



SHYLOCK V. ANTONIO ON APPEAL

“Opinion” by Jed S. Rakoff, U.S.D.J.

ON DECEMBER 1, 2008, the Venetian money-lender Shylock appealed, somewhat belatedly, from the decision of the Venetian trial court denying him recovery of a pound of flesh from the merchant Antonio, as reported in the law reports of W. Shakespeare. The appellate court consisted of U.S. Circuit Judge Richard Posner, U.S. District Judge Jed S. Rakoff, New York Appellate Division Judge Dianne T. Renwick, noted U.S. litigator Floyd Abrams, noted U.K. litigator Anthony Julius, German law professor Bernhard Schlink, and noted Shakespeare scholar Julie Stone Peters – all sitting by designation. Shylock’s principal points on appeal were that the underlying proceeding was procedurally defective because the trial judge, Balthazar, was really Portia in disguise; that the trial judge’s determination that the contract was contrary to public policy was erroneous because Venice, as a city dependent on commerce, requires strict enforcement of private contracts; and that, even if the contract were void, Shylock was entitled to return of the 3,000 ducats he had loaned to Antonio (albeit without interest, since the 400-year delay in bringing the appeal was chiefly attributable to Shylock’s tardiness). Each judge ruled separately, but in the end Shy-

Jed S. Rakoff has served on the United States District Court for the Southern District of New York since 1996. Copyright © 2009 Jed S. Rakoff.

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lock prevailed on his third argument, with Judges Posner and Julius dissenting. Below is the majority opinion of Judge Rakoff, as read from the bench.



I thank you for this opportunity
To give my views with full immunity.
My views, I hope, will seem less amateur
If stated in iambic pentameter.

I trust you won't find it far too jokey
If I add a spondee or a trochee
Or perhaps a dactyl or an anapest,
These things are offered simply as a jest.

But first I must express my gratitude
To counsel, for their hard work . . . and attitude.
Though the laws of Venice you often wrenched,
Each of you deserves to be called a mensch.

But now let's turn to appellant's first point:
He says the lower court was out of joint.
The court, he says, was a sham consortia
'Cause Balthazar was really Portia.

But it is well known, both far and near,
That judges are rarely what they appear.
If all that glitters is really not gold,
Then I say a Porsche's as good as a Rolls.

If not every judge is a Holmes or a Posner,
Then I say it's fair to make use of a poser.
Why sneer at a sham, why carp at cross-dressing
When any old judge is always a blessing.

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But now let's turn to appellant's next claim:
He says that Venice will suffer much shame,
Our commerce will fail, our enemies mock us,
The people of Venice will be without naches,
If contracts by us will not be enforced
The merchants of Venice will be like corpses.

Oh Venice dear, oh Venice imperial,
The home of canals and diseases venereal,
Oh Venice, will life here cease to be fresh
If we don't give Shylock his pound of flesh?
Will merchants reject us and nations renounce us
If we don't give Shylock his 16 ounces?

The point is taken, and worthy of note:
Venice, like Citibank, must be kept afloat.
If Venice, like Lehman, was fated to sink,
Gondoliers, like brokers, would sure make a stink.

But this one case cannot carry such freight,
Venice was never a common law state.
Even a Jew and even a Jewess
Knows the difference twixt Venice and the U.S.
In civil law countries, judicial precedent
Has as much weight as a lame-duck President.

Justice, besides, must be tempered with mercy,
Just like New York must be kind to New Jersey.
Mercy, like peaches, should never be strained,
Mercy, like toilets, should always be drained.

But, says appellant, if for flesh I can't sue
At least make him pay me the money that's due.
Although it's no more than some rain in a bucket,
He still should pay me my 3,000 ducats.

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No, says appellee, the contract is venal,
And so it is void, as it plainly is penal.
Our argument's sound, there's no way to duck it,
And as for his ducats, well tell him to . . . fudgetaboutit.

But justice is nothing if not even-handed,
Appellee should not make out like a bandit.
The law is the law, and though it seems funny
The way of all flesh is to give him his money.
(Though at the exchange rate fixed at this time,
3,000 ducats is just a thin dime.)

So, hey nonny-nonny, hey nonny-no,
Give him his dime and be done with this show.
Give him his dime in place of his ducat
And let us end now with this half-rhyméd couplet.

