

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. 40

I N D E X.

Direct. Cross. Re-D. Re-C.

John R. Harrington, 3131

1 AFTERNOON SESSION. June 26, 1912; 2 P.M.

2 -----  
3 Defendant in court with counsel.

4  
5 JOHN R. HARRINGTON,  
6 on the stand for further cross-examination.

7 THE COURT. You may proceed.

8 MR. ROGERS. If your Honor please, by some strange per-  
9 adventure, which I am unable to explain, and which calls  
10 for your Honor's intervention, and which I ask at this  
11 time, the papers that I desire to cross-examine this witness  
12 on have not yet been found.

13 THE COURT. You mean the affidavit?

14 MR. ROGERS. The affidavit here in the proceeding about  
15 Foster. It is a most strange thing that the records of this  
16 county, which are required by counsel from time to time,  
17 cannot be procured. The law requires that they should be  
18 kept safely in the custody of the clerk, and that they  
19 should be available to counsel in any matter in which they  
20 are desirable or necessary. They are necessary to me and I  
21 do not understand why they are not procurable, and I call  
22 your Honor's attention to the fact that I have demanded them  
23 time and again, and that they are not forthcoming, and I  
24 ask your Honor's intervention that those records be pro-  
25 duced. There is no excuse for it. There cannot be any  
26 paliation for it, because the County Clerk is supposed to

1 keep documents which are on file in these cases so that  
2 they may be available, and without criticism, and I par-  
3 ticularly exempt your Honor's clerk from any negligence,  
4 because there was never a kinder clerk than Mr. Sherman  
5 Smith, who sits in your Honor's court, but yet it is a  
6 strange thing I cannot get documents that I want to cross-  
7 examine this witness with that are on file in this court  
8 and I ask your Honor's intervention that I may have them.

9 THE COURT. Mr. Sheriff, will you ask the county clerk to  
10 come up here, Mr. Lelande. Wait a moment--Mr. Smith tells  
11 me that Mr. Lelande is not in the office at the present  
12 moment. Who is in charge of filing documents generally?  
13 You go and bring up who is in charge of the filing  
14 department and find out what the trouble is.

15 MR. ROGERS. I will proceed.

16 THE COURT. Mr. Rogers, the court quite agrees with you,  
17 with your position in this matter and will furnish you every  
18 facility that is possible to produce the papers, and  
19 if you desire it will allow you to stop the cross-examina-  
20 tion of this witness at this time and proceed with it at a  
21 later time and furnish you every facility possible under  
22 the circumstances.

23 MR. ROGERS. I appreciate your Honor's consideration in the  
24 matter and I appreciate that your Honor realizes--well, we  
25 may say infelicity, to use a mild word, to have the docu-  
26 ment gotten.

1 THE COURT. Let's not use any strong language until we  
2 hear from the clerk.

3 MR. ROGERS. I will go on with the cross-examination of the  
4 witness. What did you ask Darrow with reference to Caplan  
5 down there at the Hayward? A I spoke to him about  
6 showing Caplan up.

7 Q What do you mean by showing Caplan up? A Giving  
8 such information to the authorities that would enable  
9 them to find out where Caplan was.

10 Q Did you understand that a lawyer receiving information  
11 as a lawyer had a right to impart it? A I did not only  
12 think it was right but I thought it was his duty to impart  
13 it under the circumstances.

14 Q Did you--where did you get that law?

15 MR. FORD. Just a moment--we object to that as irrelevant  
16 and immaterial.

17 THE COURT. Objection sustained.

18 MR. ROGERS. I will show you a document and ask your perusal  
19 of it and then I will ask you some questions.

20 THE COURT. Perhaps counsel on the other side would like  
21 to see it first.

22 MR. ROGERS. Yes, sir. (Document handed to witness by  
23 counsel.)

24 MR. FORD. No question has been asked yet?

25 MR. ROGERS. No, I am asking his perusal of the document.  
26 (Witness examines document.)

1 MR. ROGERS. Q Is that a correct account and statement of  
2 the telephone conversation between you and Darrow on the  
3 morning of February 20th, 1912?

4 MR. FORD. If your Honor will look at the document, we wish  
5 to make an objection that the question is irrelevant,  
6 incompetent and immaterial, and especially incompetent, and  
7 calling for hearsay; the methods provided for in the ex-  
8 amination of a witness as to a transaction is to tell what  
9 he has seen or what he has heard; you cannot--the examination  
10 must be conducted by question and answer, you cannot exhibit  
11 to him a document made by somebody else who perhaps he does  
12 not even know and ask him whether that is a correct statement  
13 of the transaction or not. This witness has testified--

14 THE COURT. Let me see the document.

15 MR. FORD. --to a telephone conversation had with the  
16 defendant, Mr. Darrow.

17 THE COURT. Now, I have heard the objection, Mr. Ford, and  
18 I will examine the document, if that is what you ask me to  
19 do.

20 MR. ROGERS. I desire to be heard on the question. (Handing  
21 document to court.)

22 THE COURT. (After examining document.) What is the ques-  
23 tion?

24 (Question read.)

25 THE COURT. I will hear you, Mr. Rogers.  
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1 MR ROGERS: Now, if your Honor pleases, one may show what  
2 purports to be a stenographic account of a conversation,  
3 and ask him if that is not a correct relation or a correct  
4 statement of the conversation; one does not need to pick  
5 up a paper and say, "did you not say thus and so, did you  
6 not say thus and so or not?"

7 THE COURT: Let me go back to the original statement,  
8 does this purport to be a stenographic account?

9 MR ROGERS: I have not asked him what it purports to be.

10 THE COURT: You made your statement in argument, "what  
11 purports to be a stenographer account of the conversation."

12 MR ROGERS: That is in argument only, sir. I asked him if  
13 that is not a correct relation of the telephonic conversa-  
14 tion that occurred . That is the same thing as putting it  
15 to him and reading it to him. If your Honor desires to  
16 take the time, I will read it to him and ask him "did you  
17 not say thus and so, did this not happen, or that not happen?  
18 I can do that very readily, sir, if you desire me, but I  
19 am asking him if that is not a correct statement of the  
20 conversation as it occurred. It does not admit the docu-  
21 ment itself, no matter if he says yes or no, then I must  
22 read it.

23 MR FORD: If the Court please, this document could not,  
24 under any circumstances, be introduced in evidence; it is  
25 a fugitive piece of paper concerning which we know abso-  
26 lutely nothing, we do not know who Mr Touhy is, we don't

1 know whether he is a stenographer, we don't know whether  
2 it was written at that time or whether it has been written  
3 at this time.

4 THE COURT: I think, over the objection, you have to adopt  
5 the other method, if you want to. Objection sustained.

6 MR ROGERS: I have not asked to introduce it. I take an  
7 exception. Is this not the conversation that occurred on  
8 the morning of the 20th of February, 1912, between you and  
9 Darrow. Did you not answer to Mr Darrow's inquiry, "is  
10 this 437? Yes" and then did not Mr Darrow say to you,  
11 "Say, John, I was working until 6 o'clock last night and I  
12 called up at a quarter to six and you were not there. I  
13 don't believe you can keep from testifying on that ground.  
14 Now, say, about the other matter; I am indicted and you are  
15 subpoenaed this morning, and we couldn't afford to have any  
16 financial transaction at this time. If I am owing you  
17 anything on the old deal I will pay you when these matters  
18 are disposed of. Don't you think that is best?" And did  
19 you not then reply, "Yes". Then did not Mr Darrow say to  
20 you, "I am not feeling very well today, and if you cannot  
21 get me here when you want me, call me at the house."  
22 And did you not then reply, "All right." Then did not Mr  
23 Darrow say, "Good bye", and then did you not say, "good bye"?  
24 A That does not properly represent the conversation that  
25 took place.

26 Q Did not that exact conversation, word for word and

1 line for line occur between you and Darrow over the tele-  
2 phone, you in room 437 and he at my office, on my exchange?

3 A No sir.

4 Q Did you know that there were four people on that line  
5 at the time that conversation occurred?

6 MR FORD: Objected to as irrelevant and immaterial, and  
7 not cross-examination. If counsel has any witnesses he can  
8 produce them at the proper time.

9 THE COURT: Objection sustained.

10 MR ROGERS: What did you ask Darrow at the Hayward, about  
11 Mrs Caplan? A As to where she was and he ought to show  
12 her up.

13 Q Are you giving the exact words? A No sir.

14 Q Do the best you can, to give the exact words. A I  
15 doh him I thought it was his duty to tell where she was,  
16 tell the authorities where she was, that he knew.

17 Q What did he say to that? A He says, "I don't know  
18 where she is at present. She was in Cleveland, the last  
19 time I heard of her."

20 Q What did he say about the whereabouts of David Caplan,  
21 or William Caplan, as he is sometimes known? A I do not  
22 recall that we spoke about Caplan himself.

23 Q Didn't you say this morning that you came out here  
24 to inquire of him where Caplan was? A Schmidtie and  
25 Caplan.

26 Q Yes, now when you asked him about where Caplan was, what



1 did he say? A I don't recall what we said about Caplan.

2 Q Is your memory poor on that subject? A I say I can't  
3 recall what we said about him.

4 Q Did he say anything? A I don't remember.

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3s 1 Q Why weren't you sent out here to ask him the question  
2 as to where Caplan was?

3 MR. FORD. Just a moment--we object upon the ground that  
4 the question has been asked a number of times and the  
5 repetition is merely don for the matter of argument.

6 MR. ROGERS. Now he says he doesn't remember. It becomes  
7 pertinent to ask him.

8 THE COURT. Objection overruled.

9 A Yes, sir.

10 MR. ROGERS. Q Then why is it you don't remember what he  
11 replied to you? A Because I don't recall it.

12 Q Is your memory good?

13 MR. FORD. Objected to upon the ground the question has  
14 been asked and answered not three minutes ago.

15 THE COURT. Overruled.

16 A Fairly so.

17 MR. ROGERS. Q Then tell me anything that he said to you  
18 about the whereabouts of David Caplan when you asked him  
19 where he was or if he knew where he was? A I don't  
20 recall.

21 Q Are you afraid to recall? A No, sir; not a bit.

22 THE COURT. I am informed by the Clerk that neither Mr.  
23 Lelande or his deputy Mr. Wilson have returned. We will  
24 know it when they return. See if I have this right so far,  
25 Mr. Smith. These files were first presented in this depart-  
26 ment when we were using the other court room.

1 THE CLERK. Yes, sir.

2 THE COURT. The matter was then transferred by me to Judge  
3 Willis, the presiding judge and the papers went over there?

4 THE CLERK. Yes, sir.

5 THE COURT. He heard it?

6 THE CLERK. Yes, sir.

7 THE COURT. Then what was the next thing that happened to  
8 those papers?

9 THE CLERK. The papers were sent back to me.

10 THE COURT. And what did you do with them?

11 THE CLERK. Took them to the County Clerk.

12 THE COURT. And gave them to who?

13 THE CLERK. Mr. Wilson.

14 THE COURT. And that is the last you have seen of them?

15 THE CLERK. Yes, sir.

16 THE COURT. The papers were intact at that time?

17 THE CLERK. Yes, sir.

18 THE COURT. I don't see how we can move very well until  
19 we get Wilson. Mr. Wilson is here. Mr. Harrington, you  
20 may step aside. You wish to have Mr. Wilson sworn?

21 MR. ROGERS. No, sir, your Honor may interrogate him. I  
22 will take his word.

23 THE COURT. Mr. Wilson, there are some papers in the matter  
24 of the contempt of Robert J. Foster, the papers were first  
25 filed in the court room of Department 11 when Department  
26 11 was in session in the other court room in the Hall of

1 Justice. The matter was then transferred, according to  
2 my information from Mr. Smith, the matter was then transfer-  
3 red to Presiding Judge, Judge Willis, who heard the matter.  
4 The papers were then returned by the Clerk of Judge Willis's  
5 department to Mr. Sherman Smith, the clerk of this depart-  
6 ment, and he has just now informed me that they were handed  
7 to you, and I have sent for you to inquire where those  
8 papers can now be found.

9 MR. WILSON. If Mr. Smith says he handed them to me, no doubt  
10 he did. I don't really remember at the time he says he  
11 handed a couple of more papers with those and I have been  
12 searching for these papers, the Foster papers for con-  
13 tempt of court, put in about a day, and I haven't been able  
14 to locate them.

15 THE COURT. At what time were those papers delivered, Mr.  
16 Smith?

17 THE CLERK. I couldn't tell that. I remember the incident  
18 of bringing them over and what was said when I brought them  
19 over.

20 THE COURT. Did you bring them over from the other court  
21 room or take them down from here?

22 THE CLERK. I brought them over from the other court room.

23 THE COURT. Well, the incident must have occurred ten days  
24 or two weeks ago.

25 THE CLERK. When we get through with papers, which accumu-  
26 lates for a certain time, I bring them over here and file

1 them.

2 THE COURT. Have you any system of indexing contempt pro-  
3 ceedings there, Mr. Wilson?

4 MR. WILSON. Haven't any index.

5 THE COURT. Not indexed under that?

6 MR. WILSON. No, sir.

P 7 THE COURT Have you considered the possibility of your  
8 having put those contempt papers away in the files with  
9 the other papers you were handling at that time?

10 MR. WILSON. We thought of that and we looked back for a  
11 series of 15 days back to see if we could locate those  
12 papers in the criminal department or in the other depart-  
13 ment.

14 THE COURT It is almost impossible--I do not say it is  
15 impossible, because that has not yet appeared, but it will  
16 be very difficult at least to get copies or duplicates if  
17 indeed it can be done at all, so I shall have to instruct  
18 you at this time to lay aside all other business and  
19 devote the force of the clerk's office to hunting those  
20 papers. They must be found; they are absolutely essen-  
21 tial to the business of this court that they be produced.

22 MR. ROGERS. Are you sure, Mr. Wilson, that they came back  
23 from the hearing at which Mr. Foster was present?

24 MR. WILSON. I am not sure, no.

25 MR. ROGERS. Do you know anybody that does know whether  
26 they ever came back from the court room where Mr. Foster was

1 present and had his hearing?

2 MR. SMITH. Yes, sir, I know it.

3 MR. ROGERS. You know they did?

4 ME. SMITH. Yes, sir.

5 MR. ROGERS. Then they were taken over to the clerk's  
6 office?

7 MR. SMITH. Yes, sir.

8 MR. ROGERS. Has anybody inquired for those papers up  
9 until this time?

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1 MR WILSON: Not that I know of, no sir.

2 Q You would not say you don't know?

3 MR WILSON: I don't know, they were not inquired of me.

4 THE COURT: Will you make inquiry among all the desk  
5 clerks down there and ascertain whether or not there has  
6 been any inquiry for those papers by any person.

7 MR APPEL: I would not imagine, your Honor, Mr Foster and  
8 his attorney, probably his attorney would have a copy of  
9 those papers, he was entitled to be furnished with a copy,  
10 and probably he also has a copy of his answer.

11 THE COURT: It is also possible that the attorney who was  
12 appointed may have copies.

13 MR APPEL: I will state that there was special counsel  
14 appointed, to prosecute the case.

15 THE COURT: I think Mr Leonard Slosson was appointed in  
16 that regard.

17 MR APPEL: It is possible he may have the papers.

18 THE COURT: Mr Wilson, you may take the matter up with Mr  
19 Leonard Slosson, and with his, Mr Foster's attorney, Mr  
20 George P. Adams, and make every effort to find the originals  
21 which is most desirable, but failing that, to have the  
22 record restored by copies. And spare no pains or attention  
23 on that matter, Mr Wilson. Gentlemen, that is the best I  
24 can do.

25 MR ROGERS: Yes sir, your Honor has done all you can.

26 If the papers have been abstracted they are gone, or have

1 been lost, that is the end of the papers.

2 THE COURT: You are entitled to any indulgence that  
3 suggests itself to you in regard to the cross-examination  
4 of the witness at this time.

5 MR ROGERS: Come around to the stand and I will indulge  
6 myself a little further.

7 THE COURT: I mean in regards to delay, Mr Rogers.

8 MR ROGERS: Oh, yes sir.

9 THE COURT: In regard to delay, to take the matter up later  
10 if you so desire.

11

12 JOHN R. HARRINGTON, resumes the stand for  
13 further cross-examination,

14 MR ROGERS: Now, why is it you remember what he said, <sup>about Schmidtie</sup> and  
15 cannot remember what he said about Caplan? A I cannot  
16 explain.

17 Q Why cannot you explain?

18 MR FORD: We object to that upon the ground that the  
19 question answers itself.

20 THE COURT: Objection overruled. A I have no answer  
21 to make to that; that answer is final, that I cannot ex-  
22 plain, or I cannot recall it.

23 MR ROGERS: Now, was there anything else you asked Darrow  
24 about besides the whereabouts of Schmidtie and the where-  
25 abouts Of Caplan? A Yes sir.

26 Q What? A Well, I told him about the conversation on



1 his porch, also about the conversation, about what took  
2 place the morning of Franklin's arrest.

3 Q He denied them both, didn't he? A Yes sir.

4 Q Well now, something else, that you spoke to him about.

5 A I do not recall.

6 Q Well now, that is all you can remember? A That thing  
7 was gone over a good deal, we spoke about it, and it took up  
8 more time than you and I take up with it now, but that was  
9 the gist of the conversation.

10 Q Anything else you can remember at all, that you referred  
11 to in your questions to him? A No sir:

12 Q You have given us the gist then of the whole interroga-  
13 tion that you made of Darrow? A There might have been  
14 something else.

15 Q Well, what is it? A I do not recall.

16 Q Well, you have given us the gist of it, then, so far as  
17 your memory serves you? A Yes sir.

18 Q Are you likely to remember anything later? A I might.

19 Q Is there anything that we can do to assist you to  
20 recall it now? A If you would refresh my recollection I  
21 would be very glad to answer any questions you place.

22 Q Would the dictagraph notes taken at the time possibly  
23 refresh your recollection? A I don't know that they  
24 would.

25 Q You don't know that they would? A No sir.

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1 Q Or wouldn't a so-called shorthand report of what  
2 happened at that time help you out some?

3 MR FORD: We object to that on the ground it is irrelevant  
4 and immaterial; the section of the code provides the  
5 manner in which things of that sort can be used, and the  
6 whole matter has been disposed of by this Court.

7 MR ROGERS: It has not been disposed of, in view of the  
8 late answer of the witness, which changes the whole situa-  
9 tion.

10 THE COURT: Objection overruled.

11 A What is the question, please?

12 (Question read.)

13 A It might not.

14 MR ROGERS: It might not, but, might it? A I don't know.

15 Q It could be possible, though, that the shorthand notes  
16 taken of the conversation might aid you in your recollec-  
17 tion?

18 MR FREDERICKS: That is objected to as immaterial; on  
19 the further ground it was gone into yesterday on cross-  
20 examination, the identical questions were asked the wit-  
21 ness to which he made answers they might, and they might  
22 not refresh his recollection, identically the same ground  
23 that was gone over yesterday.

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5p 1 MR. ROGERS. If your Honor please, a witness who would  
2 answer--may I be pardoned for suggesting it--a witness  
3 who would answer that a so-called shorthand transcription  
4 of the statements made at the time would not refresh his  
5 recollection would not/<sup>be</sup>worthy of credence, even as to his  
6 own name.

7 MR. KEETCH. He did not so state; he said it might or  
8 might not.

9 MR. ROGERS. Might or might not. A shorthand report of  
10 the conversation which might not refresh his recollection  
11 would be a most absurd witness and the witness who is in-  
12 tentionally false--

13 MR. FORD. I would like to make just one statement. The  
14 witness stated he didn't know whether a dictagraph would  
15 refresh his recollection. Now, it may be he has testified  
16 to everything that occurred there and if the dictagraph  
17 reports would not show anything additional it would not  
18 refresh his recollection; if it shows something addi-  
19 tional to what he has testified here then it is manifest  
20 it would refresh his recollection. The witness has testi-  
21 fied to all he now rememera about that transaction. Now,  
22 if there is anything additional that the dictagraph would  
23 show, of course, it would refresh his recollection; if it  
24 does not show anything additional, it would not refresh his  
25 recollection and the witness has answered in the only way  
26 he could answer, it might or might not.

1 MR. ROGERS. Let us try it.

2 THE COURT. I have not any doubt about the correctness of  
3 the ruling on this matter, but I am not going to interfere  
4 with counsel making his record on it. I think he ought  
5 to have his question. Answer the question.

6 A What is the question?

7 (Question read.)

8 A I would have to know something about the shorthand  
9 notes before I could make an answer to that.

10 Q Well, you have seen part of that, haven't you?

11 MR. FORD. We object to that on the ground that question  
12 has been answered yesterday and gone into fully.

13 THE COURT. Objection overruled.

14 A Yes, sir.

15 MR. ROGERS. Q Did it refresh your recollection, any of  
16 those that you saw?

17 MR. FREDERICKS. That is objected to--we ask that the an-  
18 swer be stricken out.

19 THE COURT. Strike it out. I didn't hear it.

20 MR. FREDERICKS. That is objected to unless the time and  
21 place is referred to.

22 MR. ROGERS. He has said he saw them, that is the time  
23 I am speaking of when he saw them, did they refresh his  
24 recollection any?

25 MR. FREDERICKS. He may have seen them at other times.

26 THE COURT. Overruled.

1 A I do not recall that I did, if my memory was fresher  
2 at the time.

3 MR. ROGERS. Q Is your memory any worse now than it was  
4 when you looked at the dictagraph transcript? A I can't  
5 say that it is.

6 Q Then would you be willing to look at the remainder  
7 of the dictagraph testimony and see if it might perchance  
8 refresh your recollection?

9 MR. FORD. Objected to as immaterial whether he would be  
10 willing or not.

11 THE COURT. Objection sustained.

12 MR. ROGERS. Q Don't you know, as a matter of fact, that  
13 if the dictagraph transcript is correct of the conversation  
14 it would refresh your recollection as to what happened?

15 MR. KEETCH. Objected to upon the ground it is argumenta-  
16 tive.

17 THE COURT. What is the objection? Read it.

18 (Objection of Mr. Keetch read.)

19 THE COURT. Objection sustained.

20 MR. ROGERS. Q Don't you know, as a matter of fact, that  
21 if you were shown a correct transcript of the conversation  
22 between you and Darrow that it would reffesh your recol-  
23 lection?

24 MR. KEETCH. The same objection.

25 MR. ROGERS. That is a matter we are entitled to.

26 THE COURT. Objection sustained.

1 MR. ROGERS. An exception. Q Do you mean to say that  
2 if you saw a transcription of what happened between you  
3 and Mr. Darrow there, word for word, taken down correctly  
4 at the time and written up by competent stenographers,  
5 hearing what was said, that it would not refresh your  
6 recollection? You said it might or might not.

7 MR. FORD. Objected to as argumentative and absolutely  
8 immaterial, because the answer either way would not  
9 affect the issues.

10 THE COURT. Objection sustained.

11 MR. ROGERS. Exception. Q Now, if there should be right  
12 in that box there within your reach, a correct transcrip-  
13 tion of the conversation between you and Darrow, and you  
14 may take it up and read it over, sitting where you now sit,  
15 don't you think that it would enable you to testify with  
16 greater accuracy to what happened and what was said?

17 MR. KEETCH. Objected to as argumentative, incompetent,  
18 irrelevant and immaterial.

19 THE COURT. Objection sustained.

20 MR. ROGERS. Exception. Q Aren't you willing to tell  
21 all that is true?

22 MR. FORD. Objected to as not a proper question to  
23 address to the witness.

24 THE COURT. Objection sustained.

25 MR. ROGERS. Now, if your Honor pleases, I demand again  
26 the transcription or at least the shorthand notes of this

1 conversation that the witness says he does not recall, for  
2 the purpose of aiding his recollection and refreshing his  
3 memory. We want the truth of the matter. We have gone  
4 into the conversation in good faith. We have interrogated  
5 him as to what he said. We have interrogated him as to  
6 what Mr. Darrow said, and his memory begins to grow remark-  
7 ably weak and anemic and it gets shaky in the  
8 knees and therefore we want him to refresh his recollec-  
9 tion from the document right there in front of us, telling  
10 us what was said at the time.

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1 We want the jury to have the whole truth and not a part of  
2 the truth, not memory which is fallible or not a memory  
3 which is falacious, and not memory which is intentionally  
4 faulty, therefore in the aid of truth and Justice, we ask  
5 your Honor to give us those transcriptions, if they are  
6 reliable, and the shorthand reporters took them down, in  
7 order that this man may tell us just what he said, and  
8 what Darrow said at that time. We don't want a garbled  
9 account of it. We want the truth of it, and this jury wants  
10 the truth of it, and there is nothing in the world but an  
11 attempt to suppress evidence and keep from the jury the  
12 truth and the facts that keeps that box closed, and this  
13 witness' mouth closed, and his mind a blank, and I say it  
14 is an outrage upon Justice, that we should stand here in  
15 this court room, sir, with the aid that this witness may get,  
16 your Honor pleases, from what they claim to be a correct  
17 transcription of those notes, and that conversation, and  
18 having him say, "I don't remember." Now, you can pick up  
19 your ink bottle.

20 MR FORD: The Court please, we ask the Court to take notice  
21 of the language used by counsel reflecting on the prosecu-  
22 tion and counsel on the opposite side.

23 MR APPEL: If it is true, we are not to --

24 MR KEETCH: I call your Honor's attention --

25 MR ROGERS: Yes sir, I stood here yesterday and I saw --

26 THE COURT: Mr Rogers, sit down.



1 MR ROGERS: Yes sir, I will sit down and I will assign an  
2 error in a moment.

3 THE COURT: I will hear you at all times.

4 MR ROGERS: Yes sir.

5 THE COURT: And I think patiently, as long as you confine  
6 your remarks to the matters before the court. It is amazing  
7 to me, an argument as able as the one you have just pre-  
8 sented should be spoiled, in a measure, by the last clause.

9 MR ROGERS: If it offends your Honor I wish to withdraw it,  
10 before we go any further, and I apologize to your Honor.

11 THE COURT: Let's go back to the issue that is involved,  
12 which is the demand, which under the circumstances has been  
13 made.

14 MR ROGERS: I appreciate, your Honor please, your very  
15 great kindness to me, at all times. I appreciate the fact  
16 that your Honor has recognized that I came into this court  
17 after seven months being studiously in a courtroom under  
18 the hardest possible circumstances, and with my nerves not  
19 as calm as I would like to have them, and your Honor has  
20 been, as you phrase it, amazingly kind to me, and not for  
21 the world would I offend your Honor's sense of decorum,  
22 nor would I transgress your Honor's kindness in the matter,  
23 and if I have offended your Honor, I apologize to your  
24 Honor, for I appreciate more than I care to attempt to say,  
25 your Honor's great kindness to me, and your charity to me,  
26 in view of the facts, as I say, I have been seven months

1 in the court room, and I am pretty well worn out. I am  
2 very much worn out nervously, and at times I do go beyond  
3 what I ought to go, if your Honor please, <sup>beyond</sup> and what your  
4 Honor knows I would go if I had a little time to rest, a  
5 little time to recover my nervous condition. I apologize  
6 for the last remark; it was improper, and I appreciate now  
7 that I have made it, and I apologize to your Honor because  
8 of the sense that I bear of your Honor's great kindness to  
9 me in this matter, and if that is sufficient, I hope so,  
10 if not, I stand ready to accept your Honor's reproof or  
11 your punishment, as you see fit to give it to me.

12 THE COURT: Very difficult for the Court to reprove or  
13 punish under the circumstances, but the important thing  
14 here, gentlemen, is, and the only important thing here in  
15 the trial of this case, and I fully appreciate the strain  
16 of counsel, but we only lose time and make it harder on all  
17 parties concerned, to have these little slight emotional  
18 outbursts from time to time. Now let's come back to the  
19 question. I assume that Mr Roger's remark will be amende  
20 honorable between counsel, and that counsel ask nothing  
21 further, and I shall take it for granted that is the case.  
22 Now, as to the demand, under the circumstances, does the  
23 district attorney object to that demand?

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7s 1 MR. FORD- We decline upon the ground that any written  
2 communication concerning what occurred at the Hayward  
3 Hotel between this witness--

4 THE COURT. Mr. Ford, I will have to ask you to rise when  
5 you address the court.

6 MR. FORD. I beg your pardon--I think that is proper; I  
7 should arise, and I usually do. We decline to give any  
8 written documents in our possession upon the ground that  
9 they are not competent evidence and that they are written  
10 communications made to us in official confidence which it  
11 would be prejudicial to the best interests of the public  
12 to disclose at this time. We do so, your Honor, not for  
13 the purpose of suppressing evidence but for the purpose  
14 already stated in this court.

15 THE COURT. You avow your intention of producing these  
16 documents before the trial is closed?

17 MR. FORD. If the Court please, under Section 1881, this  
18 is merely a written communication and we could not intro-  
19 duce it if we wanted to. If the occasion arises to pro-  
20 duce witnesses as to what occurred at the Hayward Hotel,  
21 they will be put upon the stand by us; but it makes no  
22 difference, we couldn't offer it, it would not be admis-  
23 sible.

24 MR. ROGERS. I submit that is not a fair answer.

25 THE COURT. The attorney for the defense has openly charged  
26 an attempt to suppress evidence, which I do not think that  
the District Attorney would, for a moment, be a party to,

1 and your objection to producing the document at this time  
2 I assume to be an objection to presenting the document for  
3 inspection, or such use that they may properly be put to  
4 at this time, but at a later time in the trial when the  
5 public interests will not suffer by it you expect to  
6 introduce it, is that the situation?

7 MR. FREDERICKS. It is our intention, your Honor, if pos-  
8 sible, under the rules of evidence, to put before this  
9 jury everything that was taken down or may have appeared  
10 in any way as a record of what occurred at the Hayward  
11 Hotel. Now, it is our intention, if it is possible under  
12 the rules of evidence, to do that.

13 MR. ROGERS. That being so, if your Honor please, we are  
14 entitled--

15 THE COURT. That puts at an end the suggestion that any-  
16 thing is being suppressed.

17 MR. ROGERS. We are entitled to see it now because here is  
18 an actor in the conversation and here is a man that we  
19 are entitled to cross-examine at that time and use it as  
20 a memorandum for cross-examination for his benefit. He says  
21 he does not recall. He says he does not remember. There-  
22 fore, if they intend to produce this document under the  
23 rules of evidence, if it is accurate, if it is substantially,  
24 and can be relied upon, then we ought to have it now in  
25 order to cross-examine this witness and refresh his recol-  
26 lection. It may be, perchance, from what he has said that

1 it is not all there. It may be that it is not accurate.  
2 It may be that by showing it to him we may refresh his  
3 recollection and he will say, No, that is not right, and  
4 from the mere inaccuracy of it he may be able to refresh  
5 his recollection.

6 THE COURT. Well, now, Mr. Rogers, we spent all day yester-  
7 day arguing on this question.

8 MR. ROGERS. It is a different situation now.

9 THE COURT. You have changed the situation somewhat, but  
10 I am still of the opinion that the right of the District  
11 Attorney, the order in which he shall present his testimony  
12 will not be interfered with by the court, and in the  
13 face of his avowal that he will present it at a later time  
14 you can take leave, if you want to recall this witness for  
15 further cross-examination in the light of that document,  
16 and I believe that is as far as the court may go.

17 MR. ROGERS. Then we will call the shorthand reporter, if  
18 we are correctly advised, and demand the production of  
19 their notes which they took at the time and then cross-  
20 examine him with them. That is not a document in their  
21 possession.

22 MR. APPEL. What we are trying to do is this, to preserve  
23 the rights of the defendant in knowing the whole case against  
24 him, or the defendant should be put on the stand or called  
25 upon to present any evidence, then the whole matter comes  
26 out on cross-examination, when it is permitted to come out.

1 Now, if any other document of any kind in my possession or  
2 anybody's possession taken under the directions of this  
3 witness at the time the conversation occurred, there would  
4 be no difficulty in asking for them in order to refresh  
5 the memory of the witness. Now, as to the rights of the  
6 District Attorney--

7 THE COURT. Gentlemen, I am well satisfied. We spent a  
8 day in argument yesterday. The objection of the Dis-  
9 trict Attorney is sustained.

10 MR. APPEL. We take an exception.

p 11 MR. ROGERS. We ask leave to present Mr. Leo Longley and  
12 Mr. I. Benjamin on this stand with a subpoena duces tecum  
13 to present their notes and to demand the transcription of  
14 the notes for the purpose of enabling us to cross-examine  
15 this witness and refresh his recollection. I call your  
16 Honor's attention, so far as the order of proof is concerned,  
17 to the language in the case of People versus Schmitz in  
18 California Appellate 7 at page 362. I do not know that I  
19 need to read it, but your Honor should read it before  
20 ruling on it.

1 THE COURT: The order of proof is undoubtedly within the  
2 sound discretion of the Court.

3 MR ROGERS: Not so far as rebuttal on the main case is  
4 concerned.

5 THE COURT: I am not assuming that the evidence suggested  
6 by the District Attorney will be delayed until rebuttal.  
7 The District Attorney has not yet closed his case.

8 MR ROGERS: I would request your Honor to inquire whether  
9 he expects to produce it in his main case or in rebuttal.  
10 He has told the court he intends to produce it, if the  
11 rules of evidence will permit. He said the other day he  
12 was going to hold it until after the defendant testified,  
13 as a threat over his head.

14 THE COURT: I did not hear any such statement, Mr Rogers.

15 MR DARROW: Your Honor, that was stated several times by  
16 Mr Ford, that they were going to keep it until after my  
17 testimony, and then if there was something in it that con-  
18 tradicted the testimony they would introduce it.

19 MR KEETCH: Mr Ford only put that in a hypothetical manner.

20 MR ROGERS: I ask your Honor to look at the 7th California  
21 Appellate.

22 THE COURT: It did not impress me to that extent.

23 MR FORD: Your Honor does not care to hear from us?

24 THE COURT: Yes, I will ask you a question, if you expect  
25 to produce this document in your case in chief?

26 MR FREDERICKS: We have not yet determined, your Honor.

1 We are trying our side of the case, trying to try it  
2 according to the rules of evidence, which are sometimes  
3 more of a hindrance than they are of a help, but whatever  
4 they are, they are.

5 THE COURT: I quite agree with you there.

6 MR FREDERICKS: And we are trying to start our side of the  
7 case, so as to get the entire matter before the jury, if  
8 we can.

9 THE COURT: I think there is nothing before the Court at  
10 this time.

11 MR ROGERS: There is a demand to place Leo Longley and  
12 I. Benjamin upon the stand and produce their notes, for the  
13 purpose of cross-examining this witness with them, in  
14 order to refresh his recollection, the witness having stated  
15 that he does not recall certain material and vital matters.

16 MR FORD: To which we object, on the ground that such method  
17 of procedure, for the purpose of refreshing the recollection  
18 of the witness is contrary to the Code of Civil Procedure,  
19 and the provision of Section 2047; that it is not one of  
20 the methods provided for by section 2047 of the Code of  
21 Civil Procedure, and for that reason is irrelevant, incom-  
22 petent, and immaterial. I want to be sure about that  
23 section, I think it is 2047.

24 MR ROGERS: 2047.

25 MR FORD: And that it is simply an effort to evade the rul-  
26 ing of the Court heretofore made upon the same subject.



1 MR ROGERS: Oh, no.

2 THE COURT: No, I think it presents quite a different  
3 question.

4 MR FORD: We object to it upon the ground that the only  
5 method in which the witness' memory may be refreshed is  
6 from notes made by himself, or under his direction, at  
7 the time, when the fact occurred, or immediately thereafter,  
8 or at any other time, when the fact was fresh in his  
9 memory, and he knew that the same was correctly stated in  
10 the writing, and that no proper foundation has been laid,  
11 to show that this document referred to would refresh his  
12 recollection, and, further, that there is no law compelling a  
13 witness to resort to their memory or to inspect other docu-  
14 ment for the purpose of refreshing their memory; and  
15 further, that it would be absolutely improper for the witness  
16 to refresh his memory by listening to what somebody else  
17 might have said upon the subject; further, that <sup>if</sup> it is done  
18 for the purpose of impeachment, that the time for putting  
19 on impeaching testimony has not yet arrived. Counsel have  
20 laid a foundation by asking him all the things that occur-  
21 ed at this conversation; they have asked him many things  
22 which he has denied. Some things which he has admitted.  
23 Now, if by way of defense they wish to show that this wit-  
24 ness has not told the truth they would then have a right  
25 to call any witnesses who were present at such conversations  
26 and let those witnesses testify what had occurred and those

1 witnesses in testifying would be allowed by your Honor to  
2 refresh their recollection from notes taken by themselves  
3 at that time.

4 THE COURT: I want to read that 7th Appellate, and I will  
5 take a recess for fifteen minutes. Have you got it there  
6 handy?

7 MR ROGERS: Yes sir.

8 THE COURT: Gentlemen of the jury, bearing in mind your  
9 former admonition. We will take a recess for 15 minutes at  
10 this time.

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1 (After recess.)

2 THE COURT. The Court is now ready to rule on the demand  
3 of the defendant. The defendant has demanded the right  
4 at this time to put upon the witness stand two shorthand  
5 reporters, whom I assume to be the shorthand reporters  
6 who took down the dictagraph conversation. The District  
7 Attorney has objected and that objection is sustained  
8 at this time, but if it should transpire that when the  
9 District Attorney offers to close his case, the dictagraph  
10 transcript has not been produced, then the defendant is  
11 given leave to renew this offer to put the shorthand  
12 reporters on the witness stand, and if the offer should  
13 at that time be allowed--the Court does not at this time  
14 indicate it will be allowed--but if it should be allowed,  
15 then the right will follow, of course, to call Mr. Harrington  
16 for further cross-examination.

17 MR. ROGERS. Satisfactory.

18 MR. ROGERS. Q Mr. Harrington, were you in the city here  
19 at all times since this case commenced, and by the city  
20 I mean Los Angeles and its immediate surroundings and sub-  
21 urbs? A yes, sir.

22 Q Did you see an article-- A Pardon me. I wasn't here  
23 since the case commenced. Since the--I came here about the  
24 25th of May.

25 Q Well, since the taking of evidence commenced? A I  
26 think I was here all during that time.

Q Did you read an article in the Los Angeles Examiner

1 headed "I will convict Darrow by my dictagraph. R. J.  
2 Foster."

3 MR. FREDERICKS' Objected to upon the ground it is  
4 immaterial.

5 MR. ROGERS. Preliminary.

6 MR. FREDERICKS. Not cross-examination.

7 THE COURT.  $\checkmark$ Overruled.

8 A Yes, sir; I don't know that it was headed that, but  
9 I read such an article over.

10 Q You read it? A Yes, sir.

11 Q Did you know what R. J. Foster that was?

12 MR. FORD. Objected to as calling for a conclusion of the  
13 witness, irrelevant and immaterial.

14 THE COURT.  $\checkmark$ Overruled.

15 A I presumed it was the same Foster that I met in  
16 Mr. Lawler's office. I thought so at the time I read the  
17 paper.

18 MR. ROGERS. Q Now, what was there in the dictagraph  
19 conversation held between you and Darrow to which he  
20 referred, "I will convict Darrow by my dictagraph. R. J.  
21 Foster." If you know.

22 MR. FORD' Objected to as calling for a conclusion of the  
23 witness as to what Foster meant by it. Objected to on the  
24 further ground that no foundation has been laid showing  
25 that Foster ever did have such a conversation, and even if  
26 he did it would be absolutely immaterial what motives

1 prompted him.

2 THE COURT. Objection sustained.

3 MR. ROGERS. Q What did Darrow say in that dictagraph  
4 conversation other than you have given us? A I remember  
5 now that Mr. Darrow asked me if I expected to be indicted.  
6 I told him I did not and he asked me if I was scared of be-  
7 ing indicted. I told him not. He then asked me about a  
8 conversation that I had with detective Stanley in San  
9 Francisco, in which Stanley offered to remove Mrs.  
10 Ingersoll from the state of Illinois or else have her  
11 testimony changed--

12 MR. FORD. Pardon me--the witness has used the words,  
13 state of Illinois--

14 A State of California, and we spoke about the time that  
15 Mr. Darrow sent me to see Stanley in the Palace Hotel in  
16 San Francisco. He reminded me that he sent me and it  
17 was proper. He sent me there to get some information  
18 from Stanley and he told me that he afterwards heard that  
19 Stanley made the remark that I offered him money there and  
20 I denied that, and that was about the substance of that  
21 conversation. And then we spoke about the contempt pro-  
22 ceedings, and he asked me if I thought there would be any-  
23 thing further to that, about sending me out to Ingersoll's  
24 house for letters which I got and about Mr. Ford subpoena-  
25 ing me before the grand jury afterwards and asking me if  
26 I offered Ingersoll \$5,000 and an automobile. I told him

1 there was nothing to that at all and the District Attor-  
2 ney, I presume, saw there was nothing to it because he  
3 never followed the matter up at all.

4 MR. ROGERS. Now, read that answer.

5 (Last answer read by the reporter.)

6 A Then I remember telling Mr. Darrow that I thought he  
7 ought to see the District Attorney and do the best he could  
8 with him and not to be the only one in the case that suffer-  
9 ed. There were other people in San Francisco and other-  
10 where that had a great deal to do with this case and that  
11 he ought to try to get out of it as best he could.

12 Q What did he say to that? A About seeing the Dis trict  
13 Attorney?

14 Q Please read the witness his last answer.

15 (Last answer read by the reporter.)

16 Q About just what you said in your last answer. A He  
17 said, of course, that he like to get out of it.

18 Q Was that all he said? A I don,t recall any more. It  
19 might come to me later.

20 Q He was then under indictment? A Yes, sir.

21 Q When you said there were other people in San Francisco  
22 and elsewhere, whom did you refer to.? A I had in mind  
23 the San Francisco people that were interested in the  
24 McNamara case.

25 THE COURT. Mr. Rogers, let me interrupt you. There is  
26 another matter here I want to take a moment or two on.

1 THE COURT: I see Mr Longley is in Court. Do you wish to  
2 retain him here?

3 MR ROGERS: I do not wish, after your Honor has ruled, I  
4 do not wish to do anything that savors of too much persis-  
5 tence in the matter, but now that he is here I would like  
6 to ask him if he has the notes of the so-called dictagraph  
7 conversation and if he will produce them in order that we  
8 may --

9 THE COURT: In the Court's ruling the Court assumed that  
10 he did have the notes, and of course, if sworn as a witness  
11 he would produce them. You can take that for granted;  
12 that is assumed in the Court's ruling.

13 MR ROGERS: I would like to interrogate him whether he has  
14 them or not.

15 MR FREDERICKS: We will stipulate that he has the notes,  
16 and I am quite sure he has.

17 THE COURT: That settles it.

18 MR ROGERS: Your Honor's ruling is, if they close without  
19 I may call him? Mr Longley, you are not going to leave  
20 the jurisdiction of the Court?

21 MR LONGLEY: Mr Rogers, and if your Honor please, as special  
22 examiner in the United States Court case, the United  
23 States against the Southern Pacific, I am due to be in  
24 San Francisco on next Monday to continue the taking of  
25 testimony, which has occupied some time more than a month;  
26 the time within which the Government may conclude the tak-

1 ing of testimony is about to expire, and if by a sub-  
2 servience to the subpoenae under which I am at present  
3 here now, or within the next day or two, I could accomplish  
4 my duties as a witness in this case, so that I could be in  
5 San Francisco Monday morning, I would like very much to  
6 have that done.

7 THE COURT: The District Attorney informs me he expects  
8 to close within a week.

9 MR FREDERICKS: I doubt very much if I will be able to.

10 THE COURT: At any rate, you will be available for the rest  
11 of the week?

12 MR LONGLEY: Yes sir.

13 MR FREDERICKS: There is another reporter who was with  
14 Mr Longley, the defense has not got the name correctly.  
15 I saw him at noon, and I know he will be here, he is not  
16 going away, and Mr Longley told me he will come down on a  
17 day's notice.

18 MR ROGERS: That won't subserve the case. If Mr Longley is  
19 going away and they, perchance, should close, I know the  
20 matter to which he refers, if he goes to San Francisco on  
21 Monday -

22 MR LONGLEY: I expect to go to San Francisco Saturday night

23 MR ROGERS: If you go on Saturday night you will be in San  
24 Francisco for some considerable time.

25 MR LONGLEY: The estimated time is a week or ten days, the  
26 testimony to be taken is for a week or ten days.



1 THE COURT: If it becomes necessary, you can come down  
2 here at night, and be here for a day, any way?

3 It would be a great inconvenience, but the Court regrets  
4 to put you to such inconvenience.

5 MR LONGLEY: Yes sir, if I could testify to whatever the  
6 parties desire I would be very glad to do so.

7 THE COURT: It may develop that you can, but not today,  
8 Mr Longley.

9 MR LONGLEY: Well, that is my engagement, if your Honor  
10 please, I am due to be in San Francisco next Monday morn-  
11 ing at 10 o'clock.

12 THE COURT: The Court will bear that in mind, and the Court  
13 will admonish counsel that the convenience of witnesses is  
14 to be taken into consideration.

15 MR FREDERICKS: We have it in mind.

16 MR LONGLEY: May I be excused?

17 THE COURT: For a day, and until you have further notice.

18 MR FREDERICKS: I understand Mr Longley wants to get away  
19 Saturday night?

20 MR ROGERS: We can settle this matter in two minutes, if  
21 your Honor please, if Mr Longley will sit down and trans-  
22 scribe those notes and produce them to your Honor, so that  
23 we can use them to cross-examine this witness, Mr Longley  
24 can go to San Francisco and take the case of the United  
25 States vs the Southern Pacific Company to his heart's  
26 content.

1 MR FORD: We will endeavor to accommodate Mr Longley  
2 and the Court, without interfering with the process of the  
3 trial, and in pursuance of the Court's order.

4 THE COURT: The matter will be adjusted between now and  
5 Saturday morning, otherwise it will be taken up Saturday  
6 morning.

7 MR ROGERS: I know that Mr Longley is a busy man, he cannot go  
8 away under the Court's subpoenae, and I will call him  
9 when opportunity serves.

10 THE COURT: All right.

11 MR LONGLEY: May I ask your Honor, in view of the fact that  
12 Mr McCormick, United States Attorney, Mr Mills, Special  
13 Assistant Attorney General of the United States, and the  
14 attorneys on the other side, a number of witnesses sub-  
15 poenaed to appear before me as commissiner or special  
16 examiner, next Monday morning, for the convenience of all  
17 those people, may I not properly ask that some arrangements  
18 be made by which I could definitely notify those people, so  
19 as not to inconvenience them?

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11p1 THE COURT. The District Attorney has just stated he is  
2 satisfied that a means can be arranged, and I have no  
3 doubt it can be done.

4 MR. FREDERICKS. We had a talk with Mr. Longley today at  
5 noon in regard to the matter and I think there will be no  
6 difficulty about it.

7 THE COURT. If there should be any difficulty you might  
8 report here at 10 o'clock Saturday morning and the  
9 matter can be adjusted then, unless some other disposition  
10 is made of it, Mr. Longley. Of course, you are under  
11 subpoena.

12 MR. LONGLEY. I realize that.

13 THE COURT. But unless you hear something to the contrary  
14 you will be here Saturday morning at 10 o'clock.

15 MR. LONGLEY. Saturday morning.

16 THE COURT. Yes, sir.

17 MR. ROGERS. How are we going to do anything with this  
18 matter? Mr. Longley has to go to San Francisco, he  
19 being Special United States Examiner, that is to say,  
20 taking testimony in a land case, according to my recol-  
21 lection of the law he is not subject to the orders of the  
22 court in the case up there and we cannot get him back.  
23 I am entitled to these notes, I am entitled to the trans-  
24 cript, I am entitled to it for the purposes, according to  
25 your Honor's ruling, of cross-examining this witness, and  
26 I can see no reason, if it is coming before the conclusion  
of the case, why I might not have it to cross-examine this

1 witness with.

2 THE COURT. He is already under subpoena.

3 MR. ROGERS. Already under subpoena. He is Special  
4 Examiner, he is exempt.

5 MR. FREDERICKS. I will state to the court in regard to  
6 this dictagraph stuff, we have a well defined idea of what  
7 we want to try to do with it. The only exception is a  
8 point of law on which Mr. Ford and I differ, and we have  
9 been trying to come to the same conclusion on that point of  
10 law and we probably will. Things are shaping themselves  
11 right along the line that will obviate any inconvenience  
12 to Mr. Longley.

13 MR. LONGLEY. I think I ought to state--I think I ought  
14 to state to you in addition to what I have already said  
15 in open court, that my duties as Special Examiner in that  
16 case, that is, the United States Court, following the  
17 testimony which will be taken in San Francisco, my duties  
18 however they may conflict with my duties as a witness  
19 here, may require me to go to New York and Oklahoma.

20 THE COURT. I think it will be arranged some way.

21 MR. LONGLEY. I feel it is due to your Honor and the gentle-  
22 men on both sides to state that that may be the result.

23 THE COURT. If you are to give testimony it will be taken  
24 Saturday morning.

25 MR. ROGERS. May I suggest another thing before Mr. Longley  
26 leaves the room? I don't wish to say anything that may

1 reflect, therefore, I do not mention any names, but the  
2 other reporter who was also taking notes, whom your Honor  
3 may have in mind, as I understand, was unable to pass the  
4 court examination and is not a competent reporter as is  
5 Mr. Longley, and I would like to examine Mr. Longley and not  
6 the other man. From many years experience at the bar, more  
7 than my very youthful appearance would indicate, I have  
8 great confidence in Mr. Longley, and I have not a bit of  
9 confidence in some other reporters that I might name, and  
10 I would like to have Mr. Longley's report.

11 THE COURT. There has been just one other name mentioned  
12 and that was the name of Mr. Benjamin.

13 MR. ROGERS. Mr. Benjamin, I understand, is not the man.  
14 I understand I am mistaken in the name of the man.

15 THE COURT. No question about Mr. Benjamin?

16 MR. ROGERS. Not a bit in the world. I have known Mr.  
17 Benjamin for 30 years.

18 THE COURT. All right, I guess that matter is clear then.  
19 You may proceed with the examination.

20 MR. LONGLEY. And am I excused until Saturday morning?

21 THE COURT. You are excused until Saturday morning unless  
22 otherwise called, unless there is objection; so ordered.

23 MR. ROGERS. Q Now, you said people in San Francisco and  
24 elsewhere. Where else did you mean? A Across the bay  
25 from San Francisco.

26 Q Whom across the bay from San Francisco did you refer to?

1 MR. FREDERICKS' Objected to as being immaterial to the  
2 issues to who he referred, someone else aside from Mr.  
3 Darrow, nothing to do with this case.

4 MR. ROGERS\_ He said he told Mr. Darrow he better make  
5 peace, let somebody else suffer in San Francisco and  
6 elsewhere. Now, he says across the bay from San Francisco.  
7 I want to know whom he meant across the bay from San  
8 Fr ancisco.

9 MR. FREDERICKS\_ I will withdraw the objection.

10 THE COURT. The objection has been withdrawn.

11 A I didn't say to let anybody else suffer; I didn't use  
12 that expression.

13 MR. ROGERS. Well, when you referred to people across--  
14 in San Francisco and elsewhere, and said that you meant by  
15 elsewhere across the bay from San Francisco, whom did you  
16 refer to? A Mr. Johannsen.

17 Q Any one else? A No, sir.  
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1 THE COURT: Mr Rogerès, before you come back to this cross-  
2 examination, I intended to call your attention to the  
3 fact that the document was handed me in the last few mo-  
4 ments and purported to be, and which I presume are, copies  
5 of the contempt proceedings in the Foster matter. I will  
6 hand them to you at this time. I have not had a time to  
7 examine them, but I presume they are correct copies.

8 Mr Clerk, you handed me documents purporting to be copies  
9 of papers in the Foster contempt proceedings. How were  
10 those papers obtained. Mr Wilson, in the last few minutes I  
11 have been handed documents purporting to be copies of the  
12 papers in the Foster contempt proceedings. From what  
13 source were those papers obtained?

14 MR WILSON: I rang up Mr Slosson, attorney for Mr Foster in  
15 the Foster case, and asked him if he had copies of the  
16 originals left up here, and he told me he had, and I asked  
17 him if I could come down and get them, and he told me I  
18 could, and I went down and got them.

19 THE COURT: They were obtained from Mr Slosson as his  
20 copies? A Yes sir.

21 THE COURT: And you have been still unable to find the  
22 originals?

23 MR WILSON: Yes sir.

24 THE COURT: You will still continue the search for the  
25 originals in the meantime. Under the circumstances I think  
26 we may deem these copies to be true copies and proceed

1 accordingly, unless the contrary should appear. I think  
2 it would perhaps be well to fasten them together and mark  
3 them for identification.

4 MR FREDERICKS: Not in this case. They are not matters in  
5 this case. I understand that they are simply some docu-  
6 ments that have nothing to do with this case, except  
7 counsel wants to use them to cross-examine the witness,  
8 the same as the newspaper.

9 THE COURT: Well, all right.

10 MR FREDERICKS: I don't think the papers have any bearing  
11 in this case.

12 MR ROGERS: I don't want any question about it.

13 THE COURT: I think you are right.

14 MR FREDERICKS: No question about their authenticity.  
15 I have never seen them.

16 MR ROGERS: Did you read this part of the article that you  
17 said awhile ago you read, headed "I will convict Clarence  
18 Darrow by my dictagraph. R.J. Foster." Did you read this  
19 part of the article, "Every word that passed between Harring-  
20 ton and Darrow was recorded by the instrument, and accord-  
21 ing to Foster the admission of these conversations,  
22 as evidence, will be a great factor in the case." Did you  
23 read that?

24 MR FORD: We object to the question, and if you will let me  
25 have the document I will state the grounds. We object to  
26 it first, as to what purports to come from Foster on the



1 ground no foundation has been laid, showing that it is  
2 from Foster. We object to all that part which is not in  
3 quotations, as coming from some unknown reporter on the  
4 Los Angeles Examiner, unknown to us. We object to all of it,  
5 both Foster's and the unknown reporter's declarations, upon  
6 the ground it is hearsay, incompetent, irrelevant and  
7 immaterial, and we object to any questions asked of this  
8 witness upon the ground that the whole is absolutely im-  
9 material and not cross-examination. It is not a statement  
10 which can impeach this witness in any way. It doesn't even  
11 purport to be a statement of this witness, and it calls for  
12 a conclusion of the witness, as to what somebody else, to-  
13 wit, Mr Foster, an unknown reporter, may have meant when  
14 they said it, and on the further ground there is no founda-  
15 tion laid to show that these words were ever said by any-  
16 body.

17 MR ROGERS: I asked him if he read it, only. I didn't ask  
18 him if it was true, if he said it or heard it said.

19 THE COURT: Your objection is premature, in that this is  
20 preliminary.

21 MR FORD: It is objectionable, even insofar as he may have  
22 read it, anyway it is absolutely immaterial. I suppose  
23 he did or suppose he didn't, what difference does it make,  
24 absolutely immaterial. We submit the objection.

25 THE COURT: The objection is overruled. The question is,  
26 did you read the article. A I think I did, your Honor.

1 MR ROGERS: Did you know at the time you were having the  
2 conversation, that every word that passed between you and  
3 Darrow was being taken down?

4 MR FREDERICKS: That is objected to because it is an  
5 attempt to assume something as evidence, to-wit, this news-  
6 paper article statement, which is not Foster's.

7 THE COURT: Overruled.

8 MR FORD: On the further ground the witness has answered  
9 fully about his relations with Foster, with the letter,  
10 with the dictagraph, and with the stenographers; he has  
11 answered he knew about -- that is he had no personal know-  
12 ledge what the stenographers were doing, whether they were  
13 there or not.

14 THE COURT: Objection overruled.

15 A Please read the question.

16 (Last question read by the reporter.)

17 A I had no legal knowledge of it at the time.

18 MR ROGERS: I am not asking you for legal knowledge, sir;  
19 I am asking you if you knew.  
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13s 1 MR. FORD. If the Court please, we object to it on the  
2 ground that from the witness's answer it is apparent  
3 anything that he may have known on that subject would be  
4 hearsay. That appears not only from his present answer,  
5 "He had no legal knowledge," but from his former testimony  
6 given last week which was to the effect that the conversa-  
7 tion he had occurred with Mr. Lawler and what occurred  
8 in the other room he didn't know, and all that occurred  
9 in his room was there was a receiving dictagraph in his  
10 room behind the bureau and he had arrangements with Mr.  
11 Lawler in which Mr. Lawler expressed a desire to do certain  
12 things.

13 THE COURT. I think you are right, that it has been gone  
14 into, but counsel was compelled to go into it more or less  
15 handicapped. He wanted the files of this court in which  
16 he wanted to assist him in framing questions and for that  
17 reason, to a limited extent, I don't think counsel will  
18 abuse that, but to a limited extent he should be permitted  
19 to renew that examination, for that reason the objection is  
20 overruled.

21 MR. FORD. I wish to state, no further objections along  
22 this line will be made. We will content ourselves with the  
23 objection it is not cross-examination and when your Honor  
24 thinks it has been gone into far enough you may rule. We  
25 will make our objection so your Honor can have a foundation  
26 to rule and not with the intention to interrupt the proceed-  
ings.

1 A What is the question?

2 (Last question read by the reporter.)

3 A I did not know, but I suspected.

4 MR. ROGERS. I will show you a photograph.

5 MR. FORD. I will ask counsel to hold it so the jury will  
6 not see it until it has been exhibited to us.

7 MR. ROGERS. You may now lamp. I show you a photograph  
8 headed, "Detectives using dictagraph, Official Photo in  
9 Darrow case." I will ask you if you ever saw that before  
10 or one just like it.

11 MR. FORD. Object upon the ground the document being  
12 exhibited to the witness is fugitive evidence purely, no  
13 issue in this case, incompetent, and no foundation laid  
14 to show that it is--it is printed hearsay and has no higher  
15 privilege than verbal hearsay.

16 MR. APPEL. Your Honor, we would like to know what he means  
17 by fugitive, in view of the fact we didn't understand the  
18 objection we like to avoid any objectionable matter in the  
19 questions.

20 MR. FORD. I hand the counsel the dictionary.

21 MR. APPEL. I can't read a large book like that, my time  
22 is limited.

23 THE COURT. The question is, did he ever see this photo-  
24 graph. Objection overruled.

25 A No, sir.

26 MR. ROGERS. Q Do you know of a photograph like that being

1 taken? A No, sir .

2 Q Do you know who this person is here?

3 MR. FORD We object to that as irrelevant and immaterial,  
4 not cross-examination.

5 MR. ROGERS. Preliminary.

6 THE COURT. Your question does not mean anything in the  
7 record.

8 MR. ROGERS. Q I mean the figure on the left of the photo-  
9 graph I am showing you? A No, sir .

10 Q Did you see him here in the court room a few moments ago,  
11 Leo Longley? A I would not--

12 MR. FORD. We object to the testimony of counsel as to  
13 who he was on the ground counsel has not been sworn as a  
14 witness; object to it on the further ground it is incom-  
15 petent, irrelevant and immaterial.

16 MR. ROGERS. I will take a ruling on that.

17 THE COURT. Objection overruled.

18 A Will you read the question now?

19 (Question read.)

20 A I saw that gentleman addressing the court, yes, sir .

21 MR. ROGERS. Q Did you ever see this man before, the  
22 figure in the center in his shirt sleeves?

23 MR. FORD. We object to that on the ground it is incom-  
24 petent, irrelevant and immaterial, and written hearsay,  
25 having no higher privilege than verbal hearsay.

26 THE COURT. Objection overruled.

1 A No, sir.

2 MR. ROGERS. Q Do you know that is Robert J. Foster?

3 A Yes, sir, but I never saw him in his shirt sleeves  
4 before.

5 Q( Oh, you are unable to recognize him owing to the  
6 dishabille in which he appears? A No, sir. The question  
7 asked was if I ever saw him in his shirt sleeves.

8 MR. FREDERICKS. And we object to that question asked if  
9 he ever saw him in his shirt sleeves.

10 MR. ROGERS. Q Do you know whose picture that is, anyhow?

11 A yes, sir.

12 Q Whose is it? A Mr. Foster's.

13 Q Do you know whose picture that is, on this side here,  
14 on the right of the picture as it is presented to you?

15 A No, sir.

16 Q Do you know Mr. Fallome the shorthand reporter?

17 A No, sir.

18 Q Now, while you were conversing with Mr. Darrow in Room  
19 437 did you know that these three gentlemen, Mr. Longley,  
20 Mr. Foster and Mr. Falloon were taking down the evidence  
21 by means of the dictagraph?

22 MR. FORD. That is objected to on the ground it is incom-  
23 petent, irrelevant and immaterial; the witness has been  
24 fully examined upon that matter, and, further, that no  
25 foundation has been laid showing that the picture now  
26 exhibited to the witness on the stand is an accurate

1 reproduction of any things that occurred during the time  
2 that the examination or that the dictagraph conversations  
3 were being conducted inthe other room, and it is my  
4 impression that this picture was not taken at that time.

5 THE COURT. Objection overruled.

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1 A Read the question,now,please. (Question read.)

2 A No sir.

3 Q MR ROGERS: Were you ever in the room in which these  
4 gentlemen were taking down the conversation between you  
5 and Darrow? A I don't know in what room they were.

6 Q Were you ever in the room which was supposed to be  
7 the receiving room,that is to say,the reporter's room,  
8 where they were taking down your conversation with Darrow?

9 A I do not know what room was supposed to be the receiv-  
10 ing room.

11 Q Were you in Foster's room? A No sir.

12 Q Were you in the adjoining room? A No sir.

13 Q 418? A No sir.

14 Q Were you in any other room in the Hayward except the  
15 one you occupied? A No sir.

16 Q What was the number of your room? A 437.

17 Q Were you ever in 438? A No sir.

18 Q Or in any other room than 437,in the Hayward? A No sir.

19 Q When you met Mr Foster at the Hayward didn't you talk  
20 about the dictagraphing with him? A No sir.

21 Q Wasn't the subject mentioned? A No sir.

22 Q Was that after the dictagraphing had been finished?

23 A My recollection is it was while it was going on.

24 Q And do you mean to say no reference whatever was made  
25 to it? A I have said so.

26 Q Do you know how it came about that a picture was taken



1 of Longley, the reporter, Foster and Falloon, headed, "Detectives using dictagraphs, Official photograph in the Darrow case", do you know how that came about?

4 MR FORD: We object to that as irrelevant and immaterial, calling for hearsay, no foundation laid, showing the witness had any knowledge about it, mere speculation on his part.

8 THE COURT: The question is for his knowledge, does he know these things. Objection overruled.

10 MR FORD: I will withdraw the objection. A No sir.

11 MR ROGERS: Were you present when the dictagraph was removed from your room? A No sir.

13 Q Was it still there when you left? A No sir.

14 Q How do you know? A Because I missed it.

15 Q When did you look for it, and find where it had been taken? A Oh, a day or two before I left, a few days.

17 Q What occasioned you to look for it and find it absent?

18 A I didn't have to look, I could observe and see that it was gone.

20 Q How long was it there altogether? A I don't know. I knew at the time, I knew it was there, was probably a week or ten days.

23 Q Were those conversations with Mr Darrow every day?

24 A They were on consecutive days, if I remember rightly.

25 Q On consecutive days. By that you mean one day following another you had a conversation with him? A Yes.

1 Q Was the dictagraph there every day when the conversations  
2 between you and Darrow occurred? A It was.

3 Q Did you look to see? A I observed and saw it.

4 Q What for? A I could see it was there, you know, I  
5 didn't have to look, or go out of my way.

6 Q Was there always someone in the other room, at the  
7 other end of the dictagraph? A I don't know.

8 Q How did you know when to commence to talk with Darrow,  
9 in order that it might be taken down by Robert J. Foster, the  
10 investigator for the Erectors Association -- pardon me,  
11 Chief Investigator for the National Erectors' Association --  
12 and Leo Longley and Waldo Fallome?

13 MR FORD: We object to that on the ground no foundation has  
14 been laid, no evidence yet showing that they were the ones  
15 who were taking it down at that time, that is, as far as  
16 Foster was concerned.

17 MR ROGERS: Here is a picture showing it.

18 MR FORD: Let me make my objection, please. No foundation  
19 laid showing that Foster was the Chief Detective of the  
20 National Erectors' Association, or Chief Investigator.

21 MR ROGERS: The official document headed "Official Photo-  
22 graph", says Robert J. Foster, Chief Investigator of the  
23 National Erectors' Association. I would not for the world  
24 commit lese-majeste and not give him his proper title.

25 THE COURT: Read the question.

26

1 MR FORD: This document was prepared by some unknown and  
2 unnamed newspaper man.

3 THE COURT: Mr Reporter, read the question. When you get  
4 that direction pay no attention to what counsel says, from  
5 that time on until the question is read.

6 MR FORD: I beg your pardon.

7 (Question read.)

8 THE COURT: Objection sustained.

9 MR ROGERS: Did you talk with anyone else in your room,  
10 while the dictagraph was there, except Darrow?

11 A You mean, of course, in reference to the case?

12 Q No, anybody. A I spoke in casual conversations with  
13 Mr Cooney and Mr Fitzpatrick, who called on me.

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15p 1 Q They were witnesses for the prosecution here, Cooney  
2 and Fitzpatrick. A I presume so.

3 Q Any one else you talked to in the room while the dicta-  
4 graph was there? A No, sir.

5 Q Did you participate in any trial--heer or trial of the  
6 dictagraph? A No, sir.

7 Q How many times were Cooney and Fitzpatrick there or  
8 either one of them? A Oh, they came frequently. Used  
9 to come to the room in the evening a good deal, I would  
10 be safe in saying they were there 6 or 8 times, they usually  
11 came there together.

12 Q Were <sup>they</sup> there on days when Darrow was there? A Not at the  
13 time, they may have come in the evenings of these dates.

14 Q Did you talk with them about dictagraphing Darrow?

15 A No.

16 Q Did you report to them what Darrow said to you? A No.

17 Q Did you mention Darrow in your conversations with them?

18 A I don't remember; nothing in reference to the dicta-  
19 graph, I am sure.

20 Q Do I understand you to say you didn't know where the  
21 wire went from the dictagraph? A That is correct.

22 Q Then you never made any investigation of it at all?

23 A That is correct.

24 Q Did you have a bath room attached to your room?

25 A I did.

26 Q Was the dictagraph on the side of the room next to the  
bath room?

- 1 A The bath room door, yes .
- 2 Q I beg your pardon? A The same side as the bath room  
3 door .
- 4 Q Did you see any wires come through the bath room?
- 5 A I did not .
- 6 Q Was there ever any one in the bath room while Darrow  
7 was in your room? A No, referring to the bath room con-  
8 nected with my room, of course?
- 9 Q Yes . A No .
- 10 Q Or in a closet? A No .
- 11 Q Then you and he alone were in your room? A Yes .
- 12 Q Or any part of it or any appurtenance to it? A I don't  
13 know--
- 14 Q Wardrobe, closet or bath room? A I don't understand  
15 your question .
- 16 Q I mean to say, any appurtenance to your room, any closet,  
17 any bath room, any toilet, any wardrobe or whatnot connected  
18 with your room, was there anybody in there when Darrow was  
19 in your room? A No .
- 20 Q Now, when you saw this article headed, "I will convict  
21 Clarence Darrow by my dictagraph, R. J. Foster." did you  
22 have a talk with Foster after that? A No .
- 23 Q Did you have a talk with the District Attorney about  
24 that? A No .
- 25 Q Was it ever mentioned? A Not with me, of course, you  
26 mean there--

1 Q Yes, that is what I mean, did you see this picture or  
2 article in the Evening Herald of Saturday, March 23, 1912?

3 A Is that the picture you showed me when you were up  
4 here?

5 Q Yes. A No.

6 Q Never saw the article at all? A No.

7 Q Were you here then? A No.

8 Q You were not here then?

9 THE COURT. He said, "No."

10 Q No. What else, now, did Mr. Darrow say at that dicta-  
11 graph conversation of an incriminating nature or that  
12 would tend to convict him, than you have already given us?  
13 MR. FREDERICKS. We object to that as calling for a conclu-  
14 sion of the witness, further, the matter has been gone  
15 into fully on cross-examination.

16 THE COURT. Objection overruled.

17 A I do not recall, with that limitation.

18 Q You have told us all that Mr. Darrow said of an incriminating or convicting nature then?

19 MR. FORD. Just a moment--if the Court please, we have no  
20 objection as to them going into anything that was said  
21 or everything that was said in that room, but whether it  
22 is of an incriminating nature or not, we care not for this  
23 witness's opinion, neither does the jury. While the  
24 witness is bound to tell us all the facts, his opinions and  
25 conclusions are absolutely improper and irrelevant and  
26

1 incompetent testimony.

2 THE COURT. Yes, I think Mr. Ford is right about that. Objec-  
3 tion sustained.

4 MR. ROGERS. I beg your Honor's pardon--he is a lawyer and  
5 he came out here for the purpose of securing evidence.  
6 Pardon me for not rising. He came out here for the pur-  
7 pose of securing evidence of Mr. Darrow. We start with  
8 this premise: We are not dealing with an ordinary conversa-  
9 tion, we are dealing with conversations that have a declared  
10 purpose, namely, the purpose of procuring evidence against  
11 Mr. Darrow. By that we mean evidence of incriminating or  
12 convicting nature, evidence against Mr. Darrow, therefore, I  
13 have a right to ask him, in view of his declared purpose,  
14 in view of his agreement that he came here for that pur-  
15 pose, and the conversation was held for that purpose, if he  
16 has told us all he got, and that is the purpose of the  
17 interrogation. And, if your Honor pleases, we have a right  
18 in view of his declared purposes, to ask him concerning the  
19 accomplishment of his declared purposes.  
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1 If, for instance, he says he came here to build a house,  
2 one may say, "Did you build a house?" If he says he came  
3 here to buy a horse, we may say, "Did you buy the horse?"  
4 Now, anything that he says was his purpose or was his in-  
5 tention, we may inquire into. He came here to get evidence  
6 against Darrow. He says so. Now, he has told us some things.  
7 I inquire of him if there is anything else of the evidence  
8 which he came here to get, namely, incriminating or convict-  
9 ing evidence, for that is what he came after, evidence  
10 against Darrow, -- if there is anything else, he has not  
11 told us.

12 THE COURT: I do not think the opinion of the witness is  
13 competent, there. Objection sustained.

14 MR ROGERS: You came here to get evidence against Darrow.  
15 Have you told us all you got? A I think so. I don't know.  
16 I have told you all I recall.

17 Q Oh. Well, now, be kind enough, in view of the serious-  
18 ness of the consequence to Mr Darrow, be kind enough to  
19 endeavor to recollect to the best of your ability and tell  
20 us if you have told us all that you got, that you came out  
21 here for.

22 MR KEETCH: I submit, the question has been answered, your  
23 Honor, a number of times.

24 THE COURT: Objection overruled.

25 MR KEETCH: It certainly has been answered the last time.

26 THE COURT: Answer the question.



1 A I am trying to think, your Honor.

2 THE COURT: Yes, take your time. A I don't recall of  
3 anything else.

4 MR ROGERS: That is all.

5 MR KEETCH: Is that the end of your cross-examination?

6 MR ROGERS: Yes sir.

7 MR FREDERICKS: Now, may it please the Court, it is ten  
8 minutes after four, and there are some things we wish to  
9 consider before taking up the redirect examination of  
10 the witness, and which we can take up in the morning.

11 THE COURT: Do you want to take an adjournment at this time?

12 MR FREDERICKS: I hate to ask for an adjournment, and I g  
13 hate to put a witness on and break in the middle of it.

14 MR ROGERS: I consent to that, I am awfully tired.

15 THE COURT: I think that in a case that is in the form as  
16 this, a matter that has run as long as this, that it is  
17 reasonable to ask for an adjournment, and I shall assume  
18 that counsel shall not impose on their privilege, but in  
19 a case of this kind it is necessary.

20 MR ROGERS: I return to your Honor the documents, in the  
21 Foster case.

22 THE COURT: Mr Clerk, take these documents, and enter them  
23 as the original files in that case, as a substitute of  
24 the original files in that case.

25 (Here, after the usual admonition to the jury an adjourn-  
26 ment was taken until 10 o'clock June 27th, 1912.)