

## THE IMPORTANCE OF PRECEDENTS IN SHYLOCK'S JUDGMENT IN SHAKESPEARE'S *THE MERCHANT OF VENICE*

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**ABSTRACT:** This paper sets out to show the importance of judicial precedents by examining Shakespeare's *The Merchant of Venice*, since the theory of binding precedents, originally known as *stare decisis*, has its origin in British law. It is intended to address, albeit briefly, the history of precedents in its birthplace, drawing a parallel between the British legal culture and the play, in a historical perspective. It will be noted that at the time the play was written by the playwright of Stratford-upon-Avon, there was already a judicial culture about precedents, as evidenced by the analysis of contemporary court decisions around the period in which the play was probably written. The specific focus is the excerpt of the famous trial for the execution of guarantee of the promissory note, which authorized the creditor to cut a pound off the debtor's flesh, when Portia, one of the characters, states: "Impossible; there is no power in Venice that can alter a sacramental decree. It would be recorded as a precedent, and many wrongful lawsuits, once given that example, would pour over the state. Impossible". In medieval England, it is clear – and Shakespeare's work points out – the importance of judicial precedents, as well as their relevance in guiding the conduct of citizens in their relations outside the law. The speech suggests that a judicial decision generates protection of trust and legitimate expectation, not only for the parties to the concrete case, but for society as a whole.

**KEYWORDS:** Shakespeare; *The merchant of Venice*; judicial precedents; *stare decisis*; common law.

### INTRODUCTION

The present paper sets out to show the importance of judicial precedents through Shakespeare's *The Merchant of Venice*, since the theory

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of binding precedents, originally known as *stare decisis*, has its origin in British law. It is intended to analyze, in the second chapter, the history of precedents in its origin, drawing a parallel between the British legal culture and the play. It will be noted that, at the time the play was written by the playwright of Stratford-upon-Avon, there was already a judicial culture around the precedents, which is verified through the analysis of contemporary judicial decisions to the period in which the play was probably written. In the third part, the specific focus is the excerpt from the famous trial for the execution of guarantee of the promissory note, which authorized the creditor to cut a pound off the debtor's flesh, to which one of the characters, Portia states: "Impossible; there is no power in Venice that can alter a sacramental decree. It would be recorded as a precedent, and many wrongful lawsuits, once given that example, would pour over the state. Impossible." In the fourth part, it will be observed that in medieval England, as evidenced by Shakespeare's work, the importance of judicial precedents was of high consideration, as well as their relevance to guiding the conduct of citizens in their relations outside the Law. The speech suggests that a judicial decision generates protection of trust and legitimate expectation, not only for the parties in the concrete case, but for society as a whole, generating legal certainty. In both the common law and the civil law, legal certainty is a fundamental value of the legal system, but the research is limited to analyzing security exclusively through precedents. At the end, conclusive considerations will be made.

#### **THE ORIGIN OF PRECEDENTS: ENGLAND**

For the purposes of this paper, the history of British law may begin to be told from 1066, when William the Conqueror left Normandy and invaded the island, being victorious at the Battle of Hastings. Nowadays, it is known that the Normans in England were not numerous and that (new) King William did not show any desire to impose any foreign code on their new subjects, not least because there were no codes in Normandy. Norman law was not brought to England, so English law prevailed (Pollock, Maitland, 1898, p. 79). And in ancient English law, as the authors quoted above point

out, many rules were left to the custom of society; rules that in present times are in the legislation and overseen by courts (1898, p. xciv), but it should be noted that even before 1066 there was a “law” in force in England, produced during the reign of the ancient kings, and compiled in William Lambard's *Tractatus de priscis Anglorum Legibus* (1313), which shows that even customs (*leges non scriptae*) were drafted so as not to be lost in time (Hale 1971, p. 3-5).

As early as the thirteenth century, Judge Henry de Bracton (1210-1268) was able to formulate a doctrine of precedents in a treatise containing references of about 2,000 cases in which he stated that if no new or unusual circumstance appeared in a given concrete case, it should be judged in a similar way to a previous case, because it would be a good opportunity to proceed in the same way. According to Arthur Hogue (1985), Judge Bracton was an exception at the time, since there was no one that referred to previous cases – precedents – like him. But the connection to precedents was not exactly as we know it nowadays, for the quotations made in Bracton's compendium were only to illustrate or explain law. According to Hogue:

Quotes are generic at times and are in phrases in the sense of “we have often seen” or “as has been decided before this” or “are in our books”. Judges in the Middle Ages were forced to look no higher than at judicial consistency (1985, p. 201).

In addition, access to plea rolls was almost impossible, and it was not possible for litigants or even lawyers, and even those who could consult the scrolls – judges, for example – did not have the habit of looking for legal principles in them. Rare and specific precedents may have been alleged in Court, during the reign of Edward I (1239-1307) the litigants were already quoting and distinguishing previous cases; but as a general rule the judges, assisted by officials, who would be the future judges, regarded themselves as having an implicit knowledge of the *curiae consuetudo* (custom or practice of the court) and did not feel compelled to discuss past cases. They had the presumption that they knew the law, by reason of experience,

because at the time it was understood that every man who held such a function knew many laws and customs. According to Pollock and Maitland:

The custom of the King's Court is the custom of England, and it becomes the common law. As local customs, the judges of the King would phrase the general statements of their respect for them. We see no sign of any conscious desire designed to extirpate them (1898, p. 184).

Today, in the 21<sup>st</sup> century, the precedents have reached a very different level. Nowadays it is quite natural to find in court decisions precedent quotes, because precedents are the “key to English legal reasoning” (Cownie *et al.*, 2007, p. 86). However, at that time – Middle Ages – the precedents could even be found in plea rolls (a kind of scroll in which cases were recorded), but the lawyers did not seek in these records the previous cases to reinforce their arguments in a case. According to Neil Duxbury the plea rolls contained the previous cases, but not the reasons why the cases were judged (*ratio decidendi*), which were not part of the records. Moreover, he goes on to say, “although courts occasionally followed and even distinguished precedents, no one believed yet that a court could be bound by an earlier decision” (Duxbury, 2008, 32).

There are even those who claim that Henry of Bracton, in spite of his treatise compiling precedents of the Court of Common Pleas, the historically famous *Note Book*<sup>2</sup>, was actually intended to teach young law students of the day about legal principles, and the solitary search he made in plea rolls (extensive scrolls without indexes or any other way to help search for his content) took to the note book only the cases he selected. He was the only one to do this: access the scrolls and transcribe to his book the cases already judged, which he selected on his own and supposedly used old outdated cases for the time, and so some deny – such as Theodore Plucknett – that he did so with the intention of establishing a collection of precedents for future use by the judges (Plucknett 1956, p. 380).

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<sup>2</sup> A version of the Note Book, published in 1887, can be found online at: <https://archive.org/details/bractonsnoteboooomaitgoog>. Accessed on: 19 Aug. 2016.

So there is a consensus in the doctrine that, despite the compilation carried out by Bracton, one could not speak of a system of binding precedents in thirteenth-century England. Theodore Plucknett reveals to us that in 1310 a judge named Bereford referred to the importance of precedents, stating that a sentence should stand as a law before the whole nation, but also notes that it was an “isolated” case because the custom – which was enunciated by the judicial decisions of the courts – had as its characteristic the ease with which it appeared and was altered (Plucknett, 1956, p. 382).

One can only really begin to mention precedents as something relevant to the common law from the fifteenth century, with the emergence of the *Year Books*, a book that effectively compiled the precedents of the courts, but even then there was nothing like today's binding precedents (Cross; Harris, 2004, p. 24). A single case was not considered binding for future case judges, but a well-established custom (evidenced by many or few casual quotes in cases), considered as highly persuasive, no doubt, as observed by Plucknett, which began to change after the sixteenth century (Plucknett, 1956, p. 384-385).

It was only at the turn of the sixteenth to the seventeenth century – at the same time as Shakespeare lived – that for the first time it was considered that a single decision of the Exchequer Chamber would serve as a mandatory precedent for future cases. According to Plucknett:

[...]in the seventeenth century it was established that a decision of Exchequer Chamber was a binding precedent. Coke stated that the resolution of all judges was almost as high as a law (statute). Bacon insisted that even the chancellor would surrender to the opinion of all judges, and in 1602 a Chamber decision was referred to as a “determination of all the judges of England,” which “was to be a precedent for all subsequent cases”. In 1686 Herbert, Chief of Justice, announced as “a well-known rule that, after any question of law has been solemnly decided in the Exchequer Chamber by all the judges, we will never experience this question to enter dispute again” (1956, p. 384-385).

It remains to be examined whether exactly the period in which Shakespeare lived (1564-1616) there was the culture of binding precedent, and nothing better than to do this analysis through Sir Edward Coke (1552-

1634), who was Chief of Justice at the Court of Common Pleas, between 1606 and 1613. Coke was notable for some achievements, mainly the decision made in *Bonham's Case* of 1610. In a previously published work we had already highlighted the reason why the decision is historic:

An excerpt from the paradigmatic decision became notorious because it outlined the beginning of the constitutional control of laws and administrative acts, as the authority of the Royal College to judge, intimidate and still receive the money coming from the application of fines had been questioned. [...]

“And it appears in our books, that in many cases, the common law will controul [sic] acts of parliament, and sometimes adjudge them to be utterly void: for when an Act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void” (Nogueira, 2010, p. 310).

Coke was an advocate of the binding force of precedents, and in the most celebrated passage of the historic decision he states: “and it appears in our books, that in *many* cases, “that is, it is all in our “books” and “in many cases”. What books would that be, if not the *Years Books*? And which several cases were these, if not cases judged before his own decision, that is, precedents?

It is important to note that Sir Edward Coke had previously made use of precedents to substantiate his decisions, as in *Calvin's Case* in 1608. After King James VI of Scotland took over the English throne by the death of Queen Elizabeth I and become the King James I of England, there was the unification of the reigns, and in that decision Coke considers that a child born in Scotland was subject to the common law and the rights that it assured. To judge this case, Coke made use of precedents (Hulsebosch 2003, 446). In *Bonham's Case*, he cites some medieval precedents as reasons for deciding (Coke, 1826, p. 355-383). The doctrine notes a disagreement about the appropriateness of Coke's precedents to rationally justify the judgment in *Bonham's Case*, which established the common law superiority over the Parliament's acts, with those arguing that such precedents would not serve for the specific case. But the fact is – good or



bad – precedents were invoked by Coke to justify his decision in the 1610 Bonham's Case<sup>3</sup>. According to Francisco Fernandez Segado, Coke never doubted the binding force of legislation, but he envisioned the statutory law that emanates from Parliament within the historical context of the precedents of the English common law courts (Secado, 2013, p. 188).

It may be seen that at the time of Shakespeare, Judge Coke of the Court of Common Pleas used the precedents in his judgments, as if he were indeed bound by the reasons of previous decisions. And for the purposes of this work it is irrelevant that the medieval precedents relied upon by Coke were or were not in conformity with his sentence in Bonham's Case. Nowadays, a series of works, doctrinal teachings and also judicial decisions are being made in the theory of binding precedents (*stare decisis et non quieta movere*), including the institutes attached to it, and even then, mistakes are still made. It must have been difficult to do this in the fourteenth century, being practically the pioneer of the practice.

At that time, it seems important to recall, Shakespeare was already in full activity, producing plays and eventually acting, and even the expression “precedent” – which appears in *The merchant of Venice* – was first noted in 1557, according to Sir Carleton Allen (Plucknett, 1956, p. 385). It thus appears that William Shakespeare knew exactly what he was doing when he used the term “precedent” approximately 40 years later, and even this use by Shakespeare, as will be seen below, was legally perfect and revealed itself as not a simple coincidence, but rather a vision beyond his time.

### **PRECEDENTS IN *THE MERCHANT OF VENICE***

In the famous play *The Merchant of Venice*, written probably between 1596 and 1598, the playwright William Shakespeare, born in Stratford-upon

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<sup>3</sup> Segado analyzed all precedentes – *Thomas Tregor's Case*, *Cessavit 42*, *Annuity 41* e *Strowd's Case* – and concluded that only *Cessavit 42* was a solid precedente in order to fundamente Coke's decision (Segado, 2013, p. 212).

-Avon, England, wrote a well-known scene: the judgment for the execution of the guarantee that Antonio, the Merchant, owed to Shylock, the Jew<sup>4</sup>. It was envisaged that Shylock might cut off a pound of flesh from the debtor, and nothing else as a fine, which is why the lender could not receive the flesh because “the pledge does not provide that you take the blood of the merchant. Words express a pound of flesh expressly.” Besides this famous passage, in which a juridical interpretation widely studied and debated by jurists<sup>5</sup>, like André Karam Trindade<sup>6</sup>, there are others that are pertinent to the object of this study. Salarino, Antonio's friend, comforts him saying that the Doge of Venice will not consider the contract valid, to which he replies: “the doge cannot stop the course of the law.” In other words, if the law provides Shylock's right to enforce the guarantee, the decision of the Doge (judge) cannot be contrary to the law because it would have a negative effect on the whole society. Antonio's concern with the reflexes of an illegal decision, although capable of saving his life, is evident in the 3rd scene of Act III:

because there are the benefits that foreigners enjoy with us here in Venice; once the law is not fulfilled, justice in our State is discredited; since the commerce and profits of the city also welcome all nations (Shakespeare, 2010, p. 89).

Shortly before the verdict, Bassanio proposes the payment of the debt represented by the promissory note, in cash, the double and even ten times the original value. Bassanio asks his lawyer, Dr. Balthasar, who was Portia, another character, disguised as a lawyer<sup>7</sup>, to persuade Shylock to accept the payment and thus to do a “great good and a minimum evil”, pardoning the fine.

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<sup>4</sup> Even those who are not in the area of law recognize that “the grand scene of judgment is in itself a striking example of the question of justice and laws” (Heliadora, 2014, 123).

<sup>5</sup> In this respect, we suggest the production by Fragale Filho and Lynch (2008).

<sup>6</sup> On the subject, Trindade points out that, “Apparently, this Shakespeare play – in spite of the temporal distance of its production – reveals, in a special way, that there is no ‘law’ but only ‘law interpretation’, posing a hermeneutical problem, since the case installs a conflict of interpretations” (Trindade, 2015, p.180).

<sup>7</sup> There is controversy even about the role that Portia (Dr. Balthasar) plays in the trial. The assertion that he was a lawyer stems from the fact that Antonio and Bassanio, in the end, propose the payment of fees for his work. Some claim that the function was *amicus curiae*, even acknowledging the absurdity of the proposed payment (Neves, 2016, pp. 145 and 162).



Portia refuses, in the following terms: “Impossible; there is no power in Venice that can alter a sacramental decree. It would be recorded as a precedent, and many wrongful lawsuits, once given that example, would pour over the state. Impossible” (Shakespeare, 2010, 105). In the original medieval English version, published in 1600, the expression “would be recorded as a precedent” appears as “twill be recorded for a precedent”<sup>8</sup>. In modern English:

It must not be. There is no power in Venice  
That can reverse an established decree.  
’Twill then be counted as a precedent,  
And many an error, by the same example,  
Will rush into the state. It cannot be (Shakespeare, 2015,  
p. 149).

Portia could have tried to convince Shylock and the Doge to accept the payment in cash, valuing the legal principles pertaining to the case, such as the justice of what was agreed between the parties, after all the cut of the debtor's pound of flesh, besides killing him was just a fine for the non-payment case, and although the payment had not been made on time, it was being offered between double and ten times the value of the debt, removing it and extinguishing the obligation. Perhaps it would not be a problem to register as a precedent the possibility of the debtor to pay two to ten times the debt amount, not least because the literal interpretation of the “pound of flesh” without the debtor's blood caused Shylock not to receive the debt, and even lost a considerable part of his assets, under the law in force at the time.

However, Portia rejects the possibility of payment on the grounds that her decision, allowing payment and not the execution of the guarantee, would create a precedent and that precedent, with binding effect before the judges, would have a negative effect on society as a whole. Result of a “pour of wrongful legal actions”. This small fragment of the Shakespearean work

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<sup>8</sup> The original version, published in the First Quarter in 1600, is online at the *British Library* website. According to the site, the play *The Merchant of Venice*, in the first edition, appeared in 1600, printed by James Roberts at the request of Thomas Heyes. Available at: <http://special-1.bl.uk/treasures/shakespeare/merchantbibs.html#first>>. Accessed on: 19 Aug. 2016.

reveals a very interesting situation: English society, between 1596 and 1598, guided its conduct by precedents, and this is an axiom of the theory of precedents that today is defended even in countries of the civil law branch: it is important to respect previous trials because they determine conduct in extrajudicial relationships, generating predictability and security. Shylock himself, when questioned by the Doge about his refusal to accept payment and insistence on receiving the pound of flesh as a fine, argues:

That one pound of flesh that I demand of it was bought at weight of gold; it's mine, and I'm going to take what's mine. If this is denied me, sirs, your laws are a shame; the decrees of Venice are not respected. I'm here for a trial. I want you to answer me: will I have my trial? (Shakespeare, 2010, pp. 100-101).

Shylock defends the need to have a judgment on which laws are enforced and warns that if this does not happen, the judicial decision will be a cause of “shame”, giving to Venetian society – in fact English – the impression that the law is not respected. Moved by an intense desire for revenge, a characteristic note of Shakespearean works<sup>9</sup>, he asks for judgment in the certainty that the law will be applied, and, from the moment a judicial decision is taken, a precedent is set that guides the conduct of the Society, being a “shame” to disrespect and cease to apply it<sup>10</sup>.

It is also the same view that Portia demonstrates by refusing to propose noncompliance with the agreement, even though its execution is a very unfair measure, because it could create a precedent dangerous enough to make people seek in the Judiciary the non-fulfillment of obligations for various reasons. The precedent that “authorizes” the disregard for agreements to the “rain” of actions that should be judged according to the

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<sup>9</sup> It is worth mentioning the explanation offered by Ghirardi: “The theme of revenge expanded the Christian paradox by establishing a tension between Law and Nature and by making evident the difficult coexistence between the impulses of the natural man, the rationality of the good subject and self-denial of the good Christian: it does not seem surprising that the audiences of the time were passionate about this theme” (Ghirardi, 2015, p. 88)

<sup>10</sup> It should be noted that André Karam Trindade draws attention to the fact that the judgment itself is a “farce from its inception”, since Portia “leads the litigious case for the purpose of saving the friend of his beloved” (Trindade, 2015, p. 176).

precedent Shylock v. Antonio and there is “shame” due to the lack of effectiveness of the law. It is a totally plausible interpretation that reveals not only the genius of Shakespeare in anticipating issues that would only be discussed centuries later, but also the culture of precedents in common law.

This observation is confirmed by Kenji Yoshino, when he analyzes law and judicial practice in the England of the time:

When Shakespeare wrote *The Merchant*, the rigor of the promissory notes was being challenged vigorously and successfully. Individuals compelled by such instruments appealed to the king through the Supreme Court. The latter could not cancel the promissory note, but could accept a request, known as an injunction, which prohibited the collector from executing it. By 1590, interventions by the Supreme Court were routine (Yoshino, 2014, p. 45).

In Shakespeare's time the theaters were very popular, and the author had no legal background, but this simple passage from Portia, the “Doctor of Law” at Shylock's trial, reveals to us how the culture of precedents had existed in England for centuries. Although Shakespeare's plot is set in Venice, Shakespeare's experts claim that he never left England, so his play was set in Italy, but it was written by an Englishman in England and to be represented in English stages. Another possible reading is that “the play takes place in Venice because the city was one of the few in Western Europe that had not expelled the Jews” (Yoshino, 2014, 43). However, what seems to be a consensus among experts in Shakespeare is that *The merchant of Venice* was inspired in a medieval tale called *Il Pecorone* by Sir Giovanni Fiorentino, published in 1558 in Milan. According to Barbara Heliodora, “most of the plot he draws from the story of the young Gianetto, which appears as the first one on the fourth day of a novelle collection entitled *Il Pecorone* (The Simpler), written by a certain Sir Giovanni Fiorentino” (Heliodora, 2009, 231). In this tale, Portia is the “lady of Belmonte,” disguised as a “doctor of law,” she asks the Jew (who has no name) to accept the payment offered and not execute his guarantee (the pound of the

guarantor's flesh, Messer Ansaldo), leaving him free and earning his gratitude. That is to say, the lady of Belmonte only asks for the mercy of the Jew, who does not grant it because he wanted the judgment. And, shortly before this passage, the tale proves to fit the nature of civil law:

But the Jew replied that he did not want the money, since he had not been paid in a timely manner, but that he wanted to cut Ansaldo's pound of flesh. On this matter great controversy arose, and all condemned the Jew; but, seeing the equitable law established in Venice, and that the contract of the Jew was fully established and in the usual legal form, no one could deny him his rights; all they could do was beg for his mercy. (Fiorentino, 1556, p. 55)<sup>11</sup>.

It can be seen that at no time does the tale make any allusion to *stare decisis* and the force of a possible precedent that would be created should the judgment release the creditor from the execution of the guarantee. There is a reference, yes, to the law in force in Venice, which would be fair and enforceable by contract. Contextualizing the history of precedents in England together with *The merchant of Venice*, it is verified that Shakespeare took to the stage the juridical culture that well characterizes the common law, the use of precedents. Shakespeare did not merely “copy” the tale *Il Pecorone*, and at that time the plots and characters were common property for Elizabethan playwrights, but “what Shakespeare did, of course, was to take shallow works and endow them with distinction and, often, with greatness” (Bryson, 2008, p. 100-101). What Shakespeare did was to “lend” his genius to turn a medieval tale into a unique play, far superior to the tale that preceded it and eventually superior to the later adaptations that were made of his play, unknown today.

#### **THE PRINCIPLES OF PROTECTION OF CONFIDENCE AND LEGAL SECURITY THROUGH BINDING PRECEDENTS**

The updating of Shakespeare's text, from the perspective of the field of procedural law, would allow a wide range of questions to be investigated, but this is not the purpose of this article. However, important questions

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<sup>11</sup> The original version is in Italian, but we used the English version, translated by W. G. Waters.

about precedents are raised by the playwright, such as those concerning the principles of legal security and the protection of trust, among others. Nowadays, it is known that obedience to the precedents – decisions passed in the past – by judges of the present is fundamental to enable a minimally secure legal system. Legal certainty is one of the basic principles of *stare decisis*. It is unthinkable in a strongly precedent-centered legal system, such as the common law, that similar cases may be given different decisions because there is divergence among judges about the law to be applied in concrete cases. Just as in civil law, where the legislation is applied uniformly to all, in common law it occurs with precedents. Shylock wanted a trial with the certainty that the law would be applied exactly as it was determined: he had absolute confidence in obtaining a judgment that would guarantee him the right to execute the guarantee, acting in a safe and inflexible way. He did not see the final solution coming, it is true, but the “judged” merit is not the object of this work, which is devoted to examining the importance of precedents in Shakespeare.

The inflexibility of the Shylock the Jew stems from a number of factors that the Shakespearean experts have already analyzed, but the focus here is on legal certainty without, however, engaging in deepening its understanding in the context of democratic theories. Shylock demands a trial, because he knew he would have it, not under the conditions in which he received it, but he was certain. Legal certainty provides this to jurisdictions: the predictability of judicial decisions, either because the laws are clearly written when defining rights and obligations, or because there are precedents that lead the parties to deduce that they will be used in the grounds of judicial decisions. The statement that “judicial decisions provide examples, guides or criteria for the interpretation of law” (Soriano, 2002, p. 130) is current. According to Gustav Radbruch, law cannot be stranded to differences of opinion by individuals, and therefore it is necessary that there is an order above all things and persons. Therefore, besides justice and utility as essential elements of law, the philosopher includes legal certainty, and “this requires positivity of law: if it is not possible to identify what is fair, then it is necessary to establish what must be legal, and a position

which is in able to enforce what has been established” (Radbruch, 2004, p. 108).

Therefore, if it is not possible to create a just and individualized “rule” for each concrete situation, it is necessary that for law to be imposed onto all, indistinctly, either through the law itself or through judicial decisions. It is certain, however, that Shylock's certainty of obtaining a favorable judgment was even presumptuous, because he did not consider the possibility of the case being interpreted in accordance with legal principles which gave him a different meaning from that intended by the party – as in the end it occurred – and not even in the common law, with *stare decisis*, one can have that certainty based only on a precedent. The use of a precedent as fundamentation in a future case is not a simple mathematical operation, requiring a series of factors that rationally justify non-adherence to the precedent, either because it must be overruled, or because the cases – present and past – do not have sufficient similarities to the application of the reasons of precedent (distinguishing). The idea that the doctrine of precedents provides absolute security and certainty is illusory, according to some authors, since it leaves enough room for the judge to make use of a “maneuver”, so that the fact of *stare decisis* is not absolute, not providing absolute certainty, but only some degree of certainty (Duxbury, 2008, p. 160).

Even so, *stare decisis* provides “some” certainty, due to the fact that using two of its main techniques – overruling and distinguishing – requires specific and adequate reasoning, and cannot be simply argued by the judge in the concrete case that fails to follow a precedent. Therefore, if the judicial decision must be rationally justified in all its aspects, or, if it is the duty of the court to state the reasons why it is adhering to the precedent or not, the system provides sufficient legal certainty for “surprises” not to occur. As stated by the Supreme Court of the United States of America, in the case of *Kimble vs. Marvel Entertainment, LLC*, “what we can decide, we can go back. But the *stare decisis* teaches us that we should exert this authority in



moderation”<sup>12</sup>. In Shakespeare's play, when it was stated in the course of the trial, that it would not be possible to substitute the execution of the pledge for payment, since the creditor (Shylock) did not receive his payment on time and preferred to execute its guarantee, Porta argues that, should the Court authorize such substitution, that decision would create a precedent capable of guiding the conduct of society, since it would pour with wrongful legal actions. It is believed that this is a manifestation of the principle of the protection of trust.

Law incorporates the history of a nation's development over many centuries and cannot be treated as if it contained only the axioms and corollaries of a book of mathematics (Holmes, 2005, p.33), but even so every legal system has the pretension of establishing order and unity. While the first quest expresses an intrinsic state of things that is rationally apprehensible, that is, founded on reality, the second seeks not to permit dispersions in a multitude of unconnected singularities (Canaris, 2012, p. 12-13). That is, whether a system is codified as civil law, or not, as the common law, in which there is no comprehensive compilation of legal norms and statutes. In common law there are written laws, but it is a system largely based on precedents, and these precedents guide the conduct of the societies of the countries that adopt it. Just as a citizen of a civilian country has – or should at least – rule in its conduct by law, a common law citizen does – or ought to do – by what precedents say. Both must – or should – state their conduct by law, but with the above mentioned distinction. Referring to the civil law system, but perfectly applicable to the common law, Gometz states that

[...]The certainty of law arises as (exact) predictability achieved through the knowledge of a clear, limited, complete, consistent and, above all, public legislation: all individuals can know the law, so all individuals can take advantage of the possibility of programming strategically their own behavior, so that they take into account the legal consequences that this entails. (Gometz, 2012, p. 222).

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<sup>12</sup> Available on: <[https://www.supremecourt.gov/opinions/14pdf/13-720\\_jiel.pdf](https://www.supremecourt.gov/opinions/14pdf/13-720_jiel.pdf)>. Accessed on: 5 Sept. 2016.

Therefore, a judicial decision has significant importance in common law society because what is decided in concrete cases also “decides” how citizens, outside the process, should act. A juridical principle set forth in a precedent, as well as serving as a basis for the decision rendered, also serves as a principle outside that process, not only determining how judges should judge similar causes in the future, but also how citizens are expected to act. Thus, a principle related to civil law in the field of contracts, such as the “impossibility of replacing the execution of the guarantee by the payment, when it is intended to perform after the maturity of the obligation,” has a very important extraprocedural function, because creditors and debtors in a similar situation generally behave this way. That is, it is acceptable for the creditor to refuse payment, when offered after the deadline, to claim the contractual guarantee stipulated. As well noted, regarding the protection of trust:

Legal certainty also covers the principle of the protection of legitimate expectations, which provides that “those who act reasonably and in good faith on the basis of the law as it is, or at least appear to be, should not suffer from disappointment of those expectations.” In this sense, legitimate expectations protect the legal status of a citizen against the authorities who have created a situation for a considerable period of time that citizens can trust (Godínez, 2015, p. 14).

If in a lawsuit this principle is established, it is known that future cases will be judged exactly in this way, with the application of this principle, provided that the cases have sufficient similarities to induce the application of the same principle enunciated in the preceding one. This tends to discourage the filing of actions by debtors who want to pay, despite the deadline, to avoid the execution of the guarantee. If a court decision states that it is possible for the debtor to pay, even if late, to prevent the performance of the guarantee, in the same way it generates an extra-procedural effect. Whatever the *Shylock vs. Antonio* decision was, it would generate a consequence out of the process, and for this very reason Antonio knew that the Doge could not stop the course of the law, since he “understands the importance of compliance with the rules for the State, notably so that merchants everywhere can rely on Venice,” as well as having

the exact notion of the *stare decisis* “so precious to the common law system. The respect of the judge to the previous decision is fundamental to guarantee social security” (Neves, 2016, p. 142).

In short: law must generate legal certainty. Whether by laws or by judicial decisions, law fulfills this crucial social function. In common law, which adopts the system of precedents (*stare decisis*), judicial decisions – in either sense – enunciate rules of law that guide conduct, which may prevent or encourage the filing of lawsuits. Nowadays, it is common to associate *stare decisis* with the position to be adopted by someone who wants to eventually litigate in court, so that the rules of law enunciated in judicial decisions produce economic effects, such as providing “a valuable signal for future litigants” (Macey, 1989, p.106). In a speech delivered in 2016, Lord Neuberger, the President of the UK Supreme Court, said the same thing as Shakespeare in 1597, stating that common law judges do not simply decide the cases before them because their decisions are part of the law in force in the Country (law of the land). The Lord points out that, “when deciding a matter of law, a judge should remember that all potential future litigants will seek their attorney for counseling” (Neuberger, 2016, p. 7).

And from the moment people do and stop doing things to conform to the principles enunciated in the precedents, they are acting with confidence in the system. The Federal Supreme Court in Brazil has already decided that the principle of trust is an element of legal certainty. And in the doctrine is the same formulation, and that legitimate trust means that the Public Power should not deliberately frustrate the just expectation it has created in the administered or the jurisdictional (Barroso, 2005, p. 22). The same is true of the concern of Portia with what might eventually be decided in the Shylock case, since a decision authorizing the replacement of the guarantee execution by late payment would generate an expectation in all debtors in the same sense, stimulating a storm of legal action.

Adherence to precedents, and to the principles set forth in them, does not, of course, mean their “eternalization.” Minister Luís Roberto Barroso, prior to his appointment to the highest court in Brazil, had already written and concluded that

The doctrinal and normative ascension of the proceeding does not make it immutable. But it imposes greater deference and caution in overcoming it. When a court of law, notably the Federal Supreme Court, makes a serious decision to reverse consolidated jurisprudence, it cannot and should not do so indifferently with respect to legal certainty, expectations of law itself, good faith and the confidence of the courts. In situations like this, it is the very credibility of the highest court that is in question (Barroso, 2005, p. 15)

The technique of overruling exists precisely to allow the legal theory to set forth in a precedent to be dismissed by the court, promoting its overcoming, but through a specific and rational justification. This prevents a change of opinion of the court only because the previous case was decided in the wrong way. As already noted, *stare decisis* does not allow a judge to alter the understanding enunciated in previous cases only because he / she believes that previous cases were wrongly decided (Brenner; Spaeth 2003, p. 8). Therefore, a lot of moderation is required for the practice of overruling, because a change of understanding affects the trust that the population places in the Judiciary, through its precedents, to guide its conduct. Whether it is an understanding of material law or of procedural law, there is a legitimate expectation that certain conduct will have the support of the Judiciary. If a debtor cannot be released from its obligation, paying after the due date and thus allowing the enforcement of the guarantee, exactly in the way the precedents establish as being the just and the correct for the matter, one has the legitimate expectation of waiting the decision to be delivered the same way in future cases. The concern about the possibility of making an exception was therefore very well delineated in Shakespeare’s play with the fair fear that such practice could jeopardize the trust that people place in a country’s judicial system. This is why the genius of Shakespeare is expressed in expressing Antonio’s concern at the turn of the sixteenth to seventeenth centuries, with the fulfillment of the law, stating that the guarantees that foreigners find in Venice (legal security)

could not be suspended, under penalty of trust in the state being shaken before the eyes of all.

We do not mean that thesis modifications cannot be made. On the contrary, they must be made, provided that legitimate conditions are present to support this change together with reasonable arguments, but overruling must be done with great caution, for the sake of the protection of trust. And even if, in Shakespeare's play, the judgment of the precedent *Shylock vs. Antonio* had not been exactly as the creditor expected – and he expressed his confidence in getting a judgment because he believed that the law protected him in the concrete case – even so it would be an exceptional example of the importance of precedents. The final decision holds a unique peculiarity, consisting in the guarantee of the pound of flesh, once the guarantee was executed, Antonio would certainly have died, so that, if the guarantee were other, perhaps the result of the trial would have been otherwise. Respect for precedents, as stated above, is not merely a mathematical operation, but requires that the specific circumstances of the particular case are considered seriously and closely by the adjudicating body. In *The merchant of Venice*, even if Shylock's desired result had not been achieved, legal certainty would be preserved at a time when, in a future judgment, if the precedent *Shylock VS Antonio* was invoked by a creditor interested in collecting the guarantor's guarantee, as long as he could show the deep distinction between his case and the previous one. Such a creditor could, for example, wish to enforce his guarantee, consisting of some movable or immovable property, and could rely on the precedent precisely to show that it is the right of the creditor to execute the guarantee, unless it does not undermine the life of the guarantor. Likewise, a guarantor who wishes to be released from his guarantee, or would find support in the previous case, if the guaranty was against his life, or not, if the guarantee were “normal”.

### CONCLUSIONS

William Shakespeare is / was genial, philosophically immortal, because after 400 years of his death his work is still read, studied and interpreted, so that even though the “being” has perished, but the “work”, the “legacy”, is eternal. This work analyzes only one of the traits of this

playwright's genius, which is his ability to anticipate themes that would be debated centuries later. Much has already been written about his plays, his sonnets, his life, etc. However, each and every new reading opens new possibilities for interpretation and understanding of the depth and extent of his legacy. There is probably still much to be discovered about him and his work, and the reference to precedents in the scene of Shylock's trial reveals that he was no stranger to the justice system practiced in England in the late sixteenth century.

On the importance of precedents, it is already praiseworthy that a judge, a jurist recognized up to now as fundamental to the development of the common law, as Sir Edward Coke, made use of precedents in the grounds of his decisions during the period that served as Chief of Justice at the Court of Common Pleas. If a jurist deserves all the recognition for being pioneering and innovative in the exercise of his function, what can be said of William Shakespeare? The playwright simply succeeded in his work *The merchant of Venice* to represent the importance of adherence to precedents, together with the principles of legal certainty and the protection of trust.

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