To be argued by
HENDERSON G. RIGGS

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NEW YORK SUPREME COURT
APPELLATE DIVISION : FIRST DEPARTMENT

GEORGE SASSOWER,

Claimant-Appellant,

- against -

THE STATE OF NEW YORK,

Defendant-Respondent.

Claim No. 62894

RESPONDENT'S BRIEF

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Statement

This is an appeal by claimant from a judgment of the Court of Claims, dated September 19, 1979 (3, 4)*, which dismissed the claim for failure to state a cause of action. The judgment of dismissal was based upon a decision by SILVERMAN, J. (19-21). The claim sought to allege a cause of action in the nature of defamation in that Judges of the Appellate Division, Second Department, rendered a decision (Sassower v Sigorelli, 65 AD2d 756 [1978]) which defamed claimant. The dismissal was based upon the theory of judicial immunity and the fact that the claim was untimely filed. The Clerk of the Appellate Division, Second Department, Hon. Irving N. Selkin, has advised the State by telephone that this appeal was transferred to the Appellate Division, First Department, by order dated October 6, 1980.

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*Unless otherwise indicated, references are to pages in the Record on Appeal.

Questions Involved

1. Do Justices of the Appellate Division, acting in their official capacities, enjoy an absolute judicial immunity for alleged defamatory statements written in a decision in a case they are obliged to decide, when the statements are pertinent to the issues presented?

The Court of Claims decided in the affirmative, and the State submits that it decided the question correctly.

2. In enacting Court of Claims Act, § 8, did the State waive immunity and consent to be liable under the doctrine of respondeat superior for the alleged torts of members of the judiciary who are performing official and sovereign functions in deciding litigation between parties?

The Court of Claims decided in the negative, and the State submits that it decided the question correctly.

3. Does a Notice of Claim filed 120 days after an alleged cause of action arose comply with Court of Claims Act, § 10(3), which provides essentially that either a Notice of Claim or a Notice of Intention to file a claim must be filed within 90 days from the accrual of the alleged cause of action?

The Court of Claims held that the Notice of Claim was untimely, and the State submits that it decided the question correctly.

Facts

(1) Notice of Claim

A Notice of Claim (9) was filed in the office of the Court of Claims on March 9, 1979 which alleged that "* * * the Appellate Division of the Supreme Court:Second Judicial Department was an employee of the State of New York * * *";

"That on November 6, 1979, the Appellate Division of the Supreme Court of the Second Judicial Department caused to be issued irrelevant, gratuitous, and libelous statements not possibly pertinent to the issues before that Court knowing that they would thereafter be published by Lawyers Co-operative Publishing Co. and West Publishing Co. for mass distribution * * *."

The Notice of Claim continued by alleging that the Appellate Division (apparently upon motion) on December 11, 1979 (sic), "refused to vacate the offensive verbiage and consequently the defamation of November 6, 1979 (sic) was published by West Publishing Co. on December 20, 1978 (409 NYS2d 762) and will shortly hereafter be published (in the Official Reports) by Lawyers' Cooperative Publishing Co." (9)*.

It alleges that as a result thereof claimant (a lawyer) has been defamed in his profession, emotionally aggrieved, has lost earnings and has been damaged otherwise and demands special and punitive damages in the amount of $250,000.

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*The Notice of Claim, verified March 5, 1979, was filed in the Court of Claims on March 9, 1979 (9). When the Notice of Claim refers to a decision dated "November 6, 1979" and a refusal to vacate the decision dated "December 11, 1979", thereafter published by West on "December 20, 1978", it obviously means 1978 rather than 1979, as alleged.

(2) State's Notice to Dismiss

The State moved to dismiss: (1) on the grounds that the Notice of Claim was not filed within 90 days as required by Court of Claims Act, § 10(3); and (2) that the Notice of Claim failed to state a cause of action in that any statements made by a Court or its Justices/Judges are absolutely immune from suit (7, 8).

(3) The Decision of the Appellate Division, Second Department*

The decision of the Appellate Division sets forth some of the facts which form the background of this litigation (Sassower v Sigorelli, 65 AD2d 756). Further background is set forth in Kelly v Sassower, published in the New York Law Journal, September 18, 1980, p 4, col 1, and an article about the case published in the same issue, p 1, col 4, cont'd p 28, col 3.

Essentially what is stated is that appellant, a member of the New York Bar, is/was the trustee of two family trusts established by Eugene Paul Kelly, who died in 1972. Appellant defied a series of court orders directing him to file comprehensive and detailed accountings with respect to the trusts. Apparently, the situs of the trusts was in Westchester County, but the matter was transferred by court order to Surrogate's Court, Suffolk County. Appellant continued to default in accounting, after a series of extensions, and finally was given until June 22, 1977 to comply.

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*The decision of the Appellate Division is not set forth in the Notice of Claim, but is published in the official reports in 65 AD2d 756, and by West Publishing Co. in the unofficial reports in 409 NYS2d 762.

The afternoon before the final return date he telephoned the office of the Public Administrator of Suffolk County, who had been substituted as fiduciary, to state that he would not be in court the following day. Upon the return the Surrogate held a hearing and heard testimony from the Deputy Public Administrator and then adjudged appellant in contempt of court in an order which stated: "George Sassower is guilty of criminal contempt of court committed in the immediate presence of the court by reason of his failure to obey the lawful order and directions of this court." Some kind of process obviously issued to the Sheriff, who promptly took Mr. Sassower into custody and brought him before the Surrogate, who committed him to jail.

Mr. Sassower then petitioned the Appellate Division, Second Department, for a writ of habeas corpus and requested bail pending the hearing. The application for bail was denied, but a hearing on the writ was scheduled for the following day, June 24, 1977.

After the hearing had been scheduled and bail pending hearing had been denied, Mr. Sassower made a second application for a writ of habeas corpus, this time before a Justice of the Supreme Court in Suffolk County. The second application neglected to mention, in violation of CPLR, § 7002(c)(6), that a prior application had been made for the same relief. The Justice, before whom the second application was made, directed that a hearing be scheduled for June 27, 1977, set bail at $300, and the relator apparently was released from custody.

Upon the hearing of the second writ, Special Term, Suffolk County, held that, contrary to the recitation in the contempt order, the relator was not actually in Court before the Surrogate when he was adjudicated in contempt, and thus sustained the writ of habeas corpus and annulled the Surrogate's adjudication.

The Surrogate appealed to the Appellate Division, Second Department, and the order of Special Term was affirmed because under Judiciary Law, § 751, a summary adjudication of contempt is permissible only when the person held in contempt is within the court's presence. The memorandum by the Appellate Division, Second Department concluded by stating (65 AD2d 756, 757):

> "We note that petitioner has again been adjudged in contempt on further proceedings in the Surrogate's Court, a hearing which is pending in the Supreme Court, Suffolk County, where the matter (commenced by petitioner in Westchester County) was transferred by order of the Special Term in Westchester County, entered August 15, 1978."

Apparently the Notice of Claim is intended to allege that the foregoing paragraph defamed claimant-appellant, and serves as the basis of the instant alleged cause of action against the Judges of the Appellate Division, Second Department, for whom respondent, State of New York, is asked to respond.

Decision Below

The Court of Claims in a decision by SILVERMAN, J. (19-21) granted the State's motion to dismiss and a judgment of dismissal thereafter was made and entered (3, 4).

The opinion stated that while it thought that the action was untimely, it based its decision on the theory of absolute judicial immunity whereby public policy dictates that all parties to litigation, counsel, witnesses, members of the court, et cetera, be encouraged to speak freely in the course of judicial proceedings, citing Martirano v Frost, 25 NY2d 505, 508. Moreover, the Court also held that the State is not liable for the errors of a judicial officer on the theory of respondeat superior (Jameison v State, 7 AD2d 944).

ARGUMENT

POINT I

THE NOTICE OF CLAIM DOES NOT STATE A CAUSE OF ACTION BECAUSE HERE THE JUSTICES OF THE APPELLATE DIVISION ENJOY AN ABSOLUTE IMMUNITY FOR WHAT THEY WRITE IN A JUDICIAL DECISION.

The law is clear that any oral or written statements, even if defamatory, made by an attorney or a party during the course of a judicial proceeding, are privileged if the statements are material or pertinent to the issues involved (Feldman v Bernham, 6 AD2d 498 [1st Dept, 1958], affd 7 NY2d 772 [1959]). The scope of the privilege is so broad as to "embrace anything that may possibly be pertinent" (Andrews v Gardiner, 224 NY 440, 445 [1918]).

The determination of the question of privilege is a question of law, and if it be determined that the statement made or the language used was not impertinent, then the privilege is absolute (People ex rel. Bensky v Warden, 258 NY 55, 60 [1932]).

Likewise, the privilege protects a Judge or Judges sitting on a case in an official capacity (Jameison v State, 7 AD2d 944 [3d Dept, 1959]; Hanft v Heller, 64 Misc 2d 947 [S Ct, NY Co, 1970]; Bradford v Pette, 204 Misc 308 [S Ct, Queens Co, 1953], app dsmd 285 App Div 960 [2d Dept, 1955]). The Pette case involved the publication of an allegedly libelous decision.

The doctrine of judicial privilege is based upon sound considerations of public policy. In Martirano v Frost, 25 NY2d 505 (1969), a case where an attorney allegedly was slandered in court, Chief Judge FULD stated (p 508):

> "It may be unfortunate that the plaintiff must suffer an attack on his professional integrity without any means of judicial redress, but the possible harm to him as an individual is far outweighed by the need - reflected in the policy underlying the privilege here invoked - to encourage parties to litigation, as well as counsel and witnesses, to speak freely in the course of judicial proceedings * * *."

The principle of judicial immunity likewise is recognized by the United States Supreme Court (see, e.g., Stump v Sparkman, 435 US 349 [1978]; and Pierson v Ray, 368 US 547, 553, 554 [1967]).

An excellent analysis of the question of privilege in judicial and quasi-judicial proceedings is set forth in Hanzimanolis v City of New York, 88 Misc 2d 681 (S Ct, NY Co, 1976).

In the instant appeal the appellant was held in criminal contempt of court by the Suffolk County Surrogate after having defied a series of court orders directing him to file an accounting as the former executor of an estate. The Surrogate obviously issued some process after making the order of criminal contempt because the Sheriff took the appellant into custody the following day, and he was brought before the Surrogate and ordered jailed without bail.

Appellant sought release from custody by means of a writ of habeas corpus which was sustained by a Justice of the Supreme Court, sitting in Suffolk County where he was being detained, on the ground that the contempt was not committed in the immediate presence of the court. An appeal was taken to the Appellate Division, Second Department, which affirmed the sustaining of the writ of habeas corpus. In its decision the Appellate Division stated:

> "We note that petitioner has again been adjudged in contempt on further proceedings in the Surrogate's Court, a hearing on which is pending in the Supreme Court, Suffolk County, where the matter (commenced by petitioner in Westchester County) was transferred by order of the Special Term in Westchester County, entered Aug. 15, 1978."

This statement obviously was based upon public records in the Suffolk County Surrogate's Court concerning the judicial accounting proceeding, records of which the Appellate Division was at liberty to take judicial notice. Since the records obviously related to the proceeding from which the writ of habeas corpus eminated, they were "pertinent" to the appeal which the Appellate Division was called on to decide. The Justices of the Appellate Division thus were acting in their official capacities in deciding the appeal. Therefore, any statements made in their decision were absolutely privileged.

It follows, therefore, that the Court of Claims correctly dismissed the Notice of Claim for failure to state a cause of action.

POINT II

ASSUMING, ARGUENDO, THAT THE NOTICE OF CLAIM DOES STATE A CAUSE OF ACTION, THE STATE STILL WOULD NOT BE LIABLE BECAUSE IT HAS NOT WAIVED IMMUNITY FOR SOVEREIGN ACTS. JUDICIAL FUNCTIONS ARE ACTS TOTALLY SOVEREIGN IN CHARACTER, AND COMPLETELY FOREIGN TO ANY ACTIVITY WHICH IS OR COULD BE CARRIED ON BY A PRIVATE PERSON OR CORPORATION.

By the enactment of Court of Claims Act, § 8, the State waived its immunity from liability and assumed liability and consented to have liability determined in accordance with the same rules of law as would apply in a court of general jurisdiction against individuals and corporations. This, of course, was a great departure from the common law rule of absolute

sovereign immunity which had prevailed for centuries under the theory that the King can do no wrong. However, the waiver of immunity is limited and by no means does it constitute a general waiver of immunity.

One of the leading cases interpreting the waiver of immunity statute is Newiadony v State, 276 App Div 59 (3d Dept, 1949), where suit was brought against the State for injuries received as a result of the alleged negligence of the driver of a New York National Guard vehicle which collided with a car in which Newiadony was a passenger. The question was presented as to whether the State had waived its immunity for such an action.

(Then) Justice BERGAN in his opinion stated that by enactment of section 8 of the Court of Claims Act the State waived its immunity to "liability and action", but only where an individual or corporation would be required to answer to an action for the same occurrence. He stated that in enacting the waiver of immunity statute the Legislature could not have overlooked some inherent limitations when analogizing government to individuals or corporations. He pointed out that there are some kinds of activities that no private citizens engage in--and which are exclusively functions characteristic of a sovereign. For example, no private citizen undertakes to suppress insurrection or to defend the State against riots or invasion. No corporation undertakes to equip and field a militia. Such are State functions and sovereign duties and when compared to activities of private persons there is no analogy because they are

exclusively acts of sovereignty. Therefore, since immunity was waived only as to acts for which individuals and corporations would be liable in an action in the Supreme Court, the waiver of immunity does not apply to actions of the State which are sovereign in character. No liability arises from the public acts of executive and judicial officers of the State which are exercised within the framework of their constitutional and legal powers. Liability cannot attach itself to the kind of function which has no private warrant or existence.

This conclusion is buttressed by public policy. Judge BERGAN's decision recognized that the rule can impose inconvenience to certain persons, but on the other hand he pointed out that no government can function adequately in its sovereign capacity if hedged in by continual lawsuits--or the threat of continual lawsuits. Only an unequivocal declaration by the Legislature could bring that result, and the Appellate Division found such an intention lacking with respect to section 8.

Although immunity as to liability with respect to the National Guard thereafter was waived by the subsequent enactment of Court of Claims Act, § 8-a (L 1953, ch 343), the rationale of the Newiadony decision correctly states the case law as it exists today. Decisions subsequent to Newiadony pretty much turn on their own facts, but the law is settled.

The Newiadony rule consistently has been applied to sovereign acts. The act of establishing a judicial system to adjudicate legal matters is a sovereign governmental function. The only connection between the State and the court for whose actions it is sought to be charged results from a constitutional and statutory exercise of a sovereign governmental function. The rule of respondeat superior for the alleged torts of the agent is not available in such cases. See, e.g., Granger v State, 14 AD2d 644 (3d Dept, 1961), where the allegedly negligent failure of the Commissioner of Motor Vehicles to revoke a registration after notice of cancellation of insurance coverage was held to be the kind of activity which is sovereign in character and totally foreign to the kind of activity which could be carried on by a private person; Instalment Department Inc. v State, 21 AD2d 211 (3d Dept, 1964), where the immunity was applied to the Attorney General acting in a quasi-judicial capacity and functioning in a matter committed by statute to his control and supervision; Bernkrant v State, 26 AD2d 964 (3d Dept, 1966), where immunity was held to apply to the State Rent Administrator for allegedly wrongful and malicious acts because the acts alleged were sovereign in character and could not be likened to a function carried on by a private individual or corporation; Gross v State, 33 AD2d 868 (3d Dept, 1969), where the immunity was held to apply to the Secretary of State for his alleged negligence in accepting and filing a certificate of incorporation and thereafter rejecting

it, because the State's waiver of immunity and assumption of liability never has extended to redress individual wrongs which may have resulted from an error in judgment by an officer of the State in the performance of his duty.

Finally, it squarely has been held in Jameison v State, 7 AD2d 944 (3d Dept, 1959), that the State is not responsible for the errors of a judicial officer on the theory of respondeat superior, or otherwise (see also, Koeppe v City of Hudson, 276 App Div 443 [3d Dept, 1950]).

No private person or corporation is authorized or empowered to establish and maintain a judicial system for the determination of legal disputes. The establishment and operation of a judicial system is an act which is absolutely sovereign in character. Indeed, it is difficult to conceive of anything more sovereign in character.

It follows that the State by enactment of Court of Claims Act, § 8, did not waive its sovereign immunity for the act of members of the judiciary. Therefore, the Court of Claims has no jurisdiction to hear and determine the instant claim - even if it did state a cause of action.

POINT III

THE CLAIM WAS NOT FILED WITHIN 90 DAYS AFTER THE ALLEGED CAUSE OF ACTION AROSE, AND THUS IS BARRED BY COURT OF CLAIMS ACT, § 10(3).

Section 10(3) of the Court of Claims Act provides that a claim sounding in tort must be filed within 90 days of the accrual of the alleged cause of action unless a written notice of intention to file a claim is filed within 90 days, in which cause a two-year statute prevails.

The Notice of Claim, filed March 9, 1979, alleges that the Appellate Division handed down its decision on November 6, 1978* and that it was published on December 20, 1978* by West Publishing Company at 409 NYS2d 762 (9). Appellant asserts that his alleged cause of action accrued as of the date of publication by West and that his Notice of Claim, dated and verified on March 5, 1979 was filed within the 90-day statutory period, and thus filed in timely fashion.

The facts are to the contrary. This Court is asked to take judicial notice of the New York Law Journal, November 9, 1978, p 15, col 6, where the Appellate Division's decision is published.** Thus, even if appellant did have a cause of action, it accrued at the latest on November 9, 1978. The Notice of Claim was

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*The Notice of Claim actually alleged 1979, but obviously this was a misprint, as stated above.

**A copy of the decision is hereto annexed and made a part of this Brief as an Appendix (infra).

verified March 5, 1979 and date-stamped as received in the Court of Claims on March 9, 1979.

Since this is well in excess of the 90-day statutory period, it is clear that the court below correctly held that the filing was untimely (20).

CONCLUSION

THE JUDGMENT OF THE COURT OF CLAIMS SHOULD BE AFFIRMED.

Dated: Albany, New York
October 7, 1980

Respectfully submitted,

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counsel and, in response to the court's query, indicated that she understood and accepted the terms of the stipulation. Almost three months later, defendant informed the court that she refused to abide by the stipulation. No judgment was signed. In March, 1978 defendant moved, inter alia, to vacate the stipulation on the ground that she had been intimidated by her counsel into assenting to an inequitable financial settlement. Special Term granted the motion.

In our view, Special Term abused its discretion in granting defendant's motion. Relief from a stipulation of settlement should only be granted upon a showing of good cause, such as collusion, mistake, accident or a similar ground (see Ragen v. City of New York, 45 A.D. 2d 1046; Wilson v. Wilson, 44 A.D. 2d 667). The record herein indicates that defendant was represented by competent counsel and assented to the terms of the stipulation in open court. Her belated decision to attack the stipulation is without "good cause" (see Rado v. Rado, 51 A.D. 2d 811).

We also note that in granting the motion to vacate the stipulation of settlement, Special Term asserted no reason therefor.

By Latham, J.P.; Cohalan, Margett and O'Connor,

In a habeas corpus proceeding, the appeals are from (1) a judgment of the Supreme Court, Suffolk County (McInerney, J.), entered Sept. 13, 1977, which after a hearing, sustained the writ and annulled an adjudication of contempt, without prejudice to a renewal of the contempt proceedings, and (2) a resettled judgment of the same court, dated Nov. 14, 1977.

Appeal from the judgment entered Sept. 13, 1977 dismissed, without costs or disbursements. That judgment was superseded by the resettled judgment.

Resettled judgment affirmed, without costs or disbursements.

Petitioner had served as executor of the estate of Eugene Paul Kelly pursuant to the terms of the decedent's will. On April 28, 1977 an order issued in the probate proceeding directing petitioner to turn over his records pertaining to the estate in order that an accounting could be had. Petitioner had been removed as executor in March, 1976, because of his continued failure to file an accounting.

Petitioner failed to comply with the turn-over order by June 15, 1977, and he was given until June 22, 1977 to comply. On the latter date, petitioner failed to appear in court, as he had been directed, and there was continued noncompliance with the April 28, 1977 order.

Although petitioner had evidently telephoned the office of the Public Administrator late the preceding afternoon to say that he would not be in court on the date set, the Surrogate heard testimony from the Deputy Public Administrator that there had not been compliance in the week intervening. The Surrogate adjudged petitioner in contempt of court. The order of contempt recited that "George Sassower is guilty of criminal contempt of court committed in the immediate presence of the court by reason of his failure to obey the lawful order and directions of this court." Petitioner was apprehended by the Sheriff the following day and brought before the Surrogate. Petitioner stated: "My intention is to comply with the law as I see it." He was jailed.

He then petitioned this court for a writ of habeas corpus and asked for bail pending the hearing. A hearing on the writ was directed for the following day (June 24, 1977), *but bail was denied.*

Within a few hours of that determination, petitioner made application for a writ of habeas corpus to a justice of the Supreme Court in Suffolk County, without mentioning the prior application to this court. This was in violation of the statute that requires that the petition for a writ "shall state . . . the date, and the court or judge to whom made, of every previous application for the writ, [and] the disposition of each such application" (CPLR 7002, subdiv. [c], par 6). The Justice before whom the second application was made directed a hearing on June 27, 1977 and set bail at $300.

Upon the hearing, Special Term, determined that, contrary to the recitation in the order of contempt, petitioner was not in court before the Surrogate when he was adjudged in contempt. Special Term, therefore, annulled the adjudication.

It is clear that a summary adjudication of contempt is only permitted if the contemnor is within the court's presence (see Judiciary Law, sec. 751; Cooke v. United States, 267 U.S. 517; Sedler, The Summary Contempt Power and the Constitution; The View From Without and Within, 51 NYU L Rev. 34). It was proper, therefore, for the writ to be granted.

We note that petitioner has again been adjudged in contempt on further proceedings in the Surrogate's Court, a hearing on which is pending in the Supreme Court, Suffolk County, Where the matter (commenced by petitioner in Westchester County) was transferred by order of the Special Term in Westchester County, entered Aug. 15, 1978.

APPENDIX A