

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. )

No. 7373.

Clarence Darrow, )

Defendant. )

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REPORTERS' TRANSCRIPT.

VOL. 26

I N D E X.

	Direct.	Cross.	Re-D.	Re-C.
George O. Monroe,	1962			
Charles Weir,	2068	2109	2117	

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FRIDAY, JUNE 14, 1912; 10 o'clock A.M.

Defendant in court with counsel. Jury called; all present. Case resumed.

G E O R G E O . M O N R O E,

on the stand for further direct examination:

MR. FORD. I believe counsel was cross-examining Mr. Monroe as to foundation.

MR. APPEL. We were examining the book, your Honor, at the adjournment. We have examined the book sufficiently, your Honor.

MR. FORD. You don't desire to cross-examine the witness then about the book?

MR. APPEL. No, not about the book. We simply requested, as I remember, the right to look at the book so as to make specific objections to any portion thereof which we think proper, that is all.

MR. FORD. You were cross-examining him as to his notes from which--

MR. APPEL. I have got enough.

THE COURT. All right, proceed.

MR. FORD. Read the record of November 25th concerning the case designated?

MR. APPEL. On the 25th?

MR. FORD. Yes, sir.

MR. APPEL. That is already in once before.

1 THE COURT. I think it was.

2 MR. APPEL. That is the date when, your Honor, the jury  
3 was drawn on Saturday containing the name of Mr. Lockwood.

4 MR. FORD. We had it looked up, the impanelment of the jury  
5 was the only portion introduced, but not the minutes of the  
6 trial.

7 MR. APPEL. On the 25th? That was Saturday the 25th, you  
8 introduced in evidence, he read from that, that the court  
9 made an order.

10 MR. FORD. And introduced the panel that day.

11 MR. APPEL. The drawing of the jury. You will find it in  
12 volume 2.

13 MR. FORD. Now, we desire to proceed with the minutes of  
14 the trial of that day.

15 MR. APPEL. Of the 25th?

16 THE COURT. All right.

17 A Saturday, November 25th--

18 MR. APPEL. We object upon the ground that it is incompetent,  
19 irrelevant and immaterial, hearsay and no foundation laid.

20 THE COURT. Objection overruled.

21 MR. APPEL. We except.

22 A (Reading) "Saturday November 25th, 1911. In open  
23 court Hon. Walter Bordwell, Judge, presiding, the clerk  
24 sheriff and reporter present. Case No. 6939, People  
25 against J. B. McNamara. Cause resumed. All jurors, counsel  
26 and the defendant, J. B. McNamara present. By stipulation

1 of counsel made in open court and by order of court cause  
2 ordered continued to Monday, November 27, 1911 at 9 A.M."

3 MR. FORD. That is all for that day? A yes, sir.

4 Q What date was that continued to? A November 27th.

5 Q Will you read us the minutes on November 27th in regard  
6 to the same subject? A (Reading) "Monday, November 27,  
7 1911. In open Court, Honorable Walter Bordwell, Judge,  
8 presiding, the clerk, sheriff and reporter present--"

9 MR. APPEL. Wait a moment. We object to the matter now being  
10 read by the witness or about which he is going to read upon  
11 the ground that it is incompetent, irrelevant and immaterial  
12 for any purpose whatsoever; it is hearsay and no foundation  
13 laid; nothing to do with this case.

14 THE COURT- Let me see it.

15 MR. FORD. The official records of the case.

16 THE COURT. Objection overruled.

17 MR. APPEL. We except.

18 A Monday, November 27th, in open court, Hon. Walter Bordwell  
19 Judge, presiding, the clerk, sheriff and reporter present.  
20 Case No. 6939, People vs. J. B. McNamara. Cause resumed,  
21 all jurors and counsel and the defendant, J. B. McNamara,  
22 present. By stipulation of counsel Juror Houser is excused  
23 on account of his health. Juror Calvin Collins examined  
24 and challenged by the defendant for cause, and by order of  
25 court said challenge is allowed and juror Calvin D. Collins  
26 is excused. By order of the court the clerk proceeded to

1 draw from the trial jury box the names of seven persons  
2 to fill the jury, and the following named persons being  
3 drawn, to wit: George A. Coleman, Guy A. Cherry, Edward  
4 Haskell, Frederick L. Brown, George O. Remmer, Christian  
5 Sebalius and Hugh E. Osher, , who were sworn as to  
6 their qualifications. The juror Frederick L. Brown,  
7 Guy A. Cherry and George O Remmer are excused by the court,  
8 not believing in capital punishment. Juror George W.  
9 Cameron excused, not being on the assessment roll. Juror  
10 Martin Elftman examined and by order of the court  
11 is excused for cause.

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1 Juror Christian Sebalius was examined and challenged for  
2 cause by the defendant; the same resisted by the People.  
3 Said challenge is allowed and Juror Christian Sebalius  
4 is excused.

5 Juror

6 / Hugh E. Osher is excused, not believing in capital punish-  
7 ment. Juror Edward Haskell examined and farther hearing  
8 continued to Tuesday, November 28th, 1911, at 2 P.M. That  
9 concludes the minutes of that day.

10 Q Will you read the minutes of and relating to the trial  
11 on November 28th? A (Reading.) Tuesday, November 28th,  
12 1911, in open court --

13 MR APPEL: Wait a moment. November 28th, you say? A Yes  
14 sir.

15 MR APPEL: We object to that upon the ground the matter  
16 has already been introduced in evidence, page 90 of the  
17 transcript, and it is already in the record, and the pro-  
18 ceedings of this court in reference to the admissibility  
19 of the matter sought to be introduced now has been passed  
20 upon by the court and we object to a repetition of the same  
21 matter.

22 THE COURT: It seems to me that is fully covered by the  
23 question on page 89 and the answer on page 90. Let me  
24 see that minute book. (Examining minute book.)

25 MR FORD: If the court please, a portion of those minutes  
26 only were read, because we did not deem the whole of it

1 important at that time, but since that time we have found  
2 and learned somethings which make it desirable now to  
3 introduce the whole of the record; one of the names appear-  
4 ing there being the name of a juror concerning whom some  
5 testimony has already been given, Mr A. J. Kruger.

6 MR APPEL: Your Honor, that has been in and your Honor  
7 will see the record, your Honor will see that the records  
8 themselves, of those minutes are introduced in evidence.

9 THE COURT: If it is not, I do not understand why it was  
10 not. Your question on page 89 asks the witness to read to  
11 the jury, and that question was answered.

12 MR APPEL: I think counsel will, and your Honor will bear  
13 with me -- in reading the minutes, it was said only such  
14 portions as we want to read now we will read, but we will  
15 allow the other matter, the record itself, the book it-  
16 self, was passed over to the clerk and allowed to remain  
17 there in evidence and only such portions were read then  
18 as they wanted to read then, but notwithstanding that,  
19 these matters are in already.

20 MR FORD: If it is in, we will have it read.

21 MR APPEL: Only to save time, all of it was not read at  
22 the time.

23 THE COURT: Yes.

24 MR FORD: I call your Honor's attention to page 91, in  
25 re impanelment of the <sup>trial</sup> jury.

26 THE COURT: In view of Mr Appel's statement, that is

1 a matter of saving of time, and they are all in and not  
2 read, but we will have the balance of them read.

3 MR FORD: All right. Go ahead and read the  
4 balance.

5 A (Reading:) "November 28 --

6 Q Yes. A "Tuesday, November 28 --

7 Q In re impanelment of trial jury. A -- "In re impan-  
8 eling of trial jury. Now, at this time, being the day and  
9 hour set by the court --"

10 MR APPEL: I would like to ask one question. What time  
11 of day the minutes show there that the proceedings in court  
12 were had, what time did they commence, does it show?

13 Usually minutes say, "Now, at the hour of 10 o'clock A.M."--

14 A The previous order shows the hour.

15 Q The time when the proceedings commenced in court?

16 A 10 A.M. This order does not show, but the previous  
17 order shows the time when they were to be impaneled.

18 Q You don't understand me, when the court opens you  
19 take the minutes and say, "Now, at the hour of 10 o'clock  
20 A.M., the court opened for business." A This order was  
21 made after court convened, after 10 o'clock.

22 Q He don't understand me.

23 THE COURT: What time did the court open that morning?

24 A To my own knowledge, 10 o'clock.

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3p 1 Q Do your minutes show what time court opened that morning?  
2 BY MR. APPEL. Q Do your minutes show what time court open-  
3 ed that morning? A No, sir.

4 Q But it is 10 o'clock, isn't it? A Just a minute--no,  
5 sir.

6 Q Was it commenced at 1 o'clock in the morning or 10 o'clock?

7 A The impaneling of the jury was--

8 Q No, not the impaneling of the jury, the proceedings in  
9 court? A 10 o'clock.

10 MR. APPEL. Now, we object to any acts--

11 A I beg your pardon, it was continued until 2 o'clock, the  
12 proceedings were taken at 2 P.M.

13 MR. APPEL. Then the proceedings were at 2 o'clock P.M.?

14 A Yes, sir.

15 MR. APPEL. We object to the introduction of this matter  
16 on the ground it is incompetent, irrelevant and immaterial  
17 for any purposes whatsoever, the acts, declarations of per-  
18 sons or third parties or the writing introduced, the trans-  
19 actions occurring after the morning of the 28th day of  
20 November, 1911, are inadmissible for any purpose whatsoever  
21 to show any fact concerning or connected with the alleged  
22 commission of the offense which is alleged to have been  
23 committed on the morning at 9 o'clock of the 28th day of  
24 November, 1911; that you cannot add to it or subtract from  
25 it in any way in any possible manner anything possibly in  
26 any way, shape or manner tending to show the prior condition

1 of mind of the defendant; there is no admission of his,  
2 these minutes are the minutes of a third party, they are  
3 concerning transactions that occurred at 2 o'clock in the  
4 afternoon of November 28th, it does not tend to add to  
5 or take away from the alleged commission of the offense;  
6 they are acts and declarations of third parties, it is a  
7 proceeding in court, what happened in the court, not what  
8 happened with reference to the commission of this offense,  
9 but what happened in court.

10 THE COURT. I have your point. I would like to hear  
11 from Mr. Ford.

12 MR. FORD. I think there is a little confusion here--  
13 the trial of the case of McNamara was continued from  
14 Monday until 2 o'clock in the afternoon of Tuesday, mean-  
15 while in the morning the court proceeded with certain  
16 jury business, with jurors who were used in the subsequent  
17 trial in the afternoon.

18 THE COURT. That is not what Mr. Monroe has said, he said  
19 it began at 2 o'clock.

20 A I probably didn't understand, the previous hearing  
21 was continued until 2 o'clock, November 28th, the impanel-  
22 ing of the jury commenced in the morning at the morning  
23 session, although the hour is not stated.

24 BY MR. APPEL. Q At 10 o'clock.

25 BY THE COURT. Q At 10 o'clock? A Yes, sir.

26 MR. APPEL. It makes no difference to me whether it is 10

1 o'clock or 2 o'clock, the point I make is simply this:  
2 Your Honor will see we are not bound by what occurred in  
3 court there. It does not reflect any light upon the  
4 previous transaction whatsoever, but here, the main ques-  
5 tion in dispute, the main question in dispute--

6 MR. FORD' We are not offering this as acts or declara-  
7 tions of a co-conspirator, and therefore binding upon the  
8 defendant. We are offering this as part of the things  
9 done, part of the res gestae, part of the things surround-  
10 ing the case to show the situation. When we introduced  
11 proof of the running of the streets at the corner of Third  
12 and Los Angeles, counsel is not bound by it, because the  
13 streets run that way. We don't hold them responsible for  
14 the streets being down there, we don't hold him responsible  
15 because a trial is being held, but it is part of the things  
16 necessary to explain what happened, what occurred. Now,  
17 counsel at various times throughout this trial has laid  
18 great stress upon this proposition: It isn't in evidence  
19 yet, but they have declared from time to time, how could  
20 Mr. Darrow<sup>x</sup> Don't you know that on this day arrangements  
21 had already been made for those people to plead guilty?  
22 Don't you know the case was practically at an end? Your  
23 Honor can see the materiality of it to show that the case  
24 was not at an end, and that the proceedings in court occurred  
25 for several days thereafter, and one of the points we are  
26 making in this case is that the acts and declarations of

1 the defendant and of his confederates throughout the entire  
2 conspiracy,

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1 until the fulfillment and accomplishment of the conspira-  
2 tors are accomplished, even though they occur subsequent  
3 in time to the commission of a specific act for which the  
4 defendant is on trial, if the specific act was commit-  
5 ted in furtherance of the conspiracy, then all of the  
6 acts, all of the declarations that were done in further-  
7 ance of the conspiracy are admissible, even though they  
8 occur subsequent in time to the commission of the specific  
9 offense. I think the law is so well settled that I am  
10 willing to submit authorities to your Honor upon that.

11 THE COURT: I have your authorities upon that point.

12 MR FORD: Now, we are going to show just what the situa-  
13 tion was. We are going to show that not only were proceed-  
14 ings had on Tuesday, the day of the arrest, in court, the  
15 trial was proceeding and there was no settlement of the  
16 case, but we will show the same thing occurred on Wednesday,  
17 and that even on Wednesday that there was no settlement.  
18 That they proceeded to draw another venire the day before  
19 Thanksgiving Day, that whatever arrangements were made  
20 for the ending of the trial were made on Thanksgiving  
21 Day and the plea of guilty was entered the following day  
22 or the 1st of December, wasn't it?

23 THE COURT: Your offer now is to show all the minutes of  
24 Department 9 up to the close of the McNamara case?

25 MR FORD: Yes, your Honor, and negative evidence is never  
26 as strong as positive evidence, nevertheless, it is ad-

1 missible to exclude certain things and exclude certain sit-  
2 uations. Frequently the only way we can arrive at the truth  
3 is this: a witness will testify to something from which  
4 two or three deductions may be made, when only one of which  
5 would indicate the guilt of the defendant. We would then  
6 have the right by negative evidence to exclude the others  
7 showing that of the three deductions possible from the tes-  
8 timony of one witness that there was only one that could  
9 coincide with all the other facts and circumstances, that  
10 is what we are trying to do.

11 THE COURT: Let me look at those minutes. Your offer is  
12 to include the minutes of December 1st?

13 MR FORD: Yes sir.

14 THE COURT: And no others?

15 MR FORD: No others in regard to the McNamara case.

16 THE COURT: All right, I will hear you, Mr Appel.

17 MR APPEL: Now, the very statement that counsel has made  
18 here shows that this evidence is inadmissible. The very  
19 purpose for which he wants to introduce it in evidence shows  
20 it is not admissible. Someone said something here in the  
21 course of the trial which lumed up here before counsel  
22 as a big savage Indian with paint on his face. Now, he  
23 is tracing that animal through the country, trying to  
24 capture him and bring him into the fold. He said this  
25 evidence is introduced in evidence to kind of exclude us  
26 from showing certain facts that were said here in argument.

1 It is introduced in anticipation of what we may or may not  
2 hereafter show, what we may or may not hereafter claim --

3 MR FORD: Pardon me just a moment, Mr Appel.

4 THE COURT: one at a time, Mr Ford.

5 MR APPEL: If we show one fact, it might possibly be pro-  
6 bable to show this evidence as in rebuttal, and just so  
7 long as there is nothing in the record here to which it  
8 can respond, so long as there is no substantial fact here  
9 in evidence on the part of the defendant to which this  
10 would be addressed, it cannot be introduced in evidence as  
11 part of the original case; certainly it is not proper  
12 evidence, for it is -- now, he says that the acts of a  
13 co-conspirator may be shown before and after. I don't see  
14 how the proceedings in a court of law as to the trial,  
15 what occurred there, unless it is some illegal act as  
16 committed by the party on trial here in furtherance of a  
17 previously formed idea of his to carry out an unlawful  
18 purpose, which may be the subject of litigation, may be  
19 introduced in evidence. The regularly orderly proceed-  
20 ings in court concerning the examination of jurors and  
21 what transpired there from time to time are matters  
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1 which include the court, include the jurors, include the  
2 officials of the court. How are those matters tending  
3 in any way to imbue to this defendant any bad motives?  
4 How does that throw any light upon the past transaction?  
5 How is it the act of a co-conspirator? How is it the --  
6 this gentleman talks of conspiracy and talks of co-con-  
7 spiracy like talking of ordinary affairs in life. He  
8 seems to think that the word conspiracy includes everything  
9 that a man sees or looks at or smells. I suppose that if Mr.  
10 Darrow had come into court on that day with a valise in his  
11 hand carrying some books, the gentleman hadn't seen him he  
12 would say that is an act in furtherance of the conspiracy.  
13 Look! Behold! he has got a valise in his hand. If Mr.  
14 Darrow had come in here from the beach with sand on his  
15 coat that shows Mr. Darrow had been hiding over there by  
16 lying on the sand, that is an act in furtherance of the con-  
17 spiracy. I say that that word and the construction put  
18 upon it by counsel here has never received such a perverted  
19 meaning and such a scandalous construction. Why, the word  
20 conspiracy is used in a limited sense, it is bound by limi-  
21 tations and it should be bound by limitations and con-  
22 spiracy--now, all of these matters and things, your Honor,  
23 throw no light on the subject, and if it is for the purpose  
24 of excluding a reasonable hypothesis that may or may not  
25 hereafter be advanced by the defendant showing the prob-  
26 ability of his having any connection with this crime, I say



1 they cannot introduce it in anticipation of the defense.  
2 Doesn't tend to show anything, your Honor; doesn't tend  
3 to show anything. If it is true it would not refute any-  
4 thing. If we did advance the theories supposed by counsel  
5 here it would not tend to show anything. A fact may be a fact  
6 and yet may not be able to contradict the element or condi-  
7 tion of mind of the defendant to the fact.

8 THE COURT. It seems <sup>so</sup> to me, Mr. Ford, this is in the nature of,  
9 perhaps, anticipating something. It might come in on re-  
10 direct.

11 MR. FORD. Counsel <sup>does not</sup> sit down. I can never tell when he is  
12 through.

13 MR. APPEL. I am closing. I submit unless he argues it I  
14 will cite authorities, I like to bring an argument to a close.

15 THE COURT. I have asked counsel for his ideas on that before  
16 closing.

17 MR. FORD. This, as I said before, is not introduced as an  
18 act or declaration on the part of any co-conspirator. I  
19 only stated counsel's remarks during the course of the trial  
20 to illustrate the materiality of this testimony. Your Honor  
21 well knows and your Honor will instruct this jury that the  
22 evidence introduced before them--

23 MR. APPEL. I object to counsel saying what your Honor will  
24 instruct or will not instruct, because we have something  
25 to say how they will be instructed.

26 THE COURT. The court has already instructed the jury to dis-  
regard the remarks, I think.

1 MR. APPEL\_ He is going to state what your Honor is going  
2 to instruct as matter of law--

3 THE COURT. I think not.

4 MR. FORD. I have said it is the law, as your Honor well  
5 knows, and I suggested the jury, if requested by either  
6 side will be instructed that the evidence introduced in  
7 this court must not only show the guilt of the defendant  
8 but must exclude his innocence. It must be in such a con-  
9 dition that it cannot be reconciled with innocence.

10 Now, the evidence in this case, even though the jury  
11 believes Mr. Franklin, even though they have scanned his  
12 testimony with distrust, but in spite of that admonition to  
13 scan it with distrust have been convinced he is speaking  
14 the truth and they can find Mr. Darrow guilty of this offense,  
15 the law requires that there must be some other evidence which  
16 taken in connection with Franklin's testimony will connect  
17 the defendant, Mr. Darrow, with this offense. That evidence  
18 to a great extent is circumstantial. Now, if the case was  
19 ended, if the arrangements had been made to terminate this  
20 case at the time the alleged crime was committed, counsel  
21 could argue properly and logically that we should not believe  
22 Mr. Franklin, they could not believe that a man of Mr. Darrow's  
23 intelligence would cause a juror to be bribed after a case  
24 was ended, after he had agreed with the other side to have  
25 his clients plead guilty.

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1 That would be a perfectly logical deduction from the facts.  
2 It is up to us on our direct trial of the case to exclude  
3 such a hypothesis, if the facts will exclude it. Now, we  
4 desire to show the facts in this case; we desire to show  
5 that not only were proceedings had on the 28th, the day  
6 of the alleged crime, but they were had on the 29th, a  
7 day after the alleged crime, and that on the 29th they  
8 continued, they planned to continue the trial by drawing  
9 another venire, the last venire drawn, and it was not re-  
10 turned until the 1st of December, 1911. Those are the re-  
11 cords of the Superior Court of this county in regard to  
12 the McNamara trial, certainly all of it is relevant, it  
13 is the official record of the court concerning the very  
14 case around which this conspiracy is woven. We have charg-  
15 ed, and we are trying to prove that this defendant entered  
16 into a conspiracy to defeat and obstruct justice.

17 MR APPEL: That is not the charge at all. I submit, your  
18 Honor, that is the trouble in this case. I protest  
19 against injecting into the mind of your Honor and the minds  
20 of this jury a false issue. The indictment is not --

21 MR FORD: I think counsel has a right to reply --

22 MR APPEL: I know, but I object to those remarks, and a  
23 great many of those rulings and a great mass of this tes-  
24 timony has been introduced because of the wrong impression  
25 of what the issue is, and, as I sit here, I see it going  
26 on all the time, and I thought that some opportune time,

1 with all due respect to the court and counsel, whose bril-  
2 liant mind I have the utmost and most extraordinary respect  
3 for, I wish to suggest to your Honor that is not the is-  
4 sue.

5 THE COURT: You have raised an important legal question  
6 here and I would like to hear it in an orderly and proper  
7 way, but I cannot hear two counsel' at the same time.

8 MR APPEL: I know, but I object to his saying  
9 that the issue here --

10 THE COURT: Then your course is to assign it as error.

11 MR APPEL: I do, but I ask your Honor to stop that.

12 THE COURT: It is stopped. I cannot anticipate what coun-  
13 sel is going to say.

14 MR APPEL: I want your Honor to say so, That is not the  
15 issue. We ask your Honor to state right now, to state  
16 to this jury in the presence of this defendant and counsel  
17 that the issue is not as stated by counsel; the issue is  
18 as stated by the indictment.

19 MR FORD: The indictment in this case charged that the de-  
20 fendant committed the crime of bribery on the 28th day of  
21 November, 1911, in that he bribed one Juror Lockwood in  
22 the case entitled, the People of the State of California  
23 versus J. B. McNamara. The prosecution, the District At-  
24 torney, in the introduction of proof concerning that of-  
25 fense charged in court -- not in the indictment -- but  
26 charged in court, that that specific offense is but one of

1 a series of similar acts, bribing of jurors and bribing of  
2 witnesses, and violations of the law to defeat and ob-  
3 struct justice in the case of the People of the State of  
4 California versus J. R. McNamara. Then, everything that  
5 has occurred there, until that conspiracy proves successful  
6 or was frustrated, is material in this case.

7 Under our theory of the case the jury is entitled to  
8 know the truth and certainly the records of the court  
9 as to what occurred up until that date are material for  
10 that purpose, to show the entire circumstances surrounding  
11 this case from which the jury may have the means of determ-  
12 ining the truth or falsity of this particular charge. We  
13 want all the facts in evidence, we want every circumstance  
14 before the jury, and your Honor, if there is no matter  
15 contained in these pages which cast or which, by themselves,  
16 or which, taken in connection with other evidence in the  
17 case, will show anything concerning the guilt or innocence  
18 of this defendant, then they are absolutely harmless, and  
19 I do not see why counsel should object to the official re-  
20 cord in the case for it would be absolutely harmless, if  
21 his position is correct; but from our point of view, we  
22 consider it necessary to have it all in and we believe  
23 by the very insistence of counsel upon that point that it  
24 is material, that they realize its materiality, and for  
25 that reason are opposed to its introduction.

1 And insisting what they have said throughout the case--  
2 I am not doing it by way of anticipating a defense, but I  
3 am doing it by way of closing up a loophole in the direct  
4 trial of the case, which it is our duty to do. The defend-  
5 ant is not bound to introduce one scintilla of evidence in  
6 his own behalf, he is not bound to take the stand, he is not  
7 bound to introduce a scintilla of evidence--it is up to us  
8 to prove his guilt beyond a reasonable doubt, and if he does  
9 not believe we have succeeded in doing that he could stand  
10 before this jury and argue on the facts that are in evidence  
11 before them. We want all the facts before this jury and we  
12 believe it is necessary and material in this case that these  
13 proceedings be taken and put before the jury as matters of  
14 circumstantial evidence concerning this case, and the  
15 facts with which they are entitled to become familiar.

16 MR. APPEL. We take an exception to counsel's statement to  
17 your Honor in the presence of the jury, that the very fact  
18 I insisted on my objections here is proof that that matter  
19 which we seek to offer in evidence is material, that we  
20 appreciate that because I say it is absolutely false in  
21 every particular. The only reason why we object to it is  
22 because enough rot has been introduced in this case already,  
23 from our standpoint, and we propose to fight here to intro-  
24 duction of evidence of this kind if it does not tend to  
25 prove anything. Now, there is another thing I wish to state  
26 to your Honor, and that is this: And I might respond in

1 kind. Counsel has made a statement that all they want  
2 here is to bring out the facts and to bring out the truth  
3 before the jury. Of course, such an open avowal of good  
4 faith on the part of counsel would be taken as very true,  
5 yet, I am going to argue to this jury from the record here  
6 when the time comes--I will not say it here now--when I  
7 tried to get from the unwilling lips of Franklin if any one  
8 went with him to Mr. Darrow's office, as he claimed, on the  
9 morning of the 28th, when he says he got the \$4,000, or  
10 whether there was any one in the elevator or in the hallway  
11 or out of the hall, these gentlemen jumped on their four  
12 legs and objected strenuously and would not allow us to bring  
13 out that fact. They had knowledge of that fact. They had  
14 the evidence which went before the grand jury in reference  
15 to that fact, and you can bring your whole office full of  
16 deputies here to laugh and sneer at this defendant and his  
17 counsel, if you wish, but it will not make either sense or  
18 law or logic.

19 I say, that is not a sincere statement on the part of  
20 counsel, your Honor, and the motives and sincerity of counsel  
21 for the defendant should not be paraded before the jury or  
22 before the court here as being false, a pretense, a snare and  
23 a fake. We are here, your Honor, honestly trying to dis-  
24 charge our duty as God gives to us the ability to do so,  
25 and in perfect good faith. We have a duty to perform here  
26 and we are trying to perform it in a lawful and legal manner

1 and in a fair, sincere way, dictated as we see it. We  
2 are not trifling away the liberty of the man, we are not  
3 trying to send a human being into the penitentiary and  
4 shut out from his life all hopes and aspirations that may  
5 be here in the future for him. We are here to prevent a  
6 mistrial, we are here to prevent injustice being done as  
7 we see it; we are here to get a verdict from this jury  
8 by a fair means and by honest means, and have this case  
9 decided upon the merits, whichever way this jury shall see  
10 it, and there our duty ends. I say, that it is absolutely  
11 false and untrue, your Honor, that my objection to this  
12 testimony shows that it is material. I say to your Honor  
13 and I say to him now, that it may possibly become material  
14 when we introduce evidence to which it may be responsive,  
15 but he said in his own statement in the start, your Honor,  
16 the reasons upon which and the grounds upon which he undertook  
17 to introduce this evidence, it is to close up something  
18 which he anticipates--

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1 I might as well argue, if I were to be insincere and to be  
2 unfair, I might as well argue to your Honor that the very  
3 fact that he wants to introduce this evidence now, proves  
4 the assumptions that we make here before this jury --  
5 which would not be proper argument. That is not the proper  
6 way to reason things -- the way to reason an issue is this:  
7 is this evidence addressed to that issue? Does it tend to  
8 throw any light upon that issue? Not by what counsel  
9 says, not by what I say, not what we may anticipate in the  
10 future or what may or may not be done in the future, and  
11 that seems to be the illustration which has been brought  
12 fourth by counsel in the effort of his testimony -- must  
13 I say his attempts here to introduce his evidence, proves  
14 the truth of the assertions here that we made? That is  
15 no argument. That depends upon the sworn witnesses. What  
16 I say in argument concerning facts here, ought not to be  
17 taken by this jury; my motives, or the motives of counsel,  
18 ought not to sway this jury, they ought to be  
19 influenced by the sworn evidence of witnesses, by the  
20 facts as they are placed here before them. That ought  
21 to be the only consideration.

22 We protest, your Honor, to this kind of argument made  
23 by counsel. I said once before here that I thought that  
24 this case could be tried as eminent lawyers should try it,  
25 that we ought to try to simulate them as far as possible --  
26 I pray nothing for myself, but we ought to discuss these

1 questions on their merits. What difference does it make  
2 to this jury what counsel says about me, or what my  
3 motives are, or anything like that? It only tends to put  
4 counsel for the defense before this jury in advance of  
5 his argument, as a man unworthy of confidence; as a man  
6 unworthy of belief, and in one case the Supreme Court of  
7 this state, when counsel for the prosecution turned around  
8 and said, "We want to introduce a certain fact," he turned  
9 around and looked at counsel for the defense and said he saw  
10 him wince, -- the Supreme Court said he ought not to have  
11 made that statement, and reversed the case, and it was  
12 the only error in the case, because he paraded counsel for  
13 the defense in an improper light before the jury; be-  
14 cause it tends to degrade him, because it tends to show  
15 him unworthy of the office he is occupying at the bar,  
16 and I submit, your Honor, that is not an argument, and I  
17 insist upon the objection made.

18 MR FORD: It is submitted.

19 THE COURT: I agree with counsel there has been too much  
20 improper personality in this argument. There has been  
21 a keen and important point of law Mr Appel has raised,  
22 and it should have been discussed by both sides purely as  
23 a proposition of law. The question involved here is not  
24 who is who on either side of the table; the question is:  
25 what is the correct principle of law to apply? I will  
26 resolve myself to that question. I think the theory of

1 the District Attorney in this matter is correct, and the  
2 objection is overruled.

3 MR APPEL: We take an exception.

4 MR FORD: Read the record, Mr Monroe. A (Reading:)

5 "Tuesday, November 28th, 1911. In open court, Honorable  
6 Walter Bordwell, Judge Presiding, Clerk, Sheriff and Re-  
7 porter present. In re empanelling of trial jury. Now,  
8 at this time, being the day and hour set by the court in  
9 the order of November 25, 1911, for the return of the  
10 venire of 50 term jurors, drawn on said November 25, 1911,  
11 the sheriff's return shows 39 served, and 13 not served.  
12 The 13 not served being Robt. Theo Brackney, Chas. W. Brock-  
13 man, Geo Beck, H. D. Crutcher, Will E. Chapin, Frank E.  
14 Green, Mark G. Jones, Max Kahn, Gep. N. Lockwood, Henry  
15 Parlee, Thurston H. Pratt, Arthur Rivers and J. W. Van Horn.

9p 1 Of the 39 served, 39 were present who answered to the  
2 call of their names, and were sworn to well and truly  
3 answer such questions as may be asked regarding their  
4 competency and qualifications to act as trial jurors.  
5 Thereupon, all those desired to be excused from service  
6 were given opportunity to make their excuses, after which  
7 the following requests for release from service are granted,  
8 namely:

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1 "Fred Anthony, William Bryant, J. H. Blagge, Wm B.  
2 Cullen, Geo. Cloots, Chas. G. Davidson, Elmer E. Elliott,  
3 C. R. Freeman, James Hay, Frank A. Hulett, Raymond Huston,  
4 C. I. Ijams, Harry J. Mercer, Carl F. Messman, H. T. Paddock,  
5 Edwin A. Rogers, J. F. Roth, J. P. Stockdale, Geo. W. Ayls-  
6 worth, John G. Staub, Chas. S. Sanderson, Cass Schleuter,  
7 W. L. Stewart, Roy B. Sumner, L. C. Turner, C. R. Watson  
8 and Homer Williams, leaving on the panel as apparently fit  
9 for service and not excused by the Court, to wit; F.P. Baldesser  
10 Alex Culver, Isaac S. Carter, R. E. Dolley, Geo. H. Hamp-  
11 shire, C. D. Hubbard, A. J. Kruger, Dr. J. H. Martin,  
12 A. W. Stewart and Wm. A. Sackett, there being 10 trial jurors  
13 present and not excused and all having the qualifications  
14 to act as trial jurors, are declared by the Court to be  
15 and constitute the trial jury. "

16 Q Then follow the minutes of the afternoon? A Yes, sir.

17 Q I believe those have been read into the record? A They  
18 have been read.

19 Q Will you read the minutes of Wednesday, November 29?

20 A (Reading) "Wednesday, November 29, 1911--"

21 MR. APPEL. We object to that on the ground it is incompetent,  
22 irrelevant and immaterial, hearsay, no foundation laid,  
23 not tending in any manner to prove any element of the of-  
24 fense charged in the indictment.

25 THE COURT. Objection overruled.

26 MR. APPEL. We take an exception.

1 A (Reading) "Wednesday, November 29, 1911. In open  
2 court, Hon. Walter Bordwell, Presiding, Clerk, sheriff,  
3 and reporter present. People vs. J. B. McNamara. Case  
4 resumed. All jurors, counsel and defendant, J. B. Mc  
5 Namara present. Ordered that the challenge for cause  
6 of the People against

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1 Juror Edwin Haskell is allowed and said juror Edwin Haskell  
2 is excused; by order of the court, the clerk proceeded to  
3 draw from the trial jury box the names of four persons to  
4 fill the jury, and the following named persons being  
5 drawn, to wit: C. D. Hubbard, A. J. Kruger, A. W. Stewart,  
6 and Isaac S. Carter, who were sworn as to their qualifica-  
7 tions. Juror C. D. Hubbard is excused by the court, he  
8 not believing in capital punishment; Juror A. J. Kruger  
9 examined and by stipulation of counsel said juror A. J.  
10 Kruger is excused. By order of the court the clerk pro-  
11 ceeded to draw from the trial jury box the names of two  
12 persons to fill the jury, and the following named persons  
13 were drawn, to wit: J. H. Morton and Alexander Culver, who  
14 were sworn as to their qualifications. Juror Alexander  
15 Culver was examined and on request of the defendant is  
16 excused; Juror Isaac S. Carter, examined and challenged for  
17 cause by defendant there being no resistance by the people  
18 said juror Isaac S. Carter is excused; Juror A. W. Stewart  
19 examined and passed by counsel, is ordered seated. By order  
20 of the court the clerk proceeded to draw from the trial jury  
21 box the names of three persons to fill the jury, and the  
22 following named persons being drawn, to wit: F. P. Beldoser  
23 Richard D. List, and R. E. Dolley, who were sworn as to their  
24 qualifications. Juror F. P. Beldoser and Richard D. List  
25 are excused by the court, not believing in capital punish-  
26 ment; juror J. H. Morton examined and challenged by the

1 defendant for cause, said challenge allowed and juror

2 J. H. Morton excused; Juror R. E. Dolley is excused by

3 stipulation of counsel. Cause continued until Friday December

4 1, 1911, at 9 o'clock A.M." That closed that day, the  
5 minutes of the trial.

6 Q What, if anything further was done by the court on that  
7 day? A The drawing of another panel of jurors.

8 Q Will you read as to the records concerning that?

9 MR. APPEL. We object to that on the ground it is incom-  
10 petent, irrelevant and immaterial, hearsay, no foundation  
11 laid, does not tend to prove any issue or element of the  
12 offense charged in the indictment.

13 THE COURT. Objection overruled.

14 MR. APPEL. We take an exception.

15 A (Reading) "In re drawing of trial jury. It is ordered  
16 and directed that the trial jury be drawn in the court room  
17 of Department 9 of the Superior Court of the state of  
18 California on Wednesday, the 29th day of November, 1911 at  
19 the hour of 5 o'clock in the afternoon of said day, and the  
20 number of said jurors to be drawn as aforesaid is ordered  
21 and designated to be fifty.  
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1 "It is further directed that this order be filed this  
 2 day with the County Clerk of said Los Angeles County.  
 3 Walter Bordwell, Judge. In pursuance of the order made,  
 4 filed and entered on the 29th day of November, 1911, that  
 5 a trial jury shall be drawn, and this being the time  
 6 set for the drawing of said trial jury, the clerk, in  
 7 open court, in the presence of the court, proceeded by  
 8 order of the court to draw said trial jury, and after  
 9 duly shaking the trial jury box containing the names of  
 10 persons selected by the judges of the Superior Court  
 11 of Los Angeles County, state of California, to serve as  
 12 trial jurors, regularly drew therefrom 50 slips of paper  
 13 containing the names of the following persons written  
 14 thereon, to-wit:

15 MR FORD: May it be please the court, may it be stipulat-  
 16 ed that the reporter copy the names without reading them?  
 17 Go ahead and read them. A Addison Adams --

18 MR APPEL: No use of reading them. The reporter can take  
 19 them from the record.

20 THE COURT: You waive the reading at this time?

21 MR APPEL: We waived it once before, your Honor, and it  
 22 is in the record we waived it so far as these jury lists  
 23 are concerned.

24 MR FORD: If it is stipulated that it may be read by the  
 25 reporter and admitted as though read to the jury. Go  
 26 ahead and read them. A Mr --

1 MR APPEL: What is the use of that?

2 MR FORD: Before you go --

3 MR APPEL: Why do you ask me that. I say, your Honor,  
4 it is in the record to that effect before when these  
5 jury lists were read before.

6 THE COURT: Mr Appel, I heard what you said. The court  
7 doesn't recall the record at that time. Mr Appel, the  
8 court asked you at this time if you cared to waive the  
9 reading at this time?

10 MR APPEL: I said so, your Honor. That is what I mean,  
11 that it has already been in the record, your Honor, before,  
12 that the reporter could copy them, before when these  
13 lists were introduced in evidence.

14 THE COURT: The reading is waived.

15 MR APPEL: We stipulated that only such jurors as they  
16 wanted to call the attention of the court to --

17 THE COURT: You are quite right; I remember it now.

18 MR FORD: I didn't think the stipulation covered it at  
19 this time.

20 THE COURT: Counsel says it does.

21 MR FORD: If it is stipulated that they may be admitted,  
22 read and copied by the reporter into the record, we will  
23 pass on.

24 THE COURT: It is so stipulated.

25 (The following is a copy of list above referred to:)  
26 Addison Adams, Herbert B. Allen, Arthur F. Andres, James

1 Alexander, H.C.Anderson, Alvin N. Archer, George E.  
2 Brown, Sidney S. Blanchard, George M. Clark, Wm M.  
3 Carter, Harrold Crosby, G. A. Chappel, C. F. Conant, J. R  
4 Callahan, W. H. Clune, J. E. Courtney, A. B. Clement,  
5 Andrew Donahue, Albert L. Dennis, Geo. W. Dickinson,  
6 A. R. Dodworth, Robt Doane, Geo. W. Foreman, Michael Fritz,  
7 John A. Gemill, J. A. W. Hamilton, Gustavus Horn, B. L.  
8 Keag, Phillip A. Mulford, D. A. Morse, E. P. Merritt,  
9 L. C. Meredith, Briggs Monroe, C. E. Moorehouse, Roy  
10 Nance, F. M. Nickell, W. H. Nicholls, Albert Phelps,  
11 Chas. Henry Royston, Wm. Richards, A. C. Sikes, Archie  
12 Smith, E. H. Stagg, Edgar J. Sharpless, V. R. Sufliff,  
13 Chas. Snow, Arthur W. Swain, H. T. Thome, S. A. Wheeler,  
14 and J. M. Wagner.

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1 MR APPEL: They read a long list of names where the name  
2 of Kruger appeared. He said he wanted and only called the  
3 name of Kruger here, and we said all right.

4 A Shall I read the closing of that order? (Reading:)  
5 Immediately after the drawing was completed, it was ordered  
6 that the clerk make a copy of the list of names of per-  
7 sons drawn as aforesaid, and certify the same as required  
8 by law, stating in his certificate the date of the order  
9 and of the drawing, and the number of jurors drawn, and  
10 the time when and place where such jurors are required to  
11 appear, to-wit: Friday, the 1st day of December, 1911,  
12 at 9 o'clock in the forenoon of said day in the court  
13 house of said Los Angeles County, in the court room of  
14 Department 9 of the Superior Court of said county; and it  
15 is further ordered that the list of the jurors drawn be  
16 certified and delivered to the sheriff of said county for  
17 service, as required by law, by proper process, and that  
18 the sheriff make legal service and due return of his action  
19 in the premises, and the list of names as drawn was duly  
20 certified to the sheriff as ordered by the court. It was  
21 further ordered that the persons whose names were drawn,  
22 as aforesaid, appear and attend at this court in Depart-  
23 ment - thereof, on Friday, the 1st day of December, 1911,  
24 at 9 o'clock of the forenoon of said day.

25 MR FORD: The next day was Thursday, and Thanksgiving Day,  
26 and a holiday, was it not? A Yes sir.

1 Q Will you turn to the records of December 1st and see  
2 what you have in there in reference to the jury? A Friday  
3 December 1st, 1911, in open court, Honorable Walter Bord-  
4 well, Judge, the Clerk --

5 MR APPEL: That is in the record?

6 MR FORD: Not the jury is not. The proceedings of the  
7 trial on that day is, but not the jury part.

8 THE COURT: All right.

9 MR APPEL: We object upon the ground it is incompetent,  
10 irrelevant and immaterial for any purpose whatsoever, and  
11 hearsay, not tending to prove any element of the offense  
12 and acts and declarations and official acts of the court  
13 in drawing the jury or the sheriff in getting a jury  
14 into court, cannot be binding upon the defendant, unless  
15 they are offered for the purpose of proving that those  
16 persons were conspirators.

17 THE COURT: Objection overruled.

18 MR APPEL: We except. A (Reading.) In re empaneling  
19 of trial jury. Now, at this time, being the day and hour  
20 set by the court in its order of November 29th, 1911, for  
21 the return of the venire of 50 term jurors, drawn on said  
22 November 29th, 1911, the sheriff's return shows 39 served  
23 and 11 not served, the 11 not served being Herbert B.  
24 Allen, James Alexander, W. H. Clune, Robert Doane, John A.  
25 Gemill, Michael Fritz, Gus Tavuz Horn, E. P. Merritt,  
26 C. E. Moorehouse, Roy Nance, and Albert Phelps. Of

1 the 39 served, 39 were present, who answered to the call  
2 of their names, and were sworn to well and truly answer  
3 such questions as may be asked them regarding their  
4 competency and qualifications to act as trial jurors.  
5 Thereupon all those desiring to be excused from service  
6 were given an opportunity to make their excuse, after which  
7 the following requests for release from service are  
8 granted, viz:

9 MR FORD: That may be copied by the reporter under the  
10 stipulation.

11 THE COURT: Yes sir.

12 (The matter above referred to to be copied by the re-  
13 porter is as follows:) Addison Adams, Alvin N.  
14 Archer, George E. Brown, Wm. M. Carter, Harold Crosby,  
15 J. R. Callahan, Albert S. Dennis, A. R. Dodworth, Geo. W.  
16 Foreman, J. E. Courtney, Geo. W. Dickinson, J. A. W.  
17 Hamilton, R. B. King, Phillip A. Mulford, D. A. Morse,  
18 L. C. Meredith, Monroe Briggs, Chas. Henry Royston, Wm.  
19 Richards, A. C. Sikes, H. T. Thome and J. M. Wagner,  
20 and Chas. Snow, leaving on the panel as apparently fit for  
21 service and not excused by the Court, to-wit: Arthur  
22 F. Andre, H. C. Anderson, Sidney S. Blanchard, George M.  
23 Clark, G. A. Chapel, C. F. Conant, A. B. Clement, Andrew  
24 Donahue, F. M. Nickell, W. H. Nichols, Archie Smith, E. H.  
25 Stagg, Edgar J. Sharpliss, V. R. Sutliff, Arthur W.  
26 Swain and S. A. Wheeler. There being 16 trial jurors

1 present and not excused and all having the qualifications  
2 to act as trial jurors, are declared by the Court to be  
3 and constitute the trial jury.

4 MR FORD: Then follow the minutes of the trial for that day  
5 which I believe are in the record. The record of November  
6 29th states that the order was -- or, rather that the cer-  
7 tificate of the drawing of the trial jury was made out and  
8 delivered to the sheriff, and your minutes of December 1st  
9 show the return to have been filed with you. Do you de-  
10 sire to look at this document. A They do.

11 THE COURT: Bearing in mind your former admission, we  
12 will take a recess for 5 minutes.

13 (After recess.)

14 THE COURT: Proceed, gentlemen.

15 MR FORD: I have shown this document to counsel for the de-  
16 fense. I will ask you to state if that is the document  
17 to which you referred in your last answer? A It is,  
18 together with the sheriff's return.

19 MR FORD: We offer this in evidence as People's exhibit --  
20 what number, Mr Smith?

21 THE CLERK: 15.

22 MR APPEL: We object upon the ground it is incompetent, ir-  
23 relevant and immaterial for any purpose; it is hearsay,  
24 and it is not binding upon the defendant; doesn't tend  
25 to show or prove any element of the offense alleged in the  
26 indictment to have occurred on the 28th day of November,

1 1911.

2 MR FORD: The witness testified --

3 THE COURT: Objection overruled.

4 MR APPEL: We except.

5 MR FORD: Mr Smith, what is the venire number? 12, is it?

6 THE CLERK: No.12.

7 MR APPEL: I object to the clerk of this court being ex-  
8 amined here not under oath. I suppose he means what is  
9 the number on that paper.

10 MR FORD: That is not part of the record.

11 MR APPEL: He said, "What venire it is?" I suppose he  
12 meant simply what is the number on the paper.

13 THE COURT: Do you want the question and answer stricken  
14 out?

15 MR FORD: I don't care for it in the record.

16 MR APPEL: I want the record to show the difference, your  
17 Honor.

18 THE COURT: All right. The record so shows.

19 MR FORD: It is stricken out; I didn't intend it to go in  
20 to the record. Now, will you turn to your records of  
21 the 1st day of November, 1911, and state whether or not  
22 you have any record of the drawing of venire No.5 on that  
23 date? A Yes sir.

24 Q Just read that to the jury.

25 MR APPEL: We object upon the ground that it is incompe-  
26 tent, irrelevant and immaterial --



1 MR FORD: The purpose of that --

2 MR APPEL: I want to make my objection.

3 MR FORD: I beg your pardon.

4 MR APPEL: I object upon the ground it is incompetent, ir-  
5 relevant and immaterial, hearsay and no foundation laid  
6 for the introduction or reading of the matter referred to  
7 in the question.

8 THE COURT: Objection overruled.

9 MR APPEL: We take an exception.

10 MR FORD: Just for the purpose of the record and in accord-  
11 ance with the court's ruling, it was for the purpose of  
12 showing the drawing of the name of George R. Smith, that  
13 he was a juror approached by Franklin, in Franklin's tes-  
14 timony. Just read what you have there. A (Reading:)  
15 Wednesday, November 8th, 1911. In open court, Honorable  
16 Walter Boardwell, Judge, the Clerk, Sheriff and Reporter  
17 present. In re drawing of trial jury. It is ordered and  
18 directed that a trial jury be drawn in the court room of de-  
19 partment 9 of said court on Wednesday, the 8th day of  
20 November, 1911, at the hour of 9 o'clock in the forenoon  
21 of said day, and the number of said jurors to be drawn as  
22 aforesaid is ordered and designated to be 40. It is further  
23 directed that this order be filed this day with the county  
24 clerk of said county. Walter Boardwell, Judge. In pursuance  
25 of the order made, filed and entered on the 8th day of  
26 November, 1911, that a trial jury should be drawn, and

1 this being the time set for the drawing of said trial jury,  
 2 the clerk, in open court in the presence of the court,  
 3 preceeded by order of the court to draw said trial jury,  
 4 andafter duly shaking the trial jury box containing the  
 5 names of persons selected by the judges of the Superior  
 6 Court of Los Angeles County, state of California, to serve  
 7 as trial jurors, regularly drew therefrom 40 slips of  
 8 paper containing the names of the following persons written  
 9 thereon, to-wit:

10 MR FORD: And under that stipulation the names may be co-  
 11 pied. What page of that record is that? A Page 273.

12 (The matter above referred to to be copied by the re-  
 13 porter is as follows:)

- 14 Edwin M. Atkinson, Frank C. Adamson, Luke Barton, Na-
- 15 than P. Bailey, James E. Baker, J. J. Burr, Willett
- 16 Brunner, R. D Bronson, Geo. J. Birkel, J M. Brooks,
- 17 D. M. Cowan, James B. Crosby, John J. Dillon, Clarence
- 18 Drown, John W. Wm. A. Hunter, Henderson Hood,
- 19 Joseph Hill, F. D. Jones, L. W. Kindman, Taylor
- 20 Mendenthal, N. O. P. McComb, E. H. Nichols, George Phillips,
- 21 Squire Gooch, T. J. Green, A. Gribbling, W. C. Thomas,
- 22 B. L. Vickrey, C. E. Stone, Charles H. Schwam, Frank R.
- 23 Smith, George W. Sheaff, Walter J. Wrenn, George W.
- 24 Walker, Fred M. Webb, W. M. Warren, John P. Wilson,
- 25 Frank G. Wride and W. W. Weller,

26 Q Will you glance through the list of names and see whether

1 the name of Frank R. Smith appears thereon?

2 MR APPEL: Wait a moment. We object upon the ground it is  
3 incompetent, irrelevant and immaterial, no foundation  
4 laid for the examination of the witness or any question of  
5 the written matter in this case, and upon the further mat-  
6 ter that it is hearsay and not the best evidence.

7 THE COURT: Objection overruled.

8 MR APPEL: We take an exception.

9 A Yes sir. The name of Frank R. Smith.

10 MR FORD: Have you read all of that order with the excep-  
11 tion of the names? A No sir.

12 Q Read the balance. A (Reading:) Immediately after  
13 the drawing was completed, it was ordered that the clerk make  
14 a copy of the list of names of persons drawn as afore-  
15 said, and certify the same as required by law, stating in  
16 his certificate the date of the order and of the drawing,  
17 and the number of the jurors drawn and the time when and  
18 place where such jurors are required to appear, to-wit,  
19 Friday, the 10th day of November, 1911, at 10 o'clock  
20 in the forenoon of said day in the court house at said Los  
21 Angeles County, in the court room of Department 9 of the  
22 Superior Court of said county; and it is further ordered  
23 that the list of the jurors drawn be certified and de-  
24 livered to the sheriff of said county for service, as re-  
25 quired by law, by proper process, and that the sheriff  
26 make legal service and due return of his action in the

1 premises, and the list of names as drawn was duly certi-  
2 fied to the sheriff as ordered by the court. It was fur-  
3 ther ordered that the persons whose names were drawn, as  
4 aforesaid, appear and attend at this court in Department  
5 9 thereof, on Friday, the 10th day of November, 1911, at  
6 9 o'clock of the forenoon of said day.

7 Q Please turn to your record of November 10th, and what  
8 is there written concerning the same matter, in re jury?

9 A Friday, November 10th --

10 MR APPEL: Wait a moment. We object to the reading of the  
11 matter referred to by counsel in his question now, upon the  
12 ground and for the reason that no foundation has been laid  
13 for the introduction or <sup>of</sup> the reading of the matter, now  
14 about to be read by the witness, and upon the further  
15 ground that it is incompetent, irrelevant and immaterial,  
16 no foundation laid, not binding upon the defendant.

17 THE COURT: Objection overruled.

18 MR APPEL: We take an exception.

19 A (Reading:) Friday, November 10th, 1911. In open  
20 court, Honorable Walter Bordwell Judge Presiding, the  
21 Clerk, Sheriff and Reporter present. In re impaneling of  
22 trial jury. Now, at this time, being the day and hour set  
23 by the court in its order of November 8th, 1911, for the  
24 return of the venire of 40 term jurors, drawn on said  
25 November 8th, 1911, the sheriff's return shows 31 served  
26 and 9 not served. The nine not served being:

1 MR FORD: Copy the names.

2 (The matter above referred to to be copied by the re-  
3 porter, is as follows:)

4 James E. Baker, William A. Hunter, Taylor Mendenthal,  
5 N. O. P. McComb, E. Nichols, W. C. Thomas, B. L. Vickrey,  
6 Frank R. Smith and George W. Sheaff. Of the 31 served,  
7 31 were present, who answered to the call of their names,  
8 and were sworn to well and truly answer such questions as  
9 may be asked them regarding their competency and qual-  
10 ifications to act as trial jurors. Thereupon all those de-  
11 siring to be excused from service were given an opportunity  
12 to make their excuse, after which the following requests  
13 for release from service are granted, viz:

14 MR FORD: And then follow the names again.

15 (The matter above referred to to be copied by the re-  
16 porter is as follows: )

17 Frank Adamson, Luke Barton, J. H. Brooks, D. M. Cowan,  
18 James E. Crosby, John I. Dillon, Clarence Drown, Hender-  
19 son Hood, L. W. Kingman, George Phillips Squire Gooch,  
20 C. E. Stone, Charles H. Schwam, Walter J. Wrenn, George  
21 W. Walker, Frank G. Wride, and W. W. Weller, leaving on  
22 the panel as apparently fit for service, and not excused by  
23 the court, to-wit: Edwin M. Atkinson, Nathan T. Bailey,  
24 J. J. Burr, Willett Brunner, R. D. Bronson, Geo. I.  
25 Berkel, John W. Fisk, Joseph Hill, F. D. Jones, T. J.  
26 Green, A. Gribling, Fred M. Webb, W. M. Warren and

1 John T. Wilson, there being 14 trial jurors present and  
2 not excused, and all having the qualifications to act  
3 as trial jurors, are declared by the court to be and con-  
4 stitute the trial jury.

5 Q I show you a document which I have already exhibited  
6 to counsel for the defense. Is that the document refer-  
7 red to in your minutes of November 8th as having been  
8 drawn on that date, certificate made out on that date, and  
9 the parties attached, the return referred to as having  
10 been brought into court on November 10th?

11 MR APPEL: Wait a moment. We object to that as calling  
12 for a conclusion or opinion of the witness; it is incom-  
13 petent, irrelevant and immaterial for any purpose whatso-  
14 ever, and no foundation laid for the introduction of the  
15 testimony; not binding upon the defendant, not tending to  
16 prove any issue in the case.

17 THE COURT: Objection overruled.

18 MR APPEL: Exception.

19 A Yes sir, together with the sheriff's return.

20 MR FORD: We offer it as exhibit No.16.

21 MR APPEL: We make the same objection to the introduction  
22 of the document in evidence on all of the grounds hereto-  
23 fore stated in our last objection.

24 THE COURT: Objection overruled.

25 MR APPEL: Exception.

26 MR FORD: Ask you to turn to your record of November 18th, in  
re drawing of jury. The object, your Honor, is to show

1 the name Guy W. Yonkin drawn as a juror.

2 A Saturday, November 18th --

3 MR APPEL: Wait a moment. What is it you want him to do?

4 Put your question.

5 MR FORD: Will you read the record of November 18th?

6 MR APPEL: We object upon the ground that no foundation  
7 is laid for the admission of the matter about to be read  
8 by the witness, upon the further ground that it is incom-  
9 petent, irrelevant and immaterial for any purpose whatsoever;  
10 hearsay, not binding upon the defendant, concerning collater-  
11 al matters having no tendency to prove the principal issue  
12 before the jury.

13 THE COURT: Objection overruled.

14 MR APPEL: We take an exception.

15 A On that date there was a drawing of the jury and impanel-  
16 ment of a jury. Which minute order do you desire?

17 MR APPEL: I move to strike out the answer of the witness  
18 as not being responsive to the question.

19 THE COURT: Strike it out.

20 MR FORD: That referring to the drawing of the jury.

21 A (Reading:) Saturday, November 18, 1911. In open  
22 court, Honorable Walter Bordwell, Judge Presiding, the  
23 Clerk, Sheriff and Reporter present. In re drawing of  
24 trial jury. It is ordered and directed that a trial jury  
25 be drawn in the court room of Department 9 of said court  
26 on Saturday, the 18th day of November, 1911 at the hour

1 of 10 o'clock in the forenoon of said day: and the number  
2 of said jury to be drawn as aforesaid is ordered and direct  
3 ed to be 50. It is further directed that this order be fil-  
4 ed this day with the county clerk of said <sup>Los Angeles</sup> county. Wal-  
5 ter Bordwell, Judge. In pursuance of the order made, filed  
6 and entered on the 18th day of November, 1911, that a trial  
7 jury should be drawn, and this being the time set for  
8 the drawing of said trial jury, the clerk, in open court,  
9 in presence of the court, proceeded, by order of the court,  
10 to draw said trial jury; and after duly shaking the  
11 trial jury box containing the names of persons selected  
12 by the judges of the Superior Court of Los Angeles County,  
13 state of California, to serve as trial jurors, regularly  
14 drew therefrom 50 slips of paper containing the names of  
15 the following persons written thereon, to-wit:

16 MR FORD: Insert the names.

17 (As above referred to the reporter copies in the fol-  
18 lowing names:)

19 Jos. B. Alexander, Reuben M. Atkinson, Jno. M. Abramson,  
20 Geo. L. Andrews, Henry L. Asher, Eugene H. Barker,  
21 George H. Briggs, F. A. Brode, Chas. S. Brington, Robt.  
22 L. Byrd, E. H. Boden, Frederick L. Frown, G. S. Bisbee,  
23 Oliver Cunningham, J. H. Coke, Carl F. Capell, Guy A.  
24 Cherry, Francis D. Chipron, Geo. E. Cross, A. Forsberg,  
25 Geo. R. Frampton, Daniel Fry, Frank A. Garbutt, E. J.  
26 Hoffmaster, F. B. Hanawalt, O. S. Jewitt, Lyman E. Jacobus,



1 W. P. Johnson, A. R. Kilgore, W. A. Lamb, Lewis Landreth,  
2 F. W. La Fetra, A. R. Lewis, R. R. Moore, H. F. Metcalf,  
3 M. F. Mooney, R. M. Miller, S. P. Olcott, Thos W. Price,  
4 W. N. Sarver, Horace W. Snodgrass, A. W. Stevens, John O. D  
5 Sheron, Emil Shultz, J. D. Stone, A. H. Seely, Chas. B.  
6 Sandham, Lowran W. Traver, Guy W. Yonkin and C. K. Young.

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15s 1 Mr. FORD. In the list of names, I will ask you to state  
2 whether or not the name of Guy W. Yonkin appears? A Yes,  
3 sir, Guy W. Yonkin.

4 Q Turn to your records of November 20th and read that  
5 portion relating to the impanelment of the jury on that  
6 panel. A That doesn't complete the minute order of that  
7 day.

8 Q I beg your pardon. A Monday, November 20th--

9 MR. APPEL. Wait a minute--We object to the witness reading  
10 the matter to which his attention has been called by the  
11 question on the ground that no foundation has been laid  
12 for the introduction of the matter or for the examination  
13 of the witness concerning the matter to which his attention  
14 has been called; it is incompetent, irrelevant and imma-  
15 terial for any purpose whatsoever; hearsay, not binding  
16 upon the defendant.

17 THE COURT. Objection overruled.

18 MR. Appel. We take an exception.

19 A (Reading) "Monday, November 20, 1911. In open court  
20 Hon. Walter Bordwell, Judge, Presiding. The clerk, sheriff  
21 and reporter present. In re impaneling of trial jury.  
22 Now, at this time, being the day and hour set by the court  
23 in its order of November 19, 1911, for the return of the  
24 venire of 50 term jurors, drawn on said November 19, 1911,  
25 the sheriff shows 42 served and 8 not served, the 8 not  
26 served being: Reuben Atkinson, Eugene H. Barber, R. R.

1 Moore, H. F. Metcalf, John O. D. Shearon, J. D. Stone,  
2 A. H. Seeley and C. K. Young. Of the 42 served 42 were  
3 present, who answered to the call of their names and were  
4 sworn to well and truly answer such questions as may be  
5 asked them regarding their competency and qualifications  
6 to act as trial jurors. Thereupon, all those desiring to be  
7 excused from service were given an opportunity to make  
8 excuse, after which the following requests for release  
9 from service were granted, viz. Jos. B. Alexander,  
10 Jno. M. Abramson, Geo. L. Andrews, Geo. H. Briggs,  
11 Chas. S. Brington, Robert L. Byrd, E. H. Boden, Carl F.  
12 Capell, Francis D. Chipron, Geo. E. Cross, A. Fosberg,  
13 Geo. R. Frampton, Daniel Fry, Frank A. Garbut, N. P.  
14 Johnson, A. R. Kilgore, W. A. Lamb, Lewis Landreth, T. W.  
15 LaFetra, W. O. Lewis, R. M. Miller, Thos. W. Rice, W. N.  
16 Sarrer, Emil Schultz, Chas. B. Sanham, and Guy Yonkin,  
17 leaving on the panel as apparently fit for service and  
18 not excused by the court, to wit: Hugh L. Asher, F. A.  
19 Brode, Fredeirck L. Brown, G. S. Bisbee, Oliver Cunningham,  
20 J. H. Coke, Guy A. Cherry, E. J. Hoffmaster, F. B. Hanawalt,  
21 O. S. Jewett, Lyman E. Jacobus, M. F. Mooney, S. P. Olcott,  
22 Horace W. Snodgrass, A. U. Stevens and Louran W. Traver,  
23 therebing 16 trial jurors present and not excused and all  
24 having the qualifications to act as trial jurors are declared  
25 by the court to be and constitute the trial jury."  
26 MR. FORD. Q That all of the order? A Yes, sir.

1 Q I now hand you a document which I have already exhibited  
2 to counsel and ask you to state whether that is the certi-  
3 ficate of return referred to in the records of November 18th  
4 and referred to as having been filed with the return on  
5 November 20th, 1911?

6 MR. APPEL. The same objection as last upon the same grounds  
7 stated.

8 THE COURT. Objection overruled.

9 MR. APPEL. We except.

10 A Yes, sir.

11 MR. FORD. We offer it in evidence as Exhibit No. 17.  
12 Now, turn to your record of November 23, 1911. A "Wednes-  
13 day, November 23, 1911, in open court Hon. Walter--"

14 MR. APPEL. Wait a moment, you turned to that record, didn't  
15 you? A Yes, sir.

16 MR. APPEL. He didn't ask you any question.

17 MR. FORD. Q Will you read that to the jury?

18 MR. APPEL. Now, we object to his reading--we object to the  
19 witness reading the matter to which his attention has been  
20 called on the ground that it is incompetent, irrelevant and  
21 immaterial and no foundation has been laid for the reading  
22 of the matter nor to enable--or to authorize the witness  
23 to read the matter to which his attention has been called  
24 by the witness on the ground it is collateral to any  
25 issue in this case, not in any way, shape or form binding  
26 upon the defendant concerning the offense in the indictment.

1 MR. Ford. The purpose of this is to show the drawing of  
2 John S. Underwood, referred to in the testimony of Bert H.  
3 Franklin.

4 THE COURT. Objection overruled.

5 MR. APPEL. Exception.

6 A (Reading) Wednesday November 22, 1911. In open court,  
7 Hon. Walter Bordwell, Judge, presiding. The clerk, sheriff  
8 and reporter present. In re drawing of trial jury.

9 It is ordered and directed that a trial jury be drawn in the  
10 courtroom of Department 9 of said court on Friday the 24th  
11 day of November, 1911, at the hour of 1 o'clock in the after-  
12 noon of said day, and the number of said jury to be drawn,  
13 as aforesaid, is ordered and designated to be 50. It is fur-  
14 ther directed that this order be filed this day with the  
15 county clerk of said Los Angeles county. Walter Bordwell,  
16 Judge. In pursuance of the order made, filed and entered  
17 on the 22nd day of November, 1911, that a trial jury should  
18 be drawn, and this being the time set for the drawing of  
19 said trial jury, the clerk, in open court, in the presence  
20 of the court, proceeded, by order of the court, to draw  
21 said trial jury; and after duly shaking the trial jury box  
22 containing the names of persons selected by the judges of the  
23 superior court of Los Angeles County, State of California,  
24 to serve as trial jurors, regularly drew therefrom 50 slips  
25 of paper containing the names of the following persons  
26 written thereon, to wit:"

1 MR. FORD. They may be copied under the stipulation.  
2 (The following names of jurors was then copied by the  
3 reporter as directed:)

4 "Willett F. Bailey, Fred Boon, Frank C. Bolt, C. B.  
5 Blakeman, L. S. Blakeslee, H. S. Beaman, F. H. Bloodgood,  
6 L. H. Bixby, Ben H. Baker, L. W. Callender, Mark Clark,  
7 Geo. W. Cameron, N. W. Chamberlain, Calvin D. Collins,  
8 Martin Elftman, W. F. Erwin, Francisco J. Bond, Mendal  
9 G. Frampton, J. B. Gist, I. W. Gardner, J. O. Houser,  
10 James Hanley, George F. Herr, J. Hawkins, Edward Haskell,  
11 Datus E. Hunter, James Loney, G. A. Lawrence, F. C. Leh-  
12 mer, Richard D. List, Geo. J. Mitchell, Chas. I. Mason,  
13 Adolph Nelson, E. S. Payne, Hugh Petrie, Geo. O. Renner,  
14 I. J. Reynolds, Chas. C. Richmond, Abner L. Rose,  
15 David G. Scott, Christian Sebelius, James Slater, Cyrus  
16 Trueblood, Jno. S. Underwood, Chas. Van Valkenburg,  
17 Frank Walker, Dr. Ben O. Webb, W. L. Wiley, Otto L.  
18 Wuerker and J. J. Young. "

19 MR. FORD. I will ask you to look through that list and  
20 see if the name of John S. Underwood appears thereon?

21 A Yes, sir; John S. Underwood.

22 Q Turn to your records of November 24th, 1911 and state  
23 whether or not you have any record concerning the return  
24 of that venire? A I have.

25 Q Read the record to the jury.

26 MR. APPEL. We make the same objection as made to the last

1 question.

2 THE COURT' Objection overruled.

3 MR. APPEL. We except.

4 A (Reading) "Friday, November 24, 1911, in Open court,  
5 Hon. Walter Bordwell, Judge, presiding. The clerk, sheriff  
6 and reporter present. In re Impaneling of trial jury.

7 Now, at this time, being the day and hour set by the court  
8 in its order of November 23, 1911, for the return of the  
9 venire of 50 term jurors drawn on said November 23, 1911.

10 The sheriff's returns show 56 served and 4 not served.

11 The 4 not served being George F. Herr, Adolph Netson,  
12 Charles C. Richmond and Charles Van Valkenburg; of the 56  
13 served 56 were present who answered to the call of their  
14 names and were sworn to well and truly answer such questions  
15 as may be asked them regarding their competency and  
16 qualifications to act as trial jurors. Thereupon, all those  
17 desiring to be excused from service were given an oppor-  
18 tunity to make their excuses, after which the following  
19 requests for relief from service were granted, viz:

20 "Willett S. Bailey, Fred Boon, Frank C. Bolt, C. B.  
21 Blakeman, L. C. Blakeslee, F. H. Bloodgood, L. H. Bixbee,  
22 Ben H. Baker, L. W. Callender, Mark Clark, N. W. Chamberlain,  
23 W. F. Erwin, J. Bond. Francisco, Mendal G. Frampton, I. W.  
24 Gardner, James Hanley, J. Hawkins, James Loney, G. A.  
25 Lawrence, F. C. Lehmer, Geo J. Mitchell, Chas. I. Mason,  
26 E. S. Payne, Hugh L. Petrie, I. J. Reynolds, Abner L. Ross,

1 David G. Scott, Cyrus Trueblood, John S. Underwood,  
2 Frank Walker, Dr. Ben O. Webb, W. L. Wiley, Otto L. Worker,  
3 and J. J. Young. Leaving on the panel as apparently fit  
4 for service and not excused by the court; to wit:

5 H. S. Beaman, Geo W. Cameron, Calvin D. Collins,  
6 Martin Elftman, J. B. Gist, J. O. Houser, Edward Haskell,  
7 Datus E. Hunter, Richard D. List, Geo O. Renner, Christian  
8 Sebelius and James Slater. There being 12 trial jurors  
9 present and not excused and all having qualifications  
10 to act as trial jurors, are declared by the Court to be  
11 and constitute the trial jury. "

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1 Q BY MR. FORD. I hand you a document which I have already  
2 offered to show counsel for the defendant and ask you to  
3 state whether or not that is the document referred to in  
4 your record of November 22nd, as having been drawn on that  
5 day, and the record of November 24 as having been returned  
6 on the sheriff's return? A Yes, sir.

7 MR. FORD. We offer that as exhibit No. 18.

8 MR. APPEL. The same objection.

9 THE COURT. Objection overruled.

10 MR. APPEL. Exception.

11 BY MR. FORD. Q With reference to all these records which  
12 you have read this morning, you were the clerk during  
13 the times indicated by the record of that department?

14 A I was.

15 Q And you know the records to be the official records of  
16 that department? A They are.

17 Q I will ask you if you were the clerk of that department  
18 during the months of July and August, 1911?

19 A Yes, sir, I was.

20 Q Turn to your records of July 31, 1911. (Witness does so.)  
21 Have you any record of the filing of any papers on that date  
22 in reference to case entitled "In re George Beam, contempt  
23 of court"? A yes, sir.

24 Q Just read that record. Pardon me a moment--were you the  
25 clerk of the department on that date? A I was.

26 Q You know that record to be the official and correct record  
of the proceedings of that date? A Yes, sir.

1 Q Just read the record to the jury.

2 MR. APPEL. We object to that on the ground it is incompet-  
3 ent, irrelevant and immaterial, it is hearsay, no founda-  
4 tion laid for the introduction of the evidence; does not  
5 tend to prove any issue in this case.

6 MR. FORD. I want to state, if the court please, this is  
7 another incident preliminary to the testimony of one, George  
8 Beam, is offered for the purpose of showing that George  
9 Beam under the advice and with the connivance and direction  
10 of this defendant first--

11 THE COURT. All that is necessary to say is that this is a  
12 preliminary question.

13 MR. FORD. Very well, I wanted to state the whole object of  
14 it.

15 THE COURT. I will always assume when counsel on either  
16 side makes that statement and it is made in good faith, and  
17 without further explanation of it--

18 MR. APPEL. No, your Honor, we do not want the court to  
19 assume anything for us. That is, now we assume that the  
20 statement is not made in good faith, we assume that it  
21 ought not to be made.

22 THE COURT. It ought not to be made unless in the highest  
23 good faith.

24 MR. APPEL. That is it is not made in good faith, that is,  
25 we assume, to be fair with counsel, of course--and we  
26 assume that it ought not to be made and that it should not

1 be made, and that the offer should not be made and we  
2 not only assign the statement of counsel as error but his  
3 conduct in offering it as error, unless a foundation is  
4 first laid for the introduction of that by the testimony  
5 of witnesses and not by the statements of counsel.

6 THE COURT' Objection overruled.

7 MR. APPEL' We take an exception.

8 MR. FORD. Read the record.

9 A (Reading) "Monday, July 31, 1911. In open court,  
10 Hon. Walter Bordwell, Judge, presiding. Clerk, sheriff  
11 and reporter present. In re contempt of court of George  
12 Beam. Affidavit and warrant of arrest filed. Hearing  
13 on citation continued to August 1, 1911."

14 MR. APPEL. Will you give me the date of that?

15 A Monday, July 31, 1911.

16 MR. APPEL. There are three documents handed to me, your  
17 Honor, so as to identify them, and affidavit of LeCompte  
18 Davis, so that my objection will be intelligible; one is  
19 a subpoena in a criminal case and another one the order  
20 of the warrant and a certificate showing the return of the  
21 warrant.

22 THE COURT' Gentlemen of the jury, bear in mind the  
23 admonition heretofore given you. (Jury admonished.)

24 We will adjourn until 2 o'clock this afternoon.

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(Here the court took an adjournment until 2 o'clock P.M.)

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Defendant in court with counsel.

THE COURT. You may proceed, gentlemen.

MR. ROGERS. Your Honor please, a matter has arisen in this case which, after due deliberation, appears to counsel for the defendant to be necessary to be called to your Honor's attention.

On yesterday evidence was admitted over defendant's objection as to matters connected with Mrs. Flora Caplan leaving the State of California. Going back a little in the history of the matter, I might say that I took this case with a thorough conviction under the law, that no act was admissible in evidence here, whether directly connected with the defendant or by some connection supposedly attributable to him. I say I took this case with the idea that such acts were not admissible in evidence. By your Honor's ruling on yesterday you admitted in evidence the matter of Mrs. Caplan leaving the state in company with Anton Johanneson, and the name of O. A. Tveitmoe was mentioned therewith. As I explained to your Honor this morning in chambers, I find myself in an absolutely intolerable position with respect to that matter. I find the defendant in an intolerable position, and I find the case subjected to a remarkable situation or in a remarkable situation, rather, by reason of the admission of that testimony. I have no

1 right, because of my personal connection with any matter,  
2 to deprive my client of the right to show certain matters  
3 connected with this affair. Without disclosing anything  
4 I personally may know, it has become necessary for my client  
5 to show matters with which I, at that time, was connected  
6 as special counsel for the prosecution. As a matter of  
7 fact, it becomes necessary to show what I myself did with  
8 respect to Mrs. Caplan at the time that the investigation  
9 was going on to discover who, as a matter of fact, blew up  
10 the Times Building, and it becomes necessary to show what  
11 I did with respect to this very witness. Under these condi-  
12 tions, it is apparent that I cannot deprive my client of  
13 the right to show these things. I cannot disclose to him  
14 what, as a matter of fact, I know myself, because my  
15 mouth is closed, because of my professional character in the  
16 matter. If, therefore, has become necessary that something  
17 be done with reference to the situation as I explained to  
18 your Honor this morning. Upon due deliberation and all night  
19 of thinking about the matter, I cannot sit here and deprive  
20 my client of the right to show what, perchance, I did,  
21 which he and other counsel in the matter think it is neces-  
22 sary to show as the reason why Mrs. Caplan was not brought  
23 to Los Angeles. If, perchance, I did something at the time  
24 that I was looking this matter up. If, perchance, I did  
25 something with respect to Mrs. Caplan herself, I cannot  
26 deprive my client of that matter. I have told my client the

1 situation. It is absolutely impossible--it is beyond my  
2 right, I believe, to withdraw from his case. That is im-  
3 possible. He cannot supply my place at this time, and I  
4 would not do it if by any peradventure I could help it. I  
5 believe, and still do believe, with all due respect to  
6 your Honor's ruling, that those matters had no business  
7 in this case. I bowed to your Honor's decision, reserving  
8 my exception, but nevertheless my client has got to have the  
9 right to introduce the fact. I cannot go on in this  
10 situation. Something has got to be done about it, because  
11 I cannot sit here still, with my client from time to time  
12 trying his case, knowing that in a very short time this  
13 matter is coming up. Therefore, it seems to me that the  
14 only thing that can be done in justice to the defendant  
15 whose case I have prepared and whose case I am presenting,  
16 with all due respect to Mr. Appel and my colleagues, Mr. Dehm  
17 and Mr. Geisler, they cannot take it up, seems that the only  
18 thing that can be done is to permit this to happen, in your  
19 Honor's discretion, and your Honor has the right to do it.  
20 At the time I was virtually directing the actions of numerous  
21 people with respect to Mrs- Caplan, with respect to Johanneson  
22 and with respect to Tveitmoe.

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1 In other words, I was one of the prosecutors in the McNamara  
2 case until I withdrew on the 1st day of January, and here  
3 is Mr Johanneson, whom I had much to do with as against  
4 him; here is Mr Tveitmoe, whom I had much to do with as  
5 against him. I put them on the stand in certain places  
6 and examined them as a representative of the prosecution.  
7 Now, it seems to me, your Honor, that in view of the cir-  
8 cumstances, in view of the fact that Mr Darrow cannot go  
9 on with this case, seemingly at this time by any perad-  
10 venture, unless I stay in, because I am the only man that  
11 knows much to be done, and who is prepared for it. It  
12 seems to me in the exercise of your Honor's discretion,  
13 you ought to permit and I request your Honor to permit  
14 that I withdraw from this room and absent myself from  
15 this trial while it is going on, and allow Mr Appel, who  
16 is not connected with me in anywise -- Mr Dehm and Mr  
17 Geisler are -- or, rather the defendant himself, to put Mr  
18 Johanneson and Mr Tveitmoe on the stand and clear this mat-  
19 ter up, and to show that the matter has no business in this  
20 case. Mr Johanneson stands ready to go on the stand and  
21 without misconduct, I may say -- to tell the court that  
22 Mr Darrow had nothing whatever to do with the matter, and  
23 therefore that my withdrawal from the case is not nec-  
24 essary, but I cannot stand here possessing facts and  
25 knowing facts which are absolutely necessary for my client  
26 to produce under these conditions. Mr Johanneson knows

1 that I put detectives around him; Mr Tveitmoe knows the  
2 same thing.

3 I was a prosecutor in the matter; I believe the ethics  
4 of my profession permits me to defend Mr Darrow upon the  
5 charge that he bribed this witness Lockwood, because in  
6 that respect I believed I had nothing to do with it, and  
7 being convinced of my client's innocence, from what I have  
8 learned, I am ready to defend him, but I cannot stand here,  
9 if your Honor pleases, and go into the Caplan matter under  
10 these circumstances. As a matter of justice to the defend-  
11 ant; as a matter of right to the defendant; as a matter of  
12 ethics of my profession, which we all love,-- I believe  
13 your Honor knows I have some regard for those ethics --  
14 I believe your Honor knows when I stand in the court room, I  
15 do my best to be fair and not state anything to your Honor  
16 that I ought not to state, and I want to ask your Honor  
17 now, and I plead with your Honor more than move you, to  
18 allow Mr Johanneson and Mr Tveitmoe to go on this stand  
19 and clear up that Caplan matter, and show I have a right  
20 in this place without my being present, let Mr Appel go  
21 into it and I will walk out and I will come back when the  
22 matter is disposed of, and never will I refer to it again  
23 before your Honor or before the jury, because I cannot  
24 tell Mr Appel, Mr Darrow, or anyone else, except the Dis-  
25 trict Attorney what I know about that situation. I presume  
26 some stones will be thrown at me, and I am ready to take



1 them, but I cannot stand here and jeopardize my client's  
2 interests. I spoke to your Honor this morning and your  
3 Honor said it was a matter to be deliberated over, and  
4 having deliberated over it, and having considered it I re-  
5 quest your Honor at this time to remove from me and remove  
6 from my client the embarrassment of this situation.  
7 I am firmly convinced, without showing Mr Darrow had ac-  
8 tual knowledge, and knowledge and participation in the  
9 removal of Mrs Caplan from the state, the matter ought not  
10 be allowed against him. I bow to your Honor's ruling in  
11 that respect, and your Honor ruled, and I am not criticiz-  
12 ing your Honor's ruling -- we all take a different view  
13 of it; your Honor takes one view, and I take another one,  
14 and the District Attorney another view, but, nevertheless,  
15 as a matter of right to this defendant, as a matter of cour-  
16 tesy to client and counsel alike, and it will do no harm  
17 to anyone, it merely being the question of the order of  
18 proof, let me walk out of this court room and let Mr  
19 Darrow himself settle this matter or Mr Appel, who has  
20 no connection with me whatever, except in this case.  
21 Now, I move you, sir, that you do permit that Mr Johanne-  
22 son be called at this time; that he be called by Mr Appel,  
23 and that the record do show in the meantime, I be  
24 allowed to withdraw from the room.

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3p 1 THE COURT. I think the request--

2 MR. FREDERICKS. Now, may it please, the court, this is not  
3 a matter of courtesy, this is not a matter of right of the  
4 defendant neither is it a matter of procedure of choice  
5 by any one; it is the law that the prosecution puts on its  
6 case and closes its case before the defense starts, that is  
7 not courtesy, neither is it intended so, neither is it a  
8 matter within the discretion of the court. We have not  
9 finished with this Caplan matter and we are not ready to  
10 finish with it, we have other witnesses here we intend to  
11 put on in this Caplan matter at the proper time, who will  
12 connect, in our judgment, this defendant Mr. Darrow with the  
13 Caplan matter, and the Caplan matter will not be closed  
14 until that is done. Now, I cannot see any force whatever  
15 in counsel's argument. I see absolutely nothing, no point to  
16 it at all. It is true, as Mr. Rogers says, he was an at-  
17 torney associated with the prosecution in the beginning of  
18 the McNamara case; it is also true that he severed his con-  
19 nection with the prosecution on the first day of January, or  
20 the first Monday in January, 1911, and from that time on  
21 had nothing whatever to do with the prosecution in any way,  
22 shape or form, so far as I know. And this prosecution  
23 against these defendants began in April. It is true that  
24 probably Mr. Rogers, as attorney associated with the people,  
25 got some ideas and information and gathered knowledge of  
26 facts that would have been used as testimony in the McNamara

1 case if it had ever gone to trial. There is no doubt  
2 about that. He was very familiar with those facts, but  
3 that is not a matter that we are trying now. There is  
4 absolutely nothing in our production of the evidence in  
5 this Caplan matter of the spiriting away of Mrs. Caplan,  
6 there is absolutely nothing in the production of our  
7 evidence in that regard that will in any way, manner shape  
8 or form embarrass Mr. Rogers or any one else. He may have  
9 been connected with the McNamara case up to the time that  
10 he severed his connection with it, and if there is any know-  
11 ledge--there is nothing that came within his knowledge, so  
12 far as I am able to discern, and I think I am very familiar  
13 with this matter--there is nothing that came within his  
14 knowledge during his connection with that case that need in  
15 the slightest degree to embarrass him in going ahead with  
16 this matter. But, whether it does embarrass him or whether  
17 it does not embarrass him is not a matter which would permit  
18 the doing of something which is not in the way of practice  
19 and the trial of cases and not provided for in any way, shape  
20 or form, there is no reason in the world why Mr. Rogers cannot  
21 sit right here and go on and examine these witnesses and  
22 all that sort of thing, and I think I know the whole situa-  
23 tion from beginning to end.

24 MR. ROGERS. Now, let us see if counsel is quite right about  
25 that.

26 MR. FORD. If this discussion is going to last some time the

1 jury ought to be excused.

2 THE COURT. No.

3 MR. ROGERS. If your Honor pleases, a lawyer who gains  
4 information bearing upon a situation by virtue of his pro-  
5 fessional capacity violates his oath as an attorney and  
6 counsel of this court if he discloses that information, if  
7 he uses that information or if in any wise he allows that  
8 information to affect him in any other, and possibly hostile  
9 matter. Mr. Darrow informs me that it becomes necessary  
10 to show, not on his part, not because he did it, not because  
11 he knew anything about it, but because of some of the very  
12 things that I started to do, because of the very things  
13 I did, which I will not violate my oath to tell your Honor  
14 here in open court or anywhere else--it becomes necessary  
15 to show those things, it becomes necessary to go back before  
16 the first day of January, 1911, or the first Monday, when  
17 as Mr. Fredericks says, my connection with the prosecution  
18 ceased. Counsel is mistaken when he says that this prose-  
19 cution began in April. J. B. Brice, M. A. Schmidt, David  
20 Caplan were indicted by the grand jury of Los Angeles County  
21 while I was before the grand jury as a prosecutor and the  
22 foreman sits here. Mrs. Caplan--and I disclose nothing,  
23 because it is a matter of public record now--Mrs. Caplan  
24 was a witness before that grand jury over and over again.  
25 So was Johanneson and so was Tveitmoe. Counsel says nothing  
26 I may have learned will affect me. I differ with him. My

1 conscience is not unduly tender, but I still have a little  
2 conscience after 14 years of practice of law, and I do not  
3 want to sit here and I won't sit here and jeopardize my  
4 client's interest in this fashion.

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1 As I said to your Honor on yesterday, this is a case  
2 of the foundation and objection was made there was no foun-  
3 dation laid for the introduction of this testimony. I  
4 claim the right, if your Honor pleases, on behalf of my  
5 client under these conditions to call these witnesses, and  
6 then counsel can call the witnesses he pleases; if he wants,  
7 and if he calls a witness on that feature, I shall turn  
8 him over to someone else. I turned the chauffer, whatever  
9 his name may have been, I turned him over to Mr Appel for  
10 cross-examination, because at that time I could see where  
11 this matter was going. I cross-examined Miss Hitchcock,  
12 because we had nothing to do with the matter as it sub-  
13 sequently developed. I cannot do it, sir; it is impos-  
14 sible that I should sit here and be under the handicap  
15 of not being able to use these matters which my client  
16 must use. Now, wouldn't it be right and fair, in your  
17 Honor's discretion, to permit this matter to be threshed  
18 out a little bit, and counsel can call his witnesses later,  
19 if he desires, to show if I have a right to stay here. I  
20 don't want to desert my client, I do not want to leave  
21 this case, and I cannot do it in this situation, and I  
22 must have some sort of relief from this intolerable situa-  
23 tion, because I still believe, and then believed this Cap-  
24 lan <sup>matter</sup> has no right in this case at all, and now I ask that  
25 your Honor let Mr Appel take this matter up and let the  
26 case go back to the other aspects. It is a question of

1 foundation and the competency of evidence and testimony,  
2 and it is addressed to the court.

3 MR FREDERICKS: We have stated to your Honor, and we have  
4 stated in this case as we have in every other case that  
5 we intend to connect this defendant with the spiriting of  
6 Mrs Caplan and this matter cannot be cleared up in any  
7 such way. That is a question for the jury. We have put  
8 on part of our testimony, part of our witnesses, we have  
9 not put it all on, and at the proper time we are going to  
10 put the rest of it on, and at the proper time, when it  
11 comes, and the defendant's counsel will have his oppor-  
12 tunity to do what he sees fit to clear up this matter;  
13 then, if he wishes to leave the court room and leave the  
14 matter in the hands of his associates, he can do so, but  
15 I cannot see any reason, in ethics or otherwise for his  
16 doing so, and certainly it should not be handled in any such  
17 piecemeal fashion as this. We are going on trying this  
18 case according to the accepted line of procedure in the  
19 trial of cases, and it is impossible to try them in any  
20 other way, and if, when the time comes that counsel or his  
21 client wants to put in a defense to the Caplan incident  
22 and claim Mr Darrow had nothing to do with it, then if  
23 Mr Rogers wishes to turn that matter over to Mr Appel or  
24 to the defendant himself, why, he, of course, is at liber-  
25 ty to do so, but it would not better the matter at all now  
26 to put Johanneson and Tveitmoe on the stand, for it won't

1 clear the matter up; it won't stay cleared up. We  
2 would simply have to go over and over this again and the  
3 matter is simply an impossibility, there is no such proce-  
4 dure provided for. We are not laying the foundation for any-  
5 thing.

6 MR FORD: There is another angle to this situation.

7 When Mr Johanneson and Mr Tveitmoen takes the stand, we  
8 will want to cross-examine them and we will not be pre-  
9 pared to cross-examine them at the present time. We are  
10 prepared to introduce our case and when it comes time for  
11 the defense, we are prepared to cross-examine those wit-  
12 nesses and we will not be bound by the answers which their  
13 witnesses give if they give testimony that is in conflict  
14 with what we believe to be the fruth; it will be our duty,  
15 pleasant or unpleasant, to argue to this jury that those  
16 witnesses and those matters are not to be believed, and  
17 whether they speak the truth or not will be a matter for  
18 this jury to decide, not your Honor. Your Honor cannot  
19 comment to the credibility of a witness; your Honor  
20 cannot decide what the facts are in the case. All your  
21 Honor can decide is whether or not it apparently has any  
22 relevancy to the subject and if it has to admit it and  
23 allow it to go before the jury, and the jury to determine  
24 the weight of that. Your Honor might be able to --

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5s 1 THE COURT. I quite agree with you as to that phase of it,  
2 but the point I get from Mr. Rogers's remarks is this:  
3 That certain things within his knowledge that he cannot  
4 reveal to his client or to his associates, that they ought  
5 to be put in possession of at this time, and that can only  
6 be revealed by putting these two witnesses on the stand at  
7 this time.

8 MR. FORD. If the Court please, those witnesses, apparently,  
9 are sitting here in the court room associating with Mr.  
10 Darrow. I think Mr. Darrow will have no difficulty getting  
11 from them outside the court room any information he needs  
12 or any information that Mr. Appel needs, and whether he can  
13 succeed or not is not a matter affecting the prosecution.  
14 The question whether Mr. Rogers finds it ethical to accept  
15 employment in this case or finds it ethical to attend to that  
16 employment, is a matter that he should thresh out when he  
17 accepted the employment. It is matter if any <sup>thing</sup> subsequent  
18 develops in this matter which will prevent him in his  
19 opinion, ethically proceeding, that is a matter for he and  
20 his client to thresh out in the privacy of their own  
21 offices, not before this jury, not before this court. The  
22 question of ethics is one personal to Mr. Rogers only, for  
23 him to proceed in. We have not interfered with his  
24 examination on the ground of ethics; we have not brought  
25 the question of ethics about his employment up; we have  
26 not objected one way or the other on that matter, and the

1 question whether his conscience will enable him to attend  
 2 as Mr. Darrow's attorney is not--is one that they should  
 3 settle outside of court. It is not one that can be used  
 4 to embarrass the prosecution in this case; it is not one  
 5 that can take away from the jury the right to decide what  
 6 the facts from the lips of the witnesses are, as they come  
 7 upon the witness stand; it is not one that your Honor can  
 8 decide and it is the most remarkable and unheard of thing,  
 9 that an attorney should ask that his testimony be introduced  
 10 upon the stand in order that he can satisfy his own con-  
 11 science as to whether ethically he did right to accept  
 12 employment which he did or not.

13 MR. APPEL. Your Honor please, the order of trial is pre-  
 14 scribed by our Code and we are all familiar with it, that  
 15 after certain preliminaries the prosecution has the opening  
 16 of the case and the closing of the case in chief, and that  
 17 then the defense may open their case and introduce their  
 18 evidence in support of their defense, but there is an  
 19 exception provided for by the code itself, that is Section  
 20 1094: "When the order of trial may be departed from. When  
 21 the state of the pleadings require it or in any other case  
 22 for good reasons and in the sound discretion of the court  
 23 the order prescribed in the last section may be departed  
 24 from." Now, we are addressing ourselves to this peculiar  
 25 situation. This is a situation that does not arise in  
 26 any case. It arises very seldom, and this is peculiarly an

1 exception to the general rule of cases here, and general  
2 principles of law, and all the decisions are to the effect  
3 that the foundation for the introduction of certain evidence  
4 must first be introduced, that is, your Honor has the  
5 right whether or not that foundation has been sufficiently  
6 laid. Your Honor in effect does not decide whether the  
7 facts going to form the foundation are true or not, for that  
8 is left to the jury, but your Honor has the right to decide  
9 whether, prima facia, if those facts were true, that the  
10 foundation has been laid. Now, we are here in a peculiar  
11 position, if your Honor pleases. All these facts which  
12 necessarily go to the question of foundation are entrusted  
13 to an attorney here for the defendant, your Honor, and  
14 according to the law he dare not, he must not disclose to  
15 his client. Now, counsel in this case do not know anything  
16 about it because that is information which personally was  
17 entrusted to the breast of the prosecution, which they  
18 consisted of counsel for the defense and counsel for the  
19 prosecution in this case,  
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1 and whatever other assistants they had. We don't know any-  
2 thing about it. I say to your Honor that I don't know  
3 anything about this case or about the McNamara case. That  
4 all that we know of this case is what we hear here in the  
5 court room, and such other little information that may  
6 drop from the information of witnesses as we get them  
7 every day. Now, if your Honor please, we are entitled  
8 at this time to be informed of those facts --

9 MR FREDERICKS: We are perfectly willing that Mr Rogers  
10 shall tell you anything that he knows.

11 MR APPEL: But you are not the law, and you are not the  
12 legislature of the law, and the law cannot be departed  
13 from with the consent of counsel.

14 MR FREDERICKS: What law?

15 MR APPEL: The law that states on the statute books that  
16 no counsel who is a party on one side of the case may  
17 disclose whatever he has learned, whatever facts he him-  
18 self has been connected with, to his client.

19 MR FREDERICKS: Not if he is released by his client.

20 MR APPEL: The law says it cannot be released by his client  
21 in a criminal matter. Your Honor, there is no such thing  
22 as releasing an attorney from the confidence which has been  
23 entrusted to him. Now, we are entitled to that, and we are  
24 only asking your Honor that in your discretion you depart  
25 from the rules adopted by our code in respect to the mode of  
26 procedure for the purpose of introducing evidence in this

1 court from which we may understand the situation, "When the  
2 state of the pleadings require, or in any other case for  
3 good reasons and in the sound discretion of the court,  
4 the order prescribed in the last section may be departed  
5 from." Now, here is the issue made, if your Honor please,  
6 which is collateral to the main case. Now, we say before  
7 that collateral issue may be tried here by the jury that  
8 your Honor must decide whether or not that collateral issue  
9 becomes material to the principal issues here under inves-  
10 tigation. We say that we cannot try that issue without  
11 the information that is within the breast of Mr Rogers. He  
12 dare not disclose to his client, nor disclose to the at-  
13 torneys here assisting him on behalf of his client.

14 MR FREDERICKS: Will he ever be able to disclose it?

15 MR APPEL: Never.

16 MR FREDERICKS: How much better will you be off now than  
17 you will be when your proper time comes?

18 MR APPEL: Let me put this man on the stand and get evi-  
19 dence that may then disclose whether we are better off.

20 MR FREDERICKS: This witness will talk to you and tell you  
21 anything you ask him just the same as they will tell it on  
22 the witness stand.

23 MR APPEL: With him in the case? Of course not. Here  
24 are things running back, your Honor, to the time of the  
25 indictment of the McNamaras -- J. B. McNamara and others.  
26 The reasons, the motives which may have induced the parties

1 here named by the witness upon the stand in respect to  
2 Mrs Caplan's going to the state of Nevada, may be reasons  
3 which were themselves proper and good reasons by the acts  
4 of the prosecution themselves in that case. It may be that  
5 the conduct of Mr Rogers himself may have made it really  
6 necessary for that woman to leave the state. I don't know;  
7 I am simply guessing at it. Now, your Honor, we cannot  
8 call Mr Rogers upon the stand here to show that fact that  
9 this defendant is not entitled to that information which  
10 is in his own breast, that information belongs to the pro-  
11 secution. That he was part of the prosecution at that time;  
12 he was an attorney confided with the secrets of the pro-  
13 secution, and we dare not drag them from him. Now, we say  
14 that that information which is within his breast, will dis-  
15 close to your Honor a state of facts upon which your Honor  
16 may decide here that this collateral issue has no place  
17 in this case, and before we go into it, your Honor please,  
18 we ask your Honor's discretion to allow us to try that is-  
19 sue before your Honor to show the lack of foundation, to  
20 show the impossibility of their ever being anything  
21 positive to show any previous knowledge or conduct on the  
22 part of Mr Darrow, either aiding or abetting or encourag-  
23 ing whatever was testified to here by the chauffer.

24 MR FREDERICKS: Now, may it please the court, how can this  
25 court decide that without deciding what witnesses are tell-  
26 ing the truth and what witnesses are not? There will be

1 a conflict. The court cannot decide. That is a question  
2 for the jury. Your Honor, it is pretty hard for me to  
3 take this seriously. Mr Rogers left the prosecution or  
4 the investigation --

5 THE COURT: The court takes the situation very seriously.

6 MR FREDERICKS: I don't, but I am assuming the court does,  
7 but I am dealing with it in that way.

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1 Mr. Rogers left the investigation of that Times disaster on  
2 the first of January. Six months Mrs. Caplan stayed here  
3 in the state after Mr. Rogers had nothing to do with the case.  
4 Six months she was here, living her life. She was served  
5 with a subpoena by the People to appear as a witness, and  
6 three days after she was served with that subpoena we find  
7 her flitting by an out-of-way manner in an automobile until  
8 she gets up across the line and out of the state, three days  
9 after she is summoned as a witness. Now, the question is,  
10 was she a witness. We have proven that she was summoned  
11 here as a witness; that she was subpoenaed as a witness;  
12 that she was a witness then, and now we are proving that  
13 she was taken out of the state by Mr. Darrow, by the instru-  
14 mentality of Mr. Darrow in this case, that is an issue. Did  
15 Mr. Darrow have anything to do with the going away of Mrs.  
16 Caplan, that is the issue now. Now, suppose Mr. Johanneson  
17 and Mr. Tveitmoe take the stand and say, No, Darrow had  
18 nothing to do with it. How is that going to change the mat-  
19 ter. It is still a question of fact, and we haven't finished  
20 with our facts, yet. How does that relieve the conscience  
21 of counsel for the defense, if it is a matter of conscience?  
22 How does that relieve the matter of ethics? It has absolutely  
23 nothing to do with it. I am here to say to you now that  
24 Mr. Rogers don't know one solitary thing about this case and  
25 about Mrs. Caplan being taken out of this state which would  
26 be of the slightest injury to the prosecution or the slightest  
benefit to the defense, which he is not at liberty to tell



1 his client, not one single solitary thing. This is an issue  
2 where this woman was a witness for the state of California.  
3 It is one of the collateral issues in this case where this  
4 defendant was taking that witness out of the state, and  
5 what difference does it make whether Mr. Rogers was assist-  
6 ing in the investigation six months before that or not?  
7 What difference does it make what he learned or what he  
8 didn't learn? She was a witness subpoenaed, and we main-  
9 tain, being unlawfully taken out of the jurisdiction of  
10 this court, and we don't care what Mr. Rogers may have  
11 known about that matter or what he may not have known  
12 about it, it would not affect the matter whether she  
13 was a witness, for that is the proof, by subpoena, and it  
14 would not affect the matter as to whether or not Mr.  
15 Darrow and Mr. Tveitmoe and Mr. Johanneson acted together  
16 taking her out of the state, would not affect it in any  
17 way, shape or form. Why, your Honor, it is the merest  
18 ghost.

19 MR. FORD. Just a moment farther. If the court please, it  
20 was not known that J. B. Brice was J. B. McNamara until  
21 April 11th and the indictments upon which this defendant  
22 J. B. McNamara was prosecuted, indictment 6,939 was found  
23 by the grand jury, filed on the 5th day of May, 1911, that  
24 is the day that the prosecution against J. B. McNamara began  
25 and Mr. Darrow's connection with the case was not until  
26 after that as disclosed by the court records, which are now

1 in evidence before this court, and the question of ethics  
2 that is involved in this matter on the part of Mr. Rogers, if  
3 it prevents him now it will prevent him for the rest of the  
4 trial. It cannot be taken into consideration, it is a  
5 matter for Mr. Rogers to thresh out in his office with his  
6 client. If he cannot ethically proceed he will have to  
7 remove himself and his client will have to substitute  
8 somebody else in his place.

9 MR. ROGERS. I am going to close. I am going to say a few  
10 things in closing I would not say otherwise and having--  
11 I can't say opportunity, but the necessity forced on me to  
12 say it. The indictments against Caplan, Schmidt, Brice  
13 and others were found before January, 1911. Mrs. Caplan,  
14 as is disclosed by those indictments, was a witness before  
15 the grand jury over and over again. Counsel says that it is  
16 a ghost. I am regretful to observe that counsel does not  
17 appreciate that there may be such a thing on the part of  
18 counsel as a disinclination, as an impossibility for a man  
19 to be put in a place of that kind. Counsel says that we  
20 can thresh it out later. No, sir, we cannot thresh it  
21 out later, it has to be threshed out now. As far as I am  
22 concerned, I got to know where I stand in this matter.  
23 Surprised by the ruling, as I have said, surprised by the  
24 contention that Mr. Darrow had anything to do with that  
25 matter, I cannot help saying, if your Honor please, I  
26 think it is nothing but right that this matter be at least

1 put in a position where I can stand here and say that  
2 evidence comes in affecting us that my client had nothing  
3 to do with it.

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1 It will do no harm; it can do some good.

2 Mr Ford complains that they may not be ready to cross-  
3 examine. They produce witness after witness here. We have  
4 to cross-examine at once; we don't even know whom they are  
5 going to call until the man appears. They don't even call  
6 their names. We are expected to cross-examine forthwith.  
7 They want time to cross-examine.

8 MR FREDERICKS: We do the same when it comes to the de-  
9 fense.

10 MR ROGERS: And, if your Honor please, there is some evi-  
11 dence brought in here to the effect at this time whether  
12 it proves the facts or not is for these gentlemen to deter-  
13 mine, but if evidence is brought in here to the effect  
14 that Mr Johanneson, for reasons which he may explain, of  
15 which I have not even an inkling, which I would not permit  
16 him to state to me, did this thing and Mr Darrow had noth-  
17 ing to do with it, I can attend as Mr Darrow's attorney,  
18 with every conscientious scruple thoroughly satisfied,  
19 otherwise, I shall be infinitely handicapped in a manner. I  
20 appreciate counsel's statement that I may state what I  
21 know. I don't want to do it, because I don't believe he  
22 has a right to release me. I don't so understand it. I  
23 don't think Mr Fredericks has the right to release me in  
24 view of the fact that I took the oath as a deputy district  
25 attorney when I went before the grand jury. I have never  
26 told a thing that happened there and never will.

1 MR FORD: It is all in the grand jury transcript.

2 MR ROGERS: And in connection with the work that was done  
3 there, the manner of getting witnesses, what was done with  
4 witnesses, how they were treated, how they were brought  
5 here, what happened to them; I have never told and I never  
6 will, and Mr Fredericks cannot release me, it is a matter  
7 of individual conscience. I cannot see any harm, your  
8 Honor please. My client was the state of California at  
9 that time, and I don't understand that Mr Fredericks is  
10 the People, not yet. Now, with all due respect to your  
11 Honor, I tried to be ethical about the matter. I have  
12 tried to be fair about it in every respect. I can see no  
13 harm that may come by putting Mr Johanneson on the stand,  
14 one other witness, and I will withdraw and allow that mat-  
15 ter to be put before the jury so they may appreciate the  
16 fact and say whether it is true or not, it being for them  
17 to decide whether it is true or not; nevertheless, I have  
18 a right to be here and I can see no reason except an adher-  
19 ence to the ordinary rules for refusing a permission, and  
20 the code has provided for extraordinary situations, be-  
21 cause the code says that the order of proof may be depart-  
22 ed from, whenever, in the sound discretion of the court,  
23 it appears that there is good reason for it. Now, it  
24 cannot do any harm to take that matter up and if counsel  
25 wants to put witnesses on to show that Johanneson is not  
26 telling the truth, well and good. I think it ought to be

1 threshed out now. I think it is nothing but right; it  
2 won't do any harm to them and the jury can consider it.  
3 I have the closing of the matter. If counsel keeps on  
4 arguing, I want the closing.

5 MR FORD: It is our objection to such a course of procedure.

6 MR ROGERS: May your Honor please --

7 MR FORD: Mr Darrow knew from the grand jury transcript  
8 all Rogers' connection in the case, and he knew all Rogers  
9 did with it; all that transpired before the grand jury;  
10 they were furnished with a complete transcript. It is pub-  
11 lic; counsel don't need to worry about the secrecy of the  
12 grand jury. Mr Darrow had all that when he represented  
13 J. B. McNamara in that case, and Mr Darrow knew when he em-  
14 ployed Mr Rogers of Mr Rogers' connection with the case.  
15 It is a matter, I say, entirely for these two men, and  
16 a question to settle between themselves outside of court,  
17 whether he should continue in the employ of the defendant  
18 as his attorney in court. It is not a matter that can  
19 effect us. If people wish to place themselves in delicate  
20 situations, that cannot prevent the prosecution from car-  
21 rying on its case in the ordinary manner provided for it.  
22 The section as to the departure from the ordinary rules  
23 does not mean a departure from the time when the prosecution  
24 shall introduce its evidence and the time when the defend-  
25 ant shall introduce its evidence. Our evidence will be  
26 shot through and through with things from which we argue

1 the connection of Mr Darrow, and it will not be until the  
2 last witness, until we are through with that witness. The  
3 embarrassment in Mr Rogers' mind fell from the fact that  
4 there are two witnesses here he desires to examine, if  
5 he don't want to be present he can go out when they put  
6 those witnesses on, and any time during the testimony when  
7 he feels his conscience won't permit him to stay, he can go  
8 out. We don't care. It is certainly an unheard-of thing  
9 to force us to depart from our order and we have got our  
10 work mapped out for the direct presentation of our evidence  
11 on the direct case, and when Mr Rogers -- when Mr Johanneson  
12 and Mr Tveitmoe take the stand, we will then cross-examine  
13 them and we will then probably have our rebuttal, but they  
14 ask that they may put on their defense in advance of the  
15 prosecution. What for? To try and cloud the mind of this  
16 jury before the time to present it allowed by law to them to  
17 present their evidence. It is up to the jury now to hear  
18 our side of the case and whenever they have heard us,  
19 without interruption from the defense, when they have heard  
20 all we have got to show, without the presentation of any-  
21 thing on that side --

22 THE COURT: That feature of it has all been gone over.

23 MR FREDERICKS: I just want to say one word in closing.

24 That we will not participate in any such procedure. It  
25 simply makes our case absolutely impossible for when we  
26 put on one or two witnesses in regard to a matter, they

1 are permitted then to bring in some other witness in re-  
2 gard to that matter, and I will stake my reputation as a  
3 man that Mr Rogers doesn't know one single, solitary  
4 thing in regard to Mrs Caplan being or taken away there,  
5 that he is not at liberty, and with perfect propriety  
6 to tell his client or anyone else. This happened six  
7 months after he severed his connection with us -- with  
8 our end of the case.

9 MR ROGERS: I tried to be kindly about this matter, and I  
10 resent the statement, if people will put themselves in deli-  
11 cate positions, they will take their chances. I put myself  
12 in no delicate position. My reputation as a practitioner  
13 at this bar will match with any man's in this room, and  
14 there is no judge on this bench or any other judge, sir,  
15 and I have practiced law in every state in this union  
16 but nine, and there isn't a judge on this bench that  
17 won't take my word when I stand up before him. Your Honor  
18 sustained an objection here, and I took a ruling against me  
19 because your Honor knew -- your Honor misunderstood what  
20 I said, and I would not permit your Honor to linger under  
21 that misrepresentation; would they do it? They would  
22 not. Now, counsel knows very well that he cannot tell me  
23 to turn myself loose, and that I don't know something  
24 about this matter.

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26



1 I subpoenaed Mrs. Caplan the last time she was here before  
2 this time.

3 MR. FREDERICKS. It is just a year, almost a year before.

4 MR. ROGERS. That is a public matter, not a year before, not  
5 six months before.

6 THE COURT. Gentlemen, I think the court is fully advised  
7 of the situation at this time. It is a very important  
8 matter and a very unusual one, and I wish to take a few  
9 minutes to consider the matter. I have had it more or less  
10 in mind since Mr. Rogers outlined it to me before court  
11 convened this morning, but in the meantime we have Mr. Monroe  
12 here on the witness stand and he might return to the witness  
13 stand and have his examination concluded and then probably  
14 take a little recess and there will be a ruling on this  
15 very unusual and very interesting matter. At the present  
16 time I am not quite ready to rule on it.

17  
18 G E O R G E O . M O N R O E,

19 resumes the witness stand for further direct examination.

20 BY MR. FORD. Q. Mr. Monroe, before lunch I asked you to get  
21 the affidavit--withdraw the question--I hand you a document  
22 which I exhibited to counsel just before the noon recess  
23 and ask you whether/<sup>or not</sup> that is one of the documents filed in the  
24 matter of the contempt proceedings against George Beam?

25 MR. APPEL. We object to that on the ground it is incompetent,  
26 irrelevant and immaterial for any purpose whatsoever, no

1 foundation laid. Proceedings in another matter relating  
2 to other parties are not evidence in this case against the  
3 defendant. It is hearsay, does not tend to prove any  
4 element of the offense charged in the indictment.

5 THE COURT. Objection overruled.

6 MR. APPEL. We except.

7 A yes, sir, this is the warrant of arrest that is referred  
8 to in the minutes of July 31, 1911.

9 MR. FORD. We offer this document in evidence, if the court  
10 please.

11 THE CLERK. People's Exhibit 19.

12 MR. APPEL. We object to that on the ground it is incompetent,  
13 irrelevant and immaterial, no foundation laid for the intro-  
14 duction of the document, it is hearsay and the contents  
15 of it not being any declaration or act or thing on the  
16 part of the defendant in relation to any matter in this case  
17 or any declarations by him made of any matter, it has no  
18 connection with this matter at all.

19 THE COURT. Objection overruled.

20 MR. APPEL. We take an exception.

21 MR. FORD. I now ask leave to read it into the record.

22 That will be exhibit No. 18

23 THE CLERK. No. 19.

24 MR. FORD. (Reading) "In the Superior Court of the County  
25 of Los Angeles, State of California. State of California,  
26 County of Los Angeles, S.S. The people of the state of

1 California to any Sheriff, Constable, Marshall or Policeman  
2 in this state: Proof of affidavit having this day been  
3 made before the Superior Court of the County of Los Angeles,  
4 charging one/<sup>George</sup>Behm with a contempt of said Superior Court,  
5 committed in the refusal of the said George Behm to answer  
6 certain questions propounded to him by the grand jury of  
7 the said Superior Court of the County of Los Angeles on the  
8 31st day of July, 1911 in a matter then being investigated  
9 by said grand jury, and wherein said George Behm had  
10 been called and was attending and sworn as a witness, as is  
11 recited in said affidavit on file in this said county.

12 "You are therefore commanded forthwith to arrest the above  
13 named George Behm and bring him in before the Superior  
14 Court in Department 9 thereof forthwith to answer the charge  
15 contained in the said affidavit, and show cause, if any he  
16 has, why he should not answer the said questions, and each  
17 and all of them so propounded to him before said grand  
18 jury as aforesaid, or failing so to do to show cause, if any  
19 he has, why he should not be punished for contempt of said  
20 court committed thereby and if the court be not in session  
21 that you deliver him into the custody of the sheriff of the  
22 county of Los Angeles, or if he require/<sup>it</sup>that ~~it~~ you take  
23 him before any magistrate in that county, or in the county  
24 in which you arrested him that he may give bail to answer  
25 to the said charge contained in the said affidavit in the  
26 sum of Two Thousand Dollars. Given under my hand, with the

1 seal of said court affixed, this 31 day of July, 1911, by  
2 order of said court, H. J. Leland Clerk, by George B.  
3 Whiteleather, Deputy Clerk."

4 "The Clerk is directed to issue the within order.

5 Geo. H. Hutton, Judge."

6 MR. FORD. "I hereby certify that I served the within  
7 warrant--" that has no part of it--I beg your pardon,  
8 unless you desire me to read it.

9 Q Was Mr. Beam brought into court?

10 MR. APPEL. We object to that as incompetent, irrelevant  
11 and immaterial, no foundation laid for the introduction of  
12 the evidence, not the best evidence, and upon the further  
13 ground that it is hearsay, not connected with any matter at  
14 issue and being collateral thereto.

15 THE COURT. It seems to me it is not the best evidence; if  
16 he was brought into court there is a record of it.

17 MR. FORD. If the witness knows it, your Honor, of his own  
18 knowledge, that is just as good evidence as the record,  
19 unless he is depending on the record for his recollection.

20 THE COURT. Does he know it?

21 BY MR. FORD. Q Do you know whether or not he was brought  
22 into court? A Yes, sir; I do.

23 Q Were you present when he was brought into court?

24 A I was.

25 MR. APPEL. Just a minute--

26 Q Did you see--

MR. APPEL. Just a minute--don't railroad us through, let

1 MR FORD: That question was somewhat suggestive. I did  
2 not recognize it until after he answered it.

3 MR APPEL: Oh, yes --

4 MR FORD: However, this witness is not a witness --

5 MR APPEL: Do you want an objection here?

6 MR APPEL: Certainly. If counsel will give us an oppor-  
7 tunity.

8 THE COURT: I stopped him for that purpose. Let us have  
9 the objection.

10 MR APPEL: We object to the testimony; we object to the  
11 answer of the witness and the question and the answer  
12 given.

13 THE COURT: Strike out the answer for the purpose of ob-  
14 jection.

15 MR APPEL: Upon the ground it is incompetent, irrelevant  
16 and immaterial, hearsay, no foundation laid, assuming a  
17 fact not in evidence, and it is leading and suggestive,  
18 and does not tend to prove any issue in this case.

19 THE COURT: Objection sustained upon the ground it is  
20 leading.

21 MR FORD: We would concede that, but we thought that  
22 this class of witness -- Very well.

23 Q Was he arrested and brought into court?

24 MR APPEL: We object to that on the ground no foundation  
25 has been laid for the introduction of that, not the best  
26 evidence; it is immaterial for any purposes, it is hear-

1 say; calling for a conclusion of the witness.

2 THE COURT: Objection overruled.

3 MR APPEL: We take an exception. A Yes sir, he was  
4 brought into court.

5 MR FORD: At the time he was brought into court, was there  
6 any return made out on this and attached to this exhibit 18  
7 before the same was filed in your court?

8 MR APPEL: We object to that upon the same grounds stated,  
9 and upon the last objection.

10 THE COURT: Objection overruled.

11 MR APPEL: We take an exception.

12 A The return as it is now was attached to the warrant.

13 Q When you filed? A When I filed it.

14 Q And was that return attached before the return you re-  
15 fer to? A Yes sir.

16 Q And the document had that attached when you filed it?

17 A Yes sir.

18 MR FORD: We now offer that portion as part of the same  
19 exhibit, exhibit 18.

20 MR APPEL: We object to that on the ground it is not --  
21 it has no place in this trial, incompetent, irrelevant and  
22 immaterial, not binding upon the defendant; it is hearsay,  
23 no foundation laid.

24 THE COURT: Objection overruled.

25 MR APPEL: We take an exception.

26 THE CLERK: Exhibit 19.

1 MR FORD: No, it is a part of 18, and we ask that it be  
2 made part of exhibit --

3 MR FREDERICKS: No, that is 19.

4 MR FORD: Oh, yes, as part of 19. (Reading:)

5 "Sheriff's office. County of Los Angeles. ss: I hereby  
6 certify that I have served the within warrant on the 31st  
7 day of July, A.D., 1911, on George Behm, being the party  
8 named in said warrant at the county of Los Angeles, by  
9 showing the original to the said party personally and inform-  
10 ing him of the contents thereof, and bringing him before  
11 the court. W. A. Hammel, Sheriff of the County of Los  
12 Angeles. Dated July 31st, 1911, by J. J. Henry, Deputy."

13 Q I attract your attention to the following wording  
14 in the beginning of this warrant: "Proof by affidavit  
15 having this day been made --"

16 MR APPEL: We object to that as not being the best evidence,  
17 calling for secondary evidence. They are trying to  
18 prove their record here, and the statute prescribes that  
19 the best evidence of the record is the record itself, as  
20 to what was done, in reference to the matter.

21 MR FORD: If the court will pardon me, I have had Mr Monroe  
22 search --

23 MR APPEL: I object to what he has done or has not done,  
24 he can ask the witness anything to lay the foundation.

25 MR FORD: I would like to be heard when I start in with-  
26 out being interrupted.

1 MR APPEL: I object --

2 MR FORD: I wish to state to the court I have requested  
3 Mr Monroe to produce the original affidavit and he informs  
4 me that the same has been lost and that he cannot find  
5 it. I am now laying the foundation to show its existance  
6 and its loss, which I must do before I can introduce second-  
7 ary evidence, as to what it was. I have here a carbon copy  
8 of the original which I intend to identify and introduce,  
9 but I must first show by this witness such an affidavit  
10 did exist, and was filed, and it was l~~ast~~ before I will  
11 be allowed to do that.

12 THE COURT: You want to lay the foundation to prove its  
13 loss?

14 MR FORD: Yes, your Honor.

15 MR APPEL: We are not objecting to his asking the witness  
16 questions, but we are objecting to his constantly testi-  
17 fying what he has done or hasn't done, that is immaterial  
18 to me, to the jury and to the whole world, his acts do not  
19 cut any figure.

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3p 1 THE COURT. What is the question, Mr. Reporter?

2 (Question read.)

3 MR. FORD. And I just started to ask the question which the  
4 reporter apparently didn't get.

5 THE REPORTER. Then comes the objection by Mr. Appel.

6 BY MR. FORD. Q Was there an affidavit filed by the  
7 foreman of the grand jury then in session, before this warrant  
8 of arrest was issued?

9 MR. APPEL. Wait a moment--we object to that on the ground it  
10 is not the best evidence, it is immaterial.

11 THE COURT. Overruled. The witness is directed to answer  
12 yes or no.

13 MR. APPEL. We take an exception.

14 A Yes, sir.

15 BY MR. FORD. Q Have you made search for that affidavit?

16 A I have.

17 Q Where is it? A It cannot be found, we are still looking  
18 for it in that department.

19 Q Was it filed where the other papers were filed? A In  
20 the miscellaneous records of the reports of the grand jury.

21 Q In what office? A In the County Clerk.

22 Q And you are unable to find the original affidavit? A I  
23 am.

24 MR. FORD. I have exhibited a copy to counsel, who are  
25 looking at it, your Honor.

26 THE COURT. Let me see the copy of it.

MR. FORD. I do not suppose we can introduce the carbon copy

1 by this witness, without the consent of the defense.

2 THE COURT. (Examines document.)

3 MR. FORD. Q What further records have you concerning  
4 this same transaction, Mr. Monroe? A Following the  
5 order signing the affidavit warrant was filed and citation  
6 was continued to August 1st.

7 MR. APPEL. We object to the witness referring to any  
8 record of any kind in reference to the matter in question on  
9 the ground it is incompetent, irrelevant and immaterial,  
10 hearsay, no foundation laid for the reading or the referring  
11 to any document that the witness may have in his hand, and  
12 to which his attention has been called..

13 MR. FORD. I call your Honor's attention, and let the  
14 record show that the book is the same book concerning  
15 which and from which he testified this morning, namely, it  
16 is the original record of the proceedings in Department 9  
17 of the Superior Court. Question is withdrawn.

18 BY MR. FORD. Q Is this book the record of Department 9  
19 of the Superior Court of the County of Los Angeles, State  
20 of California, for the month of July, August, 1911?

21 MR. APPEL. We concede that.

22 THE COURT. Counsel conceded that.

23 MR. FORD. Also that it was made by the witness and he knows  
24 it to be correct?

25 MR. APPEL. He has testified to that.

26 THE COURT. Objection overruled.

1 MR. APPEL. We take an exception.

2 A Yes, sir, it is.

3 BY MR. FORD. Q Just read the minutes, then of August 1st,  
4 1911. A (Reading) "Tuesday, August 1. In open court,  
5 Hon. Walter Bordwell, Judge Presiding, clerk, sheriff and  
6 reporter present. In re contempt of court of George Behm.  
7 Citation continued to August 2nd, 2 P.M., 1911 and the defend-  
8 ant allowed to go on his own recognizance."

9 Q Have you any record of the court's proceedings on August  
10 2nd? A Yes, sir.

11 Q Read that record.

12 MR. APPEL. Wait a moment--we object to that. We object  
13 to the reading of that alleged record upon the ground it is  
14 incompetent, irrelevant and immaterial, hearsay, no founda-  
15 tion laid and we are entitled to have the foundation before  
16 the witness reads the document in evidence, and upon the  
17 further ground it has no connection with this case in any  
18 way, shape or manner, it is collateral to any issue herein.

19 THE COURT. Objection overruled.

20 MR. APPEL. We take an exception.

21 A (Reading) "Wednesday, August 2, 1911. In open court,  
22 Hon. Walter Bordwell, Judge Presiding. Clerk, sheriff and  
23 reporter present. In re Contempt of Court by George Behm.  
24 Citation continued to August 3rd, 2 P.M. 1911."

25 MR. FORD. Will you read us the record of August 3rd?

26 A Yes, sir.

1 MR. APPEL. Let this objection go to the whole matter, your  
2 Honor.

3 THE COURT. It will be so understood, Mr. Appel.

4 MR. APPEL. The same ruling and exception.

5 THE COURT. Yes, sir.

6 A (Reading) "Thursday, August 3, 1911. In open court,  
7 Hon. Walter Bordwell, Judge Presiding. Clerk, sheriff  
8 and reporter present. In re Contempt of Court of George  
9 Beam. Citation continued to August 5, at 10 A.M. 1911."

10 ME. FORD. At what date? A August 5.

11 MR. FORD. That is all. We now offer in evidence all the  
12 portions which have been offered by the witness today and  
13 yesterday as an exhibit. The book may remain here, we take  
14 the same course with reference to the preceding pages of  
15 the records.

16 MR. APPEL. We object--

17 THE COURT. The same objection, the same ruling and an  
18 exception.

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1 MR APPEL: -- to the portions so read and to be offered  
2 as an exhibit, on the ground that the matter therein con-  
3 tained and read by the witness, is incompetent, irrelevant  
4 and immaterial; hearsay; no foundation laid; collateral  
5 to any issue in this case, and no foundation laid for the  
6 reading and introduction of the document in question.

7 THE COURT: Objection overruled.

8 MR APPEL: We take an exception.

9 MR FORD: Cross-examine.

10 THE COURT: This exhibit better be identified by a number.

11 MR FORD: We offer it as number 20, then, and let the re-  
12 cord <sup>show</sup> it contains all the records testified to by this wit-  
13 ness.

14 Q That is correct, is it not, at all times, in this case?

15 A Yes sir.

16 Q Is that correct, Mr Monroe? A Yes sir.

17 MR FORD: Offered as exhibit 20, then.

18 MR APPEL: We move to strike out all of the testimony of  
19 the witness read by him from the minute book commencing  
20 with the proceedings of November 4, 8, 12, 18, 19, 20, 24 and  
21 the 1st, 2nd and 3rd of August, upon the ground and for  
22 the reasons that before the reading and introduction of  
23 said evidence, the provisions of section 2054 of the Code  
24 of Civil Procedure of the state of California were not com-  
25 plied with. And we want the record so to show, the ob-  
26 jection having been made at the time, that no foundation

1 was laid for the introduction of the records in question.

2 MR FREDERICKS: The record will show whatever it shows.

3 THE COURT: Read that motion again, Mr Reporter.

4 ( Motion of Mr Appel read.)

5 THE COURT: I think Mr Appel is correct on that.

6 MR FORD: Section 2054 provides, whenever a writing is  
7 shown to the witness --

8 THE COURT: It provides that the document must be shown to  
9 counsel on the other side before he is interrogated.

10 It is true that this whole book was exhibited to counsel  
11 on the other side, but their attention was not drawn to the  
12 particular dates and times to which this motion was direct-  
13 ed.

14 MR FORD: That is true, your Honor, as far as the George Behm  
15 stuff in August is concerned, and if counsel insists, of  
16 course, we will have to allow the motion and start  
17 all over and do it all over again. I would ask them to  
18 inspect it now.

19 THE COURT: Counsel has made the motion and the court has  
20 no option except to grant the motion.

21 MR FORD: I will offer it to them for inspection at the  
22 present time, if they still insist, and your Honor rules  
23 upon the motion, I will do it all over again. I under-  
24 stood they had no desire -- I certainly would not have driven  
25 ahead.

26 MR APPEL: I don't know what to inspect; do you want me

1 to look over the whole record?

2 MR FORD: No, I will ask you to look over the record re-  
3 ferred to by George Behm's testimony, the record of  
4 July 31st, August 1st, 2nd, 3rd, 4th and August 5th.

5 MR APPEL: The witness did not pass it over to counsel.

6 MR FORD: I offer the records to you, Mr Appel.

7 MR APPEL: They cannot do that with the whole book like  
8 that. Let each item come as it is introduced in evidence.  
9 I kept urging my objections all the way through, and they  
10 were absolutely disregarded by counsel, and I tried to  
11 make it plain two or three times, I inserted words in  
12 there that would convey to him he was not complying with  
13 the law.

14 MR FORD: Pardon me, Mr Appel. I understood that they did  
15 not desire to look at the book, and that point was waived.

16 MR APPEL: No sir, you could not understand that, Because  
17 your Honor will see in regard to three items --

18 THE COURT: The motion to strike out is granted.

19 MR FREDERICKS: No use talking about it.

20 MR FORD: I wish to show you page 209 -- I want the record  
21 to show it, so as not to have any further trouble, page  
22 209 of this record in the matter of the contempt of  
23 court, affidavit and return, of George Behm.

24 MR ROGERS: (Examining book.)

25 MR FORD: Page 211. Page 213.

26 MR ROGERS: Counsel has seen it. Let the matter be deemed

1 read. We wanted to see the relations of it.

2 THE COURT: The reading waived?

3 MR FORD: Will it be deemed that the testimony be restored  
4 to the record, instead of forcing it through again?

5 MR APPEL: Subject to the objections made.  
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1 MR. FORD. With the exception that you waive that portion  
2 relating to the reading, Section 2054?

3 MR. ROGERS. Yes, sir.

4 MR. FORD. With the exceptions of that you have all the objec-  
5 tions?

6 MR. ROGERS. Yes, sir.

7 MR. FORD. Very well, does your Honor restore it?

8 THE COURT. Yes, go ahead.

9 MR. FORD. Cross-examine.

10 MR. APPEL. No cross-examination.

11 THE COURT. Gentlemen of the jury, bear in mind the former  
12 admonition. At this time we will take a recess of ten  
13 minutes.

14 (After recess. Jury returned to court room.)

15 THE COURT. I said I would rule upon the question raised  
16 by Mr. Rogers at this time. It is a very unusual situation,  
17 but too important to ignore it and pass it without some  
18 definite action. I am in grave doubt as to what ought  
19 to be done, there is no precedent to guide me, but it  
20 seems to me to be a case of choosing the lesser of two  
21 evils. It is undoubtedly an undesirable method of trying  
22 a lawsuit to discommode the prosecuting attorney in the  
23 presentation of his case; on the other hand, the matter  
24 presented in the way that the application of the defendant  
25 has been presented, is also unusual, and I can see no way  
26 except to choose the lesser of the two evils. I think the

1 lesser of the two evils, under the circumstances, is to  
2 discommode the district attorney.

3 MR. FREDERICKS. It is not a matter of discommoding, your  
4 Honor, it is a matter of absolute right.

5 THE COURT. Let me finish, Captain.

6 MR. FREDERICKS. I beg your pardon.

7 THE COURT. I think at this time the defense should be  
8 permitted to call Mr. Johanneson and Mr. Tveitmoe to the  
9 witness stand, upon this condition: That they are called  
10 for the express and sole purpose of clearing up in the  
11 mind of the deferdant and associated counsel the matters  
12 indicated by Mr. Rogers's statement. That no  
13 other subject will be gone into and that the district attor-  
14 ney will have reserved to him the right of cross-examining  
15 those witnesses at any future time, either now or at any  
16 other future time during the progress of the trial, and  
17 that they will be within hailing distance of the court at  
18 any such time.

19 MR. FREDERICKS. Well, then, your Honor, if this is for the  
20 purpose of clearing up something in the minds of counsel  
21 for defense, we have no objections, but we see no reason  
22 why Mr. Tveitmoe and Mr. Johanneson should not tell counsel  
23 for defense anything that they can tell on the witness  
24 stand.

25 MR. FORD. They have already indicated that the testimony  
26 of these men will clear up the situation. How do they know

1 if they have not been in conference with these very men?

2 THE COURT. Yes, I have thought of that.

3 MR. FORD. How is it it will clear up the situation they  
4 say it will, how do they know?

5 MR. ROGERS. Mr. Johanneson told me Darrow had nothing to  
6 do with it, He said, "Call me to the stand", that is what  
7 I know.

8 THE COURT. Gentlemen, I am <sup>not</sup>entirely satisfied with the  
9 disposition of the matter, but the court has taken such  
10 action as it is given me to see can be taken under the  
11 circumstances.

12 MR. FORD. If your Honor please, you have stated here this  
13 matter was brought to you in chambers by counsel for defense  
14 this morning. It was an absolute surprise to us this  
15 afternoon, we were not taken into the confidence of the  
16 court or into the confidence of the attorneys as to what  
17 they intended to do. Mr. Rogers told me before we came  
18 in that he had a surprise for me, I asked him what it was but  
19 he didn't tell me, and I think we are at least entitled  
20 to time to present the authorities to your Honor, and for  
21 that purpose we ask your Honor to continue this case  
22 until tomorrow morning at 10 o'clock, and if by that time  
23 counsel can still prevail over Mr. Johanneson and Mr. Tveit-  
24 moe,

1 In order that we may present the authorities we ask that  
2 an adjournment be taken until tomorrow morning at 10  
3 o'clock. We feel that this is so remarkable an eva-  
4 sion of our rights and an invasion of the trial, we will  
5 need until tomorrow morning at 10 o'clock to prepare  
6 authorities to cite them to your Honor on that point.

7 MR ROGERS: I desire to differ with Mr Ford in saying I  
8 have surprised him. A witness said to him, "Shall I be  
9 in at 2 o'clock?" I said, "No, it will not be necessary,  
10 I have another matter to present to the court." He said,  
11 "Tell me what it is." I said, "No, not now." He said,  
12 "You got a surprise for me?" And I said, "No more than  
13 you give me sometimes."

14 MR FORD: You told me you had taken up the matter with  
15 the court.

16 MR ROGERS: yes, I did say I had taken up the matter with  
17 the court.

18 MR FREDERICKS: I don't think an attorney has a right to  
19 go to a judge during the trial -- I am on most intimate  
20 terms with the judges presiding, and I don't think any at-  
21 torney has that right.

22 MR APPEL: I suppose, your Honor, it is a question of pri-  
23 vilege as to whether or not an attorney is properly in the  
24 case or not, and whether he can deal properly with the sub-  
25 ject matter that comes in the regular course of his pro-  
26 fession. That is nothing but -- if I should feel em-

1 barrassed in any matter that I should go and consult with  
2 the man presiding in the court before whom I am trying a  
3 case, I think I am in a position I think I should not be,  
4 there is nothing wrong in that.

5 THE COURT: I see no impropriety in it.

6 MR FREDERICKS: Let the other side be present so we can  
7 square away and see where we are drifting.

8 MR APPEL: You might run after us then and have us in-  
9 dicted. We go to the court, and very properly. "We are  
10 officers of the court, and we go there and we consult as  
11 to our best mode of procedure. We say, "Now, here, do you  
12 think I ought not to proceed in this matter, because of  
13 information I had gained on a branch of the case on the  
14 other side," something like that. There is nothing improper  
15 in that. I think it is conducive of good behavior.

16 MR FORD: I don't think that is really the point before  
17 the court. The point is whether we are entitled to an  
18 adjournment.

19 THE COURT: You are entitled to an adjournment and you can  
20 have one, unless you have some other evidence on other  
21 matters. If you want to adjourn at this time --

22 MR FORD: We will introduce some matters. We have two  
23 witnesses here that will be very brief. We might as well  
24 introduce them, I presume.

25 THE COURT: Very well. Just suspend the matter. You take  
26 the statement that has been made as being the present mind

1 of the court upon the matter, but if say, half past 9 --  
2 can you get in that early?

3 MR FORD: We prefer 10 o'clock.

4 THE COURT: All right, you have that right.

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7 CHARLES WEIR, a witness called on behalf  
8 of the people, being first duly sworn, testified as fol-  
9 lows:

10 DIRECT EXAMINATION

11 MR FORD: State your name? A Charles Weir.

12 Q Where do you reside? A 3049 West Sixth street, Los  
13 Angeles.

14 Q During the months of July and August, 1911 -- withdraw  
15 that question. What is your occupation? A Lumber bus-  
16 iness.

17 Q Here in the city? A Yes sir.

18 Q With what lumber company? A Weir & Jordan.

19 Q During the months of July and August, 1911, did you oc-  
20 cupy any official position with the grand jury of this  
21 county? A I was foreman of the grand jury.

22 Q On the 31st day of July, 1911, did you, as foreman,  
23 preside over the grand jury on the session of that date?

24 A I did, if we had a session on that date; I think we  
25 did.

26 Q Do you recall about that date -- do you know one

1 George Behm? A Met him in the grand jury room several  
2 times.

3 MR ROGERS: Then, if your Honor please, that appears from  
4 Mr Weir's statement that he met a witness or the person  
5 named in the grand jury room; I have heard very much said  
6 about the secrecy of the grand jury, and the oath of the  
7 foreman of the grand jury, and the statements of the law  
8 as they are contained in the codes, seem to be getting  
9 pretty close to this line.

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16s 1 A I met him outside of the grand jury room several times,  
2 Mr. Rogers.

3 MR. ROGERS. I don't think Mr. Weir has the right to tell  
4 who was in the grand jury room.

5 MR. FORD. I don't think the counsel contends for a moment  
6 after having a shorthand reporter write up the transcript  
7 concerning George Behm, the fact that he appeared before  
8 the grand jury was stipulated on both <sup>sides,</sup> and we consented to  
9 have the transcript written up yesterday for the defense.  
10 The matter is made public at the present time - I don't  
11 see any force to his objection.

12 THE COURT. There isn't any objection.

13 MR. FORD. Q Do you recall whe ther or not he appeared  
14 before you as a witness on that date?

15 MR. ROGERS. That is objected to as incompetent, irrelevant  
16 and immaterial, forbidden by the statute, no foundation  
17 laid, not being a proceeding or matter in which the grand  
18 juror may be interrogated.

19 MR. FREDERICKS. He can answer it if he wants to.

20 MR. FORD. Section 926 of the Penal Code provides that every  
21 member of the Grand Jury must keep secret whatever he him-  
22 self or any other grand juror may have said, or in what  
23 manner he or any other grand juror may have voted on a mat-  
24 ter before them, but may, however, be required by any  
25 court to disclose the testimony of a witness examined before  
26 the grand jury for the purpose of ascertaining whether it



1 it is consistent with that given by the witness in court  
2 or to disclose--" that is not the section I wanted.

3 "To disclose the testimony of a witness examined  
4 before the grand jury, for the purpose of ascertaining  
5 whether it is consistent with that given by the witness  
6 before the court or to disclose the testimony given before  
7 them by any person upon a charge against such person for  
8 perjury in giving his testimony or upon trial therefor."  
9 Section 927: "A grand juror cannot be questioned for any-  
10 thing he may say or any vote he may give in the grand  
11 jury relative to a matter legally pending before the jury,  
12 except for a perjury of which he may have been guilty, in  
13 making an accusation or giving testimony to his fellow  
14 jurors."

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1 Section 925 provides for the person who may be  
2 present during the session of the grand jury and provides  
3 for the taking of testimony and the requirement of secrecy  
4 in that case, but in this case the juror has not yet been  
5 asked to disclose testimony of a witness. He has not been  
6 asked to state whether or not he appeared before them as a  
7 witness, that is not a matter of secrecy; the witness walks  
8 right in the grand jury door in the presence of detectives  
9 frequently employed by the other side, in the presence  
10 of those interested, in the presence of the newspaper repor-  
11 ters, and the fact that a man has appeared before them as  
12 a witness is published every day in the paper. That isn't  
13 a matter of secrecy.

14 MR. APPEL. That establishes the law.

15 MR. FORD. I am not asking what the person testified to  
16 at that matter, and yet we will show that this is a matter  
17 of perjury that was committed before the grand jury, before  
18 we get through.

19 MR. APPEL. He isn't on trial here.

20 MR. FORD. We will show that the defense suborned that  
21 perjury; that is a fact in furtherance of the conspiracy,  
22 and paid the witness to do it.

23 MR. DARROW. I object to that statement and ask to have an  
24 exception on it. Counsel knows better.

25 MR. FREDERICKS. No, sir, we don't know better. Counsel  
26 don't know better. That is just what we purpose to prove

1 in this case.

2 MR. DARROW. I want to ask an exception to that statement  
3 and want the jury admonished to pay no attention to it.

4 THE COURT. The jury is admonished to pay no attention to  
5 the statement of the district attorney coming from him as  
6 evidence or to any other statement at any time as being  
7 a fact in this case. It is your duty to be governed sole-  
8 ly by the evidence that may come from the witness and  
9 from witnesses.

10 MR. APPEL. The question is whether or not what transpired  
11 inside of that jury room presided over by the gentleman  
12 in question here, was gotten or disclosed by him--

13 THE COURT. The important question is whether or not he can  
14 testify whether or not a certain person appeared.

15 MR. APPEL. The secrets of the grand jury, the code pro-  
16 vides that where--may not disclose the secrets of the  
17 grand jury not only in reference to their acts, their  
18 declarations also, what was said before them, whatever ac-  
19 tions were made in his presence.

20 MR. ROGERS. Call your Honor's attention to the Section:  
21 "Every grand juror who, except when required by court, wil-  
22 fully discloses any evidence adduced before the grand  
23 jury in which he or any other members of the grand jury  
24 may have sat, or what manner he or any other grand juror  
25 may have voted, is guilty of a misdemeanor. I don't  
26 think Mr. Weir--

1           926: "Every member of the grand jury must keep  
2 secret whatever he himself or any other grand juror may  
3 have said, or in what manner he or any other grand juror may  
4 have voted on a matter before him; but may, however, be  
5 required by any court to disclose the testimony of a witness  
6 examined before the grand jury, for the purpose of ascer-  
7 taining whether it is consistent with that given by the  
8 witness before the court, or to disclose the testimony  
9 given before them by any person, upon a charge against  
10 such person for perjury in giving his testimony or upon  
11 trial therefor."

12           927: "A grand juror cannot be questioned for any-  
13 thing he may say or any vote he may give in the grand  
14 jury relative to a matter legally pending before the jury,  
15 except for a perjury of which he may have been guilty,  
16 in making an accusation or giving testimony to his fellow  
17 jurors."

18           Now, if your Honor please, it doesn't appear to  
19 be within--  
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1 MR FORD: I have an authority right on that point.

2 MR ROGERS: I haven't looked it up and possibly I may look  
3 it up during the time counsel is trying to look up --

4 MR FORD: If the court please the names of witnesses are  
5 not things undivulgable; the names of witnesses are put  
6 on the indictment when the indictment is returned. Your  
7 Honor is familiar with the rule; the exception of one  
8 thing means the exclusion of another. The section states  
9 the circumstances under which the testimony or the things  
10 that the grand jury shall do and shall not divulge them.  
11 It states the circumstances under which they shall not  
12 divulge them, consequently they have the right under  
13 circumstances where the interests of justice demand to  
14 divulge them, and this section is for the protection of  
15 the members of the grand jury, not for the protection of  
16 the witness. That has been decided in a number of different  
17 cases, and in Ex-parte Schmidt, 71 Cal., beginning with 212,  
18 this was a case where the claim was made on the part of  
19 the defense that the names of all the witnesses who had  
20 appeared before the grand jury had not been endorsed upon  
21 the foot of the indictment. (Reading:)

22 "On the hearing of the motion and in support there  
23 of, the petitioner, a member of the grand jury, was called  
24 and sworn, and was interrogated as to whether any person  
25 was examined as a witness before the grand jury whose name  
26 was not inserted at the foot of the indictment or endorsed

1 thereon. The petitioner refused to answer the questions,  
2 on the ground that he would thereby be disclosing secrets  
3 of the grand jury room; and such refusal was by the  
4 court below adjudged a contempt, and the petitioner was  
5 permitted. Hence this writ. Section 943, Penal Code,  
6 declares that the names of the witnesses examined before  
7 the grand jury, or whose depositions may have been read,  
8 must be inserted at the foot of the indictment, or endorsed  
9 thereon, before it is presented to the court; and by  
10 Section 995 the failure so to insert or endorse the names  
11 of all the witnesses is made ground for setting aside the  
12 indictment. By Section 925, no person except the district  
13 attorney and witnesses under examination are permitted to be  
14 present at the sessions of the grand jury. If, therefore,  
15 neither the members of the grand jury nor the district  
16 attorney could be called upon to state whether any witnesses  
17 were examined other than those whose names have been inserted  
18 or endorsed, a barren right to move to dismiss is given  
19 without the power to ascertain whether or not the statute  
20 has been complied with. Under our statute, the names of  
21 witnesses before the grand jury are not secrets to be un-  
22 divulged, at least for the purpose herein referred to;  
23 before the moment an indictment is presented, that moment  
24 the names should be a part of the record."

1 Now, the law permitting and directing and instructing  
2 the District Attorney to prosecute persons for crime does  
3 not mean to take away from the District Attorney the right  
4 to put before this jury all the facts, all the pertinent,  
5 material and relevant facts which belong before this  
6 court and before this jury. One of the things that we  
7 want to show is that George Behn was a witness. If this  
8 witness' mouth is shut because he was a member of the  
9 grand jury we would be unable to show that he was the  
10 witness before the grand jury. We would be unable to  
11 show that there was any material matter pending before  
12 that grand jury, and consequently we could never show  
13 something that your Honor has decided we have a right to  
14 show, namely, that this defendant bribed a witness to  
15 appear before the grand jury in furtherance of the con-  
16 spiracy to defeat justice in the prosecution of the Mc  
17 Namara case, bribing him to go there and commit perjury,  
18 and that he is guilty of suborning perjury, and bribery  
19 in connection with this.

20 MR ROGERS: I take exception to the last statement of  
21 counsel.

22 MR FORD: My remarks are addressed to the court and not  
23 to the jury, and it is not intended that this should be  
24 taken as evidence, and I think the jury so understand it.  
25 If your Honor has any doubt about the jury's understanding  
26 I wish you would admonish them again.

1 THE COURT. I have no doubt the jury has been admonished  
2 on that identical remark.

3 MR. APPEL. And after admonishing them, counsel continues  
4 those remarks, the admonition being in effect an expression  
5 of the court at the request of the defendant that the  
6 remarks are not proper, and still he continues to do it  
7 for that reason, and we again assign his conduct and his  
8 persisting in making these remarks as prejudicial to  
9 this defendant and as error.

10 MR. FORD. If the court please, I have no objection to the  
11 jury being excused. I desire to address the court, and  
12 I ask your Honor to have them retire, and I think we would  
13 save time if your Honor will excuse the jury when I am  
14 talking. You can bring them back when I have finished.  
15 Section 926 of the Penal Code and the provisions therein  
16 contained, relate to a grand juror when called as a witness  
17 and provides that a grand juror may be required by any  
18 court to disclose the testimony of a witness examined before  
19 the grand jury in cases mentioned in the section. Granting  
20 that a grand juror can only be compelled to disclose the  
21 testimony of such witness in the cases mentioned in the  
22 section referred to, it will be observed that no grand  
23 juror was called here to make any disclosure whatever.  
24 The only witness called in relation to this matter was  
25 Flournoy. It may be further remarked that it seems that  
26 the rule of secrecy set forth in the statute is intended



1 only for the protection of grand jurors, and not of the  
2 witnesses before them, and that the witnesses cannot  
3 invoke it," neither can the defendant in this case.

4 MR. ROGERS. Is that in the case?

5 MR. FORD. That is my own comment. (Reading) "The fact  
6 that a person was called, sworn, and examined as a witness  
7 before a grand jury does not come within the rule of  
8 secrecy. If it did, it is violated when an indictment is  
9 returned with the names of the witnesses endorsed on it  
10 or inserted at its foot. Publicity is thus given to the  
11 fact, and a publicity, too, that is required by the statute."

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1           In the case of this particular witness, Mr.  
2 Dehm, counsel yesterday went further than we are seeking  
3 to go at the present time. They went further and wanted the  
4 very testimony given by this witness and we consented that  
5 they might obtain it. That is, we made no serious ob-  
6 jection to it. We expressed our own intention at that time  
7 to produce that testimony in this court and before this  
8 jury for the purpose of showing that the crime of perjury  
9 had been committed, which would be a case provided for by  
10 the statute, that we had a right to in the prosecution for  
11 perjury or in proof of perjury. Counsel, yesterday, wanted  
12 it merely for the purpose of being able to cross-examine  
13 a witness on the stand, a matter really to which they  
14 were not entitled. They had a right to call the members  
15 of the grand jury to show he made different statements,  
16 but they had no real right to it before the witness went  
17 on the stand, or before they knew that we were going to  
18 call the witness or call the witness to the stand. We  
19 made no serious objection to it. This witness's testimony  
20 is now in the hands--Mr. Behm's testimony, the fact that he  
21 appeared before the grand jury, is now in the hands of this  
22 defendant by the order of the court, and they have access  
23 to it, and they have raised this point at this time, it  
24 seems to me, entirely out of place under the circumstances,  
25 but whether it be out of place or not, we maintain that we  
26 have a right to ask this witness whether or not Mr. Behm

1 appeared as a witness before the grand jury, as was in this  
2 very case I cited to your Honor. That is a fact that is  
3 made public, and it would be absurd to say we could not  
4 ask that question.

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1 THE COURT: What is the question? (Last question read by  
2 the reporter.) A Yes sir.

3 THE COURT: Objection overruled.

4 MR FORD: Immediately after his appearance before the  
5 grand jury, did you, as the foreman of the grand jury take  
6 any action in regard to his appearance before the grand  
7 jury.

8 MR APPEL: We object to that as incompetent, irrelevant and  
9 immaterial, forbidden by statute, and no foundation laid,  
10 calling for a conclusion of the witness.

11 THE COURT: Let me get that question.

12 MR FORD: I will withdraw it.

13 Q Did you file an affidavit with Judge Bordwell -- with  
14 the court, in regard to George Behn as a witness?

15 MR ROGERS: Objected to as incompetent, irrelevant and imma-  
16 terial and hearsay and no foundation laid.

17 THE COURT: Objection overruled.

18 A Yes.  
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18s 1 MR. FORD. I might state for your information that the  
2 original on file referred to in the record cannot be  
3 found. I will ask you to--

4 MR. APPEL. We object to that statement.

5 MR. FORD. It is in evidence.

6 MR. APPEL. It is not in evidence.

7 MR. FORD. Mr. Monroe so testified.

8 MR. APPEL. I know what Mr. Monroe testified. Said he  
9 was a deputy and the paper was on file in the office. He  
10 looked for it and couldn't find it and that he was still  
11 searching for it yet, and that is not sufficient founda-  
12 tion for any secondary evidence being admitted in evi-  
13 dence. It is not sufficient. There isn't sufficient  
14 foundation. There must be--the very fact they were still  
15 hunting for it would indicate to the court that they  
16 have not made up their mind that the paper is not in the  
17 custody of the county clerk.

18 THE COURT I believe Mr. Monroe did so state.

19 MR. FORD. I now ask you to look at this document, read it  
20 over carefully before I ask you any questions concerning  
21 it. Have you read that before taking the stand, Mr. Weir?

22 A Yes, sir.

23 Q State whether or not that is a copy of the affidavit--  
24 of the original affidavit filed by you in Judge Bordwell's  
25 court?

26 MR. APPEL. We object upon the ground it is incompetent,

1 irrelevant and immaterial for any purpose whatsoever,  
2 that if it were a copy it would not be admissible because  
3 no proper foundation has been laid for its introduction,  
4 on the further ground it is calling for the conclusion or  
5 opinion of the witness by way of comparison and on the  
6 further ground it is hearsay, immaterial; it is collateral  
7 to any issue in this case, and that he is prevented from  
8 testifying in reference to it under the circumstances  
9 whatsoever, and by him as being a member of the grand jury  
10 in question.

11 THE COURT. I think Mr. Monroe testified he was still hunt-  
12 ing for it, that he had been unable to find it so far, and  
13 if your Honor wishes the search continued or counsel for  
14 defendant wishes the search continued--

15 MR. APPEL. Our objection is in:

16 THE COURT. Objection overruled .

17 MR. APPEL. We take an exception.

18 A What is the question?

19 (Last question read by thereporter.)

20 A Yes, sir .

21 MR. FORD. We offer this as an exhibit, number 21.

22 MR. APPEL. Objected to as incompetent, irrelevant and  
23 immaterial; it is hearsay and no foundation laid, no wise  
24 binding upon the defendant, what Mr. Weir may have sworn to  
25 at any time or place in reference to any matter, the affi-  
26 davit cannot be made a substitute. The fact of his

1 filling the affidavit is <sup>of</sup> doubtful materiality. The  
2 relevancy of the contents of the affidavit <sup>are</sup>, not the best  
3 evidence, incompetent, no foundation laid and hearsay.  
4 Appears to be the affidavit of the witness upon the stand.

5 MR. FORD. The affidavit itself, your Honor, is not offered  
6 in proof of <sup>the</sup> truth of the recitals therein contained, but  
7 as soon as it is offered we shall then proceed to examine  
8 the witness as to the truth of each recital.

9 THE COURT. Objection overruled.

10 MR. FORD. People's Exhibit 21.

11 MR. ROGERS. What is going to be done with the affidavit,  
12 may I inquire?

13 THE COURT. File it as an exhibit.

14 MR. ROGERS. Does the exhibit contain written matter, typewrit-  
15 ten matter, words and language?

16 MR. FORD. It does. I will read it into the record so it  
17 will show just what it does contain.

18 MR. ROGERS. <sup>We object</sup> To the reading of the affidavit as incompetent,  
19 irrelevant and immaterial, and no foundation laid; hearsay  
20 and not the best evidence.

21 MR. FORD. It is the best evidence of the contents of the  
22 affidavit, it has been introduced.

23 THE COURT. Objection overruled.

24 MR. ROGERS. Exception.

25 MR. FORD. (Reading) "

26 "IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES.

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IN RE <u>G E O R G E</u> <u>B E H M</u>	}	
FOR ALLEGED CONTEMPT OF COURT		AFFIDAVIT
FOR REFUSING TO ANSWER QUESTIONS.		

STATE OF CALIFORNIA	)	
COUNTY OF LOS ANGELES	)	ss

Comes now Charles Weir, who being first duly sworn, on oath, deposes and says: That he is now and during all the times herein mentioned was the duly appointed, qualified, sworn and acting foreman of the Grand Jury of said Superior Court heretofore by said Court duly and regularly drawn, qualified, impaneled and sworn to inquire into and make investigation of all public offenses committed and triable by said Superior Court within the said County of Los Angeles, and to present the same to said Superior Court by indictment or accusation. That the said Grand Jury now is, and during all the times herein mentioned was regularly sitting and acting in the discharge of its said duties as hereinbefore mentioned. That on the 31st day of July, 1911, the said Grand Jury, together with this affiant as foreman thereof, were sitting and acting in the discharge of their said duties as aforesaid at the Court House in the City of Los Angeles, in said County and State, and then and there had under con-



1 sideration and investigation the question as to whether  
 2 or not certain persons or any of them had been or were  
 3 guilty or chargeable of or chargeable by indictment in  
 4 said Superior Court with the crime of giving, offering and  
 5 promising to give/<sup>to</sup>any witness or person about to be called  
 6 as a witness any bribe upon any understanding or agreement  
 7 that the testimony of such witnesses or person shall be  
 8 thereby influenced, or attempting by any other means  
 9 fraudulently to induce any person to give false or  
 10 withhold true testimony, contrary to the provisions of  
 11 Section 137 of the Penal Code of the State of California.

12 That in pursuance of their said duties and said  
 13 investigation and/<sup>in</sup>the prosecution of the same, one George  
 14 Behm was called on the said 31st day of July, 1911, and  
 15 duly sworn as a witness to testify and disclose his know-  
 16 ledge of and concerning the matters under investigation as  
 17 hereinabove mentioned, to and before the said Grand Jury.

18 That thereupon the following questions were then  
 19 propounded to and asked of the said George Behm while sit-  
 20 ting as such witness as aforesaid by the District Attorney  
 21 of said County, and to which said questions the said  
 22 George Behm made answer and refused to make answer as  
 23 follows, and the following proceedings were had and the  
 24 same are hereby certified to the Honorable Superior Court  
 25 within and for the said County, as follows:

26 GEORGE BEHM, called as a witness, having been  
 first duly sworn, by the foreman, testified as follows:

1 Examined by Mr Ford:

2 Q What is your name? A George Behm.

3 Q How do you spell it? A B-e-h-m.

4 Q How old are you? A Fifty-one years old.

5 Q What is your residence? A Portage Wisconsin.

6 Q Any street and number there? A No, sir.

7 Q What is your business? A I refuse to answer.

8 Q What is that? A I refuse to answer that question.

9 Q On what ground? A On that ground.

10 Q What place are you staying in Los Angeles? A I refuse  
11 to answer that question.

12 MR. FORD. Mr. Foreman, will you read section 1324 of the  
13 Penal Code to the witness.

14 MR. WEIR. I would prefer you should read it.

15 MR. FORD. Do you instruct me to read it?

16 MR. WEIR. Yes, sir.

17 MR. FORD. I will read you section 1324 of the Penal Code  
18 of this state.

19 (Said section was then read in full to the witness.)

20 MR. WEIR. I wish you would explain that to the witness  
21 and the jury, and see if he understands it.

22 MR. FORD. I tried to read it distinctly, Mr. Behm. You  
23 heard me, did you not? A Yes, sir.

24 Q And you understand that is section 1324 of the Penal  
25 Code of California, which is the law of this state?

26 A Yes, sir.

1 Q You understand that the only ground upon which you may  
2 refuse to testify is that it might incriminate yourself;  
3 that if you do make such objection, that nevertheless you  
4 can be compelled to testify, but after making such an  
5 objection you cannot be prosecuted for anything that  
6 you may have testified to before this grand jury, except  
7 that if you don't tell the truth of course you may be  
8 punished for perjury. Is that your understanding of the  
9 section? A Yes, sir.

10 Q Understanding this section now, fully and fairly I  
11 want you to understand that this grand jury is investigat-  
12 ing a certain matter, namely, whether or not there is an  
13 attempt made on the part of any person or combination of  
14 persons, separately or in connection with each other, to  
15 intimidate or corrupt witnesses, or corruptly to cause those  
16 witnesses to withhold true testimony or to give false tes-  
17 timony; that we are at the present time investigating  
18 any violations that may have occurred contrary to the  
19 provisions of section 137 of the Penal Code of the state  
20 of California. That is the matter upon which you are now  
21 being interrogated. Now, you understand all those  
22 things, do you? A Yes, sir.

23 Q Now, I am going to ask you some more questions, Mr.  
24 Behm, and with that in view, and having informed you of your  
25 rights, I will now proceed to interrogate you. What is  
26 your name? A George Behm.

1 Q How old are you? A Fifty-one years old.

2 Q Where do you reside? A Portage City, Wisconsin.

3 Q What place in Los Angeles are you stopping, Mr. Behm?

4 A That don't concern the case.

5 Q Well, where do you live in Los Angeles? A That don't  
6 concern the case.

7 MR. WEIR. You refuse to answer that question, Mr. Behm?

8 A That don't concern the case.

9 MR. FORD. You refuse to answer, without stating the  
10 grounds upon which you refuse?

11 A That don't concern the case.

12 Q How long have you been in Los Angeles? A That don't  
13 concern the case.

14 Q Where did you reside previously to coming to Los Angeles  
15 --at what street and number in Portage, Wisconsin? A That  
16 don't concern the case.

17 Q What was your business before coming to Los Angeles?

18 A That don't concern the case.

19 Q Do you refuse to answer those questions which I have  
20 just put to you? A That don't concern the case.

21 Q Concern what case? A That don't concern the case.

22 Q What case do you refer to? A I don't know what you  
23 refer to.

24 Q Do you know Ortie E. McManigal? A That don't concern  
25 the case.

26 Q Well, all the questions that we ask you, Mr. Behm,

1 whether they have any relevancy or not, we will endeavor to  
2 determine that question ourselves. If you are refusing to  
3 answer on the ground that they are immaterial and do not  
4 refer to matters now before the grand jury, we can take  
5 that matter up before another tribunal. That is the  
6 position you wish to take in regard to that question, is  
7 it? A That don't concern the case.

8 Q What relation, if any, are you to Ortie E. McManigal?

9 A That don't concern the case.

10 Q Are you the uncle of Ortie E. McManigal? A That don't  
11 concern the case.

12 Q When did you last see Ortie E. McManigal? A That don't  
13 concern the case.

14 MR. MATTHEWS. Were you instructed before coming before  
15 this grand jury, to make that answer to every question?

16 A That don't concern the case.

17 MR. FORD. Mr. Behm, do you know Mrs. Ortie E. McManigal?

18 A That don't concern the case.

19 Q Do you know Clarence Darrow? A That don't concern the  
20 case.

21 Q Do you know Job Harriman? A That don't concern the  
22 case.

23 Q Do you know a detective by the name of Harrington?

24 A That don't concern the case.

25 Q Do you know a man by the name of Tyrrell? A That  
26 don't concern the case.

Q

1 Q Were you ever at 414 South Sangamon Street in the city  
2 of Chicago? A That don't concern the case.

3 Q Do you refuse to answer that question, Mr. Behm? A That  
4 don't concern the case.

5 Q Do you refuse to answer the question I have just put  
6 to you? A That don't concern the case.

7 MR. WIER. Mr. Behm, you fully understood the reading of  
8 that section, and the statement of the district attorney  
9 of what your rights are; that you have a right to  
10 refuse to answer, or to make objections, if you think you  
11 are going to incriminate yourself; but your answers are  
12 hardly fair. If you don't want to answer the question,  
13 say you don't want to answer it.

14 A That don't concern the case.

15 MR. WIER. Then you can't make any other answer to any  
16 other question than that? A That don't concern the case

17 MR. FORD. Were you ever at any time at 414 South  
18 Sangamon Street in the city of Chicago, state of Illinois?

19 A That don't concern the case.

20 Q Did you ever meet Mrs McManigal at that place? A That  
21 don't concern the case.

22 Q Did you, previous to coming to the city of Los Angeles,  
23 California, meet Mrs. McManigal, Clarence Darrow, and  
24 the father of Ortie E. McManigal, at 414 South Sangamon  
25 street? A That don't concern the case.

26 Q Do you refuse to answer that question? A That don't

1 concern the case.

2 Q Did you ever meet them at any other place? A That  
3 don't concern the case.

4 Q Do you refuse to answer that question? A That don't  
5 concern the case.

6 Q Is that the only answer that you are going to give to  
7 any other questions? A That don't concern the case.

8 Q Is it or is it not a fact that the business upon  
9 which you came to California was a contract with some per-  
10 son or persons to interview Ortie E. McManigal? A That  
11 don't concern the case.

12 Q And that that interview was for the purpose of getting  
13 Ortie E. McManigal to change any testimony that he might  
14 have given before the grand jury? A That don't con-  
15 cern the case.

16 Q To withhold the knowledge of any facts concerned in  
17 any proceedings pending in the state of California--  
18 withhold them from the court? A That don't concern  
19 the case.

20 Q To withhold true testimony in those proceedings and  
21 give false testimony? A That don't concern the case.

22 Q Is it not a fact that you have at various times visited  
23 Ortie E. McManigal at the county jail? A That don't  
24 concern the case.

25 Q And that those visits were made for the purpose of  
26 getting Ortie E. McManigal to change the testimony which

1 he had previously given before the grand jury? A That  
2 don,t concern the case.

3 Q And that you wanted him to withhold all true testimony  
4 in any subsequent proceedings against James J. McNamara  
5 and J. B. McNamara and others? A That don't concern  
6 the case.

7 Q And to solicit him or ask him to give false testimony  
8 in those cases? A That don't concern the case.

9 Q Did you make promises to him of help of attorneys,  
10 etc., if he would follow your directions? A That don't  
11 concern the case.

12 Q How long since you saw Ortie E. McManigal at the county  
13 jail? A That don't concern the case.

14 Q When did you last see Ortie E. McManigal before coming  
15 to the state of California? A That don't concern  
16 the case.

17 Q In whose employ are you at the present time? A That  
18 don,t concern the case.

19 Q Who paid your fare to California? A That don't concern  
20 the case.

21 Q Did you pay your own fare? A That don't concern the  
22 case.

23 Q From whom did you procure the money to come to California?  
24 A That don't concern the case.

25 Q What wages did you receive before coming to California?  
26 A That don't concern the case.



1 Q By whom were you enabled to come to California?

2 A That don't concern the case.

3 Q Have you entered into any arrangement with any persons  
4 other than yourself to influence the testimony of Ortie  
5 E. McManigal? A That don't concern the case.

6 Q Now, having repeatedly said that the questions I  
7 have asked you do not concern the case, do you know what  
8 case you are referring to? A That don't concern  
9 the case.

10 Q Upon what grounds do you refuse to answer? A That  
11 don't concern the case.

12 Q Do you refuse to state the grounds upon which you  
13 refuse to answer? A That don't concern the case.

14 Q You do refuse to answer? A That don't concern the  
15 case.

16 Q Have you been instructed by any persons to refuse to  
17 answer the questions propounded to you by this grand jury  
18 or before this grand jury? A That don't concern the  
19 case.

20 Q Is it not a fact that you were instructed by Mr. Darrow  
21 to refuse to testify, and that you promised Mr. Darrow that  
22 you would refuse to testify? A That don't concern  
23 the case.

24 Affiant further says that the questions propounded  
25 to the said George Behm as hereinabove mentioned were and  
26 are material to the matters now under consideration and

1 investigation, and that they are material and necessary  
2 matters to and for the said Grand Jury, in order that they  
3 may be enabled to obtain all proper, necessary and material  
4 evidence and information to the prosecution and discharge of  
5 their duties with respect to the matters under investigation  
6 as hereinabove mentioned.

7 WHEREFORE, affiant asks that this Honorable Court  
8 make an order commanding and requiring the said George Behm  
9 to answer to and before the said Grand Jury the questions  
10 propounded to him as hereinabove mentioned and set forth  
11 to the best of his knowledge and information, and that the  
12 said George Behm be cited to appear before the Court to show  
13 cause why he should not be compelled to answer the said  
14 questions or any of them as the Court may direct.

15  
16  
17 \_\_\_\_\_  
18 Subscribed and sworn to before me  
19 this \_\_\_\_\_ day of July, 1911.

20  
21  
22  
23 (Endorsed.)

24 c o p y

25 No.....

26 In the Superior Court of the County of Los Angeles, State

1 of California.

2 IN RE GEORGE BEHM

3 CONTEMPT OF COURT.

4 A F F I D A V I T.

5 Received copy of the within-----this.....day of.....

6 190..... Attorney for.....

7 J. D. Fredericks, District Attorney, Hartley Shaw, Chief

8 Deputy, Room 51 Court House, Attorneys for.....

9 7373

10 PEOPLE

11 vs

12 CLARENCE DARROW

13 People's Exhibit 21 Filed

14 June 14 1912.

15 H. J. Lelande, Clerk by Sherman Smith, Deputy."

16 Q On the original were those signatures and blanks filled  
17 out?

18 MR. APPEL. Wait a moment--we object on the ground it is  
19 irrelevant, incompetent and immaterial and no foundation  
20 laid, calling for the contents of an instrument which  
21 is not before the court and to which counsel for the  
22 defendant have not been--had their attention called to,  
23 which has not been shown to counsel for the defendant and  
24 we object to the witness being examined concerning the con-  
25 tents of any instrument unless the foundation has first  
26 been shown--unless the foundation for secondary evidence  
has first been laid.

1 MR FORD: Where is Mr Rogers? He looked at this.

2 MR APPEL: I am not talking about this. You are talking  
3 about the contents of the original.

4 MR FREDERICKS: That has been introduced in evidence.

5 THE COURT: Objection overruled.

6 MR APPEL: We take an exception.

7 MR FORD: Answer the question.

8 A What is it?

9 Q On the original document, did you sign the blank and  
10 were the other blanks filled out that appear here on the  
11 copy to be unfilled? A Yes sir.

12 Q On the first blank, what did you sign? A Signed my  
13 own name, Charles Weir.

14 Q On the other blanks which were there had the signa-  
15 ture of the clerk before whom they were sworn, been filled  
16 in? A Yes sir.

17 Q With that exception is an exact copy of the original?

18 A Yes sir.

19 Q Mr Weir, I believe you have already stated that you  
20 were the foreman of the grand jury on that date -- was  
21 the grand jury in session on that date? A On the 31st of  
22 July, yes sir.

23 Q Were you on that date, was the grand jury and yourself  
24 on that date investigating and having under consideration  
25 the question as to whether or not any persons had been or  
26 were guilty or chargeable by indictment in the Superior

1 Court with the crime of giving, offering and promising  
2 to give to any person or persons about to be called as  
3 witnesses, any bribe upon any understanding or agreement  
4 that the testimony of such witness or person should be  
5 thereby influenced, or attempting by other means fraudulent-  
6 ly to induce any person to give false or withhold true  
7 testimony, contrary to the provisions of section 137 of  
8 the Penal Code of the State of California?

9 MR APPEL: We object to that as incompetent, irrelevant  
10 and immaterial, hearsay, that the question undertakes to  
11 invade the secrecy of the grand jury, the action by the  
12 grand jury, or any member thereof; upon the further ground  
13 it is collateral to any issues in this case, no foundation  
14 has been laid for the introduction of the evidence, hear-  
15 say, leading and suggestive.

16 MR FORD: Your Honor will recall that I offered the affida-  
17 vit only for the purpose of showing the existence of it,  
18 and the contents of it, as being in existence, but I ex-  
19 pressly said I didn't offer it for the purpose of proving  
20 the truth of its contents. If I had, your Honor would not  
21 have permitted it to have been introduced, and it has  
22 been introduced only for the limited purposes. I never  
23 introduced this document for the purpose of the truth  
24 of its contents. We can only get that from the lips of a  
25 witness who knows, and Mr Weir being the foreman, knows,  
26 being present there, knows whether this is true or not,

1 and when we seek to prove the crime of perjury and sub-  
2 ornation of perjury and bribery, it is necessary to show  
3 the instances and the investigation of the case and the  
4 calling of the witness and the materiality of the testi-  
5 mony and the refusal to testify truthfully or to withhold  
6 the true testimony or to give false testimony, as the case  
7 may be. All of those things; it is a little different sit-  
8 uation from the spiriting away of a witness, its material-  
9 ity and lack of materiality is of no consequence in this  
10 case, in the perjury case, and materiality is of conse-  
11 quence insofar as it is offered to prove bribery. We con-  
12 tend, of course, that it is of no consequence.

13 THE COURT: How about section 926?

14 MR FORD: 926, in the prosecution for perjury, the testi-  
15 mony of a grand juror is admissible. We are making a  
16 charge here of a general conspiracy, if the court please.  
17 It is true the defendant is not being tried on that specific  
18 crime at this time, but he is being tried for a general con-  
19 spiracy, involving the commission of many crimes, and  
20 each one of those crimes involved in that general con-  
21 spiracy must be proved in the same manner and is subject  
22 to the same rules of evidence as though he were on trial  
23 for the other offenses. We cannot introduce evidence of  
24 other offenses and other conspiracies, but showing the ex-  
25 istence of each element necessary, and the rules covering  
26 the production of testimony as to those other offenses is

1 exactly the same as though he were being tried and as  
2 though he were being charged with that specific offense,  
3 and as to the release of it, it has already been released  
4 right under the order of this court and it is not violative  
5 of the secrecy of the grand jury, and as I called your  
6 Honor's attention to in Ex-parte Smith and Ex-parte Young  
7 and in People versus Northy, in the 77th Cal., they lay  
8 down the rule it is for the protection of the grand juror  
9 and this grand juror is not claiming any such protection  
10 and has not claimed it.

11 MR APPEL: Your Honor, we deny most emphatically that  
12 this defendant is being tried for a general conspiracy  
13 or for committing many crimes. The statement made by coun-  
14 sel has been made often here, it is a series of misconduct  
15 and a series of acts showing misconduct on the part of  
16 counsel. It is misconduct to state that, because he under-  
17 takes to tell this jury here Mr Darrow is being tried for  
18 many offenses.

19 MR FORD: You misunderstood me.

20 MR APPEL: I object to his saying to me that I misunder-  
21 stood him. I am quoting his language. The reporter has  
22 it, and I again say that counsel should be admonished, and  
23 the jury should be told that Mr Darrow is not being tried  
24 here for a general conspiracy, or the commission of many  
25 crimes, because it is absolutely untrue, because counsel  
26 should not state, because it is his duty to be fair to

1 our client the way he should be fair to the jury and fair  
2 to himself and to the court, and this is not a case in  
3 which a witness may testify -- the exceptions mentioned  
4 under the statutes, are the only exceptions under which a  
5 juror may testify as to what occurred there. The secrecy  
6 of the grand jury must remain inviolate except in instances  
7 in which the law allows them to testify, and there is no  
8 power in the District Attorney to compel a witness to tes-  
9 tify as to what they were then considering or as to what  
10 was the matter under investigation. We certainly take  
11 an exception to the conduct of counsel in arguing these  
12 matters to the court in the manner in which he does, and  
13 we ask the court to instruct the jury now that Mr Darrow -  
14 that the statement of counsel that Mr Darrow is being  
15 tried here for a general conspiracy to commit many crimes,  
16 is untrue; it is not so.

17 THE COURT: The court will instruct the jury, as before,  
18 that the defendant is not being tried for anything ex-  
19 cept as charged in the indictment which has been read  
20 to them.

21 MR FORD: In a notation in the large Penal Code, sub-  
22 division 20, I just quote the syllabus as it is there con-  
23 tained -- I have not the case, but I am satisfied that is  
24 the law, and we can produce other authorities, if nec-  
25 essary. Under a statute containing the same language as  
26 that in the above section it was held that the rule re-



1 quiring grand jurors to disclose testimony of witnesses  
2 examined before them cannot be confined to the two cases  
3 mentioned, namely, where a person is being tried upon  
4 that specific charge, although the statute does not show  
5 that, although tried upon a charge -- I think that is the  
6 point which your Honor addresses the question to counsel  
7 on our side. The case says, in the statute containing the  
8 same language as that, it was held that the rule requiring  
9 the grand jurors to disclose testimony of witnesses ex-  
10 amined before them, cannot be confined to two cases mention-  
11 ed, but they may be required to prove whatever defendant  
12 may have said while testifying before them.

13 MR APPEL: Whatever the defendant --

14 MR FORD: I will ask your Honor to ask counsel to subside  
15 while I am addressing the court.

16 THE COURT: I see no harm in the suggestion.

17 MR FORD: I have not been able to do it, and I have been  
18 reproved by the court whenever I did it.

19 MR APPEL: We made our objection and he answered our objec-  
20 tion.

21 THE COURT: Let us discuss this question of law.

22 MR FORD: Now, the charge here is that the charge we are  
23 making is, that Mr Behm committed perjury; we are proving a  
24 crime on the part of George Behm and not proving that we  
25 are entitled to the same rules as we would be if we had Mr  
26 Behm specifically on trial, and that the statute does not

1 contemplate that wherever it is relevant and proper that  
2 we should prove that Mr Behm had committed perjury,  
3 that we cannot do, but in this case, merely because he  
4 does not happen to be specifically on trial we are charg-  
5 ing that George Behm committed perjury and I have told  
6 your Honor before, we will show that he did that at the  
7 instance and request -- I am addressing myself only to the  
8 court and not to the jury in making the statement, not to  
9 be regarded by the jury as evidence, -- but we will show  
10 that the defendant was the one who suborned him to do that.  
11 That constitutes one crime. We will charge that <sup>he</sup> bribed  
12 him to do it; that constitutes the other crime, and, if  
13 the court please, we are anticipating the argument upon this  
14 point, because I am not asking the witness at the present  
15 time to state what the testimony was; I am asking him to state  
16 whether or not there was such a charge under investigation  
17 before the grand jury, and section 926 says that he must  
18 keep secret whatever he himself may have said or whatever  
19 he or any other grand juror may have voted, and by the  
20 rule that the exclusion of one thing is the suppression of  
21 another, I think it would be fair to say in a court, at  
22 a proper time where it is relevant, we would have a right  
23 to disclose what matters were under investigation before  
24 the grand jury, and that is the only question involved now.  
25 I have not yet asked him what the testimony is. I think  
26 we are anticipating a little, but I shall get to that in a

1 minute in another question.

2 MR APPEL: Now, your Honor, I again wish to have the jury  
3 told that the statement of counsel that they want to prove  
4 by this witness that in a proceeding referred to in his af-  
5 fidavit that this man mentioned therein, had committed  
6 perjury, is absolutely incorrect and untrue. The fact of  
7 the matter is that the witness did not testify to any-  
8 thing, he just simply said whatever they asked him didn't  
9 concern the case, which is the only legal objection that  
10 he could make, and which the law allows him to make,  
11 that you cannot examine a witness concerning any matters or  
12 things not pertaining to the issue, even in open court  
13 here, and the witness may say, properly, if he so regards  
14 it, decline to answer an immaterial question here upon  
15 the stand, and because he declines to answer does not con-  
16 stitute perjury, never did constitute perjury, never will,  
17 so long as there are judges and lawyers who have any brains  
18 at all. That is the only objection, your Honor, to tes-  
19 tifying to the matters and things to which the questions  
20 were addressed, in which the witness was within his legal  
21 rights, to say, "That don't concern the case".

22 That is the objection that was put into the law books  
23 long before we ever came on earth. If he will only read  
24 back to what is at the beginning, counsel will learn more,  
25 and he won't make such a break as he makes here. Now, he  
26 is trying to show perjury, your Honor, by the answers of Mr

1 Behm, which were objections. He didn't testify to any-  
2 thing; he didn't say one thing or the other. He didn't  
3 assert one thing to be true and didn't deny another thing  
4 to be untrue. The witness said there in the presence of  
5 the grand jury, as far as I can gather from this affidavit,  
6 and Mr Ford read him some questions, wanted him to testify,  
7 and told him a lot of stuff as to what would be con-  
8 strued against him and what would not, that they could not  
9 use the testimony against him, and then wound up by say-  
10 ing, "If you have any objection to testifying here, you  
11 can make the objection", and the witness proceeded to do  
12 what Mr Ford told him to do. "That don't concern the case."

13 He might have used Latin, but I assume the witness didn't  
14 understand Latin and Mr Ford didn't understand Latin, so  
15 he used plain, ordinary English, and explained himself.  
16 They told him he could object to it and they are making  
17 a hullabaloo here because the witness proceeded to do ex-  
18 actly what they instructed him to do, and he calls that  
19 perjury.

20 Now, as I sat here and looked at it, that was a funny  
21 proceeding, and then, because the witness objected to  
22 testifying when they told him he could object, then they  
23 bring him up in court and try him for contempt. There  
24 is no charge of perjury in that affidavit there filed  
25 before your Honor or before another court. That happen-  
26 ed July 31st, nearly a year ago, and no charge of perjury

1 has ever been brought against him, and he is talking  
2 about perjury and then they say that in not having committed  
3 perjury, that Mr Darrow was guilty of two crimes. He  
4 says he was guilty of two crimes; one of suborning the  
5 witness to commit perjury by saying "That don't concern  
6 the case"; the other one by inducing him to say that it  
7 was not material, which was not a statement of any fact,  
8 and there he is guilty of another felony, and by the time  
9 we get through here, why, the whole provisions of the Penal  
10 Code evidently were violated by Mr Darrow, in the gentleman's  
11 mind.

12 THE COURT: Read the question. (Question read.)

13 Objection overruled.

14 MR APPEL: We except.

15 A Yes sir.

16 Q BY MR FORD: At the time Mr Behm was called as a witness  
17 was he called during that investigation and upon that in-  
18 vestigation?

19 MR APPEL: Wait a moment. We object to that on the ground  
20 it is leading and suggestive and it calls for a conclusion  
21 or opinion of the witness, it is incompetent, irrelevant  
22 and immaterial; it is hearsay; no foundation laid and dis-  
23 connected from any issue in the case.

24 THE COURT: Objection overruled.

25 MR APPEL: We except.

26 A Yes sir.

1 MR FORD: You stated in your affidavit to the court what  
2 the questions and answers propounded, what questions were  
3 propounded to George Behm<sup>^</sup> and the answers thereto. Was  
4 that statement of what had transpired correct?

5 MR APPEL: We object to that on the ground it is incompe-  
6 tent, and immaterial, hearsay, no foundation laid, discon-  
7 nected to any issue in this case, and does not prove any  
8 element or issue contained in the indictment in this  
9 case, calling for a conclusion of the witness.

10 MR ROGERS: It is not usual to say in an affidavit, "Is  
11 that correct" for the purpose of substantive testimony.

12 MR FORD: It is to shorten time, I thought, if the court  
13 please.

14 THE COURT: Objection overruled.

15 A I will answer yes.

16 Q BY MR FORD: Were these questions so propounded mater-  
17 ial?

18 MR ROGERS: Oh, oh.

19 MR FORD: Withdraw that.

20 Q Were all the statements made in this affidavit at  
21 that time true?

22 MR APPEL: We object to that upon the ground it is incom-  
23 petent, irrelevant and immaterial to any issue in this  
24 case; it is hearsay; no foundation laid; it is calling for  
25 a conclusion and opinion of the witness and upon the fur-  
26 ther ground that it undertakes to present to the jury the

1 matters and things contained in the affidavit --

2 MR FORD: I withdraw the question.

3 THE COURT: The question is withdrawn.

4 MR FORD: Cross-examine.

5

6 CROSS-EXAMINATION

7 MR APPEL: Will you be kind enough to state what was the  
8 matter under investigation before the grand jury? A The  
9 matter under investigation before the grand jury, they were  
10 investigating Mr Behm to see whether anybody had been trying  
11 to influence him in any way with reference to giving tes-  
12 timony, or in giving testimony.

13 Q You were investigating him, is that right? A We  
14 were interrogating him, yes.

15 Q How? A We were interrogating him.

16 Q You were investigating him, you just stated that. A He  
17 was a witness.

18 Q Will you answer my question.

19 MR FORD: Just a moment. I don't think counsel has any  
20 right to address the witness in that tone of voice, to  
21 chide him.

22 THE COURT: I don't think the witness is taking any excep-  
23 tion to the tone of voice.

24 MR FORD: I don't think it intimidates him any.

25 A Oh, no.

26 MR APPEL: What was the third question asked of the wit-

1 ness? A I don't recall that, -- yes, I can, too. The  
2 first asked him -- his name.

3 Q Yes. A The next his age; the next his residence.

4 Q And he answered all that, did he? A Yes sir.

5 Q What is the next question you asked him?

6 MR FREDERICKS: That is objected to on the ground it is  
7 immaterial as to what was the next question.

8 MR ROGERS: The witness has attempted to do most marve-  
9 lous and unique things, remember questions and answers,  
10 page after page, and we have a right to show if he does  
11 remember it.

12 THE COURT: Objection overruled.

13 A I cannot recall what the third was.

14 MR APPEL: What was the next question after that that you  
15 don't remember? A I think I will save you some time by  
16 saying that as far as I can recall, I remember those three  
17 questions.

18 Q Those are the only three questions you remember?

19 A No, I can remember other questions there, but I cannot  
20 remember them in their order.

21 Q Now, tell me one more question. A One more question?

22 Q Yes. Now, for instance, after you asked him where  
23 his residence was, what is the next question that was asked  
24 him? A I cannot tell you in the order what it was.

25 Q Well, can you remember any particular question that  
26 you asked him? A Yes sir, I can.



1 Q Well, now, give me one. A We asked him if he knew  
2 Ortie McManigal.

3 Q What is that? A We asked him if he knew Ortie McMan-  
4 igal.

5 Q What was the answer? A What was his stage answer;  
6 I have forgotten?

7 Q What was the answer? A His answer was, "It don't  
8 concern the case".

9 Q He said that? A That was his answer to every ques-  
10 tion except the first three.

11 Q What was the questions, sir? A I told you one of  
12 them. Do you want some more?

13 A Do you remember any more than four or five questions?

14 A Yes, I remember a dozen or two.

15 MR FORD: To shorten counsel's labors, I will suggest that  
16 we intend later on to call Mr Williams.

17 MR APPEL: We are not asking for any assistance, we are ex-  
18 amining this witness.

19 THE COURT: Counsel is entitled to cross-examine.

20 MR APPEL: This witness says this is an exact affidavit  
21 of the other, and we have a right to cross-examine him.

22 THE COURT: You have a right to test his memory.

23 MR APPEL: Now, there was a shorthand reporter there?

24 A Yes sir.

25 Q You didn't take down the questions and answers your-  
26 self? A No sir.

1 Q And you made no memorandum of it? A No sir.

2 Q Now, do you remember what you stated in the alleged  
3 original affidavit made by you? A No sir.

4 MR APPEL: We move to strike out now the alleged copy of  
5 the original affidavit upon the ground that no foundation  
6 was laid for its introduction, upon the further ground that  
7 the witness has shown himself disqualified and incompe-  
8 tent to testify that this copy is an exact copy of the  
9 original.

10 MR FORD: We ask leave to ask him one question before your  
11 Honor rules.

12 MR APPEL: I am asking -- cross-examining this witness,  
13 your Honor.

14 MR FORD: You made a motion, and I have a right to examine  
15 on it.

16 MR APPEL: No, he has no right to examine him; I am cross-  
17 examining this witness.

18 MR FORD: I have a right to ask him certain questions be-  
19 fore your Honor rules.

20 THE COURT: You resist the motion?

21 MR APPEL: He has no right --

22 MR FORD: We do, your Honor.

23 THE COURT: Very well. Proceed.

24 MR FORD: Mr Weir, at the time this original document  
25 was prepared, did you read it over before you signed it?

26 A I did.

1 Q Did you find it to be correct? A I did.

2 Q Were there several copies prepared at that time,  
3 also? A Yes, I think I signed two, if I am not mistaken.

4 MR FORD: That is all. We submit the matter.

5 Q BY MR APPEL: You saw two? A Signed two.

6 Q Signed two carbon copies. This is not any of them  
7 you signed? A No, I did not sign that one.

8 Q Did you ever see this before today here in court?

9 A Yes sir.

10 Q Where? A Up in the District Attorney's office yes-  
11 terday afternoon.

12 Q Who told you it was a copy of the other? A Nobody, I  
13 knew it.

14 Q By looking at it? A Yes.

15 Q How many pages were there in the original? A I don't  
16 remember, five or six.

17 Q How many pages in this copy? A Five or six.

18 Q Five or six? A That is my recollection of it.

19 Q You don't mean to say you can tell here accurately,  
20 this is an exact copy of the other, from memory? A That  
21 is my best recollection of it.

22 Q Oh, your best recollection of it? A I am very sure it  
23 is correct, too.

24 Q You are? A Yes sir.

25 Q Do you remember the contents of the first of the one  
26 you signed? A Why, I remember it in a general way, very

1 well.

2 Q In a general way. Do you remember the contents? A I  
3 remember the substance of it.

4 Q Verbatim? A I remember the substance of it, I  
5 cannot repeat it.

6 Q You remember the contents of the first verbatim?

7 A Of the first?

8 Q Yes.

9 A The first question?

10 Q The original one? A Well, I am satisfied it is the  
11 same thing and it appears all there --

12 Q No, no, not from appearance. Do you remember the  
13 original affidavit that you signed verbatim, word by word?

14 A No, it is impossible.

15 Q Impossible. Do you remember the words of this copy,  
16 word by word? A No.

17 Q You say the affidavit you signed had five or six pages?

18 A That is my recollection.

19 Q And the affidavit you signed had five or six pages?

20 A Yes.

21 Q And this one has 12? A Well, I was mistaken.

22 Q Oh, you were mistaken? A In the number.

23 Q Now, isn't this the fact, that in a general way you  
24 are saying that looks like the original? A No.

25 Q No, no? A I remember the testimony that Mr Beam  
26 gave very well.

1 Q Yes, I understand. I am not asking about that.

2 A And I am sure that is a copy of what I signed and swore  
3 to.

4 Q And you signed an affidavit containing 5 or 6 pages?

5 A I didn't count the pages.

6 Q Now, you take it all back? A No, I do not.

7 Q Not taking it back? A No sir.

8 Q Did you say 5 or 6 pages? A That was my guess at it.

9 Q So you are guessing at the whole thing? A No, I am  
10 not.

11 Q How many pages has this, now? A I don't know. You  
12 said it had 12, my guess is 5 or 6.

13 Q How many pages did the original have? A The same  
14 number that one has.

15 Q Didn't you say 5 or 6? A I said that was my guess  
16 at it.

17 Q You guessed at it; not even a recollection, your  
18 guess, eh? A (No response.)

19 Q Well, now, go on and state from memory what the  
20 original affidavit had in it.

21 MR FORD: I think there is a motion before the court;  
22 I don't know whether counsel still wants it or not; we  
23 submit it.

24 THE COURT: The motion to strike out is denied.

25 MR APPEL: We take an exception.

26 Q Go on and state what you stated in the original affi-

1   davit, word by word? A I cannot do that.

2   Q Will you state what you stated in this affidavit, word  
3   by word? A No.

4   Q If you cannot state what you stated in the original af-  
5   fidavit word by word, how can you tell by this paper which  
6   was introduced in evidence as an exact copy of the origi-  
7   nal, how can you tell me? A I am satisfied that I signed  
8   that original of which I was satisfied that was a copy,  
9   word by word.

10  Q Now, how are you satisfied? A From reading it and  
11  from my recollection of the testimony and hearing it read.

12  Q Yes; and hearing it read. Now, you were told this was  
13  a copy, weren't you? A Huh?

14  Q You were told this was a copy of the other? A No, I  
15  don't think I was.

16  Q You were not? A No.

17  Q When they showed you this paper, what did they tell  
18  you? A Read it.

19  Q What did they tell you? A They said to read it.

20  Q Is that all? A That is all.

21  Q And then immediately upon your reading it, you remember-  
22  ed it was an exact copy of the other? A I remembered it  
23  was an exact copy and my impression of what I had sworn to  
24  and what Mr Behm swore to.

25  Q What is contained on the last page of this copy?

26  A The last page is a certificate preparing for my signa-

1 ture and for the notary -- for the clerk to sign.

2 Q Is that all? A The legal phraseology I do not rem-  
3 ember.

4 Q What was contained in the second page of the original?

5 A I cannot remember.

6 Q And in the fifth page? A (No response.)

7 MR APPEL: We move to strike out, now, the affidavit of  
8 the witness, <sup>and</sup> the testimony of the witness that the document  
9 introduced in evidence here is an exact copy of the origi-  
10 nal, upon the ground it appears from an examination of the  
11 witness that his statement was based upon guess-work, and  
12 not upon a sufficient knowledge to entitle him, by compari-  
13 son or by a knowledge of the contents of both instruments,  
14 to state it as an exact copy.

15 THE COURT: Motion denied.

16 MR APPEL: We take an exception. That is all.

17  
18 REDIREDT EXAMINATION

19 MR FORD: You are satisfied it is substantially the same?

20 MR APPEL: Now, then --

21 MR FORD: Withdraw that.

22 MR APPEL: I object to that.

23 THE COURT: The question is withdrawn and the witness is  
24 excused.

25 Gentlemen of the jury, now bear in mind the former ad-  
26 monition. (Jury admonished.) The court will now adjourn  
until 10 o'clock tomorrow morning.