

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. 34

I N D E X.

Direct.

Cross.

Re-D.

Re-C.

John R. Harrington,

2688

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FRIDAY, JUNE 21, 1912; 9 o'clock A.M.

Defendant in court with counsel.

THE COURT. Gentlemen, the jurors have withdrawn their request to be present and unless the counsel desire their presence the court will accede to that request.

MR. ROGERS. Mr. Appel was going to present this matter but he is not here yet.

THE COURT. We will wait a little while. I shall assume, gentlemen, that your silence is an acquiescence that the jurors may remain in their room. It will be so ordered, then.

MR. ROGERS. If your Honor please, the rule appears to be--

THE COURT. Just one moment--if this argument is going to extend over the hour I would like to know whether or not you care to have it taken down.

MR. ROGERS. No, sir.

THE COURT. Unless either side request it I shall direct the reporter to just eliminate the argument.

MR. ROGERS. No, sir.

(Argument.)

JOHN R. HARRINGTON,

on the stand for further direct examination:

THE COURT. You may call the roll of jurors.

(Jurors called; all present.)

1 MR. FORD. If the court please, the other day at the request
2 of the defense the rule for the exclusion of witnesses was
3 invoked as to our witnesses. I now see in the court room a
4 number of witnesses, Mr. Johannsen who has been under cross-
5 examination and whom, under stipulation, we have the right
6 to further cross-examine if we desire, and Mr. Tveitmoe, and
7 one or two others, who, if are not witnesses are likely to
8 become witnesses--Mr. LeCompte Davis and others, I don't
9 know--the defense know who they are going to call as
10 witnesses.

11 THE COURT. The court will again make the announcement an
12 order has been made excluding all persons or witnesses
13 who know they are to be witnesses.

14 MR. ROGERS. The rule has been observed rather by its non-
15 observance. Mr. Hunt was here, the gentleman, the teller
16 was here, and both of them sat together and we made no
17 objection.

18 MR. FORD. They only came in in order to be called. We have
19 kept our witnesses out of the court room. They came down
20 from San Francisco and came straight to the court room. We
21 didn't know they were in here.

22 MR. ROGERS. Mr. Ong was in here and many other witnesses.
23 We have not observed the rule at all. We have not subpoenaed
24 any of these witnesses.

25 MR. FORD. We are asking for the rule and counsel know their
26 witnesses.

1 THE COURT. The rule has again been declared, Mr. Ford, that
2 is all the court can do at this time.

3 MR. APPEL. If there is any man here who can read our minds
4 as to whether we will call them or not, and they read it
5 correctly, they can step out, I suppose.

6 MR. FORD. I think you are in honor bound to notify any
7 persons whom you will call.

8 THE COURT. Mr. Ford, we will reach it when the time comes.

9 MR. DARROW. There are a few people--two or three that we
10 wish to consult with all the while, just as they have had
11 them in the court room all the while.

12 MR. FREDERICKS. If the counsel wishes to make an exception--

13 THE COURT. If you will indicate who they are and it is pro-
14 per, the court can exempt them from the rule.

15 MR. DARROW. Here is Mr. Collier, Mr. Davis, Mr. Belcher, whom
16 I have been consulting all the time with.

17 MR. FORD. If they are assisting you--

18 THE COURT. Under the circumstances they are exempt from the
19 rule.

20 MR. ROGERS. We may have to consult Mr. Tveitmo during
21 this examination, and certainly Mr. Davis.

22 MR. FREDERICKS. I think Mr. Davis is not entitled to
23 remain here.

24 MR. ROGERS. Mr. Davis informs me he cannot be here this
25 afternoon but he can be here this morning. I like to con-
26 sult him occasionally.

1 MMR- FORD. We can take a recess whenever counsel wants
2 to consult him. We ask for the rule to be enforced.

3 MR. DARROW. It has ^{not} been enforced against them. They have
4 people here all the time.

5 MR. FORD. Not unless it was these two witnesses who came
6 in yesterday.

7 MR. DARROW. Mr. Ong sat in the court room, you remember,
8 before he was put on the stand.

9 THE COURT. You have indicated two men, who else do you want?

10 MR. DARROW. Mr. Tveitmoe we have to consult in reference to
11 this matter.

12 THE COURT. You require the presence of Mr. Tveitmoe in the
13 court room in order to consult with him in regard to the
14 matter?

15 MR. DARROW. That is all I think of now.

16 MR. FORD. We certainly object to the presence of Mr. Tveitmoe,
17 if he is going to be called as a witness it will be a case
18 in which we desire the rule just as strenuous as they did
19 in regard to Mr. Behm, although we do not ask them not to
20 consult with him.

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1 MR DARROW: We made no rule on Mr Behm. We asked nothing on
2 Mr Behm, except he finish his testimony without being
3 prompted, but we never asked him to stay out of the room.

4 MR FREDERICKS: I think counsel is entitled to those em-
5 ployes and assistants --

6 THE COURT: Whom he declares or requires here personally
7 in the court room. I said he should make a declaration
8 at this time who he desires.

9 MR FREDERICKS: Mr Tveitmoe is simply a witness.

10 MR DARROW: Mr Tveitmoe is more than that in this matter,
11 and we wish to consult him in this matter.

12 MR FREDERICKS: How much more?

13 THE COURT: Well, who else.

14 MR APPEL: Your Honor, let me suggest this: that any per-
15 son whom the other side have labeled as co-conspirators
16 in this matter, is a party to this proceeding, and they
17 have a right to be here and hear.

18 THE COURT: I am only asking for your statement who these
19 people are that you require?

20 MR APPEL: They labeled Johannsen, Tveitmoe, and they have
21 labeled Mr Davis by Mr Behm on the stand here, and asked
22 him whether or not Mr Davis was present there and aided and
23 abetted the defendant in telling him what to testify to.

24 THE COURT: Who else do you want to remain in the court
25 room?

26 MR BOGERS. Mr Davis, Mr Tveitmoe, Mr Collier, Mr Johann-

1 sen and Mr Belcher.

2 MR FREDERICKS: We object to Mr Tveitmoe and Mr Davis.

3 MR FORD: The other men are who?

4 MR DARROW: We certainly need those two.

5 MR ROGERS: They have been nominated as co-conspirators,
6 the word has been used concerning them; nothing but fair
7 they should hear what is to be said against them.

8 MR DARROW: At the sametime we have to consult with them.

9 MR FORD: All the benefit derived from the rule will be
10 entirely negatived, if the defendant can arise in court
11 and make that statement concerning witnesses. You might
12 as well not invoke the rule. Now, the benefit of the rule
13 counsel well knows.

14 THE COURT: yes, that is true.

15 MR APPEL: Yes, and it doesn't cover the case.

16 MR FREDERICKS:" Well, we will submit it.

17 MR DARROW: -- that the court says we need the attend-
18 ance --

19 THE COURT: Give me those names so I can write it down.

20 MR DARROW: Mr Collier, Mr Belcher, Mr Davis, Mr Tveit-
21 moe and Mr Johannsen.

22 MR FORD: With regard to Mr Tveitmoe and Mr Hohanssen,
23 they declared themselves the other day, they couldn't find
24 out what they knew out of court, and put them on the
25 stand.

26 MR ROGERS: On certain matters.

1 THE COURT: Mr Collier, Mr Belcher, Mr Davis, Mr Johannsen,
2 and Mr Tveitmoe, those men that you desire to have in the
3 court room to assist you in presenting the defense in
4 this matter?

5 MR ROGERS: Yes sir.

6 THE COURT: All right. I think, as the prosecution says,
7 it is straining the rule a little bit, but I think you should
8 have the doubt resolved in your favor. With the exception
9 of the names that have just been called, the witnesses who
10 are either under subpoena or who are here and have knowl-
11 edge that they will be called, are excluded from the
12 court room during the trial.

13 MR FORD: Having invoked the rule, I wish to give notice
14 that if either of those witnesses testify, with the excep-
15 tion of Mr Collier and the other man, but Mr Davis and Mr
16 Tveitmoe, if we deem it desirable on account of them not
17 obeying the rule where it has been invoked, we shall pre-
18 serve our right to object if we see fit so to do.

19 THE COURT: All right, gentlemen.

20 MR FREDERICKS: What was the question pending, now, Mr Re-
21 porter? I was asking you in regard to your employment,
22 Mr Harrington, by Mr Darrow, and I believe you stated ap-
23 proximately the date of it. Now, do you remember a time when
24 there was a conversation or meeting at Mr Darrow's house
25 between Mr Behm and Old Man McManigal, Ortie McManigal's
26 father, and Mrs McManigal, his wife, and Mr Darrow, do you
remember that occasion? A I do.

1 Q About how long had you been then actively engaged under
2 the employment you referred to? A A little less than
3 two months.

4 Q A little less than two months. And do you remember
5 about when that meeting was that I have referred to, with
6 Mr Behm, Mr Darrow, Mrs McManigal and Old Man McManigal?

7 A It was on the 18th of June, 1911.

8 Q 18th of June, 1911. Have I given the correct people
9 who were present at that interview, or were there others
10 present? A I think that covers all that were there.

11 Q You think that covers it. Do you remember the conver-
12 sation that occurred there between Mr Darrow and Mr Behm --
13 I will ask you, did a conversation occur there between Mr
14 Darrow and Mr Behm relative to his coming to California?

15 A Yes sir.

16 Q Do you remember the conversation, in substance, which oc-
17 curred between them in reference to that matter? A I do.

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1 Q Will you relate it to the jury?

2 MR. APPEL. We object to that on the ground it is incompetent,
3 it is irrelevant, it is immaterial, it is hearsay, it is
4 collateral to any issue in this case; it does not tend
5 in any way, shape or manner to prove any element of the
6 offense charged in the indictment; no relation to it in
7 any way, shape or manner; it is remote, it is distant
8 from the time mentioned in the indictment mentioned herein
9 as the date of the commission of the offense, and it could
10 not possibly relate to any matter in relation to the offense
11 charged in the indictment, because it is said by the witness
12 it occurred in June, 1911, and it appears from the evidence
13 here, and the undisputed evidence in the case, that Lockwood
14 was not a juror at that time, had not been drawn and there
15 could not have been anything said at that time which might
16 affect the charge made in the indictment, therefore, it is
17 collateral to any issue in this case. We also object to the
18 evidence on the ground, and for the reason that it appears
19 from the evidence, established here by the prosecution,
20 that the situation was one in which the witness was then an
21 attorney, that any conversations had by Mr. Darrow and the wit-
22 ness or in the presence of the witness with any of the wit-
23 nesses for the defense at that time or persons who might be
24 witnesses in the future, were communications which belonged
25 entirely to the defense; they were communications which
26 belonged to the defense of the McNamaras and McManigal, that

1 they were made in the presence of Mrs. McManigal, established
2 here by the evidence to be the wife of one of the persons
3 named in the indictments then pending; that they were
4 confidential communications existing then between attorneys,
5 they being the agents as to each other, and the attorneys
6 for the defendants, the McNamaras, and that no one has
7 waived the privilege here, and therefore it is inadmissible
8 and incompetent for any purpose and the attorney cannot
9 waive the privilege.

10 THE COURT. Objection overruled.

11 MR. APPEL. We take an exception.

12 A Mr. Darrow first asked Behm if he was a labor man and
13 associated with unions, and Behm said he was.

14 MR. APPEL. Wait a moment--we move to strike out the
15 statement of the witness upon the ground that it is incom-
16 petent, irrelevant and immaterial for any purposes in this
17 case; that it appears on the face of it that the communi-
18 cation, if any, was a communication obtained by Mr. Darrow
19 in furtherance of the defense of the case and not for any
20 unlawful transaction and disconnected with the offense
21 charged in the indictment.

22 THE COURT. The motion to strike out is denied.

23 MR. APPEL. Exception.

24 MR. FREDERICKS. I would like to ask the court to instruct
25 the counsel not to interrupt in the middle of an answer.

26 Now, proceed with your answer. Read as far as he went, Mr.

1 Reporter.

2 MR. APPEL. The court cannot instruct how I shall protect the
3 rights of this defendant.

4 THE COURT. The court has not undertaken to--

5 MR. APPEL. I propose to move to strike out any evidence
6 which is not permissible.

7 THE COURT. The court has not undertaken to give any instruc-
8 tion.

9 MR. FREDERICKS. I think Mr. Appel is trying to break in on
10 this witness's testimony for the purpose of breaking up the
11 continuity of it so that it will not be understood by the
12 jury, and I want, I demand as a right and as a right of
13 practice and procedure that this witness be permitted to
14 answer fully his question before counsel moves to strike it
15 out.

16 THE COURT. That is always a right every witness has.

17 MR. APPEL. I except to that statement of counsel as abso-
18 lutely and maliciously false. It is untrue and none of
19 his statements are going to intimidate me to in any way,
20 shape or manner, from doing my full duty as I understand
21 the law, and as I do not get it from him. I say, his state-
22 ment is absolutely false, as false as other statements he
23 has made here, which can be proven to be absolutely false,
24 your Honor, and I say I deny the power of the court here
25 to instruct me when I shall not move to strike out any mat-
26 ter which I consider to be improper.

1 Your Honor, he can go right to the point, and under the rul-
2 ing made by your Honor, he can ask anything that may be
3 within that ruling, and we will not move to strike it out,
4 we will be contented with having our objection overruled.
5 I take an exception to the statement made by counsel here,
6 your Honor, and I assign the conduct of counsel as abso-
7 lutely error and prejudicial to the rights of this defend-
8 ant.

9 MR FREDERICKS: Now, will the reporter read the part of
10 the answer that the witness gave so that he can know where
11 he left off.

12 (Last answer read.)

13 MR FREDERICKS: Go ahead. A He then asked him if his
14 sympathies were with the unions, and Behm answered that
15 they were; he then asked him if he had influence with Ortie
16 McManigal and Behm said he did. So Mr Darrow asked Behm
17 if he would be willing to come out to Los Angeles and inter-
18 view McManigal and try to get him over to the side of the
19 defense. Behm said that he would be glad to go but he
20 was not in a financial condition at that time to go, so
21 Mr Darrow told him he would take care of that, that he
22 would pay his expenses and look after a man to husband his
23 farm while he was away; so Behm said under those condi-
24 tions, then, he would be in position to start at the end
25 of that following week.

26 MR APPEL: We move to strike out the statement of the wit-

1 ness upon the same grounds stated in our previous motion to
2 strike out, and upon all the grounds stated in our ob-
3 jection to the evidence, there being nothing in the state-
4 ment here to show any conspiracy of any kind to commit
5 any crime in any shape or manner connected with, or in
6 any other way, connected with any element of the offense
7 charged.

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

9 MR APPEL: Take an exception.

10 MR FREDERICKS: Go ahead. A Mr Darrow also stated
11 there, if McManigal would testify against the McNamaras
12 it would bring disgrace on him and his children and his
13 family and friends. He also told Behm that he could tell
14 McManigal that he would see he was well taken care of after
15 he got out and that he would get a good position in
16 Chicago.

17 MR ROGERS: What is the last of that?

18 (Last of answer read as follows: "He also told Behm
19 that he could tell McManigal that he would see he was well
20 taken care of after he got out, and that he would get a
21 good position in Chicago.")

22 MR ROGERS: A good position in Chicago?

23 THE REPORTER: yes sir.

24 MR FREDERICKS: Go ahead. A Mr Darrow then gave Behm
25 \$100, and it was arranged there that Behm was to start at
26 the end of that week, the following week; that is, the

1 following Saturday. That was practically the substance of
2 everything that took place there.

3 MR FREDERICKS: About how long were they present talking
4 together, Mr Behm and Mr Darrow and Mrs McManigal? A Well,
5 the time that was consumed in the talk between Behm and Mr
6 Darrow himself, was probably about half an hour. Behm
7 was there longer, but Mr Darrow was in and out of the room.

8 Q Now, did you afterwards come to California? A I did.

9 Q How soon after that did you leave for California?

10 A I left on the following Thursday, that would be the
11 22nd, I think.

12 Q Came to Los Angeles, did you? A To Los Angeles.

13 Q After you came to Los Angeles, state whether or not
14 Mr Behm came here and you met him? A I did.

15 MR ROGERS: I desire to enter in the record now, that he
16 came to Los Angeles -- that the court has not read section
17 1324 of the Penal Code to the witness, as the law requires.

18 MR FREDERICKS: The law does not require it to be read;
19 the court can read it if the court wants to. We have not
20 asked that it should be read, it is a matter of indiffer-
21 ence to us.

22 THE COURT: The court will not read it unless counsel on
23 one side or the other requests it.

24 MR ROGERS: I call your Honor's attention to the wording
25 of the section.

26 THE COURT: Just a minute.

1 MR FREDERICKS: I do not think there is any occasion for
2 counsel or the court reading the section, from the testi-
3 mony of this witness.

4 THE COURT: If either side requests it --

5 MR ROGERS: No.
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1 MR. FORD. There is nothing brought before this court as
2 yet to warrant the court reading the section to the witness.

3 MR. ROGERS. May I have the Penal Code?

4 MR. KEETCH. Surely.

5 MR. FORD. If the court please, counsel contended the other
6 day when he asked that it be read to Mr. Tveitmoe, it should
7 not be read until some evidence be introduced showing that
8 the witness was an accomplice of the defendant. I submit,
9 there has been no such showing, and under their own posi-
10 tion, if they are consistent, the time has not yet arisen--
11 if it ever does arise--but assuming for the sake of argument,
12 if there was an accomplice--

13 THE COURT. Just a minute, Mr. Ford. I want to look at the
14 form of the section itself.

15 MR. FREDERICKS. We make no claim that this witness is an
16 accomplice of the defendant.

17 MR. ROGERS. I call your Honor's attention to the last
18 paragraph.

19 THE COURT. I am reading it.

20 MR. FORD. The object of the section is to compel an
21 accomplice to testify, and even if the accomplice is testify-
22 ing, if she takes the stand voluntarily, it is not neces-
23 sary to read it to him.

24 MR. ROGERS. Just a minute--there are other counties in this
25 state and I desire, in view of certain statements made by
26 counsel, to request that your Honor as the Judge presiding

1 at this investigation shall distinctly read this section
2 to the witness.

3 MR. FORD. Now, if the court please, they the other day in-
4 sisted themselves that some showing must be made that the
5 witness is an accomplice. Now, this witness cannot be an
6 accomplice unless the defendant is guilty of the crime
7 charged and he assisted him in committing it. They are
8 two things that must be shown before your Honor can decide
9 that this witness is an accomplice. Further, your Honor
10 must leave that question entirely to the jury. The object
11 of this section is to compel the witness to testify--to
12 compel an accomplice to testify in the furtherance of jus-
13 tice, if the prosecution desire it to be done.

14 MR. ROGERS. There are ^{other} counties in this state and there
15 are other district attorneys in this state, and I demand
16 it be read.

17 MR. FORD. You are getting very tender about district attor-
18 neys of other counties. We certainly object to counsel's
19 inconsistent position at this time. What is there in the
20 testimony of this witness so far given which justifies
21 your Honor in reading it to him any more than he read it
22 to Mr. Hunt of San Francisco or any other witness.

23 THE COURT. Now, I have got to read the section, it is quite
24 long and I don't want to take a recess to do it, but I
25 cannot listen to the argument of counsel on both sides.

26 MR. ROGERS. All right, we will sit down.

1 THE COURT. You have any objection to this section being
2 read?

3 MR. FORD. We certainly have, your Honor, to this extent:
4 I don't like to question the motives of counsel at all
5 times, but to me it seems as though the only object in
6 asking that this be read is this: First, to intimidate the
7 witness and second to get an expression from your Honor to
8 the effect that this witness is or that your Honor suspects
9 he is an accomplice of the defendant. Now, whether or not
10 this witness is an accomplice of the defendant must ulti-
11 mately be determined by this jury, and if this jury deter-
12 mines that he is an accomplice they will scan his testimony
13 in such and such a manner. If they determine that he is not
14 an accomplice in this particular crime they will treat his
15 testimony differently. This point was not raised when Frank-
16 lin testified. Franklin was clearly an accomplice, conceded
17 by both sides to be an accomplice, and Franklin, if the
18 section had been read to him, would not have been immune
19 from punishment concerning anything he had testified to unless
20 he made a claim to immunity under that section. If the
21 section is not read to him he automatically gets immunity.
22 Now, counsel here knows that if this witness is an accomplice
23 and the section is read to him all he would have to do would
24 be to refuse to testify and that the prosecution could com-
25 pel him to testify, notwithstanding his objection, and that
26 he would be immune. Counsel is so tender about district
attorneys of other counties. If this man was a witness

1 and there was any other county in this state had jurisdiction
2 over him and we wanted to compel him to testify after that
3 section had been read, we would have a right to compel him
4 to testify, and they know it, but we don't concede he is
5 an accomplice. We shall argue to this jury he is not an
6 accomplice in the crime for which this defendant is charged,
7 so even assuming that he was an accomplice, counsel have no
8 right to insist upon reading this section, that is a matter
9 for the district attorney or whoever is prosecuting or
10 whoever is conducting the investigation before the grand
11 jury to decide, not for the defense to decide.

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1 This witness is not ^{an} incompetent witness, whether he is an
2 accomplice or not, but assuming that he was an accomplice
3 for the sake of argument, he doesn't become an incompetent
4 witness, because they desire to have it read, and our sole
5 objection to it is that it might influence the minds of
6 the jury improperly in letting this jury suspect that he
7 thought he was an accomplice, because we could compel him
8 to testify whether he was an accomplice or not. The object
9 of reading that section would be absolutely null and void
10 as far as we are concerned; it would not enable them to
11 keep out the testimony of this witness; it would not enable
12 them to start a prosecution of this witness in any other
13 county concerning anything he may testify to, because we
14 have it absolutely in our power to compel this witness to
15 testify whether you read that section or not.

16 THE COURT: But the section might include a great many
17 other persons besides accomplices.

18 MR FORD: Oh, no, your Honor.

19 MR APPEL: It is directed against any person hereafter of-
20 fending. Our objection is that there is sufficient
21 evidence --

22 MR FORD: I would like to reply to the court's question, if
23 I can. I think the question was addressed to me. A per-
24 son hereafter offending against any provisions of this
25 code, or against the law of this state is a competent wit-
26 ness against any other person so offending. Two people hav

1 committed a crime, one of them so offending is a competent
2 witness against the other person so offending. It relates
3 to nothing but accomplices, your Honor -- accomplice
4 testimony, and the only object of reading it, counsel
5 knows that this witness is compelled to testify whether
6 he is an accomplice or whether or not he is not an accom-
7 plice. If he is an accomplice and should testify after
8 having that section read to him, he would acquire immunity
9 from anything concerning which he testified, if he is an
10 accomplice and the section is not read to him, he will ac-
11 quire immunity from anything which he may testify to. It
12 is up to us; we are going to put this witness on the stand
13 whether that section is read or not read. He is going to
14 testify to the same things whether that section is read
15 or is not read, and the only object of it in having it
16 read, therefore, is to allow this jury to think your Honor
17 is determining he is an accomplice or suspects that he is
18 an accomplice, when counsel well knows that question is to
19 be decided by this jury and not your Honor. They accomplish
20 nothing whatever by it.

21 MR ROGERS: If your Honor please, counsel says that he is
22 going to testify whether the section is read or not,
23 therefore, there can be no harm so far as this case is
24 concerned, in reading it. He has said the witness will
25 testify whether the section is read or is not read;
26 then, we will have no difficulty in hearing his testimony

1 and the jury will not be deprived of it. On the contrary,
2 being advised of some matters, the jurisdiction of some
3 offenses doesn't lie in this county where this District
4 Attorney may grant immunity or may grant the mantel of
5 immunity or the immunity-bath, so-called. There is a
6 jurisdiction in the city and county of San Francisco,
7 where there might be, under some circumstances, the nec-
8 essity of prosecuting in matters concerning which the de-
9 fendant had nothing to do. To fail to read this section
10 as counsel has told you, automatically grants immunity to
11 the witness on the very subject and for everything which
12 he choose to touch upon, and it may be a part of the
13 agreement by which he comes upon this stand, that he
14 shall testify to some matters concerning which, doubtless,
15 the city and county of San Francisco may have cognizance,
16 therefore, your Honor has no right, if I may be permitted
17 to say so, your Honor has no right, at the request of
18 this District Attorney to grant him immunity for offenses
19 in another county, because he chooses to testify, and no
20 harm can come if you read this section and leave the mat-
21 ter to be determined by the proper authorities.

22 They will not be deprived of their testimony; they have
23 so told your Honor. Now, let's have the section read, and
24 let's start off absolutely fairly; let's start off with
25 automatic immunity; let's start off with ^{out} deceiving this
26 jury with the idea that no immunity has been granted,
automatic immunity is granted unless this section is

1 read. They didn't ask for it. They are objecting to it,
2 therefore, they want automatic immunity for this witness
3 to testify to anything concerning which he chooses, and we
4 desire him to be held within the lines of right and truth
5 and responsibility for what he says.

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1 There can be no harm anyway, and if the District Attorney
2 of the city and county of San Francisco chooses to wait and
3 see what he says before he issues a complaint for maybe
4 one or two matters, it is well enough for your Honor not
5 to interfere until your Honor shall know and your Honor--
6 all your Honor has to do is to read distinctly the section.
7 Matters which we purpose to bring out on cross-examination,
8 matters which we purpose to touch upon on cross-examination,
9 if we are so advised, ought not automatically receive im-
10 munity because there has been a bargain or automatically he
11 shall receive immunity. I don't like this immunity business.
12 I don't like this peddling of immunity from one man to
13 another, and why not start absolutely fairly, why not start
14 with this witness sitting here with this section read to
15 him and knowing that what he does he shall answer for, and
16 there can be no harm come of it if they want to grant him
17 immunity for what they have a right to grant him immunity
18 for, well and good, they may do it, but they cannot do it
19 for the district attorney of the city and county of San
20 Francisco and they cannot ask the court to do it either, and
21 your Honor has ^{not} the jurisdiction to do it and if your Honor
22 please, the law says this section ought to be read by the
23 judge presiding at the investigation. Doesn't say anything
24 about request of the district attorney. It is your Honor's
25 duty, not the duty of the district attorney. He has no
26 right to say what your Honor shall or shall not do. Let's

1 start off in this matter with the realization of the respon-
2 sibility of this matter. I am not endeavoring to frighten
3 or terrify this witness in any way;; all we want to do is
4 to be sure that immunity and whitewash shall not be peddled
5 as a price, and there will be no price paid under this
6 section. They may grant him immunity for what they choose
7 but they cannot for the rest of the state of California.
8 Why should this court assume to determine for the district
9 attorney of San Francisco what will happen, and I ask, there
10 fore, and I have the right to ask that your Honor do not
11 determine the whole matter right here. Mr. Appel has some
12 consideration he desires to argue upon.

13 MR. APPEL. Your Honor, the discussion this morning did not
14 state what was said here this morning, that the record shows
15 it, it was said here without the presence of the jury, but
16 enough was said by them to show that this gentleman here
17 was acting as one of the attorneys for the McNamaras.
18 Enough was said that there were communications between these
19 parties, Mr. Darrow and him, and communications of other
20 persons in the presence of which he wanted him to testify.
21 We have a right to inquire into the motives of this witness
22 testifying against Mr. parrow at this time. We have a right
23 to show under what conditions he has testified. We have
24 a right to show whether or not he committed offenses for
25 which he was promised immunity for so testifying in order
26 to get at his interest in the case and to know his motives.

1 Those matters we have a right to call to his attention on
2 cross-examination. We have a right to go into all of the
3 transactions, if a part of the transactions are admitted
4 in evidence, we have a right to go into all of the trans-
5 actions. Now, this section is not addressed, as your
6 Honor well understands, to accomplices only. It is addressed
7 to any and all persons who in the course of their testimony
8 may make admissions or make statements which indicate or
9 show or have a tendency to establish in the slightest degree,
10 if you please, to any connection with the commission of any
11 offense against the laws of the State of California. Now,
12 if this section--

13 MR. FREDERICKS. Oh, read the section, your Honor, as far
14 as we are concerned. Let's get at this witness and get
15 some testimony before this jury.

16 THE COURT. All right, gentlemen, as long as the objection
17 is withdrawn.
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1 THE COURT: (Reading.) "Section 1324. Witness' competency.
 2 Refusal to answer on ground that answer may incriminate
 3 himself, not ground of excuse. Testimony cannot be
 4 used against him. Exception; exemption from indictment,
 5 application to be excused. Promise, of, when. "
 6 Now, I will read the section. (Reading:) "A person here-
 7 after offending against any of the provisions of this
 8 code, or against any law of this state, is a competent wit-
 9 ness against any other person so offending, and may be
 10 compelled to attend and testify and produce any books,
 11 papers, contracts, agreements or documents upon any trial,
 12 hearing, proceeding or lawful investigation or judicial pro-
 13 ceeding, in the same manner as any other person. If
 14 such person demands that he be excused from testifying or
 15 from producing such book, paper, contracts, agreements or
 16 documents on the ground that his testimony or that the pro-
 17 duction of such books, papers, contracts, agreements or
 18 documents may incriminate himself, he shall not be excused,
 19 but in that case his testimony so given and the books,
 20 papers, contracts, agreements and documents so produced
 21 shall not be used in any criminal prosecution or proceed-
 22 ing against the person so testifying, except for perjury
 23 in giving such testimony, and, ^{he} shall not be liable there-
 24 after to prosecution by indictment, information, or present
 25 ment, or to prosecution or punishment for the offense
 26 with reference to which his testimony was given, or for,

1 or on account of any transaction, matter or thing concern-
2 ing which he may have testified or produced evidence, docu-
3 mentary or otherwise.

4 No such person shall be exempt from indictment, pre-
5 sentment by information, prosecution or punishment, for
6 the offense with reference to which he may have testified
7 as aforesaid, or for or on account of any transaction,
8 matter or thing concerning which he may have testified
9 as aforesaid, or produced evidence, documentary or other-
10 wise, where such person so testifying or so producing
11 evidence, documentary or otherwise, does so voluntar-
12 ily, or when such person so testifying or so producing
13 evidence fails to ask to be excused from testifying or
14 so producing evidence, on the ground that his testimony
15 or such evidence, documentary or otherwise, may incriminate
16 himself, but in all such cases, the testimony or evidence,
17 documentary or otherwise, so given, may be used in any
18 criminal prosecution or proceeding against the person so
19 testifying or producing such evidence, documentary or
20 otherwise.

21 Any person shall be deemed to have asked to be excused
22 from testifying or producing evidence, documentary or
23 otherwise, under this section, unless before any testimony
24 is given or evidence, documentary or otherwise, is produced
25 by such a witness, the judge, foreman or other person pre-
26 siding at such trial, hearing, proceeding or investigation,

1 shall distinctly read this section of this code to such
2 witness and the form of the objection by the witness shall
3 be immaterial, if he in substance makes objection that
4 his testimony or the production of such evidence, docu-
5 mentary or otherwise, may incriminate himself, and he
6 shall not be obliged to object to such question, but
7 one objection shall be sufficient to protect such witness
8 from prosecution for any offense concerning which he may
9 testify, or for or on account of any transaction or mat-
10 ter or thing concerning which he may testify or produce
11 evidence, documentary or otherwise, upon such trial, hear-
12 ing, proceeding or investigation."

13 MR FREDERICKS: Now, the court will see when we get
14 through with this witness that amounts to absolutely noth-
15 ing as far as he is concerned. What is the question that
16 is pending.

17 MR APPEL: What is that?

18 MR FREDERICKS: That means absolutely nothing as far as this
19 witness is concerned. It isn't applicable; it doesn't
20 apply; it is simply reading it to get --

21 MR ROGERS: We take an exception to that. It is misconduct
22 and we ask the jury be instructed to disregard it. It does
23 mean something, and counsel well knows it.

24 MR FREDERICKS: I well know it means nothing as far as
25 this witness is concerned.

26 MR FORD: We ask your Honor to instruct the jury it is

1 for them to determine whether this witness is an accom-
2 plice in this crime for which the defendant is on trial.
3 THE COURT: Gentlemen of the jury, the court does in-
4 struct you that you are the sole judges of whether or not
5 this section that has been read to the witness has any
6 application to this case.

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1 MR. FREDERICKS. Now, where are we, Mr. Reporter?

2 MR. APPEL. Just a minute--

3 MR. FREDERICKS. Are we going to get any testimony before
4 this jury at all or are we going to stand here and chew
5 words and words?

6 MR. APPEL. What does your Honor do about our request to
7 instruct the jury as to the statement of the District Attor-
8 ney?

9 THE COURT. I did instruct them.

10 MR. APPEL. Your Honor did not instruct them--

11 THE COURT. I thought I covered it.

12 THE REPORTER. You did instruct the jury.

13 THE COURT. The reporter says I did instruct the jury.

14 MR. FREDERICKS. Read that last question.

15 (Last question and answer read.)

16 BY MR. FREDERICKS. Q State whether or not Mr. Darrow^{was} in
17 Los Angeles at the time Mr. Behm came here? A Yes, sir.

18 Q Where did you have your office with reference to where
19 Mr. Darrow's office was? A It was one of the rooms in
20 his suite.

21 Q In the Higgins Building? A In the Higgins Building.

22 Q Here in Los Angeles? A Yes, sir.

23 Q At the time Mr. Behm came to Los Angeles, state whether
24 or not you had any conversation with Mr. Darrow in regard
25 to what Mr. Behm was to do here, answer that yes or no.

26 THE COURT. I think, before we go into that we will take the

1 morning recess. Gentlemen of the jury, bear in mind
2 your admonition. We will take a recess for five minutes.

3 (Here the court took a recess for five minutes.)

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

5
6 JOHN R. HARRINGTON,

7 on the stand:

8 THE COURT. You may proceed.

9 BY MR. FREDERICKS. Read the last question.

10 (Question and answer read by the reporter.)

11 Q Where was the first conversation? A Before answering
12 any further now, your Honor, I wish to state that I will
13 object to answering any more questions and I do not wish
14 to be submitted to any prosecution in reference to any
15 matters testified to in this court.

16 MR. FREDERICKS. Well, the court having read the section
17 to the witness, I will ask you to answer the question.

18 Q What was the question, please?

19 MR. FREDERICKS. Read it.

20 (Last question read by the reporter.)

21 THE COURT. You understand the effect of the section, do
22 you not?

23 A I do, your Honor. Am I compelled to answer that?

24 THE COURT. Yes.

25 A I am answering under compulsion now, from now on.

26 MR. FREDERICKS. Read the question.

1 (Question read by the reporter.)

2 A I did not catch the question.

3 BY MR. FREDERICKS. Q I asked you whether you had a
4 conversation with Mr. Darrow in regard to what Mr. Behm
5 was to do at that time and you said you had had such a
6 conversation and I ask you now when and where was the first
7 conversation you had about Behm after Behm came out here.

8 A I had it in the Higgins Building.

9 Q Who was present?

10 MR. ROGERS. Might I ask the witness to speak a little
11 louder?

12 THE COURT. Yes, Mr. Harrington, I wish you would do that,
13 it is a very difficult room to be heard in.

14 MR. FREDERICKS. Read the question.

15 (Question read.) A Mr. Behm, Mr. Darrow and myself.

16 MR. DARROW. Just a minute--

17 MR. FREDERICKS. Do I understand they want us to wait a
18 minute?

19 THE COURT. Yes, counsel are having a little consultation.

20 MR. ROGERS. Yes. (After consultation.) The jurisdiction
21 of this court--

22 MR. WORD. If the court please, just a minute. I ask
23 that the jury be excused before they take up the proposi-
24 tion they are about to take up, this is only done, the
25 only argument is made, counsel knows the effect of this as
26 well as we do, this section provides that a person--

1 MR. ROGERS. Do you want the jury excused?

2 MR. FORD. Yes, I beg your pardon.

3 MR. FREDERICKS. What is the point?

4 MR. APPEL. We have not made any yet.

5 MR. FREDERICKS. What do you want?

6 MR. APPEL. We have not said anything.

7 MR. FREDERICKS. Then, we do not know where we are at.

8 MR. APPEL. Counsel is arguing something, we don't know
9 about it, he says we are going to do something, then he
10 starts to argue. So far I have not done anything.

11 MR. FREDERICKS. Let us try the case.

12 MR. ROGERS. Counsel is unduly exercised, if your Honor please.

13 MR. FREDERICKS. We will stay here until the crack of doom,
14 but what we get this witness's testimony, and we are going
15 to get it consecutively and we are going to get it so the
16 jury will understand it. We will break into argument
17 until the end of time, but we are going to get this man's
18 testimony before the jury so that we may understand it.

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1 MR ROGERS: I take an exception upon the ground we had
2 a right to have the section read and it was not to break
3 into the consecutive order of things; the moment they
4 reached California in their questions I asked for the reading
5 of the section. We now ask --

6 MR FREDERICKS: What is the point, now?

7 MR ROGERS: Nothing, except Mr Ford saw fit to rise and ask
8 that the jury be excused, and thereupon started to make
9 an argument.

10 MR FORD: I think that the jury should be excused until
11 our argument --

12 THE COURT: The court has stopped proceedings while you were
13 having a consultation.

14 MR ROGERS: Yes.

15 THE COURT: Are you ready to proceed?

16 MR DARROW: We have not got through with our conference.

17 THE COURT: Very well. Proceed with it, and the court
18 will indulge you a little longer.

19 MR ROGERS: We understand that the witness has demanded
20 immunity, and has declined to testify unless granted im-
21 munity for any matter concerning which he testifies here,
22 and we understand that the court has directed him to testify
23 after that demand. That prevents two considerations.
24 One, whether or not the court has a right to grant him
25 immunity upon his demand; the second, whether the court
26 has the right to grant him immunity as affecting other

1 counties of the state, Santa Clara and San Francisco, and
2 therefore --

3 MR FREDERICKS: Will counsel indulge me a moment?

4 MR ROGERS: (Continuing.) And therefore, we call your
5 Honor's attention to this fact, he has demanded from
6 your Honor immunity, and that your Honor's ruling must of
7 necessity determine the matter as to whether he shall have
8 immunity or not. That is what we desire to present flat-
9 ly under the section. He has said "I desire" -- After-
10 consultation occurring during recess with the District
11 Attorney-- he has said, "I do not wish to be prosecuted
12 for anything concerning which I may testify." Therefore,
13 by directing him, without further words, to testify, your
14 Honor grants him immunity, and we merely desire to parti-
15 cularly, and moreover, we object to your Honor's --

16 MR FREDERICKS: That appears by whatever is in the record.

17 MR ROGERS: (Continuing.) Pardon me, sir. We object to
18 your Honor's granting him immunity as respects San Fran-
19 cisco County and Santa Clara County.

20 MR FREDERICKS: Now, is that all?

21 MR ROGERS: That is all for a moment.

22 MR FREDERICKS: Whatever this record shows, it shows, your
23 Honor.

24 THE COURT: Counsel have a right to state it.

25 MR FREDERICKS: Whatever the record shows, it shows, and
26 it is in the record and it is there, and we can argue it

1 to the jury any time he wants it.

2 THE COURT: They have stated their objection.

3 MR FREDERICKS: There is no objection; he has not stated any
4 objection. He says, "I want the record to show."

5 THE COURT: I thought he made an objection.

6 MR APPEL: Let us find out what he says.

7 MR FREDERICKS: Let us have the record read. Why don't
8 you ask for it?

9 MR APPEL: That is what we asked for.

10 MR FREDERICKS: Let it be read.

11 MR APPEL: That is what we asked for.

12 MR FREDERICKS: We agree with you that it be read.

13 MR APPEL: I submit, that is what we asked for.

14 THE COURT: Gentlemen, it is passing strange that you
15 should complain that the reporter does not get everything
16 down here.

17 MR FREDERICKS: I think it is a mighty good thing if he
18 doesn't get it all down.

19 THE COURT: Now, if counsel will just wait a minute, and
20 the reporter will read the record.

21 THE REPORTER: Do you wish me to read Mr Rogers' statement?

22 MR FREDERICKS: No, read what the witness said when he re-
23 fused to answer.

24 (Answer of witness read, as follows: "Before answering
25 any further now, your Honor, I wish to state I will object
26 to answering any more questions and I do not wish to be

1 submitted to any prosecution in reference to any matters
2 testified to in this court.")

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1 MR. ROGERS. Read the rest of it.

2 (Record read as follows: "Mr. Fredericks--Well, the
3 court having read the section to the witness I will ask
4 you to answer the question. A--What was the question,
5 please? Mr. Fredericks--Read it. (Question read.) The
6 Court--You understand the effect of the section, do you
7 not? A--I do, your Honor. Am I compelled to answer that?
8 The Court--Yes. A--I am answering under compulsion now,
9 from now on.")

10 MR. FREDERICKS. Now, we can go in and get a little testi-
11 mony.

12 MR. APPEL. Just a moment--we object to that, your Honor,
13 that is--

14 MR. FREDERICKS. (Interrupting) All right, let us chew
15 the rag over it.

16 MR. ROGERS. Now, if your Honor pleases--

17 MR. FREDERICKS. Oh, we all understand this.

18 MR. ROGERS. I take a further exception, if your Honor
19 pleases. This matter of granting immunity may seem a very
20 small one. I can remember the time when Mr. Fredericks
21 was calling this witness more names than is in my category.

22 MR. FREDERICKS. No, no.

23 MR. ROGERS. I can remember all those things, and it does
24 not behoove him now, in view of the fact I am trying to get
25 this record in such shape we can thoroughly understand it
26 and know what it means, it does not behoove him to talk

1 to me so and pound the table--

2 MR. FREDERICKS. Why not try the case?

3 MR. ROGERS. (Continuing) --I intend to stand here, sir,
4 so long as my client's rights I believe require protection,
5 and there need be no fussing about it. I propose to stand
6 right here until the record is in proper shape.

7 MR. FREDERICKS. (Interrupting) If counsel will tell me
8 how long he will stand here--

9 MR. ROGERS. (Continuing) -- Do I understand, if your Honor
10 please, that your Honor makes an order compelling this
11 witness to testify and granting him immunity under the
12 section of all things concerning which he testifies both
13 here and in other counties in this state?

14 MR. FREDERICKS. And after death in Heaven?

15 MR. ROGERS. And I take an exception, further.

16 MR. FREDERICKS. The record stands, your Honor, for what it
17 is.

18 MR. ROGERS. It may be a joke or not a joke. I shall stand
19 here until my statement is properly treated.

20 MR. FORD. If the Court please, they have--

21 THE COURT. I don't quite understand your position, Mr. Rogers.
22 The section has been read and I think distinctly; the
23 witness says he fully understands it, he has protested
24 against answering and objected to answering, after hearing
25 the section read, after stating that he understood it, and
26 the court has directed that he answer it. Whatever the legal

1 effect of that may be, it follows.

2 MR. APPEL. Your Honor, under the constitution and under the
3 decisions your Honor cannot compel him to answer.

4 MR. FREDERICKS. Then let him refuse.

5 MR. APPEL. I am simply stating it, your Honor cannot com-
6 pel him to answer, the witness cannot be compelled to tes-
7 tify if he makes objection after reading that section to
8 him, and if he says that conditionally he will testify, why
9 your Honor cannot hold out to him that conditionally he may
10 testify against this defendant.

11 MR. FREDERICKS. He has not said anything.

12 MR. APPEL. He said so.

13 MR. ROGERS. This ruling is sought for this purpose, sir:
14 This ruling is sought for the purpose of determining whether
15 on cross-examination we shall have the same rights of com-
16 pulsion.

17 MR. FREDERICKS. We wont get to cross-examination for a week.

18 MR. ROGERS. I take a further exception to the remarks of
19 counsel. We will get to cross-examination, if your Honor
20 pleases.

21 THE COURT. I didn't hear any remark of counsel.

22 MR. ROGERS. Will your Honor protect me from such remarks?

23 THE COURT. I heard no remarks.

24 MR. ROGERS. "We wont get to cross-examination for a week."

25 THE COURT. Oh, well--
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1 MR FREDERICKS: That is an estimate.

2 MR ROGERS: I will stand here until I am ordered to sit down
3 until I get my point strictly into the record.

4 THE COURT: The court is endeavoring to get your point
5 into the record.

6 MR ROGERS: yes. Do I understand your Honor's compulsion
7 will go through the record and will apply to questions on
8 cross-examination as well as to questions upon direct ex-
9 amination?

10 MR FREDERICKS: Now, is counsel through?

11 MR ROGERS: I have asked the court a question, and I will
12 stand here for a while.

13 MR FREDERICKS: We maintain that the court has absolutely
14 nothing to do with the matter.

15 MR FORD: Anticipating your questions.

16 MR FREDERICKS: Whatever rights counsel or witness or any-
17 body has are provided by law, and he will get them.

18 MR ROGERS: If your Honor pleases, you are directing him to
19 answer, and giving him immunity for his offenses. What
20 I desire to know at this time, is whether or not your Honor's
21 directions apply to all questions on cross-examination as
22 well as upon direct examination.

23 MR FORD: We object to any ruling of the court in advance
24 of the question asked.

25 THE COURT: Wait a minute. This is a question asked of
26 the court. The court has put aside almost every other con-

1 sideration, in matters of form and in many instances con-
2 duct of counsel in this matter to the end that this case
3 shall be fully presented on both sides.

4 MR ROGERS: yes sir.

5 THE COURT: And while it has opened the door fairly wide
6 upon cross-examination, it has opened it even wider to the
7 defense, and that course having been commenced, the con-
8 duct of this lawsuit will be continued to the end. But,
9 so far as the definite answer to the question that you
10 propound at this time, it is impossible for me to say what
11 the ruling will be when the matter comes up, but, with the
12 assurance upon my part that the course that has heretofore
13 been adopted of opening the door as wide, or even wider,
14 to the defendant as it has been to the prosecution. I
15 make the best answer I can to that inquiry, Mr Rogers.

16 MR ROGERS: Very well, sir. I may assume that the state-
17 ment which your Honor makes that you direct the witness to
18 testify over his protest and over his objection, made under
19 section 1234, after consultation, that his protest and the
20 direction which your Honor gave him to answer, we may
21 assume, in a general way, to apply to the cross-examination.

22 THE COURT: As the court is now advised, that admonition
23 to the witness applies to all matters pertinent and rele-
24 vant to the issues before the court.

25 MR ROGERS: Very well.

26 MR DARROW: If the court please, I just want to make a

1 statement, because I think possibly it is not understood
2 by the jury, who has a right to understand it.

3 MR FORD: We object to any statements to the jury on
4 questions of law.

5 MR DARROW: I am not making a statement to the jury, I
6 am making a statement to the court.

7 MR FORD:" Will you please read the first statement that
8 he made there. I would like to have it read.

9 MR DARROW: I said the jury has a right to understand the
10 situation of this witness. That is true, in measuring
11 his testimony. Now, they may not understand that this
12 witness has a right to refuse to testify, and that if he
13 refuses to testify he cannot be compelled to testify.

14 MR FORD: We desire to make an objection to counsel address-
15 ing the court at this time on a matter when there is noth-
16 ing before the court whatever. The instructions the jury
17 gets as to the law, your Honor will give them when the mat-
18 ter is finally submitted to them, and if counsel deems it
19 advisable to give the jury an instruction as to the effect
20 of section 1234 on the witness, he can request the instruc-
21 tion, he can prepare it, and I have no doubt, if it is a
22 correct instruction, your Honor will give it, but we cer-
23 tainly object to any arguments before the court on this
24 matter after it has been finally decided by the court,
25 and which, under counsel's own statement is made parti-
26 cularly for the enlightenment of the jury.

1 Now, whatever statements are made for the enlightenment
2 of the jury on questions of law ought to be put in writing
3 and read as instructions to the jury when the matter is
4 finally submitted to them, and we object to it now.

5 MR ROGERS: Just a moment. They asked your Honor to in-
6 struct the jury whether section 1234 was applicable or not.

7 THE COURT: Mr Darrow, have you a motion to make?

8 MR DARROW: I will try to keep strictly within my rights
9 in this matter. I have endeavored to from the beginning.

10 THE COURT: Go ahead.

11 MR DARROW: I take it, while this statute is somewhat puzz-
12 ling and the court was not familiar with it before you read
13 it, still I take it that the court unde rstands it and
14 understands the meaning of this rule. The witness is not
15 obliged to claim his immunity and refuse to testify in any
16 particular thing. He did, however, cl aim his immunity
17 and he refused to testify. Now, the court cannot order
18 him to testify. If he does testify, however, without
19 the court instructing him that he need not, then he has
20 complete immunity in this state, and the court and the jury
21 have a right to understand it. That is, unless your Honor
22 instructs this witness that he has the right to refuse to tes-
23 tify, then this court has given him complete immunity and
24 his evidence must be weighed in the light of that immunity
25 and it is fair that everybody should understand it. It
26 is possible even the court will consider the meaning

1 of the statute. This man waives nothing; he has asked for
2 immunity, and unless the court tells him he is not obliged
3 to testify, he has got the immunity throughout the state
4 and it is the duty of the court to tell him so, unless
5 the court wishes he shall have the immunity, and I ask
6 the court to so instruct him at this time.

7 MR FORD: If the court please, I think the law has been
8 fully complied with; the section has been read to the
9 witness, and the witness has made his objection, and I
10 think properly in view of the threats made by counsel --

11 MR ROGERS: Take an exception to the word "threats".

12 MR FORD: -- and veiled threats --

13 MR ROGERS: I take another exception to the words "veiled
14 threats".

15 MR FORD: I think, if your Honor is going to instruct
16 the jury and have them understand anything, it is to un-
17 derstand themselves that the object of this section in
18 giving immunity from prosecution concerning things he may
19 testify, is in order that the whole truth may be put be-
20 fore the jury, and I think the jury may further under-
21 stand that if this witness commits perjury on anything
22 he can be made -- prosecuted for perjury, if he commits
23 any perjury at all. The section reserves the prosecu-
24 tion for perjury, and the object of the section giving
25 immunity is to avoid the commission of perjury, by im-
26 munity, and it is possible for the witness to testify

1 freely and tell all the facts to the jury. Really, I think
2 I am out of order myself, as well as Mr Darrow, but as long
3 as he was permitted to talk --

4 THE COURT: Mr Darrow was quite in order. He asked the
5 court to admonish the jury --

6 MR APPEL: Here is the idea: the witness said something
7 which, in effect, under the language of the code is a refusal
8 to testify unless he is granted immunity. Now, your Honor,
9 without paying attention to his objection, as we assume
10 it, simply order him to testify. Now, when we contend,
11 your Honor, that under the section the witness is not ob-
12 liged to testify and there is no power in the court to
13 compel him to testify unless your Honor, in effect, grants
14 him complete immunity, and we are objecting to that. We
15 want to know what the situation is, whether your Honor will
16 grant him immunity or not; that is all we want to know.

17 MR FORD: The witness is willing to testify without any
18 further admonition.

19 THE COURT: The court made the order with, I hope and be-
20 lieve, the full knowledge of the meaning and purpose of
21 the section read and the constitutional provision.

22 A My understanding is, your Honor, that if I testify now,
23 I get immunity?

24 THE COURT: That is my understanding. Now, let's get
25 this matter clear.

26 MR FREDERICKS: Now, the question that was pending was

1 handed to me by the reporter. I was asking you, Mr Harring-
2 ton, about a conversation which you said you had with Mr
3 Darrow in his office in the Higgins Building, Mr Darrow
4 and Mr Behm and yourself being present, and it being the
5 first conversation that you had with Mr Behm and Mr Dar-
6 row together, when Behm first came here. Now, is your
7 mind back to the time and place? A Yes.

8 Q And circumstances? A Yes.

9 Q What was the conversation? A It was in reference
10 to Behm calling at the county jail to see McManigal.

11 Q And about how many days after Behm had gotten here
12 was it? A Within a ^{very} few days; two or three days.

13 Q Now, what was the conversation?

14 MR APPEL: Wait a minute. We put our objection to this
15 subject, and we object to the conversation on the
16 ground that it is incompetent, it is irrelevant and imma-
17 terial for any purpose whatsoever, and that it is col-
18 lateral to any issue in this case; that it has nothing
19 to do with the offense charged in the indictment, and
20 that the admonition or advice of the court to the witness
21 that if he testifies in this case to everything, that he
22 testifies, that he is granted immunity, does not apply
23 to his testimony upon matters not relevant to the issues
24 in the case -- directly connected with the charge in the
25 indictment, and does not extend to collateral matters.

26 MR FREDERICKS: I suppose the latter part of that is an

1 admonition to the witness rather than an objection.

2 THE COURT: Objection overruled.

3 MR APPEL: Exception..

4 MR FREDERICKS: Now, to the question. Read the question.

5 (Last question read by the reporter.)

6 A MR Darrow told Behm to go to the county jail and see
7 McManigal, and to do what he could to get him to come over
8 to the side of the defense.

9 Q How long were you there together?

10 MR DARROW: Just a moment. Was anybody present at that
11 conversation?

12 MR FREDERICKS: I laid all that.

13 MR DARROW: I understand he said nobody was there.

14 MR FREDERICKS: No, he said Behm and Darrow. Now, did you
15 afterwards have a conversation with Mr Darrow sometime
16 after that in regard to what Behm had been doing over to
17 the county jail with McManigal? A I don't recall such
18 a conversation.

19 Q Did you ever remember a time when Mr Behm came up into --
20 or Mr Behm was in talking with Mr Darrow in Mr Darrow's
21 office --- I withdraw that. With reference to Mr Darrow's
22 office, where was your office; how near to it? A There
23 was one office between us.

24 Q There was one office between you? A Yes.

25 Q Do you remember an occasion when Behm was up talking
26 with Mr Darrow in his office and Behm came into your of-

1 fice afterwards, or during the course of the conversation
2 and Mr Darrow came in with him, or immediately following
3 him, when any -- when you overheard anything said in re-
4 gard to McManigal and his position? A Yes sir.

5 Q What was that that you overheard.

6 MR APPEL: Just enter there an exception and objection,
7 that we were not permitted to make an objection to the last
8 answer, although counsel indicated to the witness, and
9 counsel on the other side that we wanted to make an ob-
10 jection. Now, to this question we object upon the ground
11 that it is incompetent, irrelevant and immaterial and hear-
12 say and no foundation laid and collateral to any issue
13 in this case, and not competent to prove any element of the
14 offense charged in the indictment.

15 MR FREDERICKS: And the record will show in point of
16 time when the question was asked, it was answered by the
17 witness, and then counsel said, "Wait a moment", and after
18 waiting possibly a fraction of a minute, no response coming
19 from the other side, counsel for the prosecution proceeded
20 to ask another question.

21 MR ROGERS: The record, your Honor please, doesn't show
22 that.

23 MR FREDERICKS: It doesn't show time.

24 THE COURT: Let's solve the problem by striking out his
25 answer; and now, what is your objection. Strike out
26 the answer for the purpose of allowing counsel to make an

1 objection to the question.

2 MR APEL: We were going to object, and we now object
3 to the question already answered and referred to in my
4 last statement, upon the ground that it is leading and
5 suggestive, incompetent, irrelevant and immaterial, and
6 no foundation laid, no persons present being named, the
7 time or the place of the said alleged conversation being
8 named in the question; particularly very leading and very
9 suggestive.

10 THE COURT: Objection overruled. The answer is restored.

11 MR FREDERICKS: Now, that question is before the court.
12 I don't know whether there is an objection to that.

13 THE COURT: Yes. Read the last question.

14 (Last question read by the reporter.)

15 A It was a message from Mr Darrow to McManigal through)
16 Behm.

17 MR FREDERICKS: Just state what you heard?

18 MR ROGERS: I move to strike out the answer as a conclusion
19 of the witness.

20 THE COURT: I didn't hear it. Read the answer.

21 (Last answer read by the reporter.)

22 MR FREDERICKS: No objection to its being stricken out.

23 THE COURT: Stricken out.

24 MR FREDERICKS: What was said by Mr Darrow to Mr Behm at)
25 that time?

26

5s 1 A Darrow told Behm to tell McManigal--)

2 MR. ROGERS. The same objection.

3 THE COURT. Overruled.

4 A - - if he wouldn't come across to the side of the
5 defense he would have him indicted on a murder charge
6 in Illinois when he got clear out here.

7 MR. FREDERICKS. Now, shortly, a few days or weeks after
8 you got here state whether or not you went to San Francisco?

9 A I did.

10 Q State whether or not you were in San Francisco in the
11 latter part of July, July 30 or 31st? A Yes, sir.

12 Q Now, at that time--how long was that after you came
13 here to Los Angeles? A I left Los Angeles for San Fran-
14 cisco on or about the 11th of July

15 Q State whether or not you--state where you remained
16 from the 11th of July up until the 31st. A With the
17 exception of one night I stayed at the Argonaut Hotel
18 in San Francisco.

19 Q And did you ever meet Mr. Tveitmoe during that time?

20 A Yes, sir.

21 Q And Mr. Johannsen? A Yes, sir.

22 Q Did you know either one of those two men before you met
23 them that time in San Francisco? A I saw Mr. Tveitmoe
24 in Chicago but never spoke to him there. I never met
25 Mr. Johannsen before.

26 Q Do you know where Mr. Tveitmoe's office was in San Francisco

1 A Yes, sir .

2 Q Where was it? A The Western Metropolis Bank Building
3 on Market street.

4 Q Do you remember a time when you got a telegram from Mr.
5 Johannsen from Reno? A Yes, sir .

6 Q Now, prior to the time when you got this telegram from
7 Mr. Johannsen in Reno state whether or not you were present
8 in the office of Mr. Tveitmoe and heard a conversation between
9 Mr. Johannsen and Mr. Tveitmoe in regard to Flora Caplan?

10 MR. APPEL. Wait a moment--we object upon the ground it is
11 irrelevant, incompetent and immaterial, hearsay, no founda-
12 tion laid, calling for acts and declarations of third parties
13 in the presence of the witness not in the presence of the
14 defendant; no foundation laid; it is collateral to any
15 issue in this case; not tending to prove any element of the
16 offense charged in the indictment.

17 THE COURT. Objection overruled.

18 MR. APPEL. We except.

19 MR. FREDERICKS. Read the question.

20 (Last question read by the reporter.)

21 A Yes, sir .

22 Q Who all was present at that time? A Mr. Tveitmoe, Mr.
23 Johannsen and myself.

24 Q And how long was it before the time you received the
25 telegram from Reno? A I think it was two days.

26 Q What was the conversation?

1 MR. APPEL. The same objection as last upon each and all of
2 the grounds stated therein.

3 THE COURT. Objection overruled.

4 MR. APPEL. We except.

5 A Mr. Tveitmoe and Mr. Johannsen were talking about sending
6 or taking Mrs. Caplan to Chicago.

7 MR. FREDERICKS. Q Well, what was the conversation in sub-
8 stance? A That was the substance of it; I don't remember
9 it verbatim.

10 Q Do you know whether Mr. Darrow had been to San Francisco
11 a few days prior to that?

12 MR. APPEL. Wait a moment--we object to that as immaterial,
13 irrelevant and incompetent for any purpose whatsoever.

14 THE COURT. overruled.

15 MR. APPEL. We except.

16 A He left San Francisco on the 22nd of July.

17 MR. FREDERICKS. 22nd of July. And did you meet Mr. Darrow
18 any while he was up to San Francisco? A yes, sir.

19 Q Prior to the 22nd of July did you and Mr. Johannsen
20 and Mr. Darrow have a meeting together when a certain code--
21 dictionary code was discussed? A Yes, sir.

22 MR. ROGERS- Mr. Witness, I understand that the witness is a
23 lawyer, doubtless he knows that there are some questions
24 to which we might desire to object. Might be well to let
25 us have a little opportunity.

26 THE COURT. Yes, the court will admonish the witness that

1 whenever counsel for the defense wishes to object, ^{to} wait.

2 A I didn't hear the objection.

3 MR. FREDERICKS. Q Mr. Harrington, where was the conversa-
4 tion you had with--first I will ask who all was present
5 at the conversation in which the arrangements for the
6 dictionary code were made that you have referred to?

7 MR. APPEL' Objected to as leading and assumes a fact not
8 testified to by the witness so far, and assumes a condi-
9 tion of things not appearing in evidence; incompetent,
10 irrelevant and immaterial and hearsay.

11 THE COURT. Objection overruled.

12 MR. APPEL. Exception.

13 A Mr. Johannsen, Mr. Darrow and myself.

14 MR. Fredericks. Q And where was this conversation? A In
15 Mr. Tveitmoe's office.

16 Q And when was it, as far as you can fix it? A It was the
17 week ending July 22nd, sometime during that week.

18 Q And what was that conversation in so far as it referred
19 to the code that I have alluded to?

20 MR. APPEL' Wait a moment--we object to that on the
21 ground it is immaterial, irrelevant and incompetent, hear-
22 say and no connection with the matter in dispute here;
23 doesn't tend to prove any element of the offense charged
24 in the indictment, collateral to any issue.

25 THE COURT. Objection overruled.

26 MR. APPEL. Exception.

A Mr. Johannsen suggested the code that we use and Mr. Darrow

1 approved of it.

2 MR. ROGERS. I move to strike that out as a conclusion or
3 opinion.

4 THE COURT. Strike it out. State what was said.

5 MR. FREDERICKS. What did Mr. Johannsen say in substance?

6 A He told Mr. Darrow and myself there about the code, the
7 kind of a code to use.

8 Q What else was said, if anything, in regard to the pur-
9 pose of it or anything of that kind?

10 MR. APPEL. Now, we make the same objection that we made
11 to this testimony and we will ask furthermore that the coun-
12 sel now in his questions suggest to the witness that there
13 was something said about a purpose, leading and very
14 suggestive.

15 THE COURT. Objection overruled.

16 MR. APPEL. We take an exception.

17 (Last question read by the reporter.)

18 A It was for the purpose of communicating with each other.

19 MR. FREDERICKS. Q Now, how many--were there any of those
20 little dictionaries there at that time?

21 MR. APPEL. Wait a moment--we object upon the ground--

22 MR. FREDERICKS. Q Did you have any of them?

23 MR. APPEL. Wait a moment--we object upon the ground it is
24 incompetent, irrelevant and immaterial; it assumes a
25 state of fact not testified to by the witness. The witness
26 has not mentioned any dictionary here that I know of.

1 MR. FREDERICKS. Yes, he has, your Honor.

2 THE COURT. Objection overruled.

3 MR. APPEL. We except.

4 A There were no dictionaries there at that time. The
5 dictionaries were not mentioned at that time. It was books
6 of like character that were mentioned, any book.

7 MR. FREDERICKS. Q Well, what was the discussion? A That
8 was the discussion that we had to get books of any one kind,
9 a story book, a fiction book, anything they used that as a
10 code, pick out certain words out of certain pages.

11 Q And was the matter of using a little dictionary discussed
12 then or at any other time? A It was discussed then.

13 Q And state what if anything was done in reference to getting
14 those dictionaries or anything of that kind. A I bought
15 three of those dictionaries at the time. Gave one to Mr.
16 Johannsen, one to Mr. Darrow and kept one.

17 Q I show you a dictionary here which has been offered in
18 evidence as people's Exhibit 23 and ask you if you ever
19 saw it before. It has already been shown to counsel?

20 A Yes, I did.

21 Q Well, state where and when and under what circumstances
22 you saw it. A I bought that dictionary in San Francisco
23 myself.

24 Q Is that one of the dictionaries you have been talking
25 about? A One of the three I have just mentioned.

26 MR ROGERS It is not well to lead this witness: "Is that

1 one of the dictionaries you have been talking about", is
2 very leading. We don't like to make objections but we
3 will have to pound on the table and be accused of inter-
4 rupting counsel.

5 MR. FREDERICKS. Well, it is a mental table. Q Now, Mr.
6 Harrington, I wish to call your attention to some writing
7 in the back of this dictionary which has not been introduced
8 in evidence and for that reason I will show it ^{to} counsel for
9 the defense, if they wish to see it. Having shown the
10 writing to counsel for the defense I call your attention
11 to some words in the back of the dictionary and ask you if
12 you ever saw those words there before? A Yes, sir.

13 Q Do you know who put them there? A That is my hand-
14 writing.

15 Q Now, state whether or not--state what was the significance
16 or meaning of the writing in the back of it?

17 MR. APPEL. Wait a moment--we object to that as immaterial,
18 hearsay, incompetent, irrelevant for any purpose whatsoever;
19 collateral, visionary, insignificant in every particular,
20 don,t tend to prove anything.

21 THE COURT. Overruled.

22 A It is the names of different parties that was connected
23 with the defense in the McNamara case and letters--each name
24 is terminated by a letter that that party was to be known
25 by.

26 MR. FREDERICKS. Q And state whether or not that was a
part of the code?

1 A It was.

2 MR. ROGERS. That is objected to as leading and suggestive
3 and calling for a conclusion.

4 MR. FREDERICKS. Withdraw the question. Q State whether
5 or not that had any relation with the code?

6 MR. APPEL. He can state what was said.

7 THE COURT. Yes, I think counsel is entitled to have this
8 witness state what was said.

9 MR. FREDERICKS. All right. Withdraw the question.

10 Q State what was said between you and Mr. Darrow and Mr.
11 Johannsen in regard to writing in the back of the dic-
12 tionaries. A This writing was not put there at that time.

13 Q When was it put there? A Later on.

14 Q When? A Oh, within--I couldn't tell you the exact time.

15 Q Well--

16 MR. ROGERS. Then I move to strike it out, your Honor .
17 please.

18 MR. FREDERICKS. Strike what out?

19 MR. ROGERS. The writing out as incompetent, irrelevant
20 and immaterial and all answers with reference to it, Put
21 there at a later time might have been put there the last
22 week or two.

23 MR. FREDERICKS. Don't you think we had better finish with
24 that subject before you ask to strike it out?

25 THE COURT. The motion to strike out is denied. You may
26 renew it later.

MR. FREDERICKS. Q When was the writing put there, Mr. Harring-

1 ton? A After my return to Los Angeles I put down that
2 from a copy of a code that I had which was furnished me
3 by Mr. Darrow.

4 MR. ROGERS. "After my return to Los Angeles I put down
5 that from a copy of a code", is hearsay, incompetent and a
6 conclusion and no foundation laid.

7 THE COURT. Read that answer.

8 (Last answer read by the reporter.)

9 MR. ROGERS. Your Honor please, the testimony that they have
10 been seeking to elicit is that a telegram came to San
11 Francisco but the code which is explaining the telegram
12 was not put down until after they got back to Los Angeles.

13 MR. FREDERICKS. Wasn't put in the book until he got to
14 Los Angeles.

15 THE COURT. Motion denied.

16 MR. FREDERICKS. Q Now, the code that you got from Mr.
17 Darrow which you say you copied into the book, when did
18 you get that from Mr. Darrow? A So we would understand
19 each other by the word "code": This code of a dictionary
20 was fixed on the 3rd--the week ending on July 22nd, but
21 I already had the different initials which represented the
22 different parties before.

23 Q Before? A Oh, yes.

24 Q I see.

25 MR. APPEL. We move to strike that out as incompetent,
26 irrelevant and immaterial, not the statement of the witness

1 of any conversation had in the presence of the defendant
2 or with the defendant and a mere conclusion and explanation
3 of the witness and not relevant to any issue in the case.

4 MR. FREDERICKS. That is very pertinent and proper.

5 THE COURT. Motion to strike is denied.

6 MR. APPEL. We take an exception.

7 MR. FREDERICKS. Q Now, when was it that you got this
8 part of the code, that is, in the back of the book there
9 ~~that~~ you kept in the back of the book from Mr. Darrow?

10 MR. ROGERS. I beg your pardon, he hasn't said he got
11 anything from Mr. Darrow. It is leading and suggestive,
12 putting something in the witness's mouth.

13 MR. APPEL. Whatever he got from Mr. Darrow is the best
14 evidence. He can't introduce evidence of a copy here.

15 THE COURT. Objection overruled.

16 MR. APPEL. We object now to the question on the ground
17 that it calls for secondary evidence. It is ^{not} calling for
18 the best evidence. It undertakes to explain original
19 evidence which is not before the witness and undertakes to
20 bring out the contents of the original writing not before
21 the witness and not shown to counsel upon the other side,
22 and the witness cannot be examined in reference thereto.

23 THE COURT. There are two objections and I want the ruling
24 to be clear. The objection made by Mr. Rogers is overruled,
25 and the objection made by Mr. Appel is overruled.

26 MR Appel. Exception.

1 MR. ROGERS. Your Honor doesn't permit us--

2 THE COURT. I wont prevent your being further heard if
3 you wish .

4 MR. ROGERS. You see how easy it is to create evidence
5 under those conditions. He says, "I copied it from some-
6 thing Mr. Darrow gave me at a subsequent time." That is
7 not conclusive. The time is not fixed. Doesn't say what he
8 got from Mr. parrow; doesn't say when he got it; doesn't
9 say where he got it or what it was or what it looked like.
10 You can manufacture evidence of that kind and damn any man
11 on earth with it and the law says that before you can
12 charge a defendant with secondary evidence of that kind
13 you have got, at least, to account for the first hand
14 evidence, and this is secondary evidence. He says that he
15 put that in the book from something Mr. Darrow gave him and
16 he hasn't even seen fit to account for what Mr. Darrow
17 gave him. Any one of us could be sent to the penitantiary
18 upon testimony of anybody. Mr. Darrow's handwriting doesn't
19 appear there. We don't know anything about where it came
20 from or what it is and yet we are supposed to be bound by
21 something that appears in the back of a book in this wit-
22 ness's handwriting, and a copy of something that has not
23 even been explained. In criminal law, if your Honor please--
24 THE COURT. Read that question and answer.

25 MR. FREDERICKS. If counsel would go along and make his
26 objections and reserve his argument until the proper time--

1 THE COURT. Counsel is making an objection and I am
2 inclined to think there is more force in it than I first
3 thought. I want the question read.

4 MR. ROGERS. We are entitled to know something about where
5 he got it.

6 MR. FREDERICKS. I am going to show it if you will only let
7 me get at the witness.

8 THE COURT. I will have to instruct the reporter to pay no
9 attention to the remarks made here when the court asks to
10 have a question and answer read. Now, read the question.
11 (Last question read by the reporter.)

12 MR. FREDERICKS. And the next question will be how did you
13 get it? Did he give it to you in writing or did he give it
14 to you verbally?

15 THE COURT. I will let the ruling stand but counsel may renew
16 it if it is not cleared up.

17 A I got that code from Mr. parrow soon after I came to
18 Los Angeles.

19 MR. FREDERICKS. Q And did you get it from him in writing
20 or did he tell it to you and you wrote it down? A No, I
21 got it from him in writing.

22 Q What did you do with the writing that you got from him?

23 A When I transferred it into this book I don't know what
24 became of it.

25 Q When did you see it last? A Not since I got this book,
26 I don't remember.

1 Q Was it on paper alone or was it on paper that had some
2 other matters on it or what was the circumstances in
3 that regard, that is, I mean the paper that you got from Mr.
4 Darrow?

5 MR. APPEL. Wait a moment--we object to his being examined
6 concerning any document or thing not shown here to the
7 other side and proceeding here in court. He cannot be
8 examined in reference to that.

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1 MR FREDERICKS: Showing the loss of it.

2 MR APPEL: You can't show the loss of it. He says he
3 don't know what became of it. That don't show loss.

4 THE COURT: You haven't shown any effort by this witness
5 to try to find that paper.

6 MR FREDERICKS: All these objections are premature. The
7 proper time will come before I offer a thing to object to
8 it, and there will be plenty of time; no use arguing it
9 over a dosen times. I want to identify it now, so I can
10 ask some questions about it.

11 MR ROGERS: The copy was for Mr Darrow and all that sort
12 of thing, and we have nothing but his own handwriting
13 for it.

14 MR FREDERICKS: Certainly, that goes to the weight of it.

15 THE COURT: Objection overruled.

16 MR ROGERS: Exception.

17 (Last question read by the reporter.)

18 A Mr Darrow handed me that paper in his own handwriting
19 with the names as I have got them here.

20 MR APPEL: I don't want him to describe the contents of
21 that paper.

22 MR FREDERICKS: He is not going to.

23 MR APPEL: He is doing it.

24 MR FREDERICKS: No, he is not doing anything of the kind.

25 MR APPEL: Well, I submit, he was.

26 MR FREDERICKS: " Don't describe anyhthing that was in the

1 paper, Mr Harrington, that is, don't say what was in the
2 paper. A There were names there, and then certain ini-
3 tials, certain letters of the alphabet after each name.

4 MR APPEL: Now, he is telling what is in the contents.

5 MR FREDERICKS: He is not saying A, B, C, D or G was
6 there, or the name for Caplan or Johanssen was there.

7 MR APPEL: He said names of certain individuals was there.

8 THE COURT: Objection overruled.

9 MR APPEL: Exception.

10 MR APPEL: We object to the witness stating the contents of
11 the document that he has identified or described, upon the
12 ground it is not the best evidence; it is incompetent,
13 irrelevant and immaterial for any purpose, hearsay, and
14 no foundation laid.

15 THE COURT: Objection overruled.

16 MR APPEL: Exception.

17 MR FREDERICKS: Now, was there anything else on that paper
18 except what you have referred to?

19 MR APPEL: Now, we make the same objection, calling
20 for the contents of a written instrument which is not
21 produced here, and not the best evidence, and immaterial.

22 A Yes sir.

23 THE COURT: Objection overruled.

24 MR FREDERICKS: What was the answer? A Yes sir.

25 Q Well, I will refer to it, then, as a document. Do
26 you know where that document is? A I do not.

1 Q When did you last see it? A Oh, it is a long time
2 ago -- months.

3 Q Do you think you could find it if you were to make
4 search for it?

5 MR APPEL: Wait a moment. We object to that as calling
6 for a mere conjecture.

7 MR FREDERICKS: Withdraw the question.

8 Q Have you ever made search for it that you know of?

9 A No sir.

10 Q Do you know what you did with it? A Yes sir.

11 Q What did you do with it? A Destroyed it.

12 Q Now, state whether or not the copy that you have
13 made -- you say you made of that paper in the back of the
14 book there is a true copy of that part of it, of which it
15 purports to be a copy?

16 MR APPEL: Wait a moment. We object upon the ground it
17 is incompetent, irrelevant and immaterial, upon the fur-
18 ther ground the witness is foreclosed under a rule of
19 evidence, from disclosing now, either the contents of
20 the original, or being allowed to produce a copy thereof,
21 because by his own act and deed, he said he destroyed the
22 original, and he is estopped now, from showing the copy
23 there.

24 MR FORD: Section 1855 provides that there can be
25 no evidence of the contents of writing other than the
26 writing itself, except in the following cases: "When

1 the original has been lost or destroyed; in which case
2 proof of the loss or destruction must first be made.

3 Section 1937: The original writing must be produced and
4 proved, except as provided in sections 1855 and 1919.

5 If it has been lost, proof of the loss must first be made
6 before evidence can be given of its contents. Or, by the
7 recollection of the witness, as provided in section 1855.

8 Now, he has got a copy he made at the time, which he knows
9 is a true copy. ^{He} He has got a right to testify it is a
10 true copy, and put it in, and independently of that, the
11 document itself is being offered as the document which was
12 in use. It isn't alone the copy which is in the back of
13 the book, is not only proof of the execution of a prior
14 document handed to the witness by Mr Darrow, of a prior
15 code that was in use, but is admissible itself as evidence
16 of its own contents as made and used in July, for two
17 purposes,-- for two reasons: first, because it is a docu-
18 ment itself, an original document itself in use in July,
19 1911, which he received -- that Mr Johanssen sent this
20 telegram, and it is also admissible as to evidence of the
21 contents of a lost document, destroyed document, a docu-
22 ment which he didn't keep after he had put it in his
23 dictionary; a document for which he had no further oc-
24 casion to have used.

25 MR FREDERICKS: I withdraw the question temporarily. If
26 I wish to put the handwriting in afterwards, I will come

enough

1 to it. Now, it is not a matter of importance to take up
2 time in arguing it. I show you here a document which has
3 heretofore been introduced as People's exhibit 22 -- I
4 will ask you whether or not you got, while you were up in
5 San Francisco on the 31st of July, 1911, a telegram from
6 anyone in the code that we have been discussing.

7 MR APPEL: Wait a moment. We object to that as incom-
8 petent, irrelevant and immaterial, and hearsay, and no
9 foundation laid; calling for the acts and declarations
10 of a third party not in the presence of the defendant, not
11 connected with the defendant, not tending to prove any issue
12 in this case.

13 THE COURT: Objection overruled.

14 MR APPEL: We except.

15 MR FREDERICKS: Read the question.

16 (Last question read by the reporter.)

17 A Yes sir.

18 MR FREDERICKS: From whom? A Mr Johannsen.

19 MR APPEL: Wait a moment.

20 THE COURT: Strike out the answer for the objection.

21 Read the question. (Last question read by the reporter.)

22 MR APPEL: Now, we object to that on the ground that it
23 is incompetent, irrelevant and immaterial, and calling
24 for a conclusion or opinion of the witness; no foundation
25 laid; the telegram would be the best evidence of its con-
26 tents or the purported sender of the telegram. He cannot

1 testify of his own knowledge that Johannsen sent him a
2 telegram that he received from some place other than the
3 place where the witness was.

4 MR FREDERICKS: We are wasting a lot of time on the tele-
5 gram Johannsen admits he sent.

6 THE COURT: Overruled.

7 MR APPEL: We take an exception to the remarks of counsel.

8 MR ROGERS: We want to see whether the witness will swear
9 to what he doesn't know.

10 MR FREDERICKS: You don't seem to want to let him.

11 THE COURT: What is the answer. What is the answer to
12 the question? A Mr Johannsen.

13 THE COURT: I think we will take a recess now.

14 (Jury admonished. Recess until 2 P.M.)
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