

SITTING AS COURT OF IMPEACHMENT

JOURNAL OF THE SENATE

Monday, September 23, 1963

The Senate, sitting as a court for the trial of Articles of Impeachment against the Honorable Richard Kelly, Circuit Judge for the Sixth Judicial Circuit of Florida, convened at 10:00 o'clock A.M., pursuant to adjournment on Friday, September 20, 1963.

The Chief Justice presiding.

The Managers on the part of the House of Representatives, Honorable William G. O'Neill and Honorable C. Welborn Daniel, and their attorneys, Honorable James J. Richardson and Honorable Leo C. Jones, appeared in the seats provided for them.

The respondent, Honorable Richard Kelly, with his counsel, Honorable Perry Nichols, Honorable B. J. Master-son, Honorable Harvey V. Delzer, Honorable Alan R. Schwartz and Honorable Thomas McAliley appeared in the seats provided for them.

By direction of the Presiding Officer, the Secretary of the Senate called the roll and the following Senators answered to their names:

Askew	Covington	Johnson (19th)	Roberts
Barber	Cross	Johnson (6th)	Ryan
Barron	Davis	Kelly	Spottswood
Blank	Edwards	McCarty	Stratton
Boyd	Friday	Mapoles	Tucker
Bronson	Gautier	Mathews	Usher
Campbell	Gibson	Melton	Williams (27th)
Carraway	Henderson	Parrish	Williams (4th)
Clarke	Herrell	Pearce	Young
Cleveland	Hollahan	Pope	
Connor	Johns	Price	

—42.

A quorum present.

Senator Galloway was excused from attendance upon the Sessions this day because of illness and Senator Whitaker was excused from attendance upon the morning Session this day because of transportation difficulties.

At the request of the Presiding Officer, Senator Spottswood of the Forty-first senatorial district offered the following Prayer:

Let us Pray.

Almighty God, give us the strength to do what is right. Shed Thy light on our problems and guide us that we may do what is right. Let us administer justice with mercy and understanding. Bless this Senate with compassion and courage and let its findings be just. Bless our deliberations and give us the insight to see right and to see wrong, to make allowances for mistakes, to set aside personalities, political affiliations, and to come to our conclusions without malice but with firmness based on the facts presented.

This Senate, Almighty God, sitting as a court, has matters before it that no other court can consider. May we embark on our undertakings today with Thy richest blessings. This we ask with all Thy goodness and mercy. Amen.

By direction of the Presiding Officer, the Sergeant At Arms made the following proclamation:

Hear ye! Hear ye! Hear ye!

All persons are commanded to keep silence, on pain of imprisonment, while the Senate of the State of Florida is sitting for the trial of Articles of Impeachment, exhibited by the House of Representatives against the Honorable Richard Kelly, Circuit Judge of the Sixth Judicial Circuit of Florida.

By unanimous consent, the reading of the Journal of the proceedings of the Senate, sitting as a Court of Impeachment, for Friday, September 20, 1963, was dispensed with.

The Senate daily Journal of Friday, September 20, 1963, was corrected and as corrected was approved.

CHIEF JUSTICE DREW: Call your next witness.

MR. JONES: We will call Mr. E. B. Larkin.

Thereupon,

E. B. LARKIN,

having been first duly sworn as a witness for and on behalf of the Managers, testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q State your name, please.

A E. B. Larkin.

Q What is your occupation, Mr. Larkin?

A I am a lawyer, cattleman.

Q Would you please give us, sir, a brief resume of your educational qualifications in the practice of law?

A I was graduated from the University of Florida College of Law, June, 1936.

Q How long have you been practicing law, Mr. Larkin, and where have you been practicing?

A Been practicing, I believe, about 27 years, all of that time in Dade City, Pasco County, with the exception of approximately four and a half years that I spent in World War II.

Q Mr. Larkin, what is the nature of your law practice, and do you practice in a firm, and if so, what firm?

A My law practice is very general. Dade City is a small town, and we handle a little of everything; probate work, title work, criminal matters. And I am a member of the firm of Larkin, Larkin & Goodson.

Q How long has that firm existed or been a firm, Mr. Larkin?

A Well, my brother, the older member of the firm, Bill Larkin, was practicing law when I graduated from law school in 1936. We formed the firm of Larkin & Larkin, which continued until about 1959 or 1960, when Mr. Goodson joined the firm as Larkin, Larkin & Goodson.

Q Mr. Larkin, do you know Judge Richard Kelly?

A Yes sir.

Q Have you had an opportunity to practice before Judge Richard Kelly in Dade City?

A I have known Judge Kelly about ten years before he was a Judge, when he practiced law in Dade City, and I have had very limited practice before Judge Kelly since he has become a Judge; I think, as a matter of fact, not more than three or four cases before Judge Kelly.

Q Mr. Larkin, are you familiar with the case of Collura vs. Collura?

A Yes sir. I represented the Plaintiff.

Q What type of a case was that, Mr. Larkin?

A That was a divorce action and affected two minor children involved.

Q Mr. Larkin, during the pendency of that case, did anything unusual occur in that case and if so, would you please relate it to the Court?

A This case was handled by Judge Dayton before - - - it was a lengthy case; it lasted a year and a half, I would judge, and it - - - the final order of modification of the final decree was - - - the hearing on it, which I filed to change the custody of the minor son, was approximately in November of 1962, and the final - - - an order on it was entered in December of '62, before Judge Dayton retired.

And then, with Judge Dayton retired, the next hearing, or the next incident that occurred - - - it really wasn't a hearing, was held before Judge Kelly.

Q Mr. Larkin, if I may interrupt you, now, as I understand it, the case had been finished by Judge Dayton, and final order had been entered?

A Yes sir, it had been.

Q What did the final order order - - -

A It was a modification - - -

Q - - - on the divorce, and so forth?

A The divorce had previously, oh, a year or more, been granted, and custody of the children fixed. It came up, a matter of the custody of the smallest - - - the small son - - - I believe he was eight years old. The mother, who had the custody of that son, and whose present husband is a doctor, the child was not doing good in school, and they took him to a child psychiatrist, and they decided that the fact that that child had to visit his father every week end, from Friday to late Sunday night, was affecting his courses in school, that he could not become stable and orientated, and they thought it was to the best interests of the child to modify the final decree to limit the weekly visitations to lesser periods of time during the week, for the child's best interests.

Q This was after the final hearing, which gave this child to the mother, is that correct?

A Yes sir, quite - - - several months, many months after the final hearing, that gave the child to the mother, and weekly visitations, long week ends to the father; and in that petition to modify the final decree, I alleged that - - - those things I've just mentioned, and I had a psychiatrist from Tampa - - - I don't remember his name, a specialist, and he testified to such; and, based upon that, Judge Dayton modified the final decree and gave the mother the child for each - - - every week end during the month except one, I think the middle week end, the 15th of the month, the father could have it, think it was for the best interests of the child.

And Judge Hayward filed a motion for a re-hearing on that final order of modification, that was the matter that we had before Judge Kelly.

Q Mr. Larkin, before whom was the petition for re-hearing, now, you say, "re-hearing," a re-hearing of the

order modifying the final order in the case, is that correct?

A Yes sir.

Q Now, before whom was the petition for re-hearing filed?

A It was filed after Judge Dayton retired from the Bench and, therefore, it was automatically Judge Kelly's case, and Judge Hayward set it down for hearing before Judge Kelly.

Q Judge Dayton had entered the order of modification?

A Yes sir.

Q But the re-hearing, to re-hear this case, that was set down before Judge Kelly?

A Yes sir.

Q Mr. Larkin, are you familiar with the law in this respect, as to who can hear a petition to re-hear a previous order?

A Well, naturally, I prepared myself somewhat on it, I - - - since it was - - - we had really never had a hearing, I didn't research the law too much, but I believe it's basic law, as established in several cases, and particularly the case of Smith vs. Mobley, decided around 1927, that one judge does not re-hear another judge's decision, that the only course is for an appeal, that you don't just swap around from one judge to another to get a different version of it.

Q In other words, if you don't like one judge's ruling, you don't go down the hall to get him to overrule the other judge?

A That's right, the law is contrary to that, in my opinion.

Q Was this law presented to Judge Kelly?

A No sir, it was not.

Q Now, would you please explain why?

A Well, Judge Hayward set the case down for a hearing on a given date - - - I'm not sure, I think around April or May - - - April or May of this year; and prior to the date of the hearing one or the other of us had a conflict; I don't remember which one.

So, we agreed to continue the matter past the date it was set for a hearing, and entered into a written stipulation to continue the case to an indefinite date and, therefore, it was not necessary to be prepared to argue the law.

Q Mr. Larkin, was this written stipulation filed, and if so, before whom, and when was it filed?

A It was filed before Judge Kelly, or in the Circuit Court in Pasco County, Judge Kelly being the only judge, then it was filed before him, and I believe that the clerk's file shows it was the day before we had the hearing, or the - - - it really wasn't the hearing, the conference in Judge Kelly's office, regarding the Collura matter.

Q Mr. Larkin, you say that this was a hearing that was set down. Was this a hearing at which witnesses would take the stand and testify, or was it a hearing where the lawyers merely argued the law back and forth?

A It was a hearing, really, only - - - no witnesses would be indicated in such a hearing, and none could testify. It was a hearing to argue the law on the motion for a re-hearing, was all it amounted to, and no witnesses were needed.

Q Do parties on both sides generally come to a hearing where there's an argument on law?

A Only their lawyers come to such hearings. The parties are not forbidden, but it's most unusual that they do appear.

Q In other words, it is not such a hearing requiring or necessitating the appearance of the parties themselves, but merely their lawyers?

A No sir, it's not.

Q I believe you stated that the hearing had been cancelled, and a written stipulation had been filed to this effect?

A Yes sir.

Q Did you, in fact, appear at the hearing date and time before Judge Kelly?

A I did.

Q Would you explain to the court the circumstances under which you appeared?

A Well, Judge Kelly called me over the telephone that morning and said - - - told me the Collura matter was up for hearing, and I explained to him that it had been continued, and he asked me would I come over anyway, that something had come up in it, and I agreed to come over, and did go over to his office.

Q Mr. Larkin, who was there when you arrived?

A Mr. Frank Collura, the defendant in the matter, and A. J. Hayward, his attorney.

Q Now, would you at this time relate to the court the circumstances surrounding the appearance there and what took place?

A When I went in to Judge Kelly's hearing room, Mr. Collura and Judge Hayward were there, and the Court Reporter. Judge Kelly started to questioning Mr. Collura as to why he was there, and, as I remember it, this was taken down by a Court Reporter, and I think the record is available; and Mr. Collura told the Judge that he was there because his lawyer told him to be there, and had not told him the matter had been continued, that he had been trying to get a hearing for quite some period of time, and that his lawyer had told him that Judge Kelly's calendar was crowded and he couldn't get a hearing, and it - - - Judge Kelly spent quite a lengthy time questioning Mr. Collura as to why he was there.

Then Judge Hayward wanted to, since his client was belittling him before the Judge and casting - - - saying statements that Judge Hayward said were not true, he wanted to reply to it, and he did, and that was also taken down; and it was a most unusual proceeding to me.

I had never seen a judge question a man, a lawyer's client under oath, which gave the impression of trying to get something to get a lawyer before the grievance committee, or disbar him, but that's my idea of what happened.

Then Judge Kelly, after that had been taken down, asked me, "What about it?" - - -

Q Excuse me, Mr. Larkin, let me ask you :

During the course of your practice in the Sixth Judicial Circuit, is it the practice of the court to step in between the lawyer and his client, in the matters of when the hearing will come up, and so forth in these matters?

MR. MASTERSON: May it please the Court, I object to that question. There's no testimony whatsoever that this judge stepped in between a lawyer and his client.

MR. JONES: If the Court please, Mr. Larkin just got through testifying for about four minutes that Judge Kelly put Judge Hayward's client on the stand under oath,

and questioned him as to why his lawyer had not called the case up for a hearing, why he was there, why his lawyer was not there, and so forth and so on, and I'm merely asking this witness if that is what he has experienced before other judges in the Sixth Judicial Circuit in the practice of law.

CHIEF JUSTICE DREW: Without explanation, I'll overrule the objection.

BY MR. JONES:

Q Answer the question, if you will, Mr. Larkin.

A In all of my twenty-seven years of law practice, I have never in my life seen that happen before, that any judge would ever question a man - - - a lawyer's client, either in the lawyer's presence or otherwise. It was most unusual to me.

Q Mr. Larkin, before whom are these matters generally taken up, where there is a grievance between a client and his lawyer in the Sixth Judicial Circuit?

MR. MASTERSON: May it please the Court, I object to the question; he says the grievance here was between the client and the Court, and we've gone over this before. The client was saying the Court would not hear his case.

CHIEF JUSTICE DREW: The question was a grievance between the client and the lawyer?

MR. JONES: Yes sir. I just merely asked Mr. Larkin, as an expert witness, before whom are those matters usually and customarily taken up.

CHIEF JUSTICE DREW: Well, now, as I understand it, you are interrogating him about something else besides the dispute between the client and the lawyer, aren't you?

MR. JONES: No sir, I'm merely asking him, according to his experience, in the past thirty-six years, before what body is a grievance between a client and his lawyer generally taken up.

MR. MASTERSON: I object to the question as immaterial and irrelevant. That is not the proposition before this body.

CHIEF JUSTICE DREW: Overruled. You may answer.

THE WITNESS: We have a Grievance Committee, consisting of three lawyers of the Pasco County Bar Association, and where a lawyer and his client have difficulty, it is taken up before that Grievance Committee. It has been done in the past many times.

BY MR. JONES:

Q Mr. Larkin, did you go to the Court Room prepared to argue this petition for rehearing?

A No sir, I did not. I carried no file; was dressed in slack clothes, and was working on entirely another matter. It was entirely a cold question.

Q Were you notified at that time, upon your arrival, that the Court would hear argument on a petition for rehearing?

A No sir. We had no argument on the hearing after Judge Kelly finished with Mr. Collura.

Q Excuse me, Mr. Larkin. I don't believe you understand my question. When you were called by the Court, were you notified at that time to come prepared to argue the petition?

A No sir.

Q After the statements and things that were done there in the Court Room, were you required to argue the matter?

A No sir.

Q Were you requested to argue the matter?

A No sir. Judge Kelly turned to me after finishing with Mr. Collura and asked me - - -

MR. MASTERSON: May it please the Court, I object to the witness volunteering any statements and I request that he be instructed to be responsive to the questions that are asked.

MR. JONES: I withdraw the question.

BY MR. JONES:

Q Mr. Larkin, will you please tell this Court what Judge Kelly said with reference to going ahead and arguing the petition for rehearing?

A At that time Judge Kelly asked me was I prepared to go ahead and argue the matter, and I told him no sir, that I wasn't prepared and had not come for that purpose, and he asked me why not, and I explained to him that Judge Hayward and I had agreed by stipulation to continue the matter to a later date, and that was filed, and I explained to him that under his ruling previously given, that that was all that was required to continue a case, was for the lawyers to call his secretary, show Judge Kelly had personally told me, to have the matter taken off the calendar, and then file in the record something in writing showing that the case had been continued, and for what reason. I had complied with this.

Q Was the stipulation in fact there in the file where the Court could see it?

A I believe the Court had it in his hands.

Q He did examine it?

A Yes sir, he did.

Q Mr. Larkin, have you handled any other matters before Judge Kelly and, if so, approximately how many?

A Only about three other matters, the first of which was a divorce case of a Keebler vs. Keebler.

Q Mr. Larkin, did anything unusual occur in that case of Keebler vs. Keebler?

A Yes sir.

Q Will you please relate it to the Court?

A I represented the Plaintiff in that case, a woman, mother of three small children, the youngest being around eighteen months at the time.

I had instructed my secretary - - - this was back in 1961, 1962, when Judge Dayton was still Judge - - - not to file any cases before Judge Kelly. Somehow this case got filed before Judge Kelly, I think by a new secretary.

I didn't know that it was filed before Judge Kelly. I went over for a hearing, which was on a decree pro confesso, before Judge Dayton, and we didn't look at the original Court file, and Judge Dayton didn't know it, that it was assigned to Judge Kelly. He referred it to Jim Swain, the Court Reporter, who had taken the testimony, and I took the testimony before the Court Reporter, and Mr. Swain transcribed it, and then I believe he called me and told me that the case was actually assigned to Judge Kelly.

Q Mr. Larkin, would you explain to us what is meant by hearing a divorce case before some other person than the Court himself?

A Well, it is customary in ex parte or uncontested divorce cases to refer a case to a Special Master or a Court Commissioner for the taking of testimony, and it thereby relieves the Circuit Judge to where he can attend to the

contested matters, and the Special Master or the Court Commissioner acts, takes down the testimony, transcribes it and refers it to the Judge, who theoretically reads it over and enters an order on it.

Q In other words, you examine all the witnesses and it is taken down in the Court Reporter's statement, typed up, and then those statements are turned over to the Court, who reviews it?

A That's right.

Q Who gives his final order based on that testimony?

A Yes.

Q That was done in the Keebler case?

A Yes.

Q If you will, just continue with the circumstances.

A Shortly thereafter, I approached Judge Kelly about getting an order, a final decree signed in the Keebler case, and he wanted to know from me why I took it before Judge Dayton, and I explained it to him as I have just explained, that I was innocent in the matter, that I did not know it was assigned to Judge Kelly or I would not have gone to Judge Dayton with it.

Then he wanted to know did he have authority, or what authority a Circuit Judge had to assign a matter to a Court Commissioner or a Special Master, and I was somewhat dumbfounded. I felt sure that he knew or should have known, but he required that I look him up the law to see if there was such authority, and which I did, and the law for it is contained in the Florida Civil Rules of Procedure, and it is very simple, and a Circuit Judge has that authority, and I was further somewhat astounded because Judge Kelly, in his second divorce case, had done exactly that same thing. His case was heard by a Special Master.

MR. MASTERSON: May it please the Court, I move that that remark be stricken, and the witness instructed not to go into matters of that character. He knows better than that.

CHIEF JUSTICE DREW: Sustained.

BY MR. JONES:

Q We might do it this way: Mr. Larkin, do you recall or have you examined the file in Kelly vs. Kelly?

A Yes sir.

Q Would you please give me the exact style in that case?

MR. MASTERSON: Would you repeat that, counsel? I didn't hear what you went into.

MR. JONES: I asked him if he has examined the Court file in Kelly vs. Kelly. He said he did, and I asked him to give me the style of that case.

THE WITNESS: Frances B. Kelly vs. Richard Kelly.

MR. MASTERSON: Your Honor, I protest. This is a matter which has nothing to do with Judge Kelly's conduct. It is something extraneous to this hearing and can only be designed to prejudice his rights before this body. I strenuously object.

CHIEF JUSTICE DREW: What is the purpose of this inquiry?

MR. JONES: The purpose is this, Your Honor. Mr. Larkin has already testified that he was required to go into an extensive brief on whether or not a matter such as this can be referred to a Special Master, with Judge Kelly denying any knowledge of that procedure under the Florida law.

I propose now to produce the file of Kelly vs. Kelly and to show that Judge Kelly did have that knowledge, because exactly the same procedure was followed in his own case.

MR. MASTERSON: May it please the Court, the prejudicial effect of this testimony is manifest. Judge Kelly did not even represent himself in these proceedings, and it could only be designed and calculated to prejudice this body against Judge Kelly.

CHIEF JUSTICE DREW: I am going to sustain the objection. I can see no materiality to the Articles of Impeachment before the Senate.

MR. JONES: All right, sir.

CHIEF JUSTICE DREW: If any member of the Court desires to raise any question as to my ruling, of course we will allow him to do so.

BY MR. JONES:

Q Mr. Larkin, will you proceed to explain to the Court the unusual circumstances that existed in this Keebler matter?

A Well, Judge Kelly signed the order, the final decree, granting my client a divorce and the custody of three minor children and \$15 a week for their support, and granting me the minimum Bar attorney fee of \$150 and forty-some dollars for Court costs. After several weeks, two or three weeks, he did sign such an order and the order further provided that the father could not visit the children so long as he was in arrears in payment of their support.

Q This was the final order in the case, Mr. Larkin?

A Yes sir. That was the final order.

Q And it awarded each child how much?

A \$15, I believe.

Q How many children were there, Mr. Larkin?

A Three children.

Q Three children, \$15 a week or \$15 a month?

A \$15 per week.

Q For the three children. In other words, \$45 per week for all of the children?

A Well, it was \$15 per week for the three of them, \$5 each.

Q I see. \$5 each per week per child?

A That's right.

Q And the children were awarded their mother, I believe?

A The children, custody of the children, was awarded to their mother.

Q Would you give us the ages of those children?

A At the time of the filing of the complaint, they were aged - - - one was aged six years, one was three years, and one was eighteen months.

Q Mr. Larkin, after the final order was this amount in fact paid to these children?

A No sir. It was not paid.

Q Would you relate to this Court the circumstances, if any, or the efforts, if any, which you took to secure the payments of these funds for these children?

A Nearly a year after the divorce was granted, I filed a petition for rule to show cause why the Defendant

should not be held in contempt of Court for failure to comply with the order.

Q Had the Defendant in fact paid any of these funds?

A Yes sir. He had paid some, and my petition shows that he was \$400 in arrears a year later, approximately a year later, and he had not paid any of the attorney fee or Court costs.

Q Please relate, sir, what transpired upon the filing of the rule to show cause?

A I had the order to show cause served on Mr. Keebler and we had a hearing on it before Judge Kelly, and at the hearing the Defendant complained that the mother had not permitted him to freely visit the children, and I explained to the Court that I had advised that she need not permit him to visit the children at any or all times - - - in fact, none, because the order provided he could not see them unless he was current in payment of their support.

Judge Kelly instructed me to change that final order. He said he believed that a father should see the children whether or not he was able or was supporting them, and in addition to the final order from Judge Kelly, I had to modify the final decree in the rule of the order to show cause, which I had never had any such experience before.

Judge Kelly directed him to pay \$25 a week thereafter, or that he would have to come back to Court or he would have to put him in jail, being \$5 on the arrears, \$15 for the usual support and \$5 for the attorney fees. I explained to Judge Kelly that it costs us around \$25 to get the man in Court; he had never paid anything on the original forty-some dollars for costs. He asked the man did he have any money, and finally extracted from him \$25 to apply on the costs, and that is all that has ever been paid.

Q Mr. Larkin, did you have an occasion again to come in contact with Mrs. Keebler?

A Yes sir.

Q Would you please relate that to the Court?

A It had just so happened that the day Judge Kelly called me to his office for a conference, the first I had ever had with him in private, it was necessary for me to represent Mrs. Keebler that same day on a charge of living in open - - -

MR. MASTERSON: May it please the Court, what this attorney was doing representing Mrs. Keebler on that day is immaterial to these proceedings.

CHIEF JUSTICE DREW: What is the materiality, counsel?

MR. JONES: It is material in this respect, Your Honor, that this woman was arrested for - - -

MR. MASTERSON: May it please the Court, I do not wish counsel to testify, to tell the materiality to these proceedings.

CHIEF JUSTICE DREW: What is the materiality? What is the purpose of this?

MR. JONES: The materiality of it is very hard to say unless we say what facts we intend to bring out.

CHIEF JUSTICE DREW: Go ahead. We will let it go.

MR. JONES: All right.

MR. NICHOLS: Your Honor, may we request a conference with you and the Managers for three minutes outside, to keep the prejudicial matter out, if it is improper?

MR. JONES: I think that we are going to have to have the argument here before this Court, because the Pre-

siding Officer does not vote, actually, and the argument on this floor, if there is going to be any argument, I think should be before this Court.

CHIEF JUSTICE DREW: Can you go to some other question, and then we will get back to it later?

MR. JONES: I think I can explain it very briefly. We are leading up to a reversal or to attempt to show a reversal of the Court's thinking because of the representation of this lady in this particular case that Mr. Larkin is about to testify on, because there is a direct relationship between the two.

CHIEF JUSTICE DREW: I am going to overrule it as of the time being. Let the Senate judge the materiality of it.

BY MR. JONES:

Q Mr. Larkin, I believe I asked you the question if you had an occasion to represent Mrs. Keebler once again, and if so, please relate the circumstances to this Court.

A Mrs. Keebler was in jail in Dade City on a charge of living in an open state of adultery, at that time that I represented her again.

Q Before what Judge?

A I was before Judge Brewton, the County Judge, on a preliminary hearing.

MR. MASTERSON: I move to strike the testimony, Your Honor, as being utterly immaterial to these proceedings.

CHIEF JUSTICE DREW: Sustained.

MR. JONES: If Your Honor please, I haven't finished yet. I am going to show a connection.

CHIEF JUSTICE DREW: Well, he is testifying about a proceeding before a County Judge, and I can see no materiality to the question.

MR. JONES: If you will let me ask the question, if the Court please, I can ask him if he appeared before Judge Richard Kelly on this same hearing.

CHIEF JUSTICE DREW: Well, ask him that question.

BY MR. JONES:

Q Did you, Mr. Larkin?

A Yes sir, I did.

Q This is all I want. Now, would you relate the conversation if any, that Judge Kelly had with you with reference to Mrs. Keebler being arrested for living in open adultery?

A I - - - my conference with Judge Kelly was right after I finished the hearing, and I took Mrs. Keebler with me, up to Judge Kelly's office.

Q All right, sir.

A And I went in Judge Kelly's office, and among our - - - the conversation we had that day, Judge Kelly asked me why I had - - - did not try any cases before him, what was my objections to it.

Q Did you explain to Judge Kelly why you didn't try any cases before him?

A Yes sir, I did.

Q Would you give the explanation made in the presence of Judge Richard Kelly?

A I cited to him the Keebler case, specifically, as being a reason why I had discontinued practicing divorce law, that, if I could not get support for the children,

that there was no use in me going to court; and he did not seem to be aware of the Keebler thing, and I don't imagine he was.

He sent downstairs and got the court file, and we sat there, and he studied the case over.

Q Now, Mr. Larkin, had you explained to him at that time the charge that was made against Mrs. Keebler - - -

A Yes sir.

Q - - - the charge of open adultery?

A Yes sir, I told Judge Kelly that Mrs. Keebler was - - - I had just finished representing her before - - - in a preliminary hearing before Judge Brewton on a charge of living in an open state of adultery, and I felt like that he, Judge Kelly, was - - - was primarily responsible for that woman having to sell her body to support her minor children.

Q Now - - -

MR. MASTERSON: We move to strike that remark, Your Honor, as absolutely prejudicial; it's manifestly absurd on its face.

MR. JONES: If the Court please, it was a statement that was made in front of Judge Kelly, to which Judge Kelly promptly replied, and I believe I can show the Court he replied to it - - -

CHIEF JUSTICE DREW: Overruled - - -

MR. JONES: - - - in my next question.

CHIEF JUSTICE DREW: Overruled. Go ahead.

THE WITNESS: I further - - -

BY MR. JONES:

Q Did the Court reply to this statement of yours, and if he did, what did he do?

A Yes sir. He looked over the file and agreed with me - - -

Q Which file, now?

A The Keebler vs. Keebler divorce file.

Q All right, sir.

A The original of it, from the clerk's office.

Q All right - - -

A He told me that it was wrong, he knew it was wrong, said, "What can we do now?"

I told him that I hadn't considered it from that aspect, as yet I hadn't, that I was in a different matter.

He said, "You prepare any order you want to correct this matter, and I'll sign it," and I never got around to preparing any order; that was - - - nothing else was ever entered in it.

Q Could you explain, sir, to this Court why you didn't go ahead with the extra effort of preparing an order?

A Well, it was my information that the husband and father of the children had remarried and left the State of Florida, to where it would be most difficult, and with the client being destitute of funds to make any investigation, it seemed like an impossible proposition at that late date.

Q To your best knowledge, and what could be discovered, the man was not in the State of Florida?

A It was my information he was in the State of Alabama at that time. As a matter of fact, his second

wife, the wife he married after that, had asked me to get a divorce for her from him, and her letter said he was in the State of Alabama.

Q Mr. Larkin, have either you or Mrs. Keebler ever received any funds from Mr. Keebler?

A Other than the \$25 that was paid that day, under direction of Judge Kelly, I never received any. Mrs. Keebler received, in other words, in a year's time, he was \$400 in arrears, I think that would indicate he had paid somewhere around - - - well, it would be fifty-two times fifteen, some \$200 or \$300 he has paid spasmodically, and that's all that's been paid.

BY MR. JONES:

Q Mr. Larkin, I'll ask you if you recall the matter of the Hancock Estate?

A Yes sir, I do.

Q If so, would you relate to this Court what type of matter this was?

A That was a probate estate, for the estate of Ward Hancock, deceased.

Q What was the approximate size of this estate, Mr. Larkin?

A Something exceeding a half a million dollars.

Q Did you represent any of the parties in the case, and if so, would you also explain, or tell us who represented all of the parties, if you will?

A I represented the widow, who was - - - did not take under the will, the property was willed to the decedent's sister, who - - - and my client elected to take dower. It was - - -

Q Was your client the - - - excuse me - - was your client the executrix - - -

A No, she - - -

Q - - - or was somebody else administering the estate at the time?

A No, the decedent's sister, Ida Ireland, was the executrix named in the will. My client was not the executrix; and she was represented by Billy Brewton, who was - - - who is the son of our County Judge Brewton, and Judge Brewton was thereby disqualified; so, in such a case, the Circuit Judge becomes the probate judge.

Q What Circuit Judge heard this matter?

A Judge Kelly.

Q Did you have any difficulty with the Court in this matter, and if so, would you please relate to us those difficulties?

A We only had very - - - I never attended but one hearing, actually, on the petition to award dower, and Judge Kelly, in that, made it emphatic that we should settle the matter.

So, we did settle it. It took us quite a - - - approximately a year to do it, but the - - - in that case, the primary difficulty was, I signed an affidavit as to what, in my opinion, was a reasonable attorney's fee for the attorney for the executrix, Mrs. Ireland, or for Billy Brewton.

It was a customary affidavit; I have had experience in probate work for some twenty-five, twenty-six years, and the courts usually require some of the older lawyers to estimate what an attorney's fee should be, and I estimated, in that case, that Mr. Brewton had earned \$25,000, and filed an affidavit to that effect; and some time later, Judge Kelly called me on the telephone and - - -

Q Mr. Larkin, if I may interrupt you, were there other affidavits filed - - -

A Yes, sir.

Q - - - as to the reasonableness of the attorney's fee?

A Yes sir, I am sure that there were others; Judge Hayward filed one. He was a former probate judge. And I believe Judge Barnes did; I'm not positive about that.

Q Were you later called as a witness by the Court in this matter, and asked to give testimony under oath and, if so, by whom were you called?

A I was called by Judge Kelly to come to his office; I don't - - - maybe, as a witness, but really, as a cross examination upon my affidavit.

Q Would you attempt to describe to this Court the manner and the method, and so forth, by which you were questioned by Judge Kelly?

A Well, I was - - - mostly, he took the affidavit and mostly cross examined as to how I had arrived at those figures, and why didn't I put it on an hourly basis, as to what a lawyer's time was worth; and I told him that it was not customary, and that I had never done such, and it was just really a half hour of haranguing about why I thought that was the right amount, and I explained to him why I did; and I never had been cross examined on an affidavit before. I thought that was - - - it was sworn to and filed.

Q What is the usual procedure as to objection to attorney's fees in these matters? How is the issue usually raised?

A Well, the beneficiaries of an estate could object to the attorney fees; the executrix could object to it.

Q Was there an objection, in fact, filed in this case, or had there been any objection made to these attorney's fees?

A There had been no objections filed.

Q Mr. Larkin, I ask you now if you have ever been cited for contempt of court, and if so, in what case, what matter?

A Yes sir, I was cited for contempt of court by Judge Kelly because of filing an affidavit in the case of State Road Department vs. Scussel and others.

Q Have you ever been cited on any other occasion during your twenty-six years of the practice of law?

A No sir.

Q Would you explain the circumstances, sir, under which you were cited on this occasion?

A Well, I signed an affidavit stating that, in my opinion, Judge Kelly was unpredictable, vindictive and was prejudiced against Charlie Luckie, who handled one parcel in that case; and I had filed similar affidavits prior to that, and I have filed many affidavits in my years of practice, and it was - - -

Q What was the final outcome, Mr. Larkin, of the contempt proceeding against you?

A I filed in the District Court of Appeal of the Second District, in Lakeland, a petition for a writ of prohibition against Judge Kelly adjudicating me to be in contempt, or for proceeding further, and the District Court of Appeal granted a writ of prohibition, which has become final, because it was not appealed, or no petition for certiorari was filed.

Q Did you file your case along with Mr. Luckie, or did you file independently of Mr. Luckie?

A I filed independently, some several days after Mr. Luckie, a week or ten days after Mr. Luckie had filed; mine was a separate and distinct case, but based upon the approximate facts of Mr. Luckie's case.

Q Has the Judge appealed your case to the Supreme Court?

A No sir, he has not.

Q He has not?

A No sir.

Q Mr. Larkin, do you have an opinion as to the reputation of Judge Richard Kelly for the operation of his court among the Bar of Pasco County?

A Yes sir, I do.

Q What is that opinion?

A I think it's very bad.

Q Sir, would you please explain to us the basis upon which you say it's very bad?

A Well, Judge Kelly has caused a tremendous turmoil in the courts; in fact, I would say a complete breakdown of orderly procedure in the Circuit Court of Pasco County. He - - -

MR. MASTERSON: May it please the Court, we're talking about the reputation of Judge Kelly, and not about - - -

CHIEF JUSTICE DREW: I sustain the objection. We have ruled that he cannot express an opinion. He can express his opinion as to his general reputation; I thought we had ruled that early in the trial.

BY MR. JONES:

Q Mr. Larkin, I'll ask you if you are familiar with any attempts to move Pasco County out of the Sixth Judicial Circuit?

A Yes sir, I am.

Q Would you tell us, please, when the first of these moves came about, to the best of your knowledge?

A That move has been discussed in the Bar Association in Pasco County since soon after I started to practicing law, I would say, back as far as 1940. At that time I had been practicing law four years; and we have always felt that little Pasco County should be connected to little Hernando, little Sumter and the counties to our north, that we have nothing in common with Pinellas County, a big county, that controls the whole show.

Q How often, to your knowledge, and over what span of years, has this situation been worked on, or attempts made to take Pasco out of the Sixth Judicial Circuit?

A I have personally tried it for over twenty years, since 1940, I would say, in talking to our Senators, Representatives, and encouraging it, to try to get that change made.

MR. JONES: You may inquire.

CHIEF JUSTICE DREW: Before you start, there are a couple of questions:

Mr. Larkin, at the time you made, or applied for, or the re-hearing matter came up, was Judge Dayton then on the Bench?

THE WITNESS: No sir.

CHIEF JUSTICE DREW: Then, I have a question, another question from Senator Cross:

If Judge Dayton was not on the Bench, would it not have been proper for him, Judge Kelly, to grant the re-hearing?

THE WITNESS: I don't believe so, under the law, that one Judge can re-hear another Judge's final order - - -

SENATOR CROSS: Mr. Chief Justice, I believe it would be clearer if you read the entire question.

CHIEF JUSTICE DREW: All right.

If Judge Dayton had remained in office, would it not have been proper for him to grant the re-hearing?

THE WITNESS: Possibly so.

CHIEF JUSTICE DREW: For Judge Dayton - - - do you understand the question, for Judge Dayton to - - -

THE WITNESS: Yes sir, I understand it, for Judge Dayton - - - Judge Dayton - - - he could have corrected the mistake he made.

CHIEF JUSTICE DREW: If your answer is "yes," then why was it improper for the successor of Judge Dayton to re-hear the matter?

THE WITNESS: Because the law is - - - doesn't provide for it, that you can go from one judge to another, in my opinion; that's my opinion.

CHIEF JUSTICE DREW: Senator Cross wants to know:

How would you ever get a re-hearing after a judge died or was left off?

THE WITNESS: I don't think you would; you would get it by appeal, you would get the same thing.

CHIEF JUSTICE DREW: Senator Johns has requested:

You stated you were dressed in slack clothes in the Judge's Chambers. Did that dress include a coat?

THE WITNESS: No sir.

I explained to the Judge, when he called me, that I was dressed in slack clothes, and was not prepared to come to court, only in my shirt sleeves, with a sport shirt on and khaki pants.

CHIEF JUSTICE DREW: Senator Gautier asks:

Did you take any further action to enforce Judge Kelly's order to pay \$25 per week on support and costs in the Keebler case?

THE WITNESS: No sir.

CHIEF JUSTICE DREW: At this time, Gentlemen, I would like to just interrupt the examination, and to say, at the request of the Senate, to request the House Managers to excuse me from attending - - - I have a subpoena to appear before the - - - in Room 236 of the Capitol Building, here in Tallahassee, to answer some questions from the Managers in a case pending in the Supreme Court, and it's returnable at 8:30 A.M., and I would request that the Senate take some action, to either relieve me from duty, or adjourn, so that I can attend that subpoena.

SENATOR CROSS: Mr. Chief Justice, is the case involved in this hearing?

CHIEF JUSTICE DREW: Yes sir.

SENATOR CROSS: Mr. Chief Justice, I move that we go into closed session at this time.

CHIEF JUSTICE DREW: Is there a second to the motion?

SENATOR HOLLAHAN: Seconded.

CHIEF JUSTICE DREW: As many as favor the motion say "aye."

(Several Senators said "aye")

CHIEF JUSTICE DREW: Opposed, "no."

(No response)

CHIEF JUSTICE DREW: The "ayes" have it.

MR. NICHOLS: Your Honor, may I inquire who this request is from?

CHIEF JUSTICE DREW: It's a subpoena from the House Managers, requesting me to appear before them at a hearing at 8:30.

MR. NICHOLS: Who? You?

CHIEF JUSTICE DREW: Yes sir.

GENTLEMEN, I felt - - I hated to interrupt these proceedings, but I felt, in fairness to the House Managers - - well, I can't be two places at once, and I felt my duty was here.

Whereupon, at 11:04 o'clock A.M., the Senate went into closed Session.

The Senate opened its doors at 12:24 o'clock P.M., and was called to order by the Chief Justice. A quorum present.

CHIEF JUSTICE DREW: Let's proceed with cross examination - - -

MR. DANIEL: All right, sir.

CHIEF JUSTICE DREW: Have you finished with direct?

MR. DANIEL: Mr. Jones has finished with direct.

CHIEF JUSTICE DREW: All right. Is the witness on the stand?

MR. JONES: No sir, he is not - - - here he is.

(The witness resumed the stand)

CHIEF JUSTICE DREW: Mr. Larkin, I have two questions from the Senators; a question from Senator Herrell, of the 13th:

I understand you to say that you believe that Pasco County should be in a separate Judicial District from Pasco County. If this is true, what difference would it make in the operation of the courts?

SENATOR HERRELL: Mr. Chief Justice, that should have been from Pinellas.

CHIEF JUSTICE DREW: From Pinellas County.

THE WITNESS: I was wondering how I could answer that.

I think, for the reason that I originally explained, that Pasco is a small county, and our type - - - and the litigation that we have is with the residents in small counties, like the counties to our north, such as Sumter and Hernando, and I have always thought that we should be in a circuit where - - counties of equivalent size, where we had more in common than we do with people in the metropolitan areas, such as St. Petersburg, Pinellas County.

SENATOR HERRELL: Mr. Chief Justice, I don't believe that answers the question.

CHIEF JUSTICE DREW: I'll read the question again:

I understood you to say that you believe that Pasco County should be in a separate Judicial Circuit from Pinellas County. If this is true, what difference would it make in the operation of the courts? What difference would it make in the operation of courts?

THE WITNESS: The Courts would be the same. We'd have a Circuit Judge, the same as we now have.

CHIEF JUSTICE DREW: Senator Askew, of the 2nd, asks:

If Judge Dayton had been the resident Circuit Judge of Pasco County instead of Judge Kelly at the time of the circulation of the petition for the Circuit change, moving Pasco County resident judgeship to Pinellas County, would you have signed the petition?

THE WITNESS: That was rather a long question. I believe - - - I'm afraid I got lost along the way there.

CHIEF JUSTICE DREW: I'll read it again to you, sir:

If Judge Dayton had been the resident Circuit Judge of Pasco County instead of Judge Kelly at the time of the circulation of the petition for the change, moving the Pasco County resident judgeship to Pinellas County, would you have signed the petition?

THE WITNESS: Yes sir.

CHIEF JUSTICE DREW: In other words, would you have been willing to move Judge Dayton out of Pasco County, as you were to move Judge Kelly?

THE WITNESS: Yes.

CHIEF JUSTICE DREW: Senator Connor asks a question:

What is the reputation of Judge Kelly among the people of Pasco County, as to how he runs his court? Is it good or bad?

THE WITNESS: Bad.

CHIEF JUSTICE DREW: Any other questions? You may proceed with cross examination.

CROSS EXAMINATION

BY MR. MASTERSON:

Q Mr. Larkin, you mentioned three or four cases, and I will try to take those up in the order in which you mentioned them to this body.

The first case was Collura vs. Collura. I believe in that case you stated that you felt that Judge Kelly improperly heard the case because Judge Dayton had originally been the presiding Judge and it was improper for Judge Kelly to assume jurisdiction; is that correct?

A No sir. I did not intend to imply that.

Q Well, did you think there was anything improper about Judge Kelly assuming jurisdiction of the case?

A No sir. He would have a right to hear a motion for a rehearing. That would certainly be within his province as the Resident Circuit Judge.

Q I misunderstood you. I thought you said the only remedy for that was appeal.

A No sir. That motion had to be disposed of.

Q All right, sir. Now, you mentioned that in the case that Mr. Collura had appeared before the Court and the Court had intruded itself between Mr. Hayward and his client. Is that your objection to what the Court did?

A Judge Kelly told us that, yes sir, that Mr. Collura had voluntarily appeared there.

Q What was wrong about Judge Kelly discussing this matter with Mr. Collura?

A Just what I said, that a Judge has no right to inject himself into the parties out of the presence of the man's counsel, that that is improper, in my opinion.

Q Now, Mr. Larkin, didn't Mr. Collura say this? I am reading from Page 3 of the transcript. He said this in the presence of you and Mr. Hayward and the Court:

"Well, I have been told by Judge Hayward that there hasn't been time for a hearing; there hasn't been time to place a hearing, that you have been so fully filled that he had to prolong this thing way into April." That statement was made to Judge Kelly, wasn't it, by Mr. Collura, in your presence?

A That's right. I testified substantially to that on direct.

Q So that what the Court was trying to do with Mr. Collura was straighten out this misapprehension that this lengthy delay had been occasioned by the Court; is that correct?

A I am not sure of that. I know the Court's calendar was not crowded.

Q Well, didn't the Court go on to say that, "I think that is perfectly all right, but what I am telling Mr. Collura is, his attorney did agree to this continuance" - - -

I am sorry. That is a matter of the continuance. Didn't the Court go on to say that his calendar wasn't crowded?

A Yes sir. I knew it was not crowded.

Q His precise language was, "The only thing is, I want Mr. Collura on the record, and you and Judge Hayward, and anyone else involved, to know that this Court has got plenty of time and is ready, willing and able from eight-thirty in the morning until six o'clock every day, Saturday included, and including the lunch hour, to hear this matter."

Did he say that?

A Yes sir, he said that.

Q Do you think it was improper for the Court to straighten Mr. Collura out on this matter in the presence of his lawyer and you?

A Well, it could have been handled very differently from what it was. It was really very embarrassing to Mr. Collura's lawyer, was the point I made.

Q You were embarrassed because - - -

A I was not embarrassed.

Q You weren't embarrassed?

A I was not embarrassed. He didn't say anything to me out of the way.

Q But you felt Mr. Collura's lawyer was embarrassed?

A I knew he was.

Q Don't you think he should have been?

A I think Judge Kelly unduly embarrassed him.

Q Well, he just stated the precise facts, did he not?

A It was a fact that his Court, his calendar, was not crowded. It was not crowded because none of us would file any cases before him. He didn't have any calendar.

Q You wouldn't file any cases before him. When did you start that practice, sir?

A From the time he assumed the Bench, I didn't file any cases before him.

Q From the very day that he assumed the Bench?

A Yes sir.

Q You never gave him a chance to be a Judge at all, did you?

A Yes sir. I was brought into his Court, as I described earlier today, on three or four different occasions.

Q You had decided from the day that he took the Bench that you would not appear in his Court, and the case that you described was one that occurred by accident?

A Because of Mr. Kelly's campaign that he conducted - - -

Q I didn't ask you that. I asked you whether you did not, from the very day he assumed the Bench, decline to go before him?

A I would say that is a fact, yes sir, but I think I should be able to explain it.

CHIEF JUSTICE DREW: You can explain your answer.

THE WITNESS: Because of the vigorous campaign that Judge Kelly waged and his criticism of the lawyers, I knew that I couldn't try a case before him, and I adopted a policy, as I previously testified to, of not filing any cases before Judge Kelly, and I wanted to avoid him so that I would not have any difficulty, and I had for fifteen years or longer, refused to take cases outside of Pasco County.

So I started to practice law in the other counties, and limiting my practice to probate work and office practice so that I wouldn't have any trouble, and then the next thing I knew, I was cited for contempt of court.

BY MR. MASTERSON:

Q Mr. Larkin, did the other attorneys have somewhat the same attitude?

A Yes sir.

Q They were trying to avoid Judge Kelly too?

A We all knew that, because of the way he conducted his campaign, that we could not try cases before him.

Q So from the very first day he assumed office, all the lawyers tried to avoid him?

A I couldn't speak for all of them. I am speaking for myself. I know that I did not file a case before Judge Kelly and instructed my secretaries not to file a case before Judge Kelly.

Q How do you avoid having a case before Judge Kelly?

A They had a rotation system of three cases before Judge Kelly and three cases before Judge Dayton, and we just waited till the docket was right. Very simple.

Q Do you see anything improper in that, sir?

A I know of nothing improper in it.

Q All right. Let's move on to the Keebler case, which I believe was the next case which offended you. This was the case in which you got into difficulties in Court by just chance, by accident, is that right?

A Yes.

Q And now, Mr. Larkin, in the proceeding, in the hearing on the divorce itself in the final hearing, this hearing was held before a Master, was it not?

A Yes sir.

Q That Master was not a lawyer, but a Court Reporter named Mr. Swain; is that correct?

A That's correct, sir. He wasn't called a Master. I think they called him a Court Commissioner or something like that.

Q Who appointed him?

A Judge Dayton originally did. Judge Kelly entered the written order.

Q Is there anything unusual about hearing divorce proceedings before Court Reporters?

A No sir.

Q Not in Pasco County?

A No sir.

Q All right, sir. Now, in that proceeding, one of the grounds for complaint by Mrs. Keebler was that her husband falsely accused her of adultery; is that correct?

A If the file reflected that. I don't remember what the grounds were in that case.

I think the complaint charged that the man had accused her of affairs with other men, and whether that constituted adultery, I don't know. She said it was false.

Q All right, sir. Now, in that same hearing, Judge Kelly awarded \$15 a week for the support of the children?

A Yes.

Q Isn't it a fact that that is the precise amount of money that Mrs. Keebler asked the Court to give for their support?

A I think it is.

Q So, he gave her the relief that she requested?

A Yes sir.

Q Now, your complaint, as I understand it, is that this man didn't pay the money, the defendant husband did not pay the money, and Judge Kelly wouldn't put him in jail?

A That's right.

Q Actually, the - - - how much money did he pay this lady? Do you recall?

A I don't recall, and the petition doesn't say, but a year later he was \$400 in arrears; so, he would have to be - - - have paid something less than \$300.

Q Now, the decree was entered on the 8th day of June, 1961, and your petition to show cause - - - for a rule to show cause, was filed on March 13, 1962?

A Yes sir.

Q Did you take any action in the interim there, to get some money for your client?

A No sir.

Q Now, what did this defendant husband do for a living?

A He was a machine operator, as I remember it; I'm not sure now.

Q He was a man of limited earning capacity, is that correct?

A I believe that he earned somewhere around \$75 a week, or - - - that's my recollection after two years.

Q And the wife was working as a waitress, I believe, is that correct?

A I'm not sure. She was at the second hearing, at the time for contempt, she was working as a waitress then - - - not as a waitress, she was a cook, I think.

Q Now, your complaint before this body is that what Judge Kelly should have done was throw this man into jail, is that correct?

A Well, sir, he should have seriously threatened him with going to jail if he didn't pay it initially. I asked him to enter an order, include in the order, where it would not be necessary to spend that much money to get him back in court. In other words, if he failed to pay it, the sheriff could go get him, and he declined to put it in there.

Q Now, that was the procedure, I believe you testified before the House, that this business of making an order which would enable you to tell the sheriff to just go out and pick the man up, that it was customary procedure in your county, is that right?

A After a man failed to pay on such an order that, if he didn't pay, we wouldn't have to spend \$25 or \$30, and prepare pleadings to get him back in court again. If he didn't pay, then the sheriff could put him in jail.

Q If he didn't pay, you'd just call the sheriff up and tell him to go out and put that man in jail?

A No, I'd give the sheriff a copy of the judge's order, and recite to him that the man had not paid for a period of, say, several weeks, and that the court order did put him in jail.

Q You did that without any further hearing at all?

A Yes sir.

Q You did that in lots of cases?

A No sir.

Q How many cases did you do that in?

A Usually, you put that provision in there, but you don't ever have to. I don't remember ever having done it. I've put it in lots of orders, but I don't remember ever having told the sheriff to go get the man.

Q You never did do that? You've never had to do it?

A I don't think I ever had to do it.

Q Essentially, it's completely unconstitutional and deprivation of due process, is it not, to go through a procedure like that?

A I would say that it was not a deprivation of due process.

Q You would say that to throw this man summarily into jail, not giving him an opportunity to be heard, as to why he hadn't paid the money, is not a deprivation of due process?

A No sir, I don't think it is.

Q Mr. Larkin, let me refer you to the case of Dykes vs. Dykes, and I want to ask you - - - 104 Southern 2d, and I'm going to read briefly from Page 599; this is a contempt proceeding:

The District Court of Appeal of the Third District of Florida says this:

"Due process of law in such a contempt proceeding requires that the party accused be advised of the charge which is the basis thereof, and be accorded an opportunity to defend himself, including the opportunity to be represented by counsel and to testify and present relevant evidence of witnesses, going not only into the facts of the charge itself, but the matters of excuse therefrom, and of extenuation and mitigation."

Now, do you feel that law applies to someone accused of disobeying a court order about paying certain sums of money? Don't you think that he's entitled to be heard about his circumstances?

A He was afforded that opportunity at the initial hearing.

Q Mr. Larkin, as a matter of fact, in this very court file, isn't it true that the defendant wrote to the court following this hearing, and he said he had been sick and could not make the payments?

MR. JONES: If your Honor please, we'd like to object to any further questions along this line. This witness has testified that the man appeared and testified, and they had a final hearing and an order, citing this man for contempt, and we think, now, that any further questions are just argumentative, arguing with this witness, as to his opinion of due process, and we do object to it as being argumentative.

CHIEF JUSTICE DREW: I think the ground's been covered, Mr. Masterson.

MR. MASTERSON: Your Honor, could I - - -

CHIEF JUSTICE DREW: If you have something you want to read from the order which is pertinent, you'll be allowed to.

MR. MASTERSON: All right, sir.

BY MR. MASTERSON:

Q Now, this order of Circuit Judge Kelly was entered on the 30th day of March, and it adjudged this defendant husband of being in contempt, and it further sets out that the husband, despite the fact that he was in arrears, could visit his child.

Is that correct? Does that substantially state the substance of the order?

A Yes sir. It modified the original order, and let the - - - and the last paragraph in that order provides that he may visit his children, period, meaning that he can, whether he is supporting them or not.

Q Now, Mr. Larkin, under your procedure, the one you wanted Judge Kelly to follow, if he didn't pay the money you'd just send the sheriff out and put him in jail, is that correct?

MR. JONES: We'd like to object to that question as being highly repetitious. That question has been answered four or five times.

CHIEF JUSTICE DREW: He has answered that question several times.

MR. MASTERSON: All right. Well, I will go on, then.

BY MR. MASTERSON:

Q I would direct your attention, Mr. Larkin, to a letter in the file from Mr. Keebler, dated April 13, 1962, approximately two weeks after the order was entered, and it says:

"Dear Judge Kelly:

"I am writing to tell you I won't be able to pay my ex-wife, Nita Keebler, the \$25 this week. I have been

home sick. I won't be able to pay her \$10. I have missed four days of work. I am working a few nights next week to make up for the time I lost.

"Very truly yours,

"Alton Keebler."

Now, my point is that if Mr. Keebler has an explanation to make as to why he's been unable to comply with the Court order, should he not, in fairness, be permitted to make it?

A I am sure that he would have - - - if the sheriff should come to get him, and he would show the sheriff that he had paid, he would not be put in jail, or if he would show the sheriff that he was sick and unable to work, he would not have been put in jail.

Q That's not the sheriff's province, though, is it, Mr. Larkin? It's the Court's province?

A The order is - - - if the order had covered it, I think that then the matter could be handled without all the expense of going back to another trial, Mr. Masterson.

Q Now, Mr. Larkin, the fact that the Court allowed this defendant father to visit his children, even though he was in arrears, offended you, is that right?

A No sir, it was - - - it didn't offend me, it was a matter, I would say, of coercing a father into paying for the support of his children, and for which he would have the privilege of seeing them.

Q You wanted the Court to coerce the father by denying him the right to see his children?

A Yes sir, I can't understand how any father could want to visit hungry children, and he not supporting them.

Q Well, let me ask you this, I want to read just one short head note from the case of Howard vs. Howard, which is reported in 143 Southern 2d, 502, and I'm quoting precisely - - -

MR. JONES: If Your Honor please, at this point we would like to object to the reading of a head note, or arguing the law with this witness. It's strictly argumentative. Apparently, counsel doesn't agree with this witness' interpretation of the law, and he attempts to argue by reading cases to him, and we object to it as being argumentative.

CHIEF JUSTICE DREW: I sustain the objection. I think that you've covered that subject, and it's purely repetitious, Mr. Masterson.

MR. MASTERSON: Well, Your Honor - - -

CHIEF JUSTICE DREW: The Court understands fully Mr. Larkin's attitude and his position. Now, as to what the law is, I can't see that what he thinks it is is particularly material. Why is it material?

MR. MASTERSON: It's material, Your Honor, because he is saying, if I understand him, that Judge Kelly was derelict in some respect in his duty by permitting this man to see his children, even though he was in arrears in the payment of his support payments.

I want to show that that's precisely - - -

CHIEF JUSTICE DREW: This Court is a court as well as a jury, and if you have any requests - - - requests for instructions of the law, I'll be glad to - - - if you will request that, I'll be glad to, but I think that the question is improper at this time.

MR. MASTERSON: Your Honor, I certainly don't want to be argumentative, but I don't think that this witness'

testimony can be understood unless it's related to the background of the law involved, and I would be glad, if the Court - - -

CHIEF JUSTICE DREW: I sustain the objection.

MR. MASTERSON: All right, sir. Would the Court read the law, sir, at this point? Would the Court read this citation?

CHIEF JUSTICE DREW: I will read it if you give it to me in connection with my charge to the court, I will fully cover it at that time.

MR. MASTERSON: All right, sir.

BY MR. MASTERSON:

Q Now, I want to pass on to the third case which you referred to, Mr. Larkin, and that's the case of the Hancock estate.

You say that you filed an affidavit in those proceedings, saying that Mr. Brewton should receive a \$25,000 fee, and Judge Kelly wanted to go beyond that affidavit, and find out a little bit more about the services that were rendered. Do you think that's improper?

A I don't believe I testified that he wanted to go beyond it; he wanted to go into it.

Q Well, he wanted to find out how many hours, I believe you stated, that Mr. Brewton had worked on the case?

A No sir, he wanted - - - he asked me could I put it on an hourly basis, not how many hours Mr. Brewton had consumed in representing the estate.

Q Well, in any event, you had filed an affidavit, saying that you thought the fee should be \$25,000, and Judge Kelly wanted to go behind that affidavit and find out more about it; isn't that correct?

A I believe I testified that he wanted to cross examine me on the affidavit.

Q So, it involved a considerable sum of the client's money, and don't you think it was his duty to those people, that he had to inquire behind the affidavit?

A Certainly, the Judge had a duty to protect all litigants in court, but I thought it was highly unusual to cross examine a man on his affidavit. It was there sworn to.

Q How did you happen to be before Judge Kelly? This was a probate matter. What's it doing in the Circuit Court?

A I believe I explained on direct that Mr. - - - the young Mr. Brewton, who represented the executrix, was a son of the County Judge, and when that - - - when the County Judge is disqualified, the circuit Judge is automatically the probate judge.

Q Well, Mr. Brewton, young Mr. Brewton, disqualified himself from practicing in his father's court?

A No sir.

Q He disqualified the judge from passing upon this proceeding?

A No sir, he did not disqualify anyone. It's just automatic, when a judge is disqualified that the case - - - in such a case, that the Circuit Judge becomes the county judge.

Q It's automatic?

A I would say so.

Q Well, did - - -

A I don't remember any disqualification being filed. I don't think there was one.

MR. MASTERSON: Just one moment.

BY MR. MASTERSON:

Q With reference to these affidavits, was that the practice in the circuit; that is, when an attorney wanted to establish what the reasonable fee was in a certain matter, the attorneys would accommodate each other by filing affidavits in support of a specified fee; is that correct?

A That's right.

Q If you had a case in which you needed an attorney to file an affidavit for you, you would go and get Judge Barnes or Mr. Brewton or one of the other attorneys?

A Some of the other attorneys, and just have them file an affidavit stating what, in their opinion, it was, and review the file with them, show them what work had been done if they weren't already familiar with this, so that they could intelligently estimate what the fee should be.

Q And in all your experience of some twenty-seven years, one of those affidavits had never been questioned?

A No sir.

MR. MASTERSON: No further questions.

CHIEF JUSTICE DREW: I have a question from Senator Mapoles, Mr. Larkin.

He asks, "Where did you receive your information that Mrs. Keeler" - - - is it?

THE WITNESS: Keebler.

CHIEF JUSTICE DREW:-"Keebler was living in adultery?"

THE WITNESS: When she was arrested in the County Jail, she called me on the telephone, told me she was in there for that.

CHIEF JUSTICE DREW: Also, "Were you ever present during the time when Mr. Keebler was in an act of prostitution?"

THE WITNESS: When Mr. Keebler was in an act of prostitution?

CHIEF JUSTICE DREW: Yes.

THE WITNESS: He wasn't.

CHIEF JUSTICE DREW: Mrs. Keebler.

THE WITNESS: The case is current. It has not been prosecuted yet.

CHIEF JUSTICE DREW: Senator Davis asked:

"Would you please cite your authority for allowing a Court Reporter to be appointed as a Commissioner to take testimony?"

THE WITNESS: I am not prepared to cite the authority. I got it up before Judge Kelly at the time, and as I remember it, it was in the Florida Rules of Civil Procedure. I believe it is Rule 4 point something. I could, with the Rules, find it very handily for him.

CHIEF JUSTICE DREW: Another question. "Did you make any attempt to collect delinquent support payments in the Keebler case under the Uniform Reciprocal Support Act through the State's Attorney's Office?"

THE WITNESS: There is no place for a lawyer in such a proceeding. The clients themselves apply for it. I suggested to Mrs. Keebler that she do that, but what action she took, I am not sure.

CHIEF JUSTICE DREW: From Senator Stratton:

"Would you have told Judge Dayton that he had contributed to the adultery of your client under the same circumstances?"

THE WITNESS: With the same situation, the same facts, yes sir.

CHIEF JUSTICE DREW: "Would you tell the Court as to your reputation with the Bar, public and the Courts in Pasco County?"

THE WITNESS: My reputation?

CHIEF JUSTICE DREW: That is the question from Senator Stratton.

THE WITNESS: I don't want to avoid the question, but I don't know what my brother lawyers think of me, though I have never heard anything critical, but I believe some of the members of the Bar could answer that better than - - - I mean, they may be unprejudiced.

CHIEF JUSTICE DREW: The Senator from the 21st:

"If in the Keebler case, if Mr. Keebler had left the state, could Judge Kelly have collected the child support? If so, in what way?"

THE WITNESS: Only under the Uniform Reciprocal Support Act.

CHIEF JUSTICE DREW: From Senator Williams of the 27th:

"Mr. Larkin, approximately how many people in Pasco County, other than lawyers, have you heard express an opinion about Judge Kelly's reputation as a Circuit Judge?"

THE WITNESS: I would say a hundred, maybe several hundred people, all that I have talked to.

CHIEF JUSTICE DREW: From Senator Cross of the 32nd:

"When you filed an affidavit relative to a reasonable fee in probate matters, did you ever attach the basis of your opinion?"

THE WITNESS: No sir. In other words, I would not give an itemized statement as to how I broke it down. I just give the round figure.

CHIEF JUSTICE DREW: Just generally, what did you state in the affidavit as support for your fee?

THE WITNESS: I haven't looked at that affidavit for a year or more, but I believe that it stated that I had been practicing law in Pasco County for - - - that I was fifty-two years old, that I have been practicing law for some twenty-six years or -7, that I have handled probate matters in Pasco County and was familiar with the fees fixed by or recommended by the Bar Association, that I was familiar with the work that the attorney had done for the executrix, and that in my opinion, that the sum of \$25,000 was a reasonable fee.

CHIEF JUSTICE DREW: Did you have such explanation of your opinion in this instance?

THE WITNESS: I am not sure what is meant by "explanation."

CHIEF JUSTICE DREW: Was that, the statement that you had made, generally what was in the affidavit in this instance?

THE WITNESS: That was what was in the affidavit substantially.

CHIEF JUSTICE DREW: Any redirect?

SENATOR FRIDAY: I have one question.

CHIEF JUSTICE DREW: Senator Connor wants to know what was the size of the estate that you filed an affidavit for \$25,000 was a reasonable fee?

THE WITNESS: In excess of half a million dollars, and it involved considerable amount of work on the part of the attorney for the executrix.

CHIEF JUSTICE DREW: From Senator Friday:

"Re the appointment of Court Reporters, is it not true that the Court simply appoints the Reporter to take the testimony, type it up and deliver it to the Judge for his study and consideration, and based thereon, did in this case, and that this was done only in uncontested cases?"

THE WITNESS: That's right.

CHIEF JUSTICE DREW: From Senator Barron.

SENATOR BARRON: That is a question for the Court, please, sir.

CHIEF JUSTICE DREW: In other words, for the explanation to the Senate, the Court appoints, when he appoints the Reporter, he is more or less designated an examiner, rather than a Master. Is that correct?

THE WITNESS: That's right.

CHIEF JUSTICE DREW: He just merely reports the testimony and makes no findings.

THE WITNESS: He makes no findings, refers his transcript of the testimony to the Court for the Court's decision; and I have the rule here that I had looked up, that I showed Judge Kelly, that I could read now if the Justice would be interested. I was asked about it a few minutes ago.

CHIEF JUSTICE DREW: I have had a request from one of the Senators, in which he feels that the defense should be allowed to read the law or ask the question that I overruled him on, and without objection from the Senate I am going to accept that as the ruling of the Senate and allow Mr. Masterson to read what he has in mind.

BY MR. MASTERSON:

Q Mr. Larkin, I want to read from Howard vs. Howard, a divorce case reported in 143 Southern 2nd 503, handed down July 31, 1962, by the Third District Court of Appeal.

"Headnote: Court could not condition divorced husband's visitation rights with his minor children to wife's custody upon his making timely support payment or upon payment of his attorney's fees and Court costs."

Then it cites earlier cases of Frazier vs. Frazier, 147 So. 464, Yandall vs. Yandall, 39 So. 2nd - - -

CHIEF JUSTICE DREW: Senator Johns.

SENATOR JOHNS: A point of order. The time to recess has arrived.

CHIEF JUSTICE DREW: The point is well taken.

I would like to ask if you are about concluded with this witness?

MR. JONES: No sir.

CHIEF JUSTICE DREW: Very well. You can finish your thought and then we will adjourn.

BY MR. MASTERSON:

Q (Continuing) Yandall vs. Yandall, the Court said, "The privilege of visiting the minor children of the parties to a divorce proceeding should never be denied either parent so long as he or she conducts himself or herself, while in the presence of said children, in a manner which will not adversely affect the morals or welfare of said progeny."

Do you agree with the law as stated to you, sir?

A Mr. Masterson, you are a lawyer the same as I am, and I hope you will appreciate the fact that I have had no opportunity to prepare myself for a legal argument on that question.

CHIEF JUSTICE DREW: We will now adjourn, Mr. Larkin, and when you come back, you can have an hour and a half to look at those cases and answer further if you desire to do so.

Whereupon the Senate recessed at 1:02 P. M., until 2:30 o'clock P. M., of the same day.

AFTERNOON SESSION

The Senate reconvened at 2:30 o'clock P. M., pursuant to recess order.

The Chief Justice presiding. A quorum present.

CHIEF JUSTICE DREW: You may proceed with the examination.

REDIRECT EXAMINATION

BY MR. JONES:

Q Mr. Larkin, when we recessed, I believe you were answering Mr. Masterson's question. Did you have any further answer as to the law on the enforcement of final decrees by the lower courts?

A I have made no research since that time. I've had no opportunity.

Q In other words, you're not prepared to argue the law at this particular time?

A No sir. I didn't come prepared to argue the law.

Q All right, sir.

Mr. Larkin, some reference was made to a letter which was sent to the Circuit Judge. Is it the custom, in the Sixth Judicial Circuit, for the Circuit Court to consider testimony such as letters and phone calls in a case, outside of the hearing of the other counsel and the parties?

MR. MASTERSON: Objected to, Your Honor. There's no evidence that this Court considered this evidence; the letter was merely filed in the court proceedings.

MR. JONES: And counsel for the Respondent has read the letter, questioning Mr. Larkin on the value and so forth, of this letter.

We merely wish to show the Court that it's improper for Circuit Courts to consider any letters outside.

MR. MASTERSON: There's no evidence that the Court did consider it, Your Honor.

CHIEF JUSTICE DREW: I don't think any predicate has been laid, nor has the man testified he knows the practice.

There's no predicate laid for the question because, as I remember the testimony, there's no evidence that the Court did consider the letter; the evidence was that it was in the file.

MR. JONES: All right, sir.

BY MR. JONES:

Q Mr. Larkin, you were asked, now, about the Court going into the affidavit in order to protect the rights of the client on the attorney's fee. Do you recall that?

A Yes sir.

Q Was the client, or was the party who was going to pay the fee - - - did they object to the amount of the fee, or did they object to the reasonableness of the fee?

MR. MASTERSON: Object to the question as repetitious and not involving anything we brought out on cross.

CHIEF JUSTICE DREW: It's repetitious, but I think we'll let him answer it one more time.

THE WITNESS: No sir, there was no objection to the fee by the client.

BY MR. JONES:

Q There was no cause for the Circuit Court to go into the reasonableness of the fee?

MR. MASTERSON: May it please the Court, we object - - -

MR. JONES: Well - - -

CHIEF JUSTICE DREW: Sustained.

MR. JONES: Well, we'll move on.

BY MR. JONES:

Q Mr. Larkin, on the question of attorney's fee, who can testify, or what persons are qualified to testify on the reasonableness or the unreasonableness of an attorney's fee?

A Attorneys.

Q Is there any other one in our society that is equipped and trained to determine what a reasonable attorney's fee is?

A I don't believe so. No one else would be qualified to testify to the reasonableness of an attorney fee, I don't believe, other than a man that was an attorney and practicing.

MR. JONES: I believe that is all.

MR. MASTERSON: No further questions.

CHIEF JUSTICE DREW: You may come down, Mr. Larkin. Oh, wait. I do have some other questions, Mr. Larkin. Pardon me.

From Senator Askew: "What fee did Judge Kelly award the attorney in the estate case?"

THE WITNESS: I don't really know. I think he awarded him \$25,000, but that is thinking. I don't know. It wasn't up to me to check it further.

CHIEF JUSTICE DREW: Another question:

"What amount did the other attorney of the estate case indicate was a reasonable attorney's fee?"

THE WITNESS: I don't know the answer to that. I only know about my affidavit and what I said. I may have been familiar at the time, but I am not now.

CHIEF JUSTICE DREW: Another question by Senator Askew:

"Did the attorney for the personal representative of the estate case suggest to you what he thought was the reasonable fee in the matter?"

THE WITNESS: Absolutely not.

CHIEF JUSTICE DREW: "If he did, what amount did he suggest?"

THE WITNESS: None.

CHIEF JUSTICE DREW: Those are the only questions I have on the desk. You may now be excused, Mr. Larkin.

THE WITNESS: Thank you.

MR. JONES: And do we understand, Your Honor, that Mr. Larkin may be excused to go home, subject to the same call and subject to the call of the subpoena?

MR. MASTERSON: That is agreeable.

(witness excused)

CHIEF JUSTICE DREW: Your next witness.

MR. DANIEL: Mr. Chief Justice, the Court directed a question at the Managers this morning as to the availability of a witness from Brevard County. He is here.

There is a motion, I think by Senator Askew, pending, and if it be the Court's wishes, we will call Mr. Wolfe and question him.

CHIEF JUSTICE DREW: The Sergeant will call Mr. Wolfe. What was his first name?

MR. DANIEL: I believe it is Frank Wolfe. It is Brevard County.

May I also announce, so that counsel may know in advance, that the questions I ask are going to be procedural here. They will be leading in nature in an attempt to save time.

CHIEF JUSTICE DREW: Also, counsel for the Respondent, of course, will have an opportunity to say whether he objects to the testimony; I mean, whether he desires the testimony stricken or not.

The Senator has made the Motion, and at the conclusion of this hearing - - -

SENATOR ASKEW: Mr. Chief Justice, because he may not wish it stricken, in order to be able to rebut any of it, I withdraw my motion, and then if he may wish to make a motion, he can.

Thereupon,

FRANK M. WOLFE,

having been first duly sworn as a witness for and on behalf of the Managers, testified as follows:

DIRECT EXAMINATION

BY MR. DANIEL:

Q Are you the same Frank Wolfe that testified here, I think, on last Thursday?

A Yes sir, I am.

Q By what authority did you appear in Tallahassee?

A I appeared in response to a subpoena.

Q Where was that subpoena served on you?

A Brevard County.

Q When did you arrive here?

A On the morning that I testified; approximately ten o'clock. I caught the 8:45 flight from Orlando and I arrived here, I think it was 9:30, 9:45.

Q Was this proceeding already in process when you arrived at the Capitol on that day?

A Yes sir. I arrived and I came right to the Senate here.

Q Had anyone advised you prior to that time that the witnesses were under the Rule?

A No sir.

Q Had you read any of the newspaper accounts that the witnesses were under the Rule?

A No sir.

Q Where does the subpoena state to respond to that subpoena?

A To the Senate, I believe, sir.

Q You are an attorney, I believe you testified before?

A Yes sir.

Q Is an attorney an officer of the Court?

A Yes sir. I am.

Q Are you familiar with the practice of - - - What is the practice in your circuit where attorneys happen to be witnesses in matters?

A I am unfamiliar with it, sir. It has never happened to me before. This is the first time I have ever - - -

Q In what stage of the proceeding were we in at the time you walked upstairs?

A As I entered into the gallery, I believe you were reading something into the record.

Q Was I sitting in the witness box?

A You were sitting or standing. I don't remember.

Q All right, sir. Just what happened?

A As I entered into the gallery, there was a secretary named Flo. I had known this secretary two years ago when I had worked here in the Attorney General's office, and she greeted me and I spoke to her for a few moments. I did not hear - - - I did not listen (because I was talking) as to what was transpiring, but there was more reading going on. At that time Flo advised me that she was on loan to the Board of Managers.

I asked her where I was supposed to be and she said she would check, and she left, and I don't remember whether I was standing or sitting.

At that time there was a call for Richard Carr, and he was apparently nowhere to be found. It took three or four or five minutes to find him, and I remember Justice Drew admonishing the prosecution to have its witnesses in the immediate area, and Richard Carr finally came and he was sworn and he testified as to where he was from, how long he had practiced, and I think that is about all.

And Flo came in and said, "You are wanted down at the House of Managers' office," and I left the Senate with her.

Q Is that all you heard of Mr. Carr's testimony, his name and educational background?

A To the best of my knowledge, that is all I do remember.

MR. DANIEL: Your Honor, that is the position of the Board of Managers. We realize it is a technical violation.

MR. NICHOLS: I would like to ask a question.

CHIEF JUSTICE DREW: Mr. Wolfe, did you come back to the gallery after you testified?

THE WITNESS: No sir.

CHIEF JUSTICE DREW: You were in the gallery before your testimony and before you talked to the House Managers or were advised of the witnesses being under the Rule?

THE WITNESS: That's correct, sir.

CROSS EXAMINATION

BY MR. NICHOLS:

Q You were in law school and you understand what the Rule is as to exclusion of witnesses from the session, don't you?

A I understand what the Rule is, sir.

Q You were taught that in law school, weren't you?

A I can't specifically say. However, my practice - -

Q Your practice, of course, involves that?

A If I may answer it this way, Your Honor. Judge Wehle was my professor and he mentioned prior to coming in here that he had omitted to teach the Rule.

MR. DANIEL: We concede that this witness is familiar with what the Rule is.

MR. NICHOLS: All right.

CHIEF JUSTICE DREW: Mr. Nichols, you have a right to object or not to object.

BY MR. NICHOLS:

Q Let me ask you, how long have you been out of school?

A I have been admitted to practice since June 2, 1961, sir.

Q Since that time have you tried cases?

A Yes, I have.

Q And you know what the Rule is and what it means?

A I am familiar with the Rule, sir.

MR. NICHOLS: In order to speed along the matter, we do not wish to take any position concerning it one way or the other.

MR. DANIEL: We do not either, Your Honor. We want to make full disclosure and accept our full share of the blame. We have, of course, attempted to advise every witness that he is under the Rule. We have no direct memory as to whether we advised this witness. It was really necessary to get him up here to find out whether we did or not.

We take no position one way or the other.

CHIEF JUSTICE DREW: At the present time there is no motion pending before the Senate. Is there any motion to be made?

Hearing none, the witness will be excused.

THE WITNESS: Thank you, sir.

MR. DANIEL: Mr. Wolfe, I believe under the former precedent, you can return to Brevard County, subject to recall, as you were recalled at this time.

THE WITNESS: Thank you, sir.

MR. DANIEL: Is it necessary for him to return?

MR. NICHOLS: No sir. He is excused under the Rule.
(witness excused)

MR. JONES: Mr. Secretary, we would like to call Joe Allen McClain.

Thereupon,

JOE ALLEN MCCLAIN,

having been first duly sworn as a witness for and on behalf of the Managers, testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q State your name, please.

A Joe Allen McClain.

Q What is your occupation and profession?

A I am an attorney.

Q Would you please give us, sir, a brief resume of your educational qualifications?

A I attended Stetson University at Deland and received a Bachelor of Science degree in Business Administration in 1955; Stetson University College of Law in 1955 to 1958, at which time I received my Bachelor of Laws degree.

Q How long have you been practicing law and where do you practice?

A I practiced in Dade City, Florida, since November of 1958.

Q Mr. McClain, what elective offices in government have you held and when did you so hold those offices?

A I was a member of the Florida House of Representatives, elected in 1958, reelected in 1960, served until 1962.

Q If you would, please, how many of the Circuit Judges in the Sixth Judicial Circuit have you served before or had matters before?

A I would say probably five of them.

Q Would you name those Judges, if you recall?

A Judge Kelly, Judge Hobson, Judge McNulty, Judge Phillips, and Judge Leavengood.

Q Now, sir, I respectfully refer you to the case of State vs. Jones. Do you recall that matter?

A I do.

Q If you will, please, relate to this Court anything unusual that occurred in that case.

A This was a case in which the Defendant was charged with first degree murder. I had been retained by his parents to represent him.

After taking the case I filed a suggestion with the Court that he be examined as to his mental competency, which request was granted. Judge Kelly appointed two psychiatrists in Tampa to conduct the investigation. As I recall, the examination was to be made some time during the first part of the year, the first of January of this year, and on two or three occasions after the examination had been made, I checked with Judge Kelly to determine if he had received any reports from the psychiatrists.

On the last occasion I talked with him, which was about January 14th, he told me that he had heard from the doctors, from at least one of them, and he knew the contents of the report, which they were forwarding, but he had not received it, and asked that we not give any publicity to the matter by letting anyone know what the results of the examination were.

The following day I had business in Tallahassee and came up here. While I was in Tallahassee I was talking with my secretary over the telephone. She informed me that she had read in the morning paper that the Defendant had been adjudicated incompetent and committed to the State Hospital in Chattahoochee.

Quite embarrassing to me to have to report to my clients, who were the parents of the boy, that the only thing I knew about the adjudication and the commitment was what I learned that was printed in the morning papers.

The boy was later transferred to the hospital at Chattahoochee, where he is now.

Q Mr. McClain, I'll ask you, did you also have a case before Judge Richard Kelly entitled Sirmons vs. Bryant?

A Yes, that was - - -

Q What type of a matter was this?

A It was a negligence action, arising out of an automobile accident.

Q Who were the attorneys in this matter, if you recall, for both sides?

A I represented one of the minor children involved in the accident; the firm of MacFarlane, Ferguson, Allison & Kelly, in Tampa, represented the other children involved, and they had associated with them the firm of Larkin, Larkin & Goodson - - - I'm sorry, they had not associated them, the firm of Fowler, White, Gillen, Humkey and Trenam, in Tampa, were representing the defendants, and they had associated the firm of Larkin, Larkin & Goodson.

Q If you will, now, Mr. McClain, would you relate to this Court anything unusual that transpired in that case, and tell us when, during the proceedings, it transpired?

A Well, at the - - - during the progress of the trial, the defense had called the Assistant Chief of Police in Dade City, Officer Ronald Stanley, to testify, and - - -

Q Pardon me, if I may interrupt you, would you please tell us, if you recall, how much was in the suit, or what the suit was over, how much money was claimed - - -

A Well, the - - -

Q - - - what was the size of the suit?

A Well, the case had been tried in 1962. At that time it ended in a mistrial. The damages which were testified to amounted to some \$560,000; and they were somewhat less in the second trial, because one of the plaintiffs had been dismissed.

There were four cases consolidated for trial; one of those was not being tried the second time.

Q What were the alleged injuries, if you could tell us, very briefly?

A Well, there were five children in one family and one other child who were involved in the accident, riding in one car. The driver of the automobile, who was one of the five children, is now in Sunland Training Center; he is completely incapacitated, and will be for the remainder of his life.

There were quite serious injuries to two of the other children in the family, and lesser injuries to the remaining children and the girl that I represented.

Q All right, sir. Now, if you will, relate to the Court any unusual incidents which occurred during this trial?

A Well, as I stated, the defense called officer Stanley to the stand, and this was an accident that had occurred at an intersection, and the question of right of way became important, and Officer Stanley, upon being questioned by the defense, made the statement that one of the streets at the intersection was a through street, at which time the plaintiffs moved for a mistrial; the jury was excused, and Judge Kelly rather severely upbraided the officer in front of the parties and their counsel and the spectators in the court room for making the statement, and told him, in effect, that, as an officer, he should know better, and should not have made the statement, but the chastisement went on for some length of time.

CHIEF JUSTICE DREW: I couldn't quite understand you. What was the statement that was made?

THE WITNESS: The witness testified that one of the streets at the intersection was a through street.

CHIEF JUSTICE DREW: Go ahead. Thank you.

THE WITNESS: Another incident that happened during the course of the trial, we had stipulated with the defense that the medical testimony could be put on at any time during the course of the trial, and we had two doctors from Tampa, who were to testify in addition to Dr. Dwayne Deal, a local doctor in Dade City.

I had contacted Dr. Deal and told him that if he could be available on fifteen minutes' notice, that it would not be necessary for him to stay in the witness room, which he told me he would be available, and at the time we needed him, I called him from his office and asked him to come on down to the court house, which he did.

When he started into the court room, up the - - - came in the back door of the court room, up the aisle, Judge Kelly asked him to stop where he was, and called counsel to the Bench, told us at that time that the day before he had permitted us to put a field hand on the stand in his shirt sleeves; however, we were now attempting to put a medical doctor on the stand, and he was dressed in a long sleeve sport shirt, without a coat, that he would recess the trial to permit Dr. Deal to go home and get properly dressed, or he could try to borrow a coat somewhere in the court house, and then testify, but he could not testify the way he was dressed.

I went back and informed Dr. Deal, and he went out of the court room and borrowed a coat, I believe, from our sheriff and came back and testified then.

BY MR. JONES:

Q Mr. McClain, had, actually, on the previous day, the Court allowed a person to testify without a coat on in the same case?

A Yes sir.

Q I'll ask you, now, sir, if there were any other unusual incidents which occurred in the same trial?

A Yes sir. At the conclusion of the testimony, we had retired to the Judge's Chambers to discuss the instructions and being a complicated case, there were numerous requests for instructions to be given, and the instructions themselves were, some of them, highly technical and, naturally, quite important to the outcome of the trial.

While we were discussing them, Judge Kelly called his secretary into Chambers, and asked her to see if she could contact Senator Covington - - -

Q Who all was there, now, when you were discussing these instructions?

A Counsel for both parties and Judge Kelly.

Q Will you tell us approximately how many attorneys for the parties, and so forth, were there?

A I would say there were approximately six or seven attorneys in the room, and Judge Kelly was there. I don't recall whether the Court Reporter was there or not, but I don't believe that he was.

Q Will you explain to us, now, what you mean by "instructions" that you were discussing?

A Well, at the conclusion of the evidence, based upon the case which both sides had presented, the attorneys at that time asked the Court to give instructions which they have prepared to the jury, to explain to the jury the law to be applied in the case, and as I recall, our side had - - - the plaintiffs' side, had some fifteen to twenty requested instructions, which we were presenting at that time.

Q Now, if you will, sir, relate what transpired while you were working on the instructions?

A Judge Kelly asked his secretary - - - called her into Chambers and asked her to see if she could get Senator Covington on the phone, and he made the statement then that he wanted to see him as soon as possible, and then he told us that he had learned that there was a proposal to come before the Legislature to transfer Pasco County from the Sixth to the Fifth Judicial Circuit, and words to the effect that this would deprive him of a court to sit in, and he spent some little time talking about this matter, rather than the matter before the Court at the time.

Q Mr. McClain, if you would, within your own knowledge, will you tell us approximately when, to your knowledge, that this Circuit change bill, or idea, came about, as far as you know, from your experience?

A Well, I personally know that it was discussed as early as the regular Legislative Session in 1959.

I was a member of the House at that time from Pasco County, and sometime during that session I called a meeting of the members of the House from the Sixth and the Fifth Circuits to discuss this matter; the bill had been prepared, and I had discussed it informally with different members of the House.

I had discussed it with the Pinellas County House delegation, who were in the Sixth Circuit with Pasco County, and we had this meeting to further discuss it; this was probably about midway during the '59 session.

Q Mr. McClain, would you tell us, sir, why the bill was not introduced, if it was not introduced, or why the bill was not passed in that session of the Legislature, if you know?

A Yes.

The then Senator from the 38th District said that he would kill it in the Senate. Therefore, it was not introduced.

Q Was this prior to Judge Richard Kelly being a Circuit Judge in that County?

A Yes, it was.

He ran for election approximately a year later.

Q Was he there practicing law at the time this bill was being taken up, in 1959?

A No, he was not.

Q Mr. McClain, I will ask you if the Circuit Court has a rule with reference to wearing coats there in Pasco County?

A They do.

Q And have you ever run afoul of this rule?

A Yes sir.

Q And, if so, will you please explain that to the Court.

A I have, on one occasion.

I was - - - I had had an ex parte matter before the Court, and had prepared an order for the Court to sign.

I called Judge Kelly's secretary one day, and asked if he were busy in hearings; she said, no, that he was not at the time.

I told her I had an order I would like to get him to sign, and she told me to come right on over then, and he would have time to sign it.

I left my office, dressed in a shirt and tie, but without a coat. I went into his office, which consists of - - - he has three rooms, a reception room and a private office and then his Chambers.

He was seated in his Chambers by himself. When I started in the door, he asked me if he could help me. I told him that I wanted to get an order signed, and he told me I was not properly dressed to come before the Court; and then I related to him the conversation that I had had with his secretary, that she had told me to come right over, and I didn't take the time to get a coat to wear over there, that I knew he was in Chambers and was not involved in any other hearing.

He told me then that he would not sign an order for his mother if she were not properly dressed, and that I could either put on a coat which was hanging in his Office, and that I could do that, and that he would then sign the order, which I did, and I put on - - - I don't know if it was his coat or whose, but it belonged to a man of considerably larger stature than myself. I looked rather ridiculous. The sleeves hung approximately six inches below my hands, but I put the coat on and went in, and he signed the order, and I took it off and left.

Q Mr. McClain, I'll ask you, now, if you have an opinion as to whether or not the action which you have described here today affected the administration of justice in Pasco County?

MR. McALILEY: I object, Your Honor, because that, necessarily, calls for a matter to be decided by this body.

CHIEF JUSTICE DREW: Sustained.

BY MR. JONES:

Q I'll ask you this, Mr. McClain, if you have an opinion of Judge Richard Kelly's reputation in Pasco County, for the manner in which he conducts his court, among the Bar?

MR. McALILEY: The same objection, Your Honor, on the same grounds. The matter has been ruled on several times.

MR. JONES: It's the same question that the Court set forth on.

CHIEF JUSTICE DREW: What you asked for was his opinion, I believe.

MR. JONES: On his reputation, do you have an opinion.

CHIEF JUSTICE DREW: You want to ask him if his reputation is good or bad?

BY MR. JONES:

Q Do you know the Judge's reputation among the Bar of Pasco County for the manner in which he conducts his court?

A I do.

Q What is that opinion - - - what is that reputation?

A I would say it's extremely poor.

Q Would you explain to this court the reason for your saying that it's extremely poor?

A The fact that - - - the manner in which Judge Kelly has conducted his court, his relationship with the attorneys; practicing before his court, have brought about a situation in which the attorneys - - -

MR. McALILEY: Excuse me, Your Honor, that wasn't responsive to the question, isn't responsive to the question, and I object to a voluntary statement, drawing opinions and conclusions of this witness.

MR. JONES: You may inquire.

CHIEF JUSTICE DREW: Let me ask these questions from the Senators.

Senator Gibson inquires:

Is the wearing of coats rule - - - is the rule regarding the wearing of coats the same in all circuit courts of the Sixth Circuit?

THE WITNESS: I don't know. I don't practice much in Pinellas County; so, I couldn't answer the question as to the judges down there.

CHIEF JUSTICE DREW: Senator Connor asks:

Why did the Senator from the 38th say, if the bill were passed, he would kill it in the Senate? Did it have anything to do with the appointment of an Assistant State's Attorney for the Sixth Judicial Circuit?

THE WITNESS: Senator Getzen at the time told me that he would not pass the bill because he had had opposition - - -

MR. McALILEY: Now, Your Honor, I must object to the hearsay involved - - - I withdraw the objection.

Go ahead. Go ahead, sir. I'm sorry I interrupted. Go ahead.

THE WITNESS: And that he wanted Judge O. L. Dayton to have opposition.

CHIEF JUSTICE DREW: Any other questions from the Senators? You may cross examine.

THE WITNESS: And may I further explain that - - -

CHIEF JUSTICE DREW: You may.

THE WITNESS: - - - Mr. Chief Justice.

CHIEF JUSTICE DREW: Did you say Senator Getzen?

THE WITNESS: Yes sir. He was a member of the Senate from the 38th District at the time.

CHIEF JUSTICE DREW: I see.

THE WITNESS: As regards the Assistant State's Attorney, Senator Getzen's brother was appointed during that session as an Assistant State's Attorney for the Sixth Circuit.

CROSS EXAMINATION

BY MR. McALILEY:

Q Your Honor:

Mr. McClain, I have a very few questions. With reference to the Sirmons vs. Bryant suit, that you characterized as having a value of half a million dollars, would you tell the Senate what you settled that case for?

A \$15,000.

Q All right, sir.

Now, would you tell the Senate what happened at the conclusion of the first case? Why were you here, trying it again?

A The jury did not agree, and it ended in a mistrial.

Q The jury could not agree on the issue of liability?

A That is correct.

Q And is it a fair statement to say that you had a close question of liability in this case?

A That is correct.

Q Now, you have named the various firms involved. Could you tell us the names of the lawyers connected with those respective firms that were present at the time of the second case?

A Yes sir, from the MacFarlane firm, there was Mr. David Kadyk and Bill Graybill; the Fowler firm was Mr. Mike Kinney and a Mr. Hapner, I don't - - - Bill Hapner, I believe.

Q All right, sir.

Now, who was Mr. William Larkin and Mr. Goodson - - - were they also present?

A Yes sir, they were associated with the defense.

Q All right, sir.

Was one of the issues in this case as to whether or not a certain thoroughfare was a through street?

A Yes, it was, the question of right of way at the intersection was involved.

Q All right, sir, and Officer Stanley, on the stand, volunteered that such thoroughfare was, in fact, a through street?

A As I recall, the question that was asked of Officer Stanley, after he testified as to traffic controls on the intersecting street, he was asked the question, "And what about 21st Street?"

At that point he stated that 21st Street was a through street.

Q Let me read his answer, sir, and see if it squares with your recollection:

"The Witness: Well, 21st Street is a through street there. There is no traffic going north and south."

Does that square with your recollection?

A Yes, it does.

Q And at that point did someone move for a mistrial?

A They did.

Q And was the jury taken out?

A Yes, they were.

Q And out of the presence of the jury, did the Court give some instructions to the police officer?

A Some admonitions, and some instructions.

Q Well, sir, let me read this to you and see if this is what you are referring to:

"The Court: All right. Now, Officer Stanley, for the balance of your testimony, here is this instruction - - - hear this instruction it is to be absolutely observed by you: You are to answer the questions that are put to you. Volunteer no information. Answer the questions only," and then he goes on for - - - well, I'll read it:

"Now, to start with, as far as this Court knows, there has never been anything asked of you about 21st Street to start with. It is not even in the trial, as far as this record is concerned, as far as I know. Now, it may well be that

based on what you have said, 21st Street and State Road 52 are one and the same, but at least it has, up to this point, not been in this trial. You didn't ask him anything about 21st Street. Now, when I attempted to ask you how that got into the act, 'Where was that?' then you answered that it was a through street. Now, I certainly didn't ask you whether it was a through street."

Substantially, is this the content of the conversation that was related to Officer Stanley by the Court?

A I believe that is a portion of it. As I recall, there was more conversation concerning it.

Q All right, sir.

Did he also explain to Officer Stanley that there had been a number of jurors empanelled? Is that correct?

A I believe that he did.

Q And that the process of putting on a jury trial is an expensive proposition, and this was one of the reasons why you have to be careful in answering questions propounded by lawyers.

Was this part of the explanation offered to Officer Stanley?

A I don't recall the exact words that he used, but I would - - - I imagine that might be.

Q Well, sir, did Officer Stanley ever tell you that he felt that he was berated, or is this just merely your conclusion that you have drawn?

A Officer Stanley told me that he felt that possibly he was wrong in answering the question, but that he was improperly upbraided in public, rather than in the privacy of the Judge's Chambers, or at some other place, rather than - - -

Q And "in public," you are referring to the court room, while the jury was out, is that correct?

A And while the spectators and the parties were there, yes.

Q But while the jury was out?

A Yes sir, they were out.

Q Now, where did you and Officer Stanley have this conversation, Mr. McClain, and who else was present?

A We had this conversation on Tuesday of last week, as we were coming to Tallahassee. No one was present.

Q And this was the first time that you had had such a conversation with Officer Stanley concerning what you testified today?

A Yes, it is.

Q All right. Now, what were the traffic control devices at this particular point where the accident took place?

A There were stop signs on Coleman Avenue, which was the intersecting street. There was at least one stop sign - - - one of the questions in the evidence was whether there was a stop sign on the west side of 21st Street, on Coleman Avenue.

Q All right, sir, with reference to Dr. Deal, were Dr. Steinmetz and Dr. Trupp also medical witnesses in this case?

A Yes, they were.

Q Did they appear with coats, sir?

A As I recall, they did. If I may explain that, Dr. Steinmetz and Dr. Trupp had come up from Tampa, and I had explained to Dr. Deal that we would use him at the

conclusion of Dr. Steinmetz' testimony, and about - - - when I figured there was about fifteen minutes more of Dr. Steinmetz' testimony, I went to the telephone and called Dr. Deal at his office, where he was practicing, and asked him to come right on down to the court house.

Q All right, sir. Now, with reference to the State vs. Jones, did you make an application to the Court to appoint psychiatrists?

A I did.

Q And did you - - - and did the Court appoint the psychiatrists at your request?

A He did.

Q Did you ever waive a formal hearing before the Court, and agree to submit the question of insanity to the Court on the doctors' reports?

A There was no discussion concerning that.

Q All right, sir.

Did you ever call the matter up for hearing?

A I did not.

Q Was there any other discussion between you and the Court concerning what the doctors had told the Court? In other words, you said that on the last visit, the last time you conferred with Judge Kelly, that he told you he had heard from the doctors. Did he relate, in essence, what the doctors had said?

A Yes, he told me that the doctors were finding that the Defendant was incompetent to stand trial.

Q Did he ask you that before - - - to keep this matter in confidence until such time as the reports were received?

A He did.

Q Now, sir, it was the goal that you sought, as the defense attorney, to have this client adjudicated as insane?

A If he were actually incompetent to stand trial; that's the ultimate result that I wanted, but in petitioning for an examination, I wanted to find out if he were capable of standing trial.

Q I understand, and the question of insanity, though, at the time of the commission of the offense is a question of fact, is it not?

A It is.

Q So, what you were seeking to determine at this point was the question of his present insanity, as to whether or not he could cooperate with you in the preparation of his defense?

A This is correct.

Q And the ultimate question of fact, as to whether he was insane at the time of the commission of the offense is a question of fact for the jury, is that correct, sir?

A Right.

Q The one to be ultimately decided by the jury, if and when the man does become competent?

A Yes.

Q Now, with reference to coats and ties, has the Pasco County Bar Association enunciated a policy with regard to the wearing of coats and ties in the court room and in chambers?

A The only time I have heard this matter discussed by the Pasco County Bar Association was to the effect that the judges would wear robes at the time they were having

hearings in the court room, and witnesses' testimony was being taken, and so forth, and that the attorneys would be required to wear coats and ties in those proceedings.

Q Sir, were you aware that on June 2, 1961, that the Pasco County Bar Association did act on the request of Judge Kelly, with reference to the members of the Bar wearing coats?

A I'm not aware of it.

Q All right, sir; and at that time the Pasco Bar said that the Bar would wear coats on all occasions when appearing before Judge Kelly, whether in chambers or in open court?

A I don't recall that I attended that meeting. I don't recall if that rule had been stated by the Bar Association.

Q Sir, as a member of the Bar, do you receive copies of the minutes of the Bar Association?

A No, I don't.

Q Did Judge Kelly allow you to avail yourself of the opportunity of either using his coat or a coat that was in the anteroom, or going back to your office and getting a coat?

A Yes, he did.

Q All right, sir, just one or two more questions. First of all, did Judge Kelly spend about half of his time in Pinellas County and about half in Pasco County?

A That's correct.

Q All right, sir.

And during the time that Judge Kelly was on the Bench, was his docket current, sir, and his work up to date?

A As far as I know, they were, yes.

Q In terms of your experience in Pasco County, were they as current and up to date as any other Judge that you have had experience before in Pasco County?

A Well, I would suppose yes. I could not at this point compare the dockets among the Judges, but I would suppose they were.

Q Just two more questions, sir. The Court Room and the Chambers, are they air conditioned?

A Yes, they are.

Q And did the jurors have to wear coats when they appeared on jury duty?

A They did.

CHIEF JUSTICE DREW: A question from Senator Askew:

"What was the plan in detail for the circuit change in 1959, particularly as to how it would affect Judge Dayton? What was going to happen to Judge Dayton? Was he to be reappointed to a new Judgeship in Pasco County as part of the Fifth Circuit?"

Do you understand the question?

THE WITNESS: Yes sir, I think so. As I recall the bill which was prepared at that time, it made no provision for Judge Dayton, as I had inquired and done some research and had found that if a county transfers from one circuit to the other, any Judge commissioned in the circuit from which the county was transferring would remain a Judge in that circuit.

However, there was no provision made in that particular bill concerning Judge Dayton and I knew nothing about any proposed appointment for Judge Dayton in The Fifth Circuit. That had not been discussed by me with anyone.

CHIEF JUSTICE DREW: Any redirect?

MR. JONES: Yes sir.

REDIRECT EXAMINATION

BY MR. JONES:

Q Mr. McClain, I will ask you if you object to wearing a coat in Court or before a Judge, or if you are here to complain about having to wear a coat?

A No sir, I am not complaining about having to wear a coat. I think it is entirely proper to require the attorneys to wear a coat in the Court Room. However, under the circumstances of that particular case, no testimony being taken, no parties present, I felt that it was wrong at that time.

Q I will ask you, sir, if you can testify within your own knowledge as to why the Bryant case was settled for \$15,000 when you were claiming \$500,000, if you can tell us within your own knowledge?

MR. McALILEY: We will object as being immaterial.

CHIEF JUSTICE DREW: You asked about it.

THE WITNESS: Well, there was no one particular reason. As I recall, we had completed taking the testimony on Thursday afternoon after trying it all week, and on Friday morning, at the time that the Judge was going to instruct the Jury and the case was to go to the Jury, one of the Jurors, a member of his family or somebody reported that he was sick and could not appear. We had not selected an alternate Juror to sit in the case. We had been negotiating for settlement for some time. There was a close question of liability in the case. So when the Juror reported sick, we got together with the defense counsel and settled the case.

BY MR. JONES:

Q Mr. McClain, I will ask you if you object to the propriety of the Court's ruling or the propriety of the witness' answer in that case as to the through street, or are you here complaining of the Court's action in view of the answer made by the witness?

A I am not complaining of the answer because I complained of that at the time in moving for a mistrial. I am complaining of the Court's action in handling the witness.

Q So you actually agreed with the Court and asked for a mistrial, that the witness' answer was incorrect or improper?

A That is right.

Q And now I will refer you to the Jones case. Are you here complaining that the psychiatrists found your client incompetent, or are you complaining of the fact that the Court passed the information to the press without you being informed so you could properly deal with your own client?

MR. McALILEY: I object, Your Honor. There is no evidence in this record that the Court passed the information to the press, and this is a conclusion of counsel.

CHIEF JUSTICE DREW: I think he can explain it. Go ahead. Overruled.

THE WITNESS: No, I am not objecting to the report of the psychiatrists. I had asked that they examine the Defendant and determine his mental competency, of which they had. I am complaining that it was quite embarrassing to me, having been retained to represent the Defendant by his parents, to have to report to them that the only thing I knew about the adjudication and the commitment was what I had read or had learned appeared in the morning paper and later read it in the paper, before I talked to them.

MR. JONES: Thank you, sir.

CHIEF JUSTICE DREW: I have some other questions. Have you finished, counsel?

MR. JONES: Yes.

CHIEF JUSTICE DREW: From Senator Askew: As I understand, if the circuit change in 1959 as you outlined it, would have passed, Judge Dayton would have been moved to Pinellas County from Pasco County?

THE WITNESS: I don't believe he would have been moved from Pasco to Pinellas. As I understand it, there is no requirement in the Constitution or the Statutes of Florida that a circuit judge reside in the circuit in which he serves.

However, it is my understanding that he would be a Judge of the Sixth Circuit, rather than becoming a Judge of the Fifth Circuit had we transferred.

CHIEF JUSTICE DREW: Senator Covington asked:

Did the 1959 circuit change bill provide for a Resident Circuit Judge for Pasco County? If so, was there any discussion as to who this Judge would be?

THE WITNESS: I don't recall that the bill provided for the Resident Circuit Judge. However, the provision in the statute requiring the Resident Circuit Judge, as I recall, was in a separate section of the Statutes.

This was repealing the section of the statute defining the circuits, the Sixth and the Fifth Circuits.

CHIEF JUSTICE DREW: Senator Connor requests an answer to this question:

In the 1959 bill, if passed, would not Judge Dayton have stayed in the Sixth Circuit until his term ran out?

THE WITNESS: That is my understanding of the law and of what would happen, that by transferring a county from one circuit to the other, you cannot change a Circuit Judge's commission.

If he was commissioned to serve in the Sixth Circuit, he would remain there rather than going to the Fifth, and I don't think that could be accomplished by legislative act.

CHIEF JUSTICE DREW: Another question: Isn't it impossible to transfer any Circuit Judge from one district to the other by legislative act?

THE WITNESS: I think that is correct.

CHIEF JUSTICE DREW: Senator Cross: Why didn't you inform your clients that you were informed of the doctors' findings prior to the release thereof, having agreed not to disclose this information until the official findings were received?

THE WITNESS: Because Judge Kelly had asked me not to discuss it.

CHIEF JUSTICE DREW: Senator Gibson - - -

SENATOR CROSS: Mr. Chief Justice, the answer was not responsive to the question.

THE WITNESS: I am sorry, sir.

SENATOR CROSS: I would like you to repeat that question.

CHIEF JUSTICE DREW: Why didn't you inform your clients - - -

SENATOR CROSS: Why didn't you inform your clients?

CHIEF JUSTICE DREW: Why didn't you? It's my fault, Senator. Why didn't you inform your clients that you were

informed of the doctors' findings prior to the release thereof, but agreed not to disclose this information until the official findings were received?

THE WITNESS: I am sorry. I don't understand the question. Are you talking about why I did not tell them prior to the time the report was received?

SENATOR CROSS: No. Why would you become embarrassed? Why didn't you tell them right quick; tell them right quick, I mean, about this?

THE WITNESS: Because I was in Tallahassee at the time it appeared in the local paper.

CHIEF JUSTICE DREW: Senator Gibson: You said that you had practiced law before five other Circuit Court Judges. What was their rule regarding wearing coats?

THE WITNESS: I don't recall hearing them state any rule at all.

CHIEF JUSTICE DREW: I imagine the Senator would like to also know, did you wear coats before those Judges on all occasions?

THE WITNESS: On all occasions, no. As I have stated, at a Bar Association meeting which I had attended, it was agreed that any time we were taking testimony or were appearing in the Court Room, that the attorneys would be required to wear coats and ties.

However, in ex parte proceedings in Chambers, they would not.

CHIEF JUSTICE DREW: Senator Friday asks this question:

Who was in Court in behalf of the Defendant Jones to represent him at the time he was adjudicated incompetent and committed to Chattahoochee? Were you given notice of this hearing?

THE WITNESS: No sir. I was not in Court.

CHIEF JUSTICE DREW: That's all.

RE-CROSS EXAMINATION

BY MR. McALILEY:

Q Just to clear up one point. In the Brooks-Bryant case, were you on the Plaintiff's side and Mr. Larkin and Mr. Goodson were on the Defendant's side? Is that correct?

A Yes sir. That is correct.

Q Did you agree to submit an adjudication of insanity on the basis of the medical reports, as opposed to calling a formal hearing on the matter?

A There is no question of insanity in the Brooks-Bryant.

Q Oh, I am talking about the State vs. Jones. Excuse me.

A Yes sir.

Q Did you submit that question, the question of insanity at the time, on the basis of the doctors' report, as opposed to calling a formal hearing on the matter?

A You are talking about his competency to stand trial?

Q Yes.

A Yes.

MR. McALILEY: That's all I want.

MR. JONES: That's all we have, Your Honor.

CHIEF JUSTICE DREW: You may come down, Mr. Witness, and you will remain under the Rule until you are

released by respective counsel. I understand you may return to your home, subject to call. If that is incorrect, counsel will advise.

MR. JONES: That is correct.

(witness excused)

CHIEF JUSTICE DREW: Call your next witness.

MR. DANIEL: Call Mr. George C. Dayton.

Thereupon,

GEORGE C. DAYTON,

having been first duly sworn as a witness for and on behalf of the Managers, testified as follows:

DIRECT EXAMINATION

BY MR. DANIEL:

Q Please state your name, address and occupation or profession.

A My name is George C. Dayton.

I live in Dade City, Florida. My address is Post Office Box 444, and I am an attorney at law.

Q How long have you been an attorney, Mr. Dayton?

A For the past thirty years.

Q Where have you practiced during that thirty years?

A In Dade City, Florida.

Q Where did you take your law degree?

MR. NICHOLS: We will stipulate as to his qualifications as an outstanding attorney and an outstanding Representative and Senator.

BY MR. DANIEL:

Q Where did you take your law degree?

A I attended the University of Florida and Mercer University. Actually, I took the Bar Examination before I got my degree and never did go back to get it. I lacked about thirty days, or about six months.

Q This was prior to the time an act was passed requiring that?

A That is right, yes.

Q To what Courts are you admitted to practice?

A All of the Courts in Florida, the Federal Court for the Southern District of Florida, the Court of Appeal, Federal Circuit Court of Appeals, the Supreme Court of the United States, and the Federal Tax Court.

Q Have you practiced before all the Judges in the Sixth Circuit?

A I have never had any matter before Judge McNulty, and Judge Driver only signed one ex parte order for me, but other than that, I practiced before all of the other Judges of the Sixth Judicial Circuit.

Q Have you ever held any elective offices, and if so, what office or offices?

A Yes. I had the honor of serving the House of Representatives of the State of Florida for the 1947 and then the 1949 sessions. I also had the honor of serving as State Senator from the 38th Senatorial District in 1951 and 1953.

Q What counties comprised the 38th District at that time?

A Pasco and Sumter Counties.

Q Do you know Judge Richard Kelly?

A Yes sir, I know Judge Richard Kelly.

Q How long have you known him?

A A little over ten years. I believe that that is the time he came to Florida, but it's in the neighborhood of ten years; and he came to Dade City, rather, to practice law, and I believe that was about ten years ago.

Q Whom did he practice with there?

A He was associated with Judge Barnes, Judge W. Kenneth Barnes.

Q Have you ever appeared before Judge Kelly as an advocate since he has been elected to the Circuit Bench?

A Yes, I have.

Q Do you recall the style of the matters in which you appeared before him?

A Well, I have appeared before him in quite a few matters.

Q Well, with particular reference to Haymons vs. Groover. Do you recall that matter?

A Yes, I recall that case. In that case we filed an affidavit of disqualification, and that was not tried before Judge Kelly. That was tried before Judge Collins.

Q Did he disqualify himself in that matter?

A Yes.

Q Was this a voluntary disqualification, or did he grant the suggestion of disqualification?

A On that occasion he entered an order recusing himself, and we also - - - I believe the order granted his disqualification. I am not positive of whether the order actually set out voluntarily recused himself, or whether the order simply granted the petition for disqualification.

Q Were additional pleadings or documents filed subsequent to the order of disqualification or order of recusement by Judge Kelly?

A That is correct.

Q What was that additional?

A Judge Kelly filed what I term an apology for certain statements which he had made in his recent political campaign, and we, in turn, accepted his apology.

Q Whom do you mean by "we"?

A My firm.

Q Your firm is - - -

A Composed of myself and Charlie Luckie, Jr.; and filed an acceptance of his apology and said in that that we hoped that we would be able to practice before Judge Kelly and that this would allay the fears of our clients, who were concerned over cases in which we were involved and represented and which were going to be tried by Judge Kelly.

Q Now, were you handling this matter and any other matters before Judge Kelly for your firm?

A Would you repeat that?

Q I mean by you personally, were you handling these matters before Judge Kelly that came to trial before him?

A These matters were not before Judge Kelly. Judge Kelly - - -

Q Of course, I am referring to the matters that have been handled by your firm before Judge Kelly. I mean, did you handle these or did your partner?

A Oh, after this apology that we are - - -

Q Yes sir.

A Or acknowledgement?

Q Yes.

A Yes, I handled some matters personally before Judge Kelly.

Q Any trials?

A We had one trial, I believe, that went to final conclusion. We had several arguments in various other matters, but I believe practically all of the cases that I had before Judge Kelly, with one or two exceptions were settled before final determination.

Q I call your attention to the State of Florida vs. Simpson and ask you if your firm handled any portion of that?

A Yes. Our firm represented some of the Defendants in that. That was a combination suit. We represented one of the Defendants in that particular suit, but there Judge Kelly disqualified himself and did not hear any of the proceedings except those relating to the disqualification.

Q How many suggestions of disqualification were there filed?

A One filed by me and my firm, and there was another filed by the attorney for the Petitioner. Judge Barnes represented the State and the County, and both of our suggestions had one ground that was the same in both.

Q What was that ground?

A That was that Judge Kelly had been identified as an attorney of record in a suit involving the same subject matter which was involved in this suit. It was a drainage problem and the damages flowing from this drainage problem.

Q What was the action taken by Judge Kelly on these two suggestions that contained the common ground?

A Judge Kelly granted the suggestion of disqualification filed by the Petitioner and denied my disqualification, petition for disqualification.

Q Did Judge Kelly make any further reference to this case at any other time or place?

A Yes. At that time he made a speech from the Bench saying that - - -

Q Whom did he make the speech to? Who was present?

A Well, there was quite an audience there. The press was there, and it was in the open Court Room, and he made quite a statement to the effect that he wasn't interested in politics, that he was through with politics, but apparently, I was trying to carry on the campaign and so he was denying my petition but granting the petition of the State.

I wasn't given an opportunity to be heard. Of course, his ruling on the petition for the County rendered my question moot because he would actually step down as Judge.

Q And it contained one of the same grounds as yours?

A Same ground, one of the same grounds.

I had other grounds in my petition for disqualification in the affidavit I filed.

Q Did you attempt to answer this particular hearing?

A No. The only answer I felt was safe to give under the circumstances - - - my partner, I believe, simply stated that he did not want the Court to think by our filing that we agreed with his speech, or something to that effect.

Q What has been your policy, your personal policy, with reference to Court trials, both prior to and after Judge Kelly assumed the Bench?

A Well, of course I was apprehensive about trying cases before Judge Kelly when he first took the Bench, but because of the statements that he made in the campaign, which I felt were derogatory of not only my brother, but my family and also of me.

A direct attack was made upon my family, and also upon anybody that held office in the Court House, and consequently, I felt like to carry out his campaign promises, he would have to engage in some kind of reprisals from the Bench against me and my firm, and of course, my clients, who at that time, we had several matters pending before other Judges in the Sixth Judicial Circuit. These were Pinellas County Judges in various cases, and it was my idea that when a case of mine came before Judge Kelly in the regular course, that I would go ahead and try the case and see how we got along, but the next thing I knew, he had gone to the Clerk's office and had ferreted out various files in which my firm was involved, cases in which my firm was involved which had already been set before other Judges of the Sixth Judicial Circuit, Pinellas County Judges, and started sending out notices and taking jurisdiction of these cases.

Even though the lawyer on the other side had not sent out any notices, he sent the notices out and set them down for hearing.

Q Do you know whether he did this in the cases involving any other attorneys other than your law firm?

A Not that I know of, but when this happened, of course then I could not safely go into Court under those circumstances and risk the fate of my clients and their rights to his judgment, because I felt that the idea of seeking out my cases and deliberately setting them down for trial, of course made me feel that we could not get a fair trial for my clients, and in the Hackney Simpson, case, which you spoke about, I filed the first suggestion of disqualification.

There was another case of Hamilton vs. the Board of Public Instruction, which Judge Hobson was hearing in Dade City. Judge Kelly came in and took notes during the time that my opponent was making his argument, but left when I started to make my argument, and made quite an effort to try to have the case assigned to him, but of course it was eventually assigned to Judge Hobson; and then in the Hackney Simpson case which had been set, I filed a suggestion of disqualification, and in the subsequent case of Haymons vs. Groover or King vs. Groover, and it was in the Groover case that we finally filed the truce, so to speak.

Q How long did the truce last?

A Actually, we signed the truce - - - I tried several matters before Judge Kelly, as I stated. A good many of these were settled, but I was getting along fairly well with him after this truce was signed.

However, in the late summer of 1961, I had a heart attack and on the advice of my doctor, I quit handling as much trial work as I possibly could, and after that time most of the trial work was handled by my partner that the firm had.

Q Now, prior to - - -

First, let me say this. Are you related to Judge Orvil A. Dayton, former Circuit Judge?

A I am his brother.

Q And he was a Resident Circuit Judge of Pasco County prior to January, 1961?

A That's true.

Q What was the policy of your office with respect to the trial of matters in Judge Dayton's Court?

A Prior to the time that - - -

Q That is, prior to January, 1961?

A Prior to 1961?

Q Yes.

A It was our policy not to take contested matters before my brother. On some occasions opposing counsel insisted, but as far as I can recall, I don't think we ever had any contested matters before my brother until after 1961.

Q You say in some cases attorneys on the other side insisted. You mean insisted that cases be tried before him?

A That is correct, but declined to serve.

Q You stated after your heart attack you no longer were as active in the trial work as you had been before, and your partner, Mr. Luckie, began to handle most of the trial work for your firm?

A That's correct.

Q Now, subsequent to this truce being signed and, of course, subsequent to your heart attack, was there any difficulty between your firm or had any difficulty occurred between your firm and Judge Kelly?

A Well, nothing of any drastic nature. Of course, there was one case that I felt I had not been properly treated, but with that one exception, at least we got along without having any open difficulties.

Q Are you familiar with the action in which Judge Kelly ordered your law partner to appear before him?

A I am familiar - - - at that time when Judge Kelly ordered my partner to appear before him, which was not involved with any case or involved with any disciplinary matter, but was where he, where Judge Kelly issued an order and had the Sheriff serve it on my partner to appear before him for a speech that he was going to make.

Q All right. Now, subsequent to that time, did you have any further matters - - - your law firm, I mean - - - any further matters before Judge Kelly?

A No. After that, after this treatment that my partner received, I felt I could no longer take cases before Judge Kelly.

Q Were there other suggestions of disqualification filed in other matters before Judge Kelly?

A Yes. There was a suggestion of disqualification filed in the State Road Department condemnation suit vs. Scussel, which my partner filed, and I had a matter pending at that time involving properties - - - I have forgotten who the other parties were, and I filed a suggestion with that case. Any other matters that we had we simply did not file or were not up for hearing.

Q Are you familiar with the case of Mountain vs. Hudson Community Club?

A Yes, I am.

Q Would you relate the circumstances of that case, sir? What was heard by Judge Kelly, or any portion of it?

A In that case - - - this is after the truce was signed, and was a case involving the Hudson Community Club, which is a community club for the little town of Hudson, and they operate the water works system, and an effort was being made by a man named Mr. Mountain to enjoin the Hudson Community Club from serving a certain subdivision, and the whole case of Mr. Mountain was based on the premise that he held an exclusive franchise from the Board of County Commissioners of Pasco County, and an application was made for a temporary injunction, and I had found a case which I thought was squarely in point.

Q Who made the application for a temporary injunction? You?

A No. Mr. Fussell, of Tampa, was representing the Plaintiff in that case and I was representing the Hudson Community Club, which was the Defendant.

The application was for a temporary injunction, and as I say, I found a decision which was squarely in point, saying that the statute did not authorize the Board of County Commissioners to grant an exclusive franchise, and that was all there was to it.

I mean, I thought this was determinative of the whole issue, but when I got over there Judge Kelly took over the entire proceedings and I was unable to get a word in edgewise, and he finally wound up by denying the application for temporary injunction, which, of course, was the result I was trying to seek.

And then he said that he didn't want to hear any argument on the motion to dismiss. And he wanted to see if we could stipulate as to the facts and come back and have a final argument on the merits as soon as possible, which we did, and when I got back to argue that again, then again Judge Kelly continually talked about the case and I was not given opportunity to read this particular case that I had.

So, finally, in desperation I handed it to opposing counsel and he read it and agreed that he didn't have any case.

Q And did he accuse you in the argument that you were not presenting to the Court on the matters that had been set down?

A I had to convince opposing counsel I was right.

Q And he stipulated to a dismissal?

A He stipulated to a dismissal, and Judge Kelly was still talking.

Q At the time of the stipulation of dismissal, you mean?

A That's right, he was theorizing on their response, and about this and that, and I was just unable to get him to listen. I had the feeling he was talking to the audience, and not to - - - not paying any attention to what I was saying or anybody else.

Q What was it that you - - - what others do you have reference to?

A There were about, oh, ten or twelve people there. It was a Chambers hearing.

Q Now, are you familiar with any efforts, past or present, to move Pasco County from the Sixth Judicial Circuit?

CHIEF JUSTICE DREW: If counsel - - - if this is on a new subject, we could take a break right now - - -

MR. DANIEL: All right, sir.

CHIEF JUSTICE DREW: - - - if that's agreeable with counsel.

MR. DANIEL: Yes sir.

Whereupon, at 3:56 o'clock P. M., the Senate stood in recess.

The Senate was called to order by the Chief Justice at 4:07 o'clock P. M. A quorum present.

BY MR. DANIEL:

Q Mr. Dayton, are you familiar with the abortive attempt to move the Pasco County from the Sixth Judicial Circuit to the Fifth Judicial Circuit, just prior to the 1963 Session of the Legislature?

A Generally, I am familiar with that, yes sir.

Q Do you know, of your own knowledge, whether or not there had been a prior attempt to accomplish this same result?

A Yes, it had been discussed for many, many years.

I recall, when I was in the Legislature, the discussion came up, and it had come up before then.

Many of the attorneys and other people in Pasco County felt that Pasco County should have a resident judge, and that we would be more at home in the Fifth Circuit, or some other circuit, that wasn't quite as urban as Pinellas County.

Q What Congressional District is Pasco County in?

A They just changed us around. We were in the First for many years; I think we're now in the Fifth, Senator Herlong's District; I don't know the number for sure.

Q What counties were in the First Congressional District besides Pasco?

A At what time?

Q Prior to the change?

A On, prior to the change?

Q Yes sir.

A It was Hillsborough, Pinellas, Pasco and Hernando Counties were - - - comprised the First Congressional District.

Q And you say that Pasco is now in the Fifth Congressional District?

A That's correct. Hillsborough County has a congressman of their own, and so does Pinellas County, and both Pasco and Sumter - - - Pasco and Hernando Counties were annexed to the district to the north of us, which is Congressman Herlong's District, the one that he is.

Q Are the counties of Hernando, Sumter, Citrus, Marion, all in this Fifth Congressional District?

A That's correct.

Q And this was the same county which, for years, you have testified that attorneys had been trying to have Pasco County added to the circuit as well, the Fifth Circuit?

A That is correct.

Q Now, Mr. Dayton, I believe you testified about a speech that Judge Kelly made before a Women's Club in Zephyrhills. Did you testify about that?

A No, I did not.

Q Well, I ask you, in point of time, do you know of such a speech being made?

A Yes.

Q Now, what happened with respect to your trial of cases, filing of cases, and where you, as an attorney, would desire to file following that speech?

A Yes, I felt that all of the Bar who were supporting this measure, including myself and my partner, had been slandered by this speech, and that, for that reason, I could no longer safely risk the rights and fate of my clients in Judge Kelly's court.

Q Did you have any conversation with Judge Kelly with respect to the Circuit change?

A I have talked to Judge Kelly about that on one or more occasions.

Q Do you recall where these conversations took place?

A In his office or, perhaps, over the telephone. I've had quite a few conversations with Judge Kelly.

Q Do you recall the subject matter of the conversations in detail?

A Well, the only - - - as I say, it's hard to remember these things word for word. The general substance of our conversation was that I informed him that I didn't feel that I could take cases before him any more, that I felt that the - - - what he had done involving the Bench and Bar and public controversy, and with the parties in political flavor that he had added, and we had quite a few sharp remarks about that, but that was generally what the conversation was about.

Q Did you advise him at that time that there had been prior activity on the part of the Bar to change Pasco County's place, as far as the Circuit Court was concerned?

A I don't recall making any such exact statement. I don't know whether - - - I felt that he probably knew about it, but I don't know that I ever mentioned it to him. I don't recall it, if I did.

Q For clarification purposes, Mr. Dayton, there's been some testimony that there were two different times that your brother held a Circuit Judgeship. Would you explain that to the Senate, please?

A Well, he was appointed, first, in 1951, by Governor Warren, and he was reelected thereafter; and then, in the 1960 election, he was, of course, defeated by Judge Kelly, but it so happened that in the Sixth Judicial Circuit at that time, because of the population change, population growth in both Pasco and Pinellas Counties, that the Circuit was entitled to another judge, and Judge Collins - - - I mean Governor Collins appointed my brother as Circuit Judge for, of course, an additional two-year term.

Q Was this in exchange for the support of the Dayton family of Governor Collins?

A No.

Q Did the Dayton family support Governor Collins?

A No, the Dayton family did not support Governor Collins.

Q Mr. Dayton, have you ever, in your practice of law - - - I believe you testified you have practiced thirty years, sir, is that right - - -

A That's correct.

Q - - - filed any suggestion of disqualification of any judge other than Judge Kelly?

A I never have, no sir.

Q Are you familiar with the procedure and statute on disqualification of judges, of a judge?

A Fairly so, yes sir.

Q What discussion is allowed by the statute in the case law on disqualification of a judge?

A On the section of the statute that we were following, the judge is allowed only to pass on the legal sufficiency of the disqualification affidavits in suggestion; he is not entitled to pass on the truth or the falsity of any of the allegations, but only on the legal sufficiency.

If he thinks that the papers are legally sufficient, then, of course, it's his duty to immediately step down, and another judge is assigned, and the case goes on.

If he rules that the affidavits are not legally sufficient, the person moving has the right to apply either for a writ of prohibition or to go ahead and try the case, and urge that as error on appeal.

Q You say "the affidavit." Does this mean that the person signing it swears to the truth of the contents of the affidavit?

A That is correct.

Q What would be the remedy, if you know, that would follow a person falsely swearing in an affidavit in such procedure as that?

MR. NICHOLS: We object to that, Your Honor. It goes far beyond the scope of what we are here about.

CHIEF JUSTICE DREW: Would you repeat that?

MR. DANIEL: I asked him what would be the remedy, if he knew, of a person falsely swearing in an affidavit of this nature.

CHIEF JUSTICE DREW: Overruled.

THE WITNESS: I presume that the party could be prosecuted for perjury if the other elements of the crime of perjury were present, but that's - - - I quit giving positive answers about what the law is about anything a long time ago; that's just my opinion.

BY MR. DANIEL:

Q In how many counties in this state have you tried cases, or appeared before Circuit Courts, or before any other courts, for that matter?

A Well, at least fifteen.

Q Mr. Dayton, based on your experience as a lawyer, and your acquaintance with the general public in Pasco County, do you know Judge Kelly's reputation for the manner in which he has conducted his court in Pasco County?

A Yes sir.

Q What is that reputation?

A It's bad.

Q What do you base that on?

A Well, the fact that the - - - what the other members of the Bar say, and the members of the public say.

Q Would you hazard an educated guess as to how many members of the public, exclusive of the Bar, that you have either conversed with, or conversations have been conducted in your presence, the answers of which, or the conversation of which is a part of your answer or, rather, the basis of your answer that it's bad?

A Well, there are quite a few people that I have talked to. I would hesitate to hazard a guess, but I would say at least a hundred, from time to time; I couldn't recall all of their names, I'm sure, but that is the subject that's discussed quite often.

Q And these would be persons other than lawyers?

A Yes sir.

Q In point of time, over what period of time has - - -

A Well, since the - - -

Q - - - this knowledge of his reputation been developed?

A Since he was first elevated to the Bench.

Q So that it's been a continuing thing since that time?

A That's correct.

MR. DANIEL: You may inquire.

CHIEF JUSTICE DREW: I have a question from a Senator; Senator Johns would like to know:

Did Judge Kelly's attitude toward your law firm have any effect on your law practice in regard to new clients?

THE WITNESS: I'm sure that it did, detrimentally, because of the campaign statements, and I don't think the average layman could feel that he would have - - - that he would be fairly treated in a situation where I was attorney for - - - his attorney before Judge Kelly, because of the statements he made in his campaign, and so on.

CHIEF JUSTICE DREW: There are no further questions on the desk.

You may proceed.

MR. NICHOLS: Mr. Dayton, in view of the fact that your law partner, Charles Luckie, has already covered the same grounds, we have no cross examination.

THE WITNESS: Thank you, sir.

CHIEF JUSTICE DREW: You may come down.

MR. DANIEL: On the part of the Managers, the witness may be excused, to return home under the same situation we have.

MR. NICHOLS: Yes sir.

MR. DANIEL: Of course, you understand, you're still under the Rule, however, subject to recall, Your Honor; I forgot to add that.

THE WITNESS: Thank you.

(Witness excused)

CHIEF JUSTICE DREW: Call your next witness.

MR. O'NEILL: Call Richard T. Earle.

Thereupon,

RICHARD T. EARLE, JR.,

having been first duly sworn as a witness for and on behalf of the Managers, testified as follows:

DIRECT EXAMINATION

BY MR. O'NEILL:

Q Will you state your name, where you live, and your profession, please sir?

A Richard T. Earle, Jr., 1522 7th Street North, St. Petersburg, and I'm a lawyer.

Q Mr. Earle, how long have you been practicing law?

A Almost twenty-two years.

Q Have you practiced the entire time in St. Petersburg?

A Except for the period of time I was in the Army, yes sir.

Q What official positions, if any, do you hold in connection with the Bar or organizations relative to the Bar of Florida?

A I'm on the Board of Governors of the Florida Bar, and have served there for, I believe, seven years.

Q Have you had any other official positions in connection with the administration of justice?

A I am Chairman of the Pinellas County Judiciary Committee, which was created by a special act of the Legislature.

Q What is the purpose of that committee?

A It's to assist the Legislative delegation in determining changes that are needed in the organization of our courts.

Q What is the official function of the Florida Bar in the administration of justice?

A I believe the primary function of the Florida Bar is to aid in the administration of justice; I think that's about it's only justification.

Q There has been some testimony about O. L. Dayton, Jr. Do you know O. L. Dayton, Jr?

A Yes sir, he's a good friend of mine.

Q What position, if any, did he hold in the Sixth Judicial Circuit?

A He was Circuit Judge.

Q Did you support him for election at the time Richard Kelly ran as his opponent?

A To the best of my ability, I did.

Q Did you contribute to his campaign fund?

A I think he had a limit of \$100 on contributions, and I believe I contributed \$100.

Q State to this Senate, this Court, the first time that you met Richard Kelly as a Circuit Judge?

A I believe the first time I met him - - - I remember the occasion; I believe the date was sometime in February of 1961.

Q Have you ever contributed to any campaign fund or supported any Republican for Circuit Judge in the Sixth Judicial Circuit?

A Yes sir.

Q Which one?

A I am sure that I have helped Judge Leavengood.

Q Are there others?

A No sir.

Q Is Judge Leavengood still on the Bench. - - -

A Yes sir.

Q - - - in Pinellas County, or in the Sixth Judicial Circuit?

A Yes sir.

Q Do you recall at the time that he was elected to the Circuit Judge Bench?

A Yes sir.

Q Do you recall approximately what year that was?

A No sir, I don't.

Q Do you recall who his opponent was?

A Yes sir.

MR. MASTERSON: May it please the Court, Judge Leavengood is not on trial here, and I think these questions are highly improper and immaterial.

MR. O'NEILL: If it please the court, I think there's been plenty of testimony to show who supported who in what races for judges in Pinellas County and Pasco County, the Sixth Judicial Circuit.

CHIEF JUSTICE DREW: Would you state what it has to do with Articles of Impeachment, what the purpose is?

MR. O'NEILL: The purpose is to show that this witness has supported other candidates, and did not support Richard Kelly, and goes to the very point of his testimony.

CHIEF JUSTICE DREW: Well, he stated, did he not, that he did not support Richard Kelly?

MR. O'NEILL: Yes sir.

CHIEF JUSTICE DREW: That he did support Dayton?

MR. O'NEILL: And it goes to the question of the partisan politics, may it please the Court.

MR. MASTERSON: May it please the Court - - -

CHIEF JUSTICE DREW: I fail to see the relevancy of the question, as far as that.

MR. O'NEILL: Very well, sir.

BY MR. O'NEILL:

Q Will you state the first time that you met Judge Kelly, and under what circumstances, and how it occurred, sir?

A As I stated a few moments ago, I remember the occasion; I believe it was in February of 1961, right after he took the Bench.

Judge Kelly called me on the phone and told me that he would like to talk to me, and I told him I would come right on over and talk to him.

Q Did you, sir?

A Yes sir, I went over to his office.

Q State that conversation, as nearly as you can remember at this time?

A I went over to his office.

He told me that he had been elected, that many of the lawyers - - - the fact is, most of the lawyers resented the fact that he had been elected Circuit Judge; that some of the judges resented it; that he was having trouble, or difficulty with some of the lawyers, relative to his hearing their cases; that he was having some difficulty with some of the judges over the trial of criminal cases; and asked me - - - or he said, "You're interested in the administration of justice. I need help. I would like your advice."

At that time I explained to him carefully that I might be one of those who resented his election, that I had supported Judge Dayton; that I was no friend of his, but he was a judge, and I would help him to the best of my ability.

I then explained to him - - - he explained his problem, that Judge Bird - - - and I think he put it rather bluntly - - - did not want him to try any criminal cases. He explained to me that he was a first-class Circuit Judge,

that his jurisdiction was as great as the jurisdiction of any other Circuit Judge; that it was important for the administration of justice that he exercise his full jurisdiction.

I explained to him that he was not the first Circuit Judge in our circuit who had been elected under these circumstances, that Judge Leavengood had been elected the same way, that the lawyers and the judges resented the election of Judge Leavengood; that Judge Kissinger had been elected under substantially the same circumstances; that both of these judges, when they went on the Bench, dismissed politics from their minds; they forgot who supported them and who opposed them, and they went on that Bench with the sole idea of being the best judge that they knew how to be; that they sat behind that Bench, they heard the cases patiently, they didn't agitate, and they ruled; that by following this procedure, Judge Leavengood had become probably the most respected Circuit Judge we had; that Judge Kissinger was a respected Circuit Judge; and that people, lawyers and other judges had acquired confidence in them, and that they were first-class judges, not only in their own minds, but in the minds of all of the lawyers and all of the other judges, and that they had no problems.

I suggested to him that he merely follow the same procedure; and that just about ends the conference. It may have taken an hour, but that was, in substance, what transpired.

Q Do you know why he called upon you for this conversation? Was it because of your official position or your position in this county as a member of the Board of Governors or former president of the association for many times?

A I don't know why. I didn't ask him.

Q Did he follow your advice, sir?

MR. MASTERSON: That is a matter of conclusion. I object to the question.

MR. O'NEILL: I will withdraw it.

BY MR. O'NEILL:

Q Did you later have a conversation, Mr. Earle, with Judge Kelly?

A Well, I think that was on a Tuesday. When he called me either the following Thursday or Friday and asked me to come back, I went back and we went through the same conversation again.

Q Did you later have another conversation with him? You say the same conversation. Essentially what you have just previously testified?

A Yes sir, substantially.

Q All right. Did you later have another conversation with him?

A Not on this subject, no sir. I had other conversations with him.

Q All right. State those conversations and along about the time they occurred just as you can remember.

A The next time I had any extended conversation with him was when the movement was afoot to remove Pasco County from the Sixth Circuit.

He asked me to come over and talk to him, and I did, and he brought that subject up and asked me to attempt to get the St. Petersburg Bar Association to take a stand in opposition to this movement on the basis that the movement was not good for the administration of justice because it was an attempt to deprive him of a portion of his jurisdiction.

Q Did you approach some members of the St. Petersburg Bar Association, and if so, whom?

A I discussed it with the Executive Committee.

Q Did they take a stand in connection with the subject matter that you testified about?

MR. MASTERSON: Objected to as hearsay.

MR. O'NEILL: I didn't ask him what the stand was. I just asked if they took a stand.

CHIEF JUSTICE DREW: Overruled. He can say whether they took a stand or not.

THE WITNESS: Yes sir. They took a stand.

BY MR. O'NEILL:

Q Do you know what that stand was?

A Yes sir.

MR. MASTERSON: Objected to as hearsay.

CHIEF JUSTICE DREW: Objection overruled.

THE WITNESS: Yes sir. I know what it was.

BY MR. O'NEILL:

Q What was it, sir?

MR. MASTERSON: Objected to as hearsay.

CHIEF JUSTICE DREW: Just a minute. Was there any official action taken, Mr. Earle?

THE WITNESS: Any official action taken? Yes sir, Judge. The Executive Committee determined what it was going to do and it did it.

CHIEF JUSTICE DREW: I mean by official action, minutes of a formal meeting?

THE WITNESS: No sir. They don't keep minutes of the Executive Committee meetings.

CHIEF JUSTICE DREW: Overrule the objection. You can state it.

THE WITNESS: They decided to take no stand whatsoever in the matter and to leave it strictly alone.

BY MR. O'NEILL:

Q Now, Mr. Earle, did you later have a conversation in relation to any other subject with Judge Kelly?

A Yes sir. I don't know the exact date of it. Let me refer to my file a moment.

Q Refresh your memory, if you will.

A It was approximately a week before March 22, 1963.

Judge Kelly called me and asked me to come to his office, and I did.

Q All right. State the nature of that conversation and what was said, please.

A He explained to me that a petition had been filed in a case to disqualify him. He told me it was a very important matter from the standpoint of the administration of justice.

He wanted his decision in that particular matter, and I think this is the case - - - to be founded upon a bed rock foundation of justice and law.

He asked me if I would find some other lawyer and if we would research the question as to the sufficiency of the petition for disqualification. I told him that I would.

Q Did you do so?

A Yes sir. I found another lawyer, Sam Mann, Jr.; we researched the problem, but in researching it, we came to the conclusion that it would not be appropriate for us to furnish Judge Kelly a memorandum without furnishing all of counsel exactly the same memorandum, because this was a litigated question. So we prepared a memorandum which came to absolutely no conclusions, but listed all of the - - not all, but most of the illustrative cases in Florida on the question of disqualification.

Mr. Mann and I took it over to Judge Kelly, and it, of course, was of little benefit, really, in determining the question. So we told him that we were not coming to any conclusions on this matter unless we were appointed amicus curiae or given some semi-official position, and unless the conclusions which we came to could be argued in the open Court Room.

Judge Kelly said that that suited him fine, that he was merely interested in determining what the law was, and if we would determine on that basis, he would be satisfied.

At that time we explained to Judge Kelly, and somewhere through the conversations "contempt" had come into this matter; just how or why, I don't know; but we explained it to Judge Kelly, I explained it to him, that I was not interested in doing any research on this problem of whether Charlie Luckie was guilty of contempt in filing this petition, that I did not want to become involved in it, that orderly procedure required, I believed, that he determine the sufficiency of the motion to disqualify first, and having determined that question, then he could take whatever action he wanted.

And I felt that we had a tacit understanding at least, that he would not become involved in the contempt proceedings, but that we would go on and help the Court in the disqualification matter and leave the contempt alone.

Q Did you tell Judge Kelly that you would or would not arrive at any conclusion, and that you would make your argument in open Court?

A That's right. I told him that we would not show him, outside of the open Court Room, what our conclusion was, that we would go into the open Court Room and argue the sufficiency of the motion to disqualify, and Judge Kelly said that that suited him fine, that all he was interested in was coming to a correct decision.

Q Was it ever argued in the open Court Room?

A No sir. The day was set for argument at eleven o'clock in the morning or four o'clock in the afternoon, or some time in Pasco County, and the day before the argument I was informed that there would be no argument.

Q Who informed you of that, sir?

A A young lawyer by the name of McDermott, in Clearwater.

Q Do you know whether or not he was taking the message from Judge Kelly to you, the purported message?

A He said he was.

Q And you took that as being the finality of this question?

A That's the last I have heard of it.

Q Mr. Earle, do you know the reputation of Judge Kelly amongst the members of the Bar and in the community as to the manner in which he conducts his cases and handles his Court?

A I do.

Q What is that reputation?

A Bad.

Q On what do you base that, sir?

A Upon what do I base that answer?

Q Yes sir.

A Upon what lawyers have told me, their comments.

Q Do you have any cases that you handled before Judge Kelly?

A Yes sir, I have handled three hearings in all before him.

Q Were those matters in which there were motions or some type of hearing like that?

A Well, there were hearings in Chambers. One was a motion for a new trial and another was a pre-trial conference. The other was a divorce case.

Q Approximately how many attorneys have you talked to in the community of St. Petersburg, or been in conversation with or who have had conversation with you, about Judge Kelly?

A This is very difficult to estimate because this is, I guess, the leading topic of conversation among the lawyers; but I would estimate somewhere between, oh, somewhat more than fifty and less than a hundred.

Q Have you had any conversations relative to the same subject with members of the Clearwater Bar in Pinellas County?

A With a few, yes sir.

Q Do you have any idea as to the number there?

A I would say somewhere around ten or fifteen.

Q How about in the Pasco Bar, Pasco County Bar?

A I have never discussed Judge Kelly with any member of the Pasco Bar that I can remember.

MR. O'NEILL: You may inquire.

CROSS EXAMINATION

BY MR. MASTERSON:

Q Mr. Earle, you have testified that your first conversation with Judge Kelly occurred in February, 1961. That would have been one month after he took office. Is that correct?

A Mr. Masterson, I didn't make any memorandum of it, but it was right after he went on the Bench. Whether it was one month or six weeks or two months, I really don't know.

Q I am not really trying to hold you precisely by dates, but it was shortly after he took office?

A It had to be because I had never met the man until that conference, and had he been on the Bench longer, I would have met him.

Q And he came to you, I presume, because you were on the Board of Governors and he wanted the benefit of your advice and guidance in this situation? Is that what you gathered from his conversation?

A I gathered that generally, yes sir.

Q And he continued to lean upon you virtually through out his troubles, I gather? From time to time he would confer with you and say, "What can I do about this particular situation?"

A I believe that is a true statement.

Q Now, Mr. Earle, in your first conversation, you mentioned that Judge Leavengood had encountered a similar situation when he was elected and had overcome it. I want to ask you in fairness, there are some marked differences, are there not, between the situations which confronted Judge Leavengood and the one which confronted Judge Kelly? Will you agree with me on that?

A I don't know whether there was or not, initially. After he had been on the Bench for two weeks, I am sure there was a difference, yes sir.

Q Let me ask you this, sir. As you recall the situation, in the first place Judge Kelly was elected in Pasco County where the Bar was comprised of some twenty-three members.

MR. O'NEILL: We object to the question on the ground that that is not the fact at all. The facts are that he was elected to the Sixth Judicial Circuit and it included Pinellas County.

MR. MASTERSON: I think I stand corrected properly, Your Honor.

BY MR. MASTERSON:

Q But he was the Resident Judge for Pasco County where there was a small Bar composed of less than twenty-five members; is that correct?

A I don't know the answer.

Q You don't know whether he was a Resident Judge or you don't know whether - - -

A I don't know how many lawyers there are in Pasco County. It is a small Bar. I am sure of that.

Q It is a small Bar comparatively to a much larger Bar?

A A much larger? Mr. Masterson, as I remember, when Judge Leavengood defeated Judge Ellis, the Bar of St. Petersburg or Pinellas County was practically unanimous against Judge Leavengood.

Q Yes, but I am directing your attention now, if you know, to the comparative sizes of the two Bars.

A Well, St. Petersburg Bar must have three hundred fifty lawyers in it.

Q Yes sir, and the Pasco County Bar has about twenty-three or twenty-four, somewhere in there. So the situation is different in that respect, is it not?

A Yes sir.

Q Now, also, when Judge Kelly took the Bench, or when Judge Leavengood took the Bench, do you recall any organized effort on the part of the entire Bar to avoid having cases set before him?

A No sir.

Q Do you recall any lawyer coming before Judge Leavengood and suggesting that he disqualify himself before the Judge had ever heard a single case?

A No sir.

Q Do you recall any organized effort by the St. Petersburg Bar to establish another court which would eliminate a major portion of Judge Leavengood's jurisdiction?

MR. O'NEILL: I object to the question. That's not the facts in this case.

MR. MASTERSON: I will stand by the question. I will let the Court rule.

CHIEF JUSTICE DREW: You asked him if some proceedings were brought against Judge Leavengood?

MR. MASTERSON: Yes sir.

MR. O'NEILL: The question, though, he said another court. There has been no evidence there has been any attempt to organize another court.

CHIEF JUSTICE DREW: I think the objection is well taken. I sustain the objection.

MR. MASTERSON:

Q Do you recall any time, Mr. Earle, on the part of the lawyers of the St. Petersburg Bar or the Pinellas County Bar to disenfranchise Judge Leavengood and move him to another county?

MR. O'NEILL: I object to the question. There has been no evidence to disenfranchise anyone. That is a matter of voting privilege.

CHIEF JUSTICE DREW: He is asking him if he knew. You may answer if you knew.

BY MR. MASTERSON:

Q Do you know of any such effort, Mr. Earle?

A No sir.

Q Now, Mr. Earle, you yourself have appeared in Judge Kelly's Court on a number of occasions, is that right?

A Only three.

Q How has his treatment been to you on those three occasions?

A Judge Kelly has always been courteous towards me.

Q You have nothing to complain about in the matters which you handled before him?

MR. O'NEILL: Objected to. Repetitious.

CHIEF JUSTICE DREW: You may answer the question.

THE WITNESS: No sir.

BY MR. MASTERSON:

Q Now, you had considerable opportunity to observe Judge Kelly's conduct in court, with reference to his diligence. Would you tell us whether or not he was a diligent, hard-working Judge?

A I can't answer that question.

Q Do you know what his reputation is for diligence?

A Mr. Masterson, let me put it this way, and it's the best way I know to put it:

It is my understanding that Judge Dayton works long hours - - -

Q Are you talking about Judge Dayton or Judge Kelly?

A I mean Judge Kelly works long hours, but it is also my understanding that a large portion of this work is not devoted to actually handling legal cases before him.

Q It's your understanding that he works long hours, however?

A Yes sir.

Q And you have no personal knowledge of what goes on in his court room, other than what happened to you?

A This is why I didn't want to answer your question.

Q And what happened to you was favorable?

A Was what?

Q Was not unpleasant; you had no complaint about that?

A Well, the result wasn't good, but the treatment was fine.

Q Now, Mr. Earle, one final question:

You have mentioned that Judge Kelly was a leading topic of conversation among lawyers. Isn't it fair to say that any judge who is subject to an impeachment proceeding such as this, would be a leading topic of conversation among lawyers?

A Mr. Masterson, he has been a leading topic of conversation since prior to these impeachment proceedings.

Q But these impeachment proceedings have accelerated the conversation?

A There's no question about that.

Q And would you not say that the change of the circuit was a topic which provoked conversation, the proposed change of the circuit - - -

A No sir.

Q - - - provoked conversation about this judge?

A It provoked conversation, but he was still a leading topic of conversation prior to that.

Q Do you think that the filing of a forty-nine-page affidavit in the first case in which Judge Kelly presided might have had something to do with the twenty-nine-page suggestion of disqualification in the very first case over which Judge Kelly presided, might have stimulated conversation about it?

A I've never heard of that affidavit until just now, sir.

MR. MASTERSON: No further questions.

CHIEF JUSTICE DREW: I have a question, Mr. Earle, from Senator Johns:

Approximately how many hours of work had you and the other attorneys put on the research of the question Judge Kelly asked you to research for him?

THE WITNESS: May I have a couple of minutes to answer that, sir?

CHIEF JUSTICE DREW: Yes sir.

THE WITNESS: I would estimate, just looking at my memorandum on it, that we had in excess of two whole days. I imagine - - -

CHIEF JUSTICE DREW: Any other questions? Do you wish to go further?

THE WITNESS: I imagine that it's somewhere around twelve or fourteen hours.

CHIEF JUSTICE DREW: Did he give you any reason why you were not allowed to argue the question in open court?

THE WITNESS: Judge Kelly was perfectly willing that we argue this question in open court without telling him what we were going to argue. He didn't stop us. The hearing was cancelled.

CHIEF JUSTICE DREW: Well, did he give - - - the question was: Did he give you any reason why you were not allowed to argue the question in open court?

THE WITNESS: I've never discussed it with Judge Kelly.

CHIEF JUSTICE DREW: You've never discussed it with him since that time?

THE WITNESS: No sir.

CHIEF JUSTICE DREW: Are there any other questions of this witness?

(A question was sent up from the floor)

CHIEF JUSTICE DREW: Senator Stratton asks:

Are you convinced that a man's reputation is bad because someone else says so?

THE WITNESS: That is the only way I know to judge reputation, is what people say.

CHIEF JUSTICE DREW: Any other questions?

MR. O'NEILL: Is there any further cross?

MR. MASTERSON: I have one further question, if the Court please.

BY MR. MASTERSON:

Q Mr. Earle, this hearing on the contempt proceedings was cancelled because of the issuance of the writ of prohibition, was it not, in the Second District Court of Appeal?

A That is my understanding. I know it only by hearsay.

REDIRECT EXAMINATION

BY MR. O'NEILL:

Q Mr. Earle, will you explain your answer to the question by Mr. Masterson, as to the fact that he was hard-working, and put part of his time on other things other than cases in his court. Will you explain that?

Mr. Masterson asked you the question, and I've forgotten exactly how you answered it.

MR. MASTERSON: We object to the question because the witness has stated that he wasn't there to see what the judge did during these sessions, and his answer would be based entirely upon hearsay.

MR. O'NEILL: May it please the Court - - -

MR. MASTERSON: This was brought out on cross examination.

CHIEF JUSTICE DREW: I think he should have a right to explain to State Counsel what he said, Counsel; he may not have heard the answer.

THE WITNESS: To answer that question, I almost have to do it by example;

Judge Kelly - - - and this is an example of what people are talking about - - - Judge Kelly had a week of jury cases set for trial.

CHIEF JUSTICE DREW: Are you speaking from knowledge or hearsay, Mr. Earle?

THE WITNESS: One of those cases happened to be one of our office's cases; so, I know this of my own knowledge.

BY MR. O'NEILL:

Q All right, sir, you can state it.

A It was about the same time that either the movement to move Pasco County from the Sixth Circuit occurred, or when this petition for disqualification came up; I don't remember which, but Judge Kelly showed up in St. Petersburg Monday morning. We had a week's cases set for trial. He cancelled the week's cases because - - - I believe the reason he gave was that he - - - for personal reasons, he couldn't try them; and then he

retired to the library to research the problem, I believe, of disqualification, which meant that that whole week's jury trials were shot for that term.

Now, that's what I meant when I said - - - it's a sample of what I meant when I said that he has a reputation for being hard-working.

Q All right, sir. Now, would you explain how the cases are set in Pinellas County, or in that circuit, of a week of jury trials, and how many cases might be set. You say you had one yourself?

A I believe they normally set about five cases for a week, thinking that two or three of them will be settled.

Q Are there jurors called for Monday morning?

A If I'm not mistaken, that particular Monday morning. - - - I believe this figure is right - - - there were fifty-four jurors present, who were dismissed and sent home.

Q All right, sir. Were there counsel there for the various parties on the suits involved in that week?

A Well, there were some counsel there, because, although you set a week's cases, beginning on Monday morning, at the pre-trial conferences, the judges try to schedule them; and so, all of counsel weren't there, I'm not sure. I just don't know how many.

Q Were there any witnesses there, do you know?

A Yes sir, yes sir, there were witnesses there.

Q Do you have any ideas as to how many, the number?

A No sir, I don't.

MR. O'NEILL: You may inquire.

CHIEF JUSTICE DREW: I have a question from Senator Edwards:

What do you think of Judge Kelly's character? Is it good or bad?

THE WITNESS: I've never heard anybody say that Judge Kelly was dishonest, immoral, or that his character was bad. I don't know whether that answers the question or not, but - - -

CHIEF JUSTICE DREW: I have another question for the witness:

Did Judge Kelly give you or make available to you the petition or suggestion for disqualification prior to your making your research for him on the question?

THE WITNESS: Yes sir, he made available the petition for disqualification and all of the exhibits. I have them here in my file still.

CHIEF JUSTICE DREW: If the answer is yes, wasn't the forty-nine-page affidavit referred to by Mr. Masterson in cross examination a part of that petition?

THE WITNESS: I don't think so, because I don't believe that this was the first case that Judge Kelly presided over. I think he referred to a forty-nine-page affidavit in the first case that Judge Kelly presided over.

CHIEF JUSTICE DREW: If the answer to the last question is yes, why did you answer Mr. Masterson's question about the forty-nine-page affidavit in support of disqualification by saying you had never heard of it until just now?

Do you wish to explain that further, Mr. Earle?

THE WITNESS: My answer to the other question was "no". My understanding of Mr. Masterson's question was, was Judge Leavengood confronted with a forty-nine-page affidavit in the first case that he presided over.

This case of State against Aiken was not the first case that Judge Kelly presided over; he had been on the Bench for two years; so, I'm sure that he wasn't talking about this affidavit, he was talking about an affidavit that I've never heard of, in another case.

MR. O'NEILL: That's all; we have no further questions, Your Honor.

CHIEF JUSTICE DREW: Any further questions?

MR. O'NEILL: May it please the Court - - - oh, excuse me.

MR. MASTERSON: I do have one more - - - one or two more, Mr. Earle.

REXCROSS EXAMINATION

BY MR. MASTERSON:

Q Do you recall when this week of cancelled jury trials that you referred to occurred? What was the date of that week, approximately?

A Mr. Masterson, I don't know. It was during the fall term of court, and I believe it was - - - well, I know it was in the spring of this year.

Mr. Hawes was going to try a case for our office, and he may have the date. Sam Mann, Jr., had a case he was going to try; I'm sure he has the date.

Q Well, it was about the time that these suggestions of disqualification were made, was it not?

A It was either when the suggestion for disqualification was made or when the movement to move Pasco County out of the Sixth Circuit came up, one or the other.

Q And he cancelled that to do some research into that problem?

A Yes sir, that's right.

MR. MASTERSON: Thank you. No further questions.

CHIEF JUSTICE DREW: You may be excused, Mr. Earle, and you may return to your home, subject to being recalled back at a subsequent time.

MR. O'NEILL: Mr. Earle, you understand you're still under the Rule also.

THE WITNESS: Yes sir.

(Witness excused)

MR. O'NEILL: May it please the Court, the next witness it would be proposed to call by the Managers would take considerably more time than the remaining time for this session and, therefore, I would respectfully request the Senate to consider a motion to adjourn until 9:30 in the morning.

SENATOR PRICE: Mr. Chief Justice, I move we adjourn at this time.

SENATOR ASKEW: Mr. Chief Justice - - -

CHIEF JUSTICE DREW: Senator Askew of the 2nd.

SENATOR ASKEW: I just wondered when the motion of the Respondent to strike the testimony of the bank official, when this is going to be argued, or when the Board of Managers is supposed to present their brief on the question.

MR. O'NEILL: It was my understanding that the brief had been presented to the Secretary; now, whether it's been distributed or not, Senator, I don't know. I will see if I can inquire.

The brief has been filed with the Secretary, as I understand it.

CHIEF JUSTICE DREW: It has been received. It will be on the desks in the morning.

I understand a motion for adjournment has been made.

MR. NICHOLS: Your Honor, may we inquire approximately of the Board of Managers as to about when they expect their case will finish?

MR. O'NEILL: Mr. Nichols, I think I informed you of that last evening, that we propose to endeavor sometime tomorrow, and we advised you again this morning, on conversation, and I think I advised with you on several occasions, that we propose to try to finish tomorrow.

CHIEF JUSTICE DREW: I think that's a matter in which the Senators would be interested, too because, if

I remember, the other day the question was asked, and we never had - - I know you haven't been in position to answer it, but you do think that you will rest tomorrow?

MR. O'NEILL: We expect to try, Your Honor.

CHIEF JUSTICE DREW: Well, you can't be bound by it, we don't intend to do that, but that's your guess?

MR. O'NEILL: Yes sir.

CHIEF JUSTICE DREW: Thank you.

The hearing is recessed until tomorrow morning at 9:30.

Whereupon, the Senate, sitting as a Court of Impeachment, adjourned at 5:02 o'clock P. M., until 9:30 o'clock A. M., Tuesday, September 24, 1963.