On both sides of the record

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Published 81 Victorian Bar News 79-80 (Winter 1992)

ABSTRACT: The difficulty of the unity of parties to civil litigation where a party brings suit against himself is considered.

KEYWORDS: civil litigation — procedure — parties — costs — unity of parties — plaintiff and defendant one and the same person — suing oneself

It is accepted law that a person cannot appear as plaintiff and defendant in the same proceedings. Our wandering reporter, Mal Park, has discovered that even apparently trite law is not of universal application. Sheriffs and even lawyers, like pop stars, may sometimes appear on both sides of the record.

[1] In 1958 Holmes J of the South African Supreme Court (Natal Provincial District) decided “a whimsical case about a deputy sheriff who served a summons upon himself as defendant.” The plaintiff Dreyer issued a summons against the deputy sheriff Naidoo at Estcourt claiming £ 2,000 damages. When the plaintiff’s solicitors forwarded the summons to the deputy sheriff for service, he raised the question whether it would be regular for him (the deputy sheriff) to serve it on himself (the defendant). The solicitors’ response was that such service would not be irregular and that if he did not effect service without delay, the plaintiff would view the delay as irregular. Consequently the deputy sheriff served himself with the summons and charged the plaintiff’s solicitors a fee of 10s. 7d. for so doing. Thereafter the defendant took issue with the mode of service and sought to have it set aside as irregular: 1958(2) SA 628. Holmes J refused to set service aside and declined to make any order for costs on the basis that both sides were responsible for the irregularity complained of. The judgment is reprinted in Blom-Cooper’s The Language of the Law (1965) at page 350 and also Megarry’s Second Miscellany-at-Law (1973) at page 20 under the heading of “The Ambidextrous Sheriff”.

[2] In Dreyer v Naidoo at least the parties were distinct and separately represented by different firms of solicitors and counsel (Harcourt QC was briefed to argue the applicant deputy sheriff’s case). Consider now the Californian landholder Oreste Lodi who harboured some doubts about the validity of his land title. To resolve the issue, he filed suit on his own behalf and named himself as defendant. There is also a
suggestion that Mr Lodi believed he would secure an income tax advantage from the litigation but the reason for this is not clear.

[3] The complaint was duly served by the plaintiff Lodi upon himself as the defendant. How Mr Lodi accomplished this dexterous feat is not described and we can only presume that he permitted his left hand to know what his right hand was doing.

[4] In his capacity as defendant Mr Lodi failed to enter an appearance and in his capacity as plaintiff Mr Lodi sought to enter judgment in default. The Californian Supreme Court (Lund J) wouldn’t have a bar of these shenanigans and dismissed his application to enter judgment. At the time Lund J denied Lodi’s request to enter judgment and dismissed his complaint he did suggest to the plaintiff that he seek the assistance of legal counsel. Fortunately for the profession Mr Lodi did not take up this suggestion which would have surely resulted in schizophrenia as legal counsel sought to erect “Chinese walls” to protect the separate interests of the single client (qv Mallesons v KPMG Peat Marwick (1990) 4 WAR 357 and David Lee v Coward Chance [1991] Ch 259).

[5] Mr Lodi appealed against the court’s refusal to permit him to enter judgment in default and, to fully appraise the Californian Court of Appeal, Third District of all relevant law and argument, filed briefs on both sides. Moreover, in oral argument before the Court of appeal in October 1985 the published reports note the following appearances:

Oresti Lodi, in pro. per., for plaintiff and appellant.
Oresti Lodi, in pro. per., for defendant and respondent.

[6] The Court of Appeal (173 Cal App 3d 628, 219 Cal Rptr 116 (1985)) per Sims J (Acting Presiding Justice Regan and Carr J concurring) gave the following judgment:

The complaint was properly dismissed. In the circumstances this result cannot be unfair to Mr Lodi. Although it is true that as the plaintiff and appellant he loses, it is equally true that as defendant and respondent, he wins! It is hard to imagine a more even-handed application of justice. Truly it would appear that Oreste Lodi is that rare litigant who is assured of both victory and defeat regardless of which side triumphs.
[7] This Solomon-like judgment of the Californian Court of appeal belies the claim of Voltaire: “I was never ruined but twice; once when I lost a lawsuit, and once when I won one.”

[8] On the other hand, perhaps Mr Lodi could lay claim to being ruined twice in his life — when he both lost and won the same lawsuit.

[9] Although generally American courts do not award costs to the successful party they do retain a discretion to award costs against a party (and in extreme cases against a party’s lawyer) for outrageous or frivolous applications. The Court of Appeal described Mr Lodi’s as “a slam-dunk frivolous complaint”. However, in this case it is difficult to imagine how this ultimate sanction of a costs award could be effectively implemented against Mr Lodi and the Court concluded:

We have considered whether respondent-defendant should be awarded his costs of suit on appeal, which he could thereafter recover from himself. However we believe the equities are better served by requiring each party to bear his own costs on appeal.
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Title:
On both sides of the record

Date:
1992

Citation:

Publication Status:
Published

Persistent Link:
http://hdl.handle.net/11343/34838

File Description:
On both sides of the record

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