BB-4

To be argued by: Eli Vigliano
Time requested: 20 Minutes

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

In the Matter of the Application of RACHEL SADY and MARIO M. CASTRACAN,

Petitioners-Appellants,

for an Order, pursuant to Sections 16-100, 16-102, 16-104, 16-106 and 16-116 of the Election Law,

-vs-

HON. J. EMMETT MURPHY, Administrative Judge of the City Court of the City of Yonkers, State of New York, ANTHONY J. COLAVITA, Esq., Individually and as Chairman, WESTCHESTER REPUBLICAN COUNTY COMMITTEE, DENNIS MEHIEL, Individually and as Chairman, WESTCHESTER DEMOCRATIC COUNTY COMMITTEE, RICHARD L. WEINGARTEN, Esq., Individually and as former Chairman, WESTCHESTER DEMOCRATIC COUNTY COMMITTEE, VINCENT NATRELLA, Individually and as Chairman, WESTCHESTER CONSERVATIVE COUNTY COMMITTEE, LLOYD KING, JR. and Hon. CAROLEE C. SUNDERLAND, Commissioners constituting the WESTCHESTER COUNTY BOARD OF ELECTIONS of the State of New York,

Respondents-Respondents.

for an Order (1) declaring invalid the three Petitions purporting to designate Respondent Hon. J. EMMETT MURPHY as candidate for nomination by the Democratic Party, Republican Party and Conservative Party for the public office of Judge of the County Court of the County of Westchester, State of New York, in the Primary Elections to be held on September 12, 1991, and as the nominee for such office of said three political parties, in the general election to be held on November 5, 1991, and (2) striking his name from the respective ballots to be used in the Primary Elections and in the general election to be held on said respective dates.

PETITIONERS-APPELLANTS' BRIEF

ELI VIGLIANO, Esq
Attorney for Petitioners-Appellants

1250 Central Park Avenue
Yonkers, New York 10704
(914) 423-0732

TABLE OF CONTENTS

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

----------x

In the Matter of the Application of
RACHEL SADY et ano.,

Petitioners-Appellants,

For an Order, Pursuant to Article 16
of the Election Law,

-against-

HON. J. EMMETT MURPHY, et. al., and
WESTCHESTER COUNTY BOARD OF ELECTIONS,

Respondents-Respondents.

----------x

STATEMENT PURSUANT TO CPLR 5531

Westchester County
Clerk's Index No.
12471/91

1. The Index Number of the case in the Court below is 12471/91.

2. The full names of the original parties are as follows:

Rachel Sady and Mario Castracan, Petitioners; Hon. J. Emmett Murphy, Anthony J. Colavita, Esq., Westchester Republican County Committee, Dennis Mehiel, Westchester Democratic County Committee, Richard L. Weingarten, Esq., Vincent Natrella, Westchester Conservative County Committee, Commissioner Lloyd King, Jr., Commissioner Carolee C. Sunderland, Respondents.

3. The Court and County in which the action was commenced was Supreme Court, Westchester County.

4. The proceeding was commenced against Respondents in or about August 2, 1991. Answers by Respondents Colavita and by Murphy, Mehiel, and Weingarten were interposed on or about August 7, 1991 and August 12, 1991, respectively.

5. This is an appeal from a Decision/Order made by Hon. Vincent Gurahian, in the Supreme Court, Westchester County, dated August 13, 1991 and entered on August 14, 1991.

6. This is an appeal upon the original Record.

Dated: Yonkers, New York
August 19, 1991

ELI VIGLIANO, Esq.
Attorney for Petitioners-Appellants

Office Address:
1250 Central Park Avenue
Yonkers, N. Y. 10704

Mailing Address:

P.O. Box 70
Gedney Station
White Plains, N.Y. 10605-0070

PRELIMINARY STATEMENT

Petitioners seek review of an Order of Hon. VINCENT GURAHIAN, dated August 13, 1991 and entered August 14, 1991, granting the motion of Respondent Colavita (par. 11 of his Answer) to dismiss the proceeding on the ground that the Petition fails to state a cause of action. This proceeding, commenced under Article 16 of the Election Law, by Order to Show Cause and Petition, seeks to invalidate Republican, Democratic, and Conservative Party designating petitions purporting to designate Respondent Murphy as a candidate for nomination for a vacancy in the office of Judge of the County Court of Westchester County, to be voted for in the primary elections on September 12, 1991 and in the general elections on November 5, 1991, and to strike his name from the respective ballots.

The Lower Court made the following serious errors--which, separately and collectively, require reversal and this Court's immediate remedial action:

(1) it erred in failing to accept as true all Petitioners' factual allegations and reasonable inferences therefrom, as required by law on a motion to dismiss; or, alternatively, holding an evidentiary hearing as to disputed facts;

(2) it erred in concluding that the subject cross-endorsement contract was not illegal or unconstitutional, and then summarily holding that Petitioners did not state a cause of action to warrant the relief requested.

QUESTIONS PRESENTED

1. Is a cause of action stated by a Petition alleging that:

Respondents, two major political parties, the Conservative Party, their chairmen, their judicial nominees, and others:

(a) entered into a contract to exchange Supreme Court, Surrogate's Court, County Court and Family Court Judgeships, over a three-year period, including creating contracted-for resignations by the proposed judicial nominees, as well as the pledge of such nominees, once elected, to make their future judicial appointments in accordance with the recommendations of such party leaders; and

(b) caused such agreement to be adopted in written resolution form by the Executive Committees of their respective parties; and

(c) performed and implemented such agreement by (i) nominating the proposed judicial nominees at their respective judicial nominating conventions, and (ii) filing the requisite respective designating petitions; and

(d) assured the "election" of such judicial nominees in the general elections held on November 7, 1989 and November 6, 1990, by running an identical slate of judicial candidates on the ballot of the two major political parties and the Conservative Party; and

(e) assured the "election" of Respondent Murphy in the general election to be held on November 5, 1991, with only token opposition by the Right-to-Life "dummy"; and

(f) effectively disenfranchised the voting public of rights guaranteed under the Constitution of the State of New York and the New York State Election Law.

The Lower Court answered "No", holding, as a matter of law, that an agreement to appoint judges by utilizing reciprocal cross-endorsements to evade contested elections are not illegal or unconstitutional, that the Petition did not state a cause of action entitling Petitioners to judicial relief, and dismissed the Petition.

STATEMENT OF FACTS

At various times and places in or about 1989, the two Chairmen of the Westchester Republican and Democratic County Committees, ANTHONY COLAVITA ("COLAVITA") and RICHARD WEINGARTEN ("WEINGARTEN"), with the aid and assistance of their respective legal counsel, GUY PARISI, Esq. and LOUIS A. BREVETTI, Esq., negotiated a cross-bartering contract (herein called "the Three Year Plan"). The terms and conditions thereof were reconfirmed, spelled out, memorialized and documented in the Resolution (Exhibit "A" to the Petition), adopted by the Executive Committees of the Republican and Democratic County Committees of the five counties comprising the Ninth Judicial District, prior to the 1989 Judicial Nominating Conventions. The Three Year Plan was also agreed to, approved and ratified by the 1989 judicial nominees for Ninth Judicial District, Republican ALBERT J. EMANUELLI, Esq., Republican HON. JOSEPH J. JUIDICE, and former Chairman of the Westchester Democratic County Committee, SAMUEL G. FREDMAN, Esq.

In exchange for mutually agreed-upon cross-endorsements, the leaders of the Republican and Democratic Party Chairmen in the Ninth Judicial District cut the following deal:

1. In 1989, one Democratic Supreme Court judgeship was to be traded for two Republican Supreme Court judgeships. An identical slate comprised of the three aforementioned agreed-upon judicial nomiminees

was to appear on the Republican and Democratic lines of the ballot at the 1989 general election. These three nominees were Republicans EMANUELLI and JIUDICE, and Democrat FREDMAN[1].

2. In 1990 (assuming their politically guaranteed election in 1989), Republican EMANUELLI would resign from the office of Supreme Court judge, to which he had been elected for a 14-year term, so that he could run for Surrogate of Westchester County (and thereby preserve the control and substantial patronage of that office for the Republicans[2], subject to the sharing pledge, hereinafter described). In return, sitting Democratic Westchester County Judge, Hon. FRANCIS A. NICOLAI, would move up to the seat on the Supreme Court, which the Republican EMANUELLI had contractually bound himself the year before to vacate by resignation but seven (7) months after his induction as a Supreme Court judge.

---

1 Both Republican EMANUELLI and Democrat FREDMAN were practicing lawyers, with no prior judicial experience, but with considerable political experience. Republican EMANUELLI had worked closely with Mr. COLAVITA on election matters for a number of years and maintained his law office in Westchester Republican Party headquarters in White Plains. Mr. FREDMAN, then 65 years of age, had served as Chairman of the Westchester Democratic County Committee for a number of years.

2 Unlike the situation prevailing in the still heavily Republican four other counties of the Ninth Judicial District, the number of registered Democrats already exceeded the number of registered Republicans.

3. In 1991 (assuming the politically guaranteed judicial elections in 1990) the vacancy created by the contracted-for elevation of Democrat NICOLAI would be filled by cross-endorsing J. EMMETT MURPHY, a sitting Democratic City Court Judge from Yonkers, and cross-endorsing Hon. ADRIENNE SCANCARELLI, a Republican, who would then be re-elected as a Westchester Family Court Judge[3].

Over and beyond the foregoing contractual provisions, each judicial nominee was required to, and did, pledge to commit themselves that once elected, all their judicial appointments would effectively be divided equally between Republicans and Democrats, in accordance with the recommendations of the party leaders. (See penultimate paragraph of Exhibit "A")

At the 1989 general elections, pursuant to the aforesaid Three Year Plan, the identical, contracted-for judicial nominees for that year, appeared on the ballot, except for token Right-to-Life opposition. The aforesaid initial candidates, Republican EMANUELLI, Republican JIUDICE, and Democrat FREDMAN, were elected and, thereafter, inducted into office. Pursuant to the aforesaid contract and in furtherance thereof, in or about August 1990, Republican EMANUELLI was

---

[3] Judge Scancarelli ran unopposed in 1990, not 1991. The parties to the agreement thought her term was to expire in 1991.

obliged to, and did, reluctantly resign his position as Justice of the Supreme Court, to which he had been elected some nine months earlier for a 14-year term, in order to create the contracted for-vacancy for Democratic County Court Judge NICOLAI to move up to the Supreme Court, and to permit Republican EMANUELLI to become the unopposed candidate of the Republican, Democratic, and Conservative parties of Westchester County for the office of Surrogate of Westchester County. The election of Republican EMANUELLI, a private practitioner with a politically connected law firm during the interregnum, was thus politically assured in the general election held in November 1990.

In 1990, another position unexpectedly became vacant on the Ninth Judicial District Supreme Court bench by reason of the retirement of Hon. THEODORE A. KELLY, a Rockland County Republican. In keeping with and in furtherance of the Three Year Plan, Republican HOWARD MILLER[4] became the cross-endorsed candidate of the three political parties for that Supreme Court position in exchange for, according to published news reports, a further agreement by the party leaders to cross-endorse three Democrats in 1991 for local government positions. Republican MILLER was thus politically assured of election at the general elections held in November 1990.

On September 18, 1990, COLAVITA convened the Ninth

---

[4] Republican MILLER is a Rockland County practitioner who had previously resigned from the bench and became affiliated with a politically-connected Rockland County law firm.

Judicial District Republican Nominating Convention. As shown on the face of the Certificate of Nomination, dated September 18, 1990, filed with the New York State Board of Elections, he was also the Permanent Chairman of the Convention, in violation of the Election Law, as set forth in the Statement of Objections and Specifications of Objections filed with said Board.

On September 24, 1990, DENNIS MEHIEL, then Chairman of the WESTCHESTER DEMOCRATIC COUNTY COMMITTEE, convened the Ninth Judicial District Democratic Nominating Convention. In violation of relevant provisions of the Election Law, as set forth in the Statement of Objections and Specifications of Objections, also filed with said Board, and contrary to the Certification, sworn to as true and correct by JAY B. HASHMALL, Esq., the Chairman and Presiding Officer of the 9th Judicial District Nominating Convention and MARC S. OXMAN, Esq., Secretary thereof, there was no legal quorum and no roll call taken to ascertain the existence thereof. As further set forth, contrary to applicable Election Law provisions, adequate seating for the requisite number of Delegates and Alternate Delegates was not provided. Nor, as noted in Petitioners' Objections, was the number of Delegates and Alternates elected to the Convention in the proportion required by law.

The New York State Board of Elections, after denying a request for a hearing on the Objections and Specifications thereto, ruled that the Objections and Specifications went beyond

the face of the Nominating Certificates, and that, accordingly, only judicial relief relative thereto would be available.

In Castracan v. Colavita, Supreme Court, Albany County (Index No. 6056/90) Justice Lawrence E. Kahn, by Order dated October 16, 1990, after oral argument the day before, dismissed the Petition therein for failing to state a cause of action. In his view, the nominees had been nominated by Delegates and Alternates to the respective conventions, and held that, absent proof that the conventions were not properly conducted, the nominations could not be invalidated. (See Decision/Order of Justice Kahn, annexed as Exhibit "B" to Answer of Respondent Colavita herein.)

With the Record on Appeal and Briefs having been reproduced overnight, served on eight law firms in Westchester County, Rockland County, New York County, and Albany County the very next day, and filed in Albany County late Wednesday afternoon, October 17th, oral argument had been anticipated on Friday, October 19, 1990. Instead the Third Department denied the automatic preference given to Election Law cases and denied the formal motion brought on by Order to Show Cause on October 22, 1990 for it entitled preference under the Election Law and the Court's own rules.

On March 25, 1991, after the general elections of 1990, oral argument was heard, and a Decision made on May 2, 1990

(annexed as Exhibit "C" to the Answer of Respondent Colavita herein.)

A jurisdictional statement has been filed with the Court of Appeals contending that the aforesaid decision is reviewable as a matter of right.

The instant proceeding was commenced on August 2, 1991 by Order to Show Cause, returnable August 7, 1991, adjourned to August 12, 1991. By Decision/Order delivered from the Bench upon conclusion of oral argument, transcribed and dated August 13, 1991 and entered August 14, 1991, the Court presented squarely for consideration and decision by this Court the narrow issue as to whether, and under what circumstances, an agreement to barter judgeships, made by political leaders and their hand-picked judicial nominees is to be declared illegal, unconstitutional and contrary to public policy and thereby render the nominee ineligible to serve as a judge.

POINT I

THE CROSS-ENDORSEMENTS CONTRACT IN ISSUE IS AN INVIDIOUS VIOLATION OF THE NEW YORK STATE CONSTITUTION, THE ELECTION LAW OF NEW YORK STATE, AND THE CODE OF JUDICIAL CONDUCT AND COURT RULES RELATIVE THERETO. AS SUCH, IT IS ILLEGAL, VOID, AND AGAINST PUBLIC POLICY.

New York law is well settled that:

"...The general right to contract is subject to the limitation that the agreement must not be in violation of the federal or state constitutions, federal or state statutes, an ordinance of a city or town, or a rule of the common law." 21 NY JUR2d 543, Contracts, §137.

The illegality of a contract under New York contract law is defined as follows:

"A contract's illegality may lie in its consideration, in a promise, or in its performance. An agreement to do an illegal act is illegal. Any act, promise, or agreement designed or intended to accomplish the furtherance or effectuation of an unlawful purpose is unlawful, and every such promise or agreement is void or unenforceable. If the effect of the agreement is to accomplish an unlawful purpose, the agreement will be declared illegal, regardless of the intention of the parties." 21 NY JUR2d supra, at p.544, Contracts, §138.

In defining what constitutes a violation of public policy, the New York courts have ruled that:

"...No one can lawfully do that which has a tendency to be injurious to or against the public good or welfare...

"Public policy is determined from a consideration of the Constitution, laws, court decisions, and course of administration...Where there are constitutional or statutory provisions, they govern as to what is the public policy. A state can have no public policy except what is to be found in its Constitution and laws...

"The principle that contracts against public policy are void and unenforceable...is based upon the theory that such an agreement is injurious to the interests of society in general..." 21 NY JUR 2d, supra, at pp.551 & 552, Contracts §144."

The cross-endorsements contract in issue, embodying the "Three-Year Plan" of the party leaders, violates Article 6, §6(c) of the New York State Constitution requiring that, "The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. . . ." Those legislators who enacted Article 6, section 6 (c) of the New York State Constitution and its predecessor sections mandating the election of supreme court justices, intended that their nomination and election be meaningful and proper, untainted by the abuses of "irresponsible members of a party convention, acting under no official sanction." See Debates in the New York State Convention, 1846, Tuesday, September 1 at pp. 584, 585, and Wednesday, September 2, pp. 585-594. As Legislator Kirkland so eloquently stated during these debates, in opposition to election of judges:

> ". . . nominations to these offices would be made by party caucuses and conventions - that these assemblages, and the nominations they made, were very often the result of intrigue, of management, of personal and local arrangements and of contracts and bargains of mere politicians. All understood well too, the iron rule of these caucuses and conventions; their decrees were despotic, and political death awaited him who refused to them passive obedience. The consequence was, that to one case where these decrees are disregarded, there are ninety nine where they are implicitly obeyed by all party men. Indeed, (continued Mr. K.) strict adherence to `regular nominations' is the watchword of all parties, and has come to be regarded as an essential article of party faith. Thus, the nomination by the party happening at the time to have the majority, is tantamount for all practical purposes to the actual election, and thus in fact the irresponsible members of a party convention, acting under no official sanction, and assembled for a day or an hour and then disbursed to meet no more, will in fact appoint your judges. I prefer for this purpose a more responsible appointing power. . . ." Debates in the New York State Convention, 1846, supra, at p. 587.

Legislator Patterson expressed the ultimate will of this Convention when he stated, in support of the principle of an election of justices by

judicial district:

> ". . . The more the election was brought home to the people, the better candidates would be chosen to occupy this high station. In all the districts of the state, there were men well qualified to occupy the bench of the supreme court. Not the severest party screws would be able to bring the people to vote for a person who was not competent, merely because he was of their own political opinions. They would feel an interest in this question far outweighing mere political considerations." Debates in the New York State Convention, 1846, supra, at p. 589.

Patterson's view carried the day, and the resolution, calling for election of Supreme Court Justices by judicial districts, was adopted. The expressed intent was to aid the people in their election of the judicial candidates so they could elect the better candidates, promote a more actively involved electorate, and minimize the effect of the "party screws".

Calling for the judicial nomination of the candidate of one party expressly conditioned on the judicial nomination of the candidate of the other party, the cross-endorsements provision of the subject contract violates:

A. Article 6, section 6(c) of the New York State Constitution and, therefore, constitutes an illegal and void contract, 21 NY JUR2d, supra, at p.555, Contracts, §147, and

B. New York statutory law, specifically the penal provisions of Election Law §17-158, which state, in pertinent part:

"Any person who:

> "1. While holding public office or being nominated or seeking a nomination therefor, corruptly uses or promises to use, directly or indirectly, an official authority or influence possessed or anticipated, in the way of conferring upon any person, or in order to secure, or aid any person in securing, ar. office or public employment, or any nomination, confirmation, promotion or increase of salary, upon consideration that the vote or political influence or action of the person so to be benefited or of any other person, shall be given or used

"in behalf of any candidate, officer or party, or upon any other corrupt condition or consideration; or,

* * *

"3. Makes, tenders, or offers to procure, or cause any nomination or appointment for any public office or place, or accepts or requests any such nomination or appointment, upon the payment or contribution of any valuable consideration, or upon an understanding or promise thereof...

* * *

"is guilty of a felony."

The instant cross-endorsements contract - adopting the party leaders' Three-Year Plan and calling for the resignation of Respondent Albert Emanuelli (a Republican) in 1990 after his election in 1989 to a 14 year term of office to permit him to then run for Surrogate of Westchester County, and in order to elevate Respondent Nicolai (a Democrat) to the Supreme Court Bench - violates Election Law §17-158, paragraph 1, because respondent party leaders and respondent judicial nominees did, in fact, use their influence in corruption of the judicial election process, assuring their nomination, and ultimately certain election, as judges, and increasing their influence as party leaders. The consideration the Democratic and Republican party leaders gave to each other was a bargained-for exchange of political influence and, as such, was corrupt and unlawful, being a "valuable consideration" within the letter and spirit of the aforesaid penal provisions of the Election Law. Each party leader agreed with the other, in sum and substance, that "I will endorse your candidates <u>if</u>, <u>and only if</u>, you endorse my candidates,". - the end result being that there would be an identical slate of judicial candidates on the ballot of both major parties, and

the intended effect being to deprive the voters of a meaningful "election" of these candidates in violation of Article 6, §6(c) of the New York State Constitution. The voters, having been denied their constitutional right to elect between the judicial Republican and Democratic nominees, have been disenfranchised.

This illegal cross-endorsements contract also specifically violates paragraph 3 of §17-158 of the New York State Election Law. The respondent party leaders and respondent judicial nominees made a deal, consisting of promises and guarantees to each other that each would cross-endorse and guarantee the nomination and election of each other's candidates to achieve an identical slate of judicial candidates on the Republican and Democratic slates over a three-year period! As stated, these mutual promises and guarantees constitute "valuable consideration" for the illegal and corrupt bargain made by the respondent political bosses and judicial nominees.

The New York State courts have interpreted Election Law §17-158, and its predecessor (Election Law §448), liberally and broadly to prohibit political office-holders, nominees, and bosses and power brokers from making corrupt bargains or otherwise corruptly using their authority, People v. Hochberg, 87 Misc 2d 1024 (Sup. Ct., Albany Co. - 1976), aff'd 62 AD2d 239 (3rd Dept. - 1978); People v. Burke, 82 Misc 2d 1005 (Sup. Ct., New York Co. - 1975). The same is true of former §775 of the Penal Law, former §421 of the Election Law, and its predecessor (§751 of the former Penal Law); People v. Lang, 36 NY2d 366, 370 (1975); People v. Willett, 213 NY 368, at pp. 375-380 (1915); and People v. Cassidy, 213 NY 388 (1915).

Justice Roberts, in People v. Burke, supra, at p.308, described the

history and intent of these statutes, referring to People v. Willett, 213 NY 368, at pp. 376-377:

> "Prior to 1892 much has been said and written about the power wielded by political leaders, or so-called 'bosses' in the state and in the subdivisions thereof. In the second edition of 'The American Commonwealth,' by James Bryce, which was issued in 1891, in discussing American politics and the power of individuals to control party nominations, he says, 'There is usually some one person who holds more strings in his hand than do the others. Like them, he has worked himself up to power from small beginnings gradually extending the range of his influence over the mass of workers and knitting close bonds with influential men, outside as well as inside politics, perhaps with great financers or railway magnates who he can oblige and who can furnish him with funds... * * * * He dispenses places, rewards the loyal, punishes the mutinous, concocts schemes, negotiates treaties * * * Another useful expedient has been borrowed from European monarchies in the sale of nominations and occasionally of offices themselves. A person who seeks to be nominated as a candidate for one of the more important offices such as a judgeship or a seat in the State Senate in Congress, is often required to contribute to the election fund a sum proportioned to the importance of the place he seeks, the excuse given for the practice, being the cost of elections; and the same principle is occasionally applied to the gift of non-elective offices, the right of appointing to which is vested in some official member of a Ring - e.g., a mayor'"

The instant illegal cross-endorsements contract, assuring the uncontested nomination and election of judges in the Ninth Judicial District over a three-year period by passage of identical resolutions of nomination at both the Republican and Democratic Judicial Nominating Conventions, is nothing but yet another attempt by political bosses to corruptly bargain, barter and trade in important offices - a practice our State Legislature, through its statutes and Constitutional Conventions, has condemned for nearly a century and a half.

This Court should note that the instant case is distinguishable from People v. Cunningham, 88 Misc 2d 1065 (Sup. Ct., Bronx Co. - 1976), an unappealed lower court decision involving a criminal proceeding in Bronx County. That matter involved a criminal indictment charging that Patrick Cunningham, then a Bronx County Democratic leader, tendered a

judicial nomination to then City Councilman, Anthony Mercorella, in return for Mercorella's promise to resign his position at a time when it would result in a political benefit to the regular Democratic organization. Acknowledging that the legal and factual issues were "close ones", the Bronx County Supreme Court Judge dismissed felony indictments against these two Bronx political officials by narrowly construing the language of the penal provisions of former §448 of the Election Law (subpara. 3), "Payment or contribution of any valuable consideration, or upon an understanding or promise thereof," to exclude from its meaning the conferring of a political benefit to a political party, as opposed to a "material benefit" to an individual or entity. The reasoning of the Court in Cunningham in support of such construction is unpersuasive, but the facts in that case differ in important respects from the instant civil proceeding where there are material benefits on all three sides, gained by all the respondents.

Most importantly, Cunningham involves a criminal prosecution. The instant case is entirely civil in nature seeking only civil remedies including, among other things, to have an illegal agreement declared void. While the courts commonly apply a strict construction to statutory language in criminal cases, they liberally construe the meaning of statutory language when civil remedies alone are sought:

> "For the purposes of ascertaining their intended object, statutes for the prevention and punishment of corrupt practices should be liberally construed and rigidly enforced. So it has been held as to its remedial provisions the statute should have a liberal construction, in the light of previous experience and prior enactments, but should be strictly construed as to its penal provisions. 29 C.J.S., 814, 815, Elections §329."

New York Election Law section 16-100, paragraph 1, provides that " . . . any subject set forth in this article [Article 16] shall be construed liberally." Article 16 includes Election Law section 16-102 pursuant to which the instant civil proceeding is brought, and therefore, this Court should apply a liberal construction to all statutory language pertinent to this proceeding.

It is imperative that this Court immediately grant the relief sought in the instant civil proceeding. This illegal contract, if allowed to stand, not only deprives voters in the upcoming election of their right to participate in a meaningful election between the two major parties' judicial nominees, it also sets a dangerous precedent for future long-term engineering of corrupt bargains, barters and trades between Republican and Democratic political bosses. The subject contract, a "Three Year Plan", might another time become a "Five Year Plan", and perhaps another time a "Plan for the Decade", or a "Plan for the Century"! The effect of all such deals is to circumvent the lawful, constitutionally-guaranteed right of election of the New York Judiciary, rendering such elections a rubber stamp, a sham and a travesty.

The cross-endorsements contract is palpably illegal for yet another reason. Over and beyond the loss of independence and integrity of the judicial nominees represented by their essential consent to the terms of the contract, their independence and integrity is further compromised by a further condition to their nomination, contractually imposed by both

Republican and Democratic parties, which expressly and specifically required that each judicial nominee:

> ". . . pledge that, once nominated for the stated judicial office by both of the major political parties, he or she will [after election] . . . provide equal access and consideration, if any, to the recommendations of the leaders of each major political party in connection with the proposed judicial appointments." See bottom paragraph on page 2 of Ex. G attached to Petition.

By making such a pledge as these judicial nominees were required to make as a condition of their endorsements, they bound themselves in advance to bring politics right into their judicial chambers by dispensing their judicial appointments, whenever guardians, conservators, administrators, referees and the like are needed, wholly on the basis of party affiliation and party loyalty. We have now arrived at judicial patronage by written fiat of the party leaders, as a pre-condition to nomination, without even passing respect to the merit, or lack thereof, of the appointees, in blatant violation of the Code of Judicial Conduct and Court Rules relative thereto.

Assuredly, the confidence of the public, as well as the practising bar, is hardly enhanced by such a brazenly political arrangement. Such political arrangement not only violates the Election Law, but also violates the Rules of the Chief Administrator of the Courts, Part 100, Judicial Conduct, sections 100.1, and 100.2, recognizing that:

> " An <u>independent</u> and <u>honorable</u> judiciary is <u>indispensable</u> to justice in our society. Every judge shall participate in establishing, maintaining, and enforcing, and shall himself or herself observe, high standanrds of conduct so that <u>independence and integrity</u> of the judiciary may be preserved . . .", section 100.1, (underscoring ours for emphasis);

and requiring that:

> " (a) A judge shall respect and comply with the law and shall conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> (b) No judge shall allow his or her family, social or other relationship to influence his or her judicial conduct or judgment.
>
> " (c) No judge shall lend the prestige of his or her office to advance the private interests of others nor shall any judge convey or permit others to convey the impression that they are in a special position to influence him or her. . . .", section 100.2, (underscoring ours for emphasis).

The court rules on judicial conduct further mandate that " . . . A judge shall exercise the power of appointment only on the basis of merit, avoiding favoritism . . .", Rules of the Chief Administrator of the Courts, Part 100, Judicial Conduct, section 100.3(b)(4), (underscoring ours for emphasis).

POINT II

RESPONDENT J. EMMETT MURPHY, AS AN INTEGRAL PARTY TO THIS ILLEGAL CONTRACT, SHOULD BE DISQUALIFIED AS A JUDICIAL CANDIDATE IN THE UPCOMING ELECTION

The Petition alleges and the evidence will show[1] that Respondent J. Emmett Murphy participated, directly and indirectly, in the making of this illegal and unconstitutional cross-endorsements contract. As such, he should be disqualified from seeking the judicial office to which he now is a candidate in the upcoming election since:

> "The penalty ordinarily imposed on a candidate for violation of corrupt practices statutes is disqualification from office..." 26 AM JUR 2d Elections Sec. 380, p. 191.

A respondent judicial nominee "...may be deemed to be a participant in the unlawful purpose [of the illegal contract] if, with knowledge thereof, he does anything which facilitiates the carrying out of such purpose." 21 NY JUR2d, Contracts Sec. 140, p. 546.

In the instant case, Respondent J. Emmett Murphy, at the very least, facilitated the carrying out of the unlawful purpose of the illegal cross-endorsements contract, not only by accepting the nomination, but also by pledging that once elected, he would divy up judicial appointments based on the recommendation of the leaders of the major political parties. As such, he participated in the unlawful purpose of the contract.

---

[1] The patent error committed by the lower Court in sustaining the demurrer is best exemplified by its failure to consider the letter dated July 19, 1991 delivered to Respondent Murphy enclosing the written Three-Year Plan, to support the allegations found in Paragraph 52 of the Petition.

Accordingly, he would be disqualified from office and, hence, ineligible to run in the upcoming judicial elections.

CONCLUSION

Petitioners are eminently entitled to the relief requested by their Petition herein, which not only states a cause of action, but, by reason of the undisputed facts, should be granted as a matter of law.

In furtherance of a mutual interest to promote a non-partisan judiciary populated by lawyers with universally acclaimed litigation skills, unblemished reputations for character and judicial temperament and distinguished civic careers, and to enable sitting judges of universally acclaimed merit to attain re-election to their judicial office without the need to participate in a partisan contest, the Westchester County (Republican) (Democratic) Committee joins with the Westchester County (Republican) (Democratic) Committee to Resolve:

That for the General Election of 1989, we hereby pledge our support, endorse and nominate Supreme Court Justice Joseph Jiudice, Supreme Court Justice Samuel G. Fredman and Albert J. Emanuelli, Esq. of White Plains, New York for election to the Supreme Court of the State of New York, Ninth Judicial District, and to call upon and obtain from our counterparts in Rockland, Orange, Dutchess and Putnam Counties similar resolutions; and

For the general election of 1990, assuming that the then Justice Albert J. Emanuelli will resign from the Supreme Court Bench to run for Surrogate of Westchester County and thereby create a vacancy in the Supreme Court, Ninth Judicial District to be filled in the 1990 general election, we hereby pledge our support, endorse and nominate County Court Judge Francis A. Nicolai as our candidate for the Supreme Court vacancy created by Judge Emanuelli's resignation, and to call upon and obtain

from our counterparts in Rockland, Orange, Dutchess and Putnam counties resolutions and commitments to support Judge Francis A. Nicolai as their candidate to fill the vacancy created by the resignation of Judge Emanuelli; and we hereby pledge our support, endorse and nominate Albert J. Emanuelli as our candidate for Westchester County Surrogate in the 1990 general election.

For the general election of 1991, we hereby pledge our support, endorse and nominate Judge J. Emmet Murphy, Administrative Judge of the City Court of Yonkers, for election to the County Court of Westchester County to fill the vacancy anticipated to be created by the election of Judge Francis A. Nicolai to the Supreme Court and Judge Adrienne Hofmann Scancarelli, Administrative Judge of the Family Court, Westchester County, for re-election to the Family Court, Westchester County; and

To require each of the above-named persons to pledge that, once nominated for the stated judicial office by both of the major political parties, he or she will refrain from partisan political endorsements during the ensuing election campaign and, thereafter, will provide equal access and consideration, if any, to the recommendations of the leaders of each major political party in connection with proposed judicial appointments.

We are resolved and agreed that the foregoing Resolution and pledges are intended to and shall be binding upon the respective Committees of the two major political parties during the years 1989, 1990 and 1991 and shall not be affected by any action or proposed action or court merger or court unification.

ELI VIGLIANO

Attorney at Law

CENTRAL PARK PROFESSIONAL BLDG.
1250 CENTRAL PARK AVENUE
P.O. BOX 310
YONKERS, NEW YORK 10704
(914) 423-0732
FAX (914) 423-8964

PERSONAL & CONFIDENTIAL

July 19, 1991

Honorable J. Emmett Murphy
Judge of the City Court
Robert W. DeCace Justice Center
100 South Broadway
Yonkers, NY 10701

Honorable Sir:

We write on behalf of the Ninth Judicial Committee. We have been informed and believe that petitions to designate you as the candidate for County Court Judge of Westchester County of both the Democratic Party and the Republican Party, and perhaps the Conservative Party, have been circulated in Westchester County beginning in June, 1991; apparently in the further performance and implementation of the political agreement made in 1989. We enclose herewith a copy of the Resolution adopted in August, 1989 by the Executive Committees of the Westchester County Democratic and Republican parties. You will note an agreement was reached whereby you are one of seven judges receiving cross-endorsements over a three year period and the one to be cross-endorsed by both said parties for the subject office in 1991. Note especially the penultimate paragraph which provides that once nominated and/or designated and elected, such judicial candidates, including you, will, after induction, pledge to provide equal access and consideration, if any, to the recommendations of the respective County leaders of the two major parties.

As the Third Department, Appellate Division cogently noted in its Decision of May 2, 1991 in Castracan v. Colavita, __ App. Div. __, several interesting issues relating to the propriety and appropriateness of "the practice of judicial cross-endorsements", were raised by said case. The enclosure constituted Exhibit G to the petition which had been filed with in Supreme Court seeking to invalidate the nominations of certain judicial nominees on various grounds, including the complaint that the agreement constituted an illegal agreement in violation of Sec. 17-158 of the Election Law of the State of New York.

Although Castracan v. Colavita has not yet been heard or decided by the Court of Appeals, it appears that the two major parties of Westchester County have not entered into any agreement respecting the judicial offices which are now vacant in the Ninth Judicial District, and Westchester County. Indeed, we are headed for contested elections with respect to the three Supreme Court vacancies and the Family Court vacancy. Hence, it is only the County Court vacancy created by the resignation of Honorable Francis Nicolai which would be uncontested.

We firmly believe that the agreement is illegal, void, unenforceable and will eventually be so held by the Court of Appeals. The participants thereof are exposed to serious penalties.

The Ninth Judicial Committee, has resolved to call upon you to decline the Republican designation and thereby avoid a Court test respecting the illegality attending such cross-endorsement.

We also draw your attention to the three recent decisions of the Supreme Court of the United States, Clark v. Roemer (90-952) 59 US Law Week 4583 (#47); Chisom v. Roemer (90-757) & U.S.A. v. Roemer (90-1032) 59 US Law Week 4696 (#49); and Houston Lawyers Association v. Attorney General of Texas (90-813) and League of United Latin American Citizens v. Attorney General of Texas (90-974) 59 U.S. Law Week 4706 (#49). The tenor of said three decisions is to the effect that the Federal Voting Rights Act, Section 2, is applicable to the election of State Court Judges. Based on the 1988 amendments, it appears that there is no longer any need to show discriminatory intent, merely a discriminatory effect. Logically, the whole is the sum of its parts. Hence, if all the voters are precluded from exercising their New York State constitutional right to elect a state judge by reason of the cross-endorsements it would appear to come squarely within the purview of said statute.

Based on the foregoing, we most respectfully urge you to avoid having your cross-endorsement challenged. With a vigorous campaign, addressed to the voters in true democratic tradition, you may then worthily succeed in your quest for this esteemed office.

Respectfully yours,

Eli Vigliano
Chairman,
Ninth Judicial Committee

EV:gl

cc: Anthony Colivita, Esq.

Decision

THE COURT: I'm prepared to render a decision.

The petitioners seek to be declared invalid an agreement between the major political parties in this County who cross endorsed various candidates claiming it is in violation of the Election Law.

I have before me a copy of that agreement and it simply says that for the general election of 1990 -- I'm sorry, for the general election of 1991, I am ignoring the clauses pertaining to the general elections of 1989 and 1990, "We hereby pledge our support, endorse and nominate Judge J. Emmett Murphy, Administrative Judge of the City Court of Yonkers for election to the County Court of Westchester County to fill the vacancy and participate -- created by the seat of Francis A. Nicolai to the Supreme Court," et cetera.

There is nothing in this agreement which compels Judge Murphy to accept a cross endorsement. It is simply an agreement accepted by both parties which indicate that each party is prepared to endorse a candidate for nomination. There's nothing

illegal about it. There's nothing unconstitutional about it. If it is to be prohibited it is for the Legislature to prohibit it. The public is not damaged in any way. They have their rights. The public's rights have not been abridged. For Supreme Court nominations you have a right to enter a primary for the election of candidates for the judicial convention. For County Court positions you have a right to submit petitions, to enter a primary for a nomination by a political party. In addition to the right to file petitions as independent candidates.

There is nothing in this agreement which is illegal. There's nothing unconstitutional about it.

I am not addressing myself to the other defenses that were raised, but I will point out that the relief sought is to declare illegal, invalid, void and against public policy the contract, and I quote, "The contract embodying the three year plan of the party leaders also known as cross endorsements," et cetera, close quote. And that quote, "Respondent Hon. J. Emmett Murphy be declared inelligible to serve as a Judge of the County

Court and disqualified of being a candidate for any party for election to such office." That's the second relief sought that the designating petition or petitions filed (I'm not quoting directly now) of the Westchester County Board of Elections, purporting to designate respondent Murphy as a candidate for the Republican and Conservative nominations for County Court Judge be declared invalid. And, that the Board of Elections be enjoined from printing and placing the name of respondent Hon. J. Emmett Murphy as a candidate. I find this petition is totally without merit, that there is no legal basis for me to grant any of the relief.

I deny the petition. I find that this agreement was not in violation of the Election Law. It is not unconstitutional. And anyone has a right to endorse anyone they wish for nomination to public office. It is when the nomination is paid for, when there is a consideration given for nomination that the agreement is illegal. That is not the situation here.

Accordingly, the petition is dismissed in its entirety. The foregoing constitutes the

Decision

Order and decison of this Court.

oOo

CERTIFICATION

I, Elizabeth A. Kent, Senior Court Reporter, do hereby certify the foregoing to be true and accurate, as taken by me on August 12, 1991, before the Hon. Vincent Gurahian, Justice of the Supreme Court.

Elizabeth A. Kent

So ORDERED

Dated: August 13, 1991

S/ HON. VINCENT GURAHIAN
J. S. C.

Cases Filed with the Court of Appeals

Special to the Law Journal

ALBANY — The New York Court of Appeals yesterday issued its weekly lists of appeals filed during two weeks ended July 25 with descriptions of key issues in each case.

The Court reminded that some of these filed appeals may never reach decision on the merits because of dismissal on motion, sua sponte, or for time deficiencies or because of stipulated withdrawals by the parties. Also, some counsel fail to file timely jurisdictional statements and thus the list should not be treated as comprehensive for any particular week.

The Court also calls attention to Rule 500.11(e), which provides criteria to qualify as amici curiae to present views to the court. The subject matter of these newly filed cases may suggest appropriate motions and participation which the Court welcomes. Motions for amicus curiae relief must be made promptly and those interested are urged to contact the Clerk's office for information on the current calendar status of the appeal.

Following is the new list of appeals:

CASTRACAN, MATTER OF, v. COLAVITA, ET AL.: Third Dept. App. Div. order of 5-15-91; affirmance; *sua sponte* examination whether a substantial constitutional question is directly involved; **Elections — Petition to Declare Invalidity of Certain Certificates of Nomination (Election Law §16-102); Cross Endorsememt of Candidate; Failure to Join Necessary Party;** Supreme Court, Albany County, dismissed petitioners' application to declare invalid certain certificates of nomination; App. Div. affirmed.

at p. 2