84-7737

To be Argued by:
GEORGE SASSOWER, Esq.
30 minutes

CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

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HYMAN RAFFE, individually and on behalf of PUCCINI CLOTHES, LTD.,

Plaintiffs-Appellants,

-against-

CITIBANK, N.A., and JEROME H. BARR, individually, and as executors of the Estate of MILTON KAUFMAN; KREINDLER & RELKIN, P.C.; LEE FELTMAN; FELTMAN, KARESH, & MAJOR; ARUTT, NACHAMIE, BENJAMIN, LIPKIN & KIRSCHNER, P.C.; RASHBA & POKART, P.C.; EUGENE DANN; ROBERT SORRENTINO; ROBERT ABRAMS, as Attorney General of the State of New York; JOHN V. LINDSAY; and SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK,

Defendants-Respondents.

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APPELLANT'S BRIEF

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CASES and AUTHORITIES

APPELLANT'S BRIEF

PROCEDURAL STATEMENT

1a. This is an appeal from a Rule 56 Order by Hon. EUGENE H. NICKERSON, United States District Judge, Eastern District of New York, dated August 1, 1984, which dismissed plaintiff's ["Raffe's"] complaint, individually and on behalf of Puccini Clothes, Ltd. ["Puccini"], staying pre-trial disclosure and ignoring other interim relief, and assessing attorneys' fees against Raffe and his attorney (A1).

b. Raffe, individually, and on behalf of Puccini, appeals from the substantive aspects of the Order, as well as the manner by which it was rendered.

c. Defendants' attorneys' fees have not been assessed, nor has the District Court informed plaintiff's attorney the manner of such determination, as represented by the Court below it would do before making such assessment.

2a. Unquestionably the complaint and submitted factual material reveal that Raffe's and Puccini's legal rights had been transgressed under "color of local law".

In plaintiff's view, "color of law" attached when, on June 4, 1980, the assets and affairs of Puccini became custodia legis. From that point forward, Puccini became a helpless ward of the court, a legal eunuch, unable to function or even protest its own rape, not when a receiver is appointed, as implied by the District Court (A10), particularly since there is no obligation by the state court to appoint a receiver.

b. The dismissal was based upon waivable defenses, privileges, and/or immunites claimed and raised by the defendants (Boyd v. Carrol, 624 F.2d 730, 732-733 [5th Cir.]), which Raffe did not have to legally anticipate, and in some cases, could not have.

c. Before plaintiff had an opportunity to respond to the aforementioned defenses, privileges, and/or immunities (A440), the Court below directed that no further papers were to be submitted and rendered the Order being appealed herein.

d. Consequently, Raffe, as petitioner, on August 10, 1984, initiated a mandamus proceeding [Docket No. 84-3061], which requested that the District Court receive his papers and re-date the Order appealed from, if same were not changed or revised, to a date after receipt of same, so review could be properly made by this Court.

Now, almost four (4) months later, the aforementioned mandamus proceeding remains sub judice in this Court.

e. Consequently, since Raffe is limited, on this appeal, by papers and arguments presented to the District Court, this Court, by its inaction on the mandamus petition, it is respectfully contended, has also violated Raffe's legal rights.

3a. On the issue of res judicata [claim preclusion] or collateral estoppel [issue preclusion], on the guarantee action, the District Court went no further than the last state order [December 28, 1983, based on a November 1983 submission] (A16), which in fact favored Raffe.

On the Puccini estate proceeding, the last entered Order was dated January 31, 1984, which denied Raffe's motion "as premature".

In neither instance, has the state matters been brought to a conclusion, there has not been any identity of issues necessarily decided, nor has there been a full and fair opportunity to contest the issues.

b. This federal complaint was verified on Friday, January 20, 1984, and filed in the Eastern District of New York, on Monday, January 23, 1984, the same day that Pennhurst v. Halderman (U.S. , 104 S.Ct. 900, 79 L.Ed.2d 67), was determined.

Consequently, this complaint was not tailored to accord with that decision or with Pulliam v. Allen (U.S. , 104 S.Ct. 1970, 80L.Ed.2d 565), which was rendered on May 14, 1984.

b. Although the District Court stopped at December 28, 1983, insofar as state judicial orders were concerned, the Court's opinion proliferates with facts and material which arose or were discovered after the date of the complaint [Friday, January 20, 1984], which clearly undermined these prior state orders, and applications were known by the District Court to be pending in both federal and state courts affecting those prior state orders.

4a. For conduct, subsequently arising or discovered (O'Brien v. City, 54 N.Y.2d 353, 358), Raffe, individually and on behalf of Puccini, commenced another action in the Southern District, which presently pends before Hon. WILLIAM C. CONNER [84 Civ. 6272].

b. For conduct, subsequently arising or discovered, the Order of Judge Nickerson clearly has no preclusive effect.

c. On issues, wherein Judge Nickerson did not afford Raffe a "fair opportunity" to respond, counsel claims that although said Order must be recognized as valid, pending this appeal, it has no preclusive effect.

QUESTIONS PRESENTED
THE ISSUES -- IN A NUTSHELL

1. Where the issues include "fraud upon and by the court", involving an agent of the court (Kaplan v. 2108, 74 A.D.2d 786; Ripple's v. LeHavre, 88 A.D.2d 120), is claim or issue preclusion ever applicable, until that issue has been fully investigated and resolved to the satisfaction of the parties affected thereby and the sovereign (Universal v. Root, 328 U.S. 575; Hazal-Atlas v. Hartford, 322 U.S. 238)?

a. On March 8, 1984, an accounting was filed which revealed that after the assets and affairs of Puccini vested in the Supreme Court and/or its justices, there were more than $9 million dollars worth of unauthorized bank transactions from its account, its extensive inventory had evaporated, most of

Puccini's financial books had been secreted or destroyed (although represented to the federal and state court by the receiver as being in his possession), its accounts receivables, and every other category of assets, could not be accounted for (A179-A205).

b. On June 6, 1984, there surfaced the "laundered" check issued by Arutt, Nachamie, Benjamin, Lipkin & Kirschner, P.C. ["ANBL&K"], issued in October of 1980, to Rashba & Pokart ["R&P"] in payment of a bill rendered to Kreindler & Relkin, P.C. ["K&R"], the monies for which were unlawfully taken from Puccini (A286).

c. To the detriment of Puccini, exceeding a sum of $350,000 (A5), these matters had been concealed from the court by the court appointed receiver, Lee Feltman ["LF"], and his law firm, Feltman, Karesh & Major, Esqs. ["FK&M"], agents of the state court, in their conspiracy with K&R, ANBL&K, and their clients.

In short -- these facts, documents, and even confessions were revealed and made <u>after</u> the last state order upon which the District Court bottomed its determination of claim preclusion!

2. Did the District Court deprive Raffe of his legal rights in this appellate court, and itself of a proper presentation, when it did not afford him an opportunity to present evidence and arguments to the affirmative defenses, privileges and immunities (<u>Bounds v. Smith</u>, 430 U.S. 817, 826)?

a. The Record on Appeal, as a result of the District Court's procedural course, is being deprived of the presentment that Raffe would have made if afforded the opportunity.

b. Thus in Raffe's view it is not a sufficient answer to state that the District Court would have adhered to its view, no matter what was presented, for it affected his appellate rights herein by not permitting a submission on his behalf (A440).

3. Are there any judgments or final orders against Raffe or Puccini, to which claim or issue preclusion would control?

a. There are no judgments or final orders against Raffe, and certainly not against Puccini, which mandates the dismissal of the federal action.

b. The judgment of February 4, 1983, based on the summary judgment decision of October 28, 1982, is not, and was not, relied upon by the defendants or the District Court as preclusive, since in 1984, it has been revealed by documentary evidence, and indeed confessed, to have been secured by perjury, aided and abetted by the state court's agent and his law firm.

c. The District Court obviously confused the doctrine of claim and issue preclusion with the "law of the case" (56 Am Jur 2d, Motions, Rules, and Orders, §30, p. 25), which were it applicable, was also the result of perjury and deceit.

4. Where the uncontrovertable evidence of larceny, perjury, corruption, and conspiracy surfaced in March and June 1984, involving an agent of the court, are the prior non-final orders entitled to preclusive effect in the federal court, where under state law, they are not preclusive?

a. There has been no pre-trial discovery either in the state or federal forum, or any hearings or trials. Consequently subsequent motions and proceedings based upon newly disclosed evidence or subsequent facts do not preclude a different determination with respect to non-final, interim, orders (Bannon v. Bannon, 270 N.Y. 484; Riggs v. Pursell, 74 N.Y. 370).

5. Were the decisions and non-final orders, cited by the District Court, of a preclusive nature?

a. The order of October 26, 1982 (A15), pursuant to an uncontroverted CPLR 3211(a)[7] motion, is not, under state law, on the merits (175 East v. Hartford, 51 N.Y.2d 585, n. 1; De Ronda v. Greater Amsterdam, 91 A.D.2d 1088, 1089), and never considered thereafter by the state court as preclusive. Therefore, reference to this or any other similar disposition is irrelevant.

b. The decision of Mr. Justice Martin H. Rettinger of March 14, 1983 (A15), which at the request of LF, resulted in the appointment of R&P, as investigatory accountants, to act "under color of state judicial authority", as an agent of the court, at the expense of Puccini, was made without disclosure that K&R were clients of R&P, and that ANBL&K had previously "laundered" monies to it, unlawfully taken from Puccini's account, to pay a K&R invoice, was a blatant and outrageous "fraud upon the court", in every sense of the word!

The appointment was jurisdictionally defective (Ellentuck v. Klein, 570 F.2d 414, 424 [2d Cir.]; La Pier v. Deyo, 100 A.D.2d 710) since it did not comply with the mandatory, non-discretionary provisions of 22 NYCRR §660.24.

Additionally, as a matter of law and common sense, a judicial appointment cannot be made to an investigator when those suspected are the investigator's clients and the firm that previously "laundered" substantial monies to it, particularly when such disqualifying information concealed from the court and all the interested parties.

This R&P appointment was made, despite the protests of Raffe, who asserted that there was some unknown association between the investigator and those who were to be investigated. Despite such serious allegations, prior to appointment, neither LF, the court appointed receiver, his law firm, K&R, nor ANBL&K revealed the prior associations.

In fact neither did R&P disclose such association!

Obviously, in suggesting such appointment, the intent of the defendants was to conceal, and not to reveal, the huge dissipation of Puccini's court entrusted assets!

Thus, to answer four simple questions, that a half-blind bookkeeping student could have answered in ten minutes, now took eleven months!

Obviously, no accounting firm would take an unlawfully drawn check from a judicially dissolved corporation, instead the funds were "laundered" through the ANBL&K account!

Obviously, an accounting firm's would not show where the monies came from!

But when R&P, an appointed agent of the court, advises the federal court, after examining Puccini's financial records, that it does not know where such funds came from, it is playing fast and loose with the court!

If there is any justification, legal or moral, for such appointment by Mr. Justice Rettinger, and the concealment of the underlying relationships, let the defendants set it forth!

The state court, by Order of May 15, 1984, has set the matter down for judicial inquiry (A257-A260), which resolves the question about the preclusiveness of the Order of Mr. Justice Rettinger.

c. The order of December 28, 1983, reiterated the proposition that Raffe was entitled to indemnification from Puccini (A158), a matter previously determined and affirmed (Barr v. Raffe, 97 A.D.2d 696), and except for chastising Raffe, was not a determination in favor of defendants.

d. The order of January 25, 1984, was made specifically with the statement that it was "premature" but could be renewed after the accounting had been rendered (A424-A425).

In short -- the state court did not find the Orders cited by the District Court as preclusive!

6. Where the state court did not find itself bound by orders and submissions made in 1982 and 1983, did the District Court err, in considering itself bound by same?

a. The Record reveals an Order of March 30, 1984, wherein the Court found that the monies unlawfully taken by the clients of K&R to have been in an individual, rather than a representative capacity (A261), and rejected the contentions of the "hard core" defendants that it was bound by the prior orders cited by the District Court.

b. The Record reveals that on May 15, 1984, the state court set down for a hearing a determination of many issues, including relationship between the investigator (R&P) and those it was to investigate (K&R and ANBL&K) [A257-A260].

7. Did the District Court err, when as a result of the March and June of 1984 disclosures, there was pending in the state court a motion to vacate all Puccini related orders and proceedings, as a "fraud upon the court"?

As a result of the disclosures made in March and June 1984, the District Court had a copy of the papers requesting that the state court reexamine all Puccini related orders, as a "fraud upon the court" (A295-316).

8. Are any of the other orders of the state court of any jurisprudential value when they were affected by the October 28, 1982 determination, now confessed to have been perjuriously secured, and the decision of March 1983, wherein the court held that Raffe has shown no evidence of any relationship between the investigator (R&P) and those sought to be investigated (K&R and ANBL&K)?

An inspection of the subsequent state judicial determinations reveal that their outcome was strongly urged based upon the aforementioned decisions which stated that there was no evidence of any improper relationship between the parties, now admitted to have been perjuriously made.

It was and is the epitome of gall for the defendants to have urged, and the District Court to have adopted, the opinion of Mr. Justice Rettinger of March 1983, in view of the 1984 disclosures concerning the relationships between the investigator and those sought to be investigated, particularly in view of the Order of May 15, 1984 which set such matter down for inquiry!

9. Did the District Court err when it refused to grant summary judgment in favor of Puccini, a helpless ward of the state court, for monies unlawfully taken by the clients of K&R, particularly when the court appointed receiver has not recovered, nor attempted to recover any of the unlawfully dissipated assets, engineered by K&R and its clients?

Not surprisingly, ANBL&K, whose clients hold a 50% equity in Puccini, nor the Receiver, an agent of the court, did not support said motion, since it is undenied that they are operating in conspiratorial consort with K&R.

There is no legal or moral reason that summary judgment should not be awarded in favor of Puccini, a helpless ward of the state court, for assets taken from it since June 4, 1980.

10. Should have the District Court stayed pre-trial disclosure under the circumstances at bar?

In view of the monumental corruption alleged and shown herein, particularly since there never was any pre-trial disclosure in the state court, discovery should have been permitted herein before a summary judgment disposition in favor of the defendants, including Hon. JOHN V. LINDSAY (International Society v. Air Canada, 727 F.2d 253 [2d Cir.]).

11. Has the Attorney General or the Supreme Court shown "entitlement" to any privileges or immunity?

These defendants have not shown any "entitlement" to any privilege or immunity in their submitted papers.

12. Should attorneys' fees be imposed upon Raffe and his attorney for contending there is corruption in the courts in the Puccini matter?

Two thousand years ago, crucification was the penalty for exposing misdeeds in the temples; sixteen hundred years ago, excommunication was the imposition; presently only attorneys' fees are imposed in favor of those who defile the temples of justice! At least it is progress!

DOGMA - STATE PROCEEDINGS
THE SMOKING GUNS

> "If you see only what the light reveals and hear only what the sound announces, then you do not see nor do you hear". (Kahlil Gibran)

Dogma in the state Puccini related litigation entails two basic propositions:

1. In the "guarantee" actions, wherein the Kaufman estate has sued or pursued Raffe, as Charlie Wilson would have said it, "what is good for Raffe is good for Puccini, Dann & Sorrentino", since they must indemnify or contribute to Raffe's loss!

This proposition, never disputed by anyone, found confirmation in Barr v. Raffe (97 A.D.2d 696).

2. In the "Puccini estate" litigations, what is good for any one of the four stockholder, is good for the other three -- each holding a 25% interest!

3a. The above is as simple as a - b - c, and prior the surfacing of the "hard evidence", were the "smoking guns" of misconduct and corruption.

b. Thus in the "guarantee" actions, one would expect that any claim made by the executors of the Kaufman estate, or its attorneys, would be resisted by Raffe, Puccini, Dann, and Sorrentino, working in tandem.

c. Any claim by anyone, not a stockholder of Puccini, would be resisted by all four stockholders and their representatives.

d. There has not been any pre-trial disclosures in the federal or state courts, but there has been about one hundred appeals, motions, and other proceedings, wherein the aforementioned pecuniary relationships have arises and have been the sole legitimate interest involved.

The alignment on such motions, proceedings, and appeals, reveal that the firm of ANBL&K invariably take a position contrary to the legitimate interests of their clients, Eugene Dann ["Dann"] and Robert Sorrentino ["Sorrentino"], and in complete accord with the executors of Milton Kaufman, Jerome H. Barr, Esq. ["Barr"] and Citibank, N.A. ["Citibank"], and their attorneys, K&R.

The alignment on such motions, appeals, and proceedings similarly reveal that the the receiver, LF, and his law firm, firm of FK&M, in every significant aspect invariably take a position contrary to the legitimate interests of the judicial trust, Puccini, and in accord with the Kaufman executors, Barr and Citibank, and their attorneys, K&R.

No situation is as dramatic, as when Raffe moves to vacate Kaufman's judgments against him and simultaneously requests that the judgments in his favor against Puccini, Dann, and Sorrentino, be also vacated.

Such relief is opposed, or not supported by ANBL&K, LF, and FK&M!

Judas is permitted, and indeed, encouraged to function, as officers of the state temples of justice, for that tribunal ignores such repeated betrayals and generally imposes draconian sanctions upon Raffe for revealing that in fact, the emperor wears no clothes!

When it comes to the quid pro quo, in the form of fees for the receiver's law firm, who, as a matter of law is not entitled to anything, inter alia, §22 NYCRR §660.24[f], the state tribunal holds that Raffe has no right to intervene and oppose, albeit his substantial judgment and 25% equity, and K&R, consents, in open court, to whatever amount FK&M desire!

STATEMENT

Respectfully, the factual statement, on summary judgment, is not the District Court's version, but that alleged and shown by Raffe.

BACKGROUND:

1. Puccini was composed of Dann and Sorrentino, the full time operators of this domestic corporation.

Milton Kaufman ["Kaufman"] and Raffe were inactive members, provided the financing by executing personal guarantees to banking institutions wherein they had other financial associations.

Personal cross-guarantees were executed by the stockholders in Puccini for the guarantees executed by Kaufman and Raffe.

Each had a 25% stock interest in Puccini, and constituted the officers and directors of the corporation.

2. Barr served as the attorney for Puccini from its inception, as well as for all the aforementioned individuals in their Puccini-related relationships.

3. Citibank provided the financing for Puccini under the Kaufman guarantees and was also, with Barr, the co-executor under the Kaufman will.

<u>The Seeds of Corruption</u>:

1a. When Kaufman died on July 19, 1979, Citibank found itself both as the co-executor of the wealthy Kaufman estate (the fiduciary department) and also its potential creditor under the Kaufman guarantee (the commercial department).

b. Citibank, clearly held a conflict of interest position, which it did not reveal to the Surrogate's Court, when it petitioned for letters testamentary.

2. Barr attempted to resolve the conflict by severing his relationship with Puccini, Raffe, Dann, and Sorrentino, in favor of a lucrative position with the Kaufman estate.

3a. The relationship between the fiduciary department and the commercial department of Citibank could be reasonably compared to the relationship that exists between Iraq and Iran.

b. When the fiduciary department did not invite the commercial department to a meeting it held with the Puccini representatives months after Kaufman's death, reason found little hospitality at these two departments.

c. The fiduciary department, completely unable to placate the commercial department, with the consent of Puccini, decided to transfer its Kaufman guarantee obligation to another bank and thus divest itself of its potential creditor position.

Pearl Harbor:

1a. While everyone, including representatives of the fiduciary department, were meeting at the proposed substitute banking institution, the parties learned that the commercial department had struck -- Pearl Harbor style - without notice or warning!

b. The commercial department refused to "roll over" a note of $42,114.34, as previously was the practice, even after Kaufman's death, because as the commercial department wrote "the Executors of the Estate of Milton Kaufman [Barr and Citibank]" failed to give "satisfactory concurrence".

2a. To satisfy such due note, the commercial department of Citibank, attempted to seize Puccini's assets on deposit with its bank.

b. Unlike Pearl Harbor, Puccini, with some sense of prescience and exercising caution, had a few days previously, withdrawn all its cash on deposit at Citibank, except for the sum of $1,00.54, and placed its monies in another bank.

c. Enraged, by not finding Puccini's capital assets not harbored at its bank ready to be seized, possibly suspecting the complicity of the fiduciary department in such transfer, the commercial department turned its war machine in the direction of the fiduciary department and seized not only the balance of $41,053.80, but $70,622.33, in addition thereto, from the assets of the Kaufman estate for which the Kaufman fiduciaries were responsible.

3. In short - Citibank's commercial department had declared war on its fiduciary department!

The War - 1979:

1a. With the same illogic that history sometimes charts for many international conflicts, Citibank's commercial department attacked Puccini because of its problems with the fiduciary department.

b. The fiduciary department sought to extricate itself from its predicament caused by the seizure of Kaufman's funds by the commercial department by demanding, through Barr's "associate attorneys" [their words], K&R, that Puccini indemnify it for this seizure of assets.

c. Puccini protested contending that it's credit under the Kaufman guarantee was substantially below the agreed $1,000,000, and that it should not be made the victim of the inability of the fiduciary department to satisfy the clerical desires of the commercial department.

2a. On November 8, 1979, a CPLR §3213 proceeding was commenced, by the fiduciary department, against Puccini [for 100% indemnification or $41,053.80], and against Raffe, Dann, and Sorrentino [for 75% indemnification or $30,790.35], under the aforementioned guarantees and based on the aforementioned seizure by Citibank's commercial department.

b. Thereafter, on December 7, 1979, in an attempt to legitimatize this seizure by the commercial department, the executors [Barr and Citibank], ex parte, petitioned the Surrogate's Court for permission by the Estate to pay Citibank the $503,000.00 that it claimed was due from Puccini. The petition is marked by non-disclosure of the underlying relevant facts.

3a. There is a known practice by Citibank and other institutions to indirectly compensate attorneys for having their clients name them as fiduciaries, by then designating such attorneys, their associates, or designees, to perform legal work on behalf of the estate, with liberal compensation -- "estate chasing".

The routine approval of such fees by the courts, is also a recognized practice.

It is a practice illegal and unethical!

b. As a result of Barr v. Raffe (96 A.D.2d 800), we know that for a CPLR §3213 action -- about the simplest know to law -- K&R, in October 1979, had 5 attorneys expend almost 58 hours, billing $5,397 [for one claim letter]; in November 1979, 5 attorneys expended 111 hours, billing $9,931 [Summons, Notice of Motion, and CPLR §3213 affidavit]; in December 1979, 8 attorneys, almost 223 hours, billing $18,932 (the cross-motion).

Thus, in an attempt to recover $41,053.80, even prior to submission to the Court for determination, the Kaufman estate expended $34,260.

Plaintiffs' motion and defendants' cross-motion was marked submitted on January 8, 1980, a month wherein K&R had 9 attorneys expend almost 115 hours, billing $12,734!

Self-Immolation:

1a. Creditors are entitled to no more than full payment (Honeyman v. Jacobs, 306 U.S. 539, 544-545) and may not complain when "they get no more than that" (Gelfert v. National City Bank, 313 U.S. 221, 233).

b. Thus, the Kaufman estate, had in January 1980, as legitimate goals: (1) recoupment of monies taken by Citibank under the Kaufman guarantee and (2) preservation of the Kaufman 25% equity interest in Puccini -- nothing more!.

c. Nevertheless, two and one-half weeks after plaintiffs' CPLR §3213 motion was submitted for judicial consideration, plaintiffs' secured an Order to Show Cause to dissolve Puccini pursuant to Business Corporation Law §1104-a.

d Clearly, any involuntary dissolution of Puccini would drastically and adversely affect its net worth, including plaintiffs 25% stock equity interest therein.

No possible result of such proceeding could possibly advance the legitimate interests of the Kaufman estate, either as an indemnitee for the seizure by and/or payment to the commercial department or as a stockholder.

e. From everyone's legitimate interest the proceeding was purposeless! It was a senseless slaughter of a viable and solvent corporation!

2. The basis of this <u>BCL</u> §1104-a proceeding was that a special meeting was not called seven months previously upon the death of Kaufman under the terms of a Stockholders Agreement which the remaining stockholders had not known existed and their attention had never been drawn to same in the interim by Barr, their former attorney and now adversary, or anyone else.

<u>The War!</u> - <u>January to June 1980</u>:

1a. Together with other actions taken by the executors, the §1104-a proceeding seemed also to be intended as a means to generate and funnel additional compensation to Barr's "associates" for making Citibank a co-executor of this estate.

b. K&R's records reveal that they were billed and paid the following sums for such dissolution proceeding:

January 1980, $12,734; February $20,015; March $22,685; April $26,888; May 32,920; and June $20,984 for a total of $136,226.

c. $136,226 was paid by the estate in order to destroy or diminish their own equity in Puccini! Pure self-immolation

2a. The raison d'etre of Special Term [per Sinclair, J.] was that by not calling a meeting and performing those acts set forth in a Stockholders Agreement, which, with the exception of Barr, no one knew about, meant that the surviving stockholders were "not acting in good faith" in July 1979 when Kaufman died, so that in May 1980 [eleven months later], a viable solvent corporation without any creditors should suffer the draconian consequences of the death penalty!

3a. Significantly, neither Barr, as the former attorney of the surviving parties, nor the executors or their attorneys ever make any demands under such agreement prior December 1979.

b. When the demand for a meeting was made the surviving stockholders complied, by calling such a meeting, which thereafter had to be cancelled because Dann, the operating officer of Puccini, was hospitalized in order to receive a heart pacemaker implantation.

4. The franchise taxes of $1,500 mentioned by Special Term, as a claim by the Attorney General as due for 1979, were in fact not due until June 15, 1980. In fact, Puccini did not owe $1,500 to the State, as it claimed, but rather the State owed Puccini several thousands of dollars as an overpayment.

5a. Special Term also granted the estate's CPLR §3213 motion, to the extent of making an award to the executors against the individual cross-guarantors [which Raffe alone thereafter satisfied].

b. On technical grounds, the action against Puccini, for 100% indemnification, was dismissed without prejudice.

Scorecard - June 1980:

The results of the first nine months of the war declared by the commercial department of Citibank [against its fiduciary department] was as follows:

1a. The estate recovered $30,790.35, on a claim of $41,053.80.

b. The estate recovered statutory interest at the rate of 6% [which because of bonding pending an appeal, was not actually received for another year]. At the time prime interest rates were over 20%!

c. The balance allegedly due the estate by Puccini, or about $450,000, it was able to invest at interest rates of almost 20%, while the estate could only expect, at the time, interest at only 6%, on any ultimate recovery!

d. The estate recovered only the nominal statutory costs and disbursements, while it now had to justify an expenditure of about Two Hundred Thousand Dollars ($200,000) in legal fees [with more to come because of appeals] for a $31,790 recovery and for diminishing its own equity in Puccini!

2. Nevertheless, Citibank and its attorneys proclaimed victory! It was the victory of the southern end of a northbound horse!

The Order of June 4, 1980:

1a. The Order of Involuntary Dissolution of Puccini dated and entered on June 4, 1980, vested, as a matter of law, all right, title, and possession of the assets and affairs of Puccini in and with the Justices of the Supreme Court (or some of them), and/or the Supreme Court of the State of New York.

b. Even K&R and the Kaufman estate, those who procured this involuntary dissolution, had no right to control the affairs of Puccini, or deal with its assets.

Puccini was and is, since June 4, 1980, custodia legis!

Except as given the power by the state court, Puccini cannot even complain about being raped by the "friends" of the court and/or their co-conspirators, except possibly in federal court!

2. Specifically, the Order of Dissolution provided:

> "ORDERED, that the officers, agents and persons in control of the corporation ... are directed to forthwith turnover to the receiver upon his request, and the receiver be and he hereby is authorized and directed to take possession of all the property and effects ...
>
> ORDERED, that the corporation, its officers, directors, and shareholders, agents and employees are enjoined and restrained from transferring or disposing any property of the corporation, except with the approval of the receiver ... "

3. The Order of June 4, 1980 appointed Hon. John V. Lindsay ["JVL"], as Receiver, whose obligation was either to promptly qualify or decline the appointment.

4. Puccini was clearly solvent, and with JVL as the court appointed constable, Raffe assumed that there would be an honest and efficient receivership and any obligation he had under the personal cross-guarantees were of no further significance.

5. Raffe and his attorney, George Sassower, Esq. ("Sassower"), hearing nothing, blithely assumed that JVL had qualified and was performing his duties properly.

6a. Hon. THOMAS V. SINCLAIR, JR. ["TVS"], was the "originating justice" and Hon. MICHAEL DONTZIN ["MD"], was the "designating justice" (22 NYCRR §660.24).

b. Hon. XAVIER C. RICCOBONO ["XCR"], was and is the Administrative Justice of the Supreme Court, New York County.

The Guarantee Action -- The Enigma:

1. In August 1980, more than two months after the Order of dissolution, K&R on behalf of the Estate commenced a suit against Raffe alone for $350,000, plus attorneys' fees etc., purportedly representing 75% of the balance of the Estate's obligation to Citibank, qua creditor.

2a. Why should K&R sue Raffe alone for 75% of an obligation, without joining Puccini, the 100% indemnitor, as part of the same lawsuit?

b. Why jeopardize or forfeit approximately $120,000 by omitting the solvent Puccini as a party defendant in this lawsuit?

3. These disturbing questions found no ready answers at the time.

4. At the end of December 1980, Raffe received a copy of an accounting report from R&P -- a firm unknown to him -- which revealed that as of June 30, 1980 (almost one month after the decree of involuntary dissolution), showing that Puccini was solvent.

5. Raffe also received a Notice of Meeting for January 5, 1981, proposing that all Puccini's remaining assets be turned over to the Estate and K&R, which, in his view, was much more than was due, since it sought to improperly reimburse the executors for legal expenditures incurred in the §3123 and §1004-a proceedings (Aleyeska Pipeline v. Wilderness, 421 U.S. 240).

The Constable Blundered:

1. Raffe petitioned the Court to stay such transfer of assets from Puccini to the estate and K&R, and by Order dated January 5, 1980, the Court, per Greenfield, J., held that such transfer, in view of the receivership, would be of "no [legal] effect".

2a. This matter resulted in the revelation that JVL had never qualified, never filed a bond, nor assumed the responsibilities of the receivership.

b. Sassower, on behalf of Raffe, conveyed to JVL, in writing, his suspicions that during the more than seven months since his appointment, there may have been some unlawful dissipation of Puccini's judicially entrusted assets.

3. Obviously, recognizing that he had blundered by not qualifying immediately (or declining), and not advising Raffe and the Attorney General of his inaction, JVL wrote to the court and declined the receivership -- more than seven months after appointment!

4. The failure of JVL to qualify immediately had been due to an ex parte conversation between him and/or his law firm and K&R, wherein a false and contrived tale had been relayed by K&R!

5. In short - JVL had been duped by K&R, "James Marcus style", or so it seems!

The Smoking Gun -- #I:

1. Raffe, by his attorney Sassower, commenced a third party action against Puccini, for full indemnification, and against Dann & Sorrentino for two-thirds contribution.

2a. The third party defendants had no defense to Raffe's claim over, but in Sassower's view, ANBL&K, the firm who served a third party answer, it had a knowledge of the true happenings at Puccini after June 4, 1980, and thus a first party defense as against K&R and its clients [CPLR §1008].

b. Thus, when Sassower received ANBL&K's answer a few days late without any first party defense, Sassower rejected same as untimely.

For Sassower, ANBL&K had the option of asserting a first party defense, full disclosure, or else it would have to move, with an affidavit of merit!

3a. Three (3) times ANBL&K moved -- three (3) times the Court rejected its application -- three (3) times it refused to assert any first party defense and it could not show any third party defense.

b. As third party defendants, Puccini, Dann, and Sorrentino were in default, were legally dead in this guaranty action, and had no standing, except to move to vacate the default!

4a. In this guaranty action, the more K&R recovered against Raffe, the more Puccini, Dann, and Sorrentino, had to indemnify and/or contribute as third party defendants!

b. Nevertheless, in and out of the judicial forum Sassower could not receive any cooperation from ANBL&K!

<u>The Resurrection</u> -- <u>Smoking Gun #2</u>:

1. Sassower served K&R with 32 written interrogatories, which would have revealed the events at Puccini after June 4, 1980.

2. K&R, back-dated a motion for summary judgment, triggering an automatic stay of disclosure (<u>CPLR</u> 3214[b]).

3. Raffe, opposed, setting forth his suspicions regarding the unlawful dissipation of Puccini's judicially entrusted assets, prejudicing his right of indemnification, and thus nullifying his guarantee (<u>Cohen v. Rossmore</u>, 225 App. Div. 300, 305; <u>New Netherlands v. Dernburg</u>, 206 App. Div. 212).

4. K&R responded, with what in 1984 is confessed to have been a perjurious affidavit executed by Citibank, denying any dissipation of any of Puccini's assets.

5a ANBL&K, "Lazarus-like", arose from the dead, and cross-moved to disqualify Sassower, the attorney most knowledgeable in this matter, and thereby able to best serve the interests of not only Raffe, but also the legitimate interests of the third party defendants, to wit., Puccini, Dann and Sorrentino.

b. ANBL&K remained silent on any dissipation of Puccini's judicially entrusted assets.

6. Sassower, responded to the cross-motion as received from ANBL&K, with an affirmation which made sense.

7a. Upon receipt of Sassower's opposing affirmation to its cross-motion, ANBL&K, "substituted", "switched", "changed", and "altered" its submitted cross-moving papers, without Sassower's knowledge or consent, thereby transmogrifying Sassower's opposing papers from "sense" to "nonsense".

b. Obviously, the substitution and changes in the originally court-submitted papers were not discovered until Sassower was disqualified and the served papers were compared with the court-submitted papers.

c. Renewal, reargument, and appeals proved fruitless. Neither Sassower nor Raffe could show a reason, bottomed on "hard" evidence, at the time, for such nefarious conduct by ANBL&K.

d. Deprived of a fair adjudication of the matter, it has had no issue preclusive effect (Gilberg v. Barbieri, 53 N.Y.2d 285), consequently, Sassower has remained on as Raffe's attorney in all actions and proceedings except the two which were directly involved at that time.

e. Nevertheless, for Raffe and Sassower, it revealed an act made in desperation to eliminate Sassower and thus conceal nefarious conduct on the part of K&R and ANBL&K.

8. K&R's motion for summary judgment was denied, without prejudice to renewal [per TVS -- the "originating justice"], because of Sassower's disqualification (CPLR §321[c]).

The stay on disclosure remained.

Judas in the Court -- Smoking Gun #3:

1a. On February 1, 1982, twenty months after Puccini's assets and affairs vested in the Court, Lee Feltman, Esq. ["LF"], was designated as Receiver. This was more than one year after JVL advised the Court he did not desire the position.

b. The same "originating justice" [TVS] and "designating justice" [MD] were involved in the designation of LF.

2a. LF's law firm, F,K&M, initially solicited and received written authorization to appear on behalf of Puccini from Dann and ANBL&K. Raffe protested!

b. Thereupon, without complying with the mandatory 22 NYCRR §660.24, LF designated FK&M, as his attorneys in the Puccini matter.

c. Such appointment, in the words of the rule, is "null and of no effect" [subd. "f']. In New York statutory disqualification is jurisdictional (Ellentuck v. Klein, supra; La Pier v. Deyo, supra).

3a. Once again, for the fourth time, Puccini, moved to vacate its default, FK&M submitting a proposed answer, as part thereof, verified by LF on May 25, 1982, without asserting any first party defense.

b. Nevertheless the motion was granted.

4a. K&R, renewed its motion for summary judgment, knowing beforehand that Raffe was again going to assert the dissipation of Puccini's judicially entrusted assets, particularly since there had been a ground swell of circumstantial evidence in support thereof in the interim.

b. Obviously, K&R knew beforehand that ANBL&K, LF, and FK&M, would not expose any perjurious denials of same, although success by K&R against Raffe, meant a judgment over against the trust and clients of ANBL&K, LF, and FK&M.

c. Once again Raffe, in opposing K&R's motion, asserted the dissipation of Puccini's judicially entrusted assets, and K&R replied with the now confessed perjurious affidavit of Citibank.

d. ANBL&K, LF, and FK&M, did not expose the perjury, consequently the Estate recovered judgment against Raffe and Raffe recovered a judgment over against Puccini, Dann, and Sorrentino.

e. The perjurious affidavit submitted by K&R, executed by Charles Zangara, a vice-president of Citibank (fiduciary department), reads as follows:

> "... Raffe claims that the plaintiffs [Kaufman's executors]and the third-party defendants [Puccini, Dann, and Sorrentino] have entered into some unspecified agreement ... and pursuant to which the 'assets [of Puccini] have been dissipated for the benefit of plaintiffs'. Once again, no documentary evidence is offered in support of this groundless assertion.
>
> The unsupported and baseless charge that the Estate has dissipated the assets of Puccini Clothes, Ltd. is totally false. The Estate has received no monies whatsoever from Puccini Clothes, Ltd.
>
> ... nor have the plaintiffs taken control of the assets of Puccini"

f. Having duped JVL, TVS, was to be the next victim.

His Honor's opinion of October 28, 1982, contained the statement:

> "Defendant's [Raffe's] papers herein, other than the vague allusion to a 'secret agreement' between Dann, Sorrentino, and Puccini Clothes, contain nothing to substantiate [his] claim of wrongdoing on the part of the plaintiffs [the executors of the Kaufman's estate]."

g. An Order and Judgment was entered based upon such opinion wherein the Kaufman estate, the clients of K&R, recovered judgment against Raffe for $429,403.60.

In turn Raffe, recovered judgment for full indemnification against Puccini, and for two-thirds contribution against Dann and Sorrentino.

h. The executors second and third causes of action for penalties, expenses, and attorneys' fees were severed and set down for trial -- a matter hereinafter discussed.

5a. There was no question that ANBL&K, LF, and FK&M knew the consequences of their failure to reveal the perjurious nature of the submission by Citibank and K&R, since previously, on September 9, 1982, Mr. Justice MARTIN B. STECHER, had analyzed the relationships between the parties and concluded that according to the law of indemnification and contribution, Puccini, Dann, and Sorrentino, were liable over for any payment made by Raffe.

b. On principles of subrogation, there never was any question of the liability over in favor of Raffe by Puccini, Dann, and Sorrentino.

6a. ANBL&K, LF, and FK&M had betrayed their trust and clients in the judicial forum!

b. The betrayal by LF, a court appointed receiver -- an agent of the Court and justices thereof -- was under "color of law".

<u>Rashba & Pokart</u> -- <u>Smoking Gun #4</u>:

1. Hon. Martin H. Rettinger ["MHR"], was to be the next major coup for the "hard core" defendants.

2. Circumstantial evidence kept percolating, leading to the irresistible conclusion of larceny of judicially entrusted funds, engineered by K&R, participated in by ANBL&K.

3a. Raffe pressed hard for an accounting by LF or an inspection of Puccini's books and records.

b. Unable to resist the demands any further, LF petitioned the Court for the appointment of R&P to answer only four (4) questions, to wit:

> "(1) are there any assets of Puccini that LF do not have in your possession; (2) was the inventory of Puccini disposed of in a commercial reasonable manner; (3) were any assets of Puccini disposed of between June 4, 1980 and February 4, 1982; and (4) does LF have all of the books and records of original entry that a company such as Puccini would normally maintain in the regular course of business?"

c. Raffe registered a strong protest, claiming there was a pre-existing disqualifying relationship between R&P with K&R and ANBL&K.

d. Raffe offered, "free of charge", to perform an accounting of Puccini's financial affairs, given, of course, access to Puccini's financial books and records, which in fact were custodia legis.

e. In their application requesting the selection of R&P, neither LF nor FK&M, disclosed the any possible disqualifying pre-existing relationships that existed between the investigator [R&P] and those to be investigated [K&R and ANBL&K]!

K&R, the accused, did not disclose to the Court any pre-existing relationship with the proposed investigator [R&P]!

ANBL&K, the accused, did not disclose to the Court any pre-existing relationship with the proposed investigator [R&P]!

R&P, to be appointed as an agent of the Court, under "color of law", to investigate judicially entrusted assets and affairs.

f. MHR, in approving the appointment of R&P, did not even inquire into the matter, except to state that Raffe had no "hard evidence" to show a disqualifying relationship.

Raffe's offer to perform the task, and more, "free of charge", rejected, since he [personally] had not shown himself qualified for the assigned task.

Raffe's offer, as he papers reveal, in terms that he would have others, qualified for the task, on his behalf and at his own personal expense, ignored!

4a. On April 6, 1983, by Order of MHR, approved the appointment of R&P, as investigatory accountants, to answer the aforementioned four (4) questions, disregarding the mandatory, non-discretionary provisions of 22 NYCRR §660.24 in the process!

b. Thus, out of a potential reservoir of about 50,000 accountants in the New York City area, the Court appoints as investigatory accountants a firm clearly suspect, without an inquiry!

5a. On March 8, 1984, eleven (11) months after the appointment, the R&P report is filed in federal court which reveals K&R and/or the Kaufman estate was and/or is a client of R&P!

b. On March 8, 1984, it is also disclosed that K&R and/or the Kaufman estate was billed $6,200 by R&P after June 4, 1980, for a report regarding Puccini's financial affairs.

c. On June 6, 1984, it was confessed that ANBL&K took $10,000 from Puccini's judicially entrusted funds, "laundered" $6,200 of such funds through its own bank account, and paid it to R&P, in payment of the bill rendered to K&R and/or the Kaufman estate.

As part of this revelation, four (4) years later, ANBL&K returned $3,800 to Puccini!

d. The aforementioned relationship was disclosed in 1984 -- in 1982 and 1983 these co-conspirators concealed such relationship from Raffe and the Court.

e. Further suspected relationships between the parties, pend a hearing ordered by Hon. ALFRED M. ASCIONE ["AMA"] on March 16, 1984, but thus far stonewalled by Referee Donald Diamond ["DD"], who has refused obedience to such Order.

f. Obviously, the manifest intent by the R&P appointment was to conceal rather than reveal!

g. The larceny was too extensive for even the conspirators designated firm to conceal.

Finally after eleven (11) months, R&P were compelled, through a "judicial notice"; a "subpoena duces tecum; complaints to administrative and prosecutorial agencies; and as the final plague, a federal lawsuit, to render a report!

h. This report, by R&P, dated March 5, 1984, while it could not conceal the massive larceny of judicially entrusted funds, was nevertheless, itself deceptive, but the District Court did not afford Raffe or counsel an opportunity to show same.

The Nature of the Judicial Process:

1a. Presidential candidate, John F. Kennedy, described members of his adversary's political party, as circus elephants, each one, with its trunk holding the tail of its predecessor, and blindly following a path set by others.

b. In fact, it is a normal human process, found in almost every endeavor of life, human and otherwise, reserving for the few, original thought or analysis.

2a. Panoplied by the judicial opinions of TVS and MHR, clearly stating that Raffe had no evidence of a conspiracy the culprits were able to survive 1983, although the evidence by November 1983 was such that the conclusion was irresistible there was larceny, perjury, and corruption which implicated three (3) law firms, Citibank, and a court appointed receiver -- a "friend" of a member of the judiciary.

b. Raffe assaulted the state courts with waves of motions for various forms of relief, including discovery, notice to admit, accountings etc.

c. In opposition came more perjury, misleading statements, and of course the opinions of TVS and MHR.

For each motion, came another order denying Raffe relief, which was, in turn, added to the line of judicial elephants.

3a. Augmenting the process, the severed action for attorneys' fees etc., was assigned to Trial Term Part 17, alternately presided over by MD, the "designating justice" of LF.

b. With arrogant confidence of judicial control in that part, the co-conspirators, openly flouted their corrupt methods and objectives.

c. The constitutional and legal concept of an "open courtroom" became a boiler type of operation; records were physically changed; Appellate Division orders were blithely ignored and disregarded.

d. Article 78 proceedings ensured against Hon. Louis Grossman ["LG"] and MD and finally they recused themselves.

e. Thus, for the simple motion to restore a case to the jury calendar, which had been struck by the Court by a mere, ex parte, physical alteration of the records, was denied by nisi prius with $40 costs, rejected by the Appellate Division in an Article 78 proceeding, but eventually restored to the appropriate calendar, as an "abuse of discretion" (Barr v. Raffe, A.D.2d , 476 N.Y.S.2d 558).

4. For Puccini, the ultimate payor, a judicial trust, the charted course of betrayal by its court appointed receiver, and his law firm, became a disaster.

5. The two decision of TVS and MHR, now became a long line of adverse determinations against Raffe.

The Last Hurrah:

1a. Four (4) days after Barr v. Raffe (97 A.D.2d 696) was determined, Sassower and Ronald Shields, an accountant, regularly employed by Raffe, inspected what was represented by FK&M as all of Puccini's financial books and records at their offices.

b. Within ten (10) minutes, Sassower & Shields had the answers to the four (4) questions, which now R&P, after seven (7) months failed to produce.

c. About two weeks later, Raffe received some photostatic documents confirming that larceny had taken place of Puccini's judicially entrusted funds, including several checks issued from Puccini checking account after June 4, 1980, issued to the Kaufman's estate.

2. Having exposed the treachery of LF, the receiver, Raffe was going to be excoriated in Trial Term Part 17, no matter what he did that was clear!

4a. Clearly, in the Puccini matter, the state tribunal was inappropriate when a deceitfully court appointed receiver was involved.

b. Sassower read the riot act to some of the culprits, about returning the assets taken from Puccini, and preparations were made for the federal forum.

<u>In Search of the Tooth Fairy</u>:

1. Despite the aforementioned Raffe at that point in time still had a residual confidence that outside Trial Term Part 17, the justices of the SC would recognize their mandate to truth and integrity, as overriding a <u>sub silentio</u> obligation to "cronyism" and "fig leafing" misconduct.

2. Based upon the same November 1983 disclosures, Sassower on behalf of Raffe moved to vacate the first judgment against him, which did not require making same returnable to Trial Term 17.

This first judgment, if vacated, would have relieved Puccini from its obligation to indemnify Raffe for satisfying same, and thus inured directly to Puccini's benefit.

Nevertheless, this motion was not supported by Puccini's court appointed receiver or his law firm.

This first judgment, if vacated, would have relieved Dann and Sorrentino of their obligation to contribute to Raffe for satisfying same, and thus inured directly to their benefit.

Nevertheless, this motion was not supported by ANBL&K, the attorneys for Dann and Sorrentino.

On January 13, 1984, this motion was submitted and referred to Mr. Justice RICHARD S. LANE ["RSL"], the justice who initially rendered the decision. The granting of this motion was compelling, since K&R did not controvert the facts nor the law. do so.

3. The day following this submission, Sassower on behalf of Raffe alone, moved to disqualify (a) ANBL&K and FK&M for betraying the legitimate interests of their clients, Puccini, Dann, and Sorrentino, and (b) disclosure proceedings of the culprits, including R&P.

Federal Court:

1. It was painfully clear, that court-appointed is a euphemism for the statement that the appointee is a "friend" of a judicial colleague, and neither Raffe nor Puccini were going to obtain any relief against the receiver, LF, his law firm, FK&M, or R&P, whose answers to four simple questions, were directed more than nine months previously.

2. When counsel's reading of the "riot act" gave no results, Raffe verified a complaint which was filed in the Eastern District of New York.

3. Hon. XAVIER C. RICCOBONO, Administrative Judge of the Supreme Court, New York County, was served with process on behalf of his Court, and alleged serious acts and omissions by His Honor and the Court in their judicial and non-judicial capacities.

4a. K&R, moved under Rule 12(b)[6], claimed res judicata, but did not what, if anything, was the basis of this plea, merely requesting judicial notice of all state proceedings under Rule 201 (A57).

b. ANBL&K, on behalf of Dann & Sorrentino, and itself did likewise (A63, A65).

c. LF and FK&M, did not plead res judicata, set forth a number of orders clearly not pertinent to such plea (A71), and stated that in May 1983, they retained R&P to respond to the four simple questions posed (A76), pursuant to the Rettinger Order of April 6, 1983.

In his affidavit of February 24, 1984, LF states (A78) that R&P advised him that he has "all of [Puccini's] books and records" (A78).

d. R&P admitted it did work for the clients of K&R, billed them $6,200, but could not determine who made payment (A90) but

> "unaware of any facts tending to indicate that the funds on which such check was drawn were indirectly drawn from Puccini's account."

Contradicting LF, it stated it was not until November 10, 1983 that any request was made to answer these four questions (A91). It denied possession at any time of any of Puccini's financial books and records (A92).

e. JVL stated that he did not qualify or take possession of Puccini's affairs because of the ex parte conversation with K&R (A37).

f. Assistant Attorney General DSC, heretofore assigned to protect Puccini's rights on behalf of the Attorney General, pleaded the Eleventh Amendment and judicial immunity on behalf of his clients.

g. Raffe cross-moved, on February 28, 1984, to strike all factual material asserted by defendants, alternatively for Rule 56 treatment (A97).

As part of his cross-motion, Raffe requested production of all Puccini's (a) "cancelled checks since June 4, 1980, (b) the R&P report authorized on April 6, 1983, and (c) the "Schedule of Information" which Dann and Sorrentino were required to file within 10 days by Order of June 4, 1980 (A98, A102).

The supporting affidavit revealed that ANBL&K that it was that firm that paid the $6,200 to R&P from funds taken from Puccini after June 4, 1980, to pay a bill rendered to K&R (A112); that the report of R&P as of June 30, 1980, was changed from the original date of May 31, 1980 to conceal the extensive larceny that took place in June of 1980 (A113); that in a few minutes a "half-blind bookkeeping student" could tell that extensive larceny took place from the books shown (A114); that based upon the books shown it was impossible to reconstruct Puccini's financial affairs as of June 4, 1980 (A117); the concealment by LF of this extensive larceny had caused a meritless judgment to be entered against him and over against Puccini (Barr v. Raffe, 97 A.D.2d 696) -- his trust and client; that R&P had no jurisdiction to act under §660.24; and now that it was revealed that K&R was its client, and ANBL&K had "laundered" Puccini's monies to it, the petitioning of the court by LF, for its appointment was a "fraud upon the court" (A128), and many other serious charges.

Raffe's counsel also stated (A136-137):

> "Particularly, in view of the fact that the facts in this matter began to uncover themselves on November 7, 1983, it is difficult to see what possibly could be res judicata or subject to collateral estoppel.
>
> The only significant decision or order of the state court which seems to be binding on this Court is Barr v. Raffe (97 A.D.2d 696), which favors plaintiff, not defendants.
>
> Furthermore, it is settled in New York courts that a CPLR 3211(a)[7] dismissal does not bar a subsequent suit based upon a new pleading which corrects the defects alleged (175 East v. Hartford [supra]; De Ronda v. Greater Amsterdam [supra].
>
> Finally, not only have the defendants failed to show, specifically, what order or judgment they contend is res judicata, but it is not generally accepted as part of a Rule 12(b)[1][6] motion, except in such cases where it is obvious and undisputed, and the courts desire to foreshorten the proceeding."

h. Learning that R&P, after eleven months had issued a report, Raffe made a "further motion" to produce same together with the cancelled check of "$6,200" (A151).

i. LF submitted a Reply Affidavit (A154) which had annexed to it the Grossman Order (A158), which the District Court misread, since it reiterated Puccini's liability to Raffe.

j. R&P's attorney also replied and in it revealed that Raffe had filed complaints on January 16, 1984 -- eight months after R&P had been authorized to answer four simple questions (A162), and clearly, did not hinder the filing of answers to such questions as stated by LF and the District Court (A).

k. LF filed a Supplemental Affidavit (A176), with the R&P report of March 5, 1984, which reveals extensive larceny of judicially entrusted funds, most of Puccini's financial books and records missing, and obvious larceny in every category of assets (A181-A205).

5a. The judicial implication of fault was obvious so Raffe moved for (a) leave to incorporate the findings of the R&P report in his complaint; (b) transferring all Puccini related proceedings to the federal court or other court meeting federal standards; and (c) mandating the SC obey federally protected rights (A208). The deficiencies of the SC, some of its jurists, including the Administrative Judge, are manifest. The treachery of LF, the "friend" and "appointee" of the SC, is also such that a neutral forum is constitutionally mandated.

b. Thereafter, Raffe requested relief as against specified justices of the state supreme court (A262-A279). The District Court held the defendants did not even have to respond to Raffe's motion (A293, A294).

c. Raffe, on behalf of Puccini, requested summary judgment against the defendants who unlawfully took its state judicially entrusted assets since June 4, 1980. The District Court denied Puccini the relief requested.

6. Following a Rule 56 conversion, wherein plaintiff only set forth the necessary facts for a 1983 action (Dennis v. Sparks, 449 U.S. 24; Gomez v. Toledo, 446 U.S. 635), the District Court refused to accept Raffe's papers addressed to the defenses raised by the defendants.

POINT I
THERE ARE NO DEFENSES, PRIVILEGES, AND/OR IMMUNITIES WARRANTING DISMISSAL

1. The instances cited by the District Court are not entitled to preclusiveness, as a matter of law or fact. If defendants contend otherwise, they did not show "entitlement" in the District Court.

The defendants must show, in the first instance, an identity of issues necessarily decided, decisive in the present action. Except for summary judgment orders, an interim, non-final order, has no preclusive effect, except as a "law of the case" doctrine within that court.

2. Judicial immunity is limited to tort damages (Pulliam v. Allen, supra). Liability based upon judicial administration is as ancient as the doctrine of judicial immunity (48A CJS, Judges, §91, p. 700). Dismissal is only warranted if no relief can be given and under the facts at bar, the court can fashion relief herein consistent with the Eleventh Amendment.

There is no judicial or eleventh amendment immunity which prevents the trustee, the Supreme Court and/or its justices, from depositing Puccini's financial books and records in the federal court, or ordering that Raffe be permitted to inspect same or to exhibit same to the District Attorney, or compelling them to account for Puccini's assets, or to sue on a bond filed by LF made in favor "of the people" for which Puccini paid the premium.

3. Without pre-trial disclosure, dismissal against JVL and particularly as to R&P, is premature.

Lindsay has been less than candid with the Court. To insinuate or imply that merely because K&R telephoned him and requested him not to qualify or perform his assigned duties for more than seven months, a court order to the contrary notwithstanding, and then not to advise the Court, the Attorney General, or the adverse party, is difficult to accept without further inquiry.

The R&P report of March 5, 1984, while informative, went wildly beyond the judicial authorization for same, and attempts by such means to conceal the obvious.

Even those who still believe in the "tooth fairy" cannot believe that Puccini was operational for seven months after June 4, 1980, had about ten employees, and the gross income was only $512!

Since counsel sees no defenses, privileges and/or immunities herein, he reserves the right to controvert same by his reply brief. There is no reason for counsel to build his own "straw men" and then destroy them, except as heretofore set forth herein.

POINT II
SUMMARY JUDGMENT SHOULD BE AWARDED TO PUCCINI

1. If there is any legitimate reason why Puccini should not be entitled to recover the assets unlawfully taken from it since June 4, 1980, counsel is unaware of same.

If, as the state court held, the clients of K&R unlawfully took Puccini's assets, or participated in such unlawfullness after June 4, 1980, as individuals, not in their representative capacities (A261), then recovery should be permitted against them individually.

2. Since the huge amount of Puccini's assets were unlawfully dissipated to and for the benefit of the receiver's co-conspirators, he and his law firm have not collected, nor attempted to recover one cent!

POINT III
THE JUDICIAL "FRIENDS" OF THE STATE COURT WHO FEED THEMSELVES ON JUDICIAL "TRUSTS" SHOULD NOT BE REWARDED WITH ATTORNEYS' FEES

1. The mandate of the constitution is for an open society and courthouse. Official, even judicial, corruption is a public matter, and should not be suppressed by fear of an attorney fee award if exposed.

2. Attorneys' fee awards to those who committed larceny of judicially entrusted funds, perjured themselves in the state and federal courts, consistently acted contrary to the legitimate interests of their trust and clients, and actively conspired with each other in criminal activity, is to reward the raven and condemn the dove.

If the judiciary cannot clean their own house and will insist punishing those who exposed same in the judicial forum, then the media will have to be the forum of first resort.

CONCLUSION
THE ORDER APPEALED FROM SHOULD BE REVERSED,
IN ALL RESPECTS, WITH COSTS

Dated: November 26, 1984

Respectfully submitted,

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