

SANCHO PANZA ON THE APPELLATE BENCH

Trial judges appear frequently in literature and philosophy, and Solomon is the poster-boy for the tough-case clever-judge formula: two motherly litigants and a baby, not-ready-for-vivisection, if the point may be put so crudely. Appellate judges' appearances in writ, holy or otherwise, are more rare. The problem would seem to be that the author (or Author) must mobilize parties in the trial court, and then bring forward their issues in appellate refinement; of course, there must be a result for the parties and a result for the non-parties who are the constituencies waiting for rules that society-ruled-by-law so eagerly yearns for. We pass by the beguiling myth at the end of Plato's *Gorgias*, in which Minos appears as the world's first appellate judge, dividing the quick from the dead, as a "court of appeal."

But the grand thing about the appellate judge, when she is deployed in literature, is that she's caught between the trial bench and whatever games the author feels like playing. Here we invite the reader's attention to Sancho Panza, he who rides a donkey, Don Quixote serving, in hopes of achieving his ambition of ruling an isle. He gets a fake island, and there's probably a good plot for a reality TeeVee show in there.

Sancho is the victim of an elaborate practical joke, which requires the alert reader to plow through twenty eight chapters of Part 2 of *Don Quixote* in which a Duke and Duchess play practical gags on the Don and Sancho Panza, such as putting them blindfolded on a horse and blowing air in their faces; they've traveled thousands of miles. What a thigh-slapper. Or Don Quixote's face is attacked by cats. Hilarious. I'm not making this up; there are people who profess to have read all of Part 2 and think it's the greatest work of art known to man.

Sancho is served trumped-up cases, because (Cervantes' conceit) Sancho's good-hearted, man-on-the-dusty-street common sense responses to these faked suits amuse the (aforesaid but unnamed) Duke and Duchess.

The trial bench is stymied by the following situation: If a man approaches them and tells the truth they let him pass, and if a traveler approaches and testifies falsely they hang him. In the case that's on appeal to Sancho, a traveler has approached, and says to the trial judges, "You're going to hang me." Now the reader (c. 1615 or thereabouts) is obliged to

accept that there can be true or false testimony about future events, or even the intentionality of a witness. Okay, accept that.

Panza, J. handles the issue by asking, “Why don’t you instruct the judges to hang the part of the man who’s telling the truth?” which then leads to the riposte (we’re at oral argument, always a dicey venue), “Well, we’d have to cut him in half and that’s just an order to kill our traveling litigant.”

Panza’s problem is that he can’t have it *all* different ways. He can’t insist that he’s previously instructed the trial judge how to handle every eventuality, because something new is always going to come up (even on remand). So the appellate bench is always making up (at least) one additional rule to decide the case, or to order the trial judges to decide the case.

Panza’s power to decide cases is, in this view, the power to notice that all the rules, substantive and procedural, haven’t been written down. And this applies with some force to the situation of the paradox proponent, the appellate barrister. If you write your appellate brief and then urge, “Those are all the rules that you need,” even as the worthy Sancho Panza, J. embraces your argument, you and he will only discover that there are many practicing and academic lawyers happy to fence with you about everything, including the necessity or desirability of the existing rules and, more to the point, whether there is one or some additional rules that must of necessity be created. Or to put it a third way, each side on appeal urges that it supplies – exclusively – all the reasoning the court needs, and each side is always wrong to seek to trap the appellate bench.

To get back to the case that Sancho Panza judged, as the Governor-Supreme Court of the Isles: here the trial judges insisted that they had previously cobbled up a complete list of instructions as to how to judge their cases. Panza’s critique wasn’t that cute or insightful, but maybe that is the literary gag at work. The trial judges were fooling themselves with the “complete list of instructions” paradox. The alert reader may recall that this was addressed in a Bar Rag article published Nov/Dec 2003 featuring Lewis Carroll’s take on the subject. Achilles played the befuddled, but earnest judge or advocate who wants to write down all the rules.

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There are fundamental – and merely logical – problems with being a listmaker, which is perhaps why rulemaking is assigned by the constitution to the Supreme Court. One crowd insists it's all written down (perhaps even in ancient writ) and the other crowd is obliged to suggest one additional rule that no one thought of. For the likes of Panza, J., it was all the same, for he was obliged to be marginally original in reasoning, even if he came off as a bit of a dimwit. In any event Panza resigned his governorship shortly thereafter and forfeited his pension. It is often the trial judge's or appellate advocate's brief to suggest that all known rules will solve all known problems, when the creative instincts of the appellate judge must fend off the Panza paradox thrust at them. And it is a hoot that Cervantes adds appellate logic to literature just as Holmes is credited with having subtracted it from the law.

Apparatus

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