

# “TO BE OR NOT TO BE”

## *The Suicide Hypothesis*

Robert Detobel

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And my large kingdom for a little grave,  
A little little grave, an obscure grave—  
Or I'll be buried in the king's high way . . .

*Richard II* 3.3.153-5



EDWARD de Vere's death is clouded in darkest silence. Not even the loquacious John Chamberlain, never forgetting to report some birth, marriage or death, has the least word to say on the decease of the Lord Great Chamberlain of England, although he mentions the deaths of the Countess of Oxford in 1612 and of the eighteenth Earl in 1625. So elusive are the circumstances of the seventeenth Earl's departure from life, the man James I referred to as "great Oxford," that one may feel inclined to suppose it wrapped in one of the greatest taboos of those times, if not the greatest at all: Suicide. Little is known of the last months of Edward de Vere's life, that little derived from the dry language of a few legal documents, yet even these, if pressed hard enough, may yield something more personal.

### The *cestui que use*

On June 18, 1604, six days before his death, we learn from an *inquisitio post mortem* that Edward de Vere arranged for the disposition of his properties, an act that clearly suggests an awareness of his imminent death. For instance, he conferred some lands upon his cousin, Sir Francis Vere, and his son-in-law, Lord Francis Norris, for a term of eleven years. At that time, his son Henry was just eleven years old, and so would just have come of age when the lease expired, thus it is safe to assume that the lands were leased to "the use" of his son.

Since *Statute 27 Henry 8* (1536), better known as the *Statute of Uses*, this particular device (or use) was greatly weakened as a means of evading debts, attainders or wardship, for which it had been used since at least the reign of Richard II, although it did manage to survive in certain forms despite the Henrician statute. Before that, legal ownership of an estate was vested in what we now would call the *nominal owner*, *nominee* or *trustee*. The technical (law French) term for this beneficiary owner was *cestui que use*, that is, the person for whose use the estate was being held. The *cestui que use* was the real owner, the one who took almost all the benefits of the estate. Under common law it was not he but the trustee who was considered the legal owner of the estate. Until

1536, the common law courts did not recognize the rights of the *cestui que use*, although he *was* recognized by the equity courts—more particularly the court of Chancery; thus the *cestui que use* was not left without legal remedy. Furthermore, since he was not considered the owner under common law, his lands would not pass into wardship if his heir was still in his nonage when he died; nor would his lands be attainted or forfeited; nor could his creditors sue him in a court of common law (King's Bench, Common Pleas, Court of the Exchequer). Thus the benefits for the *cestui que use* outweighed the risks. Because of such uses, the needy Crown was cut off to a great extent from a major source of feudal income. The Statute of Uses was instituted in order to end such evasive practices by re-vesting the legal ownership in the *cestui que use*, the beneficiary owner. Henceforth uses were *executed*—the term for the statutory re-defining of the beneficiary owner as legal owner.

Nevertheless, many a loophole remained:

It must be carefully noted that, in order to bring the statute into operation, it is essential that there should not only be an Use, but a person seised<sup>1</sup> to the Use; the statute speaking of one person seised to the Use of any other person. Therefore, where an existing term of years is limited to an Use, as where a demise of 1000 years is assigned to B to the use of C, the provisions of the Statute do not apply; and the Use will consequently remain unexecuted. (Jenks 157)

A tenant for a term of years could not be “seised.” For historical reasons (outside the range of this article) a tenure for a term of years, be it 1,000 or 10, was not considered real estate at common law. It was treated as a *chattel*—a *chattel real* as opposed to a *chattel personal*—but a chattel nonetheless. Also, a different terminology was applied for *freeholds* and *tenure for a term of years*. The owner of a *freehold* was said to be “seised of the land” and a formal ceremony was to take place, the “delivery of seisin.” A similar ceremony occurred in the case of a term of years; the *tenant* (aka *termor*) had to enter on the land, to “operate an entry” so that he was “possessed of the term.” *Possession* and *entry* are terms which refer to chattels, *seised* and *seisin* to freeholds. Since the lease for a term of years to Francis Vere and Lord Norris could not be executed, these lands were safe from wardship.

Six days before his date of death, Oxford transmitted other properties as well. Over a decade earlier (March 1592) he had leased the Manor of Bretts and lands in Plaistow to Sir Francis Trentham and Randulph Snead (brother and uncle of the Countess) for the term of his own life

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(the technical law French term was *estate pur auter vie*). On June 18, 1604, he changed this to a term of 60 years or the life of the Countess. Had Oxford died before June 18th, these estates would also have come into wardship. By then an estate *pur auter vie*—“for the life of another”—was considered to be a freehold. Either the lands would descend directly to his son or Oxford could have provided for the transfer of the lands to the use of the Countess at the moment of his death. In either case they would pass into wardship as the Crown would claim that the right of the Crown and the right of the Countess took effect at the same time—the moment of Oxford’s death—and that in this case the royal prerogative would defeat the right of the Countess, as will be seen (below) in the case of *Hales v. Petit*.

But what happened with Oxford’s other property? The *inquisitio post mortem* of 1604 tells us that six days before his death he was making provision for a succession of lands favorable to his son and wife by preventing those lands from falling into wardship, so it can’t be said that death took him by surprise. Why then did he neglect to make a will?

### Why no will?

Everyone knows that a will is an instrument by which property is transmitted from one person to another at the former’s death. But in medieval and early modern times not every kind of property could be transferred by will. For a fairly long period, devising [transferring] of lands by will was prohibited by the law, another prohibition that could be, and was, circumvented by the *use*.<sup>2</sup> In 1540 the *Statute 32 Hen. 8*, the *Statute of Wills*, made it possible to devise land by wills, but there was no legal obligation to do so. “It was not till the end of the seventeenth and the beginning of the eighteenth century that a man could leave all his property by will in every part of England” (Holdsworth *Succession* 30). Early in the seventeenth century the main purpose of a person’s will was still the distribution of his or her chattels and goods, i.e. movables such as furniture, books, clothing, linens, plate, horses, etc.<sup>2</sup>

It is further important to note that, in 1604, debts could not be recovered on inherited real estate. The heir had to pay debts from land sales or transfers if the testator had bound him to do so by sealed agreement (known as a *specialty*) with the creditor;

... except specialty debts in which heirs had been named, the real estate escaped from all liability to the other debts of a deceased person. Testators sometimes charged their lands with the payment of their debts. . . . But it was not till the [nineteenth] century that real estate was made generally available to pay the debts of a deceased person (*Law* 1.575-6).

Since debts had to be recovered from chattels and goods, we might presume that Oxford made no will, either to evade payment of his debts, or for lack of chattels and goods to cover them. This, however, would have been to no effect.

### Executors and administrators

Simply not making a will, that is, dying intestate, was not sufficient to evade debts. In the case of intestacy the ordinary (local bishop) of the diocese in which the testator had lived would appoint an administrator. Since 1357 (31 Edw. III statute 1, chap. 11) the functions of an administrator were the same as those of the executor. (There were minor differences but these were without impact on the recovery of debts.) The administrator was the legal representative of the deceased and, like the executor, he could sue and be sued for debts. Originally, the ordinary enjoyed wide discretionary powers of appointment, but since 1530 (Statute 21 Hen. 8, c. 5, § II) these had been confined within narrow limits. The first person he would appoint as administrator of an estate (“to take out letters of administration”) was the surviving spouse. If he or she refused, he had to appoint the next of kin, and so on. Ultimately even a stranger could be appointed administrator.

### Grants of administration

A general *grant of administration* was made when a man died intestate. The order in which grants of administration were made by the Court were as follows: 1) the husband 2) the widow (or the next of kin or both) 3) the next of kin 4) the Crown, and 5) a creditor. If no one was available to administer the estate, one to whom a creditor could apply for payment of his debt, he could claim a grant himself, but before the grant could be made, the Queen’s Proctor (the ordinary) and the next of kin must be cited to accept or refuse. The creditor must swear, 1) to the amount of debt, 2) to the value of the property to be administered, 3) to the fact that he has no other security for his debt, 4) to the time when the debt was contracted, and so forth. Therefore, if in Oxford’s case the Countess declined to act as administrator, no near relative agreed to assume the function, and the Crown showed no interest, a creditor of Oxford’s could step in and act as administrator. This is, in fact, what happened.

This creditor’s name was Edward Johnson. Normally, the creditor would recover his own debt, pay out all other creditors and distribute the remainder among the lawful heirs, but this was not what transpired with Oxford’s estate, as Edward Johnson explained in his bill of complaint. Not, however, for the reasons Alan Nelson suggests: “Not only did Oxford die intestate, but the Dowager refused administration of his estates” (431),<sup>3</sup> thus forcing the reader to conclude that nothing (or so little) was left that the Countess preferred not to act as administrator. Nothing was left, indeed, not because Oxford was destitute, but because he had disposed of his goods and chattels by other means.

### Edward Johnson’s bill of complaint

But now so it is may it please your most Excellent Majesty that the said Earl of Oxford is dead intestate & all his goods & Chattels whatsoever are come to the Lady Elizabeth his late wife who hath and enjoyeth the same never taking any Letters of administration thereof but converting & altering the same to her own use so as if letters of admin-

istration should be procured to your said subject yet is the estate in such manner disposed by the said Lady of Oxford as your said subject cannot by any means of law recover his said rightful & due debt. (Nelson website, text modernized)

Since neither the Countess nor any other relative had taken out letters of administration, nor had the Crown exerted any right, Johnson was free to come in as administrator, but the chattels and goods had already passed into the possession of the Countess during Oxford's lifetime, so it no longer served Johnson to take out letters of administration, there being nothing left to administrate. This way a married woman, during the life of her husband, could enjoy property which she was denied under common law (Holdsworth *History* 4.477).<sup>4</sup> Johnson's statement implies that there was a trustee through whom all chattels and goods were passed to the use of the Countess; this trustee may have been Francis Trentham. Under common law he would be the legal owner, while the beneficiary owner, the *cestui que use*, would be the Countess. It was not necessary for such an agreement to exist in written form—orally agreed trusteeships were valid—while potential litigation could be decided in a court of equity. So, again, the device of the use, in this case of chattels and goods, worked to evade debts, as it had generally done for lands before the *Statute of Uses* of 1536.

But was debt evasion the true reason for Oxford not making a will? The debt claimed by Johnson was rather small, only £36 out of a total of £40 in money and £18 in goods (£3 Johnson acknowledged to have been paid). There may have been other debtors who, for whatever reason, did not come forward. In any case, it appears that only Edward Johnson sought remedy at law.

### Twyne's case

Though not the same in all points, Twyne's case is comparable. The summary reads:

A, who was indebted to B in £400 and to C in £200, was sued in debt by C. Pending the writ he made a secret assignment of all his goods and chattels to B in satisfaction of his debt, but he still continued in possession of them, sold some of the goods, and set his mark on others. (Brigman 303-6)

Instrumentally, the gift in Twyne's case and the use in Oxford's case are identical. In Twyne's case we have a use or trust in all but name—which the judges did not fail to remark. In both cases the totality of the goods were transferred to one who was the nominal but not the real owner. In Twyne's case the verdict ran:

This was a fraudulent gift within the Statute 13 Eliz. 1, c.5, because the gift was general, without exception of A's apparel or anything of necessity; there was a trust between the parties, for A continued in possession and used the goods as his own, and a gift made bona fide within the statute must be a gift without any trust either express or implied, the trust being the cover or fraud; the gift was made in secret pending the writ . . . .

Of course, Oxford's transmission of his goods and chattels to his wife during his lifetime was

not a gift but a device generally allowed in order that a man could pass property to his wife during his lifetime. In Oxford's case it seems to have been general, since nothing was left to administrate according to Edward Johnson. Had there been enough left—and one can fairly assume that Oxford's apparel, for instance, was well worth the £36 in money and £18 in goods Johnson was claiming—it would still have been advantageous for him to take out letters of administration as a creditor. The outcome of the suit is not known, but a court could well have considered that the general transmission of all goods and chattels to the use of the Countess during her husband's lifetime constituted a fraudulent device for the purpose of evading payment of debts, and therefore she should have acted as administrator and paid the debts of her husband. No doubt Oxford would have known that this might occur, so we must seek another reason why he chose to leave no will while passing all property over to his wife shortly before his death.

A possible reason might be that, in June 1604, Oxford foresaw a time when he might wish to put an end to his own life.

### Suicide and the Law

As a general rule, in cases where an individual's death was ruled to be a suicide, the whole of his or her goods and chattels were forfeited to the Crown. This included a tenure for a term of years, that is, if the suicide, the *felo se se*, were the lessee, but not if he or she were the lessor. Freeholds such as fee tail, fee simple, terms for life or for the life of another (*pur auter vie*), and dowries were not liable to forfeiture, but all chattels and goods were.

Understandably, forfeiture was not popular. Relatives often tried to conceal the goods and chattels of a suicide from the coroners and their jurors. Sometimes the coroners themselves connived at such acts of concealment, though less so in Tudor and Stuart times when they were paid for their offices. The assiduity with which Tudor and Stuart monarchs punished suicides was probably inspired less by moral than fiscal motives:

The Crown's claim to the property of self-murderers was fiercely resented by local communities. . . . There are hundreds of suits in the surviving records of Star Chamber in which families, neighbours, and coroners and their juries were charged with concealing the goods of suicides. Imaginative gambits were sometimes devised to deceive royal officials; stupidly transparent ploys were evidently just as common. Defendants in Star Chamber swore on their oaths that gangs of strangers descended on the home of self-murderers and carried off their goods immediately after their deaths. . . . Another common ploy was to claim that the deceased's debts, which were normally settled before the Crown was paid, exceeded the value of his chattels. (McDonald 78-9)

There were other ways to escape forfeiture:

Jurors chose between two verdicts to distinguish the guilty from the innocent. A suicide whom they deemed sane was returned a *felo de se*, a felon of himself; one who was insane was proclaimed *non compos mentis*, not of sound mind . . . . Idiots and lunatics were spared both the secular and religious penalties. (16)

Another possibility was to ascribe the ensuing death to another cause than the suicide attempt, or to attribute it to an accident. All this is reflected in the grave-digger scene in *Hamlet*. In this scene we also learn that the aristocracy was treated with greater leniency:

Other. Will you ha' the truth an't? If this had not been a gentlewoman,  
she should have been buried out o' Christian burial.

Clown. Why, there thou say'st! And the more pity that great folk should  
have count'nance in this world to drown or hang themselves  
more than their even-Christen.

As McDonald and Murphy state:

We know of no great ladies of the court who killed themselves, but other cases show that the grave-diggers' complaint was fully justified. When the despicable Earl of Berkshire shot himself with his crossbow in 1622, for example, the court directed letters to the coroner, ordering that “the evidence touching the Earl of Berkshires manner of death must not be urged, but the matter made as fair as possible. (127)

The pressure worked; the jury duly ruled the earl *non compos mentis*. (This “despicable earl” was Oxford's son-in-law, husband of his daughter Bridget.) But, as the authors point out, this intervention was unusual and was due to the fact that the powerful Duke of Buckingham wanted to marry his brother to Berkshire's (and Bridget Vere's) daughter. In general, rank had no bearing; 90 percent of gentry suicides were convicted at this time. It would not be until after the Restoration (1660) that attitudes towards suicides of aristocrats would begin to change. Since for the whole of the Tudor and Stuart period, the numbers of gentlemen convicted of committing suicide was as high as 67 percent, the numbers at the time of Oxford's death would have been about the same.

Therefore we may assume that Oxford's rank would not have protected him or his family from the confiscation of his goods and chattels had he been convicted of committing suicide. Since he had the foresight to protect his property from wardship, he would probably have considered ways of preventing the confiscation of the rest of his property as well. To this end, the transfer of his chattels and goods to a trustee to the use of the Countess was an effective device, as will be clear from the following case.

Had Oxford been contemplating suicide, what he could *not* do, if he wished to pass along his property to his family, was to make a will. “If any man do wittingly & willingly kill himself, his testament, if he made any, is void, both concerning the appointment of the executor, and also concerning the legacy or bequest of any goods, for they are confiscate” (Swinburne 77). And later, Blackstone: “Neither can a *felo de se* make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture” (4.499) This, in fact, is exactly what Oxford did. But he did something more—he made a devise, a use, of his goods and chattels, one way—perhaps the only way—to save them from forfeiture.

### Attitudes towards suicide

In a society in which communitarian values prevail over the rights of the individual, suicide is always seen as dishonorable. The suicide was deprived of the holy rites of the community and sometimes of a grave within the walls of the city, or, in Christian countries, in the churchyard. The body of a suicide was treated in the same way as a traitor or other felon. Cut off from the flock, his corpse was not buried, but dumped like offal. In ancient Greece, traitors did not receive a grave, they were thrown into the *barathron*, a deep pit, shut out from the collective memory, dismembered from and disremembered by the community.

The sons of Oedipus—Eteocles and Polyneices—were equally possessed by a juvenile furor. But Eteocles, whose name meant “true glory,” fought *for* his city, so at the end of Aeschylus’s *Seven Against Thebes* the herald announces: “For this Eteocles, it is resolved, to lay him on his earth-bed, in this soil, not without care and kindly sepulture”—whereas Polyneices, whose name meant “much strife,” marched *against* his city, so: “of his brother Polyneices, this: Be he cast out unburied for the dogs to rend and tear.”

Aeschylus lived c. 525-456 BC; Euripides one-and-a-half generations later, c. 480-406 BC. How drastically the value patterns in Athens had changed by Euripides’s time can be gauged from his interpretation of the same story in his *Phoenician Women*. At the end of the tragedy, Antigone, speaking to her father, scorns Eteocles: “The way he treated you and my brother is obscene!” then crying out: “Polyneices! I always loved you the most!” The culprit is no longer Polyneices. Nor is the crime the siege of the city. Now it is Eteocles’s refusal to turn over the government of Thebes to his brother after the first year, because they had agreed that they should share the reign, ruling alternately a year at a time. From a crime against the community the tragedy has evolved into a breach of contract between two individuals.

Similar values ruled the ancient Jews. Renegades lost the right of being remembered by the community. Their “corpses become food for the birds of the air and the beasts of the earth” (Jeremiah 7:33). Though not specifically referring to suicide, the verses 28:8-10 of Ezekiel’s prophecy against the King of Tyre epitomizes the dishonorable death in a society in which communitarian values predominate over what we now regard as the rights of the individual:

They will bring you down to the pit,  
and you will die a violent death  
in the heart of the seas.  
Will you then say, ‘I am a god’  
in the presence of them who kill you?  
You will be but a man, not a god,  
in the hands of those who slay you.  
You will die the death of the uncircumcised  
at the hands of foreigners.



Ezekiel's harsh denouncement of the King of Tyre, that he thinks himself a god and behaves as such, does not lead the Prophet to forecast the King's suicide. But interestingly a modern existential author (and as will be seen an antique author as well) did make this connection. In Dostoevski's *The Possessed*, the engineer Alexei Nilytch Kirilov decides to kill himself. He has reached the conclusion that God does not exist. If God does not exist, Kirilov argues, his will is wholly his own; he is his own god and the highest expression of the will of a god-man is to kill himself. Kirilov's view of suicide as the inexorable consequence of the non-existence of God is the flip side of the sixteenth- and seventeenth-century English view, that the suicide puts himself above God's commandment, as well as the law of nature and the law of the realm. By killing himself he sets his own law.

The pit into which the King of Tyre will be thrown is without doubt the pit of oblivion, the Greek *barathron*. It was into the barathron that the corpses of six Athenian generals were thrown in 406 BC; not for having failed as commanders—they had achieved a splendid victory over the Spartan fleet at a time when Athens's fortunes were at the lowest and she was even losing to Sparta her long rulership of the sea. Nor was it, as many modern historians would have it, for failing to rescue shipwrecked soldiers. It was because they had failed to rescue from the waves the dead bodies of slaughtered soldiers that the generals were condemned to death.<sup>5</sup> According to Greek religion, such disregard constituted a blasphemous tort to the dead and to their families. As Ezekiel would have put it, they were buried "in the heart of the seas" and thus deprived of graves and the traditional funeral ceremonies with wailing women, funeral libations, cutting locks of hair, etc., by which they could be remembered—*re-membered*, as it were—into the community.

According to Plato in his *Apologia*, Socrates played a key role—the key role—in the trial of the six generals. He would have been the only man among the fifty prytanes to object to what he believed was the unlawful sentencing to death of the generals. And, as Plato tells it, it just so happened that, on that day, Socrates was the *epistates*, the man chosen to preside over the executive committee of the Popular Assembly, the governing body of Athens.

The chances for Socrates to have been chairman exactly on this particular day were one in 5000—possible, but not likely—and the more unlikely because in the same *Apologia* Plato shows how Socrates prided himself on the very values which would have disqualified him for such an office. But Plato needed Socrates as presiding official in order to give voice to his argument.

Plato made Socrates the voice and incarnation of the new philosophy which was challenging traditional Greek views of the afterlife, the same philosophy to which the six generals also adhered. The death sentence in the Arginusae trial was intended as the ultimate rejection of a philosophy that sees the body as merely the prison of the soul, which is eternal. What happens to the soul after death depends only on the kind of life lived by the individual. If the body is unimportant, the generals were right not to risk the living in order to save corpses. There was no need of a grave and the funeral libations and all the other ceremonies were without any real importance.

It should be noted that Euripides—who, contrary to Aeschylus, was also an adherent of the philosophers—had practically nothing to say about what happened to the dead bodies of Eteocles and Polyneices. As far as Euripedes was concerned, it was Eteocles who was the scoundrel and

Polyneices, the individualist, who was the hero. The Greek philosophers were diametrically opposed to the traditional views on death and life after death.

Let us hear Socrates so that we do not miss certain parallels to Shakespeare:

Let us reflect in another way, and we shall see that there is great reason to hope that death is a good, for one of two things—either death is a state of nothingness and utter unconsciousness; or, as men say, there is a change and migration of the soul from this world to another. Now if you suppose that there is no consciousness, but a sleep like the sleep of him who is undisturbed even by the sight of dreams, death will be an unspeakable gain. For if a person were to select the night in which his sleep was undisturbed even by dreams, and were to compare with this the other days and nights of his life, and then were to tell us how many days and nights he had passed in the course of his life better and more pleasantly than this one, I think that any man, I will not say a private man, but even the great king, will not find many such days or nights, when compared with the others. Now if death is like this, I say that to die is gain; for eternity is then only a single night. But if death is the journey to another place, and there, as men say, all the dead are, what good, O my friends and judges, can be greater than this? If indeed when the pilgrim arrives in the world below, he is delivered from the professors of justice in this world, and finds the true judges who are said to give judgment there. (*Apologia*)

Obeying his inner voice, his *daimon*, Socrates chose suicide rather than life in banishment. Seneca, in “Letter 41” of his *Moral Epistles*, heard this inner voice as the voice of God:

We do not need to uplift our hands towards heaven, or to beg the keeper of a temple to let us approach his idol’s ear, as if in this way our prayers were more likely to be heard. God is near you, he is with you, he is within you. (1)

Though Seneca had his own worldly idols (Socrates and Cato Uticensis), it is ironic that Cato,

*To be, or not to be—that is the question.  
Whether 'tis nobler in the mind to suffer  
the slings and arrows of outrageous fortune,  
or to take arms against a sea of troubles,  
and by opposing, end them?—To die,—to sleep,—  
No more; and by a sleep to say we end  
The heart-ache and the thousand natural shocks  
That flesh is heir to,—tis a consummation  
Devoutly to be wish'd. To die—to sleep—  
To sleep! perchance to dream!—ay, there's the rub;  
For in that sleep of death what dreams may come,  
When we have shuffled off this mortal coil,  
Must give us pause: there's the respect  
That makes calamity of so long life;  
For who would bear the whips and scorns of time,  
The oppressor's wrong, the proud man's contumely,  
The pangs of despis'd love, the law's delay,  
The insolence of office, and the spurns  
That patient merit of the unworthy takes,  
When he himself might his quietus make  
With a bare bodkin?*

Hamlet 3.1

whom Seneca adored for having killed himself for the sake of freedom, was no defender of the freedom of the individual, Seneca's ideal. Cato was a conservative, emulating his ancestor, Cato the Elder, who scorned the Scipioni for fear their individualist philosophy would undermine the communitarian values of the Roman Republic (Christ 37). It was for the political freedom of the community that Cato the Younger died, for freedom from tyranny, meaning from the monarchy, the rule of one person. Seneca's notion of freedom was the freedom of the individual, the ultimate freedom of the individual being suicide.

The best thing which eternal law ever ordained was that it allowed to us one entrance into life, but many exits. Must I await the cruelty either of disease or of man, when I can depart through the midst of torture, and shake off my troubles? This is the one reason why we cannot complain of life: it keeps no one against his will. Humanity is well situated, because no man is unhappy except by his own fault. Live, if you so desire; if not, you may return to the place whence you came. You have often been cupped in order to relieve headaches. You have had veins cut for the purpose of reducing your weight. If you would pierce your heart, a gaping wound is not necessary; a lancet will open the way to that great freedom, and tranquility can be purchased at the cost of a pin-prick . . . . (*Morales* Letter 70)

Seneca's tranquil mind is a far cry from Kirilov's agitated heart, but in substance their cry is much the same: God is in ourselves, not outside and suicide may be an act of liberation, salvation, the act by which the self for the last time affirms that it is self.

**"How absolute the knave is"**

The paradigmatic case regarding suicide is the same case to which Shakespeare alludes in Act V Scene 1 of *Hamlet*: as referred to in, among others, Plowden's *Reports* (1562) and Blackstone's *Commentaries*. In April 1554 Sir James Hales, justice of the Common Pleas, drowned himself in a river near Canterbury.<sup>6</sup> At some point in or before 1540, Hales and his father John had entered a lease for twenty years which was to take effect on Michaelmas (September 29) 1540. The lessor was Archbishop Cranmer, himself imprisoned since the ascension of Mary. Hales Sr. died soon afterwards, whereupon James took the whole lease through survivorship. The lease, renewed in 1552 as

*For within the hollow crown  
that rounds the mortal temples of a king  
Keeps Death his court; and there the antic sits,  
Scoffing his state, and grinning at his pomp;  
Allowing him a breath, a little scene,  
To monarchize, be fear'd and kill with looks,  
Infusing him with self and vain conceit,—  
as if this flesh, which walls about our life,  
Were brass impregnable; and humour'd thus,  
Comes at the last, and with a little pin  
bores through his castle-wall, and—  
farewell, king!*

*Richard II* 3.2.159-70

joint tenure for twelve years by Hales and his wife Margaret, was to take effect on Michaelmas, 1560. Had Hales committed suicide, say, in the first week of October 1560, there can be no doubt that Lady Margaret would have become sole tenant as survivor of the joint tenancy. Blackstone wrote:

But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, . . . on the latter, by a forfeiture of all his goods and chattels to the king, hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act. And it is observable that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land and the husband drowns himself, the land shall be forfeited to the king, and the wife shall not have it by survivorship. (189)

Lady Margaret was not yet joint tenant at the moment of her husband's suicide, which she would have taken had the cause of his death not been suicide. But as the case now stood, the King's claim of forfeiture would begin at the same time, namely at the moment of the death, and the King's claim was paramount. However, the King's claim would not have been paramount had Lady Margaret already been joint tenant in 1554, as the judge objected to the counsels of the plaintiff. Lady Margaret was not to achieve possession until Michaelmas, 1560. Moreover, Blackstone's statement (in which survivorship within the marriage and within a joint tenancy seems to have been confused) is contradicted by Swinburne:

If a felon be indicted, and afterwards attainted by verdict or confession, the time of the fact committed comprised in the indictment is not to be regarded in respect of his lands, but in respect of his goods, in the time of the judgment. And therefore if before judgment he do sell, give, or otherwise alienate his goods, such sale, gift, or alienation is good. (79)

In the case of a self-murderer there could be no indictment. The earliest possible moment of forfeiture was the act by which he came to his death. And any disposition outside of a will—for instance the kind Oxford made for his goods and chattels as indicated by Edward Johnson's bill of complaint—was good. Yet a will would not have been good because the rights of the heirs and of the Crown would take effect simultaneously, namely on the the suicide of the testator. This was recognized by the counsels of the plaintiff, Lady Margaret, which explains their efforts to construe the case as though the right of the plaintiff preceded the right of the Crown.

However, as can perhaps be sensed from Swinburne's foregoing statement, there was a technical difficulty in that suicide, *felo de se*, was seen as a murder, a felony, and in the case of a felony, forfeiture of his goods was related to the time the felon was convicted, not to the time of the act and the death of his victim. This was true regardless of whether the victim died instantly or some time afterwards. And the lands of a suicide were not forfeited whereas the forfeiture in case of felony took

effect on the commitment of the act. Here the Law demonstrated the opposite view from that of Dostoevski's Kirilov, who held suicide as the noblest expression of the individual will and murder of another for the lowest. Whatever one may think of Kirilov's view, it is more logical than the legal view. Perhaps it was just such an insight that inspired Shakespeare to put an explanation of legal principles and views on suicide into the mouth of one who is at the same time a clown, a lawyer, and a grave-digger, throwing clods of dirt and dust into the air. It may also be just such an insight that spurred Oxford, as he approached death, to protect his goods and chattels.

Indeed the law held—with the Chief Justice and counsels for the plaintiff and defendant concurring—that a suicide was an even greater "outlaw" than an ordinary felon because he prevented the Law from reaching him. By killing himself he made himself truly and permanently "out" of the "law." It looks as though the lawyers were avenging themselves on the suicide, or rather, since he was no longer within reach, on his innocent kinfolk.

Once the counsels of the plaintiff recognized that the claims of the Crown and their client had taken effect more or less at the same time, they tried to prove that there was nevertheless a small difference which caused the claim of Lady Margaret to precede that of the Crown. Logically, they argued, there can be no forfeiture before the death of a suicide. A felon was not a felon so long as his victim was not dead, thus a *felo de se*—a felon of himself—was not a felon so long as he was still alive. Even if the death and the forfeiture are simultaneous, the death will have priority before the forfeiture, that is, the end of his life marks the beginning of the forfeiture, and though the forfeiture is so close to the death that there is hardly any time between them, as a fact of law, the one must precede the other, therefore by no means can forfeiture have relation to any time during his life. Hence, in this case the relation of forfeiture has no relation to any time in the life of Sir James Hales, but only to the time of his death. Therefore, any person who can claim a title to the ownership or possession of his goods and chattels which is older than his death will make void the claim of the King and Queen (Philip and Mary).

At this juncture they brought in the joint tenancy for a term of twelve years of Hales and his wife. This title took effect before the King's while Hales was alive—although it should be remembered that the title was not to take effect until Michaelmas, 1560. The claim, they argued, did not derive from Hales but from the prime lessor, Cranmer, then Archbishop of Canterbury. They also referred to a precedent, a case in the time of Edward IV wherein a debt was owed jointly to two persons, one of which slaughtered himself. The debt went to the survivor and not to the King. This argument had no bearing on Hales's case, however, since there had been no joint tenancy at the time of this suicide.

Lady Margaret's lawyers followed another line of argument as well, one so convoluted that it is almost as amusing as Shakespeare's parody. They argued that the act of suicide consists of three parts: first, the imagination, considering whether it is convenient for him to destroy himself or not and how it can be done. The second is the resolution, the determination to put the plan into effect. The third is the perfection, which is the execution, and it too consists two parts: the beginning and the end. The beginning is the feausance of the act which causes the death, and the end is the death which is but a sequel of the act. The act done by Sir James Hales which is tortious and causes the

death is going into the water, and death is only sequel to it, and this tortious act should in no way be punished because the person cannot be punished, given that he is dead. Thus forfeiture could not relate to the act of going into the water. Shakespeare's Clown put it this way:

For here lies the point: if I drown myself wittingly, it argues an act; and an act hath three branches—it is to act, to do, and to perform; argal, she drown'd herself wittingly. . . . Here lies the water; good. Here stands the man; good. If the man go to this water and drown himself, it is, will he nill he, he goes—mark you that. But if the water come to him and drown him, he drowns not himself. Argal, he that is not guilty of his own death shortens not his own life. (5.1)

The latter part of the argument is not in Plowden's report, but it is a quiddity found in other lawsuits, for instance in Constable's case, decided in 1601 but referring to former cases. Here the subject was whether a wreck which was flooded from the sea onto a plot of land belonging to a manor should belong to the lord of the manor or to the Lord Admiral, whose jurisdiction covered anything that happened at sea.

In this case it was resolved by the whole court that the soil on which the sea flows and ebbs, sc. between the high-water mark and low-water mark, may be parcel of the manor of a subject. . . . Yet it was resolved that when the sea flows, and has *plenitudinem maris*, the Admiral shall have jurisdiction of every thing done on the water, between the high-water mark and low-water mark, by the ordinary and natural course of the sea: and so it was adjudged in Lacy's Case . . . that the felony committed on the sea *ad plenitu' maris*, between the high-water and the low-water mark, by the ordinary and natural course of the sea, the Admiral should have jurisdiction of; and yet when the sea ebbs, the land may belong to a subject, and everything done on the land when the sea is ebbed shall be tried at the common law, for it is then parcel of the county. (Brigman 505-10)

Shakespeare might have taken this part of the grave-digger's reasoning from Lacy's or a similar case.

We may pass over the pleading of the defendant to whom had been granted the forfeited lease by the Crown although something should perhaps be said about the reply of Chief Justice Browne. It is this reply which is most often quoted to show that Shakespeare had *Hales v. Petit* on his mind when he wrote the grave-digger scene, and further that he was aware of Browne's arguments, even though his purpose was chiefly to poke fun at the logic-chopping of the plaintiff's counsels. Whereas the plaintiff's counsels were attempting to prove that the forfeiture could not take place before death had ensued, Browne related the forfeiture to the act which led to the death, that is the entering the water, continuing: "Sir James Hales was dead; and how came he to his Death? It may be answered, by drowning; and who drowned him? Sir James Hales; and when did he drown him? In his Life-time. So that Sir James Hales being alive caused Sir James Hales to die; and the act of the living man was the death of the dead man. (Rudden 540-4)

Judging from the dispositions he took with regard to his chattels and goods, it seems likely that Oxford was familiar with the case of *Hales v. Petit*.<sup>7</sup> And from the first scene of the fifth act of *Hamlet*, it would seem that Shakespeare, too, was familiar with it.

### Better an antique Roman than a Dane?

Act V Scene 1 of *Hamlet* opens with a paradox: "Is she to be buried in Christian burial when she wilfully seeks her own salvation?" To a pious Christian, the notion that salvation might be achieved through suicide is an impossibility, a contradiction in terms. Not however to a stoic like Seneca, or to Socrates as presented by Plato in the *Apologia* and *Phaedon*. So Act V opens with the same question Horatio infers at the end: is it better to be an antique Roman than a Dane?

It is generally felt that the grave-digger is a witty but uneducated clown who confuses legal terminology. Bernard Rudden strongly opposes this view:

Lest such slights receive acceptance, this note will remind readers that, on the contrary, the First Grave-digger displays an exact acquaintance with the law, a deft sensitivity in the use of Latin, and an analysis of causation which anticipates by centuries the tenets of the foremost modern schools. (541)

One instance that is used to show the grave-digger's ignorance is his use of the term "se offendendo." On the contrary, *se offendendo* is an excellent term for a *felo de se*—one who who acts as a felon against himself, who offends himself. Another instance is the apparent corruption of the Latin word *ergo* as "argal." But in fact what we have is Shakespeare punning on the Latin term "ergo" and the name of a well-known logician, John Argall. In Argall's *Introductio ad artem Dialecticam*, (published in 1605, but probably circulated earlier in manuscript) he described lawyers as "*novi* Pettifoggers in the Law *qui nunc undique sicut Locustae multiplicantur*," i.e. "new pettifoggers in the law<sup>8</sup> which are in our times increasing like locusts." As Samuel Johnson points out, Shakespeare could never resist a "quibble."

On the other hand, the grave-digger as clown is not wholly *malapropos*. Was this the message Shakespeare wished to impart; that is, that the logic of the Law—in this case the law which treats of suicide from a traditional Christian point of view—turns to farce when it attempts to hold court over the ultimate questions of life and death? In view of recent court battles in Europe and America over the "Right to Die," which would allow patients suffering from terminal diseases to have control over the timing and circumstances of their death, it is a question as relevant today as it was in the days of Shakespeare, Seneca, and Socrates.

### A death without a funeral or a tomb

Officially, the attitude toward suicide in sixteenth-century educated circles, steeped in Roman history and familiar with Seneca, was more nuanced, as can be seen from John Donne's 1608 treatise on suicide, *Biathanatos*. As a whole the ruling class would tend to remain tacit about the



suicide of a member of their community, partly to spare the feelings of their family, partly to keep shameful information about a fellow from spreading to gossip, and partly to keep the Crown from absconding with their personal property. Matters such as suicide, homosexuality, concubinage, and duels, though publicly condemned in the harshest terms by the authorities, were silently tolerated within the ruling class—that is, as long as the principals were discreet. For instance, despite the fact that duelling was officially strictly forbidden, it went unpunished if the duel was fought in a place sufficiently remote from the Court. In France duellists were sometimes executed, but rarely for the duel as such, only if it was accompanied by an act of outright defiance of royal command.

In her will, the Countess of Oxford disposed: “. . . that there be in the said Church erected for us a tomb fitting our degree and of such charge as shall seem good to mine Executors hereafter named.” By this we see that by November 25, 1612, Oxford had a grave in the church of Hackney but not yet a tomb “according to his degree.” He was still “tombless,” and “tombless” in Shakespeare’s own words meant “barred from commemoration”:

. . . lay these bones in an unworthy urn,  
Tombless, with no remembrance over them.  
Either our history shall with full mouth  
Speak freely of our acts, or else our grave,  
Like Turkish mute, shall have a tongueless mouth,  
Not worshipp’d with a waxen epitaph.

(*Henry V* 2.2.228-233)

Though not quite so stringent, Shakespeare’s lines suggest Plato’s suggested treatment of a suicide:

. . . if he be convicted, the servants of the judges and the magistrates shall slay him at an appointed place without the city where three ways meet, and there expose his body naked, and each of the magistrates on behalf of the whole city shall take a stone and cast it upon the head of the dead man, and so deliver the city from pollution; after that, they shall bear him to the borders of the land, and cast him forth unburied, according to law. . . . They who meet their death in this way shall be buried alone, and none shall be laid by their side; they shall be buried ingloriously in the borders of the twelve portions of the land, in such places as are uncultivated and nameless, and no column or inscription shall mark the place of their interment. (*Laws* Book 9)

Plato implicitly admits that sometimes suicide might be justified “if the state requires him,” as it did with Socrates or Theramenes, or if there is some other compulsory reason, although he gives no concrete examples. The common view in Christian Europe, however, was the unconditional view of Saint Augustine, that killing oneself was in no case justifiable.

The Larousse French dictionary defines *mort sans sépulture* (death without a tomb) as synonymous with “dishonorable death.” In *Biathanatos*—finished in manuscript in 1608 though not published until sixteen years after his death—John Donne tells us which kinds of death were held



dishonorable in the early seventeenth century. *Biathanatos* means "dying by violence" but in the sixteenth and seventeenth centuries it came exclusively to designate suicide (Daube 402). Donne's subtitle is telling enough: "A declaration of that Paradox or Thesis that Self-homicide is not so naturally Sin that it may never be otherwise." Donne declares in his preface that his purpose is "to remove scandal" (32). He points to the Roman law which did not punish suicide "as in many other crimes the laws do, by confiscation, and by condemning the memory of the delinquent, and ignobling his race" (66). Though the family was not punished by loss of status in England, confiscation of goods and chattels and condemnation of the suicide's memory were accepted in England as well as in other European countries.

Donne is cautious enough not to cite England as an example of what he clearly considers to be an unjust law, referring instead to the earldom of Flanders:

The like must be said . . . in the Earldom of Flanders; if it be true that they allow confiscation of goods in only five cases: whereof [suicide] is one; and so it is ranked with treason, heresy, sedition, and forsaking the Army against the Turk, which be strong and urgent circumstances to reduce men from this desire. (74)

What has gone unnoticed is that the same thought was repeated by John Milton, William Basse, and Ben Jonson. In 1630 John Milton wrote:

What needs my Shakespear for his honour'd bones,  
The labour of an age in piléd stones, . . .  
Hast built thyself a live-long monument. . . .  
Hath from the leaves of thy unvalu'ed book,  
Those Delphick lines with deep impression took, . . .  
And so sepulcher'd in such pomp dost lie,  
That Kings for such a tomb would wish to die.

The same thought appears in verses considered to be the work of John Donne, first published in 1633, two years after his death. Later attributed to William Basse, they were removed from Donne's corpus, but Donne must have had a manuscript copy among his papers. The verses were probably written in or after 1623, as they echo Ben Jonson's First Folio eulogie:

Renowned Spencer, lie a thought more nigh  
To learned Chaucer, and rare Beaumont lie  
A little nearer Spenser to make room  
For Shakespeare in your threefold fourfold tomb . . .  
If your precedency in death doth bar,  
A fourth place in your sacred sepulcher,  
Under this carved marble of thine own

Sleep rare tragedian Shakespeare, sleep alone, . . .  
 Possess as Lord, not tenant, of thy grave . . . .

Again, the lines suggest that, contrary to Chaucer, Spenser and Beaumont, there is no sepulcher or tomb for Shakespeare— though there is a grave. And finally from Ben Jonson:

My Shakespeare, rise; I will not lodge thee by  
 Chaucer, or Spenser, or bid Beaumont lie  
 A little further, to make thee a room:  
 Thou art a monument without a tomb,  
 And art alive still, while thy book doth live,  
 And we have wits to read and praise to give.

But if Shakespeare had a monument only in his work, but no tomb with which to be remembered, what, then, could have been his crime? Heresy? Sedition? Treason? Felony? Suicide? Heresy, sedition, treason, or felony would hardly have gone without public notice. Suicide could.

Almost as suggestive is an epitaph written for Oxford's daughter Susan Vere, Countess of Montgomery by, it is thought, either William Brown, the pastoral poet, or Ben Jonson—both of them patronized by the Herberts:

Though we trust the earth with thee,  
 We will not with thy memory;  
 Mines of brass or marble shall  
 Speak nought of thy funeral;  
 They are verier dust than we,  
 And do beg a history:  
*In thy name there is a tomb,*  
*If the world can give it room;*  
 For a Vere and Herbert's wife  
 Outspeaks all tombs, outlives all life.



Notes

1 *Seised* and *seisin* must not be confused with *seized* and *seizure*. The latter words are of Romanic, the former of Germanic origin, carrying the meaning of the German *sitzen*, "to sit," "be-sitzen" meaning "to sit on," that is "to possess."

2 In feudal times, when power was based on control of land, the lord of a demesne was concerned that his power not be diminished by a landowner in his fiefdom transferring land to one of his enemies.

3 Nelson refers to the document PRO REQ2/388/28, a document he does not fully reproduce in his book but which can be viewed at his website.

4 "The denial of all proprietary capacity to the married woman by the common law was remedied by the invention of property vested in trustee to her separate use" (Holdsworth *Law* 4.447).

5 This error, widely repeated even today, was probably introduced by the Victorian historian George Grote in his monumental work on the history of ancient Greece. But the great contemporary historian Thucydides in his *History of the Peloponnesian War* repeatedly tells us that it was custom not to rescue the surviving soldiers, only the corpses of the dead. The reason is clear. The survivors could swim to the coast themselves; all sea battles were fought near the coast and foot troops followed the ships on the shore. Plato, in his *Apologia*, speaks only of slain men.

6 The case reverberated into the political-religious controversy of the day. James Hales, son of John Hales, second chief baron of the Exchequer (the justices of the court of the Exchequer were called "baron"), was a zealous protestant serving on several commissions in the reign of Edward VI, who remained loyal to the latter's rightful successor Mary. Nevertheless he ran into troubles soon after the ascension of Queen Mary and King Philip in 1553. One cause was certainly his membership in a commission that tried the Catholic bishop Gardiner, Mary's Lord Chancellor. He was imprisoned and urged to abjure Protestantism, whereupon he attempted to kill himself but survived. On his release in April 1554 he drowned himself in a creek behind his home. As Catholics and Protestants were always competing for martyrs, his case presented the difficult problem whether a suicide could be considered to be a martyr (MacDonald 61-3).

7 [Editor: Oxford may have known of *Hales v. Petit* from a personal source. In 1563-67, while in residence at Cecil House in London, he would have come in contact with Barnabe Googe, whose final translation of *Zodiacus Vitae*, by Palengenius, was published that year. Googe was a protege of Oxford's guardian, William Cecil, the son of a distant relative and former land agent. Margaret Hales was Googe's maternal grandmother, with whom he was extremely close (Kennedy 5). The trial, discussed in Plowden's *Reports* during the 1560s, would have been a topic of importance to Googe, who, while fond of his grandmother, may also have hoped to benefit had she won the lawsuit.]

8 From *pettifactors* (OED), small time lawyers, similar to today's "ambulance chasers."

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