SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

GEORGE SASSOWER,

Petitioner-Appellant,

-against-

JOHN P. FINNERTY, Sheriff of Suffolk County,

Respondent-Respondent.

PEOPLE OF THE STATE OF NEW YORK, ex rel.,
GEORGE SASSOWER,

Petitioner-Appellant,

-against-

SHERIFF OF SUFFOLK COUNTY,

Respondent-Respondent.

GEORGE SASSOWER,

Plaintiff-Appellant,

-against-

ERNEST L. SIGNORELLI, ANTHONY MASTRTOIANNI,
VINCENT G. BERGER, JR., JOHN P. FINNERTY,
ALAN CROCE, ANTHONY GRYMALSKI, CHARLES BROWN,
HARRY E. SEIDEL, NEW YORK NEWS, INC., and
VIRGINIA MATHIAS,

Defendants-Respondent.

APPELLANT'S REPLY BRIEF

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STATEMENT

This case is inexplicable if one naively accepts the factual background as set forth by nisi prius or by the dicta of this Court in Sassower v. Signorelli, 65 A.D.2d 756, 409 N.Y.S.2d 762, particularly in the light of contrary findings made at recent plenary hearings (cf. Gilberg v. Barbieri 53 N.Y.2d 285, 441 N.Y.S.2d 49).

The sua sponte published and widely disseminated statement of respondent, Surrogate Ernest L. Signorelli, dated February 24, 1978, is the source of the material found in the opinion of nisi prius and the aforesaid opinion of this Court.

The sworn testimony of Surrogate Signorelli himself in October of 1981 reveals that his published diatribe was a conglomeration of fabricated and misleading statements. Not one of the more than thirty disparaging remarks contained therein -- not one --could be called truthful.

The proceeding against appellant's wife was completely dismissed by the Appellate Division, First Department, with leave to apply to this Court for sanctions against the Grievance Committee and its attorneys for the meritless charges brought against her.

The charges against appellant were either withdrawn or dismissal recommended. Pending in the Appellate Division, First Department, is appellant's documented motion to vacate the entire Signorelli inspired proceeding, as a fraud upon the Court.

Certain facts which nisi prius and this Court assumes to be true are not!

It is assumed that appellant was removed as Executor of the Estate of Eugene Paul Kelly on March 9, 1976. Untrue, as established by everyone's testimony, including that of Surrogate Signorelli, who had appellant perform executorial duties for one year after the contrived assertion of removal. As stated by Judge Melia in his Report (p. 60):

> " In the intervening year, court transcripts of proceedings before the Surrogate, amply demonstrate that participants in the proceedings considered the respondent to still be the executor."

The Grievance Committee, in its Memorandum to the Appellate Division states (p. 7):

> " The Grievance Committee is cognizant that testimony and documentary evidence point to the fact that respondent was, in fact, thought of (by most, if not all of the attorneys and the Surrogate involved) as the executor even after service of the March 9, 1976 order ..."

Continuing, Judge Melia reported (p. 61):

> " Indeed, in this period, on October 21, 1976, on the record, the Surrogate ordered the respondent to sell the house. He could only do so as executor.
>
> The respondent prepared and entered into a contract to sell on December 2, 1976. The Surrogate then aborted the deal.
>
> More than a year later, after paying additional taxes, the Public Administrator sold the house to the same party for the same price."

Nevertheless, as directed by the Surrogate, appellant turned over the books and records of the estate one week before the first contempt proceeding.

Ironically, it was the Signorelli inspired disciplinary proceedings which produced the unassailable evidence of what truly occurred in this matter.

The disciplinary proceeding also revealed the destruction or secreting by Surrogate Signorelli or his Court of filed documents, all of which were exculpatory to appellant and his wife, or damnatory to him.

Surrogate Signorelli had clearly and deliberately misled the attorneys for the Grievance Committee, as they themselves realized during the hearings. There is no judicial immunity for such duplicity (Briggs v. Goodwin, 569 F.2d 10 [D.C. Cir. -9/21/77], cert den 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 [6/19/78], and consequently when this fraud was unveiled, the Surrogate, several of his published complaints and disciplinary instigated charges went down like the Titanic.

This Court must surely recognize that this nuclear war, commenced by Surrogate Signorelli, aided and abetted by his Suffolk County entourage, could not possibly be over some insignificant records long ago turned over to the Surrogate's appointees. The records are a diversionary ploy to misdirect attention from the Surrogate's own egregious conduct.

The oral presentations clearly demonstrated a concerted attempt, by unconstitutional and barbaric means, to obtain some important end by Suffolk County officialdom. Was that end to silence appellant and abort any investigation? Certainly, the Disciplinary Proceedings which completely exonerated appellant and his wife indicates that a complete investigation be made of the Surrogate and his Court.

With this introduction, we submit this Reply Brief responding to the Attorney-General's Brief, as well as to that of the Suffolk County Attorney's.

Appellant filed a Notice of Appeal and the issues urged by him before this Court are (1) the illegality of the criminal contempt conviction and (2) the impropriety of the Order granting the Attorney General's CPLR 3211(a)[5][7] omnibus motion.

The sole issue urged by the County Attorney is the alleged error of Special Term in refusing to grant his client(s) summary judgment. This issue is not before this Court, since the County Attorney has neither served nor filed a Notice of Cross-Appeal. Nevertheless, appellant will very briefly address himself to that issue also.

The Attorney General contends that his judicial clients have absolute immunity and that appellant has not complied with CPLR 3016(a).

None of the respondents have chosen to defend the legality of the criminal contempt conviction in any respect -- nor can they, since it is shot full of fundamental errors!

This action concerns itself with deprivation of quintessential constitutional rights, including, for example, the right to access to the courts in order to secure a Writ of Habeas Corpus; the right to expect obedience to the mandate of such Writ; the right to be charged with a crime and informed of same; the right to be notified that a trial on such alleged criminal conduct is going to take place; the right to be at such trial in order to exercise other similarly exalted rights; the right to listen to the testimony of one's accuser and examine him on such testimony; the right to give testimony and introduce evidence; the right to be present at the verdict; the right of allocution; the right to assert the Fifth Amendment without it being falsely published "under color of law" that the accused persisted in his refusal to comply; the right not to be

labelled a pariah and branded with a badge of infamy, except by due process; the right not to have one's family attained, disparaged, and incarcerated in retaliation for asserting the aforesaid rights.

These rights were not accidently found under a gooseberry bush some 200 years ago, but are the end result of civilization's long, hard march from the cave and its struggle against a gestapo mentality.

To call these essential rights "technicalities", as did "Columnist" Signorelli, in his published sua sponte diatribe, or mere "procedural errors", is an affront to history, and those societal values which, at great human cost history has produced.

More recently, the charges of my accusers, in the recently completed disciplinary proceedings, evaporated when they were exposed to examination and cross-examination, clearly exemplifying the importance of some of these rights.

The distinction between technical, procedural errors, and the mass deprivation of fundamental rights by respondents' is comparable to the difference between lightening and a lightening bug.

POINT I

THE DOCTRINE OF JUDICIAL IMMUNITY DOES NOT WARRANT DISMISSAL OF PLAINTIFF'S COMPLAINT

1. The Attorney General does not dispute appellant's contention that on the judicial respondents' omnibus CPLR 3211 motion, it is all or nothing (Advance Music v. American Tobacco Co., 296 N.Y. 79, 84; Wright v. County of Nassau, 81 A.D.2d 864, 865, 438 N.Y.S.2d 875, 876 [2d Dept.]; Long Island v. Town of No. Hempstead, 80 A.D.2d 826, 827, 436 N.Y.S.2d 351, 353 [2d Dept.]; Kaplan v. Simone, 77 A.D.2d 863, 864, 430 N.Y.S.2d 675, 676 [2d Dept.]; Quinn v. Cannibus, 72 A.D.2d 765, 766, 421 N.Y.S.2d 386, 387 [2d Dept.]; Matter of Fritz v. Board of Education, 70 A.D.2d 593, 594, 416 N.Y.S.2d 74, 76 [2d Dept.]; de St. Aubin v. Briggane, 51 A.D.2d 1054, 1055, 381 N.Y.S.2d 533, 534 [2d Dept.]; Griefer v. Newman, 22 A.D.2d 696, 253 N.Y.S.2d 791, 792; Shoehrer v. Sattler, 18 A.D.2d 683, 684, 236 N.Y.S.2d 16, 17 [2d Dept.]; Altman v. Altman, 15 A.D.2d 546, 223 N.Y.S.2d 719, 720 [2d Dept.]; Halio v. Lurie, 15 A.D.2d 62, 67, 222 N.Y.S.2d 759, 764 [2d Dept.]; Harlem v. Hall, 106 Misc.2d 627, 631, 434 N.Y.S.2d 618, 621 [Sup. Dutchess]).

2. CPLR 3211(c) relief was not requested by any party, nor was any evidence submitted in support of any immunity or defense asserted (Arrington v. New York Times, 55 N.Y.2d 433, 442-443, 449 N.Y.S.2d 941, 945; Rovello v. Orofino, 40 N.Y.2d 633, 635-636, 389 N.Y.S.2d 314, 316). Appellant requests that this Court consider all the material submitted by him, including his papers to the Appellate Division, First Department, in order to determine the judicial respondents' dismissal motion.

3. The complaint attempts to describe events occurring in the last quarter of the twentieth century in the Second Judicial Department of the State of New York -- events so horrendous that words are inadequate to depict them.

The complaint is not to be read as a mere scholastic exercise in draftmanship in order to meet an expected challenge of judicial immunity successfully. The pleaded events are supportable by the best evidence -- the sworn testimony of Surrogate Signorelli and his own personnel, as well as documents from his own Court.

a. The question by Justice Isaac Rubin, at oral argument, unveils the obstacles to the proper disposition of this appeal. His Honor asked appellant whether he had turned over the records of the estate. Appellant responded that Judge Melia, the Referee appointed by the First Department, found as a fact that appellant had turned over the records even before the first contempt proceeding and further, that the Grievance Committee itself has moved to confirm such finding (A60). The issue is not what appellant did or did not do, it is whether he was entitled to due process and other constitutional and basic legal rights in the process.

This Court, quite naturally, but incorrectly, has assumed that appellant failed in some obligation which warranted a contempt proceeding. The testimony, the findings of Judge Melia, and even of the Grievance Committee now concede that appellant did not fail in any such obligation, legally, professionally, or ethically!

This Court, quite naturally, but incorrectly, has assumed that appellant failed in some obligation which warranted his removal as executor. The testimony, the findings of Judge Melia, and even the Grievance Committee, sub silentio, now concede that appellant did not fail in any such obligation, legally, professionally, or ethically.

The testimony reveals, and Judge Melia found, that appellant handled the estate properly, and that the directions of Surrogate Signorelli and his sycophant appointees were totally inexplicable and caused needless expense to the estate.

This Court unquestionably, but incorrectly, has assumed that appellant was removed as executor in March of 1976, but the evidence, including certified copies of letters testamentary issued to respondent one year later, the Report of Judge Melia, and even the Grievance Committee, find and concede that this does not appear to be entirely true.

The implicit, but apparent, desire of this Court to find rational justification for respondents' storm trooper actions is understandable, but justification simply does not exist for such outrageous conduct.

In short, on this CPLR 3211(a) motion, this Court should not permit itself to stray from the precise issues involved and allow extraneous, respondent oriented material (particularly the Surrogate's sua sponte diatribe of February 24, 1978) to be accepted as true, even though some of it was previously improperly incorporated in dicta of this Court in Sassower v. Signorelli (65 A.D.2d 756, 409 N.Y.S.2d 762) or made part of the decision of nisi prius. The defamatory accusations in the Surrogate's widely published statement have been proven false or deceptive in every respect, mostly from the Surrogate's own sworn testimony and information contained in the Surrogate's own Court files.

b. On argument of this appeal, appellant concluded his presentation with a recitation of the events of June 10th, 1978, wherein respondents not only wilfully refused to obey a Writ of Habeas Corpus mandating appellant's immediate release, but actually incarcerated appellant's wife for several hours for serving such Writ, along with appellant's daughter, who had accompanied his wife.

In the course of appellant's presentation, when Justice Weinstein commented that appellant's charges were serious and asked the Assistant County Attorney what he had to say about them, this was actually his response:

The Assistant County Attorney advised this Court that he was personally involved in the events of that day, had handled thousands of applications from illiterates, and attempted to justify respondents' astonishing conduct by stating that the writing of the Justice who endorsed and signed this Writ on appellant's behalf was the writing of one of "the most illiterate" persons he had ever seen.

A photostatic copy of such Writ (A61), as was included in the County Clerk's file subpoened to this Court as part of this appeal is included herein, so that this Court may judge whether it was in fact endorsed and signed by an "illiterate" judge, as respondents' claim in justification for their conduct.

Respondents (including co-conspirators and Jailers Signorelli and Seidell) are liable as a matter of law for their refusal to obey the mandate of the Writ directing appellant's release (Reimer v. Short, 578 F.2d 621, 628-629 [5th Cir.-8/21/78], cert den 440 U.S. 947,

99 S.Ct. 1425, 59 L.Ed.2d 635 [3/5/79]; Whirl v. Kern, 407 F.2d 781 [5th Cir.-12/30/68], cert den 396 U.S. 901, 90 S.Ct. 210, 24 L.Ed.2d 177 [11/10/64] cf. Bryan v. Jones, 530 F.2d 1210 [5th-4/30/76], cert den 429 U.S. 865, 97 S.Ct. 174, 50 L.Ed.2d 145 [10/4/76]; Douthit v. Jones, 641 F.2d 345 [5th-4/3/81]). The law does not require that only directions from "literate" judges be obeyed, nor does it empower respondents to be the ex parte arbiters of the literacy of the judiciary in another district of their department.

Unquestionably, the instruction given to the Assistant County Attorney was that appellant was not to be released under any circumstances, Writ or no Writ!

Clearly, appellant's wife and child were also incarcerated, without any available telephone, so that they would not be able to report that the Writ was being disobeyed. It was only after midnight when the Judge who signed the Writ found out it was being disobeyed, telephoned, and read the "riot act", did the respondents begin to comply.

In Reimer v. Short (supra, p. 629), a defendants' verdict was reversed by the appellate court when the defendants refused to release plaintiff's vehicle because " 'they couldn't read the Judge's signature', and, therefore, were not going to honor it".

In Whirl v. Kern (supra, p. 791), the Court stated:

> "There is no privilege in a jailer to keep a prisoner in jail beyond the period of his lawful sentence. Birdsall v. Lewis, 246 App. Div. 132, 285 N.Y. Supp. 146 [3d Dept.-1/9/36]; Waterman v. State, 2 N.Y.S.2d 803, 159 N.Y.S.2d 702 [1/10/57]; Cohen v. State, 47 Misc.2d 470, 262 N.Y.S.2d 980 [Ct. Claims-9/1/65], rev. on other grounds, 25 A.D.2d 333, 269 N.Y.S.2d 498 [3d Dept.-5/6/66] ..."

Appellant seeks to recover under federal law, as well as state law (Zarcone v. Perry, 78 A.D.2d 70, 75, 434 N.Y.S.2d 437, 440 [2d Dept.-12/15/80], aff'd in part 55 N.Y.2d 782, 447 N.Y.S.2d 248 [12/17/81]: therefore, the issue of when a §1983 action will be entertained is not germane at this juncture (Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 [5/18/81]; Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 [3/23/76]). Appellant's rights under state law may exceed his federal rights (Ferri v. Ackerman, 444 U.S. 193, 198, 100 S.Ct. 402, 406, 62 L.Ed.2d 355, 360 [12/4/79]), since the common law

privileges and immunities were not transported wholesale into §1983 (Scheuer v. Rhodes, 416 U.S. 232, 243, 94 S.Ct. 1683, 1690, 40 L.Ed.2d 90, 100 [4/17/74]; Briscoe v. La Hue, 663 F.2d 713, 718 [7th Cir.-10/27/81]), but this Court may not curtail appellant's federal rights (Martinez v. California, 444 U.S. 277, 284 note 8, 100 U.S. 553, 558 62 L.Ed.2d 481, 488 [1/15/80]. Contrary to the Assistant County Attorney's oblique reference and the footnote of the Attorney General, the events of June 10, 1978 and many other events have never been adversely determined against appellant in the federal or any other court.

O'Neil v. City (642 F.2d 367 [9th Cir. -4/20/81]) clearly recognizes that tortious conduct actionable under state law (Utley v. City, 240 Or. 384, 402 P.2d 91 [5/19/65], may not support a §1983 action.

c. The question posed by Justice Boyers to the Assistant County Attorney warrants response and confirmatory documentation.

The criminal contempt trial, conviction, and sentence of June 22, 1977 were concededly all held in absentia. Surrogate Signorelli, a former Assistant District Attorney, Justice of the Peace, District Court, and County Judge, further admitted under oath that prior to such trial appellant was never charged and never notified that such trial was going to take place.

During the early hours of the following day (June 23, 1977), appellant, completely unaware of the criminal proceedings of the prior day, was arrested by two Suffolk County Deputy Sheriffs, who travelled to Westchester County at the direction of Surrogate, (then "Sheriff") Signorelli. They denied appellant's repeated requests and demands for an opportunity to present his Writ of Habeas Corpus or to communicate with counsel, family, or friends.

Eventually, "Sheriff" Signorelli called in a Court Reporter. During appellant's disciplinary proceedings, the Surrogate was asked the following question as to those June 23, 1977 events (Oct. 30, 1981, SM 61):

> "Q. Is everything you told the Deputy Sheriff, once the court proceedings commenced, on the transcript of that day?
> A. Once the proceedings commenced?

Q. Right.
A. Everything to my knowledge was transcribed."

The transcript of June 23, 1977, in this respect, reads as follows (Rec. on Appeal, A68-A71, 65 A.D.2d 757, 409 N.Y.S.2d 762):

"THE COURT: ...What I want to know from you, Mr. Sassower, is: Are you going to comply with my order?
MR. SASSOWER: Sir, I will comply. Right now I am a defendant who has been convicted by order of this court, and I reluctantly must take my legal rights and assert my legal privileges. In any event, Your Honor, I have no doubt in my mind that Your Honor has disqualified himself.

THE COURT: ... I am asking you again, is it your intention to comply with my order?
MR. SASSOWER: My intention is to comply with the law as I see it. I am here as a defendant, Your Honor. All I want is a trial right now, or a writ of habeas corpus signed by a judge so that I can pursue my legal remedies just like anyone else.
...

THE COURT: ... what I want to know from you if you are going to comply with my order ... I told you that I want my order complied with unconditionally.. ... Are you going to comply with the order?
MR. SASSOWER: Your Honor, may I --

THE COURT: Are you going to comply with my order?
MR. SASSOWER: I would like to make a phone call, and be given the liberty in the company of the Sheriff, or anybody else you agree to, as I am desirous of pursuing an application for a writ of habeas corpus.

THE COURT: All you are to do, as far as I am concerned, you are to comply with my order. ...
MR. SASSOWER: Could I go before a justice of the Supreme Court?

THE COURT: You are not to be transferred anywhere but to the county jail, my friend."

The shocking and palpably false response of "Sheriff" Signorelli at the hearing of October 30, 1981, to a question posed by Judge Melia tells an unbelievable story (SM 63-64):

"THE REFEREE: That was not the question. The question was: Did you believe that he [George Sassower] had a right to advance the 5th Amendment and decline to answer the questions at the point that he interposed the 5th Amendment?
THE WITNESS: No, I believe he did not have that right."

Can anyone believe that this answer was actually given by an Acting Supreme Court Justice in the Second Judicial Department of the State of New York in 1981 ... an Assistant District Attorney for three years, a Justice of the Peace for three years, a Judge of the District Court for five years, and a Judge of the County Court for six years?

As appellant advised Mr. Justice Rubin, on oral argument, Judge Melia found as a fact appellant had substantially complied one week before -appellant repeats, before - (A62-A63) and the Grievance Committee has moved to confirm this finding stating (A60)

> "Neither Berger (the Attorney for the Public Administrator) nor Mastroianni (the Public Administrator) had a clear picture of what documents respondent neglected to turn over. Fatal to this charge is Mastroianni's testimony of November 4, 1981 (p. 74) that he does not know if there are any missing documents."

Nonetheless, "newspaper columnist" Signorelli in his fabricated, distorted release to the New York Law Journal regarding this incident, wherein appellant asserted his 5th Amendment and other constitutional rights, falsely stated:

> "When he persisted in his refusal to comply with the court's order, he was remanded to the Suffolk County jail to serve his sentence."

"Prosecuting Attorney" Signorelli transmogrified the English language and appellant's assertion of Fifth Amendment rights -- which he testified appellant did not have -- into a public proclamation that appellant "persisted in his refusal to comply" (see Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 [4/28/65]).

When the District Attorney's Office made public statements about an accused which might prejudice defendant's right to a fair trial, the Court in Martin v. Merola (532 F.2d 191, 198 [2d Cir.- 2/5/76]):

> "We believe the time has come for prosecutors to realize that failure to conduct themselves within the law and in accordance with the constitutional rights of those accused of crime, may subject them to suit in a federal court for the damage caused by their disregard of the law."

4. Respondents have the burden of pleading and proving any immunity or privilege they may wish to assert (Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1924, 64 L.Ed.2d 572, 578 [5/27/80]). As the Court stated in Dennis v. Sparks (449 U.S. 24, 29, 101 S.Ct. 183, 187, 66 L.Ed.2d 185, 190 [11/17/80]) see also Dellums v. Powell (660 F.2d 802, 807 [D.C. Cir.-7/24/81])):

> "The burden is on the official claiming immunity to demonstrate his entitlement".

That burden is not met by the respondents' advice to the Court that two of the respondents are members of the judiciary, who might be entitled to absolute immunity, and that the other respondents are officials, who might be entitled to a qualified immunity.

The burden can only be met by an evidentiary showing and development (Williams v. Rhoden, 629 F.2d 1099, 1102 [5th Cir.- 11/6/80]) that the [judiciary] respondents were functionally acting (a) in a judicial capacity, and (b) that there was not a clear absence of jurisdiction, and (c) that the actions were judicial in nature, and (d) that the actions were not ministerial.

The Attorney General's mere Notice of Motion is clearly not sufficient to meet such burden.

5. With the exception of the absolute civil damage immunity accorded to the Office of the President of the United States (Nixon v. Fitzgerald, U.S. , 42 CCH S.Ct. B3365 [6/24/82], the functional approach to official immunity has been well established (Nixon v. Fitzgerald, supra, White, J., dissenting B3700, 3702). This is exemplified, as applicable to the judiciary, by Supreme Court of Virginia v. Consumers Union (446 U.S. 719, 100 U.S. 1967, 64 L.Ed.2d 641 [6/2/80]). In this case, the Supreme Court held that the Chief Justice and the highest state court were absolutely immune in their

legislative, not judicial, capacity, but liable in their enforcement capacity [736, 1976, 656] (on remand Consumers Union v. American Bar Association, 505 F. Supp. 822 [Va.-1/8/81], app. dis. 451 U.S. 1012, 101 S.Ct. 2998, 69 L.Ed.2d 384 [5/26/81]).

In applying state law, we assume that this state follows the same functional approach (Lange v. Benedict, 73 N.Y. 12 [3/19/1872]), but it is questionable whether the judicial immunity is as co-extensive (cf. Dean v. Kochendorfer, 237 N.Y. 384).

Case law must be resorted to in order to determine what the courts have considered "clear absence of all jurisdiction'", "judicial acts", and "ministerial actions and non-actions". These designations apply not only to judges, but also to prosecuting attorneys, defense attorneys, witnesses, and all those engaged in the judicial process.

The term "judicial immunity" has reference only to an immunity for civil damages, not to any immunity under the criminal or professional code, or for equitable relief.

RESPONDENTS WERE NOT ACTING IN A JUDICIAL CAPACITY.

There was no judicial immunity after Surrogate Signorelli recused himself (Spires v. Bottorff, 317 F.2d 273, 274 [7th Cir.- 5/3/63], after remand at 332 F.2d 179 [7th Cir.- 5/14/64], cert den 379 U.S. 938, 85 S.Ct. 343, 13 L.Ed.2d 349 [12/7/64]. The judicial function becomes spent after judgment, except for reargument, Gulf & Western v. U.S. (671 F.2d 1322, 1325 [Ct. Claims -2/24/82]), all subsequent actions lack immunity.

While he may be referred to with the title of "judge", and usually is so addressed in and out of court (Shilling v. State Commission, 51 N.Y.2d 397, 408, 434 N.Y.S.2d 909, 414 [Fuchsberg, J.]), a judge has no judicial immunity, while chairing a P.T.A. meeting or performing extra-judicial functions (Lynch v. Johnson, 420 F.2d 818 [6th-1/8/70].

1. Surrogate Signorelli's directions to the Deputy Sheriffs that they immediately travel to Westchester County, arrest appellant, abduct him to Suffolk County (cause appellant to be brought before him and not to the County Jail as provided in the Warrant of Commitment, which appellant requested), to hold him incommunicado, to deny appellant the right to present a Writ of Habeas Corpus, to interrogate appellant, to deny

appellant his 5th Amendment rights and his right to communicate with counsel -- all these are police, not judicial, functions.

2. The judicial function is to decide controversies (Bradley v. Fisher, 80 U.S. [13 Wall] 335, 20 L.Ed. 646 [4/8/1872]). A judge's "Letter to the Editor", a column such as Judge Aron Steuer's "Aesop in the Courts" that used to appear weekly in the New York Law Journal manifestly does not carry with it judicial immunity.

The February 24, 1978, sua sponte, pronouncement by Surrogate Signorelli, which he gratuitously sent to the New York Law Journal for publication was, as previously noted, not made in response to any motion or matter then pending before him or in his Court. Clearly, it was nothing more than a capricious self-serving fabricated commentary on appellant's alleged conduct and that of his wife, in his Court and in other courts. Surrogate Signorelli like every other citizen, has the right to set forth his opinions, but his judicial immunity never came into being because he was not then and there adjudging any applications before him. This was the precise holding in

Harris v. Harvey (605 F.2d 330 [7th Cir. - 8/20/79]) where a substantial award of damages was affirmed. In short, his publication had no more status as a judicial act than a letter to the editor.

Certainly, Surrogate Signorelli's out-of-court remarks to a reporter for the Daily News, as alleged in appellant's complaint, and quoted in the published article itself, carries no judicial immunity.

Only the Presiding Justice of the Appellate Division (or Acting Presiding Justice) may make public a disciplinary complaint or proceeding against an attorney (Judiciary Law §90). Publication of specifically prohibited material is actionable (Shiles v. News Syndicate, 27 N.Y.2d 9, 313 N.Y.S.2d 104, cert den 400 U.S. 999, 91 S.Ct. 454, 27 L.Ed.2d 450), as is an excess publication for ulterior purposes (Williams v. Williams, 23 N.Y.2d 592, 298 N.Y.S.2d 473). Surrogate Signorelli, like every citizen, had the absolute right to make complaint against anyone he chose to attack. Publishing such complaint against appellant and his wife, particularly under "color of law" is actionable (cf. Paul v. Davis [supra]).

The judicial, attorney's, and witness's, immunity for false judicial statements have travelled the same common law course. The limits of that immunity received definition by this Court in Dachowitz v. Kranis (61 A.D.2d 783, 401 N.Y.S.2d 844 [2d Dept.]). Assuming arguendo the defendant-attorney had not inserted in his legal papers the defamatory material, but the judge had included such material in a published opinion, having the same knowledge of the falsity that Kranis had. Now comes Dachowitz and sues not the attorney, but the judge. Appellant submits that the holding of this Court must be the same.

Unlike Rabbi Dachowitz, appellant had no opportunity to controvert the false material immediately, but had to wait several years for a disciplinary proceeding, and then it is only a private vindication. The defamation against Rabbi Dachowitz is secreted among thousands of legal papers filed in court and never seen by the public. The defamation against appellant and his wife was published, and is constantly republished by attorneys for prejudicial purposes. In the County Attorney's Appendix to this Court, he republished this article, not once, but twice, although it was manifestly irrelevant to any position he was

taking. It was published by the County Attorney in his Appendix after it was unquestionably proven by the testimony of Surrogate Signorelli himself that it was completely false and contrived.

Portions of such false publication have been adopted by the Court below for its opinion and portions were adopted by this Court in it prior opinion in this matter.

Appellant moved unsuccessfully to this Court to have the impertinent material adopted by this Court as part of its prior opinion redacted. Appellant also moved in the federal and state courts for such or similar relief, all without avail. It is damages or nothing for this egregious wrong (cf. Jaffee v. U.S., 663 F.2d 1239 [3rd Cir. en banc - 11/17/81]).

3. Surrogate Signorelli's conduct, particularly subsequent to recusal, personally, or as a co-conspirator, is actionable. Rankin v. Howard (633 F.2d 844 [9th Cir. - 12/5/80], cert den 451 U.S. 939, 4/27/81 101 S.Ct. 2020, 68 L.Ed.2d 326) holds that a judge is liable for conspiratorial damages, although not for the judicial acts pursuant to such conspiracy.

CLEAR EXCESS OF ALL JURISDICTION

In holding judicial immunity unavailable, the Court in Johnson v. Crumlish (224 F. Supp. 22, 25 [Pa. - 12/2/63] stated:

> "we could conceive of no more invidious form of totalitarian cruelty than the summary imprisonment without a hearing. Due process of law requires that an accused at least receive a hearing before he is punished for his alleged contempt which was not committed in the presence of the Court."

Rankin v. Howard (supra at p. 848) held in a case where the judge had subject matter but not personal jurisdiction, that subject matter and personal jurisdiction were "conjunctual" and types of jurisdiction had to be examined to determine the applicablity of immunity under Stump v. Sparkman (435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 [3/28/78]). The Court reversed a judgment of dismissal, holding that a judge's co-conspiratorial conduct, as distinguished from his judicial acts, did not have immunity.

KNOWLEDGE THAT JURISDICTION IS ABSENT.

As was clearly stated in Bradley v. Fisher (supra), where "want of jurisdiction is known to the judge, no excuse is permissible". This was repeated in

Stump v. Sparkman (supra, note at p. 356, 1104, 339) and applied in Rankin v. Howard (supra) and Schorle v. City (524 F. Supp. 821, 828 [Ohio - 2/26/81]).

Significantly, there is nothing in the Stump case, which indicates that the judge knew he had no jurisdiction. Unquestionably, a judge needs immunity, when, for instance, a Judge in Special Term Part II in New York is given an enormous number of documents for signature and he must necessarily rely on court personnel to assure that they are proper. That situation is manifestly different when, as in this case, the Surrogate is personally involved and the admissions elicited from Surrogate Signorelli himself clearly reveal actual and deliberate knowledge that he lacked jurisdiction, as alleged in the complaint.

Comparable immunities necessitate a holding that actual knowledge that jurisdiction is lacking renders a judge liable (Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 [1/29/78]; Procunier v. Narvette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 [2/22/78]).

IMMUNITY DOES NOT EXIST FOR MINISTERIAL ACTS.

A ministerial act or omission is not, and has never been considered, a judicial act (Kendall v. Stokes, 44 U.S. [3 How.] 87, 98 11 L.Ed. 506, 512 [1845]; Bivens v. Six Unknown (456 F.2d 1339, 1346 [2d Cir.-3/8/72); Yates v. Lansing 5 Johns [N.Y.] 282 [Feb. 1810]); Prosser on Torts, [4th Ed.] §132 p.989-991).

Specifically, Mr. Chief Justice James Kent held in Yates v. Lansing (supra p. 296-297) that the allowance of a writ of habeas corpus, as distinguished from its terms, is ministerial.

NON JUDICIAL ACTS

There is no immunity for non-judicial acts (Stump v. Sparkman [supra]). The aforementioned cases reveal those acts, which the courts have labelled as non-judicial, are generally acts which they have held were made in a non-judicial capacity or are ministerial in nature. The question is not the category, but the consequences.

On traditional tort grounds, the court held a judge liable for his conduct in Dean v. Kochendorfer (supra), and it would appear that if a judge were involved, rather than a hospital superintendent, as in Hoff v. State (279 N.Y. 490), he would likewise be liable.

Judicial immunity is not applicable to conduct similar to that set forth in Jennings v. Shuman (567 F.2d 1213 [3rd Cir. - 11/30/77]), or Zarcone v. Perry (supra). These types of misconduct have nothing to do with fearless decision-making.

Where the wrong is egregious, as here,the courts have responded with a remedy (Bivens v. Six Unknown, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 [6/21/71]; Halio v. Lurie (supra); cf. Fisher v. Maloney (43 N.Y.2d 553, 402 N.Y.S.2d 991).

The important opinions in Harper v. Merckle (638 F.2d 849 [5th Cir. - 3/5/81], Beard v. Udall (648 F.2d 1264 [9th Cir. - 6/26/51]; and Lopez v. Vanderwater (620 F.2d 1229 [7th Cir. - 4/29/80] cert dismd 449 U.S. 1048, 101 S.Ct. 601, 66 L.Ed.2d 491), are very pertinent and instructive in this matter and must be closely read.

In Gregory v. Thompson (500 F.2d 59 [9th Cir. - 8/14/74] - cited approvingly in Stump v. Sparkman (supra), the judge was held liable even though he had personal and subject matter jurisdiction. The point is there is a limit to which the courts are willing to go in extending judicial immunity. The courts have shown no willingness to extend the doctrine to intentional conduct having nothing to do with the decision making process. Jurisprudential values become hypocritical when attorneys are held liable for mere law office errors (Sortino v. Fisher 20 A.D.2d 25, 245 N.Y.S.2d 186 [1st Dept.]), hearing officers receive only a qualified immunity, and judges made completely immune. There should not be a caste system or "lesser breeds" within or without the law (see Rehnquist, J. in Butz v. Economou (supra, at 528, 2922, 930), absent manifest necessity.

POINT II

THE SHERIFF IS LIABLE FOR HIS MISCONDUCT

The Sheriff is a local officer, has no jurisdiction outside his bailiwick, except in circumstances not applicable herein (County Law §650; Public Officers Law §2; Criminal Procedure Law §1.20 [34-b]; Queen v. Tooley [2 Ld. Taym 1296, 92 Eng. Rep. 349 - 1807]).

His duties are to arrest and are ministerial Shelton v. Ciccone (578 F.2d 1241 [8th Cir. -6/6/78]).

When appellant wrote the Sheriff's Attorney that he (A64-A66):

> "may telephone and I [appellant] will make arrangements to be in Special Term in New York, Bronx, or Westchester at your desired time of arrest."

the Sheriff had no business making countless forays (at a huge taxpayers' expense), at Surrogate Signorelli's insistence, into New York City and Westchester County, in order to arrest appellant when a judge was not at hand to immediately sign a Writ of Habeas Corpus.

The plan, admitted by the Assistant County Attorney on oral argument, to place a net around a courthouse where appellant was expected, is an outrage, and makes the constitutional right to access to the courts a farce (Boddie v. Conn., 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 [3/2/71]).

The refusal to obey the Writ of Habeas Corpus and the jailing of appellant's wife and daughter is an outrage no immunity excuses.

The physical assaults upon appellant, while handcuffed by respondent, Anthony (Arnold Schwarz-enegger) Wisnoski and his partner, is an outrage, no immunity exculpates. The ridiculous and contrived criminal charge [which was dismissed] that it was appellant who assaulted Anthony (Arnold Schwarzenegger) Wisnoski, while handcuffed, compelling him to seek hospital treatment and a loss eleven days of employment, was ludicrous, for which a common law cause of action exists.

In Poulos v. New Hampshire (345 U.S. 395, 426, 73 S.Ct. 760, 777, 97 L.Ed. 1105, 1124 [4/27/53], Mr. Justice Douglas [dissenting] stated:

> " What Mr. Justice Roberts said needs to be repeated over and again ... [H]istory proved that judges too were sometimes tyrants."

POINT III

THIS COURT SHOULD RECUSE ITSELF.

Appellant renews his motion that constitutional fairness requires review by a court totally unconnected with any aspect of this matter. Some of these matters this Court has been aware of for some time, but despite its august legislative, as well as judicial powers, it has sanctioned, by silence and inaction, the immoral, if not criminal misconduct of respondents.

White Plains, New York
June 30, 1982

Respectfully submitted,

GEORGE SASSOWER, Esq.