Introduction

Shakespeare, in common with many of his fellow dramatists and with his society in general, was fascinated by law. His and other Elizabethan drama also focused a great deal of attention on complex, often legal, issues surrounding contemporary marriage. So the subject of the present study – Shakespeare, law, and marriage – is a large one.

Before turning to matters having specific bearing on that subject, this Introduction will outline some of the historical reasons for the great importance of the law of marriage, and indeed law in general, in everyday Elizabethan life. Observations of the litigiousness of Shakespeare's age will lead to descriptions of some of the more important jurisdictions active in the period. We will then offer examples (chosen because reflected by Shakespeare) of some of the innovations made by Elizabethan jurisdictions, and some of the dynamically changing relations between them. The impression we hope to convey is that of a legal situation that was not static, but which rather expressed the pressing social desires and needs of the age.

OUR PURPOSES

There are now new possibilities and a new need for a study of Shakespeare, law, and marriage. Shakespeare scholars are increasingly interested in the insights that can be gained by studying the laws and legal institutions of Shakespeare's world. We welcome this development, and indeed hope to contribute to it and to demonstrate its advantages in practical ways. At the same time, new studies have advanced the investigation of early modern English law and its essential contexts. Some of the legal–historical materials often used by Shakespeare scholars have become distinctly dated, and so we will update older discussions of the Elizabethan laws of marriage by reference to new, or to very new, work. Also, other older but still very valuable legal–historical studies will be re-addressed here in relation to their applications in Shakespeare studies. This is because certain confusions

have crept into the use of these, and in some cases these confusions have become entrenched and have produced misleading orthodoxies. For instance, insufficient distinctions have sometimes been made by Shakespearians between legal debates, legal proposals, enacted laws, and laws enacted but not enforced.

However, our aims go beyond contributing to, updating, or offering corrective revisions for an advancing interdisciplinary field of study. We also hope that this book will produce an impression of how profoundly influenced Shakespeare and his audiences were by the contemporary legal and allied social, political, and intellectual backgrounds. The value of obtaining such an impression is not merely the satisfaction of antiquarian curiosity. For we believe that in many ways Shakespeare may become more our 'contemporary' (in the true sense that he speaks to our vital concerns and interests) as he becomes more his own contemporary (in our understanding). This paradox is explained by the fact that if we can better appreciate the considerable differences and also similarities between Shakespeare's time and ours, then we can better empathise with the ways in which his remarkable art embodied, measured, and responded to a complex and disagreement-riven society, no less dynamic and unpredictable than our own.

We propose, therefore, that we can better enjoy and learn from such art the more we can grasp its contexts.

KNOWLEDGE OF LAW, AND LITIGIOUSNESS

These contexts, especially in relation to Elizabethan marriage, may seem extremely alien today. Indeed, today many people are unfamiliar with even our contemporary laws of marriage. Every year a new group of law students respond with astonishment and disbelief when they learn of the fate of Valerie Burns who, despite living with her partner for seventeen years and bringing up their children, found that when they separated she had no rights in the family home in English law. A wife would have done.[1] These students, together with many people, erroneously believe that there is such a thing as a 'common law marriage' that makes cohabitation equivalent to marriage, unaware that to date marriage still confers a distinct new legal status on the wife and husband.

In Shakespeare's England, a similar unawareness was most unlikely. Rather, there was then a widespread lively appreciation of the legal significance of marriage. As we will see, this greater awareness of the law of

marriage accorded with several important social factors. Marriage then had far more serious legal consequences (especially for women). Many people then used pre-marital financial legal agreements. There were heated religious and political controversies over the laws governing formation of valid marriages. Moreover, there was much greater awareness then in all ranks of society of the language and institutions of law.

It will be helpful to note how often Shakespeare's contemporaries would have come into contact with law. As premature mortality in families was common, and people of all sorts attempted to make some provision for widows and children, many of them would have encountered the customary or testamentary procedures governing the disposition of property after death. In the countryside and towns, landowners from the smallest to the greatest were familiar with the complexities of the land law, often personally dealing with freeholds, leases, taxes, tithes, and conveyancing. Even without land, merchants, masters and their apprentices, and servants, also needed to understand a wide range of legal arrangements.

Many in Shakespeare's audiences would have negotiated commercial agreements, marriage settlements, employment, and other contractual matters. Therefore, without having anything extraordinary happening in their lives to account for it, they would have been familiar with the sorts of private agreements called in his plays 'specialties' (*LLL* 2.1.164, *SHR* 2.1.126). These could have included indentures, recognisances, bonds, statutes merchant, deeds of gift (each of these are mentioned by Shakespeare), and other sealed or unsealed contractual instruments. Such private legal documents were 'drawn between' parties, as Petruchio of *The Taming of the Shrow* puts it, for good order and to avoid future litigation.

That good intent to avoid dispute, however, was far from always successful. Partly in consequence, a late Elizabethan population of about four million persons were involved in over one million legal actions every year![2] Some of these court actions were collusive, using fictitious disagreements to get on record previously agreed matters, as for example debts, land ownership, or agreed customary rights.[3] Many other actions were genuinely contentious, as in numerous disputes over debt, inheritance, property, or commerce. Some litigants sought private redress or damages for alleged wrongs by bringing 'instance' litigation to the church courts, or 'informations' alleging riot to Star Chamber, or private criminal prosecutions by 'appeal' to the common law courts. In addition, many crimes were prosecuted by the church, local, or royal courts in a restless society in which, it was complained, 'sin of all sorts swarmeth'.[4]

THE COURT JURISDICTIONS, THEIR RELATIONS AND INNOVATIONS

Such enormous volumes of litigation were heard in a large range of sometimes overlapping, sometimes competitive, sometimes co-operative, sometimes waning, sometimes burgeoning, sometimes conservative, and sometimes innovatory jurisdictions.

Repeated attempts were made to distinguish jurisdictional boundaries, as in the writs *Circumspecte agatis* (1285) and *Articuli cleri* (1315) which reserved to the church courts and away from common law courts matters of marriage, bastardy, inheritance of personal property (but not land), and the punishment of fornication, adultery, etc.[5] These courts, which had jurisdiction over English marriage until the nineteenth century, are often discussed later, especially in chapter 1, but we offer an overview here. The post-Reformation English church courts included the archdeaconry courts, the consistory courts presided over by the bishops, and the two provincial courts at Canterbury and at York which could hear appeals from consistory courts. Because the most severe punishment the church courts could order was excommunication, some early Jacobean members of Parliament attempted to remove some of their moral jurisdiction and increase the powers of the royal courts. For a variety of reasons, these attempts failed.[6] What could have happened had they succeeded, and Parliament had, for instance, made fornication a capital felony (as it was to be under the Commonwealth), may well have inspired the structure of Shakespeare's *Measure for Measure*.[7]

Shakespeare named or alluded to a number of the contemporary jurisdictions, but these were by no means all of, or even the most prominent of, the law courts known to his audiences. For instance, Falstaff is threatened with a Star Chamber action for riot in *The Merry Wives of Windsor* 1.1.1–31. Although allegations of riot were often made by Elizabethan landowners as fictional devices to get cases heard in Star Chamber to 'annoy one's neighbour'[8] or to gain tactical advantages in litigation in other jurisdictions,[9] in Falstaff's case it seems that he actually did violently break into a park to steal deer (1.1.102–9). This factuality might have brought a smile to the faces of the legally knowing in Shakespeare's audience, as it made literal an often-alleged fictional action.[10]

The prerogative court of Star Chamber was a good example of an innovatory jurisdiction. By Shakespeare's time (from the 1560s) Star Chamber had ceded to the central common law court of Common Pleas all questions over the title to land, but it had become more important than ever before because

it was developing a body of new law relating to serious misdemeanours. These included inchoate criminal offences such as conspiracy and attempt, and libel, forgery, fraud, perjury, corruption of jurors, extortion, vexatious litigation, maintenance, and fraudulent Parliamentary elections.[11] (Falstaff indulged happily in almost all of these practices.) Because it did not use grand juries or juries, in accord with Magna Carta the Star Chamber could not try felonies punishable by death, but it did impose lesser corporal punishments. It is apparently mythical that the Star Chamber used torture, and its criminal procedure did allow the accused to give evidence in their own defence, unlike that of the common law courts.[12]

In another instance of innovation, incremental developments in the common law courts of 'actions on the case' were leading in Shakespeare's time towards the development of a new civil law of tort. Such actions on the case circumvented the narrow restrictions of the required formulaic writs for trespass *vi et armis* used in medieval times for access to the courts of King's Bench and Common Pleas. They therefore theoretically made possible new ways of enforcing contractual undertakings. Yet, despite allegations by a number of Shakespeare scholars, the possibilities of such contractual actions were not yet widely exploited in Shakespeare's time, and so these did not indicate a great paradigm shift in society.[13]

Shakespeare mentions actions on the case in a punning way in *The Comedy of Errors* 4.2.41–51, and in an obscenely punning way when Mistress Quickly in *Henry IV, part 2* 2.1.30–1 says her 'exion is entered, and my case so openly known to the world'. The implications of Quickly's lawsuit are interesting because although she is seen appointing officers to arrest Falstaff for debt, the special sort of an action on the case called *assumpsit* was just about to become available for complaints of breach of a promise to marry. Quickly hilariously muddles her complaints to the bemused Chief Justice about both the money Falstaff owes her and his unmet promises to marry her (*2H4* 2.1.87–105).

Again we see that developments of legal technicalities are treated in a wickedly knowing manner by Shakespeare. Here and elsewhere Shakespeare also alludes to legal matters that are unstated but were undoubtedly well understood by the legally sophisticated in his audiences. The use of *assumpsit* in debt collection was a ploy to use the cheaper jurisdiction of Queen's Bench, where otherwise an action on a writ of debt would be required in the more expensive court of Common Pleas.[14] Prohibitions issued by Common Pleas disallowing this were first upheld, and then overturned, in case law of Shakespeare's time;[15] this was just one instance of the ways in which the more conservative courts were losing business and

fees to the more innovative ones.[16] The contemporary decline of the jurisdictions of the summary Courts Merchant, the civilian law jurisdiction of Admiralty, the Courts Staple, and local Leet courts, did not prevent Shakespeare from mentioning or alluding to these;[17] it is possible that the relative safety of mentioning declining or near-defunct jurisdictions, which lacked the powerful sway to do him harm, rather than anachronism, led prudent Shakespeare to his choice of allusions. For example, he never directly mentioned the central common law courts at Westminster Hall in London: Common Pleas, Queen's Bench, Chancery, and Exchequer Chamber.[18]

JURISDICTIONAL CONFLICTS, AND THE QUESTION OF SHAKESPEARE AND EQUITY

When the jurisdictions of Shakespeare's time overlapped they did not necessarily coincide. Several examples come readily to hand. For instance, Star Chamber and the common law courts each treated and defined slander differently from one another, and from the church courts.[19] In certain circumstances the church courts would disagree with the common law courts concerning findings of illegitimacy.[20] Numerous litigants began Chancery cross-pleadings to block common law actions, while some opponents of particularly the newer prerogative courts played on jurisdictional differences for political reasons.

It was even possible for very serious charges of *praemunire* to be brought against litigants seeking to exploit inter-jurisdictional prohibitions or injunctions; such a threat arose when attacks, particularly on the prerogative courts of Chancery and High Commission, came to a head in the spectacular events of 1616 that included the dismissal of the Chief Justice, Sir Edward Coke.

Beyond the personal enmity of Coke and Lord Chancellor Egerton, the constitutional and philosophical background of this crisis was very complex, and has often been over-simplified. It is salutary to remember that 'progressive' pro-Parliamentary, pro-common-law, and anti-royal-prerogative propaganda found equity the villain in the case. For alleged differences between equity and law have frequently been treated by Shakespeare critics as differences in which law has the complexion of the villain. In an attempt to clarify often-confused matters, we have recently presented a detailed historical study of this tradition in Shakespeare criticism, and of the actual events and attitudes of the times in which Shakespeare lived.[21]

In briefest outline, we have found that Shakespeare (perhaps) alludes to the equity jurisdiction of Chancery once only, in a passage of *The History of*

King Lear (Quarto) that was perhaps significantly expurgated in *The Tragedy of King Lear* (Folio). The Lord Chancellor (a role assigned by Lear to his Fool) is probably indicated in mad Lear's invitation to the 'commission' to try Goneril: 'Thou robed man of justice, take thy place; / And thou, his yokefellow of equity, / Bench by his side' (*LRQ* s.13.32–4). State trials, such as that of Mary Queen of Scots, involved a panel of judges including the Lord Chancellor and the Chief Justice. This fact and much other historical evidence indicate that equity and law were far from at loggerheads, but in fact co-operative and increasingly so throughout most of Shakespeare's career. In many matters brought before him, as for instance mercantile disputes, Lord Chancellor Egerton refused to hear the case and reserved it to the common law courts. The common law and equity judges knew one another well and routinely consulted one another.[22] Common law judges sat on Chancery cases and by a long-held tradition important civil cases were referred to 'all the judges of England' who would sit together to hear argument.[23]

The reasons for including this precis of our detailed arguments elsewhere are two. For one, the notion that equity, as opposed to common law, was unbounded by rules and therefore was more just or merciful than the inflexible or tyrannous strictures of law, is a misleading commonplace that has repeatedly been applied in analyses of various Shakespearian plays.[24] It thereby serves as a paradigm for some of the dangers, when legal matters are related to Shakespeare's works, of accepting critical notions based originally on reading old propaganda as historical fact, in the place of attending to the complexities of history.[25]

There is also a second reason that makes condign here some consideration of the equity jurisdictions of Shakespeare's time. This is because treatments of early modern law and marriage must consider equity because the court of Chancery was then developing a way for married women to overcome some of the extreme legal disabilities imposed on them by the doctrine of coverture. In particular Chancery upheld trusts or uses for the benefit of married women which operated to preserve some of their own property from the otherwise unlimited rights of their husbands to control or even dispose of it (those rights are very explicitly described by Portia in *The Merchant of Venice* 3.2.150–71). These matters will be gone into in detail in chapter 7. Here it is worth mentioning some important peripheral circumstances. For one, the equity courts were not performing an *ad hoc* function guided by the Chancellor's conscience when the devices making possible married women's separate estates were upheld. Rather, they were following, or developing further, the principles upon which equity had long

protected trusts or uses. However, the advantages accruing to women from these developments were often offset by the possibilities that trusts could be used against women's interests. For although the inexpensive equity court of Requests did protect some poor widows,[26] for the most part the costs and complexities of using equity to protect married women's property were great. This meant that in practice separate estates were often protected for the benefit of the wealthy families of married women and not for the benefit of the women themselves. The aims of these families were to protect wealth in a way that was more likely to limit than to enhance the women's independence.[27]

A further point to be made about Elizabethan married women's equitable estates is that Shakespeare never mentions them. He does, however, portray a great many independently minded single, widowed, or even married women. Such women are often found flourishing in quite fantastic circumstances, such as in forests or (wholly chaste) in a brothel of Mytilene. However, in the much more real-seeming world of the earlier acts of *The Merry Wives*, married Englishwomen (not to mention the unmarried daughter of one of them, Anne Page, with her own estate), seem to follow the pattern described recently by Tim Stretton, who claims that 'many married women went about their daily lives as if the concept [of coverture] did not exist'.[28]

SHAKESPEARIAN MODES

In what modes did Shakespeare's drama express these alleged social realities, or behind them such influential legal realities as wives' separate equitable estate? We find three modes characteristic of Shakespeare's deployment of legal materials and ideas. In one mode Shakespeare creates a dramatic 'mirrorland' in which (within margins of verisimilitude allowing dramatic shorthand or other artistic licence) his drama more or less realistically represents actual and well-known practices of English law. In a second mode Shakespeare creates a legal 'fableland' where folkloric, biblical, or stereotypical images hold sway in tales of, say, wicked power, justice abused, but truth at last triumphant. In a third mode a Shakespeare play presents a 'fantastical mooting' where impossibly complex contrived legal situations are premised. Fantastical moots may merely amuse with challenging riddles, or they may lead to instructive intellectual dead ends, *aporia*, intended to test received ideas or methods in a kind of poetic stress laboratory. These modes may also interact; Shakespeare produces fascinating generic and dramatic effects, for example in *Measure for Measure*, by allowing slippage between

fantastical mooting, dramatic mirroring, and legal fables. Despite such intricacies we may generalise on one point: in nearly all cases where legal matters come into question, Shakespeare's dramatic articulation alludes to actual English legal problems, ambiguities, or enigmas.

OUR STRUCTURE

In order to unravel a subject matter which is in textual and social terms tentacular, and in intellectual and historical ones labyrinthine, this book is organised around a deliberately simple framework. Its chapters follow, in mainly serial order, the chronological stages of a marriage, from courtship, through valid formation, then through events in its duration, until its end in either separation, divorce, or death. Each of these stages will be discussed in relation to their frequent Shakespearian representations, as well as being furnished with in-depth legal–historical discussions.

In our view such discussions must not be narrow. For we believe that law cannot be seen only as an agency of state power, or else as a set of professional technical rules, but rather that law and legal debates reflect far wider social and cultural contexts. For example, in chapter 3 we will discuss the legal institution of wardship in relation to early modern arranged marriages. In this case, a historical perspective based only on a narrow view of the political and legislative agitation in King James's first Parliament concerning the abuses of wardship would distort the issues involved. We must consider also the widely accepted social practice of sending adolescent children away from home to live in other households for education or training. So, in one Shakespearian instance, the wardship of young Count Bertram is not first introduced in *All's Well That Ends Well* in the familiar terms of the contemporary politicised debates concerning cruel, greedy, or negligent guardians. His forced marriage is in fact supported by his widowed mother, just the opposite of the pattern typically alleged as an abuse of wardship. The questions of his possible disparagement, and the validity of his consent to marry, are problematised rather than propagandised by Shakespeare.

Moreover, wider questions surrounding Bertram's marriage to Helena, and other resonant questions about marriage implicit in *All's Well*, are treated elsewhere in our book under a range of different heads, as well as within discussions of wardship and arranged marriage. This is typical of our method, in which a single play or important Shakespearian marriage may be discussed in several different chapters under the headings of varied and often multiple issues.

We believe that such an issue-based approach, sometimes bringing to bear more than one legal viewpoint on a particular text or passage, does not unnecessarily over-complicate Shakespeare's dramatic microcosms. Rather, it can reveal true intricacy, for Shakespeare's fictions and problems often reflected how complexly contemporary marriage expressed a web of social, sexual, religious, ethical, jurisprudential, political, and even constitutional issues.

OUR CHAPTERS

Finally, it may be useful to indicate some of the contents of and connections between our nine chapters.

In chapter 1 we begin, as we think a book on law and marriage must, with topics surrounding the logically prior question of what exactly made a legally valid marriage in Shakespeare's England. A simple rule, that the formation of a contract by the present mutual consent of bride and groom (as long as they were eligible to marry) made an indissoluble marriage, certainly applied. But that very simplicity brought in almost innumerable quandaries. The question of what constituted present consent (since no particular words, ceremonies, or gestures were specified) gave rise to many contentions. So, for instance, portions of *As You Like It* and *Measure for Measure* focus (lightheartedly and enigmatically respectively) on almost parodic exaggerations of such difficulties. Indeed an extraordinary range of legal and social problems, many having Shakespearian reflections, arose in various ways from the 'consensual model' underlying the legal definition of marriage for Shakespeare's England. Thus the principles discussed in our first chapter may be said to be foundational, and will be seen to permeate nearly all that follows.

Indeed all the chapters of this book are interactive in various ways, and some in a schematically reciprocal fashion. For example, chapter 4 on the provision of dowries concerns privately made legal arrangements. And yet the private and public domains of law interacted when dowries funded widows' jointures (as they often did). For then the public law deriving from Henry VIII's momentous Statute of Uses linked pre-marital economic arrangements (often based on dowries) with the legal rights of English widows to support from their late husbands' estates. Thus the dowries treated in chapter 4 were very often vitally linked with the issues taken up in our final chapter concerning widows and the aftermath of marriages.[29]