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OCTOBER TERM, 1969

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In the Matter of:

Docket No. 513

DAN A. SPENCER

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1969

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4 In the Matter of :
: No. 513
5 DAN A. SPENCER :
:
6 -x

7 Washington, D. C.
April 28, 1970

8 The above-entitled matter came on for argument at

9 1:55 p.m.

10 BEFORE:

11 WARREN BURGER, Chief Justice
12 HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
13 JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
14 POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
15 THURGOOD MARSHALL, Associate Justice

16 APPEARANCES:

17 NEIL DIXON, ESQ.
Shreveport, Louisiana

18 MELVIN L. WULF, ESQ.
19 New York, New York

20

21

22

23

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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We will hear arguments in

3 Case No. 513, In the Matter of Dan A. Spencer.

4 Now, as to No. 4, Younger against Harris, we will ask

5 counsel to stand by for a while. Perhaps at the half break, when

6 we are certain that we are going to have this case completed with

7 no emergencies, then counsel can be excused at 2:30 p.m., if no

8 emergencies arise.

9 Mr. Wulf, you may proceed.

xxxx 10 ARGUMENT OF MELVIN L. WULF, ESQ., ON BEHALF OF APPELLANT

11 MR. WULF: Mr. Chief Justice, may it please the Court.

12 The contempt conviction of an attorney is here on

13 appeal from the Louisiana Supreme Court. Jurisdiction was post-

14 poned pending argument on the merits, and there are some juris-

15 dictional problems. Before discussing those, I would like to

16 describe the facts of the conviction itself because the facts

17 of the conviction also involve some of the jurisdictional prob-

18 lems.

19 The appellant in this case, Mr. Spencer, is an attorney,

20 a member of the Louisiana Bar who appeared before Judge Dixon

21 a District Court judge in the Louisiana Courts representing one

22 Mr. Hopkins in a hearing in a divorce case. It was an uncontested

23 divorce suit and the purpose of the hearing was, according to

24 the Louisiana practise, to confirm default in Mr. Hopkins favor.

25 After testimony was given by Mr. Hopkins and a witness

on his behalf, Judge Dickson denied the divorce because the testimony didn't show abandonment by the spouse but showed only that Mr. Hopkins and Mrs. Hopkins had had an argument, and that they decided that one of them should leave. Mrs. Hopkins was the one to leave.

The following day, after the denial of the divorce, the appellant filed a motion for a new trial on behalf of his client, Mr. Hopkins, on the ground that the decision by Judge Dixon was erroneous in fact and in law.

Simultaneously with filing the motion for a new trial, he also filed a to recuse Judge Dixon. The Motion to Recuse, which he filed, is set out in the back of our brief.

Q Did that motion contain any new matter that he hadn't known the day before or the week before?

A The record doesn't show, Your Honor.

Q Can any inferences be drawn as to whether this was some discovery overnight, or whether it was a new idea after he learned that he had received an adverse decision?

A I believe that one cannot draw any inferences from the record because there isn't anything in the record at all to suggest when this impeachment proceeding was initiated, if it was initiated and what any of the facts surrounding that petition were.

Q So, but we don't even know if it is true or false, is that correct?

A We don't know it is true or false, Your Honor. One of the reasons we don't know whether it is true or false is that the Judge who sat on the contempt proceeding itself a year later wouldn't allow any such testimony to be entered. The record is ambiguous as to whether any such testimony was attempted to be put in by the appellant.

It is perfectly clear from the statement of Judge Williams himself, he was the judge who sat on the contempt hearing -- and this is contained in the record of the case and also in the back of the jurisdictional statement -- Judge Williams in opposing Mr. Spencer's application for writs of certiorari to Louisiana Supreme Court, and I quote - - I am sorry I don't quote. In his application -- opposition to the application, which is in the record, Judge Williams said himself that he refused to admit any such evidence concerning the truth of the assertion in the Motion to Recuse.

Q And we don't know if Mr. Hopkins was a lawyer or what he was as far as the record goes.

A I think Mr. Hopkins was not a lawyer.

Q And we don't know anything about Mr. Charles Anderson, III?

A No, sir, less about him than about Mr. Hopkins.

Q Do we know anything -- I suppose we could take judicial notice, although I certainly don't have any actual notice of how in New Orleans you get a judge removed from office

you get a judge removed from office as being unfit therefor or for any other reason. We don't know if these were members of the State legislature. We don't know anything about this case, do we?

A We do know that there was then a procedure under the Louisiana constitution, Article 9 of the constitution, which provided that upon the petition of any 25 citizens of the State in which they allege that a judge was guilty of a run of a fairly long list of offences ranging from high crimes and misdemeanors to habitual drunkenness, including incompetency, corruption, favoritism, extortion. oppression in office and gross misconduct, that upon a filing of a petition with the District Attorney by 25 citizens so alleging that the District Attorney had to initiated impeachment proceedings.

Q Where? Before what form?

A The Supreme Court of Louisiana, Your Honor.

However, that statute which was in effect at the time that this Motion to Recuse was filed was repealed not long afterwards.

Q Do we know, Mr. Wulf, how it came about that Judge Dixon ceased to hold office as a judge?

A He was elevated to an appellant court in Louisiana not long after this trial also, Your Honor.

Q You are going to address yourself to whether you are legally here at all on the question of whether there is an

1 appeal, are you?

2 A Yes, sir, I am. But, if I may just finish the

3 recital of the facts, I will address myself to that.

4 Q I am sorry I interrupted you.

5 A Rhe Motion to Recuse contained the following

6 paragraphs, it is paragraph 4 and it is set out at page 8 in

7 the appendix, the separate appendix.

8 It says the plaintiff herein, Lewis P. Hopkins, Jr., and

9 his chief witness in the case, Mr. Charles Anderson, III, are

10 presently engaged in the process of attempting to have Judge

11 Dixon removed from office as being unfit therefor by virtue of

12 corruption, favoritism, and misfeasance in office.

13 The next paragraph said that because of this activity

14 of Mr. Hopkins that the Judge is therefore interested in the

15 cause and biased, prejudiced and harbors personal animosity towards

16 the plaintiff.

17 The Motion to Recuse was filed pursuant to the Louisiana

18 statute which permits motions to recuse on allegations of bias.

19 Q At some point will you develop what is the nexus

20 as you see it between allegations of corruption and allegations

21 of bias, or perhaps indicate there is none. I am puzzled about

22 that.

23 A The nexus is that the judge inferentially know-

24 ing about the Motion to Impeach, the proceeding to impeach, initiat-

25 ed by the plaintiff in the case would necessarily be biased against

against him on the fair assumption that it certainly isn't something that were going to endear the plaintiff to the judge. That was the essence of the claim of bias and personal animosity, a fair implication, I would think.

This Motion to Recuse having been filed, the judge several days later issued an Order for a Rule to Show Cause why appellant, Mr. Spencer, ought not be held in contempt. The order is set out on page 10 of the appendix. It is very brief. It states, using the language of the Louisiana contempt statute, that he did file a pleading which contained scandalous, insulting and abusive language and abusive language and irrelevant ciritism of the judge of said court, which pleading was attached h ereto and made a part hereof and which language particularly in paragraph 4, which was the paragraph I read related to the impeachment proceeding, thereof impairs the dignity of the court and the respect for its authority contrary to the law of the State of Louisiana.

At that point the appellant here initiated collateral proceedings in the United State District Court in Louisiana to enjoin the contempt proceedings. I do not think that is directly relevant now. That was an attack on the ---

Q What was the basis of your claim? Was it due process, first amendment, or what?

A The collateral action? That was in 1983 Civil Rights Action based partially on Dumbrowski v. Pfister to enjoing the contempt proceeding against ---

1 Q Depriving you of what Federal right?

2 A I am afraid I cannot recall. It was free speech,

3 precisely.

4 Q That was decided against you?

5 A He alleged that the statute, Louisiana contempt

6 statued, violated the first amendment on its face.

7 Q That was decided against you?

8 A That decided against the appellant, yes. There

9 was initially a three-judge court.

10 Q You did not appeal that?

11 A He filed notice of appeal nad then withdrew after-

12 ards.

13 Another part of that proceeding was, I think it is

14 fair to say, that out of that proceeding Judge Dixon disqualified

15 himself from sitting on the contempt hearing himself and another

16 judge was assigned to actually hear it.

17 Q Are the issues in that Federal court action being

18 raised in this action, too?

19 A The only issue that was disposed of in a Federal

20 Court action wasthe constitutionality of the contempt statute

21 on its face, although that was raised here initially in the

22 jurisdictional statement from our supplemental brief. Here you

23 will see that we are confessiong that that ought not to be here

24 because it was not properly set forth.

25 Q When were your other issues ever raised in a

1 State court?

2 A The other issues by which you mean ---

3 Q They were not litigated here.

4 A They were raised, the invalidity of the convic-

5 tion was raised, in the Motion to Recuse in the course of the

6 baring before Judge Williams and in the appellant's application

7 for writs of certiorari to the Louisiana Supreme Court.

8 Q If you did not raise it in the trial court you might

9 be in trouble even if you raised it in the State court.

10 a It was raised ---

11 Q Where was that? It must be in the record some

12 where.

13 A It is in the record. It was most explicitly raised

14 in the course of the oral argument before Judge Williams at page

15 -- well, it is raised in a couple places. It is at page 18,

16 for example, in the appendix, in the first full paragraph. The

17 first words are, Holt vs. Virginia." That is Mr. Spencer en-

18 gaging in colloquy with Judge Williams. At the bottom of that

19 paragraph he quotes some of the language from the Holt case, and

20 then at the conclusion he says, "under these circumstances and

21 the decision decided by eight judges, the Supreme Court," mean-

22 ing this Court, "found these were constitutionally protected

23 expressions of free speech and I would submit that the same

24 thing is true here."

25 The other issue that he consistently raised was the

1 issue of his right to ---

2 Q You mean this addresses itself to 222(3) as applied?

3 Is that it?

4 A Yes, the reference to Holt.

5 Q You say this addresses itself to the constitution-

6 ality of the section we have before us, 222(3), is that?

7 A Addresses itself to the charge ---

8 Q What we are dealing with here is our jurisdic-

9 tion to hear this. Is that right?

10 A We are, and our supplemental breif conceded ---

11 Q That on its face you cannot ---

12 A We have abandoned the attack on the contempt

13 statute on its face because in my opinion it was impossible to

14 assert that it had been draw in issue properly.

15 Q And I come back to my original question. Then

16 you go on, as I read your supplemental brief, to say that the

17 constitutionality of 222(3), based upon the first amendment. As

18 applied -- is that right? Is that what you are saying here?

19 A What I am saying down here is that what we are

20 attacking is not the statute other on its face, certainly not on

21 its face. What we are attacking is the validity of the convic-

22 tion itself.

23 Q You are here by appeal.

24 A I am here by appeal. In the supplemental brief

25 I confess that we are here incorrectly by appeal. In the supple-

mental brief I have asked that pursuant to Section 2103 that the

1 case be treated as a petition for certiorariwhich in fact was
2 one of the alternative prayers in the jurisdictional statement
3 and certiorari be granted, and that the surviving issues, apart
4 from the constitutionality of the statute on its face ---

5 Q What are the "cert" issues?

6 A The essential "cert" issue ---

7 Q Before you get to the "cert" issue let me ask
8 you this. If what is not disclosed in your supplemental brief
9 had been included in your jusisdictional statement, is it possi-
10 ble that there would have been a dismissal out of hand of the
11 whole proceeding?

12 A I would not make that prediction, Your Honor.

13 Q If you admit now that you had no basis for being
14 here on appeal ---

15 A That is right, but I think we have an excellent
16 basis for being here by way of certiorari.

17 Q You have not filed for petition for certiorari.
18 You filed an appeal, is that correct?

19 A Yes, an appeal -- notice of appeal was filed from
20 the decision of Louisiana Supreme Court and then a jurisdiction
21 statement was filed here. The jurisdiction statement in its
22 conclusion at page 13 said that thequestion presented by the
23 appeal is substantial, and alternatively in the event this
24 appeal is rejected appellant prays that the paper be treated
25 in this petition for writ of certiorari.

1 If I had drawn that document, I would have made a petition for certiorari in the first place, and necessarily we
2 are now here asking that it be treated as a petition for certi-
3 orari.
4 Q Where else, Mr. Wulf, did you raise any Federal
5 constitutional matters in the trial court other than at page
6 18?
7 A I think that was the most explicit.
8 Q While you are about it, Mr. Wulf, will you point
9 out what the issues on "cert" are that you think are now be-
10 fore us? I gather this is the First Amendment issue?
11 A It is essentially a Holt vs. Virginia issue.
12 Q That is what I mean.
13 A Which is a due process, First Amendment and devoid
14 of evidence issue as I read that case.
15 Q You mean that anything that Holt vs. Virgina
16 dealt with is raised by that?
17 A Yes, sir.
18 Q You hope.
19 A I hope, yes, sir.
20 Q What other "cert" issues are there?
21 A Well, certainly the central Holt issue is raised
22 here. By referring explicitly to Holt in the course of the
23 argument in the trial court and by repeating those assertions in
24 his applications for writs to the Louisiana Aupreme Court, he
25 certainly properly raised and preserved the Holt issue. He raised

1 it, I think, in a way ---

2 Q They denied certiorari. We don't know whether they

3 might have denied it because you had not raised anything in the

4 lower court.

5 Q They not only denied certiorari, but they also

6 said there is no error of law in the rule ---

7 Q What does that mean in Louisiana? I used to know,

8 but I do not remember. It has something to do with the merits,

9 does it not?

10 A I have not frankly examined that precise question

11 in terms of what it means in Louisiana law. I would think its

12 plain meaning is that there is no error of law.

13 Q I think it has some technical meaning -- which

14 could be for you.

15 A Perhaps. I do not think the disposition by the

16 Louisiana Supreme Court is directly relevant to whether we proper-

17 ly raised the certiorari issues here. As long as we properly

18 raised them in the applicationsto the Supreme Court of Louisiana,

19 the fact that they declined to exercise jursidiction does not

20 denigrate the fact that we properly raised them in the first

21 place.

22 Q I know that, but if there were a rule in Louisiana

23 that you must raise the issues in the trial court to have them

24 considered in the appellate court, then you have not raised the

25 issue as soon as you can in a State court.

1 A We raised the Holt issue in the trial court.

2 Q The other side of it, what I am suggesting, is

3 that there is something about this Louisiana practice which

4 makes that forum a disposition on the merits, not merely a

5 denial of review such as it would be here. You can use that

6 forum for disposition of petition for "writ" as I recall it, that

7 constitutes also a disposition on the merits. There is not merit

8 in the points raised, assuming they were raised.

9 A I did not look into that. If the Court wants

10 a supplementary brief ---

11 Q Perhaps your adversary can enlighten us.

12 A In any case, if it were a disposition on the

13 merits, obviously my case would be stronger. I do not thing,

14 frankly, it is any less weak if it is a discretionary denial.

15 The question is not whether or not the Louisiana Supreme Court

16 decided it. The question is whether it was presented to them,

17 entertained and rejected either by denial of certiorari or on

18 the merits.

19 Q I know I am taking up too much of your time. I

20 apologise.

21 What other "cert" issues are there before us?

22 A The three "cert" issues which are before us all

23 revolve around the Holt issue. They are that the conviction

24 violates the First Amendment right of courtroom advocacy by an

25 attorney. The Holt vs. Virginia issue itself, denial of due

1 process because of the Sixth Amendment right to counsel and for
2 counsel to plead, and the no evidence rule. Frankly all of these
3 Holt is the center piece of these three questions. I think Hold
4 can be looked uopn as something of a free-speech case. It can
5 be looked upon as the right of free speech advocacy in the court-
6 room as Mr. Justice Douglas and Blank referred to it in Fisher
7 vs. Pane in a dissenting opinion there, so it has been treated
8 or considered to be a First Amendment right.

9 The second issue is the Holt vs. Virginia issue, namely
10 the right of a lawyer on behalf of his client to file relevant
11 pleadings in order to try to secure a forum which is free of
12 bias. That could be either a motion of the accused as in this
13 case or a motion for a change of venue as was the case in Holt.

14 The last issue is the no evidence issue along the line
15 of Thompson vs. Louisville which in fact was one of the grounds
16 in the Holt case although it did not precisely refer to Thompson
17 vs. Louisville, but the court here id say in Holt, speaking of
18 the convictions for contempt, that they rest on nothing except
19 allegations made in motions for change of venue.

20 Each of those issues were raised below and are here pro-
21 perly having been raised and preserved below.

22 Q They are here now as you concede only if we grant
23 petition for certiorari. Am I correct?

24 A Yes.

25 Q This, therefore, I gather is an inadvertent

1 misstatement in your opening brief to the effect that the jurisdictional statement was filed on August 9, 1959 and probably jurisdiction was noted on February 2, 1970. That is a misstatement of fact.

A That is a misstatement which I corrected in the supplemental brief.

Q You now concede there is no proper field here and what you are presenting is a petition for certiorari which you are asking us to grant?

A Yes, sir, grant and deal with on the merits precisely as it would have dealt with the merits of the appeal if the appeal were properly here.

I might say with respect to the application for certiorari that this Court has not infrequently considered issues of contempt visited on lawyers by the bench as a very important aspect, both as to its constitutionality and its supervisory duty over the conduct of litigation in the lower Federal courts. There have been several dozen contempt cases here in one form or another.

I would suggest that that itself indicates the significance of these kinds of cases where lawyers are held in contempt by the bench and I think that the issue, quite apart from that, even if there never had been a case of this sort here before, that quite apart from that is is an important question on its own merits and does implicate the independence of the bar and raises serious questions about the bar being free from the

imposition of arbitrary sanctions by judges and members of the bench.

I would just like to concentrate for a moment on this case in relationship to the Holt vs. Virginia. Looked at in that light it is a very easy case in that it is controlled directly and entirely by Holt vs. Virginia.

In Holt there are two lawyers who were held in contempt for filing a motion for change of venue in that case in which they cha ged that the judge there, "is now in effect and or in fact acting as a police office, adverse witness for the defense, grand jury, chief prosecutor and judge." It also charged that the judge had intimidated and harassed attorney Culp at an earlier hearing on a contempt proceeding. The judge thereupon, on hearing this motion read in open court, said "I think the plea is contemptuous.

The Virginia Supreme Court held that the motion violated the Virginia contempt law. This had to do with a person who "misbehaves in the presence of the court so as to obstruct justice or uses vile, contemptuous, or insulting language." This is language not unlike that contained in the Louisiana contempt statute.

Q Paragraph 4 refers to the client Hopkins as engaged in the process of attempting ---

A Yes.

Q And removed from office as "being unfit therefor

1 by reason of corruption and misfeasance in office." Is that
2 exact language from the statute under which Hopkins was bringing
3 his proceeding?

4 A Yes, except misfeasance is not included in the
5 statute. Corruption, favoritism and oppression is included in
6 Article 9, Section 1 of the Louisana constituion.

7 Q This was the basis for the discipline.

8 A The sole basis for the contempt was this para-
9 graph of the Motion to Recuse, which you must not is not the
10 words of the appellant, the lawyer himself, but is merely an
11 assertion by Mr. Spencer that his client, Mr. Hopkins, had initiat-
12 ed a petition for removal of Judge Dixon and that that petition
13 was written in terms of corruption, favoritism, opporession and
14 misfeasance. They are not the appellant's words. They are not
15 the words of the lawyer. They are merely the assertion by the
16 lawyer in a pleading that this was an activity in which his client
17 was presently engaged, and that therefore the judge would be
18 prejudiced against him.

19 Q Surely, though, the lawyer drafted that. Some
20 typist did the writing of it but the lawyer drafted the language.
21 Therefore, they are his words.

22 A The lawyer drafted ---

23 Q We don't know whether they are true or false.

24 A The lawyer drafted the motion for authorization.
25 I don't know who drafted the petition to removed Judge Dixon.

1 Q We are talking about paragraph 4 here.

2 A Of course, I assume the lawyer drafted and signed

3 this pleading. There is not question about that. However, this

4 is not a characterization of the judge by the lawyer. This is

5 merely, if you will read it, an assertion that his client, Mr.

6 Hopkins, is engaging in the process of attempting to have Judge

7 Dixon removed from office as being unfit therefor by virute of

8 corruption, favoritism ---

9 Q You say this is the equivilent of his saying, "My

10 client has a proceeding to remove the judge from so and so under

11 the Louisiana statute??

12 A Yes, and this language ---

13 Q What was the penalty that was imposed?

14 A Twenty-four hours and $100 which was the statu-

15 tory maximum for a first contempt offense by an attorney in

16 Louisiana.

17 Q Is that a basis for disbarment conviction?

18 A It could be. I am afraid I don't know.

19 Q Do you suppose it would have been more lawyer-

20 like to have filed the document in the form that Mr. Justice

21 Harlan just suggested? He is incorporating by reference and

22 drawing the court's attention to it.

23 A That is what the other side suggested too, in one

24 of its breifs in opposition to the jurisdictional statement.

25 I don't know that any of us can really say that the way we draw

1 draw papers as opposed to the way somebody else draws papers
2 is the proper way to do it. Some lawyers prefer to be more pre-
3 cise. I think this more precise than merely referring to the
4 statutory language, I don't know.

5 Q More precise and also less polite.

6 A Certainly more distinct, which may be a considera-
7 tion when you are trying to show to a judge that he may be
8 biased against your client. I myself have never filed such a
9 motion. I would think if I were to file such a motion I would
10 want to make as explicit as ossible what I believe the basis
11 for the possible bias might be.

12 Q Are you suggesting that the judge in question was
13 not aware of the existence of this document?

14 A The implication is that he was.

15 Q Well, therefore would it not have been at least
16 more lawyer-like to have simply called attention to the exis-
17 tence and the pendency of such a matter by reference to the
18 matter and let the document speak for itself?

19 A It may have been more prudent. I don't know
20 whether it would have been more lawyer-like. I don't know
21 whether those two terms are exchangable.

22 Q You perhaps would not be here if that course had
23 been followed. Is that likely in your judgment?

24 A I really can't say. I think that would depend
25 on Judge Dixon's temperament. I don't know anything about his

1 his temperament.

2 Q It might depend on the Supreme Court of Louisi-

3 ana, too.

4 A It might depend on that, also. I think pri-

5 marily it would depend on the temperament of Judge Dixon as con-

6 tempt proceedings always depend on the temperament of the judge

7 involved. I think precisely the over-sensitive judge is the

8 danger to the independent bar and I think that it is this Court's

9 duty to interpose itself between such insensitivity and the right

10 of a lawyer aggressively to represent the interest of his client.

11 And, I think that is what the appellant was doing here.

12 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wulf.

13 Mr. Dixon?

xxxx 14 ARGUMENT OF NEIL DIXON, ESQ., ON BEHALF OF RESPONDENT

15 TRIAL JUDGE

16 MR. DIXON: Mr. Chief Justice, may it please the Court.

17 We would address outselves first to the jurisdictional

18 problem. We submit that even treating the petition as a petition

19 for certiorari does not cross the jurisdictional issues raised

20 here.

21 We have briefed the issue that appeal was from the

22 wrong court. The same holdings, same cases, creating this rule

23 also have held that certiorari is from the wrong court. Juris-

24 diction here is based only on Section 1257 either for appeal

25 or for certiorari requiring that it be from "the highest court

of the state in which a decision could be had. This Court has on many occasions in the cases cited on page 8 of our brief held that when a higher State court declines discretionary review ---

Q What is the significance of there is no error of law to which you complained of. It is my impression -- is that somehow dealing with the merits, am I wrong.

A That is not my opinion of the law.

Q Well, then I am quite wrong, you would know better than I.

A It may have been at one time but that it not my opinion of Louisiana law. I would direct Your Honor's attention to the case cited by us on page 8 of American Express Company vs. Levy came from Louisiana in which that same situation existed, as I recall.

As I recall also in Levy, that question was asked this Court. I think the Court said we find no error of law. So, this Court was wondering what that meant or somebody raised the issue.

In the American Express Company vs. Levy, the case came out of the Second Circuit Louisiana Court of Appeal. Certiorari was applied to the Louisiana Supreme Court. Certiorari was denied, writ applied to here from the Louisiana Second Circuit Court of Appeal. The appellee filed a Motion to Dismiss saying that if the writ should have come to the Louisiana Supreme Court. This Court said that the writs properly lay to the Court of Appeal.

1 not the highest court declining its discretionary review.

2 In the instant case, the highest court involved is

3 the First Judicial Court of Cattleparish, Louisiana. No appeal

4 was taken from that court. No notice of appeal in conformity

5 with the rules of this Court was filed with the First Judicial

6 District Court. The record of the First Judicial District

7 Court has never been filed in these proceedings except by

8 Respondent Trial Judge, Judge Williams, in support of his

9 Motion to Dismiss.

10 Appellant has not complied either we submit with the

11 statute or with the rules of this Court for either certiorari

12 or for appeal and for that reason we submit that this case is not

13 properly before this Court on any issue.

14 Q Let's assume that the writ was issued at the right

15 court. Do you have any other objections to our jurisdiction?

16 A The record was not filed, Your Honor. The record

17 in this case was filed by appellee so that this Court could pass

18 on appellee or Respondent trial judge's Motion to Dismiss. The

19 record has never been filed by appellant in accordance with this

20 Court.

21 Q Because they just filed the record before the

22 Supreme Court of ---

23 A Of Louisiana, yes.

24 Q Mainly just their Petition for "cert."

25 A There were other attachments to that petition.

The Supreme Court of Louisiana has its own rules as to what goes in a Petition for Certiorari. It does not include everything. It does not include the whole record. It does not include what is printed in the appendix now. This appendix would not exist but for the filing of appellee.

Q Do you think the questions were adequately raised in the trial court, these questions that are contained in the Petition for Certiorari or the statement of jurisdiction?

A No, sir. I do not think that they are adequately raised under the standards of this Court. In fairness to appellant, there was another place, other than pointed out in which an issue was raised and we refer you to page 13 of the appendix.

Q Page what?

A Page 13, Your Honor. In Article 4 of his response to the rule, he said in further defense of the rule respondent pleads the truth of all the charges against Judge Dixon on the Motion to Recuse. The herein above described expressions described by Respondent are constitutionally protected exercise of free speech. That is the only other point than those pointed out by appellant that any constitutional issue was raised, and I do not believe that they have been adequately raised below, no sir.

We would proceed, then, assuming that this Court had jurisdiction. First, I would like to mention the statement of the case. Appellant claimed in his first jurisdictional

statement that he was denied the right to introduce testimony concerning the truth of the charges made against Judge Dixon.

We refer the Court to appendix, page 22, we have a full transcript of the hearing on contempt. Appellant was not denied the right to introduce any proffered evidence other than evidence of testimony of the co-judges of Judge Dixon in an attempt to inquire into the motive of Judge Dixon for filing the contempt.

Appellant was asked by Judge Williams, "Have you anything else to offer." Appellant said, "No." At no time has appellant attempted to introduce any evidence. At no time has he been denied a constitutional right.

Q Well, on this constitutional right, would you think it within due process to establish a rule that where you and I have a dispute on the facts of the law that I should be the arbiter as to which one of us is right?

A Your Honor, I think you must be the arbiter or which one of us is right.

Q Do you think that on the question of facts the dispute is not between two people, it is between you and me and I decide who is right. Well, let's put it on page 14 of the record. The court, "Are you representing yourself?" The answer, "Yes, I am." The court, "This shall we say will be between yourself and this court." Now, who was the umpire there?

A Your Honor, at this stage of the proceeding, Judge

Williams was trying the contempt. Judge Dixon is not.

Q What does he mean between you and me?

A This is the status of every contempt hearing that has ever been held -- every direct contempt hearing that has ever been held in the history of direct contempt. It is a question between the court and the counsel or the court and the party.

Q But this is a different judge.

A This was a different judge.

Q How can you say between you and me?

A Because contempt is always between the court and counsel or the court and the contemptor. When the judge says it is between you, he means the contemptor and me he means the court. He does not mean R. B. Williams, judge, he means the First Judicial Court, a court of the State of Louisiana.

Q Well, he is not the District Court. He is one judge of it. I think this language is significant, "it would be between you and me."

A Your Honor, every contempt convinction that this Court has sustained in history has been between the court and the counsel.

I refer you to Sakel, that is probably the most famous case to come before this Court. It came out of the Dennis trial. It was between Judge Medina and Sakel.

Q Did Judge Medina ever say it is between you and me?

1 A He didn't say it, Your Honor, he simply told him
2 to rise and sentenced him to jail.
3 Q Well, the difference, it is is another judge who
4 says it is a personal affront to me, personally.
5 Q What did the judge say here, in fact, on page 14
6 in the middle of the page, Mr. Counsel.
7 A "I do not think that there is any other party at
8 interest other than the official body of the court."
9 Q I am speaking of the sentence that begins right
10 in the middle. "This shall we say will be between yourself and
11 this court", and this court.
12 A Yes, sir, that is my view of it.
13 Q I don't find that he said between yourself and me.
14 At that point, does it say it elsewhere.
15 A No, sir. It may say it elsewhere. I don't know
16 what page Justice Marshall ---
17 Q That is the same page, it is just what I read
18 you.
19 A He starts out by saying, "I do not think there is
20 any other party in interest other than the official body of the
21 court," as I see it, which is in the middle of page 14, which is
22 what every contempt case is. I think that Judge Williams has done
23 nothing more than say that. That is what Sakel was. That was
24 sustained by this Court. That is what Terry was cited in our
25 brief that was sustained by this Court that came out of Texas

1 That is what every direct contempt is. It is only in the rare
2 instance that you have an out of court contempt with proof
3 elements that a court calls on counsel. Throughout the national
4 I don't know of any general practice of a court calling on
5 counsel to handle direct contempts. Certainly in no reported
6 decision of this Court has that been the case that I have ever
7 been able to find in a direct contempt case.
8 Q Is it true in Federal court?
9 A I have noticed an order from this court doing it,
10 yes, sir, in a contempt citation.
11 Q Wasn't there a case in a Federal court in your
12 State in which the lawyer was tried for contempt several weeks
13 after the contempt by another judge?
14 A We have a trial by another judge here, Your Honor.
15 Q I thought you said it always happened the other
16 way.
17 A No, sir, I am talking about the court appointing
18 counsel to prosecute which seems to be what Your Honor is inti-
19 mating, because in this case we do not have the trial judge, the
20 judge making the contempt citation hearing it. This is another
21 judge hearing it.
22 Q I don't suppose it could be held contemptuous if
23 an attorney asks the judge to recuse himself for bias against
24 his client.
25 A Absolutely not, Your Honor.

1 Q And if a judge says, what makes you think I am
2 biased, and he says, well my client is trying to get you impeached
3 for bias and for corruption. Now, that is quite relevant to the
4 bias charge, isn't it?
5 A No, sir, under this circumstance.
6 Q Why not, why not for heavens sake.
7 A We have first a multiple court judge in the First
8 Judicial District Court. We had an attorney who did not like a
9 ruling of the judge. The ruling was correct, but the attorney
10 didn't like it. So, the attorney wanted to try again before
11 another judge. So he advises the judge who has no other way of
12 knowing it, he advises the judge that judge my clients think you
13 are corrupt. Therefore, recuse yourself.
14 Q Well, let us assume that it were true, that his
15 clients had actually filed a formal petition against the judge
16 to get him impeached, and the lawyer then files a motion in
17 court for recusal, saying my clients have filed this petition
18 alleging that you are corrupt and hence I think that you should
19 recuse yourself for bias.
20 A You need two things. You need ---
21 Q Just take those facts.
22 A Those facts haven't said enough, Your Honor.
23 Q Why not?
24 A I think that the counsel must have alleged --
25 Louisiana is a fact-pleading state. It is not -- what do you

1 call it in common law -- an issue pleading -- Louisiana is a
2 fact pleading, and you have admitted the essential fact. That
3 is, you judge are aware that my client thinks you are corrupt.
4 Or, you judge are aware that my client has filed a petition against
5 you. Now, put that in he may not be held for contempt. Now,
6 he may be guilty of certain other disciplinary action, but put
7 that in and he cannot be held for contempt.

8 Q So, you say he can be held in contempt here be-
9 cause what?

10 A I say -- let me back up. The corruption is un-
11 ecessary for the first charge -- is unnecessary to the pleading.
12 All he has to say is, I have filed a -- my clients are seeking
13 your removal and have filed a Petition for your removal. He
14 never has to repeat the allegation corruption anywhere in order
15 to achieve his ends. That is, obtain the recusation. Any time
16 he uses the word "corruption" under our pleading, he is using
17 a word that is irrelevant to his pleading and is irrelevant
18 criticism of a trial judge.

19 Q If it had been in quotes, would it have helped
20 him?

21 A I don't think so, Your Honor.

22 Q That is what I thought.

23 A I would say this. There is talk in the brief about
24 it being lawyer-like language. It is no more lawyer-like than
25 to file a motion before a court saying that the court should
recuse itself because it is guilty of murder, burglary, rape or

1 what have you. All of these terms are lawyer-like when used
2 in the proper context, every one of them. But words that a
3 lawyer uses in one case may not be appropriate to another case.
4 The appropriateness of the charge is the one foundation, and
5 we submit the only foundation id down by this Court in Holt vs.
6 Virginia. Appellant has ---

7 Q Did I understand you correctly that if he had
8 said, that you know that my client has publicly charged you with
9 corruption that would be all right.

10 A I think, Your Honor, if we take that exact quota-
11 tion that you used and nothing more I think that it could be.
12 "You know that my client has charged you with corruption." Now,
13 we have here a ff circumstance we say "are attempting to
14 remove you from office." But just limited to the words that you
15 used, Mr. Justice, I think that it could not be contempt.

16 Q You mean that he has filed a petition to remove
17 you from office because he charges you with being corrupt, that
18 would be all right.

19 A I do not know that it would be all right. We
20 do not have that issue, but I don't think it would be all right
21 because then the word corrupt is unnecessary to the pleading.
22 In your first "hypothet" the word was necessary to the pleading.
23 Here it is not necessary. The standard that this Court set in
24 Holt vs. Virginia was whether or not the language was appropriate.
25 The wording by this Court was wholly appropriate to the charge

made.

Now, we submit that in our reading of Holt vs. Virginia this Court does not reach or come close to reaching a free-speech issue. Holt vs. Virginia cannot be relied on as ever having raised a free-speech issue. Holt vs. Virginia dealt with a very basic right, a right which Louisiana grants by statute and that is the right of a litigant to a trial before a fair tribunal. While attempting to exercise that right in Virginia, Mr. Holt was cited for contempt. Louisiana spells out the methods of exercising that right. We have such things as motions for recusal. We have motions for change of venue. In Holt vs. Virginia, the language was on a change of venue.

I would urge that Your Honors review the language used in Holt and compare it with the language used by Mr. Spencer. The language used in Holt is quoted in appellant's brief on page 13 and 14. We submit this takes it entirely out of the realm with what we are dealing with in the instant case.

The charge made in Holt was entirely appropriate to a charge of bias. The strongest language used in Holt vs. Virginia that could have possibly been considered as impinging upon the sensitivities of the trial judge was that the trial had been intimidating counsel. Now, that allegation under certain circumstances might be contempt. But, it could never be direct contempt when filed in a Petition to Recuse. If a judge has been intimidating counsel, counsel is entitled to have the judge

1 recused.

2 Q What is the exact language there which you think

3 he was fined for contempt?

4 A In Holt vs. Virginia?

5 Q I mean in our case.

6 A The exact language, Your Honor, is ---

7 Q In the appendix, isn't it?

8 A Your Honor, first, I would not limit it to one

9 group of words in the motion, because of the order of contempt

10 does not so limit it. The order of contempt refers to the

11 petition as a whole and then says particularly Article 4 there

12 of on pages 8 and 9 in which the words are repeated, corruption,

13 favoritism, oppression and misfeasance in office. At the very top

14 of page 9, corruption, favoritism, oppression and misfeasance

15 in office.

16 These words are also words of conclusion. I mentioned

17 before that we are a fact-pleading State not an issue-pleading

18 State. There is no allegation in this motion connecting any

19 corruption, favoritism, oppression or misfeasance with the trial

20 of the separation suit then pending before the court.

21 These words do not have to be contempt. If under some

22 wild set of facts the corruption of a judge has some connexity

23 with the litigation pending before it. But absent such connexity,

24 we submit that these words and in and of themselves offensive.

25 And the word offensive, again, is the word of this Court in Holt

1 vs. Virginia. In Holt vs. Virginia, they said the words of

2 counsel are not offensive in and of themselves. We submit that

3 with these words as here used are offensive in and of themselves.

4 The fact that a word may be contained in a statute

5 or a constitution does not mean that within all context it cannot

6 be offensive in and of itself. The fact that favoritism, corrup-

7 tion, murder and rape may be all statutory words does not mean

8 that they cannot be words if used in a charge against a judge

9 that are offensive in and of themselves.

10 Q Was this statement in 4, was it a fact?

11 A Your Honor ---

12 Q Would you mind reading it and say whether or not

13 it was a fact?

14 A "The plaintiff herein Lewis R. Hopkins and his

15 chief witness in this trial, Charles Anderson are presently en-

16 gaged in the process of --

17 Q Was that true?

18 A Your Honor, this allegation was made on March 21st.

19 Q But, was this true?

20 A No, sir, it was not true.

21 Q It was not true that they had made that statement?

22 A Throughout the protracted collateral Federal

23 proceedings and throughout this proceeding, there is nothing

24 anywhere to indicate that Mr. Hopkins or Mr. Anderson even had

25 any ill will to Judge Dixon.

Q I understand that. But that is not what is alleged

here. Is it? What is alleged here?

A It is alleged that Mr. Hopkins and Mr. Anderson are attempting to have him removed from office.

Q As being unfit therefor by virtue of corruption, favoritism, oppression and misfeasance in office. Now, was that true?

A Your Honor, that was not true. I have have been attempting not to get beyond the record. Judge Dixon, of course, is my brother. But that was not true.

Q That is all right. But, I am not asking you if the statement is true. I am asking you if the statement is true that they have made that statement in court.

A They certainly did not make that statement in court, Your Honor, no, sir.

Q What was this referred to? Was it a statement referred to in court?

A No, sir. We don't know what it referred to. Now, presumably ----

Q They say they are presently engaged in the process of attempting to have Judge Dixon removed from office as being unfit therefor. Was that true?

A I do not think it was true, Your Honor. There has never been a petition for his removal filed.

Q Were they not engaged in that effort?

A To my knowledge, they did not. I may point this out, Your Honor. It takes but 25 irrate litigants within a

1 metropolitan area to file a mandatory petition for removal with
2 the Attorney General. Such a petition was never filed.
3 Q Was any petition filed anywhere?
4 A No, sir, nowhere.
5 Q They had not proceeded against him on that basis?
6 A They have never proceeded, Your Honor.
7 Q Anywhere or time or place?
8 A Anywhere or time or place.
9 Q Is that shown to be untrue in the record?
10 A Only to this extent, we argued to this extent,
11 Your Honor, only. On March 20th, the day of the separation
12 hearing, there must have existed no ground for recusation for if
13 there did, counsel was remiss in not having filed a motion. Within
14 24 hours, counsel then raised the issue.
15 Q I understand the legal arguments.
16 A Sir?
17 Q But here is a statement made and I judge from
18 what you say that is the basis of the conviction. Now, does the
19 record show that that statement was not true or do we just have
20 to infer it?
21 A It depends on what the line between inference
22 and showing is. My view is that it shows it. I think that your
23 view would be that it infers it, Your Honor.
24 It infers only that at no time in either the Federal
25 court proceeding, which is fully reported we might add, or in

this proceedings, the trial of which took place about 18 months after the occurrence was there ever again any mention of the existence of such a petition. During the Federal court litigation, with the attendant ill publicity, Judge Dixon was elected by the voters of his district to the Second Circuit Court of Appeal, hardly an event consistent with an action for his removal for corruption, favoritism, oppression and misfeasance.

Q Sometimes that helps a man to be charged by the right person.

A In defense of the voters of the City of Shreveport, Your Honor, it never helps to be accused of corruption under any circumstances at any time.

Q Sometimes I have known people to get great benefit out of it because it wasn't true and they knew that the man that made it knew it wasn't true.

Q Let me go to the time of the hearing before Judge Williams, the Judge who was going to hear the contempt. At that time, did the petitioner here put into evidence any document or any evidence by any process indicating that before he filed this pleading there had been a petition of some kind filed alleging these acts of misconduct.

A Mr. Chief Justice, he did not, and we submit that that is a very significant fact.

Q Well, didn't the court prevent him from offering any evidence?

A No, sir. No, sir.

1 Q It didn't?

2 A No, sir.

3 Q What was it they kept him from doing?

4 A Mr. Spencer subpoenaed the three co-judges or

5 four co-judges of Judge Dixon, those who sat on the bench with

6 him and wanted to ask them specific questions set out in the

7 record to establish ---

8 Q I thought the court refused to let them ask him any

9 questions.

10 A To ask them the questions? He was given the

11 opportunity, You Honor. Judge Williams said what do you want

12 to prove by them, Mr.Spencer. He said here is what I want to

13 prove by them. The judge said that is not admissible, Mr.

14 Spencer, have you anything else to offer?

15 Q What did he say he wanted to prove by them?

16 A He wanted to prove that Judge Dixon had confered

17 with them and filed the contempt charge without any expectation

18 of obtaining a conviction. He had to make that contention across

19 the street in the Federal court to get it in the three-judge

20 court. He wanted -- he said something vaguely about his long

21 disputation between himself and Judge Dixon, part of which is

22 reported in -- not really reported but a case that arose out of

23 it, Spencer vs. Dixon in the Louisiana Supreme Court, in which

24 the Louisiana Supreme Court held Mr. Spencer in contempt for the

25 same situation, for having called the Louisiana Supreme Court

1 corrupt.

2 Q But at no time did he put on any evidence about

3 this petition that had been filed?

4 A At no time had he put on any and at no time was

5 he denied the right to put on any.

6 The last fact, we submit, is the significant that re-

7 moves this from all of the constitutional issues raised by appel-

8 lant.

9 Thank you, Your Honors.

10 MR. CHIEF JUSTICE BURGER: Mr. Wulf, your time is up,

11 but I would like to ask you a question, if you will please con-

12 fine yourself just to answering the questions of any members of

13 the court at this stage.

14 MR. WULF: Yes, sir.

15 Q Do you claim in this record anywhere there is

16 evidence of the filing of the kind of petition that was alluded

17 to in paragraphs 4, 5, 6 or 7 or any other part of the petition

18 which created all of this problem?

19 A Nothing whatsoever one way or the other in the

20 record. However, Mr. Spencer did assert over and over again

21 that he had been denied the right to file any evidence or to

22 produce any evidence of that petition having been filed. As I

23 read in my principal presentation, Judge Williams himself in his

24 opposition to the appellant's application for writs in the

25 Louisiana Supreme Court -- you can find this at page 21 of the

jurisdictional statement -- he says, this is Judge Williams who was on the hearing. He said, "The applicant in his petition page 5, paragraph e, section 5, assigns as error the trial court not allowing the defense of truth to the contempt charges."

Q You are on the appendix?

A No, I am on the jurisdictional statement.

Q I beg your pardon.

Q What page?

A Page 21 of the jurisdictional statement, which reproduces beginning at page 16, Judge Williams' response to the application for writs of certioari in the Lousiana Supreme Court. On page 21, I have just read the first sentence.

The second sentence says, "Judge Williams and this is Judge Williams himself speaking in the third person -- Juuge Williams refused to admit any such evidence. Then he goes on to cite a case Gatro vs. Gatro in the Louisiana Supreme Court, which held in 1952 that justification is not a defense for contempt of court.

Q You don't suggest that when -- that that statement refers to the kind of a petition that we are talking about in the question I put to you?

A This statement refers to Mr. Spencer's efforts to establish that such a petition was actually being circulated.

Q Well, I can't read it that way.

A Well, that is the way I read it. Assigns as error

1 the trial court ---

2 Q That can relate only to the judge's refusal to let
3 the four judges testify on the grounds that you cited. If you
4 look at page 21 of your appendix, you will see that Judge Williams
5 asked him whether there was anything else he had to offer and said
6 at the top of page 21, "The court feels he will be glad to see
7 what you have to offer." And, he said he couldn't find it for
8 a few minutes. The judge gave him a recess for five minutes and
9 all he came back with after the five-minute recess was that he
10 would like to point out some further cases, some citations, not
11 facts, not documents, not reference to any kind of a petition that
12 supported his statement in paragraphs 4 or 5.

13 A Yes, I don't disagree with that at all, though
14 the witnesses he tried to bring back at that time had no relevan-
15 cy to the existence or non-existence of such a petition.

16 Q I would like to ask you a further question in
17 view of the colloquy with your adversary, Mr. Dixon, here. Would
18 you care to comment on his statement that you said was going out-
19 side the record in fact no petition under this section had ever
20 been filed.

21 A All I can say is that I was told such a petition
22 was circulated, was drawn up and circulated. It may not have
23 been filed. They may not have been able to secure the necessary
24 25 signatures. But, that isn't the assertion in the Motion to
25 Recuse. It isn't that it was filed. It was said that they were

presently engaged in the process of attempting to have Judge Dixon removed, the implication being that they were trying to get the necessary 25 signatures.

I am told that such a petition was typed up and was in existence.

Q Don't you think it was incumbant upon Mr. Spencer at some time to produce that in the record so that you could have it here?

A I surely do, unless was Judge Williams said is accurate that he refused to admit such evidnece. But I agree 100 percent that there is nothing in the record one way or the other which shows whether or not such a petition exists.

Q Well, I can't see how it is possible to read Judge Williams' statement to mean what you say it means that only relating to the testimony of the four judges which he excluded on the ground that the justification was not admissible evidence. If any such document -- if you wish to supplement this record, I think we would invite you to supplement the record in that regard.

A All right, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, the case is submitted. Thank you, gentlemen.

(Whereupon, at 3:00 p.m the argument in the above-entitled matter was concluded.)