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# CONTRACT, DEBT LITIGATION AND SHAKESPEARE'S *THE MERCHANT OF VENICE*

ABSTRACT

Historians and literary critics interested in the legal themes of *The Merchant of Venice* often characterise the play as representing a clash between law and equity. Recent scholarship has rightly questioned this association, insofar as it might relate to equitable remedies available in Shakespeare's day. This article draws upon the records of England's largest equity Courts, Chancery and the Court of Requests, to expose widespread discontent with the harsh penalties attaching to conditional bonds. These precursors to modern contracts had grown increasingly prevalent in the years prior to the play's composition, spawning unprecedented levels of litigation over bonds in common law and equity courts. It is these contests over the best way to enforce the contracts embodied in conditional bonds that provide a likely context for the play.

*The Merchant of Venice* contains a number of themes that resonate with modern audiences: the fierce anti-Semitism that swirls around the character of Shylock; the grace and intellect of Portia, a woman acting independently in a largely male world; usury and the more ruthless aspects of capitalism. It also contains one of the most famous trial scenes on the English stage and interpreters of the play have long been intrigued by its many legal themes.[1] The text brims with references to forfeitures, bonds, wills and other legal instruments, while its Italian setting keeps audiences guessing about the extent to which the Venetian laws and legal mores on display might mirror, contrast with or provide some kind of critique of the English laws and courts of Shakespeare's day. In particular, scholars have pondered the relationship between law and equity in the play and in the central common law and equity courts of Elizabethan Westminster. This article seeks to place the bond story and the resulting trial into their social, legal and economic

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1 See, eg, Ian Ward, *Shakespeare and the Legal Imagination* (1999); Theodore Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (1997); Richard Weisberg, *Poethics and other Strategies of Law and Literature* (1992); O Hood Phillips, *Shakespeare and the Lawyers* (1972).

contexts through an analysis of the records of the equity Courts of Chancery and Requests from around the time when the play was written and first performed.

## The Play's Legal Plots

The bond penalty of a 'pound of flesh' and the dramatic twists and turns of the trial scene deserve their notoriety. At the play's opening, Bassanio needs money to travel to Belmont to woo Portia in the hope of gaining her love and her generous dowry. With his finances depleted and his creditworthiness under a cloud, he relies on his friend Antonio, the merchant of the title, to act as surety and to help him negotiate a loan of 3000 ducats from the Jewish moneylender Shylock. At the conclusion of their discussions Shylock says to Antonio:

> Go with me to a notary, seal me there
> Your single bond, and, in a merry sport,
> If you repay me not on such a day,
> In such a place, such sum or sums as are
> Expressed in the condition, let the forfeit
> Be nominated for an equal pound
> Of your fair flesh, to be cut off and taken
> In what part of your body pleaseth me (I.iii.137–44).[2]

The part of Antonio's body that pleases Shylock turns out to be as near as possible to his heart. However, Antonio is unconcerned by the penalty as he expects his heavily laden ships to return to port a full month before the due date, winning him profits worth three times the amount due. In fact he is grateful to Shylock for uncharacteristically providing this loan without charging interest. Unfortunately for Antonio news arrives that his ships have not returned to port, he defaults on the agreement and Shylock duly demands his pound of flesh. Shylock already hates Antonio because Antonio has mistreated him in the past by spitting on him and kicking him because he is a Jew, by hindering his business by lending without interest and by helping debtors avoid having to pay money penalties. He has also become enraged by his daughter's eloping with a Christian and absconding with his jewels and money.

Various parties step forward to offer Shylock two, three or even ten times the amount owed, but the moneylender is adamant he will have his law. Even before his daughter elopes he swears:

> That he would rather have Antonio's flesh
> Than twenty times the value of the sum
> That he did owe him; (III.ii.285–7)

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2 M M Mahood (ed), William Shakespeare, *The Merchant of Venice* (2nd ed, 2003). (All references to Shakespeare are to the Mahood edition.)

Shylock repeats again and again 'let him look to his bond', or to put it in modern terms, let him look to his contract. In court Portia, disguised as Balthazar, a doctor of civil law called upon to assist with the case, urges Shylock to show mercy. He refuses, on the grounds that mercy is nowhere mentioned in the conditions of the bond, leading Portia to respond with her famous speech that begins:

> The quality of mercy is not strain'd,
> It droppeth as the gentle rain from heaven
> Upon the place beneath: it is twice blest,
> It blesseth him that gives, and him that takes. (IV.i.180–83)

Shylock ignores her request to spare Antonio and to accept three times the original amount owed, saying 'I crave the law. / The penalty and forfeit of my bond' (IV.i.202–3) and even refuses to have a surgeon standing by to stop Antonio's wounds, once again because that provision is not included in the bond. Portia finally concedes that he is entitled to exact his penalty, Antonio bares his breast and Shylock advances, holding scales in one hand and a knife in the other in a perverse embodiment of the goddess Justice.[3] Just when all seems lost, Portia intervenes and demands the same strictness of interpretation that Shylock has demanded. He must take his pound of flesh without spilling a drop of blood. Realising that this is impossible, Shylock says he will accept the offer of three times the money owed and let Antonio go, but Portia refuses. He must exact his penalty and take exactly a pound of flesh, not a hair's breadth more or less. Shylock says he will accept his principal without any interest, but again Portia refuses. Under Venice's *Alien Statute* he is guilty of seeking to murder a Venetian citizen and must forfeit all his lands and goods as well as his life, unless the Duke chooses to be merciful. The Duke does pardon him, but orders the forfeiture of his property. Antonio, the beneficiary of half of this forfeiture, promises to hold Shylock's property in trust for his daughter and son-in-law to enjoy after his death, on condition that Shylock immediately converts to Christianity.

## Law versus Equity?

Identifying possible historical contexts for these dramatic episodes is difficult, as Shakespeare borrowed many elements of the play's plot from other sources, including the idea of a Jewish merchant demanding a pound of flesh and the casket game by which Portia's husband is chosen. However, the prominence the play gives to complex legal questions is unmistakable, in particular the tensions that exist between freedom of contract and public policy.[4] Should Venetian courts and society respect Antonio's clearly expressed willingness to put his name to a contract that may well bring him harm, or find that contract void on grounds of public policy? Presuming the contract is valid, should the positive law and legalism it embodies

3 Ziolkowski, above n 1, 174–5.

4 On possible sources for the play see Mahood, above n 2, 2–8; William Chester Jordan, 'Approaches to the Court Scene in The Bond Story: Equity and Mercy or Reason and Nature' (1982) 33 *Shakespeare Quarterly* 49.

be mitigated by discretion and reasonableness? Shylock champions positive law in part because it applies to everyone in equal measure, regardless of their wealth, social status, religion or ethnic heritage, in contrast to judicial discretion that in the wrong hands can become a licence for prejudice.[5] Other approaches to the play seek to identify the real jurisdictions that might have inspired the curious fictional courtroom where Portia pulls off her legal sleight of hand. Candidates include the laws of Venice itself, the civil law of Europe or the Roman law on which it was based, the law merchant, and the English Courts of Star Chamber, King's Bench and Chancery.[6]

These disparate and intriguing legal approaches to interpreting *The Merchant of Venice* have one thing in common; their relative timelessness. Few of them help explain what inspired Shakespeare to write the play in the mid-to-late 1590s — the current consensus dates the first performance between 1596 and 1598, most likely in the autumn of 1597 — and why the legal themes he explored might have resonated with the play's late-Elizabethan audiences.[7] Scholars seeking such an explanation have identified the play with a deep-seated ideological conflict between supporters of common law and equity, pitting Shylock as a representative of the inflexible courts of common law against Portia representing the merciful equity dispensed in the Court of Chancery. Various details within the play appear to support this association. Portia, disguised as Balthazar, is a doctor of civil law, and in England doctors of civil law practiced in Chancery and the Court of Requests, which had equitable jurisdictions, as well as in the Church courts. Characters in the play make reference to uses — the precursors to trusts — that in most instances could only be litigated in equity courts, and to interrogatories, written questions put to witnesses under the civil court procedures used in equity and Church courts, but not in courts of common law that relied on oral testimony. Towards the end of Act IV, Gratiano shows his frustration at Shylock's escape from death by making an allusion to common law trial by jury, implying that Shylock would not have been so lucky if his fate had been left in the hands of 12 good men and true (IV.i.394–96). Conflict between common law and equity courts, which prior to 1837 operated within separate jurisdictions, simmered in the 16th century and flared up in the early decades of the 17th century when Sir Edward Coke stood up for common law against Lord Ellesmere who championed the power of Chancery. Forced to intervene in this dispute in 1616, King James I, advised and assisted by Attorney-General Sir Francis Bacon, famously sided with equity over the common law as the highest authority in the land and soon after had Coke sacked as Chief Justice.[8] One literary critic was so convinced that *The Merchant of Venice* dealt with this conflict between common law and equity that he argued that the play directly influenced the

5 Richard A Posner, *Law and Literature* (revised ed, 1998) 110.

6 Richard Wilson, 'The Quality of Mercy: Discipline and Punishment in Shakespeare' (1990) 5 *Seventeenth Century* 1, 15; W Nicholas Knight, 'Equity, *The Merchant of Venice,* and William Lambarde' (1974) 27 *Shakespeare Survey* 93; B J Sokol, '*The Merchant of Venice* and the Law Merchant' (1992) 6 *Renaissance Studies* 60; M E Andrews, *Law versus Equity in* The Merchant of Venice (1965).

7 On the dating of *The Merchant of Venice* see Mahood, above n 2, 1–2.

8 J H Baker, 'The Common Lawyers and the Chancery, 1616' (1969) 4 *Irish Jurist* 368.

outcome of *Courtney v Glanvill*,[9] one of the cases that brought the crisis to a head, as the judges who ruled in that case had almost certainly seen the play performed.[10]

As scholars such as E F J Tucker and B J and Mary Sokol have pointed out, the problem with linking *The Merchant of Venice* to this historical conflict is that each of these allusions to law and equity is open to question.[11] First, it is too simplistic to align Portia with equity and Shylock with the common law. Portia speaks eloquently about mercy, but she does not dispense mercy or ask the bench to dispense it. In her actions she displays a commitment to positive law as fierce as Shylock's, enforcing first contract and then statutory criminal law in the trial scene, and then in Act V demanding unwavering commitment to the keeping of personal oaths without question and without exceptions.

Secondly, mercy is not a hallmark of equity.[12] Mercy in the Elizabethan period was almost invariably dispensed in criminal courts by common law judges, and by the monarch. As we have seen, in the play it is the Duke, not Portia, who shows mercy in sparing Shylock's life after he is held to have contravened the *Alien Statute*.

Thirdly, Shakespeare makes no direct or indirect reference in the play to the Court of Chancery or to any other equity court. If the trial had occurred in England rather than Venice, Antonio could have gone to Chancery or the Court of Requests and sought an injunction staying common law proceedings on his bond, and requested relief from the bond's excessive penalty. Including this kind of procedural intervention in the play would have robbed the plot of its dramatic power by depriving Portia of her courtroom surprises, a problem Shakespeare's choice of a Venetian setting neatly averts.[13]

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9 (1615) 79 ER 294.

10 W Nicholas Knight, *Shakespeare's Hidden Life: Shakespeare at the Law, 1585–1595* (1973) 178–90, 280–6.

11 E F J Tucker, 'The Letter of the Law in "The Merchant of Venice"' (1976) 29 *Shakespeare Survey* 93; B J Sokol and Mary Sokol, 'Shakespeare and the English Equity Jurisdiction: *The Merchant of Venice* and the Two Texts of *King Lear*' (1999) 50 *Review of English Studies* 417.

12 Christopher Saint German defined equity as 'a rightwisenes that considereth all the perticuler circumstaunces of the deede, the which also is tempered with the swetenes of mercy', and William Lambarde encouraged chancellors to ensure that 'the gate of mercie may bee opened in all calamitie of suit: to the end, (where need shall be) the rigour of law may be amended' but other references to mercy are rare; Christopher Saint German, *The Dialogues in English, between a Doctor of Divinity, and a Student in the Laws of England* (1569 ed) ch 16, fol 27; Lambarde, *Archeion*, as quoted in Ziolkowski, above n 1, 171.

13 Some scholars suggest that Shakespeare deliberately excluded references to equity or Chancery to emphasise the need for it in cases such as Antonio's; Posner, above n 5. The motivation behind this omission was supposedly the series of suits over property that members of Shakespeare's family commenced in the 1580s and took to Chancery in the 1590s; see Sokol and Sokol, above n 11, 426.

Fourthly, to invoke the famous conflict of 1616 is to risk being swayed by hindsight. Few historians any longer see the clash between common law and equity as a deeply ideological conflict between the rule of law and the Royal Prerogative, one that helped set the nation on a path to civil war and revolution. Instead, most tend to regard it as a fight for business between rival jurisdictions and a clash of particular personalities as much as a clash of ideas: the inflexible Coke pitted against the ageing Ellesmere; the ambitious Bacon and the Scottish James, a king wrongly suspected of planning to codify the common law or to replace it with European style civil law.[14] As Bacon himself said once the crisis had subsided, 'now the men were gone the matter was done'.[15] According to this reading of relations between common law and equity jurisdictions, no serious conflict existed in the 1590s. Judges in both jurisdictions regularly sought assistance from each other and many of the chancellors and masters who sat in Chancery and Requests, as well as virtually all of the legal counsel who appeared in those courts, were common lawyers trained in the Inns of Court.[16]

## The Rise of Litigation

If these scholars are right and *The Merchant of Venice* is not about equity, except in the broadest sense of fairness, and not about the clash in Westminster between common law and equity jurisdictions, what then is the play's legal context? What inspired Shakespeare to put quill to paper at that particular historical moment and what legal aspects of the plot would have seemed topical to his Elizabethan audience? Part of the answer to these questions can be found in the unpublished litigation records of the courts of Chancery and Requests that reveal what appears to be a popular dissatisfaction with the direction the common law of contract was taking (or rather not taking). This dissatisfaction manifested itself in a fundamental difference of opinion between common law and equity benches over the binding force of the terms of sealed bonds or obligations and over the status of the penalty clauses that attached to them. For while it seems clear that no single political or ideological rift separated supporters of the common law from their colleagues who championed equity, that does not mean that advocates for these jurisdictions saw eye to eye on every issue. By taking the perspective of litigants, rather than judges or commentators, it becomes possible to discern during the years leading up to 1597 an intensification of ongoing debates about contract and common law.

Recent research confirms that Shakespeare lived through the largest and most dramatic per capita rise in litigation levels in English, and arguably in world,

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14 Baker, above n 8; J P Dawson, 'Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616' (1941) 36 *Illinois Law Review* 127; W J Jones, *The Elizabethan Court of Chancery* (1967); J H Baker, *An Introduction to English Legal History* (4th ed, 2002) 108–9; Glenn Burgess, *Absolute Monarchy and the Stuart Constitution* (1996) 207; But see Damian X Powell, 'Why was Sir Francis Bacon Impeached? The Common Lawyers and the Chancery Revisited: 1621' (1996) 81 *History* 511.

15 As quoted in Powell, above n 14, 516.

16 Jones, above n 14, 317–8; Tim Stretton (ed), *Marital Litigation in the Court of Requests 1542–1642* (2008) 32 *Camden Fifth Series* 13–4.

history. In the pre-eminent common law Courts of Queen's Bench and Common Pleas the number of cases that proceeded beyond initial stages rose from just over 5000 a year in 1560 to over 20 000 by 1606.[17] In local courts the increase was even more impressive, and a recent estimate suggests that by 1580 English courts may have been hearing over 1 100 000 suits a year, at a time when the population of England and Wales was less than 4 000 000.[18] Little wonder then, that legal thinking influenced drama, especially when a high proportion of London theatre audiences had direct experience of the law, whether as law students, members of the Inns of Court, litigants, witnesses or curious visitors to the law courts in Westminster Hall and the White Hall.[19] The lion's share of these lawsuits, up to 90 per cent of actions in common law courts nationally and between 60 and 70 per cent of actions in the central common law courts of Queen's Bench and Common Pleas, concerned debt or contract.[20]

## The Law of Contract

Contract in Shakespeare's time bore little relation to the law we know today, as the key elements of offer and acceptance and valuable consideration had not yet fully developed. As A W B Simpson has explained, 'modern contract law evolved from the action of *assumpsit* [the failure to fulfill promises], and we therefore find the evolution of *assumpsit* peculiarly interesting', but equating contract with *assumpsit* can produce 'a distorted view of the contractual scenery'.[21] *Assumpsit* was still in its infancy in the second half of the 16th century, with actions relatively rare in the central Westminster courts, in marked contrast to litigation over bonds. Written

17 Christopher W Brooks, *Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch' of the Legal Profession in Early Modern England* (1986) 51, 66–9.

18 Craig Muldrew, *The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (1998) 236.

19 See, eg, Bradin Cormack, *A Power to do Justice: Jurisdiction, English Literature, and the Rise of Common Law, 1509–1625* (2007); Lorna Hutson, *The Invention of Suspicion: Law and Mimesis in Shakespeare and Renaissance Drama* (2007); Subha Mukherji, *Law and Representation in Early Modern Drama* (2006); Victoria Kahn, *Wayward Contracts: The Crisis of Political Obligation in England, 1640–1674* (2004); Charles S Ross, *Elizabethan Literature and the Law of Fraudulent Conveyance: Sidney, Spenser, and Shakespeare* (2003); Luke Wilson, *Theaters of Intention* (2000).

20 Craig Muldrew, 'The Culture of Reconciliation: Community and the Settlement of Economic Disputes in Early Modern England', *The Historical Journal* 39 (1996) 915, 921–2. Eg, by 1592 the King's Lynn Guildhall Court was hearing almost 1800 suits a year, 57 per cent for debt and 40 per cent for trespass on the case, most commonly assumpsit; Muldrew, above n 18, 204, 208, 223; Debt actions accounted for 3161 out of 5278 actions in advanced stages in Queen's Bench and Common Pleas in 1560 (60 per cent), rising to 16 260 out of 23 147 in 1606 (70 per cent). If actions on the case are included, a growing number of which involved assumpsit, the percentages are even higher; Brooks, *Pettyfoggers*, above n 17, 69 (my calculations based on his figures).

21 A W B Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 *Law Quarterly Review* 392, 392.

instruments, many of them bonds in the same general form as Shylock's (although with money penalties), made up 90 per cent of the debt actions that dominated litigation in Queen's Bench and Common Pleas.[22]

Bonds were not new in Shakespeare's time, but Elizabethans witnessed an explosion in their use in the 1580s and 1590s that bordered on an epidemic. In a rapidly expanding but volatile economy, where chains of credit were becoming ever more complex and defaults common, more and more individuals chose to rely on these written devices. Bonds brought certainty to oral agreements, by recording their details in a durable form, authenticated with signatures and seals, and provided an incentive for their observance through stiff penalties, commonly 100 per cent or more of the value of a debt.[23] Conditional bonds also rose in popularity because of the almost limitless range of different uses to which they could be put. Sheriffs used them to ensure the appearance of offenders at trial; magistrates to induce unruly apprentices or husbands to keep the peace; equity justices to encourage litigants to accept the rulings of arbitrators.[24] The ubiquity of written obligations led religious writers to employ images of bonds and their penalties as metaphors. In 1577, for example, William Fulke reported the Catholic belief that the sacrament of the host was the means 'by which the bond obligatory that was against us was cancelled', while Lancelot Andrewes later described how Christ satisfied 'the one half of the law' by 'the innocencie of his life' and the other half 'by suffering a wrongful death', observing that 'satisfying the principal there was no reason he should be liable to the forfeiture and penalty'.[25] According to Christopher W Brooks the conditional bond was 'the most significant single legal ligament in early modern society' and suits over bonds in Common Pleas and Queen's Bench appear to have increased by over 500 per cent between 1560 and 1606 (and by almost 800 per cent between 1560 and 1640).[26]

At common law it could be surprisingly difficult to enforce the bilateral agreements that characterise most contractual relationships. A conditional bond turned those agreements into a unilateral obligation to pay a fixed penalty, providing a reassuring degree of certainty in increasingly anonymous markets.[27] If agreements went awry, putting a bond in suit in a debt action at common law

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22 Brooks, above n 17, 67.

23 On the mechanics of bonds and the indentures that often accompanied them, see A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975) 88–126 and Simpson, above n 21.

24 As John Baker notes of conditional bonds, 'the variety of subject matter was limitless'. Sir John Baker, 6 *Oxford History of the Laws of England* (2003) 819.

25 William Fulke, *Two Treatises Written Against the Papists* ... (1577) 323; Lancelot Andrewes, *A Sermon Preached before the King's Majesty at White Hall* ... (1610) 22.

26 Debt actions in advanced stages in these courts rose from 3161 in 1560 to 16 260 in 1606 to 24 637 in 1640; Brooks, *Pettyfoggers*, above n 17, 68–9 (my calculations based on his figures). In Common Pleas debt actions involving bonds made up the commonest single class of action until the eighteenth century; Baker, *Introduction to English Legal History*, above n 14, 324.

27 Simpson, *History of the Common Law of Contract*, above n 23, 112.

had various attractions over the alternatives of *assumpsit* or covenant.[28] Bonds had fixed penalties, whereas in actions of covenant damages were left to the decision of a jury. Suing on a bond in an action of debt placed the burden of proof on the defendant to prove performance, whereas an action of covenant placed the burden of proof on the plaintiff to prove breach of covenant. Relying on a sealed bond and a debt suit also avoided the possibility of wager of law, under which defendants could escape liability if they could find 12 oath takers willing to swear, not that they were without fault in the disputed transaction, but simply that their word was good, an option increasingly open to abuse.[29]

Despite these attractions, the bond was a curious and rather clumsy instrument to employ in the hustle and bustle of an increasingly sophisticated marketplace. Shylock initially suggests that Antonio seal a single bond, under which he would have promised to pay Shylock 3000 ducats. However, 'in a merry sport' he changes this to a conditional or penal bond that in Elizabethan England would have stated that Antonio promised to give Shylock a pound of his flesh cut from near his heart exactly three months from the day of the drawing up and sealing of the agreement. That was the legal agreement between the two men. Underneath those words or on the reverse they added the condition, stating that the bond would be null and void if Antonio delivered 3000 ducats to Shylock by the appointed day, but this condition was not part of the formal bond.[30] Its existence did not prevent Shylock from putting the bond in suit, it merely provided Antonio with a defence that he could plead in bar of execution of the penalty. As Coke explained in his *Reports*, the condition of a bond 'was endorsed for the benefit of the obligor, to save him from the penalty of the bond'.[31]

## Litigation over Bonds

Most explanations for the rise in litigation over bonds, and over debts more generally, are largely economic and functional in nature. Put simply, a greater number of transactions, and a more volatile market for credit, produced a rise in defaults and in subsequent litigation. Alternatively, the whole edifice of credit, based as it was on chains of non-transferable personal obligations, was collapsing

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28 Originally, an action on the case in *assumpsit* was only available if a debt action was impossible. On the history of the relationship and overlap between debt and *assumpsit* see David Ibbetson, 'Sixteenth Century Contract Law: *Slade's Case* in Context' (1984) 4 *Oxford Journal of Legal Studies* 295.

29 Baker, *An Introduction to English Legal History*, above n 14, 5–6, 74, 326, 348.

30 For an example of a bond and its condition see Anon, *An Introduction to the Knowledge and Understanding as well to Make as also to Perceive the Tenor and Form of Indentures, Obligations ...* (1550) fols xxi-xxii$^{r}$; it was possible to incorporate the condition into the bond or obligation, but this was rare in the sixteenth century; William West, *The First Part of Symboleography* (1598) sig H6$^{v}$ (part I, s 101).

31 *Vinyor's case* (1609) 8 Coke's Reports (1727) fols 81$^{v}$, 82$^{v}$.

in on itself like a house of cards.[32] The view from the major common law courts appears to support this argument, but the records of litigation over bonds in Westminster's equity courts suggest a more complex picture. Chancery and the Court of Requests enjoyed a similar surge in debt-related litigation, with Requests actions concerning debt, bonds or contract rising from 21 per cent of all cases in 1562–3 to almost 60 per cent in 1598–9, during a period when total levels of business in the court increased by almost 400 per cent.[33] However, a considerable proportion of debt suits in these equity courts were actually appeals against debt actions running concurrently at common law.[34]

Thousands of defendants in common law actions flocked to Chancery and Requests as plaintiffs seeking equitable relief from what they saw as the harshness of common law process and the severity of penalties on bonds. Their complaints reveal fundamental differences of opinion between individuals and jurisdictions about the evidentiary status of written bonds and about the fairness of the penalties that attached to them. Many made allegations of fraud or unconscionable behaviour against their opponents, while others conceded that the common law suits against them were legally sufficient — in other words that they were bound by obligations, had failed to satisfy the terms of those obligations and so were liable to pay the stated penalties — but argued mitigating circumstances.[35] Debtors, for example, suggested that they had been ready and willing to settle debts on due dates, but they had been unable to do so owing to sickness, misunderstanding, misfortune or an inability to locate their creditors, and should not have to pay exorbitant penalties. Most common lawyers in Shakespeare's London, including Coke, would have accepted that these situations warranted equitable interventions.[36] Other cases were not so clear cut, such as those in which plaintiffs argued that they had missed deadlines by only a few hours or days and then had their attempts to meet the conditions of bonds rejected. One woman, for example, described how her son-in-law had poured £40 worth of coins on to the floor of her creditor's shop,

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32 Muldrew, above n 18, 199–240; Brooks, above n 17, 93–6; Christopher W Brooks, *Lawyers, Litigation and English Society since 1450* (1998) 84–90.

33 W B J Allsebrook's searches of the records of the Court of Requests identified 72 cases from the fourth year of Elizabeth's reign (1562/3), 15 of which involved debts, bonds and contractual relations, and 264 cases from the 40th year (1598/9), 157 of which involved debts, bonds and contractual relations; Allsebrook 'The Court of Requests in the Reign of Elizabeth' (MA thesis, University of London, 1936) 187. A sampling of 2000 entries in archival calendars held in the National Archives (representing about 10 per cent of the surviving records) suggest that Allsebrook's totals are conservative; Tim Stretton, *Women Waging Law in Elizabethan England* (1998), 74.

34 Brooks, above n 17, 72. However, it should be stressed that the vast majority of these 'appeals' occurred *before*, not after, judgment at common law.

35 In a future article I plan to examine Chancery and Requests pleadings containing allegations of fraud to highlight public unease at how exorbitant penalties encouraged the misuse of sealed bonds.

36 4 *Coke's Institutes* 84; although for the legal effect of an equitable intervention see *Throckmorton* v *Finch* (1598) 4 *Coke's Institutes* 86.

only to have the man turn his back and refuse the payment because it was late.[37] Alternatively, litigants argued that they had paid most of the sum owing, so that the penalty levied on them was disproportionate, as in 1569 when Joanne Littlejohn repaid all but 20 shillings of a £5 debt but was liable for a penalty of £18.[38]

What unites all of these different complaints is the sense that conditional bonds were blunt instruments, because their fixed penalties were so regularly out of proportion to the wrong committed or the harm caused. To take an extreme example from 1590, Thomas Warrilowe was obligated by bond to allow his sister Agnes quiet possession of a close in return for the yearly rent of one red rose, with a penalty of £120 for default. She sued him on the bond after he entered the close to fish an adjacent pond, even though the pair had made a new arrangement with the help of an arbitrator after their mother claimed dower in the close. Thomas took his cause to the Court of Requests and the masters found in his favour, saying they thought it to be 'a very great extremity' that Agnes 'after the making of the said award whereunto she had assented should now seek by rigour of law to take benefit of the said bond & the penalty thereof contrary to the true meaning thereof, & especially upon such a nice point, & of so small value, as for the only said fishing in the said pond'.[39] In other cases the masters ordered parties to ignore penalty provisions and settle their disputes equitably before an arbitrator, a role that Portia appears to adopt in her ambiguous position as a legal figure who is neither lawyer nor judge in the traditional sense.[40] Taken together, the thousands of cases reveal a popular distaste for the strict application of bond penalties that has obvious affiliations with the plot of *The Merchant of Venice*.[41]

## Contractual Obligations and Equitable Relief

In Shakespeare's England then, the curious form of the conditional bond meant that hundreds of thousands of people made promises they never intended to keep: they agreed to hazard the equivalent of a pound of flesh as set out in the penalty when really they were agreeing to the promises and the 'sum or sums as are / Expressed in the condition' (I.iii.140–41). A number of litigants in equity courts implied that

37 *Seller v Blackman* (1565) The National Archives, Kew, Surrey REQ 2/271/20, deponent John Smythe; on the attractiveness of penalties leading creditors to engineer forfeitures, see William O Scott, 'Conditional Bonds, Forfeitures, and Vows in *The Merchant of Venice*' (2004) 34 *English Literary Renaissance* 286, 289–90.

38 *Littlejohn v Littlejohn* (1569) The National Archives, Kew, Surrey REQ 2/235/71, Bill of complaint; *Allen v Marron* (1603) REQ 1/21, 102; Jones, above n 14, 445. For examples earlier in the century see Edith G Henderson, 'Relief From Bonds in the English Chancery: Mid-Sixteenth Century' (1974) 18 *American Journal of Legal History* 298.

39 *Warrilowe v Warrilowe* (1590) The National Archives, Kew, Surrey REQ 1/16, 396–7.

40 *Frenche v Pinchback* (1598) The National Archives, Kew, Surrey REQ 1/19, 493; *Fisher v Parkins* (1598) The National Archives, Kew, Surrey REQ 1/19, 499–500, 505.

41 These cases contrast markedly with the 'culture of reconciliation' Craig Muldrew has identified within rising litigation levels; Craig Muldrew, above n 20.

they never expected to have to pay the agreed penalty, even in case of default. Like the bond itself, the penalty acted as a security for the loan or agreement, making clear the seriousness of the commitment and encouraging its diligent performance. However, if plans went awry due to unforeseen circumstances, rather than due to malice or fraud, then neither party actually envisaged the exacting of the full penalty. In the play Antonio agrees to the penalty but it seems unlikely that he sees it as a real possibility when he puts his seal to the bond, and Shylock's jocular reference to it being 'a merry sport' gives him little reason to think otherwise. It is interesting to note in this context that the Chancellor and the masters in Chancery and Requests attached penalties for non performance of £100, £200 or even £1000 pounds to their court orders and subpoenas, yet in cases of default court officials almost never exacted these penalties.[42]

Most litigants who complained of inequitable suits running against them at common law came to Chancery or Requests to have those suits 'stayed' or interrupted until matters of equity could be examined, and the Chancellor and masters responded by issuing injunctions to halt process at common law.[43] Injunctions, then, lay at the heart of the clashes between courts of equity and common law, but injunctions staying common law proceedings were not new to the late 16th century — the articles of impeachment against Cardinal Wolsey in 1530, for example, criticised his use of injunctions.[44] What appears to have sparked conflict was the frequency of their use. In the 1560s injunctions staying common law suits were a rarity in Chancery and Requests.[45] By 1600 the judges in these courts were issuing well over one hundred injunctions a year staying or halting actions at common law, and the majority of these concerned debt actions and written bonds.[46] D E C Yale suggested, following Francis Bacon, that the quarrel between common law and equity courts was 'principally flesh and blood.

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42 See, eg, *Tito v Budd* (1603) The National Archives, Kew, Surrey REQ 1/21, 186–7; a commentator on Chancery explained that the penalties mentioned in the court's subpoenas were 'never levied, but incerted only *ad terrorem*'; Cambridge University Library Gg 2 32, fol 347.

43 See, eg, *Buswell v Buswell* (1593) The National Archives, Kew, Surrey REQ 1/17, 130; *Yerbury v Poore* (1594) The National Archives, Kew, Surrey REQ 1/17, 726.

44 D E C Yale (ed), *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (1965) 9–11; Lamar Hill (ed), *The Ancient State Authoritie, and Proceedings of the Court of Requests by Sir Julius Caesar* (1975) xxxiii.

45 In 1562 for example, the Masters of Requests issued no injunctions staying common law process, although they did order the stay of a bond suit without issuing an injunction; *Britnell v Bennet* (1562 The National Archives, Kew, Surrey REQ 1/11, 151. For Chancery, see Henderson, above n 37.

46 In 1603 the Masters of Requests issued 31 injunctions staying common law process and the Chancellor issued well over 100 such injunctions; The National Archives, Kew, Surrey REQ 1/21; C33/103; C33/104. In 1612 the Masters of Requests issued 63 injunctions staying common law process and the Chancellor issued 91 such injunctions in Hilary term alone; The National Archives, Kew, Surrey REQ 1/26; C33/123; C33/124.

Principles, personalities and pecuniary profit were all contributing causes.'[47] Yet equity justices did not issue injunctions until litigants and their lawyers requested them, which is why it is important to view this dispute from the bottom up as well as from the top down. For decades before common law justices began attacking Requests and Chancery, a growing stream of injunctions halting common law process was raising their ire, and the majority of these injunctions sought to prevent the claiming of penalties attached to various kinds of bonds, 'bands', obligations, deeds, indentures and other written instruments.

## LEGAL REFORM

It was all very well for supporters of the common law to acknowledge, as the Doctor in St. German's *Doctor and Student* did in 1530, that defendants in debt actions who felt they were the victims of unconscionable behaviour could cross Westminster Hall and bring actions in Chancery seeking equitable relief.[48] However, this process involved two suits and two sets of court fees and legal costs, making it time consuming and expensive. If common law litigants and commentators are to be believed, it was also open to abuse by those plaintiffs who initiated suits in equity courts simply as a delaying tactic.[49] The period witnessed innovation in the area of contract law, with a growing focus on *assumpsit* and on the timing of express or implied promises, a matter that pitted justices in Common Pleas and Queen's Bench against each other in the years leading up to and following *Slade's Case*,[50] but the law surrounding conditional bonds went largely undisturbed.[51] Instead of guarding the independence of their courts and the rigidity of common law principles, common law justices should have been seeking, or at least urging their colleagues in Parliament to seek, remedies to the near endemic misuse of sealed bonds. In particular, they should have re-examined their commitment to the blind enforcement of penalty clauses. Equity courts compensated parties for the actual losses they had sustained, for example ordering defaulting debtors to pay their creditors the amount of their original debt, and depending on the delay involved, 'something for forbearance'.[52] The adoption of an approach based on compensation seemed inconceivable to Coke and his fellow common law justices at the end of the 16th century, yet such an approach became standard practice in King's Bench and Common Pleas within a few decades.

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47 D E C Yale (ed), *Epieikeia: A Dialogue on Equity in Three Parts by Edward Hake* (1953) xvi, n 8.

48 Saint German, above n 12, ch 12 fols 22–3.

49 George Norburie, 'The Abuses and Remedies of Chancery' in Francis Hargrave (ed), *A Collection of Tracts Relative to the Law of England* (1787) vol 1, 431–4.

50 *Slade v Morley* (1597–1602) 4 Coke's Reports 91.

51 See Ibbetson, above n 28.

52 Debtors often delivered the sums still owing to the court for the Chancellor or Masters to hold in trust until a resolution of the conflict could be achieved; *Thumblethorpe v Thumblethorpe* (1598) The National Archives, Kew, Surrey REQ 1/19, 617; *Gorge v Bland* (1598) REQ 1/19, 620; *Cuckooe v Nicholson* (1598) The National Archives, Kew, Surrey REQ 1/19, 656–7; *Cartwright v Sharpe* (1603) The National Archives, Kew, Surrey REQ 1/21, 69.

Common law justices started to support compensation for loss instead of the strict enforcement of penalties in the 1670s. As the Chancellor, Lord Nottingham, explained, where courts of law 'saw that equity would relieve' they chose in certain instances 'rather to relieve the parties themselves than send them thither', and the first example he gave was debt suits involving penalties attached to bonds.[53] Around the same time the common lawyer Francis North, who was to become Chief Justice of Common Pleas in 1675, jotted down in his commonplace book ways in which the law could formally incorporate equitable principles into its own practice, and one of his suggestions was that courts 'releev ag[sains]t penaltys'.[54]

Statutes passed in 1696–97 and 1705 regularised judicial practice in bond cases, the first providing for relief from penalties on conditional bonds used to secure performance of covenants, and the second authorising judges to discharge an obligor who brought into court the outstanding principal, plus enough to cover interest and costs, and allowing payment to be pleaded in bar to an action of debt.[55] This change meant that the majority of penal bonds were no longer penal, yet despite this removal of their venom they remained in common use until the 19th century, providing further evidence that the utility of bonds depended as much on the symbolic power of severe penalties as on the strict enforcement of these penalties.[56]

Tensions did exist between common law and equity courts in the 1590s, but not in the form of a single ideological disagreement over the relative merits of the Royal Prerogative and the rule of law. Instead they arose in focused tussles over jurisdiction, fought out in barrages of injunctions emanating from equity benches and counter barrages of prohibitions and writs of habeas corpus fired back by justices at common law.[57] The Sokols are right to suggest that no overarching jurisdictional dispute between Queen's Bench and Common Pleas and Chancery underpins the plot of *The Merchant of Venice*.[58] However, the substance of the cases that created tensions between those courts gave the story of a conditional bond with the vicious penalty of a pound of a man's flesh an undeniable topicality and poignancy. It is the sudden and unprecedented explosion of litigation over debt and bonds in the decades before Shakespeare sat down to write *The Merchant of Venice* that provides the most obvious context for the legal elements of this play. If Portia's

53 Yale, above n 44, 203.

54 Mike Macnair, 'Common Law and Statutory Imitations of Equitable Relief under the Later Stuarts', in Christopher W Brooks and Michael Lobban (eds), *Communities and Courts in Britain, 1150–1900* (1997) 115, 119 and 125.

55 *An Act for the Better Preventing of Frivolous and Vexatious Suits* 8 & 9 Will 3 cap 11 s 8; *An Act for the Amendment of the Law and the Better Advancement of Justice* 4 & 5 Anne cap 3 ss 12 & 13; Simpson, 'Penal Bond with Conditional Defeasance', above n 21, 418–9; Macnair, above n 54, 125, 127; William H Loyd, 'Penalties and Forfeitures: Before *Peachy v. The Duke of Somerset*' (1915) 29 *Harvard Law Review* 117.

56 Yale, above n 44, 275.

57 On the use of habeas corpus writs to limit the jurisdiction of Chancery, see Paul Halliday, *Habeas Corpus: From England to Empire* (2010).

58 Sokol and Sokol, above n 11.

plea to Shylock to show mercy and reasonableness over Antonio's bond had a wider relevance to Elizabethan England, it needs to be read as a call for greater equity *within* the common law, not outside it. As James Love pondered in the *American Law Review* in 1891, it is likely that in *The Merchant of Venice* Shakespeare meant 'to hold up to reprobation the law of England, as it was in his day in relation to penal bonds', a law that in Love's opinion was 'shockingly unjust', and he 'intended by the metaphor of the pound of flesh to place the strict and literal construction of penal bonds in an odious light'.[59] Given the reforms that were to come in the 17th century, Shakespeare's highlighting of the common law position with respect to penalties seems to have been unusually prescient.

One of the ironies of the drama in *The Merchant of Venice* is that, in England, merchants largely avoided relying on conditional bonds because of their inflexibility (as did solicitors and barristers). Nevertheless, hundreds of thousands of other English men and women did put their faith in these precursors to modern contracts. When bonds worked as intended they did not become the objects of lawsuits. However, when they became the subject of disagreements they could produce verdicts at common law that could be characterised as perfectly just or unusually harsh depending on the view of the beholder. Londoners steeped in these contests, some cynical about a common law that condoned double payments for a single debt, others wary of equity courts that ignored signed and sealed legal agreements, made the perfect audience for this 'comedy' about human trust, risk and legal promises, as well as religious faith and love.

[59] James M Love, 'Lawyer's Commentary upon the Famous Case of Shylock vs Antonio, A Note' (1891) 25 *American Law Review* 899, 921–2; and see Tucker, above n 11, 98–100.