasure. Unfortunately, during the voyage, a group of the men engaged with the Spanish, and the knight's son, Walter, was killed in the skirmish. After Raleigh's return, Bacon provides an exhaustive list of Raleigh's offenses, and accuses Raleigh of feigning sickness to secure an escape. He charges that Raleigh broke the agreement with Spain by engaging in battle with Spanish citizens (Vaughan 1840: 95-106). Bacon asserts that the explorer used traitorous words against King James to plot a way to avoid keeping his word to the king, and simultaneously persuade the king to send Raleigh for another expedition. At his trial in 1618, Raleigh's words are few, yet Sir Francis Bacon does reference the many pamphlets, poems, and letters, which surround this iconic figure who at this time is arguably both so popular and so hated by his people (Sellin 2011: 137, 257-258, 284, 287) (Latham and Youngs 1999)⁴. To satisfy the Spanish, Raleigh is executed.

³ His alleged co-conspirators were Sir Griffin Markham, Lord Cobham, and Lord Grey (Vaughan 1840: 14-26).

⁴ In this trial, the chief justice is Popham (Vaughan 1840: 100, note).

Despite the strides that these early modern courts made in the field of evidence, some scholars maintain that „there were few if any rules of evidence before the eighteenth century”, but a formal process was burgeoning, which would see its ultimate fruition later (Baker 1990: 582) (Macnair 15-21)⁵. During the medieval period, most evidence used in trial consisted of oral testimony, but the period also saw „the emergence of the view that writings were to be preferred” (Macnair 1999: 92). Exhibits include proofs like „objective facts, testimonies, oaths, depositions, and confessions” (Mukherji 2006: 162-163)⁶. It was not, however, until the late sixteenth century that the courts seemed to place both a significant emphasis on written evidence and an expanded nature of the trial proceeding where the summary trial was less typical (Bellamy 1970: 158-159). Given the development of the rules of preference for writing, including the eventual promulgation of the Statute of Frauds in 1677, in the seventeenth century, there exists „in equity proof a fairly marked general preference for writings over witnesses” (164)⁷. Even earlier, there exists strong evidence that the law of evidence, particularly as regards written evidence, is alive and well as found in the Statute of Uses, which requires written proofs for interests in land, in 1535 (Moffat & Bean 39)⁸. The Statute of Frauds and the parol evidence rule required certain contracts to be in writing. The Statute of Frauds, in particular, required that written contracts, among other things, which could not be performed in one year and contracts where one party served as a surety for another party’s debt or obligation. After this point, common law jurisprudence became synonymous with a rigid reliance on proof in written form⁹.

This project builds on the work of Luke Wilson in his examination of contract law, including his analysis of *The Merchant of Venice*, where he offers a risk analysis to evaluate the reasonableness of purchasing maritime insurance, which was considered speculative at this time (Jordan and Cunningham 2007: 133). Although Charles Ross focuses on „Shylock’s Penalty” in his aptly titled chapter, he seems chiefly concerned with the bond as a fraudulent conveyance and the application of Portia’s „alien statute”, which castigates Shylock because of his religion (64-103). A.G. Harmon looks at the play’s use of legal instruments, like bonds, contracts, and sureties, to examine marriage and the law — that is, how people use the instrument to either obtain or avoid marriage (3-5, 84-115). Thomas C. Bilello argues that Portia’s judgment lacks the principles which underlie justice and equity and instead supplants her will as she exploits the law (Jordan and Cunningham 2007: 109-126). Though each of these scholars seem to make interventions with the law which surrounds the play, none of these works have examined specifically

⁵ See also Hemholz at 243.

⁶ Subha Mukherji’s discussion on Webster’s play, like Hutson’s work, focuses upon the nature of evidence, though she does not focus upon written evidence (206-232).

⁷ The first draft of the Statute of Frauds was written by Sir Heneage Finch (later Lord Nottingham), which was intended to address the instances where there was no written proof as in *Slade’s Case* (Baker 1990: 396).

⁸ Though the text by Bedford, Davis & Kelly (204) states that the statute was passed in 1540, I will defer to Moffat & Bean’s text as other texts also agree with this text on trusts law. See also Baker (283-295).

⁹ Bacon defines common law as „no text law, but the substance of it consisteth in the series and succession of judicial acts from time to time which have been set down in the books we term as yearbooks or reports’ (12.85)” (Helgerson 1992: 76)

what contribution written evidence, particularly the bond agreement, makes to early modern jurisprudence, where written evidence reveals its place as both an identifiable safeguard and a problematic tension within this period in the legal and theatrical courts. Here, this analysis focuses on the attempts in the play to devalue the trustworthiness of written evidence, particularly contracts, presented at a time where the early modern courts emphasize the reliability of such evidence, and demonstrates how interpersonal communications intervene as vital legal vehicles within this society¹⁰.

As this legal vehicle wavers between tragedy and comedy, the impact upon the nature of the resolution of the play becomes complicated. Where tragedy imitates noble action, comedy imitates baser men, according to Aristotle's *Poetics*, immersed in less noble activities (Aristotle 1961: 52-69). Here, arguably the activity within *The Merchant of Venice* is ignoble, yet no less important, where „this merry bond” (1.3.169) becomes the central artery through which the fates of two friends, Antonio and Bassanio, become intertwined, and Shylock's tragically falls. Like the fates of the foregoing characters, the moments within the play seem to shift between merriment and tragedy. The play begins as one concerned about the commercial transactions between borrowers and lenders, Christians and Jews, and royals and foreigners in early modern Venice. Then, a distinct shift occurs to the lavish life at Belmont where Portia and Nerissa escort potential suitors before the marital altar filled with both its legal mandates and romantic promises. The play is a romantic comedy, but Shakespeare makes Shylock „the emotional centre of the play” (Margolies 2012: 87). Early in the play, Bassanio becomes the figure who connects these two places — the one concerned with the business of law and the other with the business of marriage. Yet, in both places the individuals are concerned with bonds, legal and marital. A. G. Harmon suggests that the legal bond threatens the societal bond, and emphasizes the bond of friendship as opposed the marital bond (82-84)¹¹. It both naturally and logically follows, I maintain, that the use of the word, „bond”, becomes significant in this examination of genre, for it may be interpreted in ways both playful and pitiful. For instance, Kahn notes that „to be bound is to be commanded and obligated; it is also to be in bonds, enslaved, fearful and guilty”. Even further, she observes that a bond implies „a contract and a bargain” (2004: 66, 113). Hence, the play confronts the role of written evidence as a way of critiquing the law of contracts.

Specifically, this essay maintains that the written evidence, the bond agreement, within *The Merchant of Venice* offers a strong critique of socio-personal, cultural, economic, legal and political relationships, through contract law, particularly at the stages of negotiation, breach, and litigation within the courts. The play struggles with determining its genre as Shylock's case wrestles with distinguishing its field of law. This indeterminacy reflects a problem the courts had with the law of remedies, the nature of global politics, and the foundational contract principles, and illustrates the conflicted way in which early modern society perceived and received contract disputes. The scenes within

¹⁰ Though Kahn discusses contracts in her 2004 monograph, her focus seems much more broadly based in politics and not so much the field of evidence, particularly contracts, and the law of remedies. Still she acknowledges the necessity of legal remedies when dealing with property (84).

¹¹ Maus notes that „friendship... is a looser, non-teleological, largely extra-legal concept” and two of its important properties is individual agency and generosity (76-77).

the play seem to foreshadow, instigate, and foster the potential breach of the contract as a way of examining remedies. Though the early scenes in Act 1 and Act 3 address the negotiation of the third-party contract and the allegations of its breach, it is in Act 4.1 where Shylock appears at the Court of Justice. Here, the entire action of the scene hangs on the actual language of the bond and the potential remedies. Shylock, the Jewish creditor, shrewdly crafts a „single” bond (1.3.141) to which Antonio, the shipping magnate, and Bassanio, the gentleman lover, agree, yet by the end of this drama, this contract becomes implicated in its validity as an agreement, its legality as a contract, and its transformed state as a settlement offer or criminal plea bargaining agreement at the case’s denouement. Likewise, the play seems to transform from a comedy of coupling to the tragedy of Shylock. The scene becomes important in its examination of the bond itself and the judgment of the court. This essay will focus chiefly on Act 4 where the law of remedies illustrates itself most vividly. The remedies that the court offers seem, in some ways, incongruent with contract law. Somehow the making and the breaking of socio-personal bonds, like those found away from Venice, function as a precursor to and a parody of the legal bond that is broken. Where historical tragedies like *Richard II* and *Edward II* illustrate Aristotelian notions which imitate pitiable and fearful actions (Aristotle 1961: 70-78), attempts to present this comedy as merely „ridiculous” become no simple task, where the conflict wavers between attempts to assert painful or harmful effects and biting repartee and seizure of personal property.

The Duke’s Venetian Court

„Do you confess the bond?” (Portia 4.1.177)

In spite of the powerfully charged scenes of wooing at Belmont where a slew of suitors attempt to woo Portia in Acts 2 and 3, this play is heavily invested in legal evidence, like the nature of the bond, its weight as a tool for justice, and its potential for corruption. It exposes the problems with the lack of and need for safeguards to uphold the commercial relationships which exist not only in Venice, but in England, and the larger global world with which its citizens engage for the betterment of this early modern society. This contract bears the proof of the problem. The language which the contract bears becomes problematic. Just as socio-personal relationships needed safeguarding in *Titus Andronicus*, here the commercial relationships between individual parties, businessmen, and nations needed protection. The play expresses the concern about upholding Shylock’s bond because if the law of Venice exculpates a clear contract, the city would have problems with the many businessmen who engage in commercial transactions. The play expresses an unmistakable sentiment: the world’s eyes are upon this particular case. The same argument could be made in the case with Roderigo Lopez who was Queen Elizabeth I’s prosperous doctor who was later tried and convicted of treason for an attempt on the queen’s life. He is the most high profile Jewish professional in London. His access to the sovereign leader is identifiably witnessed by a whole nation. The Merchant of Venice and this case of Lopez offer an unobvious critique about how individuals treat other nations who engage with England. The nation must become hyper-vigilant about the bonds that it makes with foreigners, and possibly its citizens as well. Whether characters are insiders or outsiders, „each one begins with a bond: suggesting, making, and breaking bonds lies

at the heart of the problems in *The Merchant of Venice* — at times, the play defies classification (Risden 2012: 15, 19). In this way, this drama wavers between the marital bonds between the several couples and the legal bonds between Shylock and Antonio. Just as Shylock's terms of negotiation become legally excessive, the court's resolution in the matter of his allegedly illegal bond likewise becomes inequitable; hence, the moments which surround these points of negotiation become just as tainted as Shylock's bond¹².

Like Raleigh's experience at the Great Hall at Westminster Castle, Shylock's case at the Court of Justice at 4.1 becomes a confluence of several legal approaches representing the conflicted way in which early modern society viewed contract law, and requires an examination of the law of remedies. As a matter of course, if a litigant is wronged, the injured party may decide upon the type of remedy that he desires. Thus, remedies for breach of contract cases are quite flexible (Lawson 1972: 46-47). For example, specific performance compels a party to act in a way to complete the contract, whereas injunctions enjoin a party from acting in a manner inconsistent with the contract. The court might award either monetary damages or land. Here, the entire action of the scene hangs on the actual language of the bond with its 'pound of flesh' penalty clause. An analysis of the bond within the setting of this trial lends itself to an analysis which focuses upon the available legal remedies available to this bond agreement. These legal remedies are built upon common law concepts, which consider the injured party's expectation, his or her reliance upon the breaching party's promises, specific performance, and unconscionability (or unfairness) (Beatson and Friedman 1995: 13-15, 429-437, 474-475, 482). These foundational concepts in the law of remedies seem not unrelated to the principles of mercy and justice, which seem to be at work particularly in this scene. Of note, the King's Bench, or the Queen's Bench, was founded upon principles of equity, where many cases involved dealing with agreements and accidents (Baker 1990; 133). This play lends itself likewise to such principles where Shylock and Antonio have an agreement and Antonio's ships failure to return under accidental circumstances. The scene becomes important in its examination of the bond itself here at 4.1.221, quoting its language, and the judgment of the court. The remedies that this Venetian court offers seem somehow incongruent with early modern contract law, yet courts of equity allowed a wide berth for breach of contract cases. In this play, Shakespeare offers a scene which effectively intertwines the problem of contract law, breach, and remedies where said remedies seem quite malleable, for the Duke's „judgment” seems heavily influenced by that of Portia, Antonio, Shylock's faith, and Shylock's fortune¹³. It also seems that everyone „weighs in” on the balancing act that becomes the decision to uphold the contract or punish its author. These malleable remedies again reflect the play's shifting adherence toward the traditional Aristotelian principles of genre and the court's evolving adherence to the principles of equity. The problem within the play becomes „an unsolvable moral” dilemma (Risden 2012: 2) and a legal framework which functions within seemingly „unresolvable” contractual

¹² Posner argues that the contract is not illegal, where he distinguishes between the contract and its penalty clause for breach; he insists that the penalty provision may be „severed” from the original contract (149).

¹³ The Duke of Venice is the Doge, or the chief magistrate of Venice (sometimes Genoa). Thomas Madden begins his Introduction with an 1192 quotation from a Venetian Doge's Oath of Office: „We will consider, attend to, and work for the honor and profit of the people of Venice in good faith and without fraud” (1).

issues. The moment is filled with the intensity of jeopardy and the peril of Antonio's life because of this forfeiture action, yet there exists a cloak of humor where, as Act 4 illustrates, comedy possesses a „capacity to rescue its characters from the potential disaster of their own humanity” (Danson 2000: 68). This feeling of relief is confirmed as Act 4 opens where the Duke, the law-giver, yields a protective stance over the life of young Antonio, as the court, having recognized the parties, begins its session on the merry bond.

Where some scholars suggest that in his plays, particularly Richard II, Shakespeare demonstrates „disaffection” with the „historical tragedy” and offers what amounts to a timely „comic relief” (Shakespeare 2005: 42) (Lemon 2006: 73-75). The lure of the farce should be resisted (Zinter 1974: 243). Something more significant occurs here where Shakespeare highlights the problems with contracts even when they are memorialized in writing. Margolies suggests that the play becomes a „test bed for conflicts, character types and ideas that reach their mature form in later plays” (55). I suggest that this play maintains a distinctive quality which sets it apart from later problem plays. What Shakespeare offers in this play, *The Merchant of Venice*, which shifts without warning from the serious tone of tragedy to the light-hearted play of comedy become options for dealing with litigators, litigants and scholars who have brought before the courts and the theatres the conflicted state of contracts, written evidence, and resolving disputes among those who war before the judges, justices, and sovereign leaders. The play illustrates more than a mere debate between common law and equity (Kornstein 1994: 65-69). Shylock's incessant blustering seems at once comic and tragic where this outsider who lives, transacts, and commiserates within this Venetian society has not become a part of the larger community in a meaningful and positive way. His relation to society becomes, not a balm, but a burden to its citizenry, as one who leaps upon the opportunity to profit at everyone else's peril. Yet, how this society determines to address Shylock the shyster exposes even larger problems than this incredulous creditor.

This legal instrument, the bond agreement, becomes a useful tool for examining the motives or intent, depending on the context, of the parties, which invites this Venetian court to discuss the „doctrine of unclean hands” (Dobbs 1993: 50, 68-72). This doctrine looks at the intent of the parties, before getting to the language of the written document. Though the nomenclature for this doctrine may have evolved later, classical rhetoricians had long been using character motives as a factor to interpret suspicion (Kahn and Hutson 2001: 54-72). Though in previous scenes references to the bond abound, here in this moment where Portia examines the bond at line 221 becomes even more compelling where a hyper-attention is applied to the bond. The bond is passed from Shylock to Portia in an attempt to resolve this matter. Here, upon her inspection of the bond, Portia argues that Shylock is guilty of attempted murder within the alien statute:

In which predicament I say thou stand'st: For it appears by manifest proceeding,
That indirectly, and directly too,
Thou hast contrived against the very life
Of the defendant (4.1.353-357).

Portia's accusations require both a closer look at the bond and at Shylock himself. In spite of his desire for Antonio's flesh, Shylock, our avenger, seems to possess a quality quite different from the avengers that we have come to know in the tragic genre like Othello where Iago becomes the cause of several murders like Aaron in Titus Andronicus, Vindice in Middleton's *The Revenger's Tragedy*, or Bosola in Webster's *The Duchess of Malfi*. Though Posner insists that Shylock is a villain (148), I maintain that in this comedy, Shylock stands apart from these avengers where he has neither committed murder, nor attempted murder, but by Portia's arguments, he becomes a forestalled murderer, and some scholars have agreed where they refer to „Shylock's murderous bond” (Charney 2012: 47). Shakespeare may have written Shylock sympathetically (Risden 2012: 17)¹⁴. It is possible that even his arguments and the constant references to his faith (e.g. Gratiano's use of „infidel” at line 330) give contemporary audiences pause in perceiving him as a criminal defendant who has received a just punishment. Yet, even looking at his asides, the early modern audience may have viewed Shylock the creditor quite differently, where „the popular attitude was that to take interest for money was to be a loan shark — though limited interest was in fact allowed by law” (Barber 1959: 178). For instance, Shylock says in an aside:

I hate him for he is a Christian:
 But more, for that in low simplicity
 He lends out money gratis, and brings down
 The rate of usance here with us in Venice (1.3.37-40).

These theatre-goers may have viewed him, as Antonio, the Duke, Portia, Bassanio, and Gratiano perceive him, as somehow base, not unlike the Portuguese Roderigo Lopez of the Jewish faith, who was also Queen Elizabeth's physician, and even worse than most Jews, for Jessica is perceived as better than he. Yet embracing the distinction between Jessica and Shylock becomes quite problematic as Jessica no longer wishes to identify herself as Jewish. She seeks to convert to Christianity. The other figure we have is Tubal, who is referenced with uncomplimentary appellations not unlike Shylock. Each of these factors — Shylock's religion, his murky role as an „avenger”, and the language of the bond — influence how both the bond and Shylock will be read for the purpose of deciding whether equity would be served by awarding him the contract's penalty.

While examining notions of equity, the written evidence of this trial confronts how legal jurisprudence in local jurisdictions impacted global politics. The language of the bond penalty on its face does not seem to promote the principles which underlie equity, like fairness and equity, which the progressive Court of the King's Bench emphasized in its application of contract law¹⁵. As this court sought to apply these principles, it is difficult not to see the influence that Raleigh's deadly skirmish with the Spanish had upon his fate. Likewise, some scholars suggest that Shakespeare drew his polarizing character, Shylock from Roderigo Lopez, whose case allegedly implicated the British realm's

¹⁴ Charney compares Shylock to Richard III, Aaron and Iago and determines that his role is much smaller than the aforementioned villains; yet he acknowledges that there exists an ambiguity to this character (43, 49).

¹⁵ Spinosa refers to the King's Bench as „progressive” and the Court of Common Pleas as „conservative” (67).

relationship not only with Spain, but also with Portugal. What begins as a political power play where the Earl of Essex becomes Lopez's accuser and compiles sufficient evidence ends with Lord Burghley's pamphlet where he publicize the alleged traitorous conspiracy (Alford 2012: 300-308). In his pamphlet, „A True report of sundry horrible conspiracies of late time detected to haue (by barbarous murders) taken away the life of the Queenes Most Excellent Maiestie: whom Almighty God hath miraculously conserued against the treacheries of her rebelles, and the violences of her most puissant enemies” (1594), William Cecil, Lord Burghley, describes several conspiracies against Queen Elizabeth I. Most prominently, he describes a murder conspiracy involving her physician Lopez, and his co-conspirators, Stephano de Ferrara de Gama and Manuel Lews Tinoco — all of whom were natives of Portugal. Yet, before he explains the conspiracies, Lord Burghley notes: „friends and enemies on either side, according to their owne humors do feede the worlde with diversitie of Reortes agreeable to their owne affections and passions...yet there is but only one truth whereby the reports ought to be ruled and reformed”¹⁶. Here, he acknowledges that many „false reports” abound, but implies that there is only one truth to be had and that is the truth with „good proofes” and „manifest circumstances,” which purportedly will be derived from his pamphlet, an assumedly state-authorized report. Within this „official” report, Lord Burghley details the plot to poison Queen Elizabeth, the promised payment of 50,000 crowns from the King of Spain, the interlopers from the King of Spain, the letters and writings by the conspirators, the confessions of Lopez, de Ferrara de Gama, and Lews (Read 1961: 498, 593). Yet, like the Raleigh case, many detractors disagreed with the finding in the Lopez case as manufactured treason, manipulated meaning, and political opportunism in spite of the written evidence which surrounds this treason case. In *The Merchant of Venice*, Portia construes the meaning of Shylock's bond agreement with Antonio for the court. The agreement shifts from one which is contractual, commercial, and a depiction of the normal course of business to one which is „tainted”, dangerous, and criminal.

Arguments: Shylock versus Portia

The many allegations against Sir Walter Raleigh offer a conflicted view of the knight where the charges shift from the secret marriage without his queen's permission, to treasonous conspiracy against his king to violation of a signed proclamation with his sovereign, which seem necessarily to impact the breadth of the possible judgment against him. His case shifts uneasily from romance to tragedy. Likewise, the most striking part of this scene in *The Merchant of Venice* is the remedy that the court reaches in the conclusion of the case. Shylock competes with Portia to dominate the genre. Within this competition, the literary genre „which has previously been minor or marginal acquires a new position of dominance — a process sometimes known as „the canonization of the junior branch” (Duff 2000: 7). Though not surprising in early modern courts of equity, the judgment reads as an amalgam of criminal plea, civil settlement, and dismissal. Shylock is threatened with the death penalty and imprisonment. He also must surrender the

¹⁶ Raymond maintains that „[p]amphlets describing the trial and execution of criminals presented the opportunity for the state to enforce the message behind punishments” (Raymond 2006: 119).

value of his estate. His forfeiture action becomes a non-starter after Portia introduces the alien statute. Like *The Merchant of Venice*, Slade's Case (1597-1602) becomes important for revealing personal relationships of the litigants, the evolution of modern contract law, and the emergence of an identifiable judicial activism that is at once refreshing and startling (Wilson 2000: 76-82).

Comedy predominates where Portia participates in a less serious game than Burghley and Essex — word play. The editor for *The Merchant of Venice*, John Russell Brown, notes that some criticism has been discussed in regard to Portia's „verbal quibble” at the notes for lines 305-306 where „blood is necessarily split when flesh is cut, Portia's distinction was valid only if the contract had specifically stipulated that blood should not be split” (Shakespeare 2001: 116). This verbal quibble allows Portia, with the Duke's permission, to remove the discussion of this forfeiture action from that of the language of recovery of property, restitution, and shifts the discussion to the attempts at recovery as an attempt at a criminal act, the life of a Venetian. Ironically, at the outset of *The Wakefield Play*, an evil soul proclaims that justice may be found apart from „legal quibble”, twelve jurymen, and the process of law, yet Tutivillus touts the proofs that may be found within the „briefs in my bag, man, of sins damnable” (Rose 1961: 520, 528-529). Tutivillus becomes witness, scribe, and potential publisher of these transgressions, and offers proofs which trump oral testimony (i.e. confession) from witnesses of sin. Tutivillus not only witnesses sin, observes Hutson, but „records what he has witnessed in *writing*, [which] links his life in the popular imagination to the increasing use of writing as a form of legal evidence in English local and crown courts from the thirteenth century onward” (25)¹⁷. This verbal and legal quibble performed by Portia attempts to minimize the significance of Shylock's bond.

Shylock's incessantly bombastic arguments do not seek either to invite or convince, even if he has the law, more specifically evidence, on his side¹⁸. Earlier, Shylock insists: „I charge you by the law” at line 234 and „I crave the law” at line 202. The state of the law becomes fungible in Portia's hands. Her arguments suggest that this matter is no longer a civil, but has become a criminal matter. Legal scholar Richard Posner, in his fictional appeal on Shylock's behalf, bases the request for appellate relief on this legal shift from civil to criminal by the Duke's Court (148). Still, if the matter is wholly criminal, no discussion should exist about the underlying forfeiture action, and bond agreement. I submit that the language of the bond should control as this instrument defined the relationship. On written evidence, Cicero insists that „when the document is plain and the accused confesses everything, then the judge ought to comply with the law and not interpret it” (295). Antonio confesses the bond. Yet the court allows Portia to offer an interpretation of the contract. If the court had to rescind an offending clause to comply with „good faith” of the parties, or if the court determined that specific performance, or restitution was appropriate, then the bond agreement should not be dismissed. Daniel

¹⁷ Emphasis is original in the Hutson text.

¹⁸ In spite of Shylock's unsuccessful arguments, Barber insists that Shylock's character exudes pathos, which should appeal to the audience, but „it is being fed into the comic mill and makes the laughter all the more hilarious” (184).

Kornstein explains „good faith” as an honest person acting in good faith will abide by the sense of a contract however expressed; a villain will look for a way out of a contract no matter how tightly drawn” (67). For the purpose of this analysis, I use „good faith” almost interchangeably with the idea of „good intentions” or „good motives”. Here, the bond agreement is taken as if it becomes an instrument strictly possessed of illegality where one party, Antonio, has already received the benefit of Shylock’s performance, but Shylock is neither returned to the financial position in which he initially began nor offered penalties in interest after the alien statute is mentioned. Hence, the question becomes is the contract equitable?

The tension between Shylock’s arguments about the court’s hypocrisy (and that of the people it represents) and Portia’s arguments about national and religious principles, like „mercy”, encapsulate a larger concern within early modern England itself. The scene is rich in its discussion of justice, mercy, and social intolerance. Shylock’s speech on the hypocrisy of the court’s impunity toward him as the city of Venice participates in the cruel practice of slavery itself becomes quite vivid and difficult to deny. The crime of slavery was marked by a violation of God’s organic, nontransferable property — it made that which should not be alienable exchangeable”. This acknowledges the law’s ability to make and unmake persons, observes Bailey (61). This exposition becomes just as powerful as Portia’s ‘quality of mercy’ speech where she highlights the bases for mercy in what functions as a promotion of Judeo-Christian principles at 4.1.180. It becomes difficult to determine who offers the more profound argument here as Shylock’s bond and his life weighs in the balance. Portia’s side of the argument is consistent with the popular thinking of this particular time. Here in the seventeenth century, slavery was the fate of the insolvent in the Roman and Germanic tradition (Bailey 2013: 153). Hence, it is likely that the early modern audience would have rejected the argument by Shylock, this antagonistic foreigner with vindictive motives, as unconvincing, whereas Portia’s call to mercy seemed to call to a concept which defines England, justice, and morality. Shylock is depicted as „morally inferior” (Margolies 2012: 91). Still, it becomes difficult to ignore Portia’s calculating intentions. Billelo suggests that Portia’s intentions are not to mitigate an equitable resolution to this matter, but instead attempts to compel Shylock’s mercy by surrendering the penalty owed by Antonio (Jordan and Cunningham 2007: 114-117). Arguably both parties, Shylock and Portia, have less than honorable motives¹⁹. Essentially, Portia plays „hardball” — unable to resolve the case as initially proffered to Shylock, so she prepares to win at all costs, even if the approach imprisons, bankrupts, and converts Shylock.

Where a civil settlement fails with Shylock, a guilty plea serves as an acceptable resolution for Portia’s client, Antonio. Portia’s use of the alien statute might be read as a way of the state controlling unruly foreigners who seek to „pervert” the law in her mind, which must be addressed with extreme prejudice — in this case, the statute offers the potential to inflict the death penalty upon the offending party, Shylock. The discussion of the laws of Venice particularly the alien statute at lines 344-352 by Portia offers

¹⁹ Posner argues that bad motives do not nullify the contract, particularly where Shylock had no intention to murder Antonio (150).

another way of looking at the case. It offers another penalty to assess Shylock's actions as dangerous to Venetian citizens. Portia's use of the phrase „manifest proceeding” as the way to trigger using this statute, for it may be interpreted that Shylock's insistence on the penalty in his bond functions as the critical act. „«Manifest» is a technical term in Roman canon or civil law for proof meeting a standard which, though not as conclusive as the full complement of two eyewitnesses and/or a confession, might nevertheless secure conviction where such full proofs were lacking” (Hutson 2007: 175). Here, Portia maintains that the proofs rest within the language of the bond agreement, by seeking Antonio's pound of flesh Shylock sought the merchant's life.

Coalescence of Judgments

The diverse judgments found within this scene in the play represent competing interests that the early modern society had about the function of the courts, how individuals would relate to each other, and how this sovereign nation wanted the world to view it. Hence, the law of remedies becomes not only important for illustrating the principles of contract law, but the principles upon which this nation will propel itself from the middle ages into this early modern era. Each of the judgments found within this scene is grounded in common law concerns like notions of expectation, reliance, and specific performance upon which contracts are based, yet the principles for the law of remedies here are grounded in equitable notions, like fairness²⁰. In analyzing the different possible remedies, it is interesting to note the competing judgments of Gratiano, Antonio, Portia, and the Duke. Therefore, these varied judgments serve as the source of the amalgam that is the final sentence in this case. The play uses the word, „sentence” (4.1.201, 294, 300), which implies criminality where this legal matter begins as a forfeiture action, a remedy in both contract law and in criminal law²¹. Hence, the problem with the case is that it shifts from civil to criminal sensibilities and gestures in its treatment of Shylock. At one point, Shylock is facing the death penalty. It seems as if it might be poetic justice where he does not seem to be concerned about Antonio's potential death from extracting a pound of flesh when Portia asks for medical personnel on hand to address the bleeding from the incision. Similarly, this play runs the gamut in displaying early modern culture and becomes a drama about secret lovers, burgeoning romance, cross-cultural coupling, and marital customs and commercial contracts, financial merchants, legal evidence, religious principles, and geopolitical partnerships.

In spite of the less severe penalties assessed against Shylock, which seem to flow from civil sanctions and religious atonement, Gratiano's judgment would have included a more corporal result. He suggests that had a jury trial been conducted for Shylock: „In christ'ning shalt thou have two godfathers, — / Had I been judge, thou shouldst have had ten more, / To bring thee to the gallows, not to the font” (4.1.394-396). It is likely that a jury of Shylock's peers have decided as Gratiano in this matter. In spite of this pronouncement in Act 4, Margolies suggests that Gratiano had no knowledge of

²⁰ Spinosa discusses the struggle between equity and the common law in reading bonds and contracts (65-67).

²¹ In Posner's mock appeal, his final judgment finds Shylock not guilty of attempted murder, restores his property, but denies him „the return of the three thousand ducats that he had lent to Bassanio” (151).

Shylock's motivations (98). It is difficult to resolve this „lack of knowledge” argument with Gratiano's arguments for the gallows. Capital punishment would have been one of the options in this legal matter where the litigation shifts from trivial dispute between commercial opponents to a case of import with global ramifications for this island port of early modern Venice. Such matters were similarly of concern to the British realm.

The Duke at the opening of Act 4 clearly sides with Antonio in this matter. At first glance, it appears that the disfavor of Shylock lies in the unconscionability of the „pound of flesh” clause. However, the nature of the judgment against Shylock suggests that more lies as the core of this almost uniform animus against this Jewish lender. Of note, there exists an issue of class difference as well where the Duke refers to Antonio as „a royal merchant” (4.1.29) as he tries to convince Shylock to retract his forfeiture action. The Duke becomes a figure who vacillates in his judgment almost as much as the other characters. He becomes as indeterminate as the play with its comic *and* tragic sensibilities. The source of this vacillation may be the rationale for legal scholar Richard Posner analyzing the play as if Shylock has appealed from the Duke's decision. He posits the „legal irregularities which occur at the original trial as the basis for an appeal for Shylock. Where Posner looks at the potential „bad motives” of Shylock, I weigh the intention and the tone of Portia, Shylock, Gratiano and the Duke (147-155). Such an examination is vital in determining the validity of the judgments.

One could argue that James I displayed incredible mercy toward Raleigh by forgiving him the allegations of treason in the „Bye” and „Main” plots so that he might sail to Guyana and return to his king with all forgiven. Yet, again the consideration of geopolitics, financial state of his realm, and notions of equity might also function more prominently in this moment. Here in 4.1, the scene's segue from law to religion becomes an unorthodox way to „resolve” this contract dispute. The principles of equity demonstrate themselves in even more diverse manifestations when examining the most incomprehensible part of the judgment, which comes from Antonio who insists that Shylock convert from his Jewish faith. This move implicates the creditor's faith as the source of his vendetta against Antonio. Equity becomes embodied in a prohibitive fashion, like the prerogative writ of prohibition in terms of religion (Lawson 1972: 227-228). Think it not strange where one is compelled to change one's religion within Shakespeare's *The Merchant of Venice*; not only is Prince Charles asked to do so as a contractual requirement for the hand of Anna Maria of Spain (Farris 2007:149-151), but may poets and playwrights were compelled to change their religion as political mandate or as punishment (Murray 2009: 28-34)²². Here, Judaism becomes prohibitive as the alleged source of Shylock's illicit behavior, morals, and business acumen. Quintilian observes that „all that is said concerning equity, justice, truth and good and their opposites, forms part of the studies of an orator” (385). Shylock's offending phrase, „pound of flesh”, seems to be anticipated by using an analysis of unconscionability, or fairness, in reviewing contracts offer a way to invite these concepts. This part of the judgment which seems concerned with Shylock's faith seems more in line with an ecclesiastical court which tried cases involving adultery,

²² Murray addresses *The Merchant of Venice and the conversion of Jonson, Dryden, Donne, and others* at 28-34.

bastardy, sodomy, and other such cases (Kahn & Hutson 2001: 136-137)²³. As the case evolves into a trial of Shylock's religious faith, it struggles to remain within the domain of mercy, morality, and Christian principles, yet it becomes difficult to question the court's legitimate concern with geopolitics given that the court demands this foreigner, Shylock, to convert from Judaism to Christianity as many of its explorers, including Spanish explorers were demanding natives in distant climes²⁴. Hence, this struggle between law and religion becomes a parallel in the struggle between comedy and tragedy within the play as well.

In addition, the use of the pardon as a way to intervene upon the severity of the punishments facing Shylock seems to emanate from a religious ideology more so than a legal principle. Determining that Portia as Balthazar has sufficiently made a case for applying the Venetian law regarding aliens, the Duke says:

I pardon thee thy life before thou ask it:
For half thy wealth, it is Antonio's,
The Other half comes to the general state,
Which humbleness my drive unto a fine. (4.1.365-368).

Pardons were typically used by the crown as a „matter of grace” in a criminal prosecution or by the church in an ecclesiastical matter (Baker 1990: 589)²⁵. The use of the pardon in this particular moment as a remedy provides a fascinating contrast to Shylock's refusal to extend any such demonstrations of mercy toward Antonio. Portia actually invokes the notion of mercy as she sues for application of this alien statute where the maximum penalty takes his wealth and his life. Where Aumerle accepts the pardon when his illegal bond is discovered in *Richard II*, here, Shylock actually refuses the pardon and desires the Duke to „take my life” (4.1.370) where all of his possessions will be removed from him — including „the means whereby I live” (4.1.373). Shylock's rejection of the pardon seems to be ignored. Still, living in the world of commercial exchange Shylock recognizes the realities of poverty where one is stripped of one's possessions. The play attempts to inject humor by illustrating the financial travails of Bassanio, Antonio, and ultimately Shylock as a mere trifle. Though the plot entertains, it cannot seem to sell itself completely as a whimsical effort where Shylock's rejection of the pardon has more than economic implications, but has legal ones as well. At this moment, Shylock rejects this amorphous „settlement” which looks like criminal plea bargaining where his life and property are at jeopardy.

²³ Alan Stewart's chapter, „The Fall of Lord Chancellor Bacon”, confronts the ecclesiastical courts and sexual defamation cases, like bastardy, whoredom, cuckoldry, pimping, and adultery (Kahn & Hutson 2001: 126-142).

²⁴ Molly Murray also observes that John Donne and William Alabaster convert shortly before or after the Earl of Essex's expedition to Cadiz (69).

²⁵ Read provides a brief discussion of several requests for Queen Elizabeth's pardon by Edmund Grindal, the Archbishop of Canterbury, William Parry, and Robert Devereux, the Earl of Essex (183-184, 300-301, 514-515).

Conclusion

I cannot find it; 'tis not in the bond (Shylock 4.1.258)

Shakespeare takes the genre of comedy, and innovates it. The playwright uses this play seemingly about love and romance and propels the drama directly into a morality tale about commercial contracts and foreign affairs. In the same way, the Court of the King's Bench attempts to bring innovative methods of settling the cases, which came before it, like applying equitable principles. The law of remedies at the center of this discussion sits appropriately where equity allowed a broad spectrum of approaches to resolve early modern cases. Though this Venetian court attempts to apply principles of equity, the result is not one that is equitable. Shylock loses everything while pursuing a bond of only 3,000 ducats. Yet if Shakespeare attempted to design a sympathetic response to Shylock, the inequitable result of his forfeiture case just might evoke it. Where equity ushered in flexible remedies to appease its litigants, these principles were unable, in this fictional early modern Venetia, to solve the ills which plague this sea port community. Shakespeare creates a dilemma which possesses strong arguments on each side and attaches those protestations most notably to Shylock and Portia. Yet he complicates the comedy by crafting a result which seems anything but equitable for Shylock. Even further, the result evokes tragic sentiments. However, the playwright is able to achieve the ultimate goal of the comedy, the coupling of lovers in marriage — a symbolic move which mimics the growth of a nation. Still, by injecting the „problem” that is Shylock, Shakespeare reminds the early modern audience all is not well in either the courts or the theatre.

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