

A Midsummer Night's Dream – The Legal Issues

David P. Currie

IN THE FEW PAGES allotted to me I should like not to chant faint hymns to the cold fruitless moon, but rather to awake the pert and nimble spirit of mirth – swift as a shadow, short as any dream. Let us look not with the eyes but with the mind: Let us consider the legal issues of *A Midsummer Night's Dream*.

The play relates four stories at the same time: that of Theseus, Duke of Athens, and his fiancée Hippolyta, Queen of the Amazons; that of the four young lovers, Hermia and Lysander, Helena and Demetrius (unless it's the other way around); that of Oberon and Titania, King and Queen of the Fairies; that of the humble “mechanicals” with their stupid play of *Pyramus v Thisbe*. Each story presents its own legal problems, and I should like to discuss each of them in turn.

THESEUS & HIPPOLYTA

Theseus and Hippolyta are Royals, and they open the play; yet they are perhaps the least important figures we shall consider, and they present the least challenging legal questions. For they are basically bystanders. It is Theseus's job as Duke to apply the law to resolve the dispute between the young lovers, which will be the central focus of our discussion, and his marriage to Hippolyta provides the occasion for the presentation of *Pyramus v Thisbe*. The wedding itself seems only a part of the scenery; and yet it appears to raise troubling legal questions of its own.

We know little of Theseus and Hippolyta, or of how the Queen of the Amazons came to be betrothed to the Duke of Athens. We have only Theseus's out-of-court statement (which

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if used against him is not hearsay under Rule 802(d)(2) of the Federal Rules of Evidence) that he woo'd her "with his sword" and won her love "doing her injuries" (Act I, scene 1, l. 16-17).

Now the record is incomplete, and of course we are not permitted to look beyond the record, but it looks pretty bad for Theseus. First of all, his impatiently awaited marriage may be void for duress. Second, although we do not know precisely what "injuries" he did her, if as he admits he did them "with his sword," it looks like a tort and may well be a crime as well – though he may perhaps be sheltered from liability by the act of state doctrine (on the assumption he was waging war at the time), or, as head of state, by the immunity unsuccessfully invoked by General Pinochet in his recent troubles in London.

I must say that Hippolyta herself seems remarkably unconcerned about this whole sor-did business; we may have here an advanced case of prenuptial battered-wife syndrome. The Queen is plainly unaware of her legal rights; what she needs is a good lawyer, preferably one with a degree from the University of Chicago.

THE MECHANICALS

Peter Quince and his theatrical friends seem a pretty innocuous bunch on the whole. One is tempted to raise nit-picking questions about the keeping of wild animals (with the familiar indirect but foreseeable consequences to both Pyramus and Thisbe). But since the episode in question occurs only in a play within the play, and since the lion himself assures us most convincingly that he is not a real lion, it's far from clear that there is an actual case or controversy. I shall therefore pass on to the only serious legal question regarding the mechanicals: that arising out of the extraordinary incident involving Bottom the weaver.

It was Bumble, not Bottom, who said the

law was an ass. Bottom went him one better, for he was transformed into an ass himself – or, as counsel for the defense euphemistically puts it, "changed." But honeyed words cannot disguise the awful truth. Here, ladies and gentlemen of the jury, is the evidence:

Bottom himself says he is "marvelously hairy about the face" and has "a great desire to a bottle of hay" (Act IV, scene 1, l. 24-25, 32-33). Hearsay, you say? Indeed, but admissible nonetheless under Rule 803(1) and (2) as present sense impressions and excited utterances made under the stress of an undeniably startling event. In any case Puck admits not only the occurrence itself but also his own responsibility for it: As he gleefully tells his master Oberon, while Bottom was offstage during a rehearsal of the play he (Puck) put "an ass's nowl ... on [Bottom's] head" (Act III, scene 2, l. 17).

This statement too qualifies as an admission. It may be introduced against both master and servant under Rule 802(d)(2) if Puck was acting within the scope of his employment. On the merits, however, there seems no basis on which to hold Oberon liable on a theory of *respondeat superior*, for there is no evidence that he directed Puck to practice upon Bottom; in this case, in contrast to others of which we shall soon speak, Puck appears to have embarked on a frolic of his own.

Insofar as Puck himself is concerned, the transformation of Bottom seems a peculiarly loathsome brand of aggravated assault and battery, *prima facie* both a tort and a crime. Since Puck plainly acted outside the scope of his authority, he has no plausible claim to that official immunity which ordinarily might protect him from liability as an officer of the Crown. Nor is there any suggestion in the record that Puck acted in self-defense, or that Bottom gave informed consent to some sort of offbeat medical experiment; and of course assumption of risk is no defense in actions under the FELA.



From Leon Garfield, *SHAKESPEARE STORIES* (1985), Michael Foreman, illus. (reprinted with permission).

Nevertheless I think it unlikely that Bottom will be able to recover more than nominal damages, for the proof is clear that he was actually better off with an ass's head than without it. In his natural state he was a mere weaver and a bad amateur actor; as an ass he was paramour of the Fairy Queen. As Puck reported to Oberon, "Titania waked and straightway loved an ass" (Act III, scene 2, l. 34). Against Bottom this statement is inadmissible hearsay, but we can always subpoena Puck to testify – or take and introduce his deposition if he is more than a hundred miles from the place of trial. We can also introduce all of Act IV, scene 1, in which Titania makes

ostentatious love to Bottom in all his changed glory. This scene is not hearsay under Rule 801(c), since we do not offer it to prove the truth of the matters asserted. It is immaterial whether or not what Titania said to Bottom was true; what she *did* shows that Bottom was not injured by the translation of which he so loudly complains. Rather Puck seems to have done him a great favor – so great, indeed, that Puck would appear to have a plausible cause of action for unjust enrichment were he not, alas, plainly disqualified as an officious intermeddler.

In short, if I were Bottom's attorney I should urge him to leave well enough alone.

OBERON & TITANIA

The story of Oberon and Titania presents not one but two troublesome legal problems. The first is the unsavory business of that Indian boy.

Puck tells us, at the outset, that the boy was “stolen from an Indian king” (Act II, scene 1, l. 22). That sounds bad for Titania, but it may be hyperbole. For Titania swears she has undertaken to rear the child for the sake of his deceased mother (Act II, scene 1, l. 36). If this means at the request of the child’s mother, and if she can prove it, it may refute the charge of kidnapping; I shall therefore move on to questions of more intrinsic legal interest.

There are two such questions: those of immigration and of custody. On both the best precedent is the celebrated case of Elián González.

Here too, as in *González*, the mother dies; the child is taken in by a “friend,” supposedly for his own good; nobody asks the father, if any, for his opinion. It’s probably just as well. There is nothing in the record to tell us about the state of India at the time of the play. It seems fair to assume it has some kind of Commie pinko government, and thus that it would be in the boy’s best interest to terminate his father’s rights; for as we all know, everybody is better off in Florida, or for that matter in that other fairyland in *A Midsummer Night’s Dream*.

Terminating the father’s rights, however, does not solve the immigration question. We still don’t know how the boy entered the country. There is no suggestion that he is entitled to political asylum, and the mere fact that he is in the custody of a citizen does not give him a right to cross the border. Since there is no evidence that the boy has living relatives in India, his best bet may be to apply to the Attorney General for a suspension of deportation on grounds of unreasonable hardship – which after the *Chadha* case we know is not subject to legislative veto by either or both Houses of

Congress.

On the custody question Titania appears at first glance to have the stronger claim. The boy’s mother was her votaress, a close friend with whom she spent lots of what is now referred to as quality time (Act II, scene 1, l. 122-37); she apparently would have wanted Titania to bring up her child. Oberon’s claim, in contrast, seems purely selfish: He wants the boy for his “henchman” or for a “knight of his train” (id, l. 120, 125). This seems a poor justification for breaking up a *de facto* family, as it seems hardly to serve the best interest of the child. Look at all the fuss over the recent *Baby Richard* case – and Oberon is not even the boy’s natural father.

Indeed it is not even clear that Oberon’s interest in the boy is honorable. Puck describes the King as “jealous” because Titania has this “lovely boy,” because she withholds from him “the lovèd boy” and “makes him all her joy” (id, l. 22-27) – all of which in this suspicious age makes one wonder whether either the King or the Queen is a fit custodian. Nay, more: it also suggests the desirability of an investigation looking, at the very least, toward possible prosecution for contributing to the delinquency of a minor.

The second troublesome legal problem regarding the fairies concerns the famous juice of that purple flower, which Oberon directs his servant Puck to squeeze onto the eyelids not only of his own wife but also of more than one young Athenian – in arguable violation of the law of nations as well as of the assault provisions of the civil and criminal law.

Indeed the case is one of no ordinary assault or even battery. For what, after all, was the nature of this potion? “On sleeping eyelids laid,” Oberon tells his minion, the juice of this flower “will make man or woman madly dote upon the next live creature that it sees” (Act 2, scene 1, l. 170-72). Be it “lion, bear, or wolf, or bull” (or as it turns out our old friend Bottom the weaver), “she shall pursue it with the soul

of love" (id, l. 180-82); she will "love and languish [languish!] for his sake" (Act II, scene 2, l. 35).

In short, the substance in question is neither more nor less than a primitive date-rape drug; we've got to throw the book at them.

THE YOUNG LOVERS

Or, the case of *Egeus v Hermia*

Egeus files a complaint against his daughter Hermia under Rule 8(a) of the Federal Rules of Civil Procedure, alleging that he has decided she should marry Demetrius and that she has refused. He asks not a mandatory injunction (for equity will not order specific performance even of an employment contract, much less one of marriage), but rather an indirect sanction along the lines of that given in *Lumley v Wagner* – namely, that he be permitted to kill his daughter if she persists in her refusal. This stratagem ingeniously avoids the ticklish problem of judicial supervision of compliance with a mandatory decree – at some personal inconvenience, of course, to Hermia. Thus this case provides a paradigm illustration of Holmes's "bad man" theory of the law: The state offers a bargain to the potential lawbreaker by setting an explicit price for violation of the law.

Hermia is then asked to file an answer pursuant to Rule 12(a). She responds with a request for an advisory opinion – or, more charitably, with a counterclaim for a declaratory judgment: What are my options, she asks, under the law?

Theseus gives judgment on the spot without so much as hearing argument. He begins by correcting Egeus's initial statement of the law, which actually offers Hermia three choices, not two: She may marry or die or become a nun. (This of course is the "cruel trilemma" of which Bernie Meltzer wrote in his celebrated article on the privilege against self-incrimination.)

Only now does Hermia file her answer; she says she'll go to the convent rather than marry Demetrius. Now what kind of defense is that? She denies none of the allegations of the complaint; she raises no affirmative defense such as bankruptcy or the statute of limitations; she does not move under Rule 12(b)(6) to dismiss the complaint for failure to state a claim, as she surely ought to have done.

For a capable advocate would surely have argued that the law on which Egeus relies offends the equal protection clause by discriminating without justification between sons and daughters and (though Hermia may not have standing to assert the rights of third parties) between mothers and fathers as well. Indeed Hermia also appears to have a good argument based upon that contradiction in terms, substantive due process, on the ground that the law deprives her without compelling reason of her fundamental right to marry – citing, as always in such cases, *Dred Scott v Sandford*, *Lochner v New York*, and *Roe v Wade*. Like Titania, Hermia needed a good lawyer – preferably one with a degree from the University of Chicago.

Since Hermia's answer presented no defense at all, Theseus properly granted judgment on the pleadings for the plaintiff Egeus under Rule 12(c). (You've always wondered when a judgment on the pleadings was called for; now you know.) Like the order of civil contempt against Susan McDougall, this judgment gave Hermia the keys to her own convent. It directed her to decide whether to marry Demetrius or to become a nun by the next full moon – i.e., with all deliberate speed.

No sooner has Theseus rendered his judgment than the defendant and her accomplice decide to evade it: They will visit Lysander's dowager aunt, who lives seven leagues outside Athens, where, Lysander says, "the sharp Athenian law cannot pursue us" (Act I, scene 1, l. 162-63), and there marry in defiance of Theseus's cruel decree.

Now Lysander may have been a zealous lover, but he was not much of a lawyer. For in taking such a strict territorial view of the conflict of laws he reckoned without the Illinois Marriage Evasion Act, which makes clear that Illinois citizens may not cross the state line in order to circumvent limitations on their capacity to marry – and a related proposition was adopted in California this year. Moreover, Egeus is armed with Theseus's judgment, which is plainly entitled to full faith and credit in the forest under Article IV, § 1 and its implementing statute, 28 USC § 1738; invalidation of Hermia's projected marriage to Lysander seems an entirely appropriate remedy for her plain violation of the spirit of that decree.

The only plausible argument for the defense is that Hermia has changed her domicile and is thus no longer subject to Athenian law. "From Athens," she tells Helena, she and Lysander will "turn away our eyes, to seek new friends and stranger companies" (Act I, scene 1, l. 18-19) – thus arguably providing the necessary element of intent to transform a mere change of residence into a change of domicile and liberate Hermia from both the law of Athens and the Duke's resulting order.

Theseus appears to reject this argument – if indeed it was made, which the record does not show. For when he finds the lovers *in flagrante delicto* in the woods¹ and Egeus moves to enforce his judgment against Lysander (which seems somewhat irregular since so far as the record reveals Lysander had not been named as a party to the original proceeding), Theseus proceeds to apply Athenian law on the merits: In light of Demetrius's protestation that he does not love Hermia, he tells Egeus he will "overbear [his] will" (Act IV, scene 1, l. 178). In other words, he enters judgment for Hermia and Lysander, they will marry one another at

the same time as Theseus and Hippolyta, and they will live happily ever after.

Shakespeare plainly wants us to rejoice with them. At the risk of appearing a spoilsport, I must confess I find Theseus's second decision peculiar in two important respects.

I find it peculiar, first, that he proceeds to exercise jurisdiction outside Athens, that is, to exert sovereign authority within a foreign country. One is uncomfortably reminded of Citizen Genêt, who went about establishing prize courts in the United States after the French Revolution – in plain violation of the law of nations, although the Supreme Court was too stingy to say so when President Washington politely applied to the Justices for an advisory opinion.

On the merits, Theseus's decision seems no less peculiar. For the Athenian law, as we know it from the play, was absolute on its face; it contained no exception for the case in which the man whom the father had chosen declined the daughter's hand. Indeed, Theseus's decision to "overbear" Egeus's will contradicts the law of the case as well. For Theseus had unequivocally stated in his first opinion – quite properly, it seems to me, in view of the unqualified terms of the law – that he had no power to "extenuate" the law's requirements (Act I, scene 1, l. 120). In other words, there was no provision for variances, or indeed for the exercise of equitable discretion in devising a remedy.



In short, from the legal point of view *A Midsummer Night's Dream* is nothing but a comedy of errors. You may be tempted to say all's well that ends well. Yet I find the play really quite subversive, for it teaches that it is a good thing for both citizens and judges to flout the law –

¹ My esteemed colleague David Bevington insists they were not found *in flagrante delicto*; but I ask you, *res ipsa loquitur*.

that law itself is much ado about nothing, a mere tempest on a midsummer night.

I hope my labor of love is not lost on you. Make of it what you will. If that's as you like it, so much the better; for measure for measure, the course of litigation never did run smooth. *JB*