

THE CONSCIENCE OF THE KING

SHAKESPEARE AND EQUITY

This is the 400th anniversary year of Shakespeare's death and institutions such as the RSC and the Globe Theatre are vying with each other to celebrate his memory. So it is fit that the Chancery Bar Association should be quick to join in the general fest. The CBA, however, has another 400th anniversary to celebrate – 1616 was the date of James I's Star Chamber Decree, without which most of you would be out of a job and this Association would not exist. The Star Chamber Decree declared the primacy of equity over the common law; it is still part of our law today in the form of section 49 of the Senior Courts Act. It seems apt to take the opportunity to remember both events – but is there a connection between the works of Shakespeare and the rise of Equity? In this talk I will set out to find if there is.

Let us start with the text of the Star Chamber Decree:

“For as much as Mercy and Justice be the true Supporters of our Royal Throne, and that it properly belongeth unto us in our Princely Office to take Care and provide that our Subjects have equal and indifferent Justice ministered unto them: And that where their Case deserveth to be relieved in Course of Equity by a Suit in our Court of Chancery, they should not be abandoned and exposed to perish under the Rigour and Extremity of our Laws, We in our Princely Judgment having well weighed and with mature Deliberation considered the several Reports of our learned Counsel ... do will and command that our Chancellor ... shall not hereafter desist to give unto our Subjects, upon their several complaints now or hereafter to be made, such Relief in Equity (notwithstanding any Proceedings at the Common Law against them) as shall stand with the Merit and Justice of their Cause.”

And the King then ordered the record of the proceedings to be enrolled in Chancery “*for the better extinguishing of the like differences and questions that may arise in future times*”.

Please note at the outset the metaphor with which the Decree begins – Mercy and Justice are the supporters of the throne. “Supporters” is a term in heraldry. The lion and the unicorn are the supporters of the Royal coat of arms. So one is to imagine Mercy and Justice as two heraldic figures on either side of the throne, complementing each other as do Equity and Law. As we shall see, the relationship of Equity and Law attracts many metaphors because it is otherwise so difficult to pin down with any precision.

The Star Chamber Decree was the consequence of a running battle between the common law courts and the Chancery which had been raging throughout the previous century and came to a head during the reign of James I in the persons of Sir Edward Coke, Chief Justice of the King’s Bench, and of the Lord Chancellor, Lord Ellesmere. The issue was whether after a judgment in a court of common law, a party could petition in Chancery for an injunction or other remedy restraining enforcement or giving relief in respect of the common law judgment. The matter had come to a head in the Earl of Oxford’s case in 1616 where Coke’s ruling in favour of Magdalene College Cambridge concerning title to a property in the City, which ruling impugned the title of the Earl of Oxford, was nullified by the Chancellor’s decree that the College must make “*proportionable satisfaction*” to the Earl for having been unconscionably deprived of title to the property on which he had built 130 houses in good faith¹.

¹ For the full story, see my paper “*The Wicked Doctor and the Offended Earl*” delivered to the PBA and available on the Falcon Chambers website.

So what has this to do with Shakespeare? The Earl of Oxford's case and the Star Chamber Decree were events of seismic political and juristic proportions. They were the culmination of what one author² has called a 100 years war between Equity and the Common Law. This war intensified in the 1590s and the first decade of the 1600s when Shakespeare was writing. It would be surprising if one were to find no echo of it in the plays of so intellectually and politically astute a playwright as we know Shakespeare to have been.

So the obvious place to start is a word search. How often does Shakespeare mention "Equity"? Well, very rarely – only four times in the whole oeuvre, but two examples are especially interesting. In *King Lear*, the mad king conducts a mock trial of his daughters, Goneril and Regan, on the heath and says to Edgar:

"Our robed man of justice, take thy place"

and to the Fool:

"Thou, his yoke fellow of equity,/ Bench by his side".³

Shakespeare is imagining a court consisting of the Chief Justice and the Chancellor. Note the different metaphor – yoke fellow – two oxen ploughing in tandem.

In *Henry IV Pt 1*, at the culmination of the robbery on Gad's Hill, at which the Prince and Poins have apparently gone Awol, Falstaff crows:

"An the Prince and Poins be not two arrant cowards, there's no equity stirring".

² Mark Fortier in *"The Culture of Equity in Early Modern England"*

Books and articles have been written about that line⁴, but its sense seem clear enough to me. It is as if Falstaff said, “There is no justice in the world” or “I’ll eat my hat” or “the Pope’s not a Catholic”. The line only makes sense if he is denying something that would be taken for granted, that would be recognised as obviously a truism or a commonplace. So was “Equity stirring” a commonplace? The phrase is so striking and unexpected that it only makes sense if it was. So what is the evidence that equity was stirring in the 1590s when Shakespeare wrote Henry IV?

The philosophical and political debate that culminated in the Star Chamber Decree was well under way. Let us remind ourselves where we were in English history. The reign of Queen Elizabeth I was the height of the English Renaissance. The ancient authors had been rediscovered, translated and printed. Educated men (including the Queen and James VI of Scotland) learned and often spoke Latin, Greek and French. There were several translations of the Bible into English and there was the Book of Common Prayer 1559 containing the Canticles and Psalms in English.

I start, therefore, with a text which had a profound influence on the writers of the 16th Century. In the middle of Book Five of Aristotle’s Ethics, which discusses Justice, Aristotle discusses a concept called “Epieikeia”. His thesis is that law deals in generalities but recognises that the general rule may not be appropriate in a particular case. In such circumstances

“ it is then right, where the lawgiver’s pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion. ... So this is the nature of

³ King Lear Act 3, Scene 6, Line 37.

⁴ E.G. Gary Watt, “*Equity Stirring*”

[epieikeia], a correction of law where it is defective owing to its generality⁵.

“Epieikeia” is traditionally translated as “equity”. Aristotle is not, of course, talking of the jurisprudence of the Court of Chancery twenty centuries later in a faraway country speaking another language, but he is trying to explain how one can have justice beyond justice or at least beyond law⁶.

Aristotle then uses a rather striking metaphor: he says that Epieikeia is like the leaden ruler used by stone masons on the Island of Lesbos to reproduce mouldings. The metaphor of the “Lesbian rule” crops up again and again in subsequent writing and may be contrasted with Coke’s description of the common law as the “Golden Metwand”⁷.

He then goes on to describe the equitable man using four adjectives:

Proairetikos – discriminating

Praktikos – practical

Not *Akribodikaios* – not a stickler for his strict rights

Elattotikos – inclined to accept less, even though the law is in his favour.

This short passage was enormously influential. In about 1530 the debate about the nature of Equity was taken up in Christopher St German’s *Doctor and Student* where the Doctor, when asked by the Student what Equity is, says in words which are almost a translation of Aristotle,

“Since the deeds and acts of men, for which laws have been ordained, happen in diverse manners infinitely, it is not possible

⁵ Nicomachean Ethics V.10

⁶ A question not unfamiliar to the Greeks: it had been the subject of Sophocles’ *Antigone* a century earlier.

⁷ Measuring rod.

to make any general rule of the law, but that it shall fail in some case: and therefore makers of the law take heed to such things as may often come, and not to every particular case, for they could not though they would. And therefore, to follow the words of the law were in some case both against justice and the commonwealth.”

In these cases, therefore, *“to temper and mitigate the rigour of the law, equity rather followeth the intent of the law, than the words of the law”*.

This work attracted a furious rebuttal in a work called *“The Replication of a Sergeant at the Laws of England”*. The Sergeant argued that for the Chancellor to be able to override the law is simply to introduce hopeless uncertainty and the risk of prejudice and partiality; he wholly rejects any appeal to conscience. Later John Selden made the same criticisms when he compared Equity to a measure by reference to the length of the Chancellor’s foot.

It is worth pausing at this point to say a word about “conscience”. Until the Reformation the Chancellors were always churchmen, versed in the civil and canon law but not in the common law. They sat as agents of the King in the King’s prerogative court, the Chancery, to hear petitions to the King. They did not give reasoned judgments. They developed a jurisprudence based on the conscience, not of the King or the Chancellor, but of the respondent. If a petitioner showed that the respondent had claimed or was seeking an advantage at law by fraud or breach of trust, the Chancellor would prevent him taking that advantage because to do so would imperil *his* soul.

The Reformation, however, brought a search for a secular justification for the intervention of equity, of which the work of St German was an example. After Cardinal Wolsey, the Chancellors ceased to be churchmen and were

usually trained lawyers used to the process of reasoning from principle and precedent.

I return to the writers on the topic of Equity. In the 1570s Edmund Plowden published his report/commentary on the case of Eyston v Studd⁸. He said that the law consists of two parts, a body and a soul, which correspond to the letter of the law and its rationale; it is like (new metaphor alert) a nut, the law being the shell and its sense the kernel, “the fruit and profit” being in the kernel, not the shell; Equity’s role is to expand or restrict the letter of the law, he says, citing Aristotle (in Latin).

In 1591 William Lambarde, a bencher of Lincoln’s Inn, completed his *“Archeion, a discourse on the High Courts of Justice”*, which included a section on Equity. In 1594 William West published his *“Symboleography”*, which also discussed Equity and in 1604 Edward Hake presented King James with his *“Epieikeia – a discourse on Equity in Three Parts”*.

I do not have time to attempt a comparative analysis of these writings but all were concerned to try to explain the concept of Equity and how it related to Law. They constantly harped back to Aristotle; they seemed to be struggling to assimilate the principles applicable to the interpretation of statutes, either by extending them by analogy to similar circumstances or by recognising exceptions to them by reference to their supposed intent, with other circumstances in which Chancery could over-ride the common law. Some writers saw Equity as inherent in Law and others as something separate or opposed to or above the Law. In truth there was no agreement on what Equity was or when it could intervene and nobody, least of all the Chancellors, had worked out or laid down its principles.

⁸ [1574] Plow 459 at 465-8; 75 ER 688 at 695-700.

One person, however, was quite clear about it – King James VI of Scotland. In the 1590s he wrote two works of political philosophy, “The Trew Law of Free Monarchies” and “The Basilikon Doron”⁹. His view of Law and Equity appears from the following passage:

“For albeit be true that I have at length proved that the king is above the law, as both author and giver of strength thereto; yet a good king will not only delight to rule his subjects by the law, but even will conform himself in his own actions thereunto, always keeping that ground, that the health of the commonwealth be his chief law¹⁰; and where he sees the law doubtful or rigorous, he may interpret or mitigate the same, lest otherwise summa ius be summa iniuria¹¹: and therefore general laws, made publicly in Parliament, may upon known respects to the king by his authority be mitigated, and suspended upon causes only known to him.”

So in the 1590s equity was a hot philosophical and political topic. Equity was indeed stirring.

Shakespeare’s audience was not, however, made up of scholars and jurists. What did they know of Equity? Actually it was a word they were very familiar with from the Bible and the Book of Common Prayer (1559 Ed). There are many references to equity in both The Vulgate (“Aequitas”) and the translations of the Bible in circulation before the King James Version of 1611, especially in the Psalms. Psalm 98 deserves special mention. It was the psalm prescribed in the 1559 Prayer Book as an alternative to the Magnificat at Evening Prayer. The last verse reads: “*With righteousness¹² shall He judge the world; and the people with equitie*”. Goodness knows

⁹ Which was published after he came to the English Throne and has been called a Renaissance best-seller.

¹⁰ This is a repetition of the aphorism “*Salus populi suprema Lex*” from Cicero.

¹¹ Also a Ciceronian aphorism.

what the average member of the congregation thought Equity was, save that it was an attribute of God and something that went with being righteous.

Clerics, however, thought they knew. Richard Hooker, one time Master of the Temple Church, wrote in 1594¹³ (contemporaneously with Shakespeare's *Merchant of Venice* and, you may think very much in point)

“We see in contracts and other dealings which daily pass between man and man that, to the utter undoing of some, many things by strictness of law may be done, which equity and honest dealing forbiddeth. Not that the law is unjust, but unperfect. Nor equity against, but above, the law, binding men's consciences in things which law cannot reach unto.”

So “Equity” was a word in common currency. It was known to ordinary people from the Bible and the Psalms and was debated by the learned in their writings. It had a wide variety of meanings and associations derived from the ancients, religion, morality and politics. So where does it come into Shakespeare? It has been detected in two plays in particular: *The Merchant of Venice* and *Measure for Measure*.

The Merchant of Venice

In 2004 I gave a short paper to this Association on the trial scene in the *Merchant of Venice*. Let me recap. First, I explained the nature of an action on a bond: in mediaeval times the most common form of contract was a bond. In a bond the obligor acknowledged himself under seal to be bound to pay the obligee a sum of money. Typically bonds were conditioned by the addition of a condition of defeasance to the effect that, if the obligor paid a sum of money or performed other stipulated acts by a certain date, the bond would be void.

¹² “*Justitia*” in Latin

A loan agreement would thus typically take the following form: if I proposed to borrow £100 from you, I would execute a bond promising to pay you £200 (twice the loan was conventional) on a fixed day, subject to a condition that if I paid you £100 plus lawful interest before that day, the bond would be void. If I failed to pay, it was simple for you to sue me on the bond. All you had to do was to produce the original in court (secondary evidence was not allowed). Any sign that it had been tampered with would invalidate it. Otherwise my only defence would be to establish that I had satisfied the condition.

Secondly, I explained that when *The Merchant of Venice* was written, courts of Equity had not yet developed the jurisdiction to relieve against forfeitures except on ground of fraud, accident or oppression. They did not do so simply on terms as to payment of principal, interest and costs. That jurisdiction was not developed until the mid 17th Century.

Thirdly, I explained that the courts of common law had developed their own attitude to forfeitures, namely that forfeitures were “odious”, which justified (a) strict adherence to the required formalities, (b) strict construction of the terms of the contract against the obligee and (c) strict adherence to the rule that the slightest act inconsistent with the penalty, would waive the right to forfeit, i.e the doctrine of common law election.

Otherwise, the law merchant required that contracts be sacrosanct and the courts regarded themselves as bound to enforce the bargain according to its letter. There were good socio-political reasons for this. England (like Venice) was a trading nation and the one thing that merchants need is law which is certain and predictable. Capricious law is the enemy of commerce.

¹³ In his *Laws of Ecclesiastical Polity*

“Pacta sunt servanda”. We find reference to all these elements of the common law in *The Merchant of Venice*.

As is well known, Antonio bound himself to let Shylock have a pound of his flesh subject to the condition that the bond would be void if Antonio repaid 3,000 ducats within 3 months. Antonio’s ships, from whose merchandise he expected to make “thrice three times” the amount of the loan and which he expected back within 2 months, did not return in time and he was unable to pay the debt on the appointed day. By this time Shylock has been traumatised by the elopement of his daughter, the theft of his property and the constant horrible taunting of the Christian gentry. He has Antonio arrested and brought before the Duke and claims the penalty in his bond.

The Duke begins by making the perfectly good point that a pound of flesh is of no earthly use to Shylock and he would be better off with the money. Shylock responds with the equally good *legal* point that he is entitled to enforce the bond and the court has no jurisdiction to look behind the bond for the reasons it was entered into or his motives. Shylock is then offered twice the amount of the loan, which was the conventional forfeit in a money bond. He refuses and repeats that, if the court does not enforce the bond, there will be no force in the decrees of Venice.

Portia arrives and is granted right of audience on the recommendation of a distinguished lawyer from Padua. She identifies the parties, gets Antonio to acknowledge the bond and then makes her *Quality of Mercy* speech (of which more later), which gives Shylock an opportunity to back down, but he refuses.

Portia then asks if Antonio can discharge the debt and Bassanio (who has been given the money by his fiancée, Portia) tenders twice the principal and offers to be bound to pay more. He invites Portia to:

*“Wrest once the law to your authority:
To do a great right, do a little wrong.”*

But she replies:

*“It must not be. There is no power in Venice
Can alter a decree established:
‘Twill be recorded for a precedent,
And many an error by the same example
Will rush into the state. It cannot be.”*

Portia then asks Shylock to produce the bond, which is something a plaintiff suing on a bond had to do. He does so and she points out that he is being offered “thrice thy money”. Once more he insists on his bond. She rules that he is entitled to his pound of flesh and then suggests that he should have a surgeon to stop Antonio’s wounds, but Shylock points out that that is not in the bond. Portia then resorts to the strict construction technique herself and points out that the wording of the bond does not entitle him to a single drop of blood.

At this point Shylock says he will take three times his money. Bassanio tenders it but Portia rules that he can only have the penalty:

*“The Jew shall have all justice; soft, no haste:
He shall have nothing but the penalty.”*

Shylock, backing down further, says:

“Give me my principal and let me go.”

Bassanio tenders that and then Portia plays the election card:

*“He has refused it in the open court:
He shall have merely justice, and his bond.”*

And then in answer to Shylock asking,

”Shall I not barely have my principal?”

“Thou shalt have nothing but the forfeiture...”

He is not even allowed to have his principal, because he has elected to sue on the bond and claim the penalty.

Of course, this is all a complete nonsense because there was a perfectly good defence to Shylock’s action. The bond was void for illegality since its enforcement would have involved an act of murder by the obligee. Portia takes that point next, thus crowning a display of legal learning that was forensically entirely unnecessary, but dramatically essential.

The interest for lawyers is the perfectly correct deployment of the then current doctrines of the common law at a point in time shortly before the development of the equity jurisdiction which took place in the 17th Century.

To recap:

- There are several references to the importance of the courts enforcing contracts according to their literal tenor in the interests of commerce;
- There is a classic example of the court adopting a strict construction to avoid a forfeiture;
- The doctrine of election is invoked to deliver the coup de grace.

There is no Equity in that scene – only principles of common law. Indeed, Portia actually says there is no jurisdiction other than the law when she says *“There is no power in Venice can alter a decree established”*. Writers,

however, have often found allusions to Equity in Portia's *Quality of Mercy* speech, so let's go back to it.

<p>“Portia Antonio Portia Shylock Portia</p>	<p><i>Do you confess the bond?</i></p> <p style="text-align: right;"><i>I do.</i></p> <p><i>Then must the Jew be merciful.</i></p> <p><i>On what compulsion must I? Tell me that.</i></p> <p><i>The quality of mercy is not strained, It droppeth as the gentle rain from heaven Upon the place beneath: it is twice blessed; It blesseth him that gives and him that takes; 'Tis mightiest in the mightiest; it becomes The throned monarch better than his crown; His sceptre shows the force of temporal power, The attribute to awe and majesty, Wherein doth sit the dread and fear of kings; But mercy is above this sceptred sway, It is enthroned in the hearts of kings, It is an attribute to God himself, And earthly power doth then show likest God's When mercy seasons justice I have spoke this much To mitigate the justice of thy plea, Which if thou follow, this strict court of Venice Must needs give sentence against the merchant here.”</i></p>
--	---

Portia has got a good press for this speech but it is in truth a disingenuous trap. Just before, Portia has told Shylock he is going to win -

“... *the Venetian law/ Cannot impugn you as you do proceed*”.

Then she ends by telling him that the court must give sentence against Antonio. If as counsel you are seeking a settlement, you do not begin and end by telling your opponent that he is bound to win if he does not agree a compromise. Portia is not trying to get a deal; she is baiting the election trap, and Shylock falls straight into it when he answers:

“*My deeds upon my head! I crave the law,*

The penalty and forfeit of my bond.”

Yet the speech is interesting because it is entirely in line with the current philosophy as propounded by King James – mercy is an attribute of monarchs derived from God and it emanates not from law but from the prerogative of the monarch. In early 1605 *The Merchant of Venice* was performed before King James. He liked it so much that he had it performed again the following night.

Shakespeare was reflecting current thinking and current law. Mercy/equity was not yet for the courts of law but for the monarch acting through his/her prerogative courts, the Chancery and the Star Chamber., as he or his Chancellor saw fit.

So that was the law when *The Merchant of Venice* was written but what was Shakespeare saying about it? Here is my wholly personal take on the play. *The Merchant* is a play about wealth and the way in which people use their wealth to manipulate each other. It depicts different ways of acquiring wealth: by inheritance (Portia); by marriage (Bassanio); on the financial markets (Shylock); by commerce (Antonio). It also depicts different uses of wealth: by Portia’s father to control his daughter’s choice of husband; by Portia to secure the man she wants; by Antonio to hang on to the same man by putting him under an obligation; by Shylock to get his revenge.

It has been said that the play contains nobody remotely likeable. It has a strong satirical edge. Is its depiction of the law at work also intended to be satirical – to demonstrate that it too is a technical process which could be employed manipulatively and without regard to decency or morality? My thesis is that it was part of the wider philosophical debate at the end of the 16th Century about the need for the law to evolve in the direction of paying

more regard to substance than form, to the merits of the case as opposed to the letter of the law, an evolution that did in fact take place in the following 30 years or so.

Measure for Measure

I move on a decade to *Measure for Measure*, first performed before King James on Boxing Day 1604. Debate about Equity and the prerogative has intensified: King James is on the throne; Sir Thomas Egerton, now Lord Ellesmere, is Lord Chancellor; King James has published his *Basilikon Doron*, which was widely read; Edward Hake has presented his *Epieikeia* to the King; the Chancellor is minded to review cases after judgment at law, with the King's approval.; the King, after the conviction of Lord Cobham and Sir Walter Raleigh and others for accepting bribes from the Spanish, has rather theatrically spared the lives of the convicted conspirators when they were already standing on the scaffold. Justice with Mercy is topical¹⁴.

In *Measure for Measure* the Duke of Vienna announces that he has to leave the city on a diplomatic mission and leaves the government in the hands of Angelo, a Judge known for his strict application of the law. Angelo decrees that all the brothels in the city are to be closed and decides to enforce an old law against fornication by condemning Claudio, who has got his fiancée, Juliet, pregnant, to death. Claudio's friend, Lucio, asks Claudio's sister, Isabella, a novice nun, to intercede with Angelo. She does so, using, as Professor Skinner has shown, every rhetorical device in the Quintilian play-book¹⁵. Angelo, smitten with Isabella, offers to spare her brother if she will sleep with him. She refuses and tells her brother he must die.

¹⁴ See Endicott, "*The Conscience of the King*" (1989)

¹⁵ Skinner, "*Rhetorical Shakespeare*" (2014)

The Duke has, however, not left the city. In the guise of a friar, he advises Isabella to pretend to agree to sleep with Angelo in a darkened room but arranges that a lady called Marianna, to whom Angelo had been engaged but whom he had jilted when she lost her dowry, should take Isabella's place. Angelo, though supposing himself to have slept with Isabella, welches on his deal and orders Claudio's execution. The Duke arranges for him to be sent the head of a dead prisoner instead.

The Duke then returns as himself and is petitioned by both Isabella and Marianna. Angelo is exposed and sentenced to (a) marry Marianna and (b) death. Marianna and Isabella plead for his life¹⁶. The Duke relents, spares Angelo's life and, somewhat bizarrely, proposes to marry Isabella¹⁷.

All very entertaining, but the clue to this play is in the very first scene. The Duke dispenses two commissions: one to Escalus, whom he describes as "*pregnant in the nature of our people, our city's institutions and the terms for common justice*": the other to Angelo, on whom he confers plenipotentiary powers. He says to Angelo:

*"In our remove be thou at full ourself;
Mortality and mercy in Vienna
Live in thy tongue and heart."*

He is giving Angelo the power of life and death *and* his prerogative of mercy. This is made clear again a few lines later where he says:

*"..... Your scope is as mine own,
So to enforce or qualify the laws
As to your soul seems good."*

¹⁶ Isabella on the ground that, though he had the mens rea, he had failed to commit the actus reus.

Angelo is being given not only the right to enforce the law but the right to qualify it, which is the realm of prerogative and equity.

Two scenes later the Duke explains to Friar Thomas what he is up to. He has neglected to enforce the laws properly for 14 years and thinks something needs to be done about it but preferably not by him, because that would make him unpopular. In addition to this unworthy motive for the appointment of Angelo, he has another: he wants to observe what happens when an apparently strict law enforcer is endowed with plenipotentiary powers. He says:

“... Lord Angelo is precise;
Stands at a guard with envy; scarce confesses
That his blood flows, or that his appetite
Is more to bread than stone: hence shall we see,
If power change purpose, what our seemers be.”

In other words the Duke is conducting an experiment. What will happen if you endow a single apparently upright individual with the powers both of the courts and the king? What does happen is first an illustration of the brutality of enforcing the letter of the law – the wholly unjust sentence of death on Claudio who was all but married to Juliet anyway – but secondly, an illustration of how strict law, coupled with a discretion not to enforce it, can be used for a corrupt purpose. When Angelo asks Isabella if, hypothetically, she would sleep with someone “*with credit with the judge*” to save her brother’s life, she says “*lawful mercy / is nothing ken to foul redemption*”. Angelo has the power to dispense lawful mercy but he tries to use it corruptly to coerce Isabella into sleeping with him.

¹⁷ The moral of which is presumably that good girls get to marry dukes.

His second in command, Escalus, by contrast, in judging the riff-raff, Mistress Overdone, the brothel keeper, and the pimp, Pompey Bum, gives them both a second chance before ultimately sending them to prison. He takes account of the circumstance that they are first offenders against a new law.

Shylock and Angelo have this in common: they are both in their different ways, to use Aristotle's word, *akribodikaioi*¹⁸ and it is their undoing.

Measure for Measure is thus part of the ongoing debate about the need for equity to mitigate the rigour of the law and about its attendant pitfalls, namely the possibility of arbitrariness, partiality and even corruption. In writing it for performance at court, Shakespeare might even have thought, as he had Hamlet say:

“.... *The play's the thing,
Wherein I'll catch the conscience of the King*”.

Jonathan Gaunt QC

January 2016

Appendix – Metaphors for Equity

1. One of a pair of heraldic “supporters”: King James I
2. One of a pair of oxen pulling a plough : Shakespeare
3. A flexible ruler made of lead : Aristotle
4. As opposed to law = a (presumably stiff) measuring rod : Coke
5. A measure varying according to the length of the Chancellor's foot ; Selden
6. The kernel of a nut ; Plowden

¹⁸ As were Creon in Sophocles' *Antigone* and Pentheus in Euripedes' *Bacchae*.

Bibliography

Articles

JW Dickinson: “*Renaissance Equity and Measure for Measure*” (1962) 13(3) *Shakespeare Quarterly*, 287;

W Dunkel: “*Law and Equity in Measure for Measure*” (1962) 13(3) *Shakespeare Quarterly*, 275.

M Mackay: “*The Merchant of Venice, a Reflection of Early Conflict between Courts of Law and Courts of Equity*” (Autumn 1964) 15(4) *Shakespeare Quarterly*, 371;

TAO Endicott: “*The Conscience of the King: Christopher St German, Thomas More and the Development of English Equity*” (1989) 47 *University of Toronto Faculty of Law Review*, 549.

Books

Shakespeare’s Legal and Political Background, Keeton (1967)

The Rule of Law 1603 – 1660, Hart (2003)

The Culture of Equity in Early Modern England, Fortier (2005)

Shakespeare the Thinker, Nuttall (2007)

Equity Stirring, Watt (2009)

Forensic Shakespeare, Skinner (2014)