State of New York
Commission on Judicial Conduct

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

CHARLES P. GARVEY,

a Judge of the County Court, Family Court and Surrogate Court, Essex County.

Determination

BEFORE: Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
David Bromberg, Esq.
Honorable Richard J. Cardamone
Dolores DelBello
Michael M. Kirsch, Esq.
Victor A. Kovner, Esq.
William V. Maggipinto, Esq.*
Honorable Isaac Rubin
Honorable Felice K. Shea
Carroll L. Wainwright, Jr., Esq.

APPEARANCES:

Gerald Stern (Jack J. Pivar, Of Counsel) for the Commission
Ainsworth, Sullivan, Tracy & Knauf (By John E. Knauf) for Respondent

The respondent, Charles P. Garvey, a judge of the County, Family and Surrogate Courts of Essex County, was served with a Formal Written Complaint dated October 19, 1979. The complaint alleged misconduct with respect to respondent's (i) failure to prepare and maintain adequate records concerning payments he had received from his court stenographer, and his failure to explain

*Mr. Maggipinto's term as a member of the Commission expired on March 31, 1981. The votes enumerated on page 6 were taken on March 10, 1981.

them adequately to the Commission, (ii) receiving loans on four occasions from attorneys who practiced before him, (iii) understating his indebtedness on applications for bank loans on four occasions, (iv) maintaining an interest in licensed racehorses and (v) signing his wife's name to a notarized application for a racing license. Respondent filed an answer dated December 7, 1979, in part admitting, in part denying, and in part neither admitting nor denying these allegations.

By order dated January 9, 1980, the Commission designated William F. FitzPatrick, Esq., referee to hear and report proposed findings of fact and conclusions of law. The hearing was held on July 23, 1980, and the referee filed his report to the Commission on December 1, 1980.

By motion dated December 24, 1980, the administrator of the Commission moved to confirm in part and to disaffirm in part the referee's report, and for a determination that respondent be removed from office. By motion dated January 26, 1981, respondent cross-moved to disaffirm in part and confirm in part the referee's report, for a finding that respondent had not engaged in misconduct, and for a determination that the Formal Written Complaint be dismissed or, in the alternative, that respondent be disciplined confidentially.

The Commission heard oral argument on the motions on February 5, 1981. Respondent appeared with his counsel. Thereafter and on March 10, 1981, the Commission considered the record of the proceeding and makes the determination herein.

Charge I of the Formal Written Complaint is not sustained and therefore is dismissed.

With respect to Charge II of the Formal Written Complaint, the Commission makes the following findings of fact.

1. On March 29, 1977, respondent asked John Manning for a $1,000 loan, and shortly thereafter Mr. Manning made a $1,000 interest free loan to respondent.

2. Mr. Manning is an attorney who practiced before respondent prior to and subsequent to the making of the loan.

3. Respondent repaid Mr. Manning the $1,000 within two months. Respondent kept no records of the loan. Respondent did keep a record of the repayment, in the form of a cancelled note showing the dates of repayment.

4. While the loan was outstanding, Mr. Manning appeared before respondent on numerous occasions on ex parte matters.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 33.1, 33.2 and 33.5(c) of the Rules Governing Judicial Conduct and Canons 1, 2 and 5C of the Code of Judicial Conduct. Charge II of the Formal Written Complaint is sustained and respondent's misconduct is established.

With respect to Charge III of the Formal Written Complaint, the Commission makes the following findings of fact.

5. On February 6, 1978, respondent solicited and obtained a loan of $6,500 from John Manning.

6. Mr. Manning is an attorney who practiced before respondent prior to and subsequent to the making of the loan.

7. On April 26, 1976, respondent solicited and obtained a loan of $1,500 from James Murphy.

8. Mr. Murphy is an attorney who practiced before respondent prior to and subsequent to the making of the loan.

9. Carlton King was an attorney practicing in a firm with Mr. Murphy, under the firm name of Murphy, King and Douval. The firm had appeared on numerous occasions before respondent.

10. On August 1, 1977, respondent solicited and obtained a loan of $2,700 from Mr. King. Although Mr. King was no longer a member, the firm continued under the name of Murphy, King and Douval.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 33.1, 33.2 and 33.5(c) of the Rules Governing Judicial Conduct and Canons 1, 2 and 5C of the Code of Judicial Conduct. Charge III of the Formal Written Complaint is sustained and respondent's misconduct is established.

Charges IV and V of the Formal Written Complaint are not sustained and therefore are dismissed.

With respect to Charge VI of the Formal Written Complaint, the Commission makes the following findings of fact.

11. Jane K. Garvey is respondent's spouse.

12. On April 14, 1977, respondent signed the name "Jane K. Garvey" to an application to the New York State Racing and Wagering Board for a racing license. Thereafter respondent had the signature notarized by a court employee and had the application filed with the Racing and Wagering Board.

13. Respondent could not lawfully obtain a racing license under his own name.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 33.1 and 33.2 of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct. Charge VI of the Formal Written Complaint is sustained and respondent's misconduct is established.

A judge's obligation to be and appear impartial in the matters coming before him is fundamental to public confidence in the administration of justice. By soliciting and obtaining substantial sums of money from attorneys who appeared before him or who were associated with a firm which appeared before him, respondent acted in a manner which both was improper and appeared to be improper, even in the absence of any evidence that respondent gave preferred treatment to his attorney-creditors. The applicable rules and canons expressly prohibit a judge from accepting loans from persons whose interests have or are likely to come before him.

By signing his wife's name to an application for a racing license which he then had notarized and filed with a state agency, respondent acted improperly, knowing that statements in the application attesting to his wife's swearing to the truth thereof by her signature were false. Respondent's assertion that he signed the application on his wife's behalf pursuant to a power of attorney is irrelevant to the issue here considered. The fact is that he signed his wife's name, not his own, as her attorney-in-fact, thus creating the false impression that she was the actual signatory thereto.

By reason of the foregoing, the Commission determines that the appropriate sanction is censure.

With respect to the particular charges in the Formal Written Complaint, the Commission records the following votes.

Charge I was dismissed by vote of 9 to 2, with Mr. Bromberg and Mrs. DelBello dissenting and voting to sustain the charge.

Charges II and III were sustained by unanimous vote.

Charge IV was dismissed by vote of 6 to 5, with Mr. Bromberg, Mrs. DelBello, Mr. Kirsch, Mrs. Robb and Judge Shea dissenting and voting to sustain the charge.

Charge V was dismissed by unanimous vote.

Charge VI was sustained by vote of 6 to 5, with Judge Alexander, Judge Cardamone, Mr. Kovner, Judge Shea and Mr. Wainwright dissenting and voting to dismiss the charge.

Mrs. Robb and Judge Shea dissent in a separate opinion with respect to the majority's finding as to Charge IV.

With respect to sanction, the following members of the Commission voted that the appropriate sanction is censure: Judge Alexander, Judge Cardamone, Mr. Kovner, Mr. Maggipinto, Mrs. Robb, Judge Rubin, Judge Shea and Mr. Wainwright. Mr. Kirsch votes that the appropriate sanction is removal and dissents in a separate opinion. Mr. Bromberg and Mrs. DelBello also vote that the appropriate sanction is removal and also dissent in a separate opinion.

With respect to the dissenting views expressed on sanction, the majority notes that the sanction the dissenters would impose is based in part on charges which the majority of the Commission has found not to be sustained.

In view of the dissenters' views on Charge IV in particular, it seems appropriate to comment on the dismissal of the charge. The banks which made personal loans to respondent had authorization to do so under the banking law and were required to keep records of the loans in such form as the superintendant of banking prescribed (Banking Law, §108 subd. 4[a] and §202). The regulations promulgated and published pursuant to this statute specify the personal loan records to be kept (3 NYCRR, Banking, §320.1). Based upon the record the loans made to respondent were classified under the cited regulations either as "secured" or "unsecured" (3 NYCRR, Banking, 320.1 [a][1]).

The President of the Essex County-Champlain National Bank was called as the Commission's witness. He testified that the financial statements that were filed were obtained to show the reason for the loan and that he, as President of the bank, had authority to make loans on his own authority up to $50,000. He further testified that respondent Garvey had been a customer of his bank for over 25 years and that these financial statements were filed to support a line of credit that had been extended to respondent Garvey and also in connection with his loan application for a second mortgage. In response to a question as to the basis on which the bank made a loan, he stated: "I as a bank examiner consider character, the number of years experience we have had with a customer. Certainly in this case we are not particularly concerned and have never been concerned about the financial status on paper of a borrower such as our experience dictated over the years with Judge Garvey and as an individual prior to that." It was this experience over many, many years and the fact that Judge Garvey in

all those years had never reneged on a loan either as to principal or interest that prompted the bank to make loans to respondent. He stated that the key was that loans are made on the basis of character, credibility and the standing of the individual borrower and that the bank was in no way misled by the financial statements presented by respondent. The Commission called no other witnesses relative to the loans obtained at the other two banks.

Moreover, the statement is an unsworn written representation that the borrower has a net worth sufficient to support the credit he seeks. While the statements were not fully accurate as to respondent's liabilities and assets -- indeed, it is obvious they were negligently prepared -- it does appear that they satisfactorily met the requirements of the lending institutions. Concededly a statement of net worth was required to be filed by a borrower periodically and kept by the bank for its files in connection with such loans, even though that requirement is not specifically set forth either in the statute or the published regulations. The record is devoid, however, of any evidence of any intent on the part of respondent either to defraud the bank or to induce the making of the loan through material misrepresentations. It is significant in our view that the bank did not rely upon such statements in making the loans.

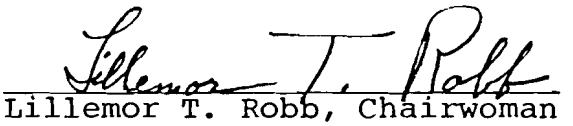
Under these circumstances, to find judicial misconduct after the fact appears to us would place an unfair and onerous burden on respondent, who filed his financial statements in the customary, though hasty, manner. An unwary judicial officer should not later learn that he acted at his peril when applying for a loan in a manner consistent with the requirements of and satis-

factory to the lending institution. We cannot find, as do the dissenters, sufficient evidence on this record to prove judicial misconduct on Charge IV.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct, containing the findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

Dated: June 23, 1981
New York, New York



Lillemor T. Robb, Chairwoman
New York State Commission on
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DISSENTING OPINION
BY MR. KIRSCH

I respectfully dissent from the Commission's determination that respondent should be censured. Specifically, I concur with the findings that Charges II, III and VI are sustained and that Charges I and V are dismissed. I respectfully disagree, however, with the Commission's dismissal of Charge IV, pertaining to the financial statements filed by respondent with three banks from which he sought loans. In my view, the totality of respondent's misconduct on the sustained charges and his conduct pertaining to the financial statements warrants the extreme sanction of removal from office.

With respect to soliciting and receiving loans from attorneys who practiced before him, respondent exhibited a disturbing disregard of the specific prohibition against such financial activity as set forth in the Rules Governing Judicial Conduct (Section 33.5[c]). Respondent compounded this violation of the Rules by thereafter presiding over numerous matters involving the attorneys who had extended him loans, in violation of Sections 33.2 and 33.3(c) of the Rules. Notwithstanding the ex parte nature of

many of these matters, respondent's conduct was plainly in violation of the applicable rules. Moreover, in one contested will probate proceeding at which respondent disclosed his personal friendship with one of the attorneys who lent him money, respondent made no mention of the loan itself, which at the time was outstanding. By soliciting and obtaining these loans from attorneys who appeared before him, the referee concluded, and I agree, that

> ...respondent acted in a manner that could cast serious doubt as to his impartiality and that created a serious appearance of impropriety; failed to observe high standards of conduct; failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary; and was in violation of Sections 33.1, 33.2 and 33.5(c) of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct.

With respect to signing his wife's name to an application for a racing license which he then had notarized by a court employee and filed with a state agency, respondent engaged in serious misconduct. There was no dispute as to the facts. The referee found that respondent could not lawfully obtain a racing license in his own name (prohibited to him as a public officer or employee under Sec. 8052 of the Unconsolidated Laws), and that respondent secured his wife's name to the application, had it notarized by his court stenographer, an employee under his supervision, and caused it to be filed with the New York State Racing and Wagering Board. The application is in the name of Jane K. Garvey, as the applicant, and ends with the printed statement immediately above the signature, "I hereby certify that this application is true and complete". It is then signed, "Jane K. Garvey" and notarized by his stenographer under the printed jurat "Sworn to before me" with the date inserted.

Pursuant to Sec. 137 of the Executive Law, the certificate of a notary public over his signature is received as presumptive evidence of the facts contained therein.

In Case v. The People, 76 NY 242, 245 (1879), the court held that in an affidavit sworn to before a notary public, the certificate of the notary that the affidavit has been sworn to indicates prima facie that the officer has done his duty.

In O'Reily v. The People, 86 NY 154, 161 (1881), the court held that a notary's certificate pre-supposes an oath already taken, of which fact it furnishes the evidence.

In my view, respondent's act approaches a violation of the Penal Law (Section 210.00), which states that a "person 'swears falsely' when he intentionally makes a false statement which he does not believe to be true...under oath in a subscribed instrument... (which) is delivered by its subscriber, or by someone acting in his behalf, to another person with intent that it be uttered or published as true." The result of respondent's act is that the signature of "Jane K. Garvey" on official file with the State Racing and Wagering Board is false.

The argument that respondent was simply signing as his wife's agent under a power of attorney is specious. As the court said in 46 Downing Street Corp. v. Loren, 324 NYS 2d 932, (Civil Ct. NY, 1971), the right to deputize an attorney-in-fact contemplates granting a power to act in the name of the principal, "but not a power to swear in the name of the principal". No one would even suggest that the respondent could be permitted under any circumstances to testify in a court or by deposition as "Jane K. Garvey",

and it is no different here where he acted for Jane K. Garvey in swearing to the truth of the facts contained in her application for a racing license. Moreover, he compounded the wrong by having his court reporter, over whom he had administrative responsibility, certify that his wife had sworn to the instrument.

In attorney disciplinary cases, the courts have considered it to be a very serious matter for an attorney to take an acknowlegement or affidavit as a notary public without the person actually appearing before him whose signature he has certified as having been signed or sworn to before him. Matter of Neuwirth, 39 AD2d 365 (2d Dept. 1972); Matter of Barnard, 151 AD 580 (1st Dept. 1912).

The essence of the misconduct is that respondent failed in his obligation to be faithful to the law and indeed prompted his employee to violate the laws and the high standards incumbent upon a notary public. Moreover, one may draw a reasonable inference from his conduct that respondent signed his wife's name to obtain a license for which by law he himself was ineligible. (The record of this proceeding is replete with examples of extensive financial interests managed by respondent himself, including ownership of several racehorses which he transferred to his wife upon ascending the bench in 1974, and continuing thereafter to act in his wife's name under a power of attorney from her.)

With respect to the financial statements filed by respondent with various banks, I respectfully disagree with the Commission's dismissal of the charge (Charge IV). There were four financial statements filed with three banks relating to loan applications

made by respondent. As the referee found, on each statement respondent substantially understated his indebtedness and substantially overstated his net worth, as follows.

-- A statement on November 1, 1977, to the Essex County - Champlain National Bank understated respondent's debts by $45,200 and overstated his net worth by the same amount. (His net worth had been listed as $65,950. An accurate reflection of his indebtedness would have reduced his net worth to $20,750.)

-- A statement on May 1, 1979, to the Essex County - Champlain National Bank understated respondent's debts by $75,200 and overstated his net worth by the same amount. (His net worth had been listed as $73,500. An accurate reflection of his indebtedness would have reduced his net worth to a deficit of $1,700.)

-- A statement on December 20, 1978, to the Keeseville National Bank understated respondent's debts by $61,700 and overstated his net worth by the same amount. (His net worth had been listed as $87,000. An accurate reflection of his indebtedness would have reduced his net worth to $15,300.)

-- A statement dated December 28, 1978, to Farmer's National Bank understated respondent's debts by $78,700 and overstated his net worth by the same amount. (His net worth had been listed as $151,850. An accurate statement of his indebtedness would have reduced his actual net worth to $73,150.)

In addition to the foregoing inaccuracies, on his statements to each bank respondent either understated or entirely omitted loans from other banks which were outstanding, as follows:

-- In the November 1977 statement to the Essex County - Champlain National Bank, respondent listed $7,500 as outstanding to that bank. He omitted $15,000 then outstanding to the Keeseville National Bank and reported $1,400 as outstanding to the State Bank of Albany as guarantor when in fact the outstanding amount was $15,000.

-- In the May 1978 statement to the Essex County - Champlain National Bank, respondent listed $9,500 as outstanding to that bank. He omitted $30,000 then outstanding to the Keeseville National Bank, $10,000 to the Farmer's National Bank and $15,000 to the State Bank of Albany as guarantor.

-- In the December 1978 statement to the Keeseville National Bank, respondent listed $15,000 as outstanding to that bank. He omitted $10,000 then outstanding to the Essex County - Champlain National Bank and $15,000 to the State Bank of Albany as guarantor.

-- In the December 1978 statement to the Farmers National Bank, respondent listed $6,500 in outstanding notes payable to banks. He omitted $30,000 then outstanding to the Keeseville National Bank, $15,000 to the Bank of Albany as guarantor and $10,000 to the Essex County - Champlain National Bank.

Respondent offered no credible explanation for the foregoing misstatements and omissions, and the referee concluded that respondent had falsely stated his debts. When asked at the hearing whether it was coincidental that the debts listed on individual statements were only those outstanding to the particular bank, respondent replied "I don't know. I haven't thought about it" (Tr. 187-88).

Phillips, the president of Essex County-Champlain National Bank, testified he had dealt with respondent as a customer for twenty-five years; that respondent maintained a "line of credit" with the bank, and that the financial statement dated November 1, 1977 (Comm. Exh. 3) "was to support our line of credit" with respondent and that they normally require "information updating our credit files". Loans by the bank, he stated, are made on the basis of character, credibility and standing of the individual, and experience over the years as a prime guideline for advancing credit, and the financial statement is just one element to which they give some consideration.

He testified, concerning the November 1, 1977 statement, that they are required by the bank examiners to keep their credit files as current as possible and so (Tr. 30),

> ...we do require on certain loan borrowings customers to submit a yearly statement to us or thereabouts. This is also to meet the requirements of the bank examiner.

The May 2, 1979 statement (Comm. Exh. 4) was submitted by respondent to the bank prior to a loan application made by him for a second mortgage.

All of the financial statements, Commission's Exhibits 3, 4, 15 and 16 were on a printed form boldly headed "Financial Statement", with the printed preamble (name of bank written in):

> I make the following statement of all my assets and liabilities at the close of business on the date indicated above to Essex County-Champlain National Bank and give other material information for the purpose of obtaining advances on notes and bills bearing my signature, endorsement, or guaranty, and for obtaining credit generally upon present and future applications.

The evidence with respect to the bank loan transactions, particularly the two statements dated only eight days apart in December 1978 with such great variance, one setting forth his net worth at $87,000 and the other at $151,850, indicates at the very least a reckless disregard for the truth by respondent, bordering on fraud. Whether reckless or fraudulent, respondent's conduct in this regard is inexcusable. He has engaged in business dealings that reflect adversely on the judiciary. He has failed to conduct himself in a manner that promotes public confidence in the integrity of the judiciary. His acts, when not in themselves improper, have appeared to be improper.

The seriousness of each act of misconduct by respondent, and the grave proportions they assume in their totality, reflect adversely on respondent's capacity for the administration of justice and cast doubt on his moral fitness to serve on the bench. For these reasons I vote that respondent should be removed from office.

Dated: June 23, 1981
New York, New York

Michael M. Kirsch, Esq., Member
State Commission on Judicial
Conduct

State of New York
Commission on Judicial Conduct

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DISSENTING OPINION BY MR. BROMBERG AND MRS. DELBELLO

We concur with the findings of the Commission that Charges II, III and VI should be sustained and that Charge V should be dismissed.

We respectfully dissent from the Commission's dismissal of Charge I. We vote that Charge I should be sustained.

We join with Michael M. Kirsch in respectfully dissenting from the Commission's dismissal of Charge IV and we vote that Charge IV should be sustained. We join in the opinion of Mr. Kirsch in that regard.

We join with Mr. Kirsch in respectfully dissenting from the Commission's determination that respondent should be censured, and we vote that he be removed. We join in the opinion of Mr. Kirsch in that regard.

With regard to Charge I: The gravamen of Charge I is that, between April 1979 and July 1979, respondent's court stenographer made unaccounted-for deposits of more than $50,000 in a checking account maintained by respondent. Respondent attempted to

explain those deposits by testifying that they represented a mixture of (a) payments on an office building of which respondent's stenographer was buying one-half from respondent, (b) a loan to respondent of some of the money which had previously been deposited by the stenographer as part payment for the building, (c) money deposited by the stenographer for respondent's personal use and (d) money deposited by the stenographer as part payment for the building which was later withdrawn by her for her own personal use. The referee found that respondent offered no testimony and had no reliable record or document which accounted for or explained the deposits in the account or supported the explanations advanced by respondent. Among other things, of the $14,500 supposedly deposited by the stenographer for her own personal use, at least $5,000 was used by respondent for his own purposes. The referee, therefore, rejected respondent's explanation as being inadequate and not consonant with the known and objective facts. We see no reason that the referee's findings -- made after extensive hearings -- should be discarded. The referee concluded as follows, and we agree, that

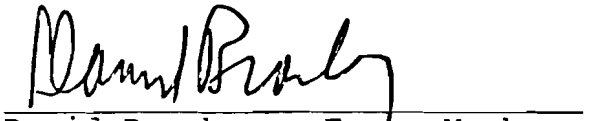
> [b]y reason of his conduct, respondent failed to observe high standards of conduct, failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary; engaged in a business transaction that could reflect adversely on the judiciary; and was in violation of Sections 33.1, 33.2 and 33.5(c) of the Rules Governing Judicial Conduct and Canons 1 and 2 of the Code of Judicial Conduct.

The totality of respondent's misconduct has compromised the integrity of the judiciary and the administration of justice. It reveals a serious lack of understanding by the respondent of his

obligations as a member of the judiciary. His continued presence on the bench can only serve to erode public confidence in the courts.

For the reasons set forth herein and in the opinion of Michael Kirsch, we vote that respondent should be removed from office.

Dated: June 23, 1981
New York, New York



David Bromberg, Esq., Member,
State Commission on Judicial
Conduct

Dolores DelBello, Member
State Commission on Judicial
Conduct

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DISSENTING OPINION BY MRS. ROBB AND JUDGE SHEA

We concur with the majority determination that respondent should be censured. We disagree with the majority's dismissal of Charge IV. We believe that Charge IV should be sustained. The discussion on Charge IV in the dissenting opinion of Commission member Michael M. Kirsch represents our views on Charge IV, and to that extent we join in his dissent.

Dated: June 23, 1981
New York, New York

Lillemor T. Robb

Lillemor T. Robb, Chairwoman
New York State Commission on Judicial Conduct

Felice K. Shea

Hon. Felice K. Shea, Member
New York State Commission on Judicial Conduct