

J. D. FREDERICKS.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

IN AND FOR THE COUNTY OF LOS ANGELES.

Dept. No. 11.

Hon. Geo. H. Hutton, Judge.

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The People of the State of California,)

Plaintiff,)

vs.)

Clarence Darrow,)

Defendant.)

No. 7373.

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REPORTERS' TRANSCRIPT.

VOL. 13

I N D E X.

	Direct.	Cross.	Re-D.	Re-C.
Henry H. Flather,	972	982	1000	

AFTERNOON SESSION.

June 5, 1912. 2 o'clock P.M.

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4 THE COURT: Proceed in the case of People vs Darrow.

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7 HENRY H. FLATHER, on the stand for
8 further direct examination:

9 MR FORD: The next check "No. 83. Washington, D C,
10 November 4, 1911. The Riggs National Bank, formerly Riggs &
11 Co. Pay to the order of Clarence Darrow Ten Thousand and
12 no/100 Dollars", figures "\$10,000. Frank Morrison, Secy.
13 Special No.5."; in red ink on the face, "Not over \$10,000";
14 endorsed in ink, "Clarence Darrow"; in ink, "C S Darrow,
15 Trustee"; rubber stamp endorsement, "240. Pay to the order
16 of the First National Bank, Los Angeles, Cal. November 8,
17 1911. Equitable Savings Bank, Los Angeles, Cal., J G Cary,
18 Cashier"; endorsement, rubber stamp, "Pay to the order of
19 any bank or banker, all previous endorsements guaranteed.
20 Nov 9 1911. First National Bank, Los Angeles, Cal. Cage No.
21 3. W T S Hammond, Cashier." Endorsement, rubber stamp,
22 "Pay Riggs National Bank, Washington, D C; all previous
23 endorsements guaranteed. Pay First National Bank Detroit,
24 Michigan, F G Smith, Cashier."

25 "No. 89. Washington, D C, November 9, 1911.
26 The Riggs National Bank, formerly Riggs & Co. Pay to the

1 order of Clarence Darrow Ten Thousand and no/100 Dollars".
 2 Figures, "\$10,000." Signed, "Frank Morrison, Secy. Special
 3 No.5." In red ink on the face of check, "Not over \$10,000."
 4 Endorsed in ink, "Clarence Darrow"; in ink, "Clarence Dar-
 5 row, Trustee". Rubber stamp endorsement, "Pay any Bank or
 6 Trust Co, or order, prior endorsement guaranteed. November
 7 15, 1911. Commercial National Bank, Los Angeles. Newman
 8 Essick, Cashier." Rubber stamp endorsement, "Pay to the
 9 order of Girard National Bank, Philadelphia, Pa., all prior
 10 endorsements guaranteed. Nov 20 1911. To the First Nation-
 11 al Bank of Pittsburg, Pa. F H Richard, Cashier." Rubber
 12 stamp endorsement, "All previous endorsements guaranteed.
 13 Pay to the order of any Bank or Banker. Girard National
 14 Bank, Philadelphia, Pa. Joseph Wayne, Jr., Cashier.
 15 Nov 21 1911."

16 "No. 92. Washington, D C. November 15, 1911.
 17 The Riggs National Bank, formerly Riggs & Co. Pay to the
 18 order of Clarence Darrow Ten Thousand and no/100 Dollars."
 19 Figures "\$10,000." Signed "Frank Morrison, Secy. Special
 20 No.5." Endorsed in ink, "Clarence Darrow"; in ink, " C S
 21 Darrow, Trustee"; rubber stamp endorsement, "240. Pay to
 22 the order of the First National Bank, Los Angeles, Cal.
 23 Nov 20 1911, Equitable Savings Bank, Los Angeles, Cal.
 24 J G Cary, Cashier." Rubber stamp endorsement, "Pay to the
 25 order of any Bank or Banker. All prior endorsements guar-
 26 anteed." Date blurred. "First National Bank, Los Angeles,
 Cal. Cage No. 3. W T S Hammond, Cashier." Rubber stamp

1 endorsement, "All prior endorsements guaranteed. Pay any
2 Bank or Banker or Order. Nov 25 1911. The Fourt Street
3 National Bank, Philadelphia, Pa. R J Clark, Cashier." On
4 this also appears some pencil memorandum I will not read.
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1 MR. FORD. Now, in this book, your Honor, containing the
2 exhibits which have been introduced, are a number of
3 other documents which are not a part of this case and if
4 your Honor will admonish the jury that they must not look
5 at anything except those checks, I would like to have the
6 jury look at the checks which have been introduced.

7 THE COURT. Do you want them to look at them now?

8 MR - FORD. I have some photographs segregated from the
9 others, which, if counsel desires, to let them look at
10 instead of these.

11 MR. ROGERS. Use the photographs?

12 MR. FORD. We ask that the jury be permitted to look at
13 the book.

14 THE COURT. Gentlemen of the jury, in examining this book
15 and its contents you will disregard any other checks that
16 may be found in the book except those that have been
17 introduced in evidence. You can designate them by the
18 fact that they are all drawn in favor of the defendant
19 here, Clarence Darrow.

20 MR. APPEL. I want to know whether the book is considered
21 in evidence, your Honor?

22 THE COURT. The checks that have been read in evidence
23 only are in evidence, with the endorsements thereon as
24 read.

25 MR. APPEL. Then, we will take an exception to your
26 Honor and the district attorney in passing over the books

1 and other exhibits therein to the jury, the checks being
2 intermixed with other evidence and other checks that are
3 not in evidence and they have to necessarily look at
4 all of them in order to find the ones introduced.

5 MR. FORD. Counsel have an opportunity to examine that
6 book and if there is therein any specific check that they
7 think is prejudicial I would like to have them designate
8 them. I do not think they have any bearing on this case and
9 that they are prejudicial.

10 THE COURT. The court has admonished the jury and counsel
11 is making an objection and exception, which he has a right
12 to do. Is it necessary to take up time at this hour,
13 however, to examine it?

14 MR. FORD. The jury are entitled to look at the exhibits
15 whenever they are introduced.

16 MR. APPEL. Your Honor, these checks, as I understand it,
17 are attached to stubs having memoranda in reference to
18 what those checks are for and the jury will necessarily
19 look at them.

20 THE COURT. The jury has been admonished to disregard
21 everything except the checks themselves, that includes
22 the stubs. There is nothing in that book the jury
23 should consider except the checks.

24 MR. FORD. I now hand to counsel for defense--

25 THE COURT. You better wait a minute. The jury cannot do
26 two things at once. If you want them to examine that book

1 give them time to do it .

2 (Book handed to jury by Mr. Ford and jurors examine same.)

3 MR. FORD. I attract your attention, Mr. Flather, to a
4 document which I have already exhibited to counsel for
5 defense, and ask you to state whether you have ever seen
6 it before or not? A Yes, I have seen it.

7 Q State whether or not that is a part of the files of
8 your bank, received inthe ordinary course of business and
9 filed in the ordinary course of business when received?

10 A It is and has been filed.

11 Q Will you state the circumstances under which it was
12 received?

13 MR. APPEL. We object to that on the ground it is incompetent
14 irrelevant and immaterial for any purposes whatsoever;
15 hearsay; no foundation laid, not being the act or deed
16 of the defendant, not made in his presence or by his
17 authority or with his knowledge and consent.

18 MR. FORD. We wish to show that it accompanied check
19 No. 30 which has been already introduced in evidence and
20 identifies that check as a check received from the bank
21 designated in the remittance letter and we will show
22 the--well, the check itself already shows the defendant's
23 signature on it, therefore, it is connected with the
24 defendant and it is admitted, stipulated in court by the
25 defendant and his counsel both that it is the signature
26 of the defendant upon that check. We wish to follow that
up, that particular check at the present time.

Pete 1 MR APPEL: We object to any evidence being given in the
2 presence of the jury while a part and a portion of the jury
3 is not paying attention to the evidence, not hearing the
4 same, engaged in the examination of documentary evidence
5 introduced here.

6 THE COURT: Objection sustained.

7 MR FORD: Will you read the question, please.

8 THE COURT: You can have the question re-read when the
9 jurors have finished the examination of the documents.

10 MR FORD: Very well, your Honor.

Sm 11 THE COURT: Gentlemen, the jury has finished with the exhibits.
12 Read the last question.

13 (Last question read by the reporter)

14 MR FORD: Now, is your Honor's ruling based on the fact
15 as to the time I asked it, or some other ground?

16 THE COURT: On the objection as stated.

17 MR FORD: Then one of the grounds was it was during the time--

18 THE COURT: On the sole ground of the objection.

19 MR FORD: I will then ask the question at the present time:
20 State the circumstances under which that document was re-
21 ceived by your bank?

22 MR APPEL: Objected to as incompetent, irrelevant and im-
23 material; no foundation laid. It is hearsay and not binding
24 upon the defendant.

25 MR FORD: If your Honor will look at the document you will
26 see the connectâdn between it and the document already intro-
duced.

1 THE COURT: I want to say at this time, gentlemen, this
2 witness informs me he has very urgent business that calls
3 him back and it is desirable that his testimony be taken
4 and closed today.

5 MR FORD: We will be very brief, now.

6 THE COURT: Objection overruled.

7 MR APPEL: Exception.

8 A We received this letter from The Anglo, London & Paris
9 National Bank, San Francisco, upon September 7. Shall I say
10 what we received in it?

11 MR FORD: Yes.

12 MR APPEL: We object -- I understand subject to the same
13 objection?

14 THE COURT: Subject to the same objections.

15 A We received in this letter three checks; one for
16 fourteen --

17 MR FORD: Possibly I am not interested in all of the checks.
18 State whether or not any one of the three checks were any of
19 the checks that have already been introduced in evidence as
20 Exhibit No.10? A Yes, one check was on ourselves for
21 \$10,000, drawn by Frank Morrison, Secretary, Special No.5
22 account.

23 Q Do you know what check that is in Exhibit No.10 which
24 has been introduced in evidence here? A I can tell it as
25 soon as I see it.

26 Q Can I have Exhibit 10, Mr Clerk? I will ask you to

1 look at check No.30, and state whether or not that is the
2 check? A Check No.30, dated August 21 is the check that
3 was enclosed in that latter.

4 Q And that check was received by you with this document
5 which you have just testified about on what date?

6 A On September 7th.

7 Q 1912? A 1911.

8 MR FORD: We will offer in evidence this document which has
9 already been exhibited to counsel.

10 MR APPEL: We object to it upon the ground that it is in-
11 competent, irrelevant and immaterial, and hearsay and not
12 binding upon the defendant; no foundation laid; being the
13 acts and declarations of other persons not in his presence,
14 not binding upon him and not made by the defendant.

15 THE COURT: Objection overruled.

16 MR APPEL: We take an exception.

17 MR FORD: Cross-examine.

18 MR APPEL: Mr Witness --

19 MR FORD: Pardon me just a moment. I wanted to read this
20 to the jury. (Reading) "The Anglo & London Paris
21 National Bank, San Francisco, Sep 2 1911. Riggs National
22 Bank, Washington. We hand you herewith items as listed
23 below for credit to our account. Do not hold items for
24 convenience of drawees. Protest all items over \$25, unless
25 marked X, but do not protest any item which does not bear
26 endorsement of parties other than drawer or ourselves.

1 Wire advice of none-payment of items \$500 or over."

2 Drawn on U -- I will read the third item.

3 "U 10,000." Attract your attention to that third item,

4 "U" amount "10,000". Will you kindly explain to the jury
5 what that indicates?

6 MR APPEL: We object to that --

7 MR FORD: Under endorsement of your bank and bankers.

8 MR APPEL: Wait a moment. We object to that upon the ground
9 it is incompetent, irrelevant and immaterial, and calling for
10 secondary evidence; no foundation laid, and hearsay so far
11 as the defendant is concerned.

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1 THE COURT. Objection overruled.

2 MR. APPEL. Exception.

3 A U, means drawn on ourselves, on the Riggs National
4 Bank. In other words a check drawn on the Riggs National
5 Bank.

6 MR. FORD. And that is that third item which referred to
7 check No. 30? A This check No. 30 for \$10,000 dated
8 August 1, drawn by Frank Morrison, Secy. Special No. 5,
9 to the order of Clarence Darrow.

10 MR. FORD. Will you mark that last exhibit No. 11, Mr. Clerk

11 Q You are the Washington Correspondent of the Anglo &
12 London Paris National Bank of San Francisco? A We are.

13 Q And they are your San Francisco correspondents? A We
14 have quite a few correspondents in San Francisco.

15 Q They are one of your San Francisco correspondents?

16 A One of them.

17 MR. FORD. You may cross-examine.

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19 CROSS-EXAMINATION.

20 BY MR. APPEL. Q Did you personally receive that letter?

21 A It came to the Riggs--

22 Q Did you personally receive that letter? A I open the
23 mail, yes.

24 Q Did you personally receive it? A Yes, addressed to me.

25 Q You remember receiving it? A I don't remember--
26 receive hundreds of letters each day.

1 Q I am talking of this one, do you remember now you
2 personally received that letter? A Yes, my memory carries
3 me back when I looked it up; I received it.

4 Q You did receive and opened the letter and found it in
5 the envelope? A I opened the mail.

6 Q And found the check? A Yes.

7 Q Which check? A \$10,000 dollar check.

8 Q Which check? A Well, I identify the check now by the
9 instrument--

10 Q No, which check? A Check No. 30.

11 Q You remember having received that check? A Yes, sir.

12 Q What is the date of that check? A August 21st.

13 Q And you received it on what date? A September 7th.

14 Q How many checks did you get that day? A From whom, sir?

15 Q From any one? A Utterly impossible to tell from every
16 source.

17 Q Can you tell the jury any other check you received on
18 that day in any letter? A No, I haven't the letter before
19 me, sir.

20 Q Is this--that is all.

21 THE COURT. Can this witness be excused from further
22 attendance on the trial?

23 MR. FORD. As far as we are concerned, your Honor.

24 THE COURT. Any objection?

25 MR. APPEL. We haven't any objection. That exhibit we
26 insist it should be left here on file.

1 THE COURT. Oh, yes, the exhibits will have to remain here.

2 MR. APPEL. At sometime when it is--outside of the jury
3 I want to have such a memorandum made of the matters and
4 things contained in that book in a concise manner by the
5 reporter, not in the presence of the jury in order to
6 illustrate and explain our objection.

7 THE COURT. I will take that up during the afternoon recess.

8 MR. APPEL. I would like to ask him one question.

9 BY MR. APPEL. Q You were subpoenaed to be here?

10 A Yes, sir.

11 Q Under subpoena from this court? A From this court, sir.

12 Q Who served it on you? A It came by mail.

13 Q It came by mail? A Yes, sir.

14 Q Who spoke to you first about coming here, if any one?

15 A The Department of Justice spoke to me first.

16 Q The Department of Justice spoke to you? A No. They
17 called me up on the 'phone, sir.

18 Q Who did? A The Federal Department of Justice.

19 Q I know. The Department don't talk except through some
20 person. That is what I am trying to get at. A I am
21 trying to think of his name now, just at this minute I
22 don't recall his name. I know him by sight.

23 Q You don't know his name? A I did know it. If I heard
24 it; just at this moment I don't recollect it.

25 Q Do you know Burns? A No. I have seen him but I don't
26 know him.

1 Q He isn't the man who talked to you through the 'phone?

2 A No, no.

3 Q And you have paid your own expenses here? A Yes, sir,
4 I have so far.

5 Q You expect to get them back? A I expect to, sir.

6 Q From whom? A I guess from the State of California--
7 I mean the County of Los Angeles. I don't know, I haven't
8 the slightest idea.

9 Q You got a letter from the district attorney's office
10 here? A Yes, sir.

11 Q Have you got that letter with you? A No, I have not--
12 at least I don't think I have--let me see whether I have
13 or not. I may have it. Yes, sir, I have it. (Hands
14 same to counsel.)

15 Q You have no objections, if there is anything in there?

16 A Nothing at all, sir.

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1 MR FORD: We stipulate it may be introduced in evidence.

2 MR APPEL: I don't want any stipulation, your Honor.

3 Q You had received another letter before you received
4 this one? A Yes sir.

5 Q You have not got that one? A No sir.

6 Q Well now, you had talked to the District Attorney before
7 he wrote to you from Los Angeles? A Talked to him?

8 Q Yes. A You mean --

9 Q Mr Fredericks. A Before he wrote to me?

10 Q Yes. A No, never.

11 Q Never? A No sir.

12 Q Had a talk to any person representing him? A No.

13 Q You didn't talk to either Mr Burnes or any of his
14 assistants? A No, never saw Mr Burnes.

15 Q Never saw him? A I think I saw him at a distance when
16 in New York, but I never saw him since.

17 Q You never had any communication, so far as you know,
18 with him or any of his assistants? A No sir, not at all.

19 Q Now, in this letter, I suppose you understand, there is
20 no statement contained here of what you shall bring with you.
21 Who, if anyone, communicated with you what you should bring
22 here? A No one.

23 Q No one? You knew it without anyone indicating to you
24 what you were wanted for? A No sir. They didn't tell me
25 at that time. I didn't bring anything, sir.

26 Q You didn't bring anything. You found this thing here?

1 A These were here. I don't know how they got here, but
2 they were here when I got here.

3 Q You don't have any idea how they got here? A No sir.

4 Q You were custodian of these checks ever since they
5 were returned to your bank? A I last saw them in Indiana-
6 polis, sir.

7 Q You last saw them there? A Yes sir.

8 Q Were they not in your bank at some period of time?

9 A Yes sir.

10 Q How did they come to leave your bank? A We balanced
11 the book of Mr Morrison and returned the cancelled checks,
12 together with his pass-book, to Mr Morrison.

13 Q I understand. And then afterwards, in Indianapolis,
14 when you appeared there as a witness in some proceeding or
15 other, they were presented to you and you identified them
16 there? A That is right, sir.

17 Q Yes. Before the Grand Jury there? A Yes sir.

18 Q Before the Federal Grand Jury? A I should judge it
19 was, yes sir. That is because I was subpoenaed by the
20 Department of Justice.

21 THE COURT: Is that all, gentlemen? Mr Flather may be ex-
22 cused from further attendance at the trial, then.

23 MR APPEL:: In order not to keep the witness here, may we
24 agree upon this: If there are any Exhibits -- I don't know
25 that there are, I have not examined them, but out of pre-
26 caution, if there are any exhibits in that book that we

1 may want to introduce in evidence, that we may do so
2 without the presence of this witness and counsel, if he
3 will facilitate it --

4 MR FORD: We will stipulate, if you desire, that all of
5 them may be offered in evidence now.

6 MR APPEL: I do not ask that.

7 MR FREDERICKS: That covers all, your Honor.

8 MR APPEL: That is putting us in a position to accept or
9 reject that,

10 MR FREDERICKS: No.

11 MR APPEL: I am simply saying, if we desire anything in
12 there --

13 THE COURT: Do I understand you, Mr Ford, you stipulate if
14 counsel desires to introduce anything in that book he may
15 do so later on without the presence of this witness?

16 MR FORD: The possibility is he may introduce something and
17 we might likewise desire to introduce something to explain
18 what he introduces. We do not feel like sewing ourselves
19 up to that extent.

20 MR APPEL: Then we insist that the witness remain here,
21 your Honor; then we can offer what we want, and we may
22 introduce what we need and keep the record straight.

23 MR FORD: In fairness to the witness, they ought to lock
24 over the book now.

25 MR APPEL: No sir.

26 MR FREDERICKS: Mr Appel wants us to stipulate that any-

1 thing he wants to introduce may be introduced without the
2 presence of this witness.

3 MR APPEL: Without laying the foundation for it --

4 MR FREDERICKS: We are willing to do that, providing there
5 is anything else in there we want to introduce we may have
6 the same privilege. I don't know that there is anything
7 in there any of us will want to introduce.

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p 1 MR. FORD. May I address counsel on the other side?

2 THE COURT. Just a moment. They are consulting now.

3 MR. APPEL. We cannot enter into any stipulation of that
4 kind, your Honor.

5 MR. FORD. I would suggest, if the Court please, perhaps
6 we can reach the thing desired by counsel in this way.

7 I have asked the witness to examine all the checks contained
8 in that book and perhaps we could ask him whether all those
9 checks have been received in the ordinary course of business
10 and paid by his bank, leaving the foundation so that if the
11 relevancy of any one check appears at any time, counsel will
12 have the foundation laid and can then introduce it. I
13 don't know that there are any in there that are relevant,
14 but I suggest that could be one way to lay the foundation
15 so that in event--

16 THE COURT. Put him on the stand.

17 MR. APPEL. His laying the foundation differs from our view,
18 from ours.

19 MR. FORD. I would suggest that counsel do it at this time
20 and that will save any further delay on the part of the
21 witness. I think that is a fair proposition and if they
22 find anything that is relevant their foundation will be
23 laid.

24 MR. APPEL. We are entitled to any assistance of any witness
25 who appears here and who submits himself to the jurisdic-
26 tion of this court and we ask the court now to order this

1 gentleman to appear here at some future date after the
2 defense opens, for the purpose of using him if we deem it
3 necessary. In the meantime we can look over the matters,
4 to facilitate all matters. We feel we want to act advised-
5 ly at this time.

6 MR. FORD If the court please, this witness is here from
7 some distance. Your Honor will have to direct the clerk
8 to take care of his expenses, he is here from some distance
9 to attend to this court and I feel as a matter of economy
10 and justice to the witness that we ought to take a recess
11 of ten minutes and let counsel look it over. Mr. Flather
12 has important business he has to attend to and he has come
13 out here in obedience to the court's subpoena and I think
14 we could at least extend him the courtesy to decide that
15 question so he could get away tonight, if he possibly can.

16 MR. APPEL. An enforced permanence of the witness in this
17 beautiful city will prove a pleasant duress, your Honor.

18 THE COURT. It is, of course, the duty of the court to see
19 that witnesses are not unnecessarily or unreasonably
20 detained. The court expects counsel to assist it in so
21 far as possible, and in accordance with the rights of both
22 parties. I have no doubt they will. I am going to take
23 a recess at this time for a few minutes in order to
24 enable counsel to look over the documents and counsel can
25 determine whether or not they can protect their rights and
26 have the further examination of this witness at this time.

1 Gentlemen of the jury, bear in mind your former admoni-
2 tion. We will take a recess of ten minutes.

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(After recess. Defendant in court with counsel)

THE COURT: Mr Appel, before adjournment you indicated there was something you wished to take up out of the presence of the jury.

MR APPEL: That we wished the record to show that attached to the checks which the jury were instructed that they might inspect in Exhibit No. 10, I believe, that there are the stubs attached to the checks. The face of them show several comments of what the moneys indicated in the checks were spent for or what they were paid for, rather, and also that these checks which they inspected were comingled with checks made payable to other persons in large and small amounts. And to persons who^{probably} will be witnesses in this case on the part of the prosecution, and we now wish to have permission of the Court to refer to those matters in case it is necessary to make up a bill of exceptions.

THE COURT: Let me see the book.

MR APPEL: I will say this: the ground upon which we ask that the record show that, is this: that there is no power in the Court permitting the jury to see any writings or receive the exhibitions of any writings or any evidence not legally admitted in court under the rules of evidence, and that the exhibition to the jury of statements of that kind or writings of that kind, not admitted in evidence, is in effect the receiving of evidence outside of court.

MR FORD: I think, your Honor has cautioned the jury fully

1 enough not to regard anything except that which has been
2 introduced in evidence; however, we have no objection to
3 your Honor admonishing the jury more fully if you believe
4 it is necessary. We certainly want to have them have their
5 attention confined to those things introduced in evidence.
6 We didn't feel it was our right to mutilate things that don't
7 belong to us, and I cannot see any other way of guarding
8 against the thing which counsel fears, except by admonishing
9 the Court, and it is supposed this jury is composed of
10 honest men and composed of intelligent men, and that they
11 will be only guided by the evidence which is introduced in
12 evidence. We are satisfied with the record.

13 THE COURT: Here is an application of Mr Appel for permis-
14 sion of the Court to make reference to the stubs and other
15 checks contained in this book in any bill of exception that
16 he may deem fit --

17 MR APPEL: Yes.

18 THE COURT: I cannot see why that permission may not go
19 into the record at this time.

20 MR FORD: Your Honor, we don't wish to have any advantage
21 over them, or do we wish them to have any advantage over us.
22 Now they ask for a stipulation of that character, without
23 giving us the same privilege.

24 THE COURT: Not for a stipulation.

25 MR FORD: They are asking permission of the Court to intro-
26 duce evidence without legal manner, without the Court giving

1 us the same permission. For your Honor to permit them to
2 introduce other documents without laying the foundation for
3 them, and deny us the same privilege --

4 THE COURT: That is not what Mr Appel asked for at all.

5 MR FORD: I must be very dull; I understood what counsel
6 asked for, for permission to introduce in evidence other
7 checks, or even the cancelled stubs in there, whenever he
8 saw fit to do so.

9 THE COURT: That is not the application.

10 MR FREDERICKS: May it please the Court, I heard what the
11 matter was. Mr Ford's attention was attracted to something
12 else, and our position on that matter is just this: that
13 whatever this record is, it is, and it cannot be added to,
14 or changed, or taken from. It stands for just exactly what
15 it is, and whatever the record is counsel has a right to
16 the advantage of it. There is no procedure known to the law
17 giving counsel the right to ask ^{to have} ~~for~~ something considered,
18 and have it considered in any different way than it would be
19 considered if he simply refers to the record. Now the
20 record stands for just exactly what it is, and if he wishes
21 to show that there were things handed to this jury that were
22 not introduced in evidence, the proper way to do that is by
23 affidavit, and there is nothing before this Court, and there
24 cannot be anything before the Court except the record of
25 procedure; that is our position in that matter.

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8s 1 MR- APPEL. That is just exactly what I am trying to
2 avoid, the introduction of affidavits to prove anything
3 that we might deem of advantage to us. I am reminding
4 the court and I am asking the court what ever passed in
5 his presence is a matter within the knowledge of the court,
6 and I am simply asking the court that in his discretion,
7 in his judgment, that which we deem has occurred here in
8 court in the presence of the court, if it becomes neces-
9 sary, that the court will permit us to put it in
10 the record if it becomes necessary and that the court may
11 consider the matters or strike out whatever he deems to be
12 true and whatever he don't deem to be true he can strike
13 out. We will leave it entirely to the court.

14 MR. FORD. I understand the position, now, your Honor.
15 If after this case is concluded counsel desires to argue
16 a motion for a new trial or prepare a record for appeal, if
17 it becomes necessary and in that event your Honor may grant
18 your permission to insert those things in the record.

19 MR. APPEL. Whatever the court deems to be true.

20 MR. FORD. But that wont arise at any time during the trial.

21 MR. APPEL. No, sir.

22 THE COURT. In that event counsel may assume that this
23 court will take cognizance of the fact that the entire
24 book was presented to and examined by a number of the jury
25 individually and by all of them; that they were at the same
26 time admonished to disregard the stubs attached to the

1 checks and other checks--all other checks not being drawn
2 in favor of Clarence Darrow, not being introduced in
3 evidence, consider only those checks.

4 MR. FORD. I think, if the Court please, that your Honor
5 has made the matter a little bit broader than what we
6 could-- we believe is the fact. Your Honor has stated that
7 you have taken cognizance of the facts, not only has the
8 book been presented to them with all its contents but that
9 they have examined it.

10 THE COURT. Yes, sir.

11 MR. FORD. Now, your Honor has cautioned them in advance
12 not to examine anything except that portion which has
13 been introduced in evidence, and I suppose the jury has
14 complied with it.

15 MR. APPEL. The court was as careful as he could possibly
16 be. Notwithstanding that we still insist that you may
17 tell a man not to look at a thing but if he looks at it
18 and it is the fact it is an advantage that we have the right
19 to have it in the record.

20 THE COURT. The court will take judicial cognizance of
21 what occurred.

22 MR. FORD. We would like to know what conclusion he has
23 come to--

24 MR. APPEL. After consultation we wish, of course, to
25 follow any suggestion--of course, whatever stipulation we
26 enter into being part of the trial, whatever offer we make.

1 and I think it will be acceded to, we like to have it
2 done in the presence of the jury as being part of the trial
3 THE COURT. All right, bring the jury in, Mr. Sheriff.

4 (Jury returned into court room.)

5 THE COURT. The jurors are all present. You may proceed,
6 gentlemen.

7 MR. APPEL. Your Honor, in order to accommodate the witness
8 who comes from Washington, and in order to conform to your
9 Honor's wishes and desires in this matter, and to facilitate
10 the introduction of evidence, should the case arise where
11 we wish to introduce that evidence we are willing to stipu-
12 late the foundation for the introduction of any and all
13 other documents not heretofore introduced and being a part
14 and parcel of Exhibit No. 10, be deemed to have been laid:
15 Second, that the defense may, without laying further founda-
16 tion, subject to the objection of incompetency, relevancy
17 and immateriality of the document or documents which we may
18 offer in evidence, that we may offer them without laying
19 any further foundation, subject, of course, to their objec-
20 tion that they in turn in rebuttal, if they deem it proper
21 and necessary and should the occasion arise, do the same
22 thing, subject also to the only objection as to whether it
23 is material or not. In other words, we leave these docu-
24 ments here as if there was nothing else to ask than to say
25 "We offer these in evidence", and then the objection, whether
26 it is material or not may come up before the court.

ete 1 MR FREDERICKS: As I understand it the matters are still
2 subject to the objections as to their materiality?

3 MR APPEL: Sure, we always reserve that.

4 MR FORD: If the Court please, I think the only thing we
5 can stipulate is that it might be proved by this witness,
6 and the stipulation which counsel offers is of all other
7 documents contained in this book that contains Exhibit 10 --

8 MR APPEL: Not heretofore introduced in evidence.

9 MR FORD: Not heretofore introduced in evidence. Now, that
10 stipulation is all right, provided it is limited to what
11 appears on the face to be cancelled checks, appearing to be
12 checks coming through the Riggs National Bank.

13 MR APPEL: Any document in there, your Honor. We know where
14 they come from, and all that has been testified to. We do
15 not want to bring this witness back on the stand and take up
16 some document and have to ask him "Where did you get this?
17 And did it come from your bank?" We offer a certain piece
18 of paper contained in there and we offer it in evidence, and
19 we offer it subject to the objection to it on the ground it
20 is immaterial, and if your Honor sustains the objection--

21 THE COURT: I see your point.

22 MR FORD: Just a moment.

23 THE COURT: Do you want to interrogate the witness further?

24 MR FORD: If your Honor, please.
25
26

1 HENRY H. FLATHER, resumes the stand for
2 further Redirect Examination:

3 BY MR FORD:

4 Q Concerning the stubs of this book to which the various
5 cancelled checks are attached, do you know anything about the
6 making of those stubs? A No sir.

7 Q Have you any knowledge of them whatever? A I have no
8 knowledge of them whatever.

9 Q And with regard to the check which has been marked
10 No.94, was that check ever paid through your bank?

11 MR APPEL: We object to that as immaterial, incompetent,
12 irrelevant.

13 MR FORD: We wish to show that the witness has absolutely
14 no knowledge of those things, and to make a stipulation
15 covered by that portion of which the witness has knowledge --

16 MR APPEL: They have not offered that check.

17 THE COURT: No. Objection sustained.

18 MR FORD: Now, we are willing to stipulate that each one --

19 THE COURT: Let me see that book. (Counsel hands book to
20 Court)

21 MR FORD: We are willing to stipulate that as to each check
22 appearing to be a check paid through the Riggs National
23 Bank, with the exception to check 94, that with regard to
24 those matters we will stipulate that the foundation for
25 their introduction may be waived at any time upon proof by
26 either side that the matters contained in them are relevant

1 and material.

2 MR APPEL: Your Honor, this defendant is entitled, with all
3 due respect to counsel, to the same opportunity to intro-
4 duce in evidence whatever document he thinks is proper,
5 whatever evidence he thinks is proper he is entitled to that.
6 In order to accommodate the witness, in order to harmonize
7 with your Honor's views and counsel's desires, we have been
8 willing to waive what we proposed in our stipulation. We
9 have gone as far as it is possible. They waive no rights,
10 and we waive no rights. I think we are preserving the
11 rights on both sides.

12 MR FORD: We do not want them --

13 MR APPEL: If I offer any document and counsel for the
14 defense offers any document in there that is not material,
15 your Honor is very well qualified not to allow it to be
16 introduced in evidence, and we do not wish to quibble here
17 over a stipulation and we do not wish to have propositions
18 of this kind made to us, because we occupy a different
19 position here than counsel on the other side does. They
20 offer propositions to us here, your Honor, in the very
21 nature of things if we say "no" this jury might think,
22 might say, might draw inferences against us, and we ask
23 your Honor that either our stipulation be agreed to as we
24 make it, as we think in our own way and think it should be
25 accepted, or not.

26

Petd 1 I do not think it is right to ask counsel now, "We want you
2 to do this," or "will you do it", and that is not fair to us.
3 It is all right. We may ask the prosecution that, they are
4 not defendants, but it places the defendant at a disadvan-
5 tage, and we do not like to be asked those things because
6 we really do not know, sometimes we are driven to say "yes"
7 because we fear, we feel that we are placing ourselves and
8 our client in a wrong light before this jury. Your Honor
9 can see how we are situated if we feel that way; it may not
10 be that way, but we do feel that way.

11 MR FORD: We do not ask counsel to go further than they
12 have gone. We accept their stipulation, all of it, with
13 the exception of the stub books and check No.94, and, of
14 course, the book will be here and if they wish to lay a
15 foundation as to those matters they can do so. We think
16 we are offering a stipulation which will cover everything
17 which this witness can possibly testify to. We do not care
18 to stipulate for the convenience of this witness as to
19 matters that are not within the witness' knowledge at all.
20 The witness has just stated he doesn't know anything about
21 the stubs attached to the checks, and we were not allowed
22 to show anything with reference to check 94, or with refer-
23 ence to every other cancelled check except 94, and the stubs
24 we are willing to accept counsel's stipulation to that ex-
25 tent.

26 MR ROGERS: I do not understand, if your Honor please,
this is a question of doing this to accept or

1 as if they were conferring a favor upon us. They are not.
2 We can subpoena this witness to stay here, and he will
3 have to stay, and we offer, in the interests of time and
4 accommodation to go as far as we can. If they do not like
5 what we offer we will take our own course. They have not
6 any right to put us in the attitude of refusing to accom-
7 modate. They are not accommodating us; we are accommodating
8 them. Otherwise, we shall subpoenae the witness.

9 MR FORD: We are not trying to accommodate their side. We
10 are trying to act and cooperate with the defense in ac-
11 commodating the witness, that is all. It is not an accom-
12 modation to us, and it is not an accommodation to them, I
13 admit it. I want to help to accommodate the witness who is
14 here, and who is here at the expense of this Court.

15 MR APPEL: I beg your pardon.

16 MR FORD: Oh, yes, the Clerk will have to pay it.

17 MR APPEL: The Court does not pay it, it comes out of my
18 taxes and it comes out of the taxes of every citizen here,
19 and it is right it should come out, and it comes out of you
20 gentlemen's pockets in proportion to mine.

21 THE COURT: There is no misunderstanding about that.

22 MR APPEL: No, your Honor. The witness comes here in answer
23 to a subpoena, and the witness is a good citizen and does
24 what he considers is his duty to do, he comes here, at the
25 same time the witness is a good citizen and he ought to be
26 perfectly willing to remain here subject to the orders of

1 this Court in the interest of justice. A little justice
2 scattered around on both sides of this case will be con-
3 sidered very lovely by either side.

4 MR FREDERICKS: May it please the Court, the proposition is
5 this; This is our last word on it: This witness has tes-
6 tified as to what his position is. He is in custody of
7 these cancelled checks, he knows what they are, and we are
8 willing to stipulate all these cancelled checks may go in
9 as if he was here to testify. He does not know anything
10 about the stubs, and it certainly would be folly for us to
11 stipulate that the stubs might go in under an arrangement
12 to accommodate this witness to something he couldn't testify
13 about at all. It must naturally be assumed, he doesn't
14 know anything about the stubs; anything that this witness
15 knows we are perfectly willing to stipulate, anything that
16 is within his knowledge and within the purview of his af-
17 fairs, he may testify to; otherwise the witness is on the
18 stand, he has been subpoenaed and subjected to direct exam-
19 ination and been turned over for cross-examination, and that
20 is as far as we can go in the matter.

21 THE COURT: Then there is no stipulation. Any further
22 questions of this witness by either side at this time?

23 MR APPEL: Not at this time, but we do ask that the witness
24 be ordered to come back for the purpose of testifying for
25 the defense.

26 MR FREDERICKS: I suppose the witness is subpoenaed, and

1 obeys his subpoena, and that is all there is about that,
2 the same as any other witness.

3 MR FORD: We would like to do all we can to accommodate this
4 witness, but we cannot do anything further.

5 MR ROGERS: Neither can we.

6 MR FREDERICKS: We are through with the witness. There is
7 nothing before the Court.

8 THE COURT: In view of the statement made on both sides,
9 I question the right of the Court to direct the witness to
10 remain in attendance, and that will not prevent the defend-
11 ant from subpoenaeing him if they are so advised. That is
12 all.

13 MR APPEL: We take exception at the refusal of the Court in
14 not ordering the witness to remain here and depriving us of
15 the assistance of the witness.

16 THE COURT: Are you ready to ^{further} cross-examine Mr Franklin at
17 this time?

18 MR ROGERS: I desire to explain the situation to your Honor.
19 Your Honor is aware that we had no preliminary examination
20 and therefore had no opportunity to familiarize ourselves
21 with his testimony; secondly we had no grand jury testimony
22 under the conditions with which your Honor is entirely
23 familiar, therefore there are some necessities arising from
24 the consideration of his testimony, which, of course, we
25 never had heard of before, and knew nothing about what he
26 was saying, and we were looking it up a little, and have

1 diligently pursued the matter, and are diligently pursuing
2 the matter, and there is a certain matter which I want to
3 familiarize myself with and I would like further time, in
4 your Honor's discretion and --

5 THE COURT: You want further time, do you?

6 MR ROGERS: Yes, your Honor.

7 THE COURT: Any objection on behalf of the People?

8 MR FREDERICKS: Yes, we have. We are entitled to know where
9 we are in this trial as we go along. This witness took the
10 witness stand last week, there have been three days, four
11 days since he started his testimony; he has been subjected
12 to a cross-examination going over several days, and while
13 it is true there has been no preliminary examination, there
14 is no reason why counsel should not finish his cross-
15 examination before we go on with our case, and we realize
16 that often matters may come up which will give counsel a
17 right to bring a witness back and cross-examine him, even
18 without any arrangement of the Court. If any such matters
19 come up, we think they can be presented at that time to the
20 Court for its consideration.

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1 but as it is now we would like to finish with Mr. Franklin,
2 and proceed with someone else.

3 MR. ROGERS. A Matter of your Honor's discretion.

4 MR. FREDERICKS' Entirely.

5 MR. ROGERS. I call your Honor's attention again to the
6 fact that there were many things which came out on cross-
7 examination, which, owing to the fact that they did not see
8 fit to interrogate him before the grand jury and furnish
9 us with a transcript, we were not advised concerning. There
10 must be interrogation as to circumstances and facts and
11 when we say we are through we then can ask to recall at any
12 time, but it is not right; it is not fair. We should
13 have an opportunity under these peculiar circumstances
14 when their chief witness was not interrogated before the
15 grand jury, where we were not furnished with a transcript.
16 I will not mention the circumstances but your Honor knows
17 them. It is nothing but right that we have an opportunity
18 to investigate some of the things to which he testified
19 with an opportunity to cross-examine him concerning. This
20 is the kind of a witness of whom the most liberal cross-
21 examination is guaranteed by the law, and I appeal to your
22 Honor's discretion to give me an opportunity to investigate
23 some matters and I am making it entirely in good faith. I
24 have an engagement at 5 o'clock tonight. I tried to make it
25 at noon today, but I couldn't get the man I wanted to
26 talk to. At 5 o'clock tonight I have an engagement which

1 I wish to interrogate him about some features of this
2 case and which came up on cross-examination.

3 THE COURT Will you be ready to go on at 10 o'clock to-
4 morrow morning?

5 MR. ROGERS. I hope so. If not I will tell your Honor
6 in all frankness. I will exercise every diligence. I
7 have a right, when they didn't see fit to have his story
8 come before the grand jury and furnish us a transcript of
9 it, we have a right to investigate what this man has said
10 and see what there is--

11 THE COURT. Is there any witness you can put on this after-
12 noon?

13 MR. ROGERS. Captain White is outside.

14 MR. FORD. We are going to run our side of the case. We
15 are going to put witnesses on the stand that never testi-
16 fied before the grand jury. It is a frequent occurrence
17 in criminal cases that witnesses appear at the trial that
18 have not been heard at the preliminary examination or
19 before the grand jury. It is frequent occurrence that
20 men have been brought upon the trial that have not testified
21 before. Those are frequent occurrences. We are going to
22 be confronted here on the stand perhaps with witnesses on
23 the part of the defendant of whom we have never heard, and
24 your Honor will compel us to examine them and we will be
25 taken entirely by surprise. Here is a man appearing as
26 a witness before the grand jury at a certain date known to

1 the defense. His name appears. If there is anything
2 they want to look at they have had ample opportunity
3 to look it up as to their testimony. We have been
4 here three or four days cross-examining, during which time
5 they have had numerous opportunities to send out their
6 agents and have any investigation they wanted. We don't
7 want our witnesses picked up and dragged in here piece by
8 piece. We want our witnesses to finish their examination
9 in a consecutive manner so when we get through we may then
10 put on our next witness. We don't want to be putting
11 witnesses on piecemeal and piecemeal. We have tried to
12 accommodate them by putting a witness on here and allowing
13 them time for further cross-examination. Your Honor allowed
14 time, in your discretion, and I think they have been allowed
15 more than reasonable length of time. They have been given
16 ample time for a break in the cross-examination. I think
17 any further exercise of discretion asked for by them would
18 be unreasonable. They have had more than they reasonably
19 expected in that way and we think the examination ought
20 to be concluded. Certainly, we do not wish to proceed
21 with the rest of our testimony until it is concluded.

22 MR. ROGERS. The interrogation of the witness Franklin,
23 if your Honor please, will not cover a matter to which
24 Captain White will testify but an entirely different phase
25 of a thing, therefore we have--

26 THE COURT. I do not think it would be proper to require

1 counsel for the def ense to go on with the cross-examina-
2 tion at this time in view of the statement that he has
3 made, and is absolutely sincere in making this statement.
4 If this matter goes over I want to say to him that tomorrow
5 morning will be the longest continuance, unless some extra-
6 ordinary condition intervene, he should be reddy to proceed
7 at that time.

8 MR. ROGERS. Yes, sir.

9 THE COURT. Put on the other hand I do not think the district
10 attorney should be required to go on at this time unless he
11 so elects. If it becomes necessary the court will adjourn
12 until 9 o'clock tomorrow morning.

13 MR. ROGERS. No, sir, these jurors' time is worth something.
14 I am investigating-- I desire to investigate and ascertain
15 absolute proof of--

16 THE COURT. We can start at 9 o'clock tomorrow morning.

17 MR. ROGERS. Well, I want to see about that matter before
18 I put it to him and I cannot conclude until I do, but I
19 don't want to take the jurors' time.

20 THE COURT. Very well; very little time lost if we start
21 in at 9 o'clock tomorrow morning.

22 MR. ROGERS. All right.

23 THE COURT. Gentlemen of the jury, you have heard and
24 understand the necessity of an adjournment at this time until
25 9 o'clock tomorrow morning. You will bear in mind the
26 admonition heretofore given you that you are not to talk or

1 suffer yourselves to be addressed by any other person
2 upon the subject of this trial. You are not to form or
3 express any opinion on the subject of this trial until the
4 whole matter is submitted to you. Bearing that admonition
5 carefully in mind the court will adjourn until 9 o'clock
6 tomorrow morning.

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