

J. D. FREDERICKS.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

IN AND FOR THE COUNTY OF LOS ANGELES.

Dept. No. 11.

Hon. Geo. H. Hutton, Judge.

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The People of the State of California, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Clarence Darrow, )  
 )  
 Defendant. )

No. 7373.

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REPORTERS' TRANSCRIPT.

VOL. 58

I N D E X.

	Direct.	Cross.	Re-D.	Re-C.
Tom L. Johnston,	4697	4716	4730	4734

1 MONDAY, JULY 15, 1912; 10 A.M.

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

4 -----  
5 THE COURT. Ready to proceed?

6 MR. FORD. Now, if your Honor please, counsel for defense  
7 on Friday submitted a number of authorities to the effect  
8 that the communication between client and attorney was not  
9 privileged, in a case where the client was an accomplice  
10 to a crime and had turned states evidence, telling all that  
11 had occurred on the stand, and read a number of cases in  
12 which the communication under those circumstances, not  
13 being privileged, the client could be compelled to state  
14 what occurred between him and his attorney, the client  
15 being a witness on the stand. Each one of the authorities  
16 submitted by them was confined to the client's testimony  
17 concerning these communications under those circumstances.  
18 There was one of the cases in which the statement was made  
19 by the Court that perhaps--or which might indicate, perhaps,  
20 that the attorney could be examined; however, that point  
21 was not before the court in that case at that time, and  
22 whatever the court may be speculating upon the subject  
23 would be over dicta and not binding; it was not a decision  
24 but a mere discussion by the court of what might have  
25 occurred if the attorney was on the stand. The fact is  
26 as far as their value as precedents as decisions go, they

1 were confined to the cases of clients testifying, just  
2 as in this court Mr. Franklin has testified as to communica-  
3 tions made <sup>by</sup> him to his attorney, Mr. Johnson. We do not con-  
4 tend that that was error--

5 MR. APPEL. Just a moment--let's understand it--

6 MR. FORD. If you will permit me to make my full statement  
7 perhaps you will understand our position.

8 THE COURT. Let's see; just address yourself to the court  
9 and then I can determine whether an interruption is proper.

10 MR. APPEL. They made objection to this testimony and we  
11 were replying to it, and I stated, your Honor, the record  
12 will bear me out, we wanted to cite a few authorities  
13 this morning, and conclude our argument. Now, he gets  
14 up here and starts to close his argument.

15 THE COURT. Perhaps that is my fault. I understood you had  
16 closed.

17 MR. FORD. I don't think we are so far apart--

18 THE COURT. Wait a moment--just a moment. I might say at  
19 this time, however, Mr. Appel, I presume the argument is  
20 for the purpose of convincing this court. I think you  
21 have cast the burden over on the other side by the argu-  
22 ments already submitted. If they meet them the court will  
23 hear you again. With that statement on my part I suppose  
24 you are willing the case should proceed.

25 MR. APPEL. That is the only reason I interrupted.

26 THE COURT. I think you are quite right.

1 MR. FORD. I think after we state our position the mat-  
2 ter will be quite clear and as your Honor indicated on  
3 Friday, perhaps our objection was somewhat premature, and  
4 it is to some extent a question before the court,  
5 but it is well to decide the matter before we get done and  
6 decide it once and for all, decide the whole subject.

7 At the beginning of the argument counsel for the  
8 defense made a number of assertions to which we took  
9 exception. Now, if it will be confined to a certain line  
10 as was indicated in the subsequent part of his argument,  
11 then the only objection we have to it at the present time,  
12 and that perhaps is premature, is that no foundation has  
13 been laid for the asking of any questions of Mr. Johnson  
14 as to what transpired between him and his client, Mr. Frank-  
15 lin, but first, on the general subject, your Honor, I will  
16 just content myself with quoting two cases.

17 In the case of Keyes vs Barr, reported in the  
18 14th Pacific, page 456, the Supreme Court of Kansas;  
19 In that case the depositions of the defendant had been  
20 taken and the depositions were not presented in the record,  
21 and there was no proof of the parts of the depositions  
22 <sup>of were</sup> complained of, as a matter of fact admitted in evidence,  
23 Carr's, the defendant, only accepted.  
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1 In his deposition was a letter of defendant to J. R.  
2 Good, Esq., who the defendant claimed was his attorney  
3 at the time the letter was written. Objection was made  
4 to its introduction and an offer to prove that the rela-  
5 tion of attorney and client existed as claimed. The court  
6 declined to hear evidence on that point and allowed  
7 the letter to be read; this was no error. An attorney  
8 is incompetent to testify of any communication made to him  
9 by his attorney without the client's consent." That is  
10 the law the same as in this state. (Reading:) "The  
11 communication itself from the client is incompetent, but  
12 the attorney is prevented from testifying concerning it."  
13 That is the law in Kansas and that is the law in this state,  
14 and the position we take that the communication itself may  
15 be admitted in evidence has been admitted and introduced;  
16 Franklin has testified to it, but our claim is that the  
17 attorney is incompetent to testify concerning it. That  
18 is the exact language of the statute; the attorney can-  
19 not testify: "There are certain witnesses who are declar-  
20 ed incompetent and in the case of -- Now, the Michigan  
21 case quoted by counsel, we have no quarrel with, but in  
22 the 93rd Michigan, the position -- the exact point in dis-  
23 pute before this court is set forth whether or not an  
24 attorney can testify to the matter even though the cli-  
25 ent can -- the client can testify, and in this case has  
26 testified. It is the case of Erickson vs. Milwaukee, L.S. & W.  
Railway Com-  
pany, 93rd Michigan, page 414. The portion I am reading

1 from ~~begins at page 417: (Reading:)~~ "Complaint is made  
2 of the ruling of the trial judge, and while plaintiff was  
3 upon the witness stand. He had been examined through an  
4 interpreter up to the noon recess of the court, and had  
5 been questioned relative to the order given him by Moleski  
6 to pull the pin and jump from one car to another, and had  
7 testified that the brake was open before he pulled the  
8 pin or was ordered to jump, and which state of facts, it  
9 is claimed, he has testified to on his former trial. Be-  
10 fore the court convened in the afternoon of that day,  
11 plaintiff had a consultation with his counsel, and was told  
12 by him that he (the plaintiff) had stated the case differ-  
13 ently than he (the counsel) had understood it in his  
14 talk with him. The plaintiff went to the interpreter,  
15 and told him that "they had got him down wrong", meaning,  
16 evidently, that either the interpreter had misunderstood  
17 him or that the court reporter had taken his testimony  
18 down erroneously. When the court convened, the plaintiff  
19 took the witness stand, and corrected his testimony, mak-  
20 ing claim that he had been misunderstood, as he had been  
21 informed by his counsel, and then made the statement  
22 that the brake was loosened after he had pulled the pin,  
23 while he was in the act of jumping. The correction of his  
24 testimony was made against defendant's objection.  
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3s 1 "The defendant's counsel, upon cross-examination, showed  
2 the talk had between plaintiff and his counsel during the  
3 noon hour, and offered to call the plaintiff's counsel  
4 to show the fact. Counsel objected to being sworn in  
5 reference to the matter, and the court ruled that he could  
6 so decline. We find no error in this. Defendant's  
7 counsel had a full and fair opportunity to cross-examine  
8 the plaintiff in reference to the whole subject matter,  
9 and availed themselves of it. The plaintiff had a right  
10 to make a correction of his testimony if he had made an  
11 erroneous statement, or had been misunderstood by the  
12 court reporter, or misinterpreted by the interpreter.  
13 It was a question of fact for the jury whether this was  
14 so or not, and to give such weight to the plaintiff's tes-  
15 timony as, under the circumstances, they thought it war-  
16 ranted; but by no rule of practice had defendant to call  
17 plaintiff's counsel to the stand against his objection, and  
18 interrogate him as to what statement he had made to his  
19 client. Counsel had not been called as a witness by either  
20 side, and was not thereafter called."

21 THE COURT. I do not understand that the defense has of-  
22 fered to prove what statements Col. Johnson made to Mr.  
23 Franklin as his client, but on the contrary they are offer-  
24 ing to prove what Mr. Franklin said to his attorney; am I  
25 correct in that?

26 MR. FORD. That is correct.

1 MR. DARROW Yes.

2 MR. FORD. Your Honor, the way I understand it the rule  
3 as to the conversation--

4 THE COURT. That case holds they had a right to ask the  
5 attorney what he said to his client, what had been his  
6 advise.

7 MR. FORD. The universal rule, your Honor, is what the  
8 attorney said to the client and what/<sup>ever</sup>the client said to  
9 the attorney as to the communication, whatever the law is  
10 as to one part of the communication is law as to the other  
11 part of the communication. There is no quarrel on either  
12 side as to that.

MR APPEL: If the court please, --

p 13 MR. FORD. Let me finish my argument to the court and I  
14 think I can finish it better.

15 MR. APPEL. The court asked us a question.

16 THE COURT. I asked a question of the defense in order to  
17 clear it up. Mr. Appel, I will hear you.

18 MR. APPEL. The testimony of Mr. Johnson will show, your  
19 Honor, that Mr. Johnson was employed to make these com-  
20 munications to the District Attorney and to bring com-  
21 munications from the District Attorney to Mr. Franklin;  
22 we contend that in those instructions the relation of  
23 attorney and client do not exist such as to prevent  
24 declarations made by both sides to be published and to be  
25 transmitted from one to the other, and he acted as a go-  
26 between.



1 MR. DARROW. I think--

2 MR. FORD. If the court please--

3 THE COURT. Mr. Ford, the court reserves the right to  
4 interrupt whenever it sees fit and proper so to do. Now,  
5 I interrupted the argument in order to get an answer.

6 MR. FORD. I thought the question had been answered,  
7 your Honor.

8 THE COURT. Yes, sir.

9 MR. FORD. That the question and everything in regard to it--

10 THE COURT. Mr. Appel answered the question and also Mr.  
11 Darrow, and if he desires to make a statement he has the  
12 right to do so.

13 MR. DARROW. We claim that, and we claim beyond that, that  
14 there is no privilege of any sort after a man takes the  
15 stand and testifies himself, and the object of the law  
16 is to protect the client, and when he does not protect  
17 himself the object has been served, with his consent, and,  
18 of course, there is no dispute about these civil cases,  
19 there would be no question about that, but they have no  
20 application in criminal cases.

21 THE COURT. Now, Mr. Ford, in order that the court's  
22 position may be clear to you, I have just stated to the  
23 defense that they had raised by the citation of authori-  
24 ties, they had cast the burden over on the prosecution to  
25 convince the mind of the court. Now, this is the point  
26 that is in my mind, a clear view and a very clear argument--

1 this is not final--but this is the point that has seemed  
2 to my mind to be conspicuous. As presented, subdivision  
3 2 of Section 1881 has some object. Now, what is that  
4 object?  
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1 What is the object of that statute, if not the protection  
2 of the client? It seems to me that it has no further ob-  
3 ject, no object except of public policy, or any  
4 further object to serve except the protection of the cli-  
5 ent and that after the client has voluntarily waived that  
6 protection by taking the stand, then has not the reason  
7 for the rule ceased and by that token, the rule, under the  
8 well-established rule of law? That is the point I gath-  
9 er from the defense's argument, and those are the ques-  
10 tions I ask you to address yourself to.

11 MR FORD: I think I understand the court's point on that,  
12 and I wish to state that I did not intend any discourtesy  
13 a moment ago either to the court or counsel on the other  
14 side, but I thought the court's question had been answer-  
15 ed, and whether I am right or wrong in my deductions, it  
16 seems to me we have accorded to them the privilege of mak-  
17 ing argument without interruption, and it struck me as be-  
18 ing an interruption of my argument by the defense.

19 THE COURT: The court felt it was necessary to cause an  
20 interruption and did so.

21 MR FORD: I had not any objection to that, but I had ob-  
22 jection to the continuation of it. Now, if the court  
23 please, the law secures to the client the privilege of  
24 objecting at all times, and forever to an attorney, soli-  
25 citor or counsellor from disclosing information in a  
26 cause confidentially given while the relation exists.

1 "The client alone can release the attorney, solicitor or  
2 counsellor from this obligation. The latter cannot dis-  
3 charge himself from the duty imposed upon him by law."  
4 Your Honor desires to know the object of that section,  
5 and I have been reading from the language of the Supreme  
6 Court of this state: "The client alone can release the  
7 attorney, solicitor, or counsel from this obligation. "  
8 No one else can. "The latter --" counsel -- "cannot dis-  
9 charge himself from the duty imposed on him by law," no  
10 matter what the object of it may be, the law absolutely se-  
11 cures to the client, and he stated here on the stand ex-  
12 pressly that he would not release his attorney from that  
13 obligation, whatever that obligation may be. I am quoting  
14 from In re. Cowdery, 69 California Reports, page 50,  
15 and in the 83 California, People versus Mullings, which is  
16 a husband-and-wife case, but the court, beginning at page  
17 141, for the purpose of enunciating what is secured to  
18 the client when he sees his attorney, where it is a case  
19 of husband and wife, it discusses the relation of attorney  
20 and client. "The main provision of our code upon the sub-  
21 ject is as follows: 'There are --'"this is the language of  
22 sect on 1881 -- "'There are particular relations in  
23 which it is the policy of the law to encourage confidence  
24 and to preserve it inviolate;'" The Supreme Court italicizes  
25 those words. That is the object of the provision of  
26 section 1881, to preserve it inviolate. "Therefore a per-

1 son cannot be examined as a witness in the following cases."  
2 That is, an attorney cannot be examined without the consent  
3 of his client. "In Murphey versus Commonwealth, 22 Gratt.,  
4 960, the rule was applied to a mere witness for the prose-  
5 cution: In that case, Alexander Murphey was on trial  
6 for an alleged assault with intent to kill, on one John  
7 Murphy. John Murphy was a witness for the prosecution,  
8 and on cross-examination he was asked by counsel for de-  
9 fendant if he had not stated to his wife that defendant  
10 acted only in his own defense."  
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1 "The prosecution objected to the question as privileged,  
2 and the objection was sustained, and the Supreme Court of  
3 Appeals of Virginia held the ruling correct, because the  
4 question 'required him to state a communication supposed  
5 to have been made by him to his wife, which, if made, was  
6 what the law considers a confidential communication, and  
7 which he was not bound to disclose.' That has been  
8 repeatedly held that a party offering himself as a witness  
9 in his own behalf cannot be cross-examined as to any com-  
10 munication made to his attorney. In Duttonhofer vs  
11 State, 34 Ohio S.P. 91, 32 Am. Rep. 362, the defendant  
12 was indicted for and convicted of forgery. He was a  
13 witness for himself; and, on cross-examination the State  
14 succeeded in examining him, over his objection of privi-  
15 lege, about certain communications made by him to his at-  
16 torney concerning the matter in controversy. But the  
17 Supreme Court of Ohio reversed the judgment for this error  
18 and in its opinion said, among other things, as follows:  
19 'The privilege applies to the communication; and it is  
20 immaterial whether the client is or is not a party to the  
21 action in which the question arises, or whether the dis-  
22 closure is sought from the client or his legal adviser.'  
23 And the court further says: 'Nor do we see the propriety  
24 of not allowing the attorney to make the disclosures without  
25 the consent of his client and yet compelling the client  
26 himself to make them.' In Bigler vs Peyker, 43 Ind. 112,

1 it was held that 'Communications made in consultation by  
2 a client to his attorney are privileged and protected from  
3 inquiry, when the client is a witness as well as when the  
4 attorney is a witness.' In *Hemenway vs Smith*, 28 Vt.  
5 701, one Orcult who was a defendant, was a witness on  
6 his own behalf and was cross-examined against his objec-  
7 tion, about consultations with his attorney. For this  
8 error the judgment was reversed, the Supreme Court of  
9 Vermont saying that, 'The rule should be the same as it  
10 would have been if the counsel had been called to prove  
11 the consultation.' In *Bobo vs Bryson*, 21 Ark. 38,  
12 76 Am. Dec. 406, it is held that a witness is protected  
13 from testifying as to any communication he may have made  
14 to his attorney in confidence. In *State vs White*, 19 Kan.  
15 445, 27 Am. Rep. 137, the defendant, who was being tried  
16 for bigamy, was a witness for himself; and he was cross-  
17 examined by the prosecution, against his objection, about  
18 consultations with his attorney. For this error the  
19 judgment was reversed; and the court '--it appears to the  
20 court of this state which closed as follows: 'The  
21 reasoning and felicity of these cases (and there are  
22 many others to the same effect) apply with increased force  
23 to the relation of husband and wife, --a relation more con-  
24 fidential than that of attorney and client--indeed the  
25 most confidential relation known to human beings. And  
26 we have cited the above cases because they are closely

1 analagous in principle to the one at bar, and because we  
2 have been unable to find any reported case where it has  
3 been attempted to compel a defendant in a criminal case  
4 to testify to communications between his wife and himself.  
5 Slightly changing the language above quoted from State  
6 vs White, but applying its principle to this case, we can  
7 say that, 'this statute would be of no utility or benefit  
8 if the husband could be compelled, against his consent, to  
9 make such disclosures. It would be absurd to protect  
10 communications between husband and to leave them unprotect-  
11 ed on the examination of the husband.'



1 My only object in reading this is to show to your Honor  
2 that the reasoning which applies in cases of husband and  
3 wife is exactly that which applies in cases between at-  
4 torney and client, although, as the court says, with much  
5 increased force; that is the philosophy of it, increase in  
6 force in the case of husband and wife, because of the sa-  
7 credness of this relation, and, even though the sacredness  
8 of that relation be greater, the force of the law greater  
9 in the case of husband and wife, the law, however, itself,  
10 is absolutely the same.

11 In Peopleversus Atkinson, a criminal case in this state,  
12 40 Cal., beginning at page 284: "The defendant was con-  
13 victed of grand larceny, and has appealed to this court.  
14 On the trial one Tannon was called as a witness for the  
15 prosecution, and was inquired of as to certain statements  
16 made by the defendant, when, on examination, before the  
17 committing magistrate, charged with this offense. The  
18 witness stated that he was an attorney at law, and was act-  
19 ing as the counsel for the defendant on the examination  
20 before the committing magistrate, and 'that what he knew of  
21 the matter was communicated to him before he was sworn,  
22 and as his counsel.' Thereupon the defendant objected  
23 to the testimony, but the court overruled the objection  
24 and compelled the witness to testify. After detailing  
25 the substance of the statement made by the defendant, the  
26 witness, on cross-examination, said he did not know whether

1 the admissions of the defendant, to which he had testified  
2 'was what he told me confidentially beforehand or what he  
3 swore to. I cannot recollect how it was.'" In that case  
4 the client had taken the stand and swore to everything,  
5 and we might say, because he had already sworn to the facts  
6 on the stand. The witness proceeds to state, "I cannot  
7 recollect how it was." The court says, "When it appear-  
8 ed that the witness was unable to state whether the ad-  
9 missions to which he had testified were made to him as  
10 counsel of the defendant, or whilst the accused was under  
11 examination as a witness in his own behalf, the court  
12 should have excluded the testimony of its own motion.  
13 On principles of public policy, communications from a  
14 client to his attorney touching the subject matter under  
15 investigation are privileged, and will not be allowed to  
16 be disclosed by the attorney, even though he be willing  
17 to do so."

18 That is the only point we are making here is, that  
19 the attorney is not allowed to disclose it. As I stated  
20 to the court, there was one situation not touched upon  
21 by those decisions, and not shown by them at all, they were  
22 relying on a different state of facts, they were relying  
23 on the fact where the man was an accomplice. They can  
24 get this testimony in on another ground, which on Friday,  
25 we stated we were willing to go into. We want all the  
26 facts to go before the jury, but we do not want a portion

1 of the facts to go before the jury, and by reason of limi-  
2 tations placed on cross-examination be foreclosed from  
3 putting all the facts before the jury. We have not any  
4 objection to them putting Mr Johnston on the stand and  
5 testifying concerning a communication made by his client  
6 to him where it was intended, and where it actually hap-  
7 pened that the attorney communicated such facts to the Dis-  
8 trict Attorney. In this case, where the fact was communi-  
9 cated to somebody else, the law is slightly different,  
10 and on Friday, we conceded that, and we still hold to the  
11 same position, if they lay the foundation showing what  
12 facts were communicated, then, after having laid the foun-  
13 dation and showing that Mr Johnson held a conversation  
14 with Mr Ford showing what was said and done there, then  
15 ask if Mr Franklin had told him to say that, we have no ob-  
16 jection whatever to that, because a communication made to  
17 an attorney for the purpose of having it disclosed is ad-  
18 missible in evidence, and Mr Appel said in the latter part  
19 of his argument, it was an entirely different position  
20 to which we were willing to meet them on, said in the lat-  
21 ter part of his argument that in order to show your Honor  
22 that he told Mr Johnson to go over to Ford and request him  
23 to "postpone my examination and my case for about a month  
24 and I will produce the man who gave me the money to bribe  
25 Juror Lockwood and Juror Bain."  
26

7p 1 THE COURT. Now, just a moment. I will ask Mr. Appel.  
2 My recollection is that after consultation between Mr.  
3 Appel and Mr. Darrow they stated they desired to go some-  
4 what further than that.

5 MR. DARROW. We do, your Honor, we want the full communica-  
6 tion.

7 MR. APPEL. Yes, and part of the communication, your Honor,  
8 is not privileged at all, it does not come within the  
9 privilege, the other part we contend is not privileged.

10 THE COURT. Your position is, Mr. Franklin's coming to  
11 the stand threw the door wide open as to everything he  
12 said in all the conversations between him and Mr. Johnson?

13 MR. APPEL. Yes, sir. There are two grounds.

14 MR. FORD. Our position is--

15 THE COURT. That it must be confined to the statements  
16 made in the communication with a view or intention of hav-  
17 ing them come to the District Attorney?

18 MR. FORD. I think under the law that is strictly true,  
19 but we want all the facts to go before the jury and if  
20 they lay the foundation showing what facts went to the  
21 District Attorney, as far as we are personally con-  
22 cerned, they can have all the matters--

23 THE COURT. There is no personality here, it is, what is  
24 the law?

25 MR. FORD. We have stated that we do not think under the  
26 law they can go into the whole of the case and if we per-

1 mit them to go into the conversation without showing the  
2 foundation, we are foreclosed from showing the whole facts  
3 to the jury. We want the proper legal foundation laid,  
4 not that we care a snap what was told by Mr. Franklin to  
5 Mr. Johnson. Mr. Franklin has told largely what the matter  
6 was, but our theory is at this time he was framing up  
7 evidence to protect the defendant.

8 THE COURT. Now, Mr. Ford, I don't care whether the evidence,  
9 when it comes in, is going to affect one side or the other,  
10 the only question before the court is whether or not the  
11 evidence tendered by the defense through Mr. Johnson as a  
12 witness is legal evidence. If it comes it will have to  
13 benefit or injure who it may, that is not a matter for the  
14 court to consider now.

15 MR. FORD. I have one more citation. Our position is  
16 this, your Honor, and if we can get together on this point  
17 we can save argument. If they are willing to show a  
18 foundation, to show that Mr. Johnson communicated certain  
19 things to Mr. Ford and what occurred on that occasion, and  
20 then they want to go into that conversation upon which Mr:  
21 Johnson acted, I shall not object or technically raise any  
22 point as to what occurred between Mr. Johnson and Mr. Frank-  
23 lin, we are perfectly willing that the whole evidence go  
24 before the jury, although under the law I do not think  
25 anything can be before the jury except what was actually  
26 communicated. However, we do not want to be technical on

1 that, we are willing the jury shall have all the facts  
2 and we do not want it confined to just what occurred between  
3 the client and attorney without showing what the attorney  
4 did, and we would be if we didn't make our objection. It  
5 is not for the purpose, as counsel has insinuated, that  
6 we are trying to keep evidence from going before this jury.  
7 If the court will permit--I find a citation here-- I have  
8 forgotten the case and I can find it under the Code sec-  
9 tion--in Phaler vs Phaler, 136--132 Cal. in the estate of  
10 Nelson and in all of the estate cases, where it frequently  
11 happens that an attorney is a witness to a will which is  
12 offered for probate in the courts, our courts have held  
13 that those circumstances show an intent on the part of the  
14 client that the attorney should, under proper circumstances,  
15 disclose what had transpired between him and his client  
16 and that being the case whatever the client intended  
17 should be disclosed was not privileged, and that they can  
18 be examined upon it. Of course, the foundation must  
19 first be laid showing that intent to disclose by showing  
20 the actual disclosure and the directions to disclose it,  
21 and then going into the subject matter what was to be  
22 disclosed, whether the attorney disclosed it or not, and  
23 all of those estate cases, beginning with the Nelson case--  
24 well, there were cases before that, but that is a typical  
25 case, 132 Cal. 182, and in the Sharon case, I think it is  
26 in the 79th Cal., although the same subject was discussed.

1 That is our position. I might say upon the present  
2 question which is before the court, our objection is pre-  
3 mature and when the proper time comes if the witness is  
4 asked what transpired between himself and Mr. Franklin, we  
5 shall object upon the ground that no proper foundation has  
6 been laid, unless the witness is just examined as to the  
7 disclosure and the directions to disclose, and, of course,  
8 if they show that the disclosure was made to Ford by Mr.  
9 Johnson and that that disclosure was at the direction of  
10 Mr. Franklin, then they may go into the whole of the matter  
11 and we desire that they should.

12 THE COURT. I think the defendant's position is right. I  
13 am convinced that the object of the statute is upon the  
14 ground of public policy as stated, a particular kind, but  
15 in any case where the client has voluntarily taken the  
16 stand as a state's witness and admitted his own guilt by  
17 testimony tending to implicate another, I am satisfied that  
18 he has waived all objection under that statute,  
19  
20  
21  
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23  
24  
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26

8p 1 and if it should appear that he has gone to his counsel  
2 and made admissions or statements contrary to his state-  
3 ment on the stand, why, the def endant certainly ought to  
4 have a right to show it. I believe under the well known  
5 rule of law where the reason of the rule ceases the rule  
6 itself, applies strictly here, that the door is thrown  
7 wide open and any statement or admission or competent  
8 evidence that Col. Johnson could give here to the same  
9 extent as if he were not an attorney. Col. Johnson, you  
10 will take the stand, please.

11  
12 T O M L J O H N S T O N,

13 takes the stand for further direct examination.

14 THE COURT. Are there any witnesses in the room, persons  
15 who expect to be called as witnesses, other than those  
16 who have been permitted to remain? If so, I will state  
17 that the rule has been invoked and you are required to  
18 remain outside of the court room until after your testi-  
19 mony. The court room at the other end of this hall has  
20 heretofore been used as a witness but that is now being  
21 used as a court room and the probation officer's room off  
22 the hall has been provided, the room marked "Probation  
23 Office" is available as a witness room during the progress  
24 of this trial.

25 MR. APPEL. In as much as the other question was probably  
26 lost, I will put it substantially the same, /asked and I will prelin-



1 inarily two or three questions.

2 THE WITNESS. Mr. Appel, just let me have a word with the  
3 court.

4 THE COURT. Yes.

5 THE WITNESS. The report of the proceedings in court last  
6 Friday by the papers put me in the attitude of an attorney  
7 seeking to disclose information given to him by my client.  
8 It was wrong and I repudiate it. I was brought here by  
9 legal process of court and did everything to avoid coming  
10 here and I did not want to have anything to do with it and  
11 my testimony will be under direction and ruling of this  
12 court.

13 THE COURT. The Court understood your position correctly  
14 in that respect, Col. Johnston and you are now testifying  
15 because the matter has been presented to the court and the  
16 court has ruled under the circumstances it is your duty  
17 to so testify.

18 MR. FORD. The question before the court--

19 THE COURT. That has been withdrawn and another one sub-  
20 stituted.

21 MR. APPEL. In view of Mr. Johnston's statement here, your  
22 Honor, I want to ask him preliminarily a few more ques-  
23 tions so that the record may speak concerning his whole  
24 attitude, concerning this man, so that for the witness's  
25 own protection, in regard to his position, I want to ask  
26 him.

1 THE COURT. for the purpose of the record I will state  
2 that the statement made by the court is to be taken as  
3 indication--after listening to the argument of counsel as  
4 to what the ruling will be, and at suitable times, because  
5 the law gives them their objections, and preserving the  
6 record--

7 MR. APPEL.Q Sometime in the early part of January, in the  
8 year, 1912, you may state whether or not you met Mr. Frank-  
9 lin on Broadway and whether or not upon meeting him, after  
10 greeting you, he did or did not speak to you or extend  
11 to you an invitation to go over to the Waldorf Saloon on  
12 Broadway?

13 A Yes, sir, I met him.

14 Q You may state whether or not after reaching the Waldorf,  
15 whether or not you and he occupied one of the seats in  
16 the compartments inside of that place? A We occupied  
17 one of the booths.

18 Q You may state whether or not after being seated, Mr.  
19 Franklindid or did not, you and he being alone, say to  
20 you, "You are pretty friendly with the District Attorney's  
21 office, are you not?" or words to that effect? A Yes.

22 MR. FORD. What page is that? Object to it on the  
23 ground no proper foundation has been laid. Counsel in-  
24 forms me it is not part of the conversation.

25 MR. APPEL. It is for the purpose of showing that Mr.  
26 Franklin did not employ him as his attorney.

1 THE COURT. All right.

2 MR. FORD. It is an impeaching question.

3 MR. APPEL. It is not an impeaching question. I am trying  
4 to show the relation between them.

5 THE COURT. For the purpose of their relation is another  
6 matter. Of course, the question is leading. I think it  
7 is competent under the circumstances.

8 MR. FORD. If the Court please, I would like to be heard  
9 on that just a moment. Mr. Franklin has testified to cer-  
10 tain conversations made or had with Col. Johnston, had  
11 with Colonel Johnston is for  
12 the purpose of impeaching the witness. The only question  
13 raised on the impeachment side of it was what the rela-  
14 tion was, as part of the impeaching question, whatever  
15 the relation was occurring out of the transaction as it oc-  
16 curred, and they desire now to impeach him and show the  
17 conversation was not had between him and Franklin as at-  
18 torney and client, but on the contrary was a mere friendly  
19 conversation. If that be true it is then their duty and  
20 was their duty to put the question that they are now  
21 putting to the witness to Mr. Franklin in order to lay the  
22 foundation for the impeachment of the witness, but under  
23 the mere guise that it is preliminary would not apply to  
24 this case at all, because whatever the transaction was,  
25 was a part of the conversation, and the conversation must  
26 be put to the witness before he can be impeached. It is  
only fair to the witness. They ask a point blank question

1 and now they want to ask for a conversation which would  
2 show the existence of a different relation. The witness  
3 is entitled to have the questions put to him in order that  
4 he may answer them.

9s 5 THE COURT. What page are you reading from?

6 MR. APPEL. I am not referring to the questions we pro-  
7 pounded to Mr. Franklin, I am simply showing this state of  
8 facts preliminary. I am showing that Mr. Franklin requested  
9 Col. Johnston to do him a favor, go and take a message  
10 over to the District Attorney's office for him, and told  
11 him what to say. Now, that shows the relation, and that  
12 shows the facts and shows whether or not he acted as his  
13 attorney or not; whether or not he acted as his attorney--  
14 because I am an attorney and may take a message to someone,  
15 that doesn't necessarily involve legal advice or anything  
16 of that kind.

17 THE COURT. I think counsel is right, I think he has a  
18 right to show the relation preliminarily to putting the  
19 impeaching question.

20 MR. FORD. Do you contend, Mr. Appel, that at this time  
21 he was the attorney or he was not the attorney?

22 MR. APPEL. Now, you asked Col. Johnson whether or not  
23 this man was his client or whether or not he was his  
24 attorney, you understand. I say that is a conclusion  
25 which must be determined from the facts, and I want to  
26 show the facts in order--

1 THE COURT. I think so.

2 MR. APPEL. That the court--if the court makes a ruling  
3 in our favor that it will place Col. Johnston in a position  
4 where no one will criticise him as disclosing communica-  
5 tions of his client to him, and I want to show the ruling  
6 of the court was justified and if any one ever criticises  
7 Col. Johnston he can come back on the record and say that  
8 the court decided this question and I did so testify, and  
9 I want to place him right, and it is my duty to do so.

10 MR. FORD. I can only see one object in this and that is  
11 to contradict Mr. Franklin's statement made at a certain  
12 time and place, and the courts have repeatedly held that  
13 a communication made by a client to his attorney will be  
14 protected if the client thinks the other man is his attorney.  
15 Now, an attorney may not consider himself as actually being  
16 an attorney until he has been paid a retainer, until he  
17 has been paid a fee, yet the courts have held the rela-  
18 tion existed prior to that. People frequently come to  
19 an attorney and ask him to do certain things for them and  
20 nothing whatever said about fee until the transaction is  
21 closed, and then he is paid. The mere fact the client  
22 failed to pay the attorney--

23 THE COURT. That has absolutely nothing to do with it.

24 MR. FORD. Suppose Mr. Franklin thought he was his attorney--

25 THE COURT. That is a question that will have to be pre-  
26 sented. The witness has already stated he thinks he was

1 his attorney.

2 MR. FORD. If the court please, your Honor has ruled  
3 whether he was attorney or whether he was not his attor-  
4 ney, he would have to testify to the conversations had;  
5 that being the case, the relationship is absolutely imma-  
6 terial, and we object to it on that ground, a new  
7 ground. Your Honor has ruled it doesn't make any dif-  
8 ference; if it doesn't make any difference it is immaterial  
9 and we object to it on the ground of its immateriality.

10 THE COURT. I think they have a right to protect the record  
11 in that way.

12 MR. APPEL. Then let's be frank--

13 THE COURT. I am not ruling which way--

14 MR. APPEL. I am not going to say anything improper. I  
15 have talked with Col. Johnston and I am not going to say  
16 what he told me, but Col. Johnston is exceedingly careful  
17 about being a witness in this case and I don't blame him--

18 MR. FORD. The court please we object--

19 MR. APPEL. your Honor, I think there is going to be a  
20 refusal to testify in spite of your Honor's ruling and we  
21 want a record here that will sustain your Honor before  
22 any Appellate court.

23 THE COURT. I am ruling your way irrespective of what  
24 that condition could be, but I think the record should be  
25 very full and complete.

26 MR. FORD. Then the object is to show he was not a client?

1 MR. APPEL. The object is to show the facts, whatever they  
2 may be.

3 THE COURT. Objection overruled.

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

5 MR. APPEL. Q You may state whether or not after you  
6 responded to him in the affirmative he then said to you,  
7 "Col. will you do me a favor? Will you go up to see Joe  
8 Ford and request him that if he will postpone my case,  
9 that is coming up soon, three or four weeks or thirty  
10 days, and give me an opportunity to find a certain party,  
11 and with whom I had several meetings prior to my arrest,  
12 but whom I have not been able to find after my arrest,  
13 that if I can find him, that the party," he describing the  
14 party to you as a dark complectioned man--

15 MR. FORD. Pardon me, Mr. Appel, what page are you reading  
16 from?

17 MR. APPEL. I am putting the question. I am not reading  
18 from anything. I am putting the impeachment question from  
19 the substance of what we asked the other one, "That there  
20 will be something doing," that he would find the party who  
21 had given him the money with which the bribery had been  
22 accomplished, or words to that effect, and didn't you in  
23 answer to that say, "Yes, I will go and deliver your  
24 message to Mr. Ford," and make an engagement with him then  
25 to return and deliver the answer at the same place a 4  
26 o'clock of that day? Did he or did he not have that con-





1 MR FORD: just a moment. To that question we object upon the  
2 ground that no proper foundation has been laid for the  
3 asking of such question, in that the words and language now  
4 implied by counsel were never put to Mr Franklin at any  
5 time or place, and upon that ground we object that the  
6 witness is entitled to have the questions put to him be-  
7 fore an impeaching witness can be brought against him, and  
8 counsel himself just admitted here in an aside to us that  
9 he is not reading from any particular transcript.

10 THE COURT: You will have to leave out discussions from the  
11 side. Counsel must have a right to discuss these matters  
12 privately among themselves without having the statement  
13 made in open court. They may get into these discussions -

14 MR FORD: The aside was addressed to us, your Honor, and I  
15 just communicated the fact to your Honor.

16 THE COURT: The impeaching question occurson what page of  
17 the transcript?

18 MR APPEL: I make up one question out of a whole lot pro-  
19 pounded to Mr Franklin. It commences at page 853 -- 852.  
20 I will read it to you.

21 MR FORD: A great many of these were admitted, and a great  
22 many statements were admitted that were included in  
23 that statement, and consequently a part of the question --  
24 they cannot break it up and ask question after question  
25 of one witness, and then break it up; it must be asked  
26 in the same form and in the same language as it was asked

1 of the witness Franklin, so the jury may determine what  
2 credit to give to the witness who is impeaching.

3 THE COURT: You may be right about that, Mr Appel, but it  
4 will take some little time to examine the transcript to  
5 see if it is all included. You might cut it up.

6 MR APPEL: Your Honor will see it is substantially so,  
7 it is the same we asked.

8 THE COURT: It will take some little time to examine it.

9 MR APPEL: Down at the bottom of page 853, then jump over  
10 to page 856, your Honor.

11 THE COURT: Read the question, Mr Reporter. (Last question  
12 read by the reporter.)

13 MR FORD: Now, if the court please, there are many  
14 of the portions that were admitted by Mr Franklin. There  
15 were one or two things we don't believe were asked Mr  
16 Franklin at all.

17 MR APPEL: It is the substance.

18 MR FORD: Regardless of all that, it is the privilege of  
19 the witness when an attempt is sought to impeach him,  
20 that the same words -- that the questions be put to him  
21 seriatim just the same manner in which they were put to  
22 the witness, and it is only fair to the witness --

23 THE COURT: I think you are right. I think it will have  
24 to be put seriatim. objection sustained.

25 MR APPEL: Exception.

26 Q Did he or did he not say to you at that conversation

1 what he desired you to inform the District Attorney's of-  
2 fice concerning? A Yes, he did.

3 Q Colonel, did you -- You may state whether or not you  
4 came to him from the District Attorney's office or from  
5 anyone else, or whether you went to the District At-  
6 torney's office at his request? A He came to me and re-  
7 quested me to attend to this business for him.

8 Q Now, Colonel, did he or did he not, upon that occasion,  
9 say to you in effect, to say to the District Attorney, to  
10 request him to postpone his case, that it might take a  
11 little time to find the person who had furnished him the  
12 money with which to do the bribing, that if the District  
13 Attorney would furnish some help to him; that is, some  
14 detectives, that he could land him in a short time, or  
15 words to that effect?

16 MR FORD: Now, I object upon the ground that the question  
17 is not in the exact language, but it is the same in substance,  
18 and on the further ground that Mr Franklin said, "I may  
19 have said that in effect, yes sir." It has been answered  
20 and admitted.

21 MR APPEL: Then, it is admitted. That stands admitted,  
22 of course.

23 MR FORD: The question was, "Q--Did you say at that time  
24 you could find the man who gave you the money, that it  
25 might take a little time, and you didn't have the money  
26 yourself, but if the District Attorney's office would furn-

1 ish the detectives, you could land him in a few days?

2 Did you say that to Colonel Tom Johnston at that time?

3 A -- I may have said that in effect, yes sir. Q -- You  
4 did? A -- I may have said it in effect."

5 MR APPEL: yes, all right.

6 MR FORD: There is no foundation laid. Is the question  
7 withdrawn?

8 MR APPEL: No, you admit that he said so.

9 MR FORD: I am making an objection to the court.

10 Mr Appel; I say it is admitted, There is no use, the wit-  
11 ness answers -- counsel says it has been answered. Now,  
12 that is all right. Now, we will go on further, with the  
13 balance of the conversation.

14 THE COURT: Mr Appel, I think it is time we take the  
15 morning recess.

16 (Jury admonished. Recess for 5 minutes.)

17 (After recess.)

18 MR APPEL: Will you read that question. (Last question  
19 read by the reporter.)

20 MR FREDERICKS: That was objected to on the ground that  
21 Mr Franklin admitted that was true.

22 MR APPEL: And we have their admission that he said so.

23 MR FORD: We admit Mr Franklin admitted it.

24 MR APPEL: yes, and that you do, too?

25 THE COURT: The record tells what it is.

26 MR APPEL: It is only a difference, without, really, much

1 distinction. Now, Colonel, following that statement by  
2 Mr Franklin at the same time and place, did he or did he  
3 not, at that time describe to you the individual that he  
4 referred to as the party that he wished to see?

5 MR FORD: Object upon the ground no foundation has been  
6 laid by asking Franklin that question.

7 MR APPEL: yes --

8 MR FORD: What page?

9 MR APPEL: Well, I withdraw that question right there,  
10 but I will go on with the -- I will get it in after a  
11 while. Now, Colonel, did you go to the District Attor-  
12 ney's office, after he made that request to you? A I  
13 did.

14 Q Now, did you see Mr Franklin again that day? A I did.  
15 I had an appointment to meet him the same place at 4  
16 o'clock that evening.

17 Q Now, when you came back for him at 4 o'clock that  
18 afternoon, did you say to Franklin then, that Mr Ford had  
19 told you to say to Franklin that they were getting more  
20 evidence every day --

21 MR FORD: Pardon me. What page are you reading from?

22 MR APPEL: (Continuing.) And that they hoped and desir-  
23 ed would convict Darrow, and that they would not need  
24 Franklin's testimony, but would send Darrow and Franklin  
25 to the penitentiary, and that he, Ford, did not take any  
26 stock in his cock-and-bull story, or words to that effect?

1 MR FORD: If the court please, I don't want to be tech-  
2 nical there, but the question appears on page 857, that  
3 they had evidence enough to send both Franklin and Dar-  
4 row -- that is, yourself and Darrow to the penitentiary,  
5 and that if you didn't come across you would go to the  
6 penitentiary and didn't you thereupon say to Johnston, that  
7 you knew you would never get immunity unless you named  
8 Darrow, that neither Darrow nor Davis knew anything about  
9 it, and you would be telling a damned lie if you said you  
10 did. If they wanted to put it as an impeaching question,  
11 they have got to put it in that language, but for the  
12 sake of saving time, your Honor, I am perfectly willing  
13 that they -- if they want to go into all that occurred be-  
14 tween Mr Johnston and myself, and then as reported to Frank-  
15 lin so that the jury may get the whole facts, why, I  
16 won't be technical, but if they don't want to do that, we  
17 will have to hold them to the record. We object to it on  
18 the ground no foundation has been laid.

19 THE COURT: Overruled.

20 MR APPEL: just read the question. (Last question read  
21 by the reporter.)

22 MR FORD: Just a moment please. We also add the objection  
23 at this time, that it is complex; I cannot understand  
24 whether the point in the question is that I told him to  
25 say to Franklin that or whether he told that to Franklin.

26 MR APPEL: I don't say anything of the kind. I am asking

1 whether or not he told Franklin.

2 THE COURT: If the question is not understood we will have  
3 it read again.

4 MR FORD: just that particular portion, that I may under-  
5 stand it correctly. I understand that Mr Appel wants to  
6 know if the witness told Mr Franklin, or I said he must say  
7 this to Franklin.

8 MR APPEL: No, no; I never said anything of the kind.

9 MR FORD: That is in the question.

10 THE COURT: Read the question.

11 (Last question read by the reporter.)

12 THE COURT: Answer the question.

13 A If the court please, that is partly correct and partly  
14 incorrect. I would like to answer just exactly like it oc-  
15 curred.

16 MR APPEL: Very well. What you told Franklin. A What  
17 I told Franklin.

18 Q yes. A I told Franklin that I had had a conference  
19 with Mr Ford in his office, and that he had refused to  
20 continue the case; that the grand jury would be in ses-  
21 sion Monday morning; that if he desired to make a full,  
22 free and open confession of this whole transaction that he  
23 would give him an audience at any time; that he wanted  
24 the man that was responsible for this crime; that he took  
25 no stock in his cock-and-bull story about being furnished  
26 this money by a man whom he didn't know, and whom he

1 could not find. That they -- he was securing new evidence  
2 every day, and that he believed in a short time they  
3 would have sufficient evidence to sent Darrow to the Pen-  
4 itentiary, independent of his evidence, and if they did,  
5 they would put him in the penitentiary with him.

6 Q Then, upon you saying that to Franklin, did he or did he  
7 not say to you then that neither Davis or Darrow had  
8 given him any money to bribe jurors, and that they knew  
9 nothing about it, and that he would be a God damned liar  
10 if he said they did, and did you not then say to him, not  
11 to lie about anything, but to tell the truth? A yes.

12 Q Now, I will ask you whether or not, as a -- I would  
13 like to state further.

14 Q Yes. Go ahead. A That I told him not to tell a lie  
15 about it under any circumstances; that I was satisfied  
16 the District Attorney's office didn't want him to lie  
17 about it; that they wanted the truth and the whole truth,  
18 and would not be satisfied with anything else.

19 MR FRED ERICKS: But the witness has answered yes to the  
20 whole recital there. A But this is in addition to that,  
21 this explanation that I gave.

22 MR APPEL: You told him that. Now, Colonel, did he not,  
23 in the course of that conversation --

24 MR FORD: May I have the whole of that last answer read?

25 THE COURT: yes, read it. (Last answer read by the  
26 reporter.)



1 MR FREDERICKS: The question that Mr Appel gave to the  
2 witness, please read that. (Last question read by the  
3 reporter.)

4 MR FREDERICKS: Do you understand the first part of that  
5 question. Read the first part again. (First part of  
6 question read by the reporter.) A That neither nor  
7 Davis; yes, he told me that.

8 MR FREDERICKS: It was a double question. A yes, he told  
9 me that neither Davis nor Darrow.

10 MR APPEL: Neither Davis nor Darrow? A That neither Davis  
11 nor Darrow had furnished him money to bribe jurors, and  
12 that they didn't know anything about it.

13 A JUROR: May I ask a question.

14 THE COURT: Yes.

15 THE JUROR: Was this Franklin? A yes sir.

16 MR APPEL: Now, did he or did he not, in the course of that  
17 statement that he first made to you before you went to the  
18 District Attorney's office, describe the man that you spoke  
19 of?

20 MR FORD: Objected to upon the ground no foundation has  
21 been laid for the asking of that question, Franklin was not  
22 asked --

23 MR APPEL: I can --

24 MR FORD: Let me make my objection.

25 THE COURT: Let's get the objection first, then I will  
26 hear you. What is your objection, Mr Ford?

1 MR FORD: Let him give the whole conversation -- we withdraw  
2 the objection.

3 THE COURT: The question is withdrawn.

4 MR APPEL: Read the question. (Last question read by the  
5 reporter.) A Yes.

6 Q What description did he give you? A He said he was a  
7 small, sallow complexed man; dark complexed man and he  
8 didn't know his name. I asked him who he was, he didn't  
9 know his name.

10 Q You asked him for his name? A Yes.

11 Q Did you ever say to Franklin there at that time of  
12 your first interview with him at the Waldorf the same time  
13 and place referred to in my previous questions, that you  
14 had been sent to him by -- from the District Attorney's of-  
15 fice, or from Mr Ford? A I did not.

12s 1 Q Did you at any time say at that time or any other time  
2 say to Mr. Franklin that if you will come through against  
3 Darrow that he would be all right?

4 MR. FORD. What is that question?

5 (Last question read by the reporter.)

6 A No.

7 MR. FREDERICKS. "He" refers to Franklin.

8 A No, I didn't say that at all.

9 MR. APPEL. The reason I ask that is it is not clear  
10 by page 852, if you look you will see it is very indefinite.

11 Q Did you at that time or any other time say to Franklin  
12 that if it was necessary to mix up anybody else, any  
13 local man, in a fight of this kind, to keep his mouth  
14 shut up? A No.

15 Q Did Mr. Franklin-- take the witness.

16  
17 CROSS-EXAMINATION.

18 MR. FORD. You reported this first conversation with Mr.  
19 Franklin to Mr. Ford, did you not? A Yes, sir.

20 Q When was that? A I don't remember the date.

21 Q Well, how long after the first conversation? Was it  
22 the same day or another day? As I understood you, you  
23 testified you had a conversation with Mr. Franklin at the  
24 Waldorf saloon? A Yes.

25 Q You went up to see Mr. Ford? A yes.

26

1 Q You saw Mr. Franklin again? A yes.

2 Q Was that all on the same day? A All on the same day;  
3 yes, sir.

4 Q Where did you see Mr. Ford? A I saw him in his office.

5 Q Just state what you told him at that time.

6 MR. APPEL. Wait a moment--we object to that upon the  
7 ground it is not cross-examination; it is incompetent,  
8 irrelevant and immaterial. I didn't ask him for the con-  
9 versation with Mr. Ford, your Honor--it is hearsay. I  
10 simply asked him, your Honor, for what Franklin said to  
11 him and what he said to Franklin, and what Franklin said  
12 to him in response to what the witness said to Franklin.  
13 I am not asking him concerning what he said to Ford. I  
14 have not asked him because that would be hearsay and it is  
15 hearsy on direct examination it will be hearsy on cross-  
16 examination.

17 MR. FORD. If the court please, if counsel--

18 MR. APPEL. your Honor will see it is not what he said to  
19 Mr. Ford that is material, it is what Franklin said to him  
20 that is material.

21 THE COURT. I have your point.

22 MR. FORD. The court please, this witness has testified  
23 that he reported to Mr. Ford that in my opinion would make  
24 what he reported absolutely admissible, but leaving that  
25 aside, there is a reason why it is admissible. This wit-  
26 ness has testified as to the conversation that occurred

1 between him and Mr. Franklin. Now, to test his recollec-  
2 tion we would have a right to come in and find out when he  
3 went to see Mr. Ford. It is preliminary, or will be, what  
4 occurred between him and Franklin. Suppose the witness  
5 held the conversation? It would tend in some slight  
6 measure to impeach him and impeach the witness. Suppose  
7 there is no statement corroborating him? We have a right  
8 on cross-examination to test his recollection finally.  
9 We would have a right to impeach to show he made a different  
10 report at a different time.

11 MR. APPEL: yes, by calling his attention to it.

12 MR. FORD: We have a right--the fact he has testified to  
13 any impeaching questions, if we think he has told it differ-  
14 ently from what occurred, we don't know, he may tell it as  
15 it exactly occurred, and in that case it would not be  
16 necessary to put the impeaching question. We want to  
17 put all the witness knows before this jury. This witness  
18 testified he went to see Mr. Ford and went back and report-  
19 ed. Suppose he never saw him, now, suppose he never had  
20 any conversation with Mr. Ford. He was asked this question,  
21 Didn't you say to Franklin that Ford had told you to say to  
22 Franklin--suppose the witness had never been to see Mr.  
23 Ford at all, wouldn't that affect his credibility? Sup-  
24 pose he has been to see him, and show whether he reported  
25 to Franklin the same language he got from Ford. That is  
26 a fact involving the whole transaction and the jury is

1 entitled to have it all.

2 THE COURT. I cannot agree with you, Mr. Ford. Objection  
3 overruled.

4 MR. DARROW. You mean objection sustained.

5 THE COURT. I misstated, it, yes, sir; objection sus-  
6 tained.

7 MR. FORD. Q Now, you told Mr. Franklin all that Ford had  
8 said to you, did you? A Substantially.

9 Q Told him the full conversation? A Substantially.

10 Q Well, now, tell us what you told Franklin, fully.

11 A I told him that I had a conference with Mr. Ford and  
12 had requested him--had placed his request before him that  
13 the case be continued for 2 or 3 weeks and had stated to  
14 him what he requested me to state, that if he would con-  
15 tinue the case for 2 or 3 weeks or a month and give him an  
16 opportunity to locate a certain man who had given him  
17 this money, with whom he had several appointments but  
18 who had failed to keep his appointments, that there would  
19 be something doing.

20 Q Did you report to him Ford's reply to that? A I did.

21 Q What was that? A I told him that Mr. Ford said if he  
22 wanted to make a free, full and open confession of this  
23 matter that he would hear him but that he didn't believe  
24 any cock and bull story about his getting this money,  
25 bribe money, from some man he didn't know, whom he couldn't  
26 locate, that he didn't believe--yes, there is a part of the

1 conversation I am glad you called my attention to--that he  
2 didn't believe he would take money from a man he didn't  
3 know and that Mr. Ford further stated that the grand jury  
4 was in session and that they were securing new evidence  
5 every day and that they hoped to be able to get sufficient  
6 evidence to send Darrow to the penitentiary without his  
7 testimony, without his aid.

8 Q Coming back to that portion of the conversation, Mr.  
9 Johnston, wherein you told--

10 THE COURT: The witness has not finished--he has a right  
11 to finish without being interrupted. Finish your answer.

12 A In the event they did secure this evidence they  
13 would send Darrow to the penitentiary and Franklin along  
14 with him.

15 MR. FORD: Coming back to the conversation wherein you  
16 told Mr. Franklin that Ford had said he didn't believe  
17 Franklin would take money from a man he didn't know, was  
18 there anything further along that subject?

19 MR. APPEL: Anything that you said to Franklin?

20 MR. FORD: Anything he said to Franklin, yes. I suppose  
21 he reported it in full.

22 MR. APPEL: That is not the proposition. He may or may  
23 not.

24 THE COURT: I think the question is was anything else said  
25 to Franklin between you at that time and place?

26 A Yes, sir. It is difficult to remember every word that

1 was said, but something more was said in reference to his  
2 taking money from--didn't believe he would take money from  
3 a man he didn't know under the circumstances.

4 MR. FORD. Q Dd you report to Franklin--

5 MR. APPEL. Wait a moment--

6 THE COURT. Apparently Col. Johnston has not finished  
7 his answer.

8 MR. FORD. I will ask him another question along the  
9 same line that will refresh his memory. Q Did you report  
10 to Mr. Franklin at that time that Ford had said that if  
11 Franklin was approached by an unknown man he would be  
12 afraid of the prosecution and would consult the people  
13 on his side of the case before taking it, and find out who  
14 that man was? A Yes.

15 Q And that was the reason it was a cock and bull story?

16 A I don't know as I put it exactly in those words but  
17 substantially to that effect.

18 Q You reported to Franklin? A Yes.

19 Q What you reported to Franklin was true? A Yes, sir.

20 MR. APPEL. I object to that as incompetent, irrelevant and  
21 immaterial. It isn't whether it was true or not. He  
22 can't tell whether it is true or not.

23 MR. FORD. I think the only language that is pertinent  
24 is the conversation between this witness and Franklin.  
25 Strike out the answer.

26 THE WITNES. I meant it was true that I made that statement.



.1 MR. APPEL. yes, I understand that.

2 THE COURT. Well, with that explanation of the answer it  
3 can be restored.

4 MR. APPEL. This answer is--

5 THE COURT. His explanation what he meant.

6 A JUROR. I would like to know if this unknown man was  
7 unknown to Franklin or was he just keeping his name from  
8 you?

9 A Well, I only know from what Franklin told me.

10 THE JUROR. Did he tell you he was unknown to him?

11 A He told me he didn't know his name. He was trying  
12 to locate him.

13 MR. FORD. Q did he tell you that he never saw him before?

14 A No, he didn't tell me that ?

15 Q Did he tell you he had never seen him since? A Yes.

16 Q Did he tell you he didn't know where he was? A yes.

17 Q Did Mr. Franklin--did you say to Mr. Franklin that Ford  
18 had told you to say that if he didn't come across that  
19 he would go to the penitentiary? A No, I didn't say that.

20 Q Did you tell--did Franklin say to you at that time that  
21 he, Franklin, would never get immunity unless he named  
22 Darrow? A Well, it may not be exactly in that language  
23 but to that effect. He says, "I am expected--" here is  
24 his language, I remember it distinctly. "I know I am  
25 expected to say that Darrow did it."

26 Q But you never told him that he was expected to name  
Darrow? A No, no; Oh, no.

1 Q Didn't you tell him that the District Attorney wanted  
2 the parties whoever they were? A That is it; I told  
3 him that the District Attorney wanted the parties that  
4 was responsible for this crime.

5 Q Didn't the District Attorney--didn't you say to  
6 Franklin that the District Attorney knew that Franklin  
7 didn't have \$4,000 and he must have gotten it from some-  
8 body else? A I did.

9 Q And didn't you tell Franklin that he had to tell the  
10 truth about that whoever he was? A I did.

11 Q And didn't you tell Franklin that the District Attorney  
12 after he heard his story and examined it/<sup>to</sup>see if it was  
13 true-- A That is it. He had no promises to make him.  
14 He would come through with a clear, full and complete  
15 statement of the whole transaction and state all about it,  
16 a story that could be corroborated, as I recollect you,  
17 or substantiated, while you made no promises, you would  
18 do all you could for him.

19 Q And that he would investigate any story that he might  
20 tell? A That you would investigate any story that he  
21 might tell.

22 Q But that he didn't want to hear from him at all unless  
23 he made up his mind to tell the truth, that is what you  
24 told Franklin? A That is what I told him.

25 Q That there was no use of making up stories? A I told  
26 him that you regarded that as a cock and bull story and

1 that you said that statement didn't interest you at all,  
2 and I advised him to tell the facts.

3 Q You told him that he must tell the truth, if he told  
4 anything? A Yes, that the District Attorney's office  
5 would be satisfied with nothing less than the truth and  
6 the whole truth. I had four conferences, you remember,  
7 Mr. Ford, with you, about that matter.

8 Q How many? A Four.

9 Q Did you report each one to Franklin? A Well, I  
10 believe I did.

11 Q Any substantial variation from what you told? A No.  
12 MR. APPEL. Wait a moment--

13 THE COURT. Strike out the answer for the purpose of the  
14 objection.

15 MR. APPEL. About asking the witness whether there was  
16 any difference in those several conversations. That is  
17 not cross-examination.

18 THE COURT. That was not gone into on direct. Objection  
19 sustained.

20 MR. FORD. At the time you saw Mr. Franklin it was just a  
21 few days before the 14th of January, was it not? A I  
22 don't remember the exact time; I couldn't state with  
23 any degree of certainty as to the date because I paid  
24 no special attention to it.

25 Q It was before Franklin had made any confessions?

26 A Yes, before Franklin made any confession.

.1 Q And just a short while before? A yes, a short while  
2 before.

3 Q It was the 10th to the 12th of January, was it not?

4 A Somewhere along there.

5 Q 12th? A Yes.

6 Q At that time did you know, Col. Johnston, that Mr. Darrow  
7 and Mr. Franklin had framed up this story to tell the Dis-  
8 trict Attorney through you?

9 MR. APPEL. Wait a moment--that is not cross-examination  
10 your Honor, and upon the further ground that there is  
11 nothing in the record here to show such fact as that.

12 Upon the second ground, your Honor, that he ought never  
13 to have been asked by the District Attorney because it is  
14 an insinuation of the District Attorney which should only  
15 appear from the facts in the case; it is not cross-  
16 examination. It cannot have been asked, your Honor, in-  
17 advertently and because it is such a plain proposition that  
18 we must assume that a man so loaded with legal law as  
19 counsel on the other side knows--should know if he don't  
20 know, and we take an exception to his remarks and conduct  
21 in asking such a question as that. We have never asked  
22 the witness here on the stand what he knew or what he  
23 didn't, your Honor. We simply asked him what was told  
24 and what he told someone else. Now, isn't the path well  
25 shown there what the cross-examination should be?

26

1 Why is it, your Honor, I submit, that we should be tried  
2 here in this manner? What is there in this case that it  
3 could be tried in any different way than any case? Why  
4 should there be insinuations thrown around this defendant?  
5 Isn't it important, proper -- isn't it more important to  
6 all of us as human beings and to this great state, that  
7 when a man is convicted it should be said he was con-  
8 victed fairly and honestly, and I appeal to him not to do  
9 that, and I appeal to your Honor, in my manner, nor to per-  
10 mit that.

11 MR FORD: If the court please, this witness is their wit-  
12 ness. We have a right to examine him on all he knows about  
13 the situation at that time, and as to what occurred. Mr  
14 Franklin has testified that at that time, the day he saw  
15 Colonel Johnston, prior to his last conference with Mr  
16 Darrow, there is one place he was mistaken about it, but  
17 three times he reiterated it was before he saw Mr Dingle  
18 and Mr Ford, that fixed the date as being prior to his  
19 last conference with Darrow. At that time he had framed  
20 up with Mr Darrow a story to tell the District Attorney,  
21 and had considered the possibility of deceiving the Dis-  
22 trict Attorney, in order to protect Mr Darrow to give some  
23 story to the District Attorney that would satisfy the Dis-  
24 trict Attorney that it was the truth.

25 THE COURT: But how does that make your question cross-  
26 examination?

1 MR FORD: To find out what the relations of this witness  
2 were; what he knew about that situation.

3 THE COURT: He was examined only in chief about the con-  
4 versation between him and Franklin. The question doesn't  
5 contemplate any part of that conversation.

6 MR FORD: Exactly. If he made that about Darrow, the  
7 lack of proof of that story is admissible. Then, they  
8 put this thing for the purpose of showing there might have  
9 been somebody else; that there might have been some unknown,  
10 unnamed man, a story he had framed up with Darrow at that  
11 time to tell the District Attorney.

12 THE COURT: What this witness knew is not cross-examination.  
13 What was said between this witness and Mr Franklin would  
14 be cross-examination, but that is not the question. The  
15 objection is sustained.

16 MR DARROW: just a moment.

17 THE COURT: The objection is sustained.

18 MR DARROW: I want to reply to this false statement that is  
19 made to this jury, knowingly false. Mr Franklin in his  
20 testimony --

21 MR FORD: If the court please, I object to any statement  
22 being made to the jury. I wasn't addressing the jury,  
23 but was addressing the court.

24 MR DARROW: I am addressing the court.

25 MR FORD: There is nothing before this court.

26 MR APPEL: It is this statement.

1 MR DARROW: I have a right to correct that statement.

2 THE COURT: What is your purpose, to assign error?

3 MR DARROW: To correct the statement that was made to the  
4 court in reference to Franklin's statement. Mr Franklin  
5 said that Mr Davis told him to tell this story on the 14th  
6 day of January -- the 14th, in his office on Sunday,  
7 just before he met Mr Dingle, and this is on the 12th,  
8 according to Mr Ford.

9 THE COURT: Gentlemen, I think --

10 MR DARROW: There isn't a word of evidence --

11 THE COURT: The jury undoubtedly know what the testi-  
12 mony was. That will be reached in due time.

13 MR DARROW: And I want to take an exception to Mr Ford's  
14 statement.

15 MR FORD: Did Mr Franklin ever tell you that he had been  
16 in conference with Mr Davis and Mr Darrow in reference  
17 to the story he should tell the District Attorney? A No,  
18 he did not.

19 Q Did he ever tell you they were his attorneys?

20 MR APPEL: Not what he told you, your Honor. I object  
21 to that, what occurred at that conversation, your Honor.

22 THE COURT: Yes.

23 MR APPEL: I object to it as not cross-examination.

24 THE COURT: The other conversations were not gone into on  
25 direct examination.

26 MR FORD: Did he at this conversation tell you, at the

1 two conversations you have testified to, did he tell you  
2 that Davis and Darrow were his attorneys, and they wanted  
3 to protect Mr Darrow, and tell some story that would de-  
4 ceive the District Attorney?

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1 MR APPEL: Referring to that conversation? A Well, part  
2 of that conversation is true.

3 MR FORD: Just which part? A And part is not true. He  
4 stated they were his attorneys, and had been his attorneys  
5 and advising him.

6 Q Just give us the conversation when he said about that.

7 A Well, he said that Mr Davis and Mr Darrow had been ad-  
8 vising him in the matter, and he asked me to advise him and  
9 I did so.

10 Q And you advised him to tell the truth? A I did.

11 MR APPEL: Now, your Honor --

12 THE COURT: It is already covered:

13 MR FORD: That is all.

14

15 REDIRECT EXAMINATION

16 MR APPEL: Are you sure, Colonel, that he mentioned Mr  
17 Darrow was one of his attorneys? A I think -- I believe he  
18 mentioned Governor Gage also.

19 Q Didn't he say Gage and Davis? A No, I think he said  
20 Gage, Davis and Darrow had been advising him.

21 Q Did he say Mr Davis was his attorney? A No, I didn't  
22 say attorney, I said he stated they had been advising him  
23 and he asked me for my advice, and I gave it to him.

24 Q Did you tell him that if his story would involve a  
25 local man to shut his mouth up? A No sir.

26 Q You didn't say that to him? A No sir, I did not.

1 Q But you did say to him when you said to him that Ford  
2 said he didn't take any stock in his story, that they were  
3 getting evidence every day that they hoped would be suffi-  
4 cient, or words to that effect, to convict Darrow, without  
5 his, Franklin's testimony, that in that event, they would  
6 send both Darrow and Franklin to the penitentiary -- he  
7 did say to you that he knew they expected him to say some-  
8 thing that would convict Darrow?

9 MR FORD: We object to that on the ground it is assuming  
10 something not in evidence; that Ford had ever hoped to  
11 convict Darrow; on the further ground the whole question  
12 is leading and suggestive, and on the further ground it  
13 is not redirect examination; was gone into fully on direct  
14 examination.

15 THE COURT: Objection overruled.

16 A He stated, in reply to the answer that I gave him from  
17 Mr Ford, that he would not -- that he would not entertain  
18 that cock-and-bull story about the man whose name he  
19 didn't know, that he didn't believe he received money from  
20 a stranger under the circumstances and --

21 Q Yes, and, -- well, what did he say about Darrow?

22 A -- Read the balance of that question. (Question read.)  
23 It was in reply to that, Ford's refusal to accept his  
24 statement in relation to receiving this bribe money from  
25 some man whose name he didn't know, that he replied, he  
26 says, "Well, I know I am expected to say I got that from

1 Darrow."

2 Q And did he say that in that connection, that if he  
3 did say so he would be a God damned liar? A Well, I  
4 think that occurred at a different conversation.

5 Q What did you say to him then? A What did I say to  
6 him.

7 Q Yes. A I don't know exactly what reply I made to his  
8 statement.

9 Q And what did he say? Did he say, "If I say so, it  
10 would be a God damned lie"? A He told me that, I  
11 think, at a different conversation.

12 Q Didn't you tell me, in the presence of Mr Giesler  
13 here on Saturday night, in your place, at your own home,  
14 on Francisstreet, at 8 o'clock P.M.,-- A Yes sir.

15 Q -- the following, in reference to this -- A yes sir.

16 Q -- "I met Franklin; I saw Ford and told him what  
17 Franklin had said --" that is at 4 o'clock -- A Yes  
18 sir.

19 Q -- "Ford told me to tell Franklin they were getting  
20 more evidence every day which they had a desire would con-  
21 vict Darrow, and then they would not need Franklin's tes-  
22 timony, and would send both Darrow and Franklin to the pen-  
23 itentiary and further he told me, Franklin -- that he  
24 didn't take any stock in his cock-and-bull story, refer-  
25 red to by him -- I met Franklin at the Waldorf that  
26 afternoon and conveyed Ford's message -- A Yes.

1 Q -- "Franklin then told me that neither Davis nor Dar-  
2 row had given him any money to bribe jurors, that they knew  
3 nothing about it, and he would be a God damned liar if  
4 he said he did. I told him not to lie about anything but  
5 to tell the truth." Didn't you say that to me? A Yes  
6 sir, every word of that is true, but I don't know whether  
7 all of that is in the same conversation.

8 Q Isn't it a fact I never asked you about any other  
9 conversation except two conversations you had with Frank-  
10 lin on that first day?

11 MR FORD: Just a moment. I object --

12 A I believe that is so.

13 THE COURT: It is answered.

14 MR FORD: It is answered now, but it struck me as an  
15 attempt to impeach their own witness.

16 MR APPEL: Now, Ford said he wanted the whole truth, or  
17 words to that effect? A Yes sir.

18 Q And if he wanted to make a statement concerning the  
19 matter and voluntarily to tell the whole truth, that he  
20 would examine -- you told Franklin that Ford said so --

21 A Yes.

22 Q -- that he would see what he could do for him? A Yes.

23 Q And if he could make a statement that would satisfy  
24 Ford, that Ford would do whatever he could for him? A Yes.

25 Q Didn't Franklin tell you that after his arrest,  
26 didn't Franklin say to you that after his arrest, that

1 he had made several appointments with that man whom he  
2 claimed had given him the money? A That is right, and  
3 he had never kept the appointment.

4 Q And he had never kept the appointments? A yes sir.

5 Q And didn't he say now, that he had a little time to  
6 find him, that he would be willing to say everything about  
7 the matter? A yes.

8 Q But when you asked him for his name he said he didn't  
9 know his name? A yes.

10 Q He said he was a stranger to him, didn't he? A Yes.

11 Q Well, now, didn't he say to you that before he had got  
12 the money from this man he had had several meetings with  
13 the man? A Well, I don't know that he said he had sev-  
14 eral meetings before he got the money. He said he had met  
15 him several times.

16 MR APPEL: That is all.

17  
18 RE-CROSS-EXAMINATION

19 MR FORD: Didn't you tell Mr Franklin at that conversa-  
20 tion that Ford had said that unless Franklin got the  
21 money from Teitmoe or Johannsen or somebody whom he knew  
22 to be connected with the defense, that he would immediate-  
23 ly go and consult Mr Darrow, because Mr Darrow employed  
24 him, that he would not take any chances on any traps on  
25 the part of the prosecution?

26 MR APPEL: In that conversation? A yes. No, I didn't

1 call Tveitmoe's or Johanssen's name. I didn't state  
2 it that way at all to Mr Franklin.

3 Q What did you say? A I said, "Mr Ford said you would  
4 not accept money from a stranger you didn't know for fear  
5 of a trap being laid for you."

6 Q And did you tell him Mr Ford had said if any stranger  
7 whom he didn't know to be connected with the defense ap-  
8 proached him, he would immediately consult the man who  
9 employed him, Mr Darrow? A I don't know whether I made  
10 that statement or not.

11 Q That was a fact, however, that was told you? A I  
12 don't remember whether I told Franklin that or not.

13 MR APPEL: Just a moment. We object to that -

14 THE COURT: The objection is sustained.

15 MR FORD: I would like to have been heard on that matter,,  
16 your Honor, to refresh the witness' recollection.

17 The witness is testifying as to what he told Franklin and  
18 I would certainly have a right to refresh his recollection  
19 to find out what I told him and see if he didn't tell that  
20 to Franklin.

21 THE COURT: The witness has not asked to have his recol-  
22 lection refreshed in any way; if he does, then -- but  
23 until he does, the objection is sustained.

24 MR FORD: That is all.

25 THE COURT: That is all. (Jury admonished.) We will  
26 adjourn until 2 o'clock.