

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. 57

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B. N. Smith,  
Official Reporter

1 July 12th, 1912, 2 o'clock P.M.

2 Defendant in court with counsel.

3  
4 CHARLES O. HAWLEY on the stand, for further  
5 redirect examination.

6 THE COURT: The files of the Tribune office, I presume,  
7 are still here?

8 MR APPEL: Yes sir.

9 THE COURT: Have you agreed upon some disposition in regard  
10 to the exhibit?

11 MR APPEL: Your Honor, before we do that, your Honor ad-  
12 mitted it in evidence, and I want, with your Honor's per-  
13 mission, I would like to call the attention of the jury  
14 to the two articles.

15 THE COURT: To the exhibit, the entire matter to the jury,  
16 as it is?

17 MR APPEL: Yes.

18 THE COURT: You may do so. Gentlemen, the clerk has just  
19 informed me that he called up the manager of the Tribune  
20 and was informed they would endeavor to get a copy of  
21 that paper and send it up here.

22 MR FREDERICKS: Then we can withdraw this and substitute  
23 the other.

24 THE COURT: Yes, if that is the stipulation.

25 MR ROGERS: Yes.

26 THE COURT: It is so stipulated.

1 MR APPEL: With your Honor's permission I will state --  
2 Mr Ford here will correct me if I am not right, one of the  
3 articles referred to by the witness is right here. Head-  
4 ed, "As it was in the beginning." Under date Los Angeles,  
5 Cal. November 28, 1911. That is one of those articles.  
6 The other one is here under page 16, Gibbons challenge on  
7 aqueduct and harbor site issues --

8 MR FORD: Issues instead of sites.

9 MR APPEL: Mr Hawley, when you were there at the head-  
10 quarters of Mr Harriman's campaign, did you have any --  
11 on the 28th day of November, 1911, did you have any conver-  
12 sation or discussion with Mr Harriman in regard to the de-  
13 bate mentioned therein in that article of the 28th, under  
14 the head of "Gibbons challenge"? A Not at that time.

15 MR FORD: Just a moment.

16 THE COURT: Do you wish to object?

17 MR FREDERICKS: No.

18 THE COURT: All right, proceed, Mr Appel.

19 MR APPEL: Did you on that day? A Yes.

20 Q When was it you had any conversation with him in ref-  
21 erence to the debate? A It was the subject of the conver-  
22 sation in the early morning.

23 Q In the early morning, that is -- yes.

24 MR APPEL: Take the witness.

25 MR FORD: That is all.

26 THE COURT: Mr Hawley, just before you leave will you state

1 your address in San Francisco? A 1144 Larkin street,  
2 that is where I live.

3 ---

4 D. M. WILLARD, a witness called on behalf  
5 of the defense, being first duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 MR ROGERS: I will have to wait just a few minutes. I  
8 will ask you to take a seat. I ask your Honor's permission  
9 to call Robert F. Bain for further cross-examination  
10 upon a matter which has come to my notice and knowledge  
11 since his retirement from the stand.

12 MR FORD: If the court please, the People's case has clos-  
13 ed. We have no objection to their calling him as their  
14 own witness.

15 MR ROGERS: No sir; cross-examination upon a matter, the  
16 knowledge of which, even intimation of which came to me  
17 after the People had closed their case.

18 THE COURT: And some questions that would properly be ask-  
19 ed on cross-examination?

20 MR ROGERS: Yes sir, which should have been asked on cross-  
21 examination and would have been asked.

22 THE COURT: You may call him.

23 MR FREDERICKS: I don't know whether he is here.

24 MR ROGERS: We subpoenaed him and he was here this morn-  
25 ing.

1 ROBERT BAIN recalled for further cross-  
2 examination;

3 BY MR ROGERS:

4 Q Mr Bain, do you know a man named I. B. Henderson?

5 A Yes sir.

6 Q Does he live next door to you? A He does.

7 Q Did you buy your house from him? A Yes sir.

8 Q Is he an intimate friend and acquaintance of yours?

9 A He has been a friend of mine ever since I knew him.

10 Q How long is that? A Three years; he has not been there  
11 all the time, he was away about a year.

12 Q He is a contractor and builder who built your house or  
13 the house you live in? A Yes, he built it.

14 Q Did you talk with him either at your house or his  
15 house, they being next door to each other, several evenings  
16 after Franklin's arrest, in the kitchen, yourself and wife,  
17 Mrs Bain and Mr and Mrs Henderson being present, and on  
18 numerous other occasions at the same place, about the mat-  
19 ter of Franklin and about your connection with respect to  
20 it?

21 MR FREDERICKS: I object to that --

22 A No sir, there was but very little ever said between  
23 myself and Henderson or anybody else in regard to that.

24 THE COURT: Do you want the answer to go out?

25 MR FREDERICKS: It was a preliminary question, and I will  
26 watch the next question.

1 THE COURT: Yes. Now, Mr Bain, don't answer the next  
2 question until Captain Fredericks has a chance to object.

3 A All right.

4 MR ROGERS: Now, in the course of that conversation did you  
5 say to Mr Henderson and Mrs Henderson and in the pre-  
6 sence of your wife, that you were too confused or too  
7 wrought up, or words to that effect, to know what you  
8 ought to do, and you said to Mr Henderson, "What would you  
9 do?" or, "What is your advice", or words to that effect,  
10 whereupon Henderson said, "If I were you I would make a  
11 clean breast of the whole thing and expose everyone who  
12 was implicated in this in any way. Who was responsible  
13 for this?" Did you thereupon reply, "Bert Franklin"?  
14 Did Henderson say "Was there anyone else implicated?",  
15 did you then answer him, "No, there was not", or words to  
16 that effect; later in the conversation, did either  
17 you or he, either Mr Henderson or yourself, or one of the  
18 ladies bring up the name of Mr Harriman and the name of Mr  
19 Darrow, whereupon, did Henderson ask you if either of  
20 them had anything to do with it, and did you thereupon  
21 reply to Henderson, "Neither one had anything to do with  
22 it", or words to that effect"?

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2p 1 MR. FREDERICKS. That is objected to on the ground, first,  
2 no foundation has been laid in point of time--

3 MR. ROGERS. I said several evenings--

4 MR. FORD. Let us make the objection and then you can  
5 argue it.

6 MR. FREDERICKS.--First that no--my head is aching so, give  
7 me as far as I went there-- (Objection read.) Second,  
8 that it is not material and not contradictory of this  
9 witness's testimony and does not tend to impeach his  
10 testimony in any way and any statement of his as to whether  
11 or not any one else was back of Franklin or associated with  
12 Franklin would be a mere conclusion on his part, his testi-  
13 mony here being that he dealt with Franklin.

14 THE COURT. I think the foundation is laid but I will hear  
15 you on the other branch of the objection, Mr. Rogers.

16 Mr. Ford wants to further amplify the objection.

17 MR. FORD. I want to say in regard to the character of the  
18 question as an impeaching question, this witness testified  
19 on direct examination and cross-examination, the only  
20 person that he had anything to do with was Mr. Franklin.

21 THE COURT. Mr. Ford, I think you can assume that the court  
22 has a fair recollection of the testimony.

23 MR. FORD. I was simply reciting it.

24 THE COURT. I have a very clear recollection of the testimony  
25 to which this question is directed.

26 MR. FORD. I have not the slightest doubt of that or I would  
have produced the transcript itself. I wish to show now,

1 that being the situation, any statement that this witness  
2 might make as to any other matters outside of his knowledge,  
3 outside of what he testified to on direct examination would  
4 be a mere conclusion.

5 THE COURT. I think that is fully covered by Captain  
6 Fredericks' objection. I will hear you, Mr. Rogers. I  
7 think the foundation is laid.

8 MR. ROGERS. The foundation is laid. This witness testified  
9 that Franklin told him that Darrow had given him, Franklin,  
10 \$20,000 for such purposes, and he remembered it. Mrs.  
11 Bain, who is recited to have been present at the time this  
12 conversation is said to have occurred, is said to have  
13 related that Franklin said that Darrow had sent him out  
14 there, or words to that effect, and that Darrow had given  
15 Franklin a large sum of money. Darrow's name was brought  
16 in by these two people, and I purpose to show that  
17 not only on this occasion but on several occasions that the  
18 matter was brought up. This witness said that neither  
19 Darrow or Harriman had anything to do with it or knew any-  
20 thing about it, or words to that effect, if that is not a  
21 contradiction--had no information on it.

22 MR. FREDERICKS. Now, that is different. When counsel  
23 says, "No information," that is different. That makes a  
24 different question out of it. I, of course, do not know  
25 how this witness will answer this, but assuming that he  
26 did say it, which is the only object of the question, to



1 prove he did say it, it would not contradict him. It is  
2 true--I remember the testimony which is as counsel has narra-  
3 ted it, but that would not justify him nor cause this wit-  
4 ness to have any different opinion than the one that he is  
5 alleged to have expressed, if he did express it, and the  
6 mere fact that Franklin told him this that Darrow had some-  
7 thing to do with it, does not connect Darrow with it in his  
8 mind and he may have said it and still it would not be any  
9 contradiction of his testimony here. He may have said to  
10 this gentleman, Darrow had nothing to do with it and still  
11 it would not contradict his testimony because he testified  
12 Franklin said that is what--

13 THE COURT. I think that is a matter for argument and the  
14 weight to be given it is a matter for the jury, and I think  
15 in view of the statement which you made <sup>in</sup> your objection,  
16 slipped my mind. I think counsel is entitled to it.  
17 Overruled. Answer the question.

18 A I don't think anything of that kind ever took place in  
19 Henderson's house, because I was always very careful not  
20 to say a word about it until especially after the trial  
21 was over. I would not even allow my wife to talk about it.

22 MR. ROGERS. Q Did you have a conversation from time to  
23 time about this matter immediately following Franklin's  
24 arrest with this gentleman, Mr. Henderson, at your house and  
25 at his house?

26 MR. FREDERICKS. That is objected to, may it please the  
court, as not impeaching.

1 THE COURT. That is preliminary, I think he answered it, Mr.  
2 Rogers, I think he has already answered that question.

3 MR. ROGERS. Possibly he has. Q Now, did you not on  
4 several different occasions between the time of Franklin's  
5 arrest and the time you testified at the preliminary ex-  
6 amination of Franklin the first time, did you not on  
7 several occasions say to Mr. Henderson, no one else had  
8 anything to do with it or knew anything about it, or words  
9 to that effect, meaning--except Franklin?

10 MR. FREDERICKS. That is objected to on the ground that  
11 no foundation has been laid in point of time.

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1 MR FORD: If the court please, it is also objectionable  
2 in that it does not in anywise tend to impeach the state-  
3 ment made by the witness about it. That probably,  
4 would refer, if counsel should receive an affirmative  
5 answer from the witness as to the conversation, "about it",  
6 would probably refer to the passing of money from Mr  
7 Franklin to this witness, and they two being alone, the  
8 witness, if he did say such a thing, would be absolutely  
9 correct in saying no one else knew anything about it, or  
10 about the bribery of their own knowledge; it would be hear-  
11 say if he did say that.

12 THE COURT: That would be a question for interpretation,  
13 the weight to be given it is a matter for the jury.

14 MR FREDERICKS: How about the time?

15 THE COURT: About the time. Is that as definite as you  
16 can fix it?

17 MR ROGERS: On several different occasions in the evening  
18 between the time of Franklin's arrest and the time that  
19 this witness testified at the first preliminary examination

20 THE COURT: The court does not require you to do any more  
21 than you are able to do.

22 MR ROGERS: That is as definite as I can make it.

23 THE COURT: That is definite enough. Objection overruled.

24 A Well, as I stated, there was never but very little  
25 said about it, the trial, at all.

26 MR ROGERS: Please tell me whether he said that or any-

1 thing like that? A There was one time my wife was over  
2 there, I was not there that evening.

3 Q You were not there that evening? A I was not there.

4 Q Then you don't know what happened, and naturally you  
5 cannot testify to it? A All right, then.

6 Q You didn't hear it yourself? A No, I did not.

7 Q Then you cannot testify to it. Do you deny making  
8 those statements, Mr Bain, or anything like them, or to that  
9 substance and purport? A There was very little said about  
10 it. He came over to my house next morning after I got home  
11 and he said, "This is a bad thing." I said, "Yes, it's done  
12 and can't be helped now." And then -- let's see -- said he  
13 wanted to know how it was going to come out. I said I  
14 didn't know, time would show, and he said -- he says, it  
15 is a bad thing all the way through. It was probably  
16 three or four days after that, we were back and forth, he  
17 lived right in the back part of the lot, right next to me --  
18 we was back and forth and he brought up the subject once  
19 or twice, and I told him, "Henderson, here, we have agreed  
20 not to say anything about this." I says, "and the less  
21 that is said about it the better." There might have been  
22 little things dropped in, but they didn't amount to any-  
23 thing one way or the other.

24 Q Pardon me if I ask you for a direct answer. Do you  
25 deny saying the things that I have quoted? A In part,  
26 yes sir. I might have said somethings there, but there is

1 some things that I know I didn't say.

2 Q Well, what didn't you say? A I don't remember just  
3 exactly the way -- what I said, in the way I said it -- we  
4 spoke something about them and that was about all there  
5 was to it. I told him I didn't want to hear any more  
6 about it.

7 Q Do you know a man by the name of Willie? A Yes.

8 Q Do you know a man called "Stiff-neck Ben"? A Yes.

9 Q Have you been working for the District Attorney's of-  
10 fice since the arrest of Franklin? A I have not.

11 Q Have you been working for them in the detection of gamb-  
12 ling joints? A No sir.

13 Q Were you out here since this Franklin matter,  
14 out at Willie's gambling place on Boyle Heights and when  
15 a raid took place, and was the house arrested, among  
16 them Willie and Stiff-neck Ben, and you allowed to go as  
17 the stool pigeon of the District Attorney?

18 MR. FREDERICKS: Well, -- we will not object?

19 A I was not arrested, no sir. As I understood they only  
20 took Willie and stiff-neck Ben, as you call him.

21 MR. ROGERS: Were you there when the raid was made? A I  
22 was there.

23 Q And Willie and Stiff-necked Ben were arrested for  
24 running a gambling joint, with you there? A I was there,  
25 yes sir.

26 Q What were you doing there? A I went out there to see

1 Willie about making window frames for his house.

2 Q That is not the first time you have ever been arrest-  
3 ed in a gambling joint, is it?

4 MR FREDERICKS: Objected to as incompetent, irrelevant  
5 and immaterial.

6 MR ROGERS: Weren't you acting for the District Attorney  
7 at that time in the detection of Willie and Stiff-neck  
8 Ben at the gambling joint? A I told you I was not.

9 Q You were not? A No sir.

10 MR ROGERS: That is all.

11 MR FREDERICKS: Were you, Mr Bain, even employed by the  
12 District Attorney's office in any way, shape or form?

13 A No sir.

14 MR FREDERICKS: Did you ever have any -- did you ever do  
15 any business -- well, I guess I have covered it. That  
16 is all.

17 ---

1 D. M. W I L L A R D,

2 recalled by the defense for direct examination.

3 MR. ROGERS. Q Will you please give your name?

4 A Daniel M. Willard.

5 Q Where do you live--

6 THE COURT. Just a moment. For the convenience of counsel

7 I will announce at this time that when court adjourns

8 this evening it will adjourn until Monday morning at 10

9 o'clock.

10 MR. ROGERS. Q Did you give your address, Mr. Willard?

11 A 220 West Fourth street, this city.

12 Q What is your business? A Press telegrapher.

13 Q And by whom are you engaged at the present time?

14 A Associated Press.

15 Q You have been sending out Associated Press accounts of  
16 this trial have you, from time to time, as they have been  
17 prepared? A Yes, sir.

18 Q Do you know Bert H. Franklin? A I met him, yes, sir.

19 Q Did you see Bert H. Franklin in company with a man  
20 named Pearson at Judge Young's court or in the immediate  
21 vicinity of Judge Young's court at any time? A Yes, sir.

22 Q When was that? A At the time of Franklin's preliminary  
23 hearing last December, I think it was.

24 Q Who is Mr. Pearson? A Pursons.

25 Q Pursons? A He is the representative of the Associated  
26 Press in Frisco.

1 Q He is now in San Francisco? A yes, sir, that is his  
2 headquarters.

3 Q Did you have a talk with Franklin at that time, at the  
4 time of that preliminary examination and at that place,  
5 that is, either in Judge Young's court or in the immediate  
6 vicinity --

7 MR. FORD. There were two preliminary examinations.

8 MR. ROGERS. Q Do you remember which preliminary it was, Mr.  
9 Willard? A The one before Justice Young that was held  
10 in the same court where the McNamara trial was held.

11 MR. FORD. Two were held there.

12 MR. ROGERS. Q Which one was that, Mr. Ford?

13 MR. FREDERICKS. They were both held there.

14 MR. ROGERS. Q Do you remember whether it was the first  
15 or second preliminary? Do you remember whether it was  
16 the Lockwood case or the Bain case? A It was in the  
17 Lockwood case.

18 Q It was in the Lockwood case? A No, I beg your pardon.  
19 I believe, now, it was the Bain case--it was the Bain case.

20 Q Yes. At that time and at that place, as I have said,  
21 in Justice Young's court or in the immediate vicinity there-  
22 of, did Mr. Franklin say this to you, in substance or  
23 effect: "I cannot talk about my case until it comes up  
24 for trial in the Superior Court, except one thing, Mr. Darrow  
25 knows nothing about this affair and you can make that as  
26 broad as you like?" A Yes, sir.



1 Q At the same time using a motion of his hand? A Yes,  
2 sir . he made a gesture like that when he said it. (Indi-  
3 cating.)

4 Q A gesture? A yes, sir .

5 Q And "you can make that as broad as you like--" using the  
6 gesture mentioned? A Yes, sir .

7 Q How many times did he use that gesture while he was  
8 speaking to you? A I think only once, in the latter part  
9 of it in making it broad.

10 MR. ROGERS . That is all.

11

12 CROSS-EXAMINATION.

13 MR. FORD . Q you do not pretend what you have just now  
14 said is the exact language used by Mr. Franklin on that  
15 occasion, do you ? A I believe those are the exact words,  
16 yes, sir .

17 Q Did you make any memorandum of that at that time?

18 A No, sir .

19 Q You were not a reporter at that time? A no, sir .

20 Q You received all your stuff from a representative of  
21 the Associated Press and then send it out over the tele-  
22 graph wires? A That is correct.

23 Q Whatever is given to you by a reporter? A Yes, sir .

24 Q You did not interview Mr. Franklin for the purpose of  
25 securing any news at that time? A No, I did not, but Mr.  
26 Pursons, who introduced himself to Franklin introduced

1 Franklin to me--he asked Franklin if he wanted to make any  
2 statement and Franklin made that reply to both of us .

3 Q Now, what did he state? A That, "I cannot talk about  
4 my case until it comes up for trial in the Superior Court,  
5 except to say one thing, Mr. Darrow knows nothing of this  
6 affair and you can make it as broad as you like."

7 Q Were you present in the court room while that preliminary  
8 examination was being held? A The one I spoke of? yes,  
9 sir.

10 Q Do you recall that during that examination Mr. Lockwood  
11 had testified as a witness? A I do not recall that, no,  
12 sir.

13 Q You do not recall that Mr. Lockwood was a witness in the  
14 Lockwood case--

15 MR. ROGERS. Pardon me--

16 MR. FORD. Oh, this was the Bain case.

17 A This was the Bain case, yes, sir.

18 Q MR. FORD. Don't you recall that Mr. Lockwood was a witness  
19 at that time? A I do not.

20 Q Do you recall that Mr. Bain was a witness? A He was.

21 Q At this conversation, was it not right after Mr. Lockwood  
22 had testified? A It was right after court had adjourned  
23 for that hearing.

24 Q Adjourned for the matter--

25 MR. ROGERS. Wait a moment--please finish the answer.

26 A The Court had adjourned for that hearing and Mr. Franklin  
was leaving the room.

1 MR. FORD. Q Did it adjourn entirely on the entire pro-  
2 ceeding? A For that day, anyhow, yes, sir.

3 Q For that day? A Yes, sir.

4 Q Don't you now recall Mr. Franklin was very angry towards  
5 Mr. Lockwood on that occasion? A I do not.

6 Q You do not recall that he criticised Mr. Lockwood for  
7 testifying against him? A I do not.

8 Q You never heard him on any occasion express any anger  
9 towards Mr. Lockwood?

10 MR. ROGERS. That is not cross-examination.

11 MR. FORD. For the purpose of fixing the time, I want to  
12 show this occurred after Lockwood had testified and that the  
13 witness has not got the language correctly.

14 THE COURT. All right, if that is the purpose of it the  
15 objection overruled?

16 A I did not.

17 MR. FORD. Q Did you send out any associated press report  
18 of what Franklin had said on that occasion? A Send to  
19 whom?

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1 Q To you and Mr Persons? A Yes sir.

2 Q Have you got that with you? A No sir.

3 Q Have you looked at it since that time? A No sir.

4 Q Can you procure a copy of that Associated Press report  
5 that you sent out on that day? A Well, I doubt it, be-  
6 cause I do not think our records will go back more than  
7 six months, and it is pretty hard to get them even then.

8 MR FORD: We will ask leave to recall the witness and cease  
9 our cross-examination at this time, your Honor, until we  
10 get certain material.

11 THE COURT: All right.

12

13 REDIRECT EXAMINATION

14 MR ROGERS: just a moment, Mr Willard. Concerning the man-  
15 ner in which this came back to you, do you remember the  
16 circumstances of how this came to your mind? A Yes sir.

17 Q How was that?

18 MR FORD: Just a moment. I think in all fairness we ought  
19 to conclude our cross-examination before he begins to  
20 turn him over, --

21 MR ROGERS: I do not see any reason for that.

22 MR FORD: We will be prepared to do that the first thing  
23 Monday morning.

24 MR ROGERS: I do not think that is necessary at all, sir.  
25 We can redirect him.

26 MR FORD: It would be more regular.

1 MR FREDERICKS: This is cross-examining their own witness,  
2 your Honor. He has said he remembers it, and now one  
3 can only remember what he remembers.

4 THE COURT: I think in view of the fact that the District  
5 Attorney disposed of him for the present, counsel is  
6 entitled to redirect as to any matters that have been  
7 brought out, if any, and then take up the matters Monday  
8 morning.

9 MR FORD: But I have not finished the questions on memory.  
10 That is what I want to go into.

11 THE COURT: Go ahead.

12 MR ROGERS: You remember the circumstances under which  
13 this came to your recollection? A Yes sir.

14 Q What were they? A I heard Mr Franklin testify on  
15 this stand.

16 Q Where was that? A In this trial.

17 Q Was it in this court room? A In the Hall of Justice.

18 Q You were sitting at the reporter's table at that time?

19 A Yes sir.

20 Q And you heard him testify and remembered it? A And  
21 remembered it, yes sir.

22 MR ROGERS: That is all.

23 MR FORD: Just a moment.

24  
25 RE-CROSS-EXAMINATION

26 MR FORD: You mean you heard Mr Rogers asking Mr Franklin

1 if he had said these things? A No sir, I heard Mr Rogers  
2 ask Franklin if he had told anyone that Mr Darrow had had  
3 nothing to do with the affair, and he said no, and I  
4 remembered then that he had told me that very thing.

5 Q And you wrote out the questions for Mr Rogers to ask,  
6 did you? A I wrote out a statement and gave it to Mr  
7 Rogers, of what Franklin had said to me.

8 MR FORD: That is all for the present.

9 MR ROGERS: That is all.

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11 FERN KERNEGHON, a witness called on behalf  
12 of the defense, being first duly sworn, testified as follows:

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DIRECT EXAMINATION

14 MR ROGERS: Your name? A Fern Kerneghon.

15 Q How do you spell it? A K-e-r-n-e-g-h-o-n.

16 Q Where do you live, Miss Kerneghon? A 1207 West Third  
17 street.

18 Q In this city? A Yes.

19 Q How long have you lived in Los Angeles? A I have  
20 been here more or less since last October.

21 Q Have you an occupation? A Yes.

22 Q What is it? A Stenographer.

23 Q Have you practiced your occupation here in the city?

24 A Yes.

25 Q Are you employed at the present? A At the Security  
26 Bank.

1 THE COURT: Will you speak a little louder, please? A Yes.

2 MR ROGERS: You say you are at present employed in your  
3 occupation. A At the Security Bank.

4 Q Securing Savings Bank in this city? A Yes sir.

5 Q Did you ever work for Mr Darrow or up in the office  
6 of Mr Harriman? A Yes.

7 Q When was that, Miss Kenneghon? A In October of last  
8 year, until December.

9 Q From October until December? A Yes.

10 Q About what part of October? A The second week, the  
11 11th of October, I believe I came down here.

12 Q And remained until sometime in December? A The 1st  
13 of December, the first week.

14 Q And in what capacity were you employed? A Stenog-  
15 rapher.

16 Q And where was the room that you occpied or used?

17 A Well, it was the outer office where the telephone ex-  
18 change was; I don't remember the number of the room.

19 Q Do you know John R. Harrington? A Yes.

20 Q When did you come to know John R. Harrington?

21 A Well, almost immediately after I commenced working in  
22 the officesthere.

23 Q And did you know him from that time on until you ceased  
24 to work there? A Yes.

25 Q Did you know Bert H. Franklin? A Yes.

26 Q When did you first know Franklin? A I don't remember,

1 during the first few days that I was at the office.

2 Q The first few days of your employment? A Yes.

3 Q During the time that you were there from October  
4 until December, or the 1st of December, sometime, state  
5 whether or not you saw Harrington, the man I have named,  
6 and Franklin, the other man I have named, together?

7 A Many times.

8 Q Many times? A Yes.

9 Q Where? A Well, in Mr Harrington's office.

10 Q In Mr Harrington's office. Do you recall seeing  
11 them anywhere else than in the office? A I have seen  
12 them leaving the building, probably, and come in.

13 Q By "many times" can you give us any specific statement  
14 as to the number of times you say, many times, can you  
15 give us your best recollection and estimation of the number  
16 that would be? A Well, no. I suppose they were together  
17 almost daily, but I didn't see them every time they were  
18 together.

19 MR FREDERICKS: We object to that and move to strike out  
20 that part of the answer.

21 MR ROGERS: Yes, that may go out.

22 THE COURT: Yes, strike it out.

23 MR ROGERS: You saw them many times, you say, but are un-  
24 able to give the number? A I could not give that.

25 Q How would it be with respect to being daily, every other  
26 day or third day or something of that sort? A I couldn't



1 say.

2 MR FORD: Just a moment.

3 MR ROGERS: I beg your pardon --- you couldn't say?

4 A I couldn't say.

5 MR FORD: We were going to object to a leading question --  
6 he didn't give us an opportunity.

7 MR ROGERS: It is the same thing.

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6pp 1 Q Give us an estimate of the number of times, your best  
2 recollection. A I don't believe I could; a dozen or two  
3 I should say at least.

4 Q A dozen or two at least. A yes.

5 MR. ROGERS. You may cross-examine.

6  
7 CROSS-EXAMINATION.

8 MR. FREDERICKS. Q Miss Kerneghon, both you and Mr. Harrington  
9 and Mr. Franklin and many others were working for the  
10 defense in the case, were you not? A Yes.

11 MR. FREDERICKS. That is all.

12 MR. ROGERS. That is all.

13  
14 H A R R Y H J O N E S,

15 a witness called on behalf of the defendant, being first  
16 duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 MR. ROGERS. Q your name, please? A Harry H. Jones.

19 Q Your residence? A 4201 South Grand.

20 Q in this city? A Yes, sir.

21 Q How long have you lived in this city, Mr. Jones? A I  
22 think about six years.

23 Q your occupation? A Newspaper man.

24 Q With what paper are you connected? A The Tribune.

25 Q You have been reporting this trial since it started for  
26 the Tribune? A Yes.

1 Q Do you know Bert H. Franklin? A I do.

2 Q How long have you known Franklin, as near as you can  
3 remember? A Oh, I should say four years.

4 Q During the preliminary examination on the Lockwood case  
5 in Department 9, and by the Lockwood case I mean of Franklin  
6 upon the Lockwood charge in Department 9 in the Superior  
7 Court before Judge William Young, did you hear Franklin say  
8 the following words, or words to the same substance and  
9 effect: "Any man who says I mentioned Darrow's name at  
10 that time is a God Damn liar. I might be guilty of all I  
11 am charged with but I am not a damn fool, I certainly am not  
12 going to drag an innocent man into this thing," or words  
13 to that substance and purport?

14 MR. FREDERICKS. Just a moment, Mr. Jones--

15 MR. FORD. Now, if the court please, we object to the  
16 whole of the question on the ground that no foundation has  
17 been laid--referring back to volume 11, beginning at page  
18 839, the question asked of Mr. Franklin was as follows:  
19 "Any man who says I mentioned Darrow's name at that time  
20 is a God Damn liar. I may be guilty of all I am charged with  
21 but I am not a damn fool, I certainly am not going to drag  
22 an innocent man into this thing," or words to that sub-  
23 stance or effect--" and the answer was "I said almost  
24 exactly the words you used to Mr. Timmons, with the excep-  
25 tion of the latter part, I didn't say that to him or  
26 anybody else."

1 MR. ROGERS. This is not Mr. Timmons.

2 MR. FORD. The question was with regard to Jones and  
3 Timmons and all of them there.

4 MR. ROGERS. No, you will find the record at page 840  
5 exactly as I have read it.

6 MR. FREDERICKS. Our position is that Franklin did not  
7 deny having made that statement, he did deny having  
8 made a small portion of it.

9 MR. FORD. The answer was, "I said all of it except the  
10 last part of it which you put onto the end of it." So it  
11 is only the last part that can be introduced as impeach-  
12 ment. "I certainly am not going to drag an innocent man  
13 into this thing," that was the part Franklin denied saying  
14 and then down to the next question shows that, "You did not  
15 say to Mr. Jones, 'I certainly am not going to drag an  
16 innocent man into this thing?' A-.I did not, him or any  
17 body else. All the statements you have repeated at Judge  
18 Young's court were to the effect as you have stated in that  
19 particular statement except the latter part of it."  
20 It is only the latter part for which any foundation has  
21 been laid at the present time.

22 MR. ROGERS. That is altogether true, but the conversation  
23 as a whole must be in in order that the part that is  
24 denied may be brought to the attention of the witness, and  
25 I put the question to the witness precisely as I put it to  
26 Franklin, the whole of it, as a whole conversation, and

1 his denial of a part of it renders the whole conversation  
2 susceptible of being put to an impeaching witness, page 840.

3 THE COURT. I have it.

4 MR. FORD. He wont deny the latter part. We submit it.

5 THE COURT. Objection overruled.

6 A That was his statement, to the best of my recollection.

7 MR. ROGERS. You may cross-examine.

8

9

CROSS-EXAMINATION.

10 MR. FORD. Q Are those the exact words, Mr. Jones?

11 A Well, Mr. Ford, I couldn't say that they are the exact  
12 words but I don't think there could have been very much of  
13 a divergence from that.

14 Q You don't remember the exact words? A To the best  
15 of my recollection those were the exact words.

16 Q Those were the exact words? A Yes, sir.

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1 Q You may be mistaken? A It is possible that there is  
2 a word or two --

3 Q Now, do you mean that those are the exact words or  
4 that is the effect of it, or substance of it? A It  
5 certainly is the substance of it, and to the best of my  
6 recollection those are the exact words.

7 Q How old are you? A 28.

8 Q Where did you come from to Los Angeles? A Came from  
9 Arizona.

10 Q Were you born in Arizona? A No sir.

11 Q Where were you born? A Indiana.

12 Q How long did you live in Arizona before you came to  
13 Los Angeles? A Well, the first time, I should say two  
14 years.

15 Q You have been in the employ of the defense in this  
16 case, have you not? A No sir.

17 Q Been in the employ of Mr Darrow or Mr Rogers at any  
18 time in any manner? A No sir.

19 Q Haven't you been around active among the newspapermen  
20 here trying to secure statements from them, or from them  
21 for the defense? A No, I think they have been trying to  
22 secure statements from me.

23 Q That who has? A The newspaper men.

24 Q The newspapers have been trying to secure statements  
25 from you? A Yes.

26 Q From you? A Yes.

1 MR ROGERS: That is what he said. You might get the record  
2 read, without bulldozing the witness.

3 THE COURT: Now, now; Mr Rogers.

4 A No, I am not around trying to secure statements from  
5 anybody except in the interests of my paper.

6 MR FORD: Except for your paper? A That is all.

7 Q You haven't been trying to secure statements from the  
8 various newspaper men, however? A No.

9 Q You deny having tried to secure any statements from the  
10 newspapermen? A I certainly do.

11 Q Do you know I. A. Kellogg? A I do.

12 Q A Herald reporter? A I do.

13 Q Do you remember meeting him during the early days of  
14 the Darrow trial in the Federal Building in this city?

15 A I have seen Kellogg almost daily since the Darrow  
16 trial has been in progress, and over at the Federal Build-  
17 ing I presume.

18 Q What other places have you seen him besides the Feder-  
19 al Building? A I have seen him around the different --

20 Q Corridors of the court-house? A Yes.

21 Q Do you recall seeing Mr Kellogg during the early days  
22 of this trial either in the Federal B<sup>u</sup>ilding or the Corri-  
23 dors of the Court-house, and at that time saying to him,  
24 you and he being alone, that you stated to Mr Kellogg,  
25 were you at the boys' when Franklin denied Darrow had any-  
26 thing to do with the bribery and at which Kellogg replied

1 "I do not think so." Did you not then say, "Don't you  
2 think we ought to go in and help the old man out of the pen-  
3 itentiary", and did not Kellogg then reply, "No, I think  
4 he is guilty;" did you not then say, "Maybe he is, but we  
5 are going in and help him and get him out of it; he has  
6 always been a good fellow with the boys; we ought to do it"?

7 A I did not.

8 Q Did you ever at any time -- did you say anything like  
9 that in substance or effect? A I did not.

10 Q Did you meet Mr Kellogg on July 10th at Sixth and  
11 Broadway day before yesterday? A I think so.

12 Q You had a conversation with him at that time? A Yes  
13 sir.

14 Q Who else was present at that time? A People on the  
15 street; I don't know anyone overheard the conversation.

16 Q At that time did Mr Kellogg say to you -- did not this  
17 conversation occur, Mr Kellogg say to you, "I would have  
18 hard work to remember Franklin's --" and at that time  
19 did you not ask Mr Kellogg to appear as a witness for the  
20 defense, and did not Mr Kellogg reply, "I would have hard  
21 work to remember Franklin's exact words". Did you not  
22 then say, "I don't know that I could remember them."?

23 A I did not.

24 Q You did not? A Pardon me; I did not:

25 Q Did not Mr Kellogg then say, "If they ask you, what  
26 will you say?", and did you not reply, "I will say he said



1 that or words to that effect." Did Mr Kellogg then say,  
2 "The questions directed against Franklin were shaped so he  
3 could not answer them because they contained words that he  
4 did not say; or "meanings that he did not intend," and did  
5 you then -- did he not further say he had to deny certain  
6 things because of the cunning wording; did you not then say  
7 "That don't make any difference; that is splitting hairs",  
8 and did you not also say, "You mean that on the stand  
9 Franklin made technical denials of the questions and not  
10 denials that he, in fact, had said that Darrow had nothing  
11 to do with it. Did such a conversation occur between you  
12 and Mr Kellogg? A There was a conversation concerning --

13 Q Answer yes or no; then you may modify it. A No such  
14 conversation as that --

15 Q Neither in substance nor effect? A Mr Franklin was  
16 discussed.

17 Q Well, answer this question.

18 MR APPEL: He says he wants to explain. He started in to  
19 say what was said.

20 THE COURT: He has said no. Now, he wants to explain.

21 MR APPEL: This is another question.

22 MR FORD: Did he say anything like that in words?

23 MR FREDERICKS: May it please the court, we must ask, did  
24 you say that in substance or effect. We did ask did you  
25 say that, and he said no. Now, he wishes to add --

26 THE COURT: I am about to admonish him it is his duty to

1 answer that question yes or no, and then he may make such  
2 explanation as he desires. Is that clear?  
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1 MR. FORD: I haven't been allowed to finish it. Did you  
2 have such a conversation, either in words, substance or  
3 effect? A I would like to have the previous question  
4 read.

5 THE COURT. Yes, read the previous question and answer.  
6 (Last question read by the reporter.)

7 A No, sir.

8 MR. FORD. Q Niether in words, effect or substance, yes  
9 or no? A As I remember--

10 THE COURT. Now, Mr. Jones, you should answer that question  
11 yes or no and then make such amplification and explanation  
12 as you desire?

13 A No, sir. Nowy can I explain?

14 THE COURT. You may explain.

15 MR. FORD. Just a moment--

16 MR. APPEL. He must explain.

17 MR. FORD. We wish to take issue with the court on that  
18 proposition. I think we can show your Honor that that  
19 is not proper on an impeaching question. We have put an  
20 impeaching question asking him if he had a certain conversa-  
21 tion and he says no. We asked if he had it either in sub-  
22 stance or effect and he says no. Now, if he did not have  
23 that conversation it is absolutely immaterial what other  
24 conversation he might have had unless he wishes to modify  
25 this. That is the only explanation he can make. If he  
26 wishes to modify it or say he said it in part, all right.

1 There was part of it he wishes to say, that would be a  
2 modification which would be permissible, but for the  
3 witness to go on and say anything else, any other conversa-  
4 tion or talk about an entirely different subject, or  
5 even talk about the same subject but say nothing like  
6 this, it would not be in any sense a modification of his  
7 answer. That is all he is allowed to do, to modify his  
8 answer. The witness cannot go on and explain his reasons  
9 for believing certain things to have occurred or not  
10 occurred and give his conclusions.

11 THE COURT. Mr. Ford, you have no difference of opinion  
12 between you and the court. I don't know how an explanation  
13 to the answer could be other than a modification of it.

14 MR. FORD. Put, your Honor, witnesses sometimes when  
15 asked--when they ask for an opportunity to explain their  
16 answer, go off in a long lecture on something entirely  
17 out of the record.

18 THE COURT. If he does it will be stricken out.

19 MR. FORD. But the harm is done then.

20 MR. FREDERICKS. I would just like to add one statement,  
21 that I believe it to be the rule--I believe it to be the  
22 rule that on impeaching questions you may ask--this is our  
23 impeaching question of this witness.

24 THE COURT. yes.

25 MR. FREDERICKS. That you may ask the witness, Did you not  
26 testify thus and so or in words to that effect or in sub-

1 stance. He must answer that yes or no; that that ends  
2 the controversy. There can be no amplification of it or  
3 could not be permitted to show what had happened or what  
4 had occurred.

5 THE COURT. You are entirely right so far.

6 MR. FREDERICKS. because, when it comes our turn, for  
7 instance if we should desire to put Mr. Kellogg--we may put  
8 Mr. Kellogg on and propound to him the exact question we  
9 have propounded to this witness, and he can answer it in the  
10 affirmative or the negative, and they cannot amplify, either  
11 one of them. I believe that to be the rule.

12 MR. APPEL. When Franklin was on the stand he was allowed  
13 to explain about everything.

14 MR. FORD. If we can ask one question with your Honor's  
15 permission, I think it will dispose of it; I think our  
16 reasons will appear.

17 Q Is the statement which you have made to the effect that  
18 you never had such conversation, either in words, effect  
19 or substance, do you say that without any qualification  
20 whatever? A No, I don't say it without qualification.

21 Q Then you did have a part of the conversation? A I dis-  
22 cussed it with Mr. Kellogg, yes, sir.

23 MR. ROGERS. Just wait a moment, Mr. Jones. Mr. Franklin  
24 sat on that stand day after day and every time I put an  
25 impeaching question to him he was allowed to slosh all over  
26 four pages of explanations and denials, qualifications and

1 one thing and another and here they put a question that  
2 doesn't sound like anybody that knew the English language  
3 talked it until we cannot understand it and the witness  
4 desires to explain and is not allowed to.

5 THE COURT. Mr. Rogers, you are jumping into conclusions.

6 THE COURT has held that he is entitled to make such an  
7 explanation or modification, but has listened to the District  
8 Attorney as he will always listen to the District Attorney  
9 or to the defendant so long as they want to be heard upon  
10 questions of law.

11 MR. APPEL. We were just simply stating a precedent.

12 MR. ROGERS. Asked two more questions.

13 THE COURT. For the purpose of merely clearing the present  
14 purposes of his position and the questions were allowed  
15 for that purpose and the court hasn't changed the ruling  
16 heretofore made and the witness is now directed to make  
17 such explanation and confine his explanation to a modifica-  
18 tion of his answer as he may see fit. Proceed, Mr. Jones.

1 A The Darrow case was discussed in various ways, as I  
2 remember the conversation, I told Mr Kellogg I expected  
3 to be called as a witness at any time, and he asked me what  
4 I would testify to, and I told him concerning certain  
5 statements that Franklin made to me. The subject was  
6 generally discussed then, if I remember right, and he ask-  
7 ed me if Franklin made the statement, and I said yes, and  
8 during the discussion I told him that I thought Franklin  
9 made a mistake by denying it in his testimony, and he says  
10 that Franklin probably did not say word for word what Mr  
11 Rogers had put to him in his entire questions, and I says,  
12 "Kellogg, I think you are splitting hairs." I think that  
13 is all there was to the conversation. Now, I never asked  
14 Kellogg if he would be a witness, because I didn't know  
15 Kellogg until weeks and weeks after the Franklin preliminary  
16 hearing. I didn't know there was such a man in existence.

17 MR FORD: At the time you heard this alleged interview  
18 with Mr Franklin, what was your business? A I was a news-  
19 paper man.

20 Q For what paper? A The Tribune.

21 Q What particular assignment did you have at that time?

22 A I had the Franklin case.

23 Q Reporting it? A Yes sir.

24 Q Did you ever write this interview in your paper or  
25 publish it? A I turned the interview in to the city editor  
26 whether it was published or not, I don't know.

1 Q As a matter of fact you know it never was published,  
2 don't you? A I know no such thing, sir.

3 MR APPEL: Wait a moment. It is immaterial and not cross-  
4 examination.

5 MR FORD: Did you look for it? A No sir. I don't  
6 think that file covers it. I think it was in December.

7 MR FORD: Yes, I see this is only for November. Don't  
8 you know you never wrote such a story, and that such a  
9 story was never published in the Tribune?

10 MR ROGERS: Just a moment now; that is a double ques-  
11 tion.

12 THE COURT: Objection sustained on that ground.

13 MR ROGERS: I take exception to the manner and attitude of  
14 counsel in his questioning of the witness under these  
15 circumstances, and in that vicious repeating the question,  
16 and saying, "Don't you know" by repetition, and I suggest  
17 to the court that in view of the well known feeling of  
18 bitterness on the part of the District Attorney's office  
19 against the Tribune, for various reasons, that it does not  
20 become them to insult a reporter to get even that way.

21 MR FREDERICKS: Now, may it please the court, I wish to  
22 state that the District Attorney's office has no feeling  
23 or antipathy towards the Tribune in any way, shape or form,  
24 and that is a personal matter, and I don't wish it to go  
25 undenied. We have no such feeling. I have no such feeling  
26 toward any paper or any man on God's green earth; life



1 is too short.

2 MR FORD: And personally I am a subscriber to the paper,  
3 and read it every day.

4 THE COURT: Now, let's go on with the examination of this  
5 witness. Objection sustained on the ground it is a dou-  
6 ble question.

7 MR FORD: Don't you know that such a story was never pub-  
8 lished in the Tribune?

9 MR APPEL: Objected to as immaterial whether it was pub-  
10 lished or not. He has already answered it, though.

11 A I don't know whether it was or not.

12 Q You don't know that it was ever published. Who is  
13 your city editor? A Our city editor at that time, I  
14 think was Mr J. C. Stewart.

15 Q And you turned a story in to him? A Yes sir.

16 Q Have you ever looked for that memorandum? A What mem-  
17 orandum.

18 Q The document which you wrote, the story which you  
19 wrote -- copy. A No.

20 Q Copy is the term you use for it, is it? A Yes sir.

21 Q You have never looked for it? A No sir.

22 Q You knew for sometime you were going to be a witness  
23 in this case? A I didn't suspect it even, until Mr  
24 Rogers cross-examined Bert Franklin.

25 Q Didn't suspect it until that time? A No sir.

26 Q You furnished him the account of what had transpired

1 in order that he might cross-examine Mr Franklin on it,  
2 did you not? A He asked me for it and I furnished it  
3 to him.

4 Q He asked you for it and you furnished it to you?

5 A Yes sir.

6 Q Did you go down to your office and get the exact words?

7 A I did not.

8 Q You did not? A No sir.

9 Q You are not sure that these are the exact words?

10 A To the best of my recollection they are the exact words.

11 Q Well, but you are qualifying it with the words, "best  
12 of my recollection"? A Yes sir.

13 MR ROGERS: I take an exception to that as not cross-exam-  
14 ination, and I object to the question upon the same grounds  
15 already asked and answered at least three times.

16 THE COURT: I think that objection, it is asked and answer-  
17 ed, is well taken. I think that ground is fully covered  
18 in the former question.

19 MR FORD: Didn't you look for your stuff in the paper the  
20 next day after you wrote it? A I think I looked for it,  
21 yes sir. I didn't read the article.

22 Q It is your custom always to look for it? A I look  
23 to see if it is in.

24 Q You considered that an important item of news? A Yes  
25 sir.

26 Q And didn't look to see whether the city editor had cut

1 it out or not? A The general article was there. That  
2 particular portion of it, I don't think I looked to see.

3 Q You didn't see it and you know you didn't see it,  
4 because it was not there.

5 MR ROGERS: Now, he has not stated anything of the kind.  
6 That is no way to cross-examine a witness, make an asser-  
7 tion like that with three questions in one, part of which  
8 is covered and part of which is not.

9 THE COURT: I think you will have to divide your question.

10 MR FORD: Let me hear the question.

11 (Last question read by the reporter.)

12 MR ROGERS: He has not say he didn't see it; he said he  
13 didn't look for it.

14 THE COURT: What is the objection?

15 MR ROGERS: The objection is that it assumes something  
16 that the witness has not said.

17 THE COURT: The objection has already been sustained and  
18 counsel is reframing the question.

19 MR FORD: Isn't it true, Mr Jones, that the reason you  
20 didn't see it in that article, is because it was not there?  
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10p 1 MR. APPEL. Your Honor, I object to that question, because  
2 it answers itself; if the facts contained in that question  
3 are true, I certainly cannot see anything--

4 MR. FORD. Sure.

5 THE COURT. Let us have the answer. The objection is  
6 overruled.

7 A If it was not there I certainly would not have seen it,  
8 no, sir.

9 Q Don't you know you did not see it and the reason you  
10 did not see it was because it was not there? A No, I do  
11 not know that.

12 Q What other work have you done for the defense besides  
13 furnishing them a copy of your testimony?

14 MR. ROGERS. I take an exception to the asking of the  
15 question, in the first place I designate it as untrue  
16 under the statement of the witness that he has done any  
17 work for the defense. He said he furnished me, at my  
18 request, a copy of what was said, and it is not cross-  
19 examination, and it is objected to as a question on that  
20 ground, and we take an exception to its being asked, <sup>if</sup> that  
21 be doing work for the defense when a man tells me what he  
22 knows and I ask him for it--

23 THE COURT. The objection is sustained upon the ground it  
24 is not cross-examination.

25 MR. FORD. Did you not furnish Mr. Rogers a list of other  
26 witnesses who could testify to various matters of impeach-  
ment? A No, sir.

1 Q Did you furnish him the names of any persons who were  
2 present at any alleged conversations with Franklin?

3 A No, sir .

4 Q Are the names of any persons who were present at any  
5 alleged conversations with any other persons? A No, sir .

6 Q Do you know Mr. Dias? A I do .

7 Q Who works on the same paper you do? A Yes, sir .

8 Q Have you and Mr. Dias conferrēd together about this  
9 matter? A Probably we have talked it over a number of  
10 times .

11 Q How many times have you talked it over together? A I  
12 couldn't say .

13 Q About how many? A Several times; half a dozen times,  
14 probably .

15 Q And since when have you talked it over? A Dias and  
16 I have been discussing the Darrow case in all its phases  
17 from time to time since it has been in progress as I met  
18 him in the office and met him about the court house .

19 Q I am talking now about this particular conversation,  
20 you have talked it over half a dozen times? A What par-  
21 ticular conversation?

22 Q The particular conversation you had with Franklin?

23 MR. ROGERS. That is an assertion on the District Attorney,  
24 "Now, you have talked it over half a dozen times", and the  
25 witness has not said so .

26 MR. FORD. I am asking him, that is in the nature of a

1 question.

2 THE COURT. Asking the question.

3 A I don't know that I ever discussed that with Dias.

4 Q MR. FORD. You have never talked over with Dias what  
5 had occurred there at that time with Franklin? A I don't  
6 remember of it, no, sir.

7 Q You never discussed it with anybody until you heard  
8 Bert Franklin testify in court? A I probably discussed  
9 it with a number of people at the time he made the statement  
10 and subsequent thereto.

11 Q How many times between the 28th day of November, 1911  
12 and the first day of June, or about the time that Franklin  
13 testified, how many times during that period did you discuss  
14 it with anybody?

15 MR. APPEL. We object to that as not cross-examination,  
16 immaterial, irrelevant for any purposes; there is no  
17 point in it, no point can be probably gotten from it, your  
18 Honor, it is just fishing, your Honor, that is all.

19 MR. FORD. Testing his memory.

20 MR. APPEL. You cannot ask a man on cross-examination--

21 THE COURT. objection sustained.

22 MR. FORD. If the court please, this witness has testified  
23 that he never looked at a memorandum, that he never mentioned  
24 the conversation until he mentioned to Mr. Rogers during  
25 the time--

26 MR. ROGERS. Oh, no--

1 MR. FORD. --that Franklin was testifying on the stand,  
2 which was about the first of June, or thereabouts, and  
3 this alleged conversation occurred in last December, about  
4 the 13th of December, a period of over 6 months, and we  
5 certainly have a right to test the witness's recollection,  
6 how does it happen that he can recall it?

7 THE COURT. you have a right to test his recollection.  
8 Read that question.

9 MR. FORD. the question is--

10 MR. ROGERS. Wait a moment--

11 THE COURT. The court wants the question read. I will  
12 hear you before I rule or before I change the ruling.

13 (Question read.)

14 MR. ROGERS. In the course of his argument counsel made  
15 a misstatement of the evidence, absolutely; he made the  
16 statement that the witness had said that he never had dis-  
17 cussed it from that day until he talked with Mr. Rogers  
18 about it. The witness says it was discussed at the time  
19 and discussed at other times and he said he didn't remember  
20 the time. If counsel is going to repeat evidence he must  
21 repeat it correctly, otherwise it is error and I assign  
22 it as such.

23 MR. FORD. the reporter will note it.

24 MR. ROGERS. Without any request, undoubtedly, from you.

25 THE COURT. I think under the statement made counsel is  
26 entitled to the question on that matter to test his memory.

1 The objection is overruled on that ground.

2 MR. APPEL. We except.

3 MR. FORD. read the question.

4 (Question read.)

5 MR. FORD' I meant to say--this is the 28th day of  
6 November, I meant to say the 13th day of December instead  
7 of the 28th day of November. A You mean approximately  
8 how many times?

9 Q Yes. A Approximately a dozen or more.

10 Q About the time that it happened or subsequent to that?

11 A Subsequent, of course.

12 Q Well, how long subsequent to that? A I think the  
13 subject was freely discussed among the newspaper men for  
14 several days and I presume from time to time as the  
15 matter was brought to my attention it may have been dis-  
16 cussed.



1 MR FORD: Don't you know it was never published in any  
2 newspaper and it was an important item of news if it was  
3 true.

4 MR APPEL: We object to that as immaterial, your Honor,  
5 not cross-examination. That is not cross-examination that  
6 something was not published.

7 THE COURT:" Objection sustained.

8 MR FORD: Who directed you to interview Mr Franklin on  
9 that occasion, if anyone? A I directed myself.

10 Q Did anyone tell you to go to Mr Franklin? A No sir.

11 Q Did you hear anyone say to anyone else to go to Mr  
12 Franklin? A No sir.

13 Q You don't know that the reporters were directed to go  
14 to Mr Franklin in order to get this statement? A No, I  
15 do not know.

16 Q You don't know, then, that Mr Franklin was making what-  
17 ever statement he made under orders?

18 MR ROGERS:" Wait a minute. I take an exception to the  
19 asking of that kind of a question, sir. I do not believe  
20 that counsel even pretends or expects, from the way he is  
21 making his examination here, that he can sustain a convic-  
22 tion if he got one for 15 seconds, and I submit, your Honor,  
23 that this kind of cross-examination ought not to be per-  
24 mitted, and -- We are perfectly helpless, sir, -- I take  
25 an exception to the asking of the question and to the re-  
26 citation of matters of that kind, and I submit, if your

1 Honor pleases, it is not cross-examination and counsel  
2 ought not to ask such a question.

3 MR APPEL: Your Honor will see --

4 THE COURT: The objection has been made, and I think it  
5 is well taken. The objection is sustained.

6 MR FORD: If the court please, here is a man who was a  
7 newspaper reporter, and we want to show what his object  
8 was in going to Mr Franklin at that time and to show what  
9 his knowledge was of that situation and the reason why  
10 that was not published in the paper, and, if possible, to  
11 show that the witness is mistaken, at least, when he says  
12 that he even wrote it up. Now, here is a man that was a  
13 reporter engaged in ferretting out news, and gaining in-  
14 formation and I want to show what information he gained.

15 THE COURT: Read that question.

16 MR FORD: Not as proving that the things were true or  
17 untrue, but proving what information he gathered, as a mat-  
18 ter of fact, and gathered information -- what was that  
19 information.

20 THE COURT: Read the question.

21 (Question read.)

22 MR ROGERS: It assumes something from Mr Franklin's testi-  
23 mony; that is all.

24 MR FORD: It is cross-examination. You can assume any-  
25 thing.

26 THE COURT: Objection sustained.

1 MR FORD: Did you talk with Mr Gage the same day that you  
2 talked with Mr Franklin? A I do not recollect.

3 Q You do not recall? A No sir.

4 Q You recall that Mr Gage was Mr Franklin's attorney  
5 at that time in court? A I know that Mr Gage represent-  
6 ed Mr Franklin after Mr Davis had originally appeared for  
7 him, and I think that day Mr Gage was in court, yes sir.

8 Q Do you recall having an interview with Mr Gage?

9 A No, I do not recall an interview with Mr Gage.

10 Q Didn't you publish an interview in the paper with Mr  
11 Gage on that day? A I do not recall it.

12 Q Or remarks made by Mr Gage? A I do not recall.

13 Q Didn't you publish proceedings of the court on that  
14 day? A I did.

15 Q Don't you recall what the proceedings in court were on  
16 that day? A I do.

17 Q What were they?

18 MR ROGERS: I object to that as not cross-examination.

19 MR FORD: Testing his memory.

20 MR ROGERS: I suggest we adjourn now until next month  
21 and let counsel sit down and read it over for his own  
22 satisfaction.

23 THE COURT: Objection sustained.

24 MR FORD: Do you mean to say now you didn't hear either Mr  
25 Gage, Mr Darrow or Mr Davis direct the reporters, you or  
26 the other reporters present, to go to Mr Franklin and get

1 a statement from him? A I heard no such direction.

2 Q And you never gathered any such information? A No  
3 sir.

4 Q You didn't Believe MR Franklin when he made whatever  
5 statement he did make, did you?

6 MR APPEL: That is immaterial.

7 MR ROGERS: Not cross-examination.

8 MR APPEL: Not cross-examination; calling for the wit-  
9 ness' opinion, for his own feelings in the matter.

10 THE COURT: It is calling for an opinion of the witness.  
11 The objection is sustained.

12 MR FORD: Wasn't that the reason you didn't publish what-  
13 ever you heard, wasn't that the reason because you didn't  
14 believe it.

15 MR ROGERS: It has not been shown yet, if your Honor  
16 pleases, that this was not published. Counsel has put it  
17 into his own statement and he is assuming it is true;  
18 because he said it does not make it so by a whole lot, and  
19 it has not been shown it has not been published. The  
20 witness says he turned it in but he didn't read the ar-  
21 ticle to see if that particular portion of the article  
22 appeared, or whether the city editor cut it out. Counsel  
23 cannot ask such a sort of a thing, and he is gradually  
24 trying to drive this into the minds of the jury and the  
25 court that it was. Counsel has not got the article be-  
26 fore him; if he has, let him see it.

1 MR FORD: If counsel desires to put that article in and  
2 can find any article like that, they can introduce it on  
3 redirect, if there is such an article in existence.

4 MR APPEL: Oh, he cannot put anything like that on the de-  
5 fense. That is begging the question here, and counsel mak-  
6 ing any such proposition to us -- the article would not  
7 be admissible in evidence, and any lawyer on the part of  
8 the defense that would introduce it as part of the evidence  
9 ought to be disbarred.

10 MR FORD: Introduce it the same as you introduced Gib-  
11 bon's article this morning.

12 THE COURT: What is the purpose? Do you wish to assign  
13 error, Mr Appel?

14 MR APPEL: I did it, your Honor.  
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12p 1 THE COURT. All right. The error is assigned. Now,  
2 read the question, Mr. Reporter.

3 (Question read.)

4 THE COURT. Objection sustained.

5 MR. FORD. That is all.

6  
7 REDIRECT EXAMINATION.

8 MR. ROGERS. Q Did you know, Mr. Jones, when speaking  
9 of this man Kellogg of the Herald, did you know, did you  
10 hear or did it come to your information that three weeks  
11 ago I myself, accompanied by Mr. Dehm, went to the office  
12 of the Herald and told them they had two Burns men on their  
13 staff down there and they had better let them off?

14 MR. KEETCH. Is this in the form of a question or testify-  
15 ing?

16 MR. ROGERS. In the form of a question and if it becomes  
17 material it will be so testified to.

18 MR. FORD. We object to that on the ground it calls for  
19 hearsay, and the statement of a witness not under oath,  
20 Mr. Rogers, and without any foundation as to the source  
21 of Mr. Rogers's information.

22 MR. FREDERICKS. And we will ask the court to instruct the  
23 jury that what Mr. Rogers has stated is not evidence and they  
24 should disregard it.

25 MR. APPEL. We are asking the witness the question.

26 THE COURT. I assume that is a question.

1 MR. APPEL. Yes, it is .

2 THE COURT. Let us have it and see if it is a question or  
3 a statement .

4 MR. FREDERICKS. We will ask that the jury be admonished  
5 todia~~r~~egard it .

6 THE COURT. Of course, if it is a statement the jury  
7 will be so admonished and if it is a question, that is an  
8 entirely different matter . Read it .

9 (Question read.)

10 MR. KEETCH. We object to that as incompetent, irrelevant  
11 and immaterial, argumentative, not redirect examination .

12 THE COURT. Objection sustained .

13 MR. ROGERS. Q Mr. Jones, did you ever get a dollar or  
14 any compensation or reward of any kind whatsoever from the  
15 defense for anything? A No .

16 Q Did you ever have a promise of any compensation, reward,  
17 present or anything from the defense for any purposes what  
18 soever? A No, sir .

19 Q Did you ever work for anybody connected with the  
20 defense here? A No, sir .

21 Q Speaking of the matter of the publication of the pro-  
22 ceedings onthat day,-I wont put it in that form--strike  
23 it out--you know, don't you, that there exists an animosity  
24 of considerable magnitude, quite a momentous affair,  
25 between the District Attorney's office and the paper which  
26 you have the honor to work upon?

1 MR. KEETCH. Just a moment. We object to that --

2 MR. FORD. We object to that on the ground it is incompetent  
3 irrelevant and immaterial unless <sup>it is</sup> the malice on the part  
4 of this witness towards the District Attorney--that would  
5 be a proper question, but any malice that might exist between  
6 his paper and the District Attorney's office would be absolute  
7 ly immaterial and not redirect examination.

8 MR. KEETCH. On the further ground, it calls for a conclu-  
9 sion of the witness.

10 MR. ROGERS. May I be heard?

11 THE COURT. yes.

12 MR. ROGERS. The cross-examination of this witness was not  
13 a cross-examination at all; it was a series of statements  
14 many of which were insults and many of which were not  
15 questions or intended to be questions, and nothing in the  
16 world but an attempt to humiliate, annoy and browbeat the  
17 witness; under those conditions I cannot assume it was  
18 done for any other purpose except private malice occasioned  
19 by the fact which I believe the witness will testify to,  
20 that the paper which he works on, the Tribune, owned by Mr.  
21 Earle, or by the Tribune Publishing Company, of which Mr.  
22 E. T. Earle is an officer and member, bitterly opposed the  
23 election of Captain Fredericks at the time of the last  
24 election.

25 MR. FREDERICKS. We would like to have Mr. Rogers cite any  
26 question that was asked of this witness that was an insult.



1 THE COURT. I am about to inquire of the witness myself.

2 MR. FREDERICKS. We would like to have Mr. Rogers cite it,  
3 he has made the statement.

4 THE COURT. It is the duty of the court to protect witnesses  
5 from insults, and if this witness has been insulted the  
6 court will take some proper action.

7 MR. ROGERS. Very well, sir, I will take that up, if your  
8 Honor please, as soon as the record is transcribed, and  
9 I will stand here Monday morning and show that not only  
10 by one but by a dozen questions, and if I do not do it,  
11 your Honor may punish me for contempt in the manner you  
12 may deem best.

13 MR. FREDERICKS. I don't think there would be any occasion  
14 for punishing counsel for contempt.

15 MR. ROGERS. I will be here Monday morning. The court has  
16 asked me and I am ready to respond on Monday morning.

17 THE COURT. We will go on with the case, with other ques-  
18 tions.

19 MR. FREDERICKS. The court has heard this statement here.  
20 Mr. Rogers is about a year behind the times when he speaks  
21 of Mr. Earle and myself, just about a year--that was last  
22 year, and this is this year and I would like to have the  
23 opinion of the court as to whether this witness has been  
24 insulted by any question.

25 MR. APPEL. We would like to know what he means by "one year  
26 behind the times?" Does that mean that some time there may

1 have been some differences?

2 MR. FREDERICKS. At some time there may have been, but  
3 not now.

4 MR. APPEL. We would like to know when this friendship  
5 ceased.

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1 THE COURT: No, we will not go any further with that.

2 I would like to ask Mr Jones a question. Mr Jones,  
3 has the manner or any question of the District Attorney  
4 insulted you or offended you? It is the duty of the court  
5 to protect you from any insult on this witness stand,  
6 and if you have been insulted, I want to know it.

7 Counsel states he thinks you have been, and if you have I  
8 want to know it, and the court will protect you from any-  
9 thing of that kind. A No, I have not been insulted.

10 THE COURT: The court saw no insult.

11 MR ROGERS: You may call it an insult or not, Mr Jones --

12 THE COURT: Now, gentlemen, we are through with this in-  
13 cident. The sole purpose is to protect the witness if he  
14 requires protection. Now, are there any other questions  
15 to ask of this witness at this time?

16 MR ROGERS: Yes, there are some more. A If you will  
17 allow me to explain my answer to you, your Honor.

18 THE COURT: Yes, you may. A I might have been insulted  
19 had I not heard that this was coming several days ago.

20 MR FREDERICKS: Does the witness think he must not be  
21 cross-examined.

22 MR ROGERS: They sent you word they were going to do some-  
23 thing to you, didn't they, if you went on the stand.

24 MR FORD: Sent him word? A No. They evidently talked a  
25 good deal, though.

26 MR ROGERS: You got it that you were going to be trimmed

1 if you went on there, or words to that effect, didn't you?

2 MR FORD: We object to that as not in anywise being redirect  
3 examination.

4 MR ROGERS: We have a right to show --

5 MR FORD: Let me make my objection.

6 THE COURT: One at a time, gentlemen.

7 MR FORD: The only thing that is pertinent is this, what  
8 the witness has said and what is his attitude towards the  
9 case. What the attitude of the District Attorney to-  
10 wards the witness is <sup>is</sup> absolutely immaterial, and has noth-  
11 ing to do with the case, the jury is not interested, in  
12 their deliberations by the attitude of the District At-  
13 torney; they are interested only by the testimony that  
14 comes from the lips of witnesses; the jury here does not  
15 care one rap, and should not care one rap what the attitude  
16 of the District Attorney is towards any particular indi-  
17 vidual or towards witnesses; all they are interested in is  
18 the testimony of witnesses themselves, and the evidence  
19 they are giving; what difference does it make what the  
20 District Attorney attempts to do with this witness?

21 THE COURT: Not the slightest.

22 MR ROGERS: It does make a difference if the District At-  
23 torney sends word to a man if he goes on that stand he  
24 will trim him.

25 MR FORD: Did we ever send him such word?

26 MR ROGERS: I am asking that; that is the question, let us

1 have an answer.

2 MR APPEL: Or anyone.

3 THE COURT: Let us have an answer. I have ruled your way,  
4 what is the answer? A Not to my knowledge.

5 MR ROGERS: What did you mean a moment ago when you said  
6 if you hadn't known this was coming several days ago,  
7 what did you mean by that?

8 MR FREDERICKS: That is objected to as incompetent, irre-  
9 levant and immaterial. Probably every witness knows when  
10 he takes the stand, his statements will be combed over.

11 THE COURT: Objection sustained.

12 MR APPEL: We except.

13 MR ROGERS: Now, next Monday morning I will respond to  
14 your Honor's request.

15 THE COURT: There is nothing further to respond to. I  
16 think the witness has covered it; it is a personal mat-  
17 ter with the witness and he has covered it. Gentlemen  
18 of the jury, bear in mind your former admonition. We  
19 will take a recess for 5 minutes. That is all, Mr Jones.

21 (After recess.)

22 J. L. BARNARD, a witness called on behalf  
23 of the defense, being first duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 MR ROGERS: Your name is J. L. Barnard? A Yes sir.

1 Q Where do you live? A Pasadena.

2 Q How long have you lived in Los Angeles County? A Since  
3 about 1900.

4 Q Your business or occupation? A Newspaper reporter.

5 Q How long have you been in the newspaper business?

6 A Well, I have been in the editorial end, I think about  
7 6 years, between 5 and 6 years.

8 Q With what paper are you at present connected?

9 A Los Angeles Express.

10 Q How long have you been with the Express? A Since  
11 June 30th of last year.

12 Q June 30th of last year? A I am not quite sure of that  
13 date, but I think that is about right.

14 Q Do you know Bert H. Franklin? A Yes sir.

15 Q How long have you known him? A I think I met him in  
16 the United States Marshal's office about -- well, in the  
17 neighborhood of 3 or 4 years ago when I was working for  
18 the Los Angeles Examiner.

19 Q When you were working for the Los Angeles Examiner?

20 A Yes, I might have met him before that time, but that  
21 is the time I distinctly recollect of meeting him.

22 Q Did you have a conversation with Bert H. Franklin  
23 about the time of the preliminary examination of said  
24 Franklin on the Bain matter or the Lockwood case? A Well,  
25 I covered both preliminary examinations and I think I had  
26 conversations with him on both occasions.

1 Q At the time of the examination in the Bain case, did he  
2 say to you that Mr Darrow never gave him -- that is,  
3 Franklin -- one dollar or any money of any kind to bribe  
4 any juror and Mr Darrow never knew anything about the  
5 bribery of any jurors at any time or words to that effect  
6 and substance? I have omitted the profanity.

7 MR FREDERICKS: just a moment, Mr Barnard. I don't wish to  
8 interpose objections. I want just a moment's time to  
9 look over our notes to see if the foundation has been  
10 laid.

11 THE COURT: All right.

12 MR FREDERICKS: No objection.

13 THE COURT: What is your answer? A Read the question.

14 (Question read by the reporter.)

15 A Well, part of that is correct, and the latter part I  
16 don't believe is. I think I could give more substantially  
17 his words, that is, I don't remember them word for word,  
18 absolutely, I would not attempt to give that.

19 MR FREDERICKS: Just a moment. You are not going to give  
20 them without another question.

21 THE COURT: No, don't give them without another question  
22 to save an objection.

23 MR ROGERS: Did he say anything to that substance and ef-  
24 fect and if not, just tell us to what part of it he did  
25 say and what part he did not.  
26

14s 1 MR. FREDERICKS. Just a moment--we object upon the  
2 ground that no foundation has been laid and, of course,  
3 the persons present has not been laid and I am assuming  
4 counsel refers to the same conversation that he has asked  
5 the other witnesses about, if I am wrong I presume he  
6 will correct me, but the question now asked is did he  
7 say anything to that effect. We do not believe that that  
8 is permissible under the rules. Did he say that in sub-  
9 stance or effect, is the rule, and the idea we must be  
10 governed--

11 MR. ROGERS. The voluntary answer of the witness was,  
12 when I said--the witness said--I said, "Have you told Mr.  
13 Bernard that? A No, sir, and the best evidence I didn't  
14 is the fact it never was published in the paper. Q Never  
15 mind about your best evidence. Please say whether you did  
16 or not and don't argue with me. A I did not. Q Very  
17 well." And the voluntary answer, "A Or anything to  
18 that effect."

19 MR. FREDERICKS. Yes.

20 MR. ROGERS. So I am asking the witness precisely what  
21 Franklin voluntarily said.

22 MR. FORD. If the court please, the question just preceding  
23 this, did he say anything like that in substance and  
24 effect, the witness said he did not.

25 MR. ROGERS. But the witness said he did not.

26 MR. FORD. Just read the second question before this, read



1 the question and answer.

2 (Last question and answer read by the reporter.)

3 THE COURT. Gentlemen, I have the matter in mind. I think  
4 we are spending more time than the matter needs in dis-  
5 cussion. I am ready to rule on the question. I think the  
6 question is a proper one.

7 MR. FREDERICKS. I think counsel should split it so we can  
8 have a chance to object. He should talk to this witness  
9 off the stand and find out what he will testify to.

10 THE COURT. I think the counsel is entitled to the  
11 question.

12 (Last question read by the reporter.)

13 THE COURT. The objection has been overruled. Answer the  
14 question.

15 A The question--his statement at that time was substan-  
16 tially as Mr. Rogers has stated it up to the point where  
17 he refers to Franklin making a statement regarding other  
18 jurors or the bribing of other jurors. I think I could  
19 get at it easier by stating just what Mr. Franklin said at  
20 that time.

21 MR. ROGERS. Go right ahead. A I was called out of the  
22 booth where I was attending the preliminary over the tele-  
23 phone to the Express by messenger, who told me that Mr.  
24 Franklin wanted to see me, and I went out to see him, and  
25 Mr. Lockwood had made a statement just prior to the time I  
26 went into the booth to the effect that Mr--relative to the

1 conversation in Mr. Franklin's office about Darrow being  
2 able to fix it and so forth and so on, regarding the  
3 transfer of the money, and Franklin called me over there  
4 and he said--I will cut out the profanity--

5 MR. FREDERICKS. Put it in.

6 A He said, "Anybody says that Darrow ever gave me a cent  
7 to bribe a juror is a God Damn liar," and I took the  
8 statement. I think that is about as far as he went that  
9 time, and later I was called into another conference with  
10 some other newspaper men who were present. At this time I  
11 was alone with him.

12 MR. ROGERS. That is all.

13  
14 CROSS-EXAMINATION.

15 MR. FREDERICKS. Mr. Banard, wasn't this what Mr. Franklin  
16 said: "Lockwood had just testified on the stand to the  
17 effect that Mr. Franklin had told him that he would see  
18 Clarence Darrow, that is, Lockwood had just said that  
19 Franklin had mentioned Darrow's name, I don't know that he  
20 had just said, but he had said it a short time previously,  
21 Lockwood had said that Franklin had mentioned Darrow's  
22 name in their conversation, and didn't Franklin state to  
23 you this, that anybody said that he had ever mentioned  
24 Darrow's name to Lockwood in connection with that matter  
25 was a God Damn liar? A No, sir, that was not what he  
26 said to me that day, I am positive.

1 Q Now, did he ever say that on any occasion to you?

2 A Not in relation to that matter, no, sir. Not in  
3 relation to Lockwood's statement unless, I guess, after he  
4 testified we were talking out in the hall, he came and  
5 tried to explain the situation.

6 Q Tried to tell you what he had said, is that it?

7 MR. DARROW. Just a moment--I object to that.

8 MR. FREDERICKS. Well, I thought I was shortening it.

9 THE COURT. The objection is overruled.

10 (Last question read by the reporter.)

11 MR. ROGERS. He tried to tell you, that is what he had  
12 said is--I don't think it is quite cross-examination; I  
13 don't think it is shortening matters at all, because I  
14 cannot understand it.

15 MR. FREDERICKS. Well, then, I will try to make it clearer.

16 Q Mr. Franklin testified here that what he had said to you  
17 was what I have related to you, that he had said that  
18 anybody said that he had ever mentioned Darrow's name  
19 to Lockwood was a so and so damn liar. Now, that is what  
20 he said to you out in the hall after he had testified here,  
21 isn't it and asked you if that is not what he had said down  
22 at the preliminary examination, if you get me? A Why,  
23 I wouldn't say for sure because just about the time that  
24 he--he went at the thing in two or three different angles and  
25 and Mr. Ford came up and stopped us talking before we got  
26 down to any definite basis as to what either one had said.

1 MR. ROGERS. Pardon me, are you referring in this--when  
2 you say "Mr. Ford came up and stopped us," you are referring  
3 to the conversation since this trial commenced? A Yes, sir.

4 MR. FREDERICKS. That is the understanding.

5 MR. ROGERS. Not the conversation with Franklin before  
6 but a conversation since the trial commenced?

1 MR FREDERICKS: Now, Mr Barnard, isn't it possible that  
2 you may be mistaken in regard to that; newspapermen take a  
3 good many stories in a day's time. A Well, the reason I  
4 remember that so specifically was that I was watching Mr  
5 Franklin very close at that time, for the reason that I  
6 was expecting him to come out and make some kind of a clean  
7 cut statement, and when he sent for me that morning I was  
8 hoping that he had decided to come out and make some kind  
9 of a clean-cut statement, some place where we would have  
10 some grounds on which to base some -- every newspaperman  
11 in town was practically up in the air in connection with  
12 the case; didn't know where we were.

13 Q Something in the nature of a confession; is that the  
14 idea you were looking for? A Yes sir.

15 Q Now, the fact that Mr Franklin made this statement  
16 that Darrow had nothing to do with it or anybody said <sup>Darrow</sup> had  
17 ever given him a dollar and so forth. Did you ever re-  
18 port that to your paper? A It was turned in with the  
19 line of the news right over the telephone.

20 Q Don't you know that that statement was never published,  
21 and doesn't that make you a little doubtful whether you  
22 turned it in just that way or not? A I don't think --  
23 I probably didn't give his exact conversation on account  
24 of the Express not wishing to run swear words, but I brought  
25 out the facts, I believe, in my paper; I have never look-  
26 ed it up since -- I believe I brought up something to the

1 effect that Franklin had denied he had ever received any  
2 money from --

3 Q Darrow? A Yes sir.

4 Q Well, he was denying his own guilt, took at that time,  
5 wasn't he?

6 MR ROGERS: Objected to as not cross-examination.

7 MR FREDERICKS: That same conversation.

8 MR ROGERS: Let's have the conversation; that is only one  
9 thing. What did he say.

10 THE COURT: Objection sustained.

11 MR FREDERICKS: The other conversation that was had when  
12 you and all of the other newspaper boys were present, was  
13 that at the same preliminary? A I think it was about 10  
14 minutes later at the same preliminary.

15 Q And that was at the Lockwood preliminary? A No, I  
16 don't think so. MY recollection is that it was -- it  
17 was over here next door. I don't remember, there was sever-  
18 al continuances they had, and they jokeyed along the case  
19 for a long while.

20 Q Trying to jog your memory up a little bit and in view  
21 of the fact you are working on the Express, I will simply  
22 say you are trying to tell the best memory you have on it.  
23 Now, all of these examinations occurred down at the same  
24 place, didn't they? A I think not. My recollection is  
25 that one examination occurred down in -- or they started to  
26

1 hold an examination downstairs in Judge Young's court, but i  
2 it was removed up to Judge Bordwell's court which was then  
3 in the next room adjoining.

4 Q But the subject started, as you said here on the  
5 stand; the subject started over the testimony of Lock-  
6 wood? A Yes sir.

7 Q Doesn't that refresh your memory that probably it was  
8 the Lockwood trial? A No, I wouldn't say for sure; be-  
9 cause my recollection is that he was called in to testify  
10 in the case in relation to the Bain matter.

11 Q He did mention in this conversation, however, that  
12 Lockwood had said this? A Yes sir.

13 MR FREDERICKS: That is all.

14 ---

15 I. B. HENDERSON, a witness called on behalf  
16 of the defense, being first duly sworn, testified as fol-  
17 lows:

18 DIRECT EXAMINATION

19 MR ROGERS: What is your name, please? A My name is I.B.  
20 Henderson.

21 Q Where do you live? A 349 West Fifty-eight street.

22 Q In this city? A Yes sir.

23 Q How long have you lived in this city? A 5 1/2 years.

24 Q What is your business or occupation? A At the present  
25 time I am building.

26 Q You build houses. How long have you been in that bus-

1 iness? A Five months.

2 Q Do you know Robert Bain? A yes sir.

3 Q How long have you known him? A About three years.

4 Q Did you ever have any business with him? A Some,  
5 yes sir.

6 Q As amatter offact, you built the house that he lives  
7 in? A yes sir.

8 Q And sold it to him? A Yes sir.

9 Q You remember the circumstances or occasion, I don't ask  
10 for the date, but the circumstance of the arrest of Bert  
11 H. Franklin on the charge of bribery? A yes sir.

12 Q Where did you live -- Where do you live with reference  
13 to Mr Bain? A I live the first lot west on the same side  
14 of the street.

15 Q That is you are right next door? A Yes sir.

16 Q Now, within a few evenings after the arrest of Frank-  
17 lin and before the preliminary examination, that is be-  
18 fore Franklin's trial, did you have a conversation with  
19 Bain in his house? A Yes sir.

20 Q In what part of the house was it? A Kitchen.

21 Q State whether or not at that time Bain said to you  
22 substantially that he was -- that they, rather, were confus-  
23 ed to know what they should do, and that he wanted your  
24 advice or words to that effect, and that you said to him  
25 "If I were you I would make a clear breast of the whole  
26 thing and expose everyone who was implicated in this anyway,"



1 and then you said, "Who is responsible for this", where-  
2 upon Bain said, "Bert Franklin". That you thereupon asked  
3 him "Was there anyone else implicated"? whereupon Bain  
4 said no. Later in the same conversation the name of Har-  
5 riman and the name of Darrow came up, whether you mentioned  
6 it or whether he mentioned it, but the names came up,  
7 whereupon you asked Bain if they had anything -- that is,  
8 either Darrow or Harriman had anything to do with the mat-  
9 ter, and Bain replied, neither one had anything to do with  
10 it, or words to that effect or in substance?

11 MR FREDERICKS: I don't wish to object to it. Counsel has  
12 not asked -- stated who all were present. Those two --

13 MR ROGERS: You may state who was present? A Mrs Robert  
14 Bain, Mr Robert Bain, Mr's Henderson and myself.

15 MR ROGERS: Now, will you answer me? A Your question is  
16 correct with one exception, to the best of my recollection.

17 Q What is the exception? A With regard to my asking him  
18 about Mr Darrow and the other parties -- Harriman.

19 Q How did that come up? A Why, it came up in a general  
20 way. He recited the entire story, what was supposed to be  
21 the entire story, how this difficulty was brought about,  
22 and how confused they were in the matter and they had no  
23 minds of their own, and asked me for advice in regard --  
24 what we thought or I thought he ought to do. Now, whe-  
25 ther he asked that question or whether Mrs Bain asked  
26 that direct question, I am not in a position to say. I

1 don't know, but the question was put.

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1 Q All right. You mean that-- A Read that over, if you  
2 will, and I will get it in my mind.

3 Q That is, they asked you for advice, is that the question  
4 you mean? A No, that question was right.

5 Q Whereupon the question was asked, was there any one else  
6 implicated? A Yes. I don't know whether I asked him--  
7 I am positive that that question is all right.

8 Q What did Bain say? A He said not that he knew or not  
9 to his--wait a moment--I don't believe I can answer that  
10 question correctly; I don't know.

11 Q Didn't you tell me out in the hall when this document  
12 was shown to you that it was correct? A Yes.

13 Q Now, what is your recollection about it, that is what  
14 I want to know? This is prepared on your statement and  
15 I want to get it absolutely right. A I am confused on the  
16 latter part of that. Now there is something in there  
17 I don't understand.

18 Q Let me show it to you.

19 THE COURT. Take all the time you want. A Thank you,  
20 that is what I want to.

21 MR. ROGERS. Now, you make it in your own way and your own  
22 form and give that just--

23 MR. FREDERICKS. I suppose while the witness is looking  
24 it over there will be no objection to my looking over it?

25 THE COURT. If he don't object.

26 A I don't object. Here is the portion I don't clearly

1 understand. Who was responsible for this, that is one  
2 thing about this that I can see is incorrect.

3 MR. ROGERS. What is it?

4 THE WITNESS. The rest--the question reads "Who is respon- )  
5 sible for this." I don't know whether I asked that ques- )  
6 tion or not.

7 Q You don't know? A No.

8 Q Did any one ask him, did your wife ask him? A I )  
9 couldn't say that.

10 Q Well, now the next one, was there any one else implicat-  
11 ed besides Franklin, was that question asked? A I didn't  
12 say so; yes, I asked him that question.

13 Q And what did he say to that? A He said "No."

14 Q Now, the latter part of it, during the course of the con-  
15 versation were the names of Darrow and Harriman mentioned?  
16 A Yes.

17 Q Now, at that time did you ask him, that is, Bain, if  
18 they had anything to do with it and didn't he say to  
19 you, "Neither one had anything to do with it?" A Yes,  
20 that is correct.

21 Q Mr. Bain talked to you about this several times, didn't  
22 he? A Yes.

23 Q Fully? A Yes, sir.

24 Q And during any of those conversations did he ever say  
25 that Bert Franklin told him that Darrow had given him,  
26 Franklin, \$20,000?

1 MR. FREDERICKS. Don't answer that yet.

2 MR. ROGERS. Or any other amount of money?

3 MR. FREDERICKS. Objected to, as no foundation has been  
4 laid. Of course, the fact that he may never have said  
5 that Darrow--that Franklin had told him this would not  
6 in any wise impeach the witness and no foundation laid with  
7 Bain.

8 THE COURT. Objection sustained.

9 MR. ROGERS. That is all.

10

11 CROSS-EXAMINATION.

12 Mr. Fredericks. Mr. Henderson, you started to say there  
13 in reply to one of counsel's questions, he asked you if  
14 Bain had said whether Darrow or Harriman had anything to  
15 do with this and you said that Bain said "Not that I know"  
16 and then you stopped. Now, I want to get at your meaning  
17 there.

18 MR. ROGERS. Now, wait a moment, the witness didn't finish  
19 that answer.

20 MR. FREDERICKS. That is just it, I want him to finish it.

21 MR. ROGERS. And it was in response to the former question,  
22 that is the question which included everything, to get  
23 which Mr. Henderson couldn't get through his head.

24 MR. FREDERICKS. I will ask the reporter to read back,  
25 read the question and answer and let the witness finish  
26 it from where he stopped.

1 (Question and answer as indicated read by the reporter.)

2 MR FREDERICKS: Now, "Not that he knew or not to his --

3 not his --" Read the question, read as far as he went

4 and then it will be apparent what I want. (Question

5 read.)\* Just finish that, not to his --

6 MR ROGERS: I don't think that is fair.

7 THE COURT: If the witness can answer --

8 MR ROGERS: He did not finish his answer.

9 THE COURT: Did you finish that answer? Is that all of  
10 the answer? A No, I hesitated, being uncertain.

11 MR FREDERICKS: Q Now, what was it he said not that he  
12 knew of -- A I can't answer, I don't know.

13 Q Are you still uncertain about that? A To a degree,  
14 yes sir.

15 Q You are uncertain on the point? A Yes sir.

16 Q What Mr Bain's answer was as to who else was im-  
17 plicated, whether it was a flat answer or whether it was

18 "Not that he knew of." A No, it is going through my  
19 mind this way: It is possible that he said, not to the  
20 best of his knowledge, or not that he knew of.

21 Q Or not that he knew of? A Yes.

22 Q That is your best recollection, is it? A That is  
23 my best recollection.

24 MR FREDERICKS: That is all.

25 MR ROGERS: That is all.

26 THE COURT: That is all.

T O M L J O H N S O N ,

a witness called on behalf of the defense, being first  
duly sworn, testified as follows:

DIRECT EXAMINATION

MR. APPEL. Q You may state your name, please? A Tom  
L. Johnson.

Q Mr. Johnson, you reside here in the city? A Yes, sir.

Q How long have you resided here, Mr. Johnson? A Four  
years next January.

Q And whereabouts is your place of residence? A 2901  
Francis Avenue.

Q What is your business, occupation or profession?  
A Lawyer.

Q How long have you been practicing your profession, Mr.  
Johnson? A Something over thirty years.

A JUROR. thirty years? A Yes, sir.

MR. APPEL. Are you acquainted with Bert H. Franklin?  
A I am.

Q Did you know him prior to the 14th day of January,  
1912? A I did.

Q In the early part of January, 1912 and prior to the  
14th, did you have any conversation with him concerning  
this case? A I did.

~~MR. FREDERICKS. We move to strike out the answer--~~

THE COURT. Strike it out for the purpose of the objection.

~~MR. FREDERICKS. We desire to ask, before objecting to this,~~

1 ~~we desire to ask the witness some questions which we believe~~  
2 will develop the fact that at the time of the conversation  
3 this witness was Mr. Franklin's attorney and, therefore, any  
4 communication between him and Mr. Franklin would be privi-  
5 leged, and even the fact that they had a conversation would  
6 be privileged and we ask that we may ask the questions.  
7 MR. APPEL. We had better argue that fully, your Honor.  
8 I think I can show your Honor that Mr. Franklin could not  
9 be protected under the rule of privilege, he having come  
10 here and spoken concerning the transaction in which he him-  
11 self was implicated and the rule of privileged communica-  
12 tions does not apply to accomplices or to the attorneys  
13 who have communications with accomplices.



1 We will show your Honor what is directly in point, that  
2 what Mr Franklin said to his attorney must be divulged,  
3 but also what the communications of the attorney were to  
4 the party, and that the attorney as well as the party him-  
5 self will be compelled to testify in a case of this kind.  
6 We can show you all of the authorities bearing on that  
7 point are uniform, the only authorities in the United  
8 States are uniform.

9 MR FREDERICKS: We are not up to that point yet.

10 THE COURT: Suppose we let the District Attorney ask the  
11 questions, then we will have the record, and then I will  
12 hear you on the question <sup>of law</sup> and that will be squarely raised  
13 there.

14 MR APPEL: ~~Let him ask.~~

15 MR FREDERICKS: At the time of the conversations referred  
16 to, state whether or not you were Mr Franklin's attorney?

17 A I was.

18 THE COURT: That settles it. Now, I will hear you, Mr  
19 Appel.

20 MR APPEL: I have sent for the authorities, your Honor.

21 MR ROGERS: Every authority --

22 MR FREDERICKS: If it will take some time --

23 THE COURT: I want to read the section of the code, sub-  
24 division 2 of section 1881, isn't it?

25 MR ROGERS: I may state the law to be this: --

26 THE COURT: Just one minute; I want to look at the

1 ~~section, and then I will hear you.~~

2 MR APPEL: Your Honor, it does not lie on the part of the  
3 District Attorney to raise that objection. Mr Franklin  
4 waived it while upon the stand by testifying to the trans-  
5 action, and testifying to the conversations had with  
6 Colonel Johnson. I have his testimony here. He waived  
7 that, and the only person that would have a right to ob-  
8 ject, is Mr Franklin himself, and certainly we understand  
9 here appearing for him at this time, and he cannot make the  
10 objection himself.

11 MR ROGERS: In other words, the District Attorney cannot,  
12 if your Honor will permit me to state, the District At-  
13 torney cannot raise an objection for Mr Franklin that  
14 anything Mr Franklin said at any time to any person is  
15 privileged. Mr Franklin himself, by going on the witness  
16 stand, waived the right.

17 THE COURT: It seems to me that is the point, whether or  
18 not there was a waiver there.

19 MR FREDERICKS: There is another point, however.

20 THE COURT: What is the page of the transcript?

21 MR APPEL: The District Attorney cannot waive it.

22 MR FREDERICKS: There is another point there.

23 MR APPEL: It commences at page 852, your Honor, and he  
24 went on and stated what Mr Johnson advised him to do and  
25 what Mr Johnson told him.

26 ~~MR FREDERICKS: The point is not that the District Attorney~~

1 ~~may raise or may not raise it. Mr Johnson is an attorney~~  
2 ~~and may wish it raised for his own sake. We submit the~~  
3 ~~point as a point of law.~~

4 MR APPEL: We present the matter to the court.

5 MRFREDERICKS: If there is going to be an argument for  
6 any length of time, however, we might let those raising  
7 the point argue it and let the jury retire.

8 MR APPEL: Inasmuch as the objection has been made before  
9 the jury, we might argue it before the jury.

10 MR FREDERICKS: The jury has nothing to do with a question  
11 of law, they can be excused every time a question of law is  
12 argued.

13 THE COURT: Gentlemen, I must have a moment to look at  
14 this section.

15 Q BY THE COURT: Colonel Johnson, have you read the  
16 transcript of Mr Franklin's testimony, insofar as it  
17 relates to you? A I have, yes sir.

18 Q And do you at this time claim the privilege of section  
19 1881 of the Code of Civil Procedure?

20 MR FORD: We object to that question on the ground it is  
21 incompetent, irrelevant and immaterial, to the question  
22 put by the court.

23 MR APPEL: Now,--

24 MR FORD: If the court please, the proposition before  
25 the court is one of competency of witnesses.

26 THE COURT: Yes.

1 MR FORD: Section 1879 provides what persons are competent  
2 to act as witnesses. The section says, "All persons with-  
3 out exception otherwise than as specified in the next two  
4 sections, who, having organs of sense, can perceive, and  
5 perceiv~~ing~~, can make known their perceptions to others,  
6 may be witnesses; all persons without exception, except  
7 as provided in the next two sections --" the first excep-  
8 tion to that is in section 1880, which provides that cer-  
9 tain persons cannot be witnesses at all under any condi-  
10 tion; those who are of unsound mind at the time of their  
11 production for examination, children under the age of 10  
12 years who appear incapable of receiv~~ing~~ just impressions  
13 of the facts respecting which they are examined, and which  
14 they are examined or relating them truly, and parties  
15 to an action or proceeding, and persons in whose behalf  
16 the action or proceeding is prosecuted against any execu-  
17 tor or administrator upon a claim, etc. That is one  
18 class of persons in the first exception to 1879, who cannot  
19 testify under any circumstances; section 1881 contains two  
20 classes of persons who cannot testify under certain condi-  
21 tions, that is, where certain relations exist.

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18p 1       The first subdivision of 1881 relates to husband and  
2 wife, the second subdivision relates to attorneys, so that  
3 the code reads, "There are particular relations in which  
4 it is the policy of the law to encourage confidence, to  
5 preserve it inviolate, therefore, the persons cannot be  
6 examined as a witness in the following case: Subdivision  
7 2: An attorney cannot, without consent of his client",  
8 therefore, under Section 1879, unless the client has given  
9 his consent--and Mr. Johnson testifying to a communication  
10 made to him as an attorney, Mr. Johnson is not a competent  
11 witness under section 1879, he does not come within the  
12 classes provided for in section 1879, for section 1879  
13 says, "Only such persons are competent as witnesses who  
14 are without the exceptions in Section 1880 and 1881," and  
15 Mr. Johnson, in this relation, is not without that exception  
16 and is not a competent witness under section 1879.

17       Now, that leaves the whole point as to what consti-  
18 tutes consent of the client. Counsel states here in  
19 court that where a client has testified in court to a  
20 communication made by him to his attorney that that consti-  
21 tutes a consent.

22 MR. ROGERS. No, that is not it at all.

23 MR. APPEL. I did not say anything of the kind. I will not  
24 be misquoted on a proposition of law. I said an accomplice,  
25 a person who comes in as an accomplice and confesses to his  
26 own misdeeds in court in order to convict another one that be

1 thereby waives the privilege and everything he says to his  
2 attorney may be extracted from him in court and everything  
3 that the attorney heard from his client may be taken from  
4 the attorney as a witness by interrogation here.

5 MR. FORD. Very well, then. The point before your Honor  
6 is this: They claim that an accomplice who has testified  
7 to what has transpired between him and his attorney, that  
8 when that exists that that constitutes a consent in law  
9 on the part of the client. There is no such law. They  
10 must submit authorities on that point to your Honor.

11 The objection now before the court is to the question propound  
12 ed by your Honor and I will make this argument at this time  
13 merely for the point of showing that the question addressed  
14 by your Honor to the witness is not material to the inquiry  
15 before the court and when they come down to the other pro-  
16 position I will argue it after they have submitted their  
17 authorities showing that such action on the part of accom-  
18 plices constitutes a consent. I do not believe it does  
19 and I am satisfied that it does not and I think instead  
20 of arguing -

21 THE COURT. Mr. Ford, I think you misunderstood the purpose  
22 of the court's question. It is to ascertain whether or  
23 not Col. Johnson comes here with any consent or with any  
24 action that he deems a consent which might dispose of this  
25 whole matter, if he answers the question.

26 MR. FORD. I think the easiest way to ask him is, "was your

1 client consented?" and on that matter we would want to  
2 produce Mr. Franklin here in court and show he consented, but  
3 he did make a statement in the record he would not and did  
4 not consent.

5 MR. APPEL. That would not make any difference what he said.  
6 We contend that he, having testified, he is not entitled  
7 to the privilege now, that is, neither an attorney nor he.  
8 Now, he says he wants the law upon that. He says we must  
9 show him the law and he says there is no such law. We are  
10 going to show him.

11 MR. FORD. We claim this is something more than a privilege  
12 in this particular instance, we claim this is a question of  
13 the competency of the witness to testify, it is not a  
14 question of privilege belonging to parties involved in the  
15 case but a question of the competency of the witness.

16 THE COURT. All right. I will not press the question.

17 MR. ROGERS. Your Honor, 65 Mississippi, at page 183,  
18 directly and absolutely in point: "The act of an accom-  
19 plice in testifying for the state so as to criminate him-  
20 self with others is voluntary. we could not be compelled  
21 to do so. He testifies for the state under a promise or  
22 favor express or implied on condition that he will make a  
23 full statement and confession in regard to the matter.  
24 His testimony comes in such questionable shape that it  
25 should in the interest of truth and justice be susceptible  
26 to the severest scrutiny and acted on with the greatest

1 caution. There is no case in which cross examination is  
2 more desirable--"

3 MR. FORD. May I interrupt counsel just a moment to make a  
4 suggestion?

5 THE COURT. What is it, Mr. Ford?

6 MR. FORD. We will want to read some authorities in  
7 return and it is now half past four and I would like to ask--  
8 there is no necessity of keeping the jury here--

9 MR. APPEL. They have argued this matter before the jury.

10 MR. ROGERS. They argued the matter--

11 THE COURT. One at a time.

12 MR. FORD. We will desire to present some authorities and  
13 your Honor has indicated you are going to adjourn until  
14 Monday and I would like to ask that this matter be allowed  
15 to go over until Monday.



1 ~~THE COURT: I think we can dispose of it in a few minutes.~~

2 ~~MR FORD: I will have to produce some authorities from~~  
3 ~~this state, and I will have to go <sup>to</sup> the law library to get~~  
4 ~~them, so that I may argue it fully to your Honor.~~

5 ~~This is an important matter, one bearing not only on the~~  
6 ~~question of law, but one of the ethics of the profession,~~  
7 ~~and it is a very important point, and I think we ought to~~  
8 ~~have at least half an hour's time to argue it and it is~~  
9 ~~now 25 minutes to 5, and if we can take this up at half~~  
10 ~~past 9 Monday morning, we will not lose any time.~~

11 ~~THE COURT: Let us get along as far as we can tonight.~~

12 ~~MR FORD: It is understood we need not present our argu-~~  
13 ~~ment tonight?~~

14 ~~THE COURT: If you are not able to, the court is not going~~  
15 ~~to press you.~~

16 ~~MR ROGERS: (Continuing.) "His testimony comes in such a~~  
17 ~~questionable shape that it should, in the interest of truth~~  
18 ~~and justice, be subjected to the severest scrutiny and act-~~  
19 ~~ed on with the greatest caution. There is no case in which~~  
20 ~~cross-examination is more desirable or important to test~~  
21 ~~the credit of a witness, than that in which one man is~~  
22 ~~seeking to save his own life or liberty by swearing away~~  
23 ~~the life or liberty of others. Communications between~~  
24 ~~a client and his attorney or legal advisor, are privliaged~~  
25 ~~from exposure, without reference to whether proceedings~~  
26 ~~are pending or in contemplation, and neither can be requir-~~

1 ~~ed to disclose such communications unless the client con-~~  
2 ~~sents. Such privilege is created for the benefit and pro-~~  
3 ~~tection of the client, and if he waives it, there is no~~  
4 ~~ground for such protection. While the privilege may be~~  
5 ~~waived by the client, it is generally held that he does~~  
6 ~~not do so merely by becoming a witness and testifying in~~  
7 ~~his own behalf, but when one jointly indicted with others,~~  
8 ~~turns state's evidence, and attempts to convict others by~~  
9 ~~testimony which also convicts himself, the rule must be~~  
10 ~~different, and he has no right to claim any privilege con-~~  
11 ~~cerning any of the facts pertinent to the issue, nor any~~  
12 ~~exemption from the broadest latitude of cross-examination.~~  
13 ~~He thereby waives all privileges against incriminating~~  
14 ~~himself, and against disclosing communications between him-~~  
15 ~~self and his counsel touching the offense charged. Both~~  
16 ~~client and counsel, may in such case, be compelled to~~  
17 ~~disclose such communications. Alderman v. People,~~  
18 ~~4 Mich. 414; Foster v. People, 18 Mich. 266; Hamilton~~  
19 ~~v. People, 29 Mich. 173. <sup>The reason</sup> for maintaining such privileges~~  
20 ~~ceases, when one has voluntarily exposed himself by his~~  
21 ~~own testimony, to the very consequences from which it~~  
22 ~~was intended by the privilege to protect him. To preserve~~  
23 ~~such privilege in such case would be worse than vain, for~~  
24 ~~while it could not help the witness, it might, by withhold-~~  
25 ~~ing the only means of contradicting and impeaching him,~~  
26 ~~operate with the greatest injustice towards the party on-~~

1 trial. The judgment is reversed, and the cause remanded."

2 MR FORD: What citation is that?

3 MR ROGERS: Jones vs. the State, it is in 65 Mississippi.

4 I read the opinion from page 182, and it commences at page

5 179. Now, if your Honor pleases, there is the foundation

6 case, there is the leading case, we may say, and it holds,

7 as I say to your Honor, that both client and counsel may

8 be examined, because, as the authority so well says, the

9 reason for maintaining such privilege ceases when one has

10 voluntarily exposed himself by his own testimony to the

11 very consequence from which it was intended by the privi-

12 lege to protect him; to preserve such privilege in such a

13 case would be worse than vain, for while it could not

14 help the witness -- and it could not help Franklin, Frank-

15 lin has been helped all he can be helped to now, every-

16 thing has been done for him that can be; he has been

17 turned scott-free and scott-loose, told the story now. It

18 says, "To preserve such privilege in such a case would be

19 worse than vain, for while it could not help the witness

20 it might, by withholding the only means of contradicting

21 and impeaching him, operate with the greatest injustice

22 towards the party on trial."

23 I read from the fourth Michican, Alderman versus the

24 People; the case commences at page 414 and the opinion at

25 page 421: "Waiving for the present the consideration

26 of the assigned causes, which relate to the insufficiency

1 of the indictment, we will proceed to notice those brought  
2 up by the bill of exceptions. Of this class are the seven-  
3 th and eighth and they relate to the exclusion on the  
4 trial below, of the impeaching evidence sought to be ob-  
5 tained from the witness Bush, on his cross-examination, on  
6 the ground that the statements were privileged, having  
7 been made to Mr Baldwin, an attorney, under the supposition  
8 as Bush himself testified that Baldwin was his counsel.  
9 And it was upon the ground of belief, on the part of Bush,  
10 that Baldwin was his counsel, that the court refused to have  
11 the question answered. Leaving the question as to  
12 whether the relation of attorney and client actually ex-  
13 isted or not, and in regard to which there was a con-  
14 flict of testimony between Baldwin and Bush, undetermined,  
15 we have no doubt that if a communication should be made  
16 to an attorney in fact, by a party under an impression that  
17 such attorney had consented or agreed to act as the attorney  
18 of such party, that such communication would be privileged,  
19 although the attorney himself may not have so understood  
20 the agreement. But to make the communication a privileged  
21 one, either in that case or where the relation of attorney  
22 and client exists, it must have been made to the attorney  
23 by the party or client, as his legal adviser, and for the  
24 purpose of obtaining his legal advice and opinion, rela-  
25 tive to some legal right or obligation. But there is a  
26 broader ground upon which the admission of the excluded

1 evidence may be based, and that is the witness Bush was an  
2 accomplice in the crime for which the defendants, his asso-  
3 ciates, were on trial. He had been led to give evidence  
4 for the people under an express or implied promise of par-  
5 don, or that he should not be prosecuted, on condition  
6 that he should make a full and fair confession of the  
7 truth. It is a rule of law, that no witness shall be re-  
8 quired to answer any question that may tend to criminate  
9 himself, yet the accomplice when he enters the witness  
10 box with a view of escaping punishment himself, by a be-  
11 trayal of his co-workers in crime, yields up and leaves  
12 that privilege behind him, he contracts to make a full  
13 statement, to keep back nothing, although in doing so he  
14 may but confirm his own guilt and infamy." and so forth.  
15 "We think an accomplice who makes himself a witness for  
16 the People should be required to give a full and complete  
17 statement of all that he and his associates may have done  
18 or said, relative to the crime charged, no matter when or  
19 where done, or to whom said. He should be allowed no  
20 privileged communications. These he has voluntarily sur-  
21 rendered. The enforcement of such a rule may be the only  
22 protection the party on trial has left -- the only means  
23 remaining to him to meet, it may be, the perjury of the  
24 criminal upon the witness stand." Directly in point,  
25 your honor.

26 ~~The Supreme Court of Michigan, in Hamilton versus Peo-~~

1 ple, 29 Michigan, page 184: "When a co-defendant in a  
2 criminal case by proof also convicting himself, he has no  
3 right to claim any privilege concerning any of the facts  
4 bearing upon the issues. He has waived all privileges  
5 which will permit him to withhold anything. It was so  
6 held in Alderman versus The People, that this waiver  
7 covered confidential communications to attorneys, and there  
8 is no more reason for saving this which may be waived, and  
9 is by such criminating disclosures conclusively waived;  
10 both the client and counsel may be compelled to disclose  
11 the client's statements which are pertinent to the issue."

12 MR FORD: But, in that case, it was the client and not the  
13 counsel; is that correct?

14 MR ROGERS: It says both, though.

15 MR FORD: I know, but it was the client whose testimony  
16 was before the court.

17 MR ROGERS: yes, but what use would it be to ask the client  
18 "Did you say so and so" if you cannot contradict him  
19 by the attorney?

20 MR FORD: I do not want to argue it; I just wanted the  
21 information. We will admit that the client may be ex-  
22 amined.

23 MR DARROW: We do not want that admission.

24 MR ROGERS: We do not care for any admissions whatever,  
25 as to the law.

26 MR FORD: ~~just to save argument, there is no use arguing~~

that; we will admit that the client may be examined as  
to statements made by him to his counsel.

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Als 1 THE COURT. ~~That is not the question.~~

2 MR. FORD. That is the point, can the attorney be asked?

3 MR. DARROW. Any client can be examined as to statements  
4 to his attorney.

5 MR. ROGERS. Jones on Evidence, paragraph 756, page 947,  
6 says, (Reading) "When statements are made to his attorney  
7 by one who has admitted his connection with a crime and  
8 testified against another as an accomplice, the privilege  
9 is waived; and such statements may be received, like other  
10 statements made out of court to impeach the witness."

11 Citing many cases, just the same as if he said it to any-  
12 body else. It says, "such statements may be received  
13 like other statements made out of court to anybody else."

14 I read from the 65th Michigan Report page 515: (reading) --  
15 but the part I speak of is, "waives all privilege by his  
16 own act."

17 MR. APPEL. In this case, if your Honor please, of  
18 Hamilton against the People,--there are a number of  
19 other cases which we might cite, but all these cases are  
20 approved, and there is only one line of authorities and  
21 that line of authorities is applicable to this particular  
22 exception, and they all hold to the same effect. I think  
23 there are some California cases--I haven't my notes here  
24 or else I would cite them, but your Honor can see the  
25 object of the privilege is to preserve the facts secret  
26 ~~of the client, it is for his benefit; the secrecy goes~~



1 ~~to the facts, but when a party comes upon the stand, your~~  
2 Honor, and testifies to the whole conversation, admits  
3 his own guilt, and tries to implicate someone else. If  
4 he has made any communications to his attorney that are  
5 in direct conflict with his evidence in court, your Honor,  
6 we have a right to call upon the attorney and ask him  
7 whether or not his client said to him so and so and so,  
8 when it pertains particularly to the matter of his con-  
9 fession. Now, if your Honor please, if Mr. Franklin here  
10 upon the stand has denied that he made communications to  
11 Mr. Johnson, if he has said, and I suppose your Honor can  
12 look at the record page 853, that Mr. Johnson came to  
13 him purporting to come from the District Attorney's office  
14 and spoke to him, and if it be true that instead of Mr.  
15 Johnson coming to him from the District Attorney's office,  
16 that he sent Mr. Johnson to the District Attorney's office  
17 to make a proposition to the District Attorney, that he sent  
18 him there or told him that if his case was postponed that  
19 he could get within thirty days the man who had given him  
20 the money with which to bribe jurors. If your Honor please,  
21 that Mr. Darrow had never given him a cent, and if Mr. Franklin  
22 has said here that it was not so that Mr. Johnson came to  
23 him, and he said to him, advised him what to say, is that  
24 ~~in the nature of a privileged communication? If your~~  
25 Honor please, if a client of mine goes upon the stand and  
26 he says that I have advised him to lie, is that in the

1 nature of a privileged communication? Wouldn't the  
 2 court or any one else upon earth allow me to go upon the  
 3 stand and say that it was not true; that the statement  
 4 that he made is not true; that on the contrary he said  
 5 to me what the facts were and asked me to communicate to  
 6 the District Attorney's office in reference to those  
 7 facts. Where is the privilege? Franklin himself has  
 8 said here what Mr. Johnson--what we propose to prove by Mr.  
 9 Johnson was not true. He has come upon the stand and said  
 10 Mr. Johnson advised so and so, to say such and such things.  
 11 He has said that voluntarily without claiming the privi-  
 12 lege. We contend that on the contrary Mr. Franklin stated  
 13 to Mr. Johnson those things and that Mr. Johnson did not  
 14 advise him to tell those things; that Mr. Johnson advised  
 15 him to tell the truth. Now, where is the privilege?  
 16 Here is a man, your Honor, for whom the District Attorney  
 17 is claiming privilege. Oh, no, the District Attorney says  
 18 Franklin was allowed here without objection to put his  
 19 attorney in an improper light before this jury, and now  
 20 when we are asking the attorney to come here and say the  
 21 truth, to show the true conditions of things, which in our  
 22 judgment will not only show that Franklin committed perjury  
 23 in reference to the facts here in this case, testified to  
 24 by him as against our client, but testified falsely in  
 25 reference to the facts that he stated here in evidence to  
 26 his own attorney. Where upon the face of the earth is that

1 privilege to be extended to him, and who claims it here?  
2 Does Franklin claim it? No. Franklin testified without  
3 objection; he waived it. He testified to the whole trans-  
4 action.

5 • Mind you, your Honor, the privilege goes to the  
6 communications in a proper case, but when the client himself  
7 goes upon the stand and discloses everything, he not only  
8 ought to disclose everything that he said to his attorney,  
9 if proper matter to impeach him, but we have a right to ask  
10 the attorney that which his own client has waived by testi-  
11 fying, we have a right to treat that as a waiver. There  
12 is only one line of authorities, and it is not anything new.  
13 Mr. Greenleaf speaks of it; Starkey speaks of it. It  
14 existed as common law. These decisions only declare the  
15 rule that existed as common law. He said to Mr. Johnson,  
16 "You go to the District Attorney's office and tell them  
17 if my case is postponed for thirty days that I will produce  
18 the man." He said to him, "You tell Mr. Ford that." Was  
19 that a privileged communication? Didn't he direct Johnson  
20 himself to disclose that communication to another? Isn't  
21 that a well established rule of law that if my client  
22 tells me, I being his attorney, you go to Judge Hutton  
23 upon the other side of the case and communicate to him  
24 these facts--

25 MR. FORD. Right there we will stipulate that any con-  
26 versation which is communicated to an attorney for the

1 purpose of being divulged is not privileged, but there  
2 are different--

3 MR. APPEL. That is exactly what we are going to ask him,  
4 we don't want to stipulate with one who says there is no  
5 law on the subject. We are entitled to the whole of it.  
6 We want to show your Honor--

7 MR. FORD. I am only stipulating that much law to save  
8 argument over that point.

9 MR. APPEL. We want to show, your Honor, that he told  
10 Mr. Johnson to go over to Ford and request him to postpone  
11 my examination or my case for about--my case, yes, for  
12 about a month and I will produce the man who gave me the  
13 money to bribe juror Lockwood and juror Bain.

14 MR. FORD. You say Franklin said that?

15 MR. APPEL. Yes, sir, you go down there, you tell Ford  
16 that, and he says to him, the man who did that was a  
17 dark complected man and described him absolutely, and I  
18 want to show your Honor that Johnson did make that com-  
19 munication to Mr. Ford and that then the communication  
20 Mr. Ford made to Johnson went back and communicated to  
21 Franklin and he came back and said to him, "Ford wont  
22 take that cock and bull story, they say they want  
23 Darrow." That is a privileged communication then?  
24 Then reason has no place in the law? Then all that has been  
25 written upon the subject is absolutely of no efficacy  
26 of no merit, of no meaning, that is what we want to show;

1 we want to show that fact. In the very nature of  
2 things it is not privileged communication even under the  
3 statute of this state, your Honor. That statute states  
4 general principles, but your Honor knows very well that  
5 those general principles of law have exceptions and this is  
6 one of the exceptions.

7 MR. FORD. Now, if the Court please, so there won't be any  
8 misunderstanding, our objection is that whatever a client  
9 communicates to an attorney, whether he be an accomplice  
10 or not, whatever any client communicates to any attorney  
11 for the purpose of being communicated to some third party  
12 is not privileged communication.

13 THE COURT. Now, let's see. Let's see where we are. Did  
14 I understand you, Mr. Appel, to say that that was what  
15 you propose to show?

16 MR. APPEL. Exactly, your Honor.

17 THE COURT. Then there is no difference of opinion at all  
18 here.

19 MR. FORD. That was not the original point we started out  
20 with.

21 MR. APPEL. We propose to ask the same questions of the  
22 witness here that we put to Franklin. We propose to show  
23 what Franklin said to him, and how he authorized him to go  
24 and tell it to the District Attorney.

25 THE COURT. With that statement it is quite likely the  
26 District Attorney will not--

1 MR. DARROW. ~~We go further than that.~~

2 MR. FORD. Of course you do.

3 THE COURT. All right.

4 MR. FORD. The point is this, your Honor, that is before  
5 the court now: We concede that an accomplice who has  
6 taken the stand is compelled to tell all that he may have  
7 told his attorney. We concede that any client who has  
8 told any attorney some thing which is to be communicated  
9 to some third party, that that is also not privileged  
10 communication. The sole point before the court at this  
11 time is this: If the accomplice takes the stand and  
12 testifies his very conversation which he may have had with  
13 his attorney does that amount to such a consent of the  
14 client as will permit the attorney to testify? We admit  
15 the client can be compelled to testify but does it amount  
16 to such consent as will render the attorney a competent  
17 witness? That will be the point before the court which  
18 I desire to take up on Monday morning, merely that we may  
19 have no further misunderstanding during the whole of his  
20 testimony and stop arguing once and for all while Mr.  
21 Johnson is testifying, and that is the point I will present  
22 to the court on Monday morning, and would prefer to do it  
23 in the absence of the jury merely for the convenience of  
24 the jury. However, if counsel want them present I have  
25 no objection.

1 THE COURT: They have heard part of the argument; they  
2 would like to hear the rest of it.

3 MR APPEL: Your Honor, we reserve the right to bring  
4 here other authorities which we have not cited.

5 THE COURT: The question presented is whether or not under  
6 the well known rule of law that where the reason for the  
7 rule ceases whether the rule itself ceases, and whether  
8 or not the privilege has been removed by Mr Franklin's  
9 own act; that is the sole point involved here, and I will  
10 hear you on that matter when court reconvenes.

11 (Jury admonished.) Recess until Monday, July 15th,  
12 1912, at 10 A.M.

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