THE QUALITY OF MERCY

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The expression "waiver" is used loosely to describe the effect of at least four quite different distinct legal doctrines:

1. Common law election

Where A is faced with a choice between inconsistent courses of action which affect B's position and, knowing that the two courses are inconsistent and he has the right to choose between them, makes the choice and communicates it to B, A is bound by his election and cannot go back on it. Note that no proof of detrimental reliance is required.[1]

2. Equitable election

This is the doctrine that says that you cannot blow hot and cold or "approbate and reprobate". It prevents cherry picking – i.e. taking a benefit under part of a document while challenging or declining to give effect to another part.[2]

3. Estoppel by conduct or acquiescence or promise

This requires proof of detrimental reliance by B caused or encouraged by A's conduct or inactivity or promise in circumstances which would make it unconscionable for A to assert his legal rights.

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[1] Kammins Ballrooms Co Limited v Zenith Investments (Torquay) Limited [1971] AC 850 at p.882. "The Kanchenjunga" [1990] 1 Ll Rep 391 at p.399; Oliver Ashworth Limited v Ballard Limited [2000] Ch 12.

4. Deemed abandonment or "lost modern release"

Sometimes a person is said to have waived a contractual right (typically a restrictive covenant) as a result of knowing long acquiescence in its non-observance or breach.[3] This is really a case of imputed release, a sort of reverse prescription.

Let us concentrate on the first of these types of "waiver", common law election. It finds a number of familiar applications in the modern law:

- Waiver of forfeiture of leases;
- Waiver of repudiatory breach and affirmation of the contract;
- Waiver of a right to rescind for misrepresentation or under a contractual provision.

All these situations present a party with a choice and there comes a time when he must make it or be deemed to have made it by the Court.

This doctrine is a very old principle[4] devised by the common law Courts to ameliorate the harshness of contracts at a time before the invention by the Courts of Chancery of its various jurisdictions to relieve against the oppressive results of bargains, as by:

- Granting relief against forfeiture;
- Relieving against penalties;
- Allowing mortgages to be redeemed after the contractual date for redemption.

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[2] This has been said to be quite distinct from common law election: Lissenden v Bosch [1940] AC 412 at p.418 per Viscount Maugham and Banner Industrial and Commercial Properties v Clark Paterson Limited [1990] 2 EGLR 139 at p.140F-G per Hoffmann J.
[3] Hepworth v Pickles [1900] 1 Ch 108; A/G for Hong Kong v Fairfax [1997] 1 WLR 149.
[4] Coke on Lyttleton, 146a gives an example from the reign of Henry VI.

The attitude of the common law towards forfeiture of leases was that forfeitures were "odious" and justified (a) a very strict adherence to the rule that the slightest act inconsistent with termination of the lease would waive the right to forfeit and (b) strict construction of the terms of the lease against the lessor. One wonders whether these rules would ever have been invented if the Court of Chancery had evolved the jurisdiction to grant relief on terms earlier than it did.

My thesis this evening is that the trial scene in Shakespeare's *Merchant of Venice* has to be understood as having been written just before the dawn of the equitable jurisdictions and at a time when the only techniques of the law for avoiding the oppressive effects of contracts were threefold:

(1) Insistence on formalities;

(2) Strict construction;

(3) The doctrine of 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. All these elements are to be found in the case of Shylock v Antonio, an action upon a bond.

In mediaeval times the most common form of contract was a bond and the most common form of action on a contract was an action in debt sur obligation, i.e. an action on the 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 by a certain date or performed other stipulated acts by a certain date, the bond would be void.[5]

[5] Appended to this paper is an example of a bond taken from Blackstone's Commentaries. In Shakespeare's day, most bonds would have been 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.[6]

It might reasonably be thought that such an arrangement was (a) usurious and therefore offended against canon law and (b) plainly imposed a penalty, but neither of these features were seen as objectionable. The amount by which the bond exceeded the loan was regarded as agreed compensation for late repayment.

In the reign of Elizabeth I, a jurisdiction developed whereby the Court of Chancery might relieve against bonds or mortgages in cases of oppression or hardship but special circumstances had to be averred and proved. In the following century the practice grew up of granting relief without special circumstances upon payment of the principal, interest and costs. The date of the change from the narrow to the broad ground of relief is put by R.W. Turner[7] (who had read every case on mortgages in the Chancery Reports before 1750) at between 1615 and 1630. It may have coincided with the end of Lord Ellesmere's tenure as Chancellor in 1617 or have resulted from

[6] For a more detailed discussion of the history of the bond in contract law, see A.W.B. Simpson, A History of the Common Law of Contract (1975) to which work I am indebted for the above summary.
[7] See the Equity of Redemption, Cambridge, 1930, Chapter II, page 30.

James I's ruling that the Chancellor's subpoena was to override the decisions of common law. Turner thinks that the Chancery Court established a general jurisdiction to relieve against forfeiture of bonds and mortgages at much the same time and that the common law Courts developed the same jurisdiction in relation to bonds (but not mortgages) about 50 years later after the Restoration. In 1705 the Courts were authorised by statute to discharge an obligor who brought into Court principal, interest and costs due on a money bond (thus bringing the law into line with Equity).

By contrast, it was said of Lord Ellesmere (Lord Chancellor from 1596 to 1617) that he:

> "*would not relieve any that forfeited a bond, unless it were in case of extremity, or that he could make it appear that by some accidental means he was occasioned thereto.*"

Otherwise the Courts enforced bonds strictly according to their express terms.[8] Not everybody agreed with this. In the reign of Henry VIII Sir Thomas More had attempted unsuccessfully to persuade the Judges to give relief in respect of money bonds:

> "*For he summoned them to a conference concerning the granting of relief at law, after the forfeiture of bonds, upon payment of principal, interest and costs; and when they said they could not relieve against the penalty, he swore by the body of God that he would grant an injunction.*"[9]

[8] In one case a bond provided that if the obligor did not pay by the due date, the bond was to be void. That was obviously not intended but the Court gave effect to the bond as drawn and discharged the obligor.

[9] Per Lord Mansfield in Wyllie v Wilkes (1780) 2 Doug KB 519 at page 522 cited by Nicholls LJ in Jobson v Johnson [1989] 1 WLR 1026 at page 1038F.

The equitable jurisdiction to relieve against forfeitures and the invention of the equity of redemption of mortgages appear to have emerged at much the same time as the jurisdiction to relieve against penalties. There are lots of cases on waiver of forfeiture after the reign of Elizabeth I[10] but I have not been able to find any cases on relief against forfeiture in her reign.

This brings me to Shylock v Antonio. 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. Shylock suggested this and Antonio understood it as an act of kindness and a joke[11]. Antonio's ships, from whose merchandise he expected to make "thrice three times" the amount of the loan and which he expected back within two months, did not return in time and he was unable to pay the debt on the appointed day. By this time Shylock has become 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 his bond.

The Duke begins[12] 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 at 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.

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[10] E.g. Green's case [1582] Cro Eliz 3; Harvey v Oswald [1596] Cro Eliz 553 and 572; Pennant's case (1596) 3 Co 64A; Marsh v Curteys [1597] Cro Eliz 528. As to mortgages, see Megarry and Wade, 6th Ed paras 19-009 to 011. The earliest example of a Court of Equity holding that an interest granted by way of security might be void, even though the debt had been paid after the legal date for redemption, appears to be Emmanuel College v Evans (1625) 1 Rep Ch 18.

[11] Act I, scene 3.

[12] Act IV, scene 1.

He refuses and repeats that, if the Court does not enforce the bond, there will be no force in the decrees of Venice.[13]

There is then some unattractive robing room needling from Gratiano, to which Shylock replies:

> *"Till thou canst rail the seal from off my bond,*
> *Thou but offend'st thy lungs to speak so loud*"

This is a reference to the fact that, if a seal was missing from a bond or there was any other sign that the original deed had been tampered with, the Courts regarded the bond as void.

Portia arrives and is granted right of audience on the (mendacious) recommendation of a distinguished lawyer from Padua. She identifies the parties, invites Antonio to acknowledge the bond and then makes "the quality of mercy" speech, which gives Shylock an opportunity to back off, 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."*

[13] A point that Antonio as an experienced man of commerce had anticipated when he was arrested the previous day: Act III, scene 2, line 25.

At this point every Equity lawyer in the audience is thinking, "Discharge the bond on terms that Shylock is paid his principal, interest and costs", but that jurisdiction, despite the efforts of Thomas More, had not yet developed.

She 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:

> "*For, the intent and purpose of the law*
> *Hath full relation to the penalty*
> *Which here appeareth due upon the bond."*

Portia then suggests that Shylock 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. If you think about it, this is no more absurd than the well known rule that a covenant not to sublet is not broken by subletting part, and the reasoning is much the same.[14]

At that point Shylock says he'll take three times his money. Bassanio tenders it but Portia rules that he can only have 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 hath refused it in the open court:*
> *He shall have merely justice, and his bond.*"

He is not even allowed to have his principal, because he has elected to sue on the bond and claim the penalty.[15]

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.

What we as lawyers may find interesting is the perfectly correct deployment in this scene of the then current doctrines of the common law, at a point in time just before the development and systematisation of the Equity jurisdiction which took place in the 17th Century. To recap:

- There is a reference to the effect of the seal being removed;
- There are several references to the importance of the Courts enforcing contracts according to their literal tenor in the public interest;
- 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.

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[14] Cook v Shoesmith [1951] 1 KB 752.

[15] For a modern example of precisely the same thing, see GS Fashions v B&Q [1995] 1 EGLR 62, where a landlord who had served a writ claiming forfeiture of a lease was held unable to amend his pleading and resile from that election.

Epilogue

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 try to hang onto 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 was a technical process which could be employed manipulatively and without regard to decency or morality? Was it part of a 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, an evolution that did in fact take place in the following 30 years?

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