

This Rhymeless Nation

or:

The Breach Unprov'd, being a perfect narrative expressed in poetical numbers concerning the late lawsuit now happily concluded, in which The Poetry Foundation, notwithstanding glorious *Gifts* of *Monies* undertaken to endow it perpetually, and to avoid Testamentary Contests, had seen fit to light its Donor's Big Toe On Fire through petitions that demonstrate its own neglectful act of Reading; with explanatory NOTE supplied.

Written by One Banditto, *Gent.*, lately housed near the shed by the end of Ramshackle Road, in the land of the rhyming weir.

No good deed goes unpunished. Anon

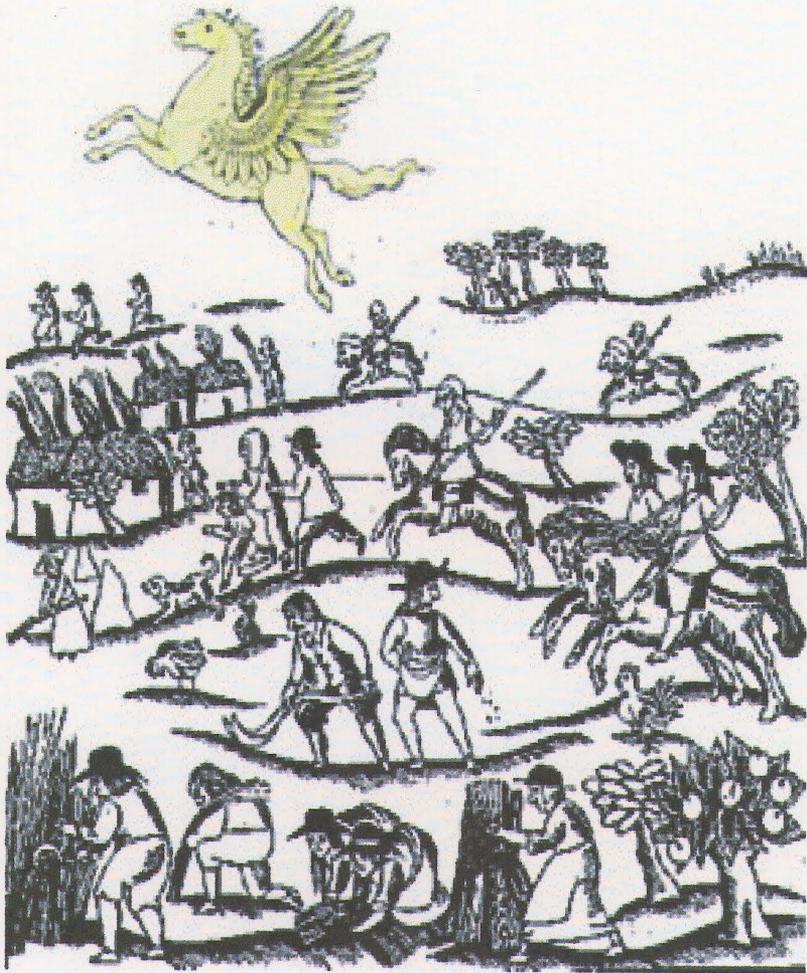
C A M B R I D G E :

by Infolio.

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at the sign of the GILT.

THIS RHYMELESS NATION

*A NOTE whereunto is annexed a poem
lately found by the waters of michigan*



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NOTE: In late 2001, National City Bank of Indianapolis, court-supervised conservator for the estate of Ruth Lilly, a “protected person,” was directed by the probate court of Marion County, Indiana to draft a new estate plan for Ms. Lilly. When the bank petitioned the court to approve the new plan, it noted that during the period of her conservatorship protection, which extended back to 1981, Ms. Lilly had managed to execute, with no court involvement, “twenty-two testamentary documents disposing in excess of \$1 billion” that likely would generate “years of costly and burdensome litigation upon her death.” Further, without the new plan, which included large lifetime gifts as well as testamentary dispositions, Ms. Lilly’s estate would be subject to “significant, unnecessary taxes.”

Accordingly, the bank proposed a plan that essentially restored the pattern of distribution among beneficiaries present in the last will Ms. Lilly executed prior to the establishment of her conservatorship many years ago—when her estate was worth roughly 5% of what it had become worth by 2001. This last fact alone explains why the well-known gift to Poetry Magazine under the new plan turned out to be so vast and seemingly out-of-proportion with any reasonable expectation.

The gift was conveyed through several trusts, including two Charitable Remainder Annuity Trusts (“CRATs”) that would distribute principal to The Poetry Foundation (as it is now called) and two other charities upon termination. These trusts were funded with roughly \$286 million of Eli Lilly common stock, \$100 million of which represented the initial value of the Poetry Foundation’s share.

The CRATs quickly became the focus of a major lawsuit when the value of Eli Lilly dropped through the spring and summer of 2002. The Poetry Foundation and another charitable beneficiary, Americans for the Arts (“AFTA”), sued the bank for breach of fiduciary duty for its purported failure to sell off the concentration in Lilly stock and reinvest the proceeds in a diversified portfolio. In asserting this they claimed damages of approximately \$100 million. While the bank *was* in fact implementing a diversification strategy, it did not happen soon enough to suit the charities, who in effect argued that the bank should have liquidated the stock immediately upon funding.

The case proceeded on through a blizzard of petitions and motions. Fortunately for all, by late April 2005, the stock market had rebounded and the trusts had recovered to 97% of their initial value, or \$277 million (including distributions). Even better, by June 2005, according to the bank's brief to the Appellate Court, "each charitable remainder beneficiary...had already received over \$40 million dollars from trusts (other than the CRATs) under the plan approved by the Probate Court." One assumes that some of this windfall from Ms. Lilly's *other* trusts had been budgeted for attorneys' fees to sue the bank that arranged the gifts.

The bank's motion for summary judgment, filed in June 2005, was granted in December 2005; the charities then appealed the judgment to the Court of Appeals. The Court of Appeals upheld the probate court's judgment in favor of the bank in October 2006. As of this writing, the charities had moved for transfer to the Indiana Supreme Court.

Beside the staggering gifts negotiated for the charities by the bank—and beside the fact that the charities refuse to allay their pursuit of a huge surcharge payoff at bank expense, even though the trusts have recovered their values—what is striking about these circumstances is that the Poetry Foundation and its co-plaintiff *actually helped create the terms of the trusts they sued over.*

Hoping to head off the inevitable will contest, and to avail itself of tax strategies designed to promote gifts to charities, the bank had sought out and brought to the table all the various interested parties to review and comment on the new estate plan prior to its approval by the probate court. The language that later became at issue was found in paragraph 10(b) of the trust documents, which authorized the bank as trustee "to retain indefinitely any property received by the trustee," and stated further "that any investment made or retained by the trustee in good faith shall be proper despite any resulting risk or lack of diversification."

The Appellate Court describes the situation: "The appellants were all represented by numerous sophisticated attorneys who are experienced in the area of trusts and estate planning. The attorneys spent well over 400 hours and amassed nearly \$250,000 in legal fees poring over the documents, formulating objections and proposed changes, and

presenting their objections and suggestions to the probate court. No party was naïve, unrepresented, or taken advantage of in this situation. Moreover, paragraph 10(b) is neither buried nor misleadingly labeled. Indeed, it takes up one-half of one page in a ten-page document.” The Court also observed that “National City and the probate court afforded the appellants and their attorneys every opportunity to question or object to every facet of the proposed estate plan. The appellants chose not to quarrel with any portion of paragraph 10(b), and they are not now entitled to turn back the clock and claim that, in hindsight, the clauses are problematic and unenforceable.” The bank’s counsel, in its brief to the Appellate court, argued more pungently that “the Objectors [The Poetry Foundation and AFTA] and their counsel created the very trusts they seek to side-step. The Objectors are here only because, having suffered through a down market in 2002, they want to re-write trust documents they helped draft for their own benefit in Ruth Lilly’s estate.”

As to the heavy fees charged by the charities’ attorneys to review the trust documents that transferred enormous gifts to them, the Appellate Court pointedly noted all such fees were paid “from Ruth [Lilly]’s estate” (emphasis in original).

The President of the Poetry Foundation, Mr. John Barr, has argued strenuously that poets need “to pay as much attention to how they live as to what they write” in order to sustain “poetry as a moral act.” Within that context, one may wonder how to assess the obstinate pursuit of expensive litigation against the bank that sought out his organization to secure its interest in Ms. Lilly’s estate, thereby assuring its survival in perpetuity.

This rhymeless nation
Seeks foundation
For edification;
Such rhymes it knows

Are basically those
That streets compose
To fill their nose;
Not the great tradition
Of rhythmic diction
Whose moral force
Can kill a horse
Unless it canters
On Greenwich acres.
And so we praise
Ourselves, who raise
Poetry's name, and lift
Equity's gift,
No longer bereft,
But flush with validation
From timely donation.
Let us build us a castle,
The funding's no hassle;
We'll sing there for you
And your money too;
Though you lack a soul,
We'll supply it whole,
Two-hundred million times
In two-hundred million rhymes.
Our monthly, old and cranky,
Once doubled as a hanky,
Yet with newer, bolder purpose
We'll haul it to the surface,

Mandating such use
As abjures the abstruse,
And feeds from living
Not workshop jerking.
We'll cash all checks
From you hapless hacks,
Then hire counsel
To refill our mainsail;
So belly up to the bar
And reach for the jar
Of endless bounty
(Not the one in Tennessee
That shapes what we see);
Nor does greed or ingratitude
Capture our attitude,
But our fiduciary duty
To multiply our booty.
We scream diversify
All but poetry!

Our lily, gifted by thirds,
Has resolved into turds,
Albeit plenty of them.
Bake 'em in the oven
Then look again:
They've all turned green.
For in taking discovery
To fish for recovery

We expensively see
How much richer we'll be—
Reconstituted cash
Shall overflow our stash.
Hedge funds and courts
Real estate and torts,
That's playing the game
In the moral muse's name.
Meanwhile, you benighted masses
(To us the same old asses),
Seen through our glasses
Your brains are molasses;
So we'll write plain, and we'll write clear
To bounce this off your ear:
All poems shall make sense
Compounding years hence
Despite negligence.

And you slugs in the gallery
Drawing bank salary,
Attend to these notions
As pertinent cautions:
No prudent investing
Without second-guessing,
No facts but in hindsight
This is your insight:
Think 'concentration'
For your meditation;

*Consider what risks you take
For poesy's sake;
Avoid us career-destroyers
With our silken lawyers,
And your own frightened bosses
Amid wreckage of losses,
If only on paper,
Not in rhyme or in meter.*

L'envoy

Our appeal was taken
But our cause is forsaken;
Contentions unravel
Under pressure of gavel.
That our counsel can't read
Gave rise to our greed;
In a corner they backed us,
Also known as Malpractice.
*Still our gift horse canters
On Greenwich acres.*

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