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. 63

I N D E X.

B, N. Smith,
Official Reporter.

AFTERNOON SESSION, July 17, 1912; 2 P.M.

Defendant in court with counsel.

F R E M O N T O L D E R,

on the stand for further direct examination.

THE COURT. You may proceed, gentlemen.

MR. APPEL. If your Honor please, addressing myself to the question before the court, I attract your attention to the provision of the code, Section 1850 of the Code of Civil Procedure which declares: "Where also the declaration, act or omission forms part of a transaction which is itself the fact in dispute, the evidence of that fact, such as declaration, act or omission, is evidence as part of the transaction." Now, one of the issues in this case is the existence of a motive onthe part of the defendant or the absence of motive on the part of a defendant to commit the charge against him. That is the fact in dispute. Upon the one side, on the part of the prosecution, they have introduced evidence here which, if your Honor please, they will base an argument on to the effect that a motive onthe part of the defendant existed, and caused the act complained of to be committed, as was said by one of the witnesses here that Mr. Darrow expressedthe desire to win the case then on trial, as your Honor well knows. Now, we contend, if your Honor please, that a time came inthe

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course of that trial when any desire onthe part of the defendant to win the case was completely at an and, and that in view of that absence of desire to win the case, that he acted in respect to that desire and to accomplish the object of bringing the trial of the McNamara cases to an end, and that the declarations accompanying his acts are clear and positive evidence of his motive and intention: First, to bring the trial to an end by having a plea of guilty entered and therefore, necessarily, any absence of motive to do anything contrary to that thing. In other words an absence of motive or intent or reason for the commission of any offense. Upon the one side they say he wanted to win the case. This declaration is made as having been made by the defendant long prior to the 23rd day or to the 22nd day of November. We have a right to show that if that desire existed that a time came in the course of events, to wit, on or prior to the 22nd day of November or the 23rd day of November, when he had made up his mind positively to assume the entire responsibility of recommending and bringing about the entering of a plea of guilty on the part of those two defendants. Therefore, we contend that the declarations standing themselves, accompanied by the act contemplated and prior to its end become evidence under the declaration of our code: "Where also the declaration, act or omission forms a part of the transaction--" Now, here is the act on the part of this

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defendant calling in a conference of gentlemen in whom he had entire confidence, proposing that they should act with reference to accomplishing the act. One of the most clear evidences--one of the most clear cases in which the declarations of a party have been admitted in evidence are those cases in which the person, for instance, is about to have a survey made of a certain line between two pieces of property. While he is making that survey he declares he is causing that survey made, that he orders that survey to be made for the purpose of establishing a road, for instance. If he, in furtherance of that declaration, in furtherance of that act, he causes a map to be made showing the road, with the intention on his part of dedicating it as an easement or as a road and before the actual delivery of the instrument he dies and subsequently his administrators carry into effect the dedication by making the map a public record which shows theact declared--which was the intention of the testator or the deceased, mentioned in the declaration in controversy arising from the dedication of that road, the declarations of that deceased person, accompanied by the act of causing the survey and causing the map to be map to be mad, become a part of one and the same transaction, and shed light upon the whole transaction.

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Another instance in which those declarations have been admitted in evidence is in criminal cases, and if it is true that the commission of an offense at a certain place the defendant is shown by the prosecution to be there present and to have the opportunity of commiting the offense, and the prosecution shows he went there, he was there, and the offence was committed, and the defendant said, "I was there, but I did not commit the offense; it is true I had an opportunity of commiting the offense, but I did not", he has a right to go upon the stand and say for what purpose he was there; that hedeclared his purpose at that time, and when hisdeclarations are prior to the alleged commission of the offense, he can prove by other persons what he said when he was there at that place, because the absence of collusion, if your Honor pleases, was not then present; because if the statements are true, they are clear evidences of his intention, of his motive for being at the place of the alleged commission ofthe offense, and in view of that, your Honor, if you will permit me a moment, I will cite your Honor authorities on that point.

MR APPEL: I fully agree with you on all you say.

MR FREDERICKS: That is not the point.

MR APPEL: Now, with the other question that is raised here, that question is as to whether or not thedeclarations made by Mr Steffens to the witness here are declarations which must be admitted in evidence, ordeclarations of all

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parties to a transaction having in view the same object, having in view the same matter under consideration, acting jointly one with the other, are the declarations of each and all of them, because they each and all of them act as their agents. Now, here is a telegram which invites the gentleman upon the stand to be and appear at a conference, which is an invitation upon the part of these two individuals. Now, the order of proof is immaterial; that has been ruled in this case; we have a right to show, your Honor the declarations of Mr Steffens not only to this witness, not only with respect to the object of the conference mentioned in that telegram, but we have a right to show that he then might have -- I do not wish to state the evidence for fear I should not state it properly, your Honor -- that he might have said to the witness upon the stand, "We sent for you after a consultation, Mr Darrow and I, after a consultation we have had with other persons here in the city of Los Angeles, which I have communicated to Mr Darrow, and we want to have a conference concerning this subject." Now, that establishes the declarations, establishes the object of the conference, and we have a right to follow that up by connecting the fact that Mr Steffens was then stating the intention and the act and the purposes and the object of that conference as coming from Mr Darrow, and we have a right to show hereafter that he was authorized so to do.

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THE COURT: Do you avow your intention of so showing?

MR APPEL: Exactly, sir. We propose to connect it all togeth er.

THE COURT: That presents a little different situation then.

MR APPEL: yes, of course, if your Honor pleases, we will so connect it all together that the whole proceedings of what each one did in reference to this matter will be so clearly established to your Honor's mind and to this jury that the time had come when the defendant had absolutely made up his mind to enter such a plea of guilty as was subsequently entered, and that thereupon, and up to that time and probably a day or two preceding that, or some time of which I am not apprised, that these negotiations were being then carried on between individuals interested in having that plea entered, that is, that the fact that a plea of guilty was entered, we have a right to show when that advice was given by Mr Darrow to his clients, following it up, we have a right to show, your Honor, that his clients had consented to enter that plea, in view of Mr Darrow's intentions, in view of thefact that he had made up his mind that that plea of guilty should be entered, we have a right to show, your Honor, that that was absolutely agreed upon before Tuesday morning, the 28th day of November, 1911. We shall show to your Honor, in connection with that matter, that then it had been so clearly

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arranged that there was no further use for any jurors to be examined, and we will explain to your Honor why the plea was not entered on the morning of the 28th day of November, we shall show to your Honor, that before the 28th of November, that the terms upon which that plea would be accepted had been agreed upon. Now, under those circumstances, we will contend, your Honor, that there was absolutely an absence of motive for a reasonable man to go to work and take $4000 out of his pocket and give it to someone to go to bribe a juror. This was the condition of mind of this defendant at and on the morning of the 28th of November, and prior thereto. They are not self-serving statements.

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I can easily see that a defendant can go upon the stand and say, "Why, I went over to a friend of mine to state to him I was going to enter a plea of guilty," but if the declaration was accompanied by acts, by negotiations, clearly establishing that the declared intention was not a stimulated one but that it continued and did end in the actual transaction, that it was carried into effect, we have a right to show when he had formed that intention in order to show the absence of motive to commit the crime. The last clause of this action also is important. "Where also the declared act or omission forms a part of the transaction--" Here is a transaction entered into, agreed upon that it should be carried to a determination of a plea of guilty, "which is itself the fact in dispute," the transaction is the fact in dispute--or if it is evidence of that fact, that is the declarations plus the transaction, plus the negotiation, plus the acts of the parties for the purpose of the declared intention of Mr. Darrow are evidence of that fact, such declaration, act or omission is evidence, such declaration--the declaration on the part of Mr. Darrow.

MR. FREDERICKS. But the declaration of Mr. Darrow is not the point we are arguing.

MR. APPEL. Yes, the declaration of Mr. Steffens will become the declaration of Mr. Darrow.

THE COURT. Well, it seems to me that brings this issue

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down pretty close, in view of that avowal of Mr. Appel.
MR. APPEL. "The act of an agent performed in the scope of his employment is the act of the principal and where the act of the agent will bind the principal through his declarations or admissions respecting the subject matter, will also bind him if made at the same time and constitute a part of the res gestae." Mr. on agency, so he says, and it is a pretty good authority. The admission or declaration of an agent is not always binding upon the principal but the admission or declaration of an agent binds him only when it is made during the continuance of an agency in regard to the transaction then pending et dum fervet opus.

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because it is a verbal act and part of the res geatae, that it is admissible and, therefore, it is not necessary to call the agent himself to prove it." Mr. Greenleaf on evidence is a pretty good authority on that question.

So that the act of the agent is admissible, what he said or did is res gestae of that act, is admissible also and his declarations and admissions are not admissible unless they are the res gestae of an authorized act.

Now, we do not intend to put any declarations here by Mr. Steffens to the witness here except that his acts were accompanied by his declarations to the gentleman upon the stand, seeking the aid and assistance of the gentleman upon the stand, seeking after the conduct onthe part of the gentleman upon the stand to come and do an act or acts or conduct tending to carry out into effect the avowed intention of Mr. Darrow, and it becomes a part of the res gestae of that transaction.

In People against Vernon--I will say this also--

MR. FORD. The 71st?

MR. APPEL. I read from the notes in People--the case is People against Vernon, which is a California case and is cited with approval in the 95th American Decisions commencing at page--it is a long case--page 49.

MR. FORD. What page are you going to read from?

MR. APPEL. I am going to read the decision and then I am this, then I am going to read the notes. Reading from

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page 68. Concerning the state of mind--now, the state of mind of this defendant is proper as tending to illustrate whether there was lacking in his mind any idea of committing a crime at that time. "Where the state of a person's mind, his sentiment or disposition at a certain time is subject of inquiry, his statements and declarations at that period are admissible." Citing Lyles versus the State, 30th Alabama 24. People against Shea 8th Cal., 538 and other criminal cases, and a great many civil cases. (Reading) "Motive and purpose of the act. The motive, character and object or purpose of the act frequently indicated by what was said by the persons doing the act at the time. Such statements are all the res gestae and are in the nature of verbal acts and are admissible in evidence with the main transaction which they illustrate, show evidence of a distinct offense," and so on.

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Upon the very theory the evidence of a distinct offense on the part of a party when so connected in point of time, so connected with the transaction is admissible in evidence as being an act what he said in evidence for the purpose of showing his condition of mind at the time he made the declaration tending to show thedeclaration -- or tending to show the condition of that state of mind when the transaction in question is said to have occurred.

THE COURT: Mr appel, there is no question at all -- no controversy over that. There is just one single question before the court at this time. That is, whether or not the statements made to this witness by the gentlemen who met down there at the Alexandria before they reached Mr Darrow's office, is admissible in the order that it was offered and without laying the foundation. There is no objection being considered except the one of foundation.

MR APPEL: I can get here and cite any number of authorities here --

THE COURT: There is no necessity of citing authorities on any point except that. That is the only question, whether or not the foundation is laid for the conversation between this witness and Mr Lincoln Steffens.

MR APPEL: Well, your Honor, we have avowed our intention to connect it as being authorized statements on the part of Mr Darrow, so made by Mr Steffens to the witness.

THE COURT: Well, if that was done prior to your avowal

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within the last few minutes, it has escaped my attention.
MR APPEL: yes, I said --
THE COURT: You made an avowal here a few moments ago. If you done it prior to that time, it escaped my attention. I think in view of that avowal, I would like to hear from the District Attorney on that branch of the subject. I feel well satisfied except as to that point.
MR FORD: That was a point that was raised by us, that there had been no foundation laid. Simply that a self-serving declaration could not be admissible under any circumstances, and in view of the fact that counsel has now made an avowal that he will show such a connection, which would be a mere order of proof, perhaps, resting in your Honor's discretion, we want to address ourselves on the main point, and that is this: can a self-serving declaration of thedefendant, under any circumstances,be introduced in evidence?
THE COURT: Well, now; wait a moment. If you want to be heard further on that main question, I will allow Mr Appel to continue his argument. I will not allow the introduction to stand.
MR FORD: It being understood it is our objection, we have the closing after he gets through, we can close the matter and get a ruling from the court.
MR APPEL: Now, if your Honor please, in the case of Tait against Hall, 71 Cal., page 149, I shall read this deci-

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sion by Mr Searls, Commissioner, and at one time one of our justices of the Supreme Court, and it is affirmed and confirmed by the whole court: (Reading:) "This is an action to restrain the defendant, as road overseer of Tehama road district, in the county of Tehama, from opening a road for public use across the land of plaintiff." And then it goes on, the case was tried, and gives the finding. (Reading:) "There was no error in permitting the witness A. J. Clark to testify as to the declarations of Toomes, (deceased) made while he was having the land surveyed, to the effect that he was not going to have a road on the west line of the land he was surveying." x x x "The evidence was admissible in rebuttal of the declarations introduced by defendant, tending to show that Toomes had said about the same time that he would open a road at the point indicated." Certainly it is admissible to show that in rebuttal of what Mr Franklin has testified to here that Mr Darrow said to him or did something or did some act by way of giving him money and by way of asking him whether or not he could see Juror Lockwood, whether or not he could approach him and obtain his assistance upon the jury; whether or not he could bind him to return a verdict of not guilty; he has so testified. There is absolutely no difference in this case than the one I have cited, that we have a right to show that when Mr Darrow, prior to the 28th day of November, 1911, that when he was

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acting with reference to the case, and the management of the case, that he started to bring about a certain result, and in doing that act of bringing about that result, in bringing about a transaction which would culmiate in the results which actually took place, that he then said that he had fully made up his mind and that he would -- was willing to have a plea of guilty entered. "Declarations of a party while engaged in the performance of an act --" the declarations of this defendant while engaged in the performance of what? While engaged in the performance as an attorney of those defendants, and in the performance of an act which brought about a result.

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"And illustrating the object and intent of its performance are admissible in evidence," and they are not self-serving statements because the Code says, "That each declaration, act or omission to make--" the declaration, if you please, --"is evidence asa part of the transaction." It is not a mere declaration without an accompanying act. A man might as well go up onthe housetop and say, "Oh, I didn't intend to rob A," and after robbing him he might as well proclaim through the streets of Los Angeles, "I did not intend to rob A." Such statements as that are not admissible in evidence. That is a self-serving statement pure and naked, but when the declarations of a party prior to an alleged commission of that act in question are accompanied by acts and conduct which tend to show a different intention than that of the commission of the offense is, his declaration becomes verbal acts, and as the Code says, "Such declaration, act or omission is evidence as part of the transaction." (Reading) "The action of the court in ruling out the testimony of the witness Healy, so far as he proposed to give his impressions, was proper," and so on, and this case was affirmed. In People against Shay, this decision was by Burnnett, Judge, and Field, Judge afterwards--one of the Justices of the Supreme Court of the United States, affirmed, (reading) "The defendant was indicted forassault with intent to murder, and was convicted and sentenced. The bill of exceptions

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contains only a small portion of the testimony, and none of the instructions given by the court. On the trial, the prosecutor, Daniel Perrigru, was examined as a witness, and upon cross-examination, the prisoner's counsel asked the witness 'if he did not buy a postil, a few days previous to the assault, to use upon the person of Shea, the defendant?' The witness at first answered that he 'bought the pistol to defend himself and sister'. The question was repeated, and the witness required to answer 'yes' or 'no' and he then answered, 'yes, I did.' The District Attorney then asked the witness to state the reasons therefore, and the witness stated that 'from what his sister had told him what Shea said (the sister being the wife of Shea, the defendant) induced him to purchase the pistol to use against Shea.' The defendant's counsel objected to the testimony on the ground of its being hearsay, but the court overruled the objection and the prisoner excepted. A motion for a new trial was made and overruled, and the defendant appealed. "

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Now, here was the act of purchasing a pistol and what was said to him to induce him to purchase the pistol clearly shows the intention of the witness. That is the act of purchasing the pi stol plus his declatation and reason and intent, what he intended to do with it, clearly indicated his intention, his motive to do a thing, his only motive to desist from doing a thing. What does the court say? Now, here was an objection on the part of the defendant's counsel. The People introduced that declaration. (Reading.) The court said , "The objection on the part of the prisoner does not seem, under the circumstances to have been well taken. The intention of the prisoner's counsel was to prove the simple fact that the prosecutor had purchased a pistol 'to use upon the person' of the prisoner, and from this circumstance, to leave the jury to infer tha t the witness purchased the instrument with the intent to assault the prisoner, and not use it in his own defense." That is what the defendant undertook to show, that this man armed himself, and he wanted to argue to the jury that the act of purchasing a pistol and having it in his possession was clear evidence of his intention to do it, to assault the defendant, the prisoner. Now, the witness was allowed to show what was said to him that led him to purchasing the pistol, as being the declaration that formed a part of the res gestae in the prosetution. (Reading:) "The attorney for the State had then

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the right to ask the witness for what purpose he purchased the pistol. The question as to the motive or interest of the witness, was brought out by the question of prisoner's counsel, and it was competent for the witness to state the grounds of his conduct, to show his motive.

'Thus, when the question is, whether the party acted prudently, wisely, or in good faith, the information on which he acted, whether true orfalse, is original and material evidence.'"

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Now, if your Honor please, if Mr. Steffens and the witness here had a conversation concerning the matter of a plea of guilty that was subsequently entered by the McNamaras, if they talked with each other and agreed upon a plan, if that conversation was in pursuance of an agreed interview between these gentlemen, if we can show that declaration of the witness to Steffens was in accord with the wishes of this defendant, the declarations of Mr. Steffen are only the words--the mouth of Mr. Steffen is only the means through which the communications onthe part of the defendant were made. It is a speaking tube, you might say, by which these declaration and intention on the part of the defendant were communicated, accompanied by the act of the parties. Here is one act, the first act that we have shown here is the joint signing of a telegram calling for a conference, that is one act in the transaction, and each and all acts inthe transaction become part of the res gestae and become either verbal--become verbal acts, become a part of the transaction.

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I cite to your Honor, Mr Wharton's criminal evidence, volume 2, section 949. "A natural inference at that time arose -- "

THE COURT: Just a moment. I think it better for you not to leave the room, Mr Older. You are theoretically on the stand, but you may remain in the room. I presume there is no objection on either side to Mr Older stepping off the stand.

MR FORD: None whatever.

MR APPEL: (Reading:) "A natural inference of guilt arises from the recent possession of property shown to have been stolen, or of property known to have been in the possession of the victim of the himicide. But such inference may always be negatived by evidence of facts and circumstances showing that the possession is innocent or was honestly acquired. Thus, it is relevant for an accused charged with the illegal possession of another's money, to explain the possession by evidence that he found it; and where the dispute concerns personal property, evidence that the brand on an animal resembled the brand owned by the accused, or that the herds became mixed by accident, or that property belonging to the accused had been placed near similar property belonging to others, or that the property came into his possession under an honest belief that it belonged to him, or that, upon discovering the mistake, he had sought out the owner

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and paid the value of the property, or returned the property itself, may be introduced by way of explanation. On a charge of larceny, it is relevant for accused to show that he purchased the property, and, in explaining the possession of stolen goods, he may prove from whom he got them and what the parties said at the time;" that is, a client of mine charged with having stolen property in his possession, or having stolen property, has a right to come upon the stand and to show by himself and other witnesses that the party came there and sold him the property and what he said about it. What he said about it standing alone, would not be evidence, but what he said about it, accompanied with the act of stealing it, becomes a verbal act, because it is merged in the act of disposing of it to the defendant. It becomes a verbal act, it becomes an actual act. (Reading.) "And it is relevant for him to offer evidence of what he said, or what explanation he made, at the time when he was first found with the property in his possession. And on principle, it is always relevant, where any act is shown or conduct charged against the accused, for him to explain such act or conduct by showing some other hypothesis equally or more natural, as a reason for his conduct; and such explanation should always be received."

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In Lancaster against the State, found in the 31st Southwestern Reporter, at page 517, the court says this: (Reading:) "In rebuttal of the state's evidence, the defendant turned over a number of bills to the hotel clerk in Fort Worth, and to a party to hold for him at a baseball game at Defendant proposed to prove that he had stated at the time that he had won the money in a game of cards at a certain place in Ft Worth." The defendant proposed to prove, not that he merely said that, your Honor, but that when turning over the money, he accompanied that fact with conduct, with transaction, with the explanation that he had won it at a certain place; won the money at a game of cards at a certain place at Ft Worth, that his testimony was excluded and an exception reserved. It should have been admitted under the circumstances, and should not be considered self-serving, but explanatory and a part of the res gestae of his possession." Now, we can see clearly the distinction between a self-serving declaration and an act accompanied by conduct of specific acts concerning specific acts. "The court permitted the state to prove, over defendant's objection, by the witness Boyd, that on or about the 1st day of June, the defendant told him that he did not like some of the people of Cranbury", and so on, and the "state proved, over the objection of the defendant", and so on -- "We think the testimony of Estes and Cooper, corroborated

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by the defendant tending to show that the deceased prior to the homicide was impecuneous, was inadmissible in this case. According to the theory of the case, the object of the homicide was robbery, and the fact that the defendant was shown to have a considerable amount of money shortly after the killing, was one of the strongest criminal facts against him, and to rebut this testimony, defendant ought to have been allowed to show by witnesses the fact that he had a transaction with the deceased shortly before he was killed, and he thenstated he then had no money, and as an earnest of that conveyed one-half of a homestead -- " Here was thedeclaration by a third party, outside of the presence of the defendant, and that was allowed to be admitted in evidence, in favor of the defendant. "Declarations showing motive or want of motive, or purpose, very frequently, they are part of the res gestae, that is, declarations of the defendant made at the time of passing counterfeit notes, was admissible as part of the res gestae." McCartney against the State, 3rd Indiana, 353. "The declarations of the guest made before the alleged stealing that the property was his own, held to be admissible in his behalf, as a part of the res geatae; while he had possession of the property he says, 'This property is mine' before the alleged stealing." If your Honor please, here are all these declarations, we undertake to show, accompanied by acts of [illegible] this defendant, and

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these different individuals on behalf, not only of the defendant here in this case, but on behalf of his clients, tending to show and to corroborate the future evidence we intend to introduce here, that prior to Tuesday morning, November 28th, all the attorneys in the case, and all the friends of the attorneys and other people upon the other side of the case had agreed that a plea of guilty should be entered.

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and that Mr. Darrow here had expressed his ultimate final determination and hoped that transaction could go through and there was no necessity for offering a bribe to any juror, and to show that such evidence as that is under the circumstances unreasonable, for no man can say that a reasonable man, having made up his mind and having agreed upon the disposition of a case, that he would be so foolhardy, that he would be so absolutely void of common sense that he would deliberately go and commit a crime against himself which would accomplish nothing in the world in view of the circumstances of the transaction.

"In a suit for damages for assault and battery evidence of what the parties said during the altercation, which was followed by the assault, is admissible, and all the words and acts of the parties and not detached words and sentences should go to the jury, and also declarations of a bystander made during the progress of said altercation, if necessary to a full understanding of the character of the act complained of may be received." "So, where a boy who had driven against a foot passenger on the street immediately stopped his horse and came back and said, 'I didn't mean to,' the declaration was held a part of the res gestae and was admissible in evidence." Why, your Honor, it was done so when the act complained of by time was connected with it that the mind had not cooled, and reason had not asserted itself,

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that there was no time for calculation to make a self-serving statement, and the self-serving statement, your Honor, after the commission of the act, your Honor, is not admissible in evidence. That is a self-serving statement. That is one of the clear tests in law by which you can determine whether a declaration of a defendant is a self-serving statement; it is self-serving--the words themselves, if I may be allowed to draw my own conclusions--how imperfect my mind may be in regard to reasoning these things out clearly--indicate what they mean, "self-serving" means what? Means to serve the purpose of showing his innocence after the act was committed, becomes self serving, but declarations made before the alleged commission of the offense, do they show him or serve to show his innocence? They are not self-serving declarations, they are a part of the res gestae when accompanied by acts.

We propose to show what was done and said in reference to that matter. I doubt not, your Honor, the importance of this question; I doubt not, if your Honor pleases, why it is so strenuously objected to. If I were accused, your Honor, of going into your house and stealing from you my note which you held against me, wouldn't I have a right to come upon the stand and say that I didn't steal it from youand couldn't I show by my clerk that way down there in my office, before the alleged commission of the offense that I stated to him, "I am going

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to give you a check, go to the bank and get it certified." And I follow that declaration by writing the check and giving it to him to have it certified, and I state to him, "Go on up to Judge Hutton and recover my note," and, forsooth he acts in reference to that and may be delayed or may not have found you in your office and the next day I am seen coming out of your office and when you come back there the next day you find that your note is gone and I am arrested for the act. Have I no right to show my declarations accompanied by those acts, that there was no intention on my part to steal that note, but, on the contrary, my intentions were lawful and after having delivered that check to be delivered to you? The person who had that check in his possession becomes your trustee, that check is in his hands, it is your check, you have a right to recover it in an action against him, you can say, "That check was given to you in trust for me, it is my property, the moment it left the hands of Mr. Appel it became my property, he delivered it to you with the trust that it should be delivered to me. You accepted that trust, voluntarily or by reason of employment, but you became my trustee, and I have a right to recover that check, it is mine." It is your property, it was payment by me as far as it was possible for me to make payment.

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Have I no right to go upon the stand and hasn't my clerk the right to come upon the stand, or anyone else there present, and say, "We were present at that time and he said, 'Go and pay for this note'?" Are those self-serving statements? It shows the intention on my part not to steal the note, but to pay it, so if Mr Darrow here, or Steffens, on his behalf, asked Mr Older to come and arrange a plea of guilty, and they discussed the terms and so on, what Mr Darrow said, what Mr Steffens said for him to the witness here, that with the avowed intention on our part to show we are all actors in one and the same transaction and acting for each other most fairly, most undoubtedly, without equivocation, show that Darrow had no idea then and no intention of having Franklin go on and meeting Lockwood to bribe him, and so clearly, your Honor, that I venture to say, that if this evidence comes in here as we think it will, that it ought to be the decision of this case in the minds of any reasonable man who would only have the good conscience to treat this defendant in a fair way, as he would have others treat him under similar circumstances, and without prejudice, or without favor, or without sympathy, a plain, clean-cut, just proposition of justice to this defendant; we must not keep out evidence, your Honor, against a defendant, it is very easy to make a prima facie case against a man, the burden is cast upon him to clear his good name, he must resort to all of his conduct

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in reference to the transaction, he must say why he went down here, and "I told so and so to come here, and see the District Attorney if he won't accept a plea of guilty under such and such terms as that"; cannot he open up his mind and his heart to this jury? Must the evidence of a co-conspirator, as they claim him to be, stand alone, standing alone, I said, for no one on earth, so far as we know, has testified that they heard Darrow speak with Franklin and tell him to go and bribe anyone. Can they say, your Honor, under those circumstances, we have no right to show that this defendant then had another condition of mind directly or opposite to what Franklin says, and the motive of this defendant was? Isn't that a most strong circumstance? Isn't it more forcible and pursuasive than mere words of man? I say, it is of the highest importance that we should be permitted to show this. Ah, your Honor, let us not close up the lines too close against a defendant in presenting his defense; let us be careful that we do not commit an error that will forever, perhaps,-- perhaps by committing an error, forever close up a man's life against all the aspirations of the only few years he has to live, and in arguing questions of law, the true principle is the guiding star for any court or any attorney to follow; it is clear, that wherever there is a reasonable doubt, wherever the mind waivers as to upon which side there is reason or justice, and where the

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law lies, that human charity and human principles and the eternal principles of justice demand that that question be resolved in favor of the defendant.

I might multiply here authorities upon this question, a great many criminal cases and any number of civil cases, and the rule is just the same in civil as in criminal cases, and with the few observations I have made, your Honor, I trust that you will consider this matter in the true spirit that I know your Honor wishes to consider it, and we ask your Honor for a favorable ruling on our side.

MR DARROW: May I add a word to this?

THE COURT: yes.

MR DARROW: Because, I think I know the facts better than anyone else. What I say will be very brief.

There is not any question about the law as to the right to prove motive or lack of motive. I think I suggested that this morning and, of course, Mr Fredericks at once said that was permissible, and there was no doubt about the conversations with me. However, some further argument may be had upon that subject. There is no doubt about the right of the state to prove the motive for an act never could be. For instance, in murder they have the right to prove the motive was robbery, or if murder, they would have the right to prove the motive was revenge.

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9p The rule is so general that it is almost impossible to prove a crime without proving the motive which caused it. My impression is that you cannot do it, but I would not be quite certain about that, but it is the first thing, practically the first thing is to prove motive. It is just as competent on the part of the defendant to prove lack of motive, for that is what moves man and you have to have the motive not to do a certain thing and when you find out a man's motive, then you have got most of it. If he had the motive to act the state may prove it, if he had the motive not to the defense may prove it, and I do not understand there has been any serious question on that subject.

The State says the motive to act was that I wanted to win this case. My observation, inthe 35 odd years of practicing law around the court room, is that every lawyer wants to win every case he ever had. If I could find one that did not I could be dead sure he would not be practicing law very long. That is their business to win cases--that has been adduced as a motive in this case to do this act. We have the same right to prove any motive, any lack of motive to do this act. There never was any question about it and could not be, and as I understand it, that matter is not directly involved.

Now, as to whether the case was settled or partly settled, or whe ther every lawyer knew of it, or

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who knew of it, all those things simply go to the weight with the jury, the weight. The progress of a settlement is a matter for them to consider as to whether at that time under those circumstances a man would probably act in that way, and that is all, the motive of the defendant or a lack of motive of the defendant. Now, if there has ever been any case that denied the right to show lack of motive I would like to see it. I never heard of one. It does not come under the line of self-serving declarations, it cannot be that. It is the proof of the motive, it is the basis of all criminal cases, and motive to do it or lack of motive to do it. There has never been any holding any other way upon that subject. But, that is not the question that arises here. It was not as to whether a discussion with me was competent in this case, but whether it was competent for those witnesses to relate a conversation with a third party in reference to this transaction, that is the question here. Now, let us look at that a moment. We have a right to show that this case was settled, or practically settled or partly settled or settlement begun or ended, or any phase of it, that is an independent fact, we have a right to show who was involved in it and how far it had progressed and then to show that that came to the mind of the defendant and that he knew it and therefore had no motive to act in this case. The proposition seems to me to be perfectly clear; if it

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was a committee entirely disconnected with the defendant, if there were no question of agency in it, if there had not been any agreement onthe other side whatever, but if this committee acting had determined upon that proposition, and that proposition had been brought to the defendant and the defendant believed that the settlement would be completed, the defendant has a right to show that he would have no motive for this act, whether completed or incompleted, it makes no difference with the right to the evidence. It might make a difference with the weight of it, for that, like everything else, is to be determined by the jury as a question of fact, But the right of the absence of motive on the part of the defense is certainly always as competent as the fact of motive, both are competent and always have been competent in criminal cases. That is the first thing a jury would look at, that is the first thing the court would look at, and that is the first thing a reasonable person would look at, what was the motive for the act, or what was the lack of motive for the act, and that motive must be with the man who is charged in it, whether it is complete or how it affected the mind of the person charged that is his motive or that is the lack of motive.

Now, in this case, we have a perfect right, I take it under the law, to show all the negotiations of a disposition for disposition and settlement of the case, and

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to show that all those negotiations were communicated to me and that I believed it was settled, or practically settled.

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and that a plea would be entered any day and that therefore there could have been no motive for this act. It is a matter of an independent fact, it is not governed by the rules of hearsay; it is not in the nature of self- serving declarations; it is a question of the motive or the lack of motive of the defendant; if they seek to prove a motive to commit an act, we have the same right to prove a lack of motive to commit an act, and that is all there is to it.

MR FORD: Now, if the court please, the defense in this case have announced their intention of introducing the present evidence for the purpose of proving one thing, and that is a motive or lack of motive, rather, on their part. We are not contending for one moment that they have not the right to prove lack of motive, but we do contend that the evidence by which they are offering to prove lack of motive is absolutely incompetent for that purpose, that it consists of self-serving declarations and conduct which are never admissible in favor of a party. Just a moment, now, before taking up our side of the case. I want to refer to a few of the cases cited by Mr Appel. In the case of People versus Vernon, he didn't cite that at all -- that was a case where declarations of a deceased had been -- in this case of People versus Sharon, the fact that written statements or declarations made by a deceased,

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an extremist, verified by him, were read in evidence on the trial of the defendant thereby accused of murder on his objection to the introduction of other and independent evidence of the same and similar declarations, those came under the provisions of section 1870 of the Code of Civil Procedure, which expressly states also in criminal actions, the act ordeclaration of a dying person, made under a sense of impending death respecting the cause of his death may be proved. In People versus Shea, 8 California, the sole question there was this: the people had introduced in the proof of their case, the evidence that the defendant had purchased a pistol, and by way of proving the purposes for which he had purchased the pistol introduced in evidence him thedeclaration made by him. Subdivision 2 orsection 1870 of the Code of Civil Procedure, provides that in conformity with the preceding provisions evidence may be given upon a trial by the following facts: subdibision 2. The act, declaration and omission of a party as evidence against such party. The law does not permit the act, declaration or omission of a party as evidence in his favor; it is only evidence against him, and there is a reason for that rule. The law does not permit, we will contend, the acts, declarations and omissions of this defendant, as evidence in his favor, but does admit his acts, declarations or omissions as evidence against him, but not in his favor, and there

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is a reason for such a rule; there is a reason for the existence of such a law. In Lancaster versus the State, quoted by them in the 31 S. W., 517, the situation was one of the exceptions to the general rule, and that was because it was a part of the res gestae; it was a part and parcel of the evidence introduced by the People in that case. The defendant in that case had been accused of murder or robbery, I have forgotten which -- of murder, I think it was -- the robbery was the motive, and by way of proving he had committed the murder, the People had shown he had possession of certain moneys; they showed that possession by showing on a certain occasion he had turned over a large amount of money to a clerk at a hotel; the act of turning that money over to the clerk at the hotel was part of the things done by the defendant and part of the res gestae and part of the evidence introduced by the People. Under those circumstances, there is an exception to the rule that the defendant may put in evidence his act or declaration accompanying the act that has been introduced in evidence against him, just as he may if the people have introduced an act or declaration against him, he has the privilege of introducing the whole of that conversation, although he would not have any right to introduce it in his behalf if it had not been for the fact that the People had introduced a part of it.

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It is only the act of people in introducing it, in making it a part of the evidence against him that permits him to put in the whole of an act or declaration he may have made in his favor, and there is a reason for that rule, as is said, very concisely, in 12 Cyc. page 426, after discussing the fact that admissions may be put in evidence against a party, the volume says, at page 426, "The statements and declarations of the accused in his own favor, unless they are a part of the res gestae, or unless they are made evidence by the prosecution in producing a conversation in which they are contained, are not competent in his favor on the trial."

THE COURT. Read that again.

MR. FORD. Are not competent on the trial--

THE COURT. Read the entire clause.

MR. FORD. "The statements and declarations of the accused in his own favor, unless they are a part of the res gestae, or unless they are made evidence by the prosecution in producing a converstion in which they are contained, are not competent in his favor on the trial," and here is the reason, "They are excluded, not because they might never contribute to the ascertaining of the truth," that is not the reason at all--"but because if received that they most commonly consist of falsehoods fabricated for the occasion and would mislead oftener than they would enlighten."

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In this particular case the People have not introduced any proof of the conversations referred to by the witness or which they are going to offer in evidence in this case. The sole claim upon which they can offer them, the sole claim upon which they think they can base their competency is that they are a part of the res gestae and I shall show that they are not a part of the res gestae in this case that is now before the court. How easy it would be to fabricate evidence in favor of yourself. If you were about to commit a crime, and assume for instance that this defendant, knowing that he was closely watched and fearing that he might be detected in the act of bribery, when he knew that evidence might be introduced in his favor of his own acts and declarations, how easy it would be for him to call a couple of people together, have them visit the District Attorney and pretend to beopening negotiations to end the matter while he was doing something else. There would be a two-fold object in doing that, one to mislead his opponent, and the other to protect himself in case of discovery, and if such might be introduced in evidence he could then say, "Why, I never intended to bribe anybody, I was intending at that time to have these clients plead guilty, making arrangements to do it, really intending some other facts." If successful, if not detected in the bribery never to have them plead guilty and having secured a sufficient

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number of men onthe jury to stand pat and go to trial no matter what the evidence might be against him.

Now, inthis case, if the court please, the res gestae are the things that were done in furtherance of the commission of the crime; there is no issue that has been raised as yet by the evidence that Franklin did not commit the bribery--I will take that back--I believe they do contend that no bribery was ever committed, there is the evidence of one man here that Franklin had said that he and Lockwood were confederates with Fredericks and consequently that no crime had been committed, but I do not believe there is any serious contention here that the bribery has not been committedd, the sole contention is if it was committed that the defendant is not the one who was responsible for it.

Now, the res gestae means the things that were said and done by the various parties to that act in committing an act, it does not mean other things, it does not mean other things that were done by other people or by the parties themselves that were not done in furtherance of the act.

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MR FORD: I didn't make a note of the case here that I want to call your Honor's attention to to illustrate the case. If you will bear with me just a moment.

THE COURT: We will take a recess at this time.

(Jury admonished. Recess for 15 minutes.)

(After recess.)

THE COURT: You may proceed, Mr Ford.

MR FORD: If the court please, the question now before the court is whether or not the acts of the defendant in some other matter not connected with the bribery, constitutes a part of the res gestae. Franklin has testified in this case that the defendant paid him $4000. If the defendant admitted he gave him $4000, but said he gave him $4000 to deposit in the bank, and said "Here, take this $4000 and go down and deposit it in the bank", that would have been part of the res gestae, and a declaration of the defendant made at the time he handed the $4000, would be admissible to show that he didn't give it to him to go and bribe a juror with. The same as the case of a person charged with stealing horses. He is seen in the possession of the horses, and someone comes along and says to him, or asks what he was doing with the horses, and he gives a declaration in his own favor, and seeks to introduce it afterwards in his ownfavor. That is not a part of the res gestea, although he was seen with the horses, he cannot introduce a declaration of that sort to show that his

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possession of the horses was innocent. It is a different proposition from the Texas case where part of the things done by the defendant were introduced by the people showing that the defendant delivered a certain sum of money to a clerk. Then it became a part of the res gestea, for it was part of the evidence relied on by the People, and the defendant should have been permitted to show what he said when he handed the money over, but not in a case where it is not a portion of the evidence introduced by the People, and is not a part of the res gestea. Now, we don't have to go to Texas or other places for authorities on that point. We have plenty of authorities in our own state. In the case of people vs. Prather, the defendant was accused of grand larceny; was charged on the 8th day of March -- 120th Cal., the Supreme Court of this state, page 660. (Reading:) "The defendant was charged with having stolen horses on the 8th day of March, 1907 --" reading on page 664 in the case. (Reading:) "A brother of the defendant had been up to his ranch with provisions, and when on his return and on the 11th day of March, met the defendant, just west of Arbuckle, driving about 30 head of cattle, and had a conversation with him." I think I said horses; I should have said cattle. (Reading:) "Defendant's counsel then sought to prove by their witness what the conversation was. The testimony was objected to and the objection sustained. The evident object

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was to prove the declarations of the defendant in his own favor. We think the court was correct, when, on ruling on the question, it spoke of it as a self-serving statement and not admissible." Just as they seek to show that the defendant had been met by these other people during the day that these proceedings were being carried on, during the time that the negotiations were happening for the bribery of Lockwood, and that he said certain things to these men, that he had conversations with him. The court will be correct in saying that it is a self-serving declaration and not admissible.

Counsel has plead with your Honor not to commit error in this matter. We certainly are just as anxious to have no error committed, because if we did, a verdict would not stand two minutes before a higher court, if we are wrong upon this proposition. In the case of the People vs. Rodley, 131 California, quoting now from page 254 -- this decision has been frequently cited to your Honor by both sides in this case, and upon the case of conspiracy where the declarations of third persons were admitted as against the defendant. Your Honor will remember that declarations of Mr Houseworth and the witness Swearingen had been introduced as evidence against the defendant; declarations of third parties against him, because they were co-conspirators. (Reading:) "The defendant while upon the witness stand was asked by his counsel the following ques-

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tion: "After the death of Mr Fuller, did you make a statement to anyone that this document was in existence; and if you did, how soon after and to whom did you make such statement?" There had been a forgery of a will, and also perjury committed in putting the document, or attempting to probate the document. (Reading:) "To which the witness answered: 'Well, I made the statement to several people. I think I told Mr White. I told several people right after he died.' Following this answer, and without any motion to strike out, the prosecution objected to the evidence as irrelevant, immaterial, and incompetent. After argument and a recess of the court, this objection was sustained. Waiving the question of whether the evidence is shown to have been excluded, the defendant had already testified to the existence of the will from a time prior to the death of Fuller, and we cannot see how his testimony as to a statement made by him after the death of Fuller showing the existence of the will can add anything to the force of his evidence.

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13s1 "Certainly, such testimony is inadmissible under the
2 general rule excluding self-serving declarations, and no
3 exception of this rule has been called to our attention
4 under which it might be admitted." And in this case, the
5 defendant has not called to the attention of your Honor
6 one single California case or one single case from any state
7 under which these declarations might be admitted. They
8 have not submitted one single thing. They have argued
9 from general statements--from general principles, which
10 your Honor can see by Section 1870 are every one based upon
11 subdivision of 1870, and have no application to the case
12 at bar. (Reading) "For all that appears to the contrary,
13 the defendant may have had the same motive and purpose to
14 manufacture evidence the day after Duller died that he and
15 his confederates had at any later date to manufacture a
16 will. To make it admissible at all it must be shown that
17 the corroborating statement sought to be put in evidence
18 was made at a time when defendant had no motive or interest
19 to fabricate such statement, here, however, there is nothing
20 to show when the criminal design was first conceived. (Mason
21 vs Vescal, 88 Cal. 396; People vs. Doyell, 48 Cal. 85.)"
22 Those were cases in which a witness--I have a
23 case here and will cite them to your Honor to show just
24 what the court meant by the latter part of that statement;
25 that it must be made at the time that the defendant had
26 a motive or interest to fabricate such statement, and must

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be certain foundations laid by way of impeachment, which don't exist in this case.

Now, calling your Honor's attention to the case of People vs Huntington in the 8th California Appellate, beginning at page 621, is the portion I am reading from. In that case the defendant was charged with the commission of murder, it appearing that he had performed a criminal operation upon a woman from which her death followed. (Reading) "The defendant claimed that the operation which was performed by him upon the deceased was the lawful operation of curettement, performed by instrumental treatment of the inner womb for the remobal of a condition therein of endometritis; that he was not in any way attempting to produce ab abortion. He called one Dr. Depuy as a witness, and proposed to prove by such witness that he borrowed a curette, dilator and irrigator, with which to perform the operation, and that he, the defendant, made the contemporaneous statement to Dr. Depuy that he wanted such instruments for the purpose of performing such operation upon deceased." There is a declaration accompanying an act which counsel has laid such stress on. (Reading) "After objections had been made to this line of questions as to such declarations, the record shows the following to have occurred while the attorney for the defendant was explaining what he desired to prove: 'Mr. Dunne: One day before the operation--if the operation was

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upon the 27th, that it was upon the 26th that Dr. Huntington obtained the instruments, made the declaration to this doctor as to his purpose in obtaining them and inviting him to be present at the operation." Your Honor will recall that the case cited by the defense where the declaration, accompanied by the buying of the pistol, this illustrates another case where the defendant was borrowing an instrument and it is attempted to put in evidence the declaration in his own favor, which the law does not permit, for the reason cited inthe 12th Cyc.

MR. APPEL. I don't think you state the case right. I don't think you understood it. It was not introduced.

MR. FORD. So much the worse for me if I don't.

THE COURT. Gentlemen, the argument is for the court.

MR. FORD. (Reading) "The Court: Has proof been offered that the instrument was used, the curette? Mr. Dunne:: If it has not been offered inthe case it will be offered. That is a mere question of the order of proof. (Argument) The Court: The objection will be sustained at this time without prejudice to the renewal of the offer. Mr. Dunne: We note an exception.' The objection which had been interposed to this line of questions leading up to the offer was that the declarations were incompetent, irrelevant and immaterial and hearsay; that no proper foundation had been laid. It is evidence from an examination of the record that no question was asked of the witness as to

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mere fact of the defendant having borrowed the instruments from him; but the questions were each accompanied by the question as to the statement or declaration of the defendant made to Dr. Depuy at the time he desired to borrow or procure the instruments. The statements made by defendant to Dr. Depuy the day before the attempted operation as to the purpose for which he desired them, would be clearly self-serving declarations."

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Just as in this case, the declarations of the defendant to these other parties as to what he intended to do in the case would be clearly self-serving declarations, which might have been fabricated by the defendant without even the knowledge of these witnesses, or which the witnesses might have been fabricating since that time. There are two sources open, one admitting the truthfulness of the witness, but they having been brought together by the defendant to plan for a defense in a case, or protection in a case of bribery, and the court holds that self-serving declarations will not be admitted for the danger, not that it is always true, but it is so liable to be true, that courts and legislatures have decided that such evidence should not be admitted as self-serving declarations. They admit rules as to admissions, because people don't make admissions against them for the purpose of being allowed to put them in evidence. They would make self-serving declarations for the purpose of allowing them to be put in evidence. Admissions are made involuntarily and unconsciously; self-serving declarations may be made purposely, and with a certain view in end. (Reading:) "It was not a declaration forming a part of the transaction and made while it was in progress. The law would not permit a party who was intending to perform an act that was criminal to make statements or declarations a day or two before the act as to the lawful purpose in mind, and

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then introduce such declarations to justify himself. Not only this, but the court placed its ruling upon the ground that there had been no proof offered as to the use of the curette and sustained the objection, with leave to renew the offer."

If the law would not permit that in a murder case, it would not permit it in a bribery case. The law will not permit this defendant, contemplating a crime, to do things which would be indicative of innocence, and then afterwards introduce them in evidence, and this is a California case directly in point, and they have not submitted one.

In the case of people vs. Taylor, 4th California Appellate, in that case thedefendant was charged with having killed and murdered one Bedrosian on the 28th day of June, 1905. This is in the 4th California Appellate, beginning at page 34, is where I am reading from. The decision begins on page 31. (Reading:) "It is urged that the court erred in sustaining objections to questions asked by defendant's counsel in direct examination of the witness, Tremper, as to what statement defendant made to him at the time defendant told him of having fired the first shot into thewater ditch. The court correctly sustained the objections. The witness had testified that he with others, had searched the ditch at or about the point the shooting took place, and found a bullet in the bottom of the ditch, which was a 38-caliber bullet, similar to the

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one found in the body of deceased; that the searching for the bullet was because of the statement made by the defendant to the witness about having fired a shot into the water. Counsel say that the object in asking the question was to corroborate the defendant by showing that he made a statement of a material fact, which proved to be true by an examination of the ditch." Just as in this case, the defendant might testify he did not commit bribery at that time he was engaged in trying to negotiate a plea of guilty, and then seek to prove and substantiate his statement as to the negotiations by proving what he said to other parties at that time." (Reading.) "Counsel say that the objectin asking the question was to corroborate the defendant by showing that he made a statement of a material fact, which proved to be true by an examination of the ditch. The court certainly was very liberal to the defendant, by allowing in evidence the portion of the statement made to the witness as to having fired into the ditch." Just as in this court, the court has been very liberal in allowing him to state that negotiations were pending at all for the taking of a plea of guilty in that case. (Reading:) "It was not permissible to allow the witness, without any restrictions, to state all that defendant said to him. It was not part of the res gestae, and was purely hearsay and a self-serving declaration."

Referring again to People versus Doyell, which was re-

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ferred to in another decision, which I will take up in a moment, if the defendant should take the stand and give an account of his movements on that day, then, we sought to impeach him by showing that he made statements inconsistent with his testimony upon the stand, then, undoubtedly they would be permitted to show that the statements made by him at that time were not of the nature that weclaimed they are, perhaps they would be, if they came within the provisions of people vs. Doyell in the 48th California. (Reading:) "In this case there was no such question to which the evidence sought to be elicited would have been permissible.

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In this case, as in the case at bar, the question is not one of the credibility of the witness, but one as to the acts of the defendant, and self-serving acts and declarations will not be admitted in evidence.

In People vs. Bordet, 13th Appellate, page 427, (Reading) "It is also urged that the court erred in sustaining an objection made to the following question asked of the defendant by his counsel when he was upon the stand." I ought to go back and read the whole of it; it is very short. It is a case where the defendant was convicted and took an appeal. (Reading:) "The defendant was charged in the information with the crime of felony in willfully and feloneously placing and leaving his wife in a certain house of prostitution, known and designated as No. 50 Bartlett Alley, situated in the city and county of San Francisco, and with permitting his wife to remain in said house. To the information he entered a plea of not guilty, and after the evidence was in, the jury returned a verdict finding him guilty as charged in the information. Judgment was accordingly entered upon said verdict, and his appeal is prosecuted from the judgment and from the order denying the defendant's motion for a new trial. The case comes here upon the judgment roll and a bill of exceptions. The defendant's counsel, in his brief states, that the defendant was convicted upon the uncorroborated testimony of his wife, and that the said testimony was

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contradicted in every material particular, and it then became a question of veracity for the jury to determine. The brief then states: the evidence presented by the people was insufficient to justify the verdict. No other or different argument is made in regard to the insufficiency of the evidence, nor is it pointed out in any way, nor at all, as to what the evidence was or the respects wherein it was insufficient. In such case, we do not deem it our duty to consider the sufficiency of the evidence, but will regard it as sufficient.

The wife of the defendant testified that her husband went with her after telling her the place where she could find employment, and that she first went with her husband to 46 Bartlett Alley, and that she found that it was not the right house, and the woman at 46 Bartlett Alley accompanied her to No.50, where she talked to the woman at No. 50. She was then asked by defendant the following questions: "Now, what conversation, if any, did you have with the lady living at No. 46?" This question was objected to by the District Attorney, and the objection was sustained. It is claimed that the court erred in sustaining the objection to this question. It appears by an examination of the record that in answer to the question immediately following, the witness answered that she had no conversation with any person at No.46, prior to the time she went to No.50. Therefore, if the question was material

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it was afterwards answered by the witness that she had no such conversation.

It is also urged that the court erred in sustaining an objection made to the following question asked of the defendant by his counsel when he was upon the stand: "'Did you make a statement to them there regarding your wife?' The question had reference to the fact that defendant had taken his children to or permitted them to be placed in care of the Society for the Prevention of Cruelty to Children, and that he went there and had some conversation with regard to his children and his wife. Nothing was said in reference to the character of the statement that was made by defendant or what was the object of it, and we are not told in the brief. By an examination of the record we cannot determine that the question related to a material matter. Any self-serving declaration made by defendant at that time to third parties would not be admissible. There is no other error complained of, and hence, it follows that the judgment and order must be affirmed, and it is so ordered."

Just as in this case, they want to show that the defendant could not have done this act because, forsooth, he said to some third parties he was going to have the defendants plead guilty, and that that indicated that they were going to plead guilty, and that the crime of bribery was never committed. Seeking by such hearsay testimony to

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destroy the fact that the pleas of guilty were brought about by the fact that they had been detected in the crime of bribery, and that the only possible defense being taken away from them, no other recourse was left them but to plead guilty.

MR ROGERS: We take an exception to the remarks of counsel. They are made in the presence of the jury, and absolutely for the purpose of telling this jury that the plea of guilty was brought about by the condition of this case. I say it is unjustified; it is not proper; it is one of the series of the tricks and fraud undertaken to be practiced upon this jury, and against this defendant.

MR FORD: I overlooked the personalities indulged in by the counsel. I think counsel have commented upon the evidence to your Honor, stating that was -- one remark that was made was that it was senseless to have considered this and that to be a logical deduction from the evidence. Your Honor can instruct the jury afterwards to disregard all statements made by counsel.

MR DARROW: Mr Ford says there they can draw any inference.

MR FORD: No, I didn't.

THE COURT: The remark to which counsel for the defense have directed my attention, coming from the District Attorney, might be construed and is in fact a statement of fact, and the jury are admonished to disregard the statement as being a fact not to be considered by them in this

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case. Now, let's hold the argument down to a cold-blooded argument. The question is what the law says on this subject.

MR FORD: Now, if the court please, there is one state of circumstances under which declarations of the defendant or of any witness, even of the defendant, if he is a witness, or of any witness, may be introduced in evidence, and that is the case where the testimony of a witness is claimed to have been fabricated, as was stated in one of the decisions which I just read, where the People were claiming that -- I think I can get the thing, to get your Honor's attention back to that, that is the one case which was cited, in passing, the case of People vs. Taylor, in the 4th California Appellate, at 35. (Reading:) "Where a defendant has given an account of a transaction, and the prosecution has attempted to impeach him by evidence as to a different account of the same transaction made to other parties, the law, in its spirit of fairness, to the defendant, allows him to call other witnesses for the purpose of showing that other accounts or statements made by him immediately after the occurrence and while it was fresh in his mind, are the same in substance as that given by him as a witness upon the stand. The question in such case is as to the credibility of the defendant or the witness." That is, the defendant, as a witness, or any other witness. Citing People vs. Doyell, and as was

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said in People vs. Rodley, "To make it admissible at all it must be shown that the corroborating statements sought to put in evidence --" Now, they are putting this in as a straight statement, not as a corroborating statement. The defendant has not testified, nor has any witness testified to any accompanying fact, and it is not a corroborating statement, because there is nothing to corroborate at all, except the bare statements of counsel' which have been made from time to time, and which your Honor has so often admonished the jury that they should not consider as evidence, that is, the statements of counsel; they must get their evidence from the lips of witnesses, or from documents or other evidence that has been introduced in the case, not from the lips of counsel at all. They have made the statement time and again, it is not to corroborate their statement but to corroborate evidence in the case, if there is any. There is no evidence in the case yet, of any attempt to introduce evidence to cause the defendant to plead guilty and so it cannot be corroborating evidence, but as was said in People vs. Rodley (Reading:) "Certainly, such testimony is inadmissible under the general rule excluding self-serving declarations, and no exception to this rule has been called to our attention under which it might be admitted. For all that appears to the contrary, the defendant may have had the same motive and purpose fo manufacture evidence the day

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after Fuller died, that he and his confederates had at any later date to manufacture a will."

That is where they have sought to impeach by showing that the statement is a fabrication, then he would have the right to show the declartion was made, a similar declaration was made at the time when he had a motive or interest to put in a statement of that character:

In People vs. Hoyell, 48th Cal., that question was decided as to the manner or when a witness could be allowed to introduce a declaration made by himself at a time to his appearing on the stand by way of corroborating the statement that he made upon the stand. It was a case where he was first indicted. I am reading from page 90 of the decision by the Supreme Court of this state: (Reading:) "There are cases which sustain the proposition of defendants counsel, that when an attempt is made to impeach a witness by proving former contradictory sta tements, he may be supported by evidence that he has made to other persons, declarations consistent with his t estimony." And if a defendant should take the stand and testify to a state of facts, namely, that he had been carrying on negotiations with the District Attorney, and had arranged for a plea of guilty or that a plea had been actually entered upon that day, and there was no trial pending, and an attempt should be made to show that his present testimony was a fabrication, then it would be within

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the rules laid down in this case. (Reading:) "Such declarations may, however, be admissible in contradiction of evidence tending to show that the account is a fabrication of late date, where it may be shown that the same account was given before its ultimate effect and operation (arising from a change of circumstances) could have been fore seen; " There must be something to contradict. There is nothing to contradict here yet, because no statement has been made to contradict. (Reading:) "And also, perhaps, in other peculiar cases. In the present case the record does not suggest tthat the witness occupied any peculiar relation to the defendant or the deceased, or to any matter arising on the trial, or transpiring in the evidence, which should consiitute a reason for a departure from the general rule." (Wharton Am. Cr.L. 820; 2 Phillipp's Ev. C. & H. Notes, 5 A.M., Ed., Spar. p.915; Roscoe's Cr. Ev.97; 1 Green L Ev. 469; Starkie's Ev. 253.) I think your Honor, after reading those cases and seeing that there is nothing here before this court which constitutes the relations of the defendant with Lincoln Steffens or the witness on the stand, which makes them a part of the res gestae, they have not been charged with delivering the bribe of $4000 to Lockwood or participating in it in any way; there has been nothing in the conduct of the defendant with this witness, which make it part of the prosecution in any way, and under the

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rules laid down in the California Decisions, it is not part of the res gest ae, and if not part of the res gestae, and not coming within the act and provision of the law as laid down in Cyc. on page 426, "The statements and declarations of the accused in his own favor, unless they are a part of the res gestae, or unless they are made evidence by the prosecution in producing the conver sation in which they are contained, are not competent in his favor on the trial; they are excluded not because they might never contribute to the ascertainment of the truth, but because, if received, they would most commonly consist of falsehoods fabricated for the occasion, and would mislead oftener than they would enlighten. When statements constituting admissions are received against defendant, he may prove his self-serving statements in connection therewith, by reason of the rule admitting the whole conversation. Thus, where the prosecution proves that the witness charged the accused with the crime, the accused has a right to prove that he denied the accusation. But the accused cannot prove, in explanation, self-serving declarations contained in other conversations."

As was in this case, the portion of the things that resulted in the death of the patient. He could do a number of acts and introduce them in his own favor.

MR APPEL: Your Honor please, we will only content ourselves --

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THE COURT: I don't think I care to hear from you. By that I don't mean to minimize the authorities presented by the District Attorney, but on the contrary the court appreciates their very clear presentation of this matter from both sides --

MR FORD: If your Honor will pardon me just a moment, there was one statement made by counsel for the defense, which I did not answer, and perhaps it won't be necessary unless your Honor is basing any decision which he is about to give upon that. They read some declarations here to the effect that a man was responsible for the acts of his agents. That is true in civil cases. In criminal law it is only true in one case, and that is the case of conspiracy.

THE COURT: I am not attaching any great importance to that, Mr Ford.

MR FORD: If they are not to be considered admissible on that theory, I could argue that because I have a number of authorities on that point.

THE COURT: I regard this particular point as an offer to prove the existence of a state of mind, men actually present, possessed by the defendant at the time prior to the alleged commission of this offense. Now, that state of mind.

MR FORD: Now, I just want to be heard on that.

THE COURT: In a moment, if you think it is necessary.

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THE state of mind existed or didn't exist, is a matter of fact. The facts to be determined of the existence or non-existence are for the jury, but the proof or disproof of the existence of that state of mind can only be shown by what was said and done in that connection.

MR FORD: By the defendant.

THE COURT: Now, that is a feature of the case, the conclusion I draw. I will not interfere with the District Attorney in making further argument upon that theory , if he wants to be heard. That is the view I entertain at this time, but it is not stated as being final.

MR FORD: If the court please, I want to state we agree thoroughly with the court, that the state of mind of a person, whenever that fact is a relevant fact, can be shown by the acts and declarations of that party, and not by the acts and declarations of any other party., -- the acts and declarations of the party himself. In insanity cases, with which your Honor is familiar, every time you decide the sanity or lack of sanity of the persons coming before you, by their acts and declarations, regardless of the fact that they may in part be true, and part untrue. You consider the acts and declarations, not for the purpose of proving that the responses contained in the declarations are true, but solely for an indication of a state of mind of the person whose state of mind is in question, and so wherever the state of mind is a relevant

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fact, there is no question but what the acts and declarations of that party may be introduced for the purpose of proving that state of mind, but not the acts or declarations of any other person except in this one instance where those acts and declarations are a part of the conversation containing the acts and declarations of the person whose sanity or state of mind is in question. That is, if the communication was made to the defendant, and the defendant made response, the reponse alone indicates his state of mind, but it may be necessary to have a communication in order to understand the response.

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It may be necessary to have the whole of the conversation in which the defense's responses occur, and therefore whatever might have transpired between Mr. Darrow, Mr. Steffens and Mr. Older at the Alexandria Hotel, the things said to one another at that place might all be necessary in order to understand the things said by the defendant, also, and the acts and conduct of the defendant alone as illustrating his state of mind, and whatever occurred between Steffense and Older outside of the hearing of the defendant could not in any way illustrate his state of mind, if they were communicated to Mr. Darrow, what they had said there and done there, and Mr. Darrow made some response indicative of his state of mind, the communication would be admissible, but not the actual fact.

THE COURT. The defense have avowed their intention of making such a showing.

MR. FORD. They have avowed their intention of showing what was said between Mr. Older and Mr. Steffense was something that the defendant had directed to be done, to Mr. Steffens.

THE COURT. And afterwards affirmed.

MR. FORD. But, your Honor, that would be all right where it was an agency and the defendant was responsible for the acts of the agent, that is absolutely inadmissible in this case. The only thing in this case that will be admissible is what Mr. Darrow said about that matter, not what they did afterwards. They might not have followed

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his orders or they may have followed their interpretation of his orders. The question is, what did Mr. Darrow say to Mr Steffense when authorizing him, or if the authorization occurred afterwards, as I understand it, from some remarks dropped by counsel, then the whole sum and substance of his state of mind will be upon the thing that was communicated to him and his response to it, not what they did, absolutely, and independently of it, what his state of mind the day before was, and if the testimony be what occurred or what Mr. Darrow communicated to Mr. Steffens if it occurred after the conference, let it be what was communicated either by Mr. Older or Mr. Steffense to Mr. Darrow or what was said at that time and not what actually did occur, that is of absolutely no importance. The only thing that is of importance is the communication of Mr. Darrow to Mr. Steffens authorizing him to have an interview or the response of Mr. Darrow to Mr. Steffense or Mr Older when informed that the interview had taken place, that is all; they cannot introduce the other. I think that point is so clear, if it is only the state of mind that we are getting at, that the conversation on this occasion, that the conversation between Steffens and Older alone is admissible on any occasion, whether connected or not, it does not have any bearing on the subject. Your Honor ruled that the conversation between Johnston and Ford should not be introducedby way of proof of what Johnston

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had told Franklin, and I think you were right, and I think inthis case what was communicated to Mr. Darrow and what was communicated by Mr. Darrow to Steffens might be proper, but what actually occurred afterwards, between Steffens and Older, that does not illustrate the defendant's state of mind in any way, shape or form, I think it is absolutely and clearly incompetent for that purpose; and as to the state of mind itself, your Honor, which is another question, I do not believe that the state of mind is relevant in this case. Motive is distinguished from state of mind inthe authorities and discussed under an entirely different subject, and the state of mind forms no part of the motive, yet motive and state of mind are absolutely independent of one another, state of mind is an entirely different subject from motive, and in this case the defendant's state of mind does not arise in any way, shape or form, the motive here is whether he wanted to bribe him and it is not a question of state of mind at all

THE COURT. I do not pretend to suggest that the argument of the District Attorney has not raised some serious doubts on this matter, it is not one of those things that it is possible to say there is no doubt about it this way and there is no doubt about it that way, but my best judgment is that the defendant having offered to prove a state of mind showing entire lack of motive and state of mind rendering the act charged to be improbable, and offer-

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ing to prove that by things that were said and done either in his presence or by those having his confidence, and authorization to speak for him as inthe case of the conversation tendered between Mr. Fremont Older, the witness on the stand and Mr. Lincoln Steffens, I think it is competent for him to make that showing and the objection is overruled.

F R E M O N T O L D E R,

resumed the stand for further direct examination:

MR. DARROW. Q Mr. Older, I have forgotten just where we were, but you came down to Los Angeles on the 23rd of November? A Yes.

Q Who did you meet? A I met Lincoln Steffens.

Q Whereabouts? A At the Alexandria.

Q Did you have a conversation with him about the purpose of your having been called to Los Angeles? A Yes, sir.

Q What was it, in substance?

MR. FORD. There is no foundation laid as to the place or time with reference to his arrival.

THE COURT. This was onthe 23rd of November, according to the witness's testimony this morning.

MR. FORD. There was another conference that day and we are entitled to the time, whether it was before or after that conference, and also the persons present, if there were any other persons.

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MR. DARROW. We can cure this quicker by asking questions than listening to argument. Q Was anybody else present? A No.

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Q Was that the first conversation in reference to it that day? A Yes.

Q What time was it, about? A I arrived on the Lark, I don't remember whether the train was on time or not, and I went directly from the station to the Alexandria, and Steffens was there.

Q What conversation did you have with him with reference to the purpose of your visit?

MR FORD: To that we object, without arguing --

THE COURT: I assume the same objection, the argument and ruling and objection is presented:

MR FORD: I would like to make it each time, your Honor. We object to it on the ground it is hearsay, a self-serving declaration; incompetent, irrelevant and immaterial for any purpose and no foundation laid for its asking.

THE COURT: Objection overruled.

MR DARROW: Now, you may state, Mr Older, the substance --

A Mr Steffens told me --

A JUROR: A little louder.

A Mr Steffens told me that he had had in mind for a long time, he had a belief for a long time that capital could be brought to realize that it would have to make some concessions and would have to yield somewhat and that he thought here was -- after he got here, he thought this was a good place to put his idea, to undertake to develop it and see if he could do anything with it, and he said he

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had succeeded in making a number of prominent men here see the uselessness of this strife, if it could be avoided, that he had met a number of men, I think he said 10 or perhaps more, and had convinced them that it would be wise for them to yield somewhat if the other side would be willing to yield, and not demand the blood of a human being in the case of the dynamiting of the Times Building, but to be content with imprisonment for life, and that Mr Darrow had agreed with him, and that the other side had agreed, and that the thing was practically settled. This was on the way up to Mr Darrow's office, and we talked about it there for some time prior to Mr Darrow arriving. He came in, I think, from court, and joined us, and we then went down to some cafe here, I think Levy's, if I remember rightly, for luncheon, the three of us, and Mr Darrow said --

MR FORD: That is not responsive, and I move to strike out the answer as not in anywise indicating a state of mind of Mr Darrow, and as incompetent, irrelevant and immaterial; hearsay.

THE COURT: The motion to strike is denied.

MR DARROW: Now, what conversation was had at the cafe with reference to the McNamara case between us three?

MR FREDERICKS: This, I suppose, refers to the case of J. B. McNamara, who was then on trial.

MR DARROW: It refers to -- A I will get to that if you

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give me a chance.

MR FREDERICKS: All right.

MR DARROW: Let us have the conversation.

A Before we went to lunch, as I remember it now --

MR FORD: I want to make a general objection on the ground it calls for a self-serving declaration.

THE COURT: Wait a moment.

A It is very difficult to tell anything, to have all these interruptions.

THE COURT: I appreciate your difficulty, but we must get our record so it will show what happened.

MR FORD: He has finished with the conversation between him and Mr Steffens alone. A I have not finished it, -- oh, while we were alone --

THE COURT: You have not finished it? A Yes.

MR FORD: Calling for a new conversation and we object to the new conversation on the ground that it does not in anywise indicate the state of mind of Mr Darrow and is calling for self-serving declarations, hearsay, and object to it as incompetent, irrelevant and immaterial.

THE COURT: Objection overruled. Have you the question in mind, Mr Older? A No. What is it?

THE COURT: Read the question.

(Question read.)

A I started to say, prior to leaving for the cafe, Mr Steffens, in the presence of Mr Darrow -- I don't remember

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now whether Mr Davis was present or not -- I think not -- showed me a typewritten memorandum of the agreement as he said was the agreement -- my recollection of it was that it provided for J. B. McNamara pleading guilty, and taking a life imprisonment, and all other cases to be dismissed and Mr Steffens said that that was the agreement, that is what had been agreed upon, substantially.

MR FREDERICKS: In order that we might not interrupt. Now, by "agreed upon", you mean agreed upon by whom?

A He stated it had been agreed upon.

MR FREDERICKS: Excuse me.

MR DARROW: All right. A By the committee of citizens, not naming them, and Mr Darrow.

A JUROR: I would like to have that read.

THE COURT: Read the answer.

(Last answer read.)

MR FORD: I move to strike out the answer for reasons previously given.

THE COURT: The motion to strike out is denied.

MR DARROW: Do you recall any other names that were mentioned, any of the names of citizens? A Well, Lissner, and Mr Chandler --

MR FORD: To that we object on the ground the naming of citizens would not illustrate the state of mind of Mr Darrow.

MR DARROW: Part of the conversation.

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MR FORD: I cannot see it.

THE COURT: Objection overruled.

MRDARROW: Mr Lissner and Mr Chandler? A Mr Lissner and Harry Chandler, of the Times, were mentioned, and I think one or two others, but I do not recall them.

Q Do you remember whether Mr Gibbon's name was mentioned?

A Yes, Tom Gibbons' name was mentioned.

Q When you went to the restaurant, what conversation was had? A Directly after we sat down to the table, you stated --

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A3p 1 MR. FORD. Better say, "Mr. Darrow stated."
2 A Mr. Darrow stated while at court, in the morning the
3 District Attorney Fredericks said to him that, as I rem-
4 ember it, that he would oppose or should insist on J. J.
5 taking punishment, that he would not agree to anything
6 that did not include John J. I think that is about what
7 you said.
8 Q Do you remember about what was said as to the character
9 of punishment or what he should plead guilty to?
10 A I do not recall that, I do not recall that, no--that it
11 should not go just J.B., that the other one would have
12 to take punishment also.
13 Q You don't remember what punishment or how much? A No.
14 I heard afterwards that it was 15 years, that is, before
15 the day was over.
16 Q Now, what further was said by me or by anybody else
17 in reference to that? A I think, I am pretty sure I
18 said to you that--it might have been Steffens, the point
19 was raised if you agreed to do this you would be mis-
20 understood by labor and that it would hurt you, perhaps
21 runin you with labor if you did this thing, if you allowed
22 it to be done, but you said that you did not think we
23 ought to raise that point, that you had been employed to
24 save these men's lives and that was the thing you ought
25 to do and you ought not to consider yourself at all, and
26 I corroborated you, I said I thought you ought not to con-

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sider yourself at all and agreed with you about that. That was about all, except the point you made about Mr. Fredericks not agreeing to the--not--in insisting on J.J. taking punishment and Steffens said he would ring up Lissner later and have another conference and he did that in my presence, he rang up Lissner and I think told him over the 'phone that there was some hitch in the District Attorney--I don't remember whether he mentioned exactly what it was or not, but he said that Mr. Lissner asked him to come over at 2:30 and they would have another meeting and he left and you went back to court, as I remember it, and I didn't see you again until dinner time and we had another meeting at dinner at the Alexandria, Steffens had his conference with these men, Gibbons was one and Lissner and Chandler.

Q Just a minute, before I get to that. Do you remember anything further I said with reference to whether it would be permitted for J. J. to receive any punishment or not?

A Whether you said anything or not?

Q Yes. A You said you protested against it, you said you didn't think that ought to be done and you thought that the original agreement as Steffense had outlined it had ought to be lived up to, as I remember it.

Q What was said, if anything, in case that we could not get the original agreement lived up to? A You said, of course, before I left that night, that if that had to be,

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of course, it would have to be, we would have to throw John J. to the wolves also.

Q That was in the evening? A That was at dinner, we agreed upon that if it had to be so, but meanwhile Steffens had said Chandler had gone out then to see the District Attorney Fredericks and was going to try to fix it up without J. J.

Q Well, go back to the evening conference, what time was that? A It was before the train left, it must have been between 6 and 7--I left onthe trainthat evening.

Q And was that at luncheon time or dinner time? A This was dinner time.

Q Do you remember what the conversation was at that time? A It had a bearing on--the essence of it was what Steffens had--his arguments with this committee, or whoever he had seen, and his optomism from the result of it, he thought it was going to go through all right.

Q Did he say what report he had from the committee, as to whether the original proposition would go through? A Only that Chandler had agreed to see Fredericks and he was quite sure it would be all right.

Q That is as to the original proposition or agreement? A Yes, the original proposition.

MR. FREDERICKS. What is meant by the "original proposition?"

A Without J. J.

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MR. FREDERICKS. Oh, yes.

MR. DARROW. Q Do you recall whether anything was said as to what Mr. Fredericks had demanded as to the length of the term, I don't know that I asked that, of J. J.? A I don't remember about Mr. Fredericks saying anything about the term. All I recall is that he did not like it as it stood, he thought J. J. should be punished.

MR. FREDERICKS. That is what Mr. Darrow reported to you?

A That is what Mr. Darrow reported as you having said that morning in court. I don't remember about the term.

MR. DARROW. Q What was said, if anything about any other cases that were pending or might be contemplated in regard to the same matter? A They were all to be dismissed and the evidence was to be destroyed, not to be used in any other court in any way.

Q As to the destruction of the Times, that is what I mean.

A Everything was to be ended, not to be used against any one.

MR. FREDERICKS. This is rather loosely put and I am unable to follow it. This is the statement of Mr. Darrow, is it?

A No, Mr. Steffens.

MR. DARROW. Q Do you remember whether there was any further conversation or not? A Excuse me. Let me correct that. Mr. Steffens--I think Mr. Darrow said that the agreement would be to include the destruction of the

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evidence and that it should not be used against any one, and Steffens replied to that that that was a part of the agreement, that is my recollection of it.

Q What was said about the other cases? A That they were to be dismissed, that was the end of the entire McNamara, the entire dynamiting episode, so far as I remember it, everything was ended.

Q Was there anything said at that time, at either of these meetings about the future relations between the organizations and the employers here in Los Angeles, as to whether that was taken up? A Yes, Steffens was very hopeful. He said that these men had said that after this was done they would be willing to meet the union men and the unions and treat them as unions. I think he said--they were willing to make the hours the same as they were up and down the coast from Seattle down, and the wages the same, that that was a part of it, they were willing to do that also.

Q Were you asked by me for your opinion in reference to disposing of these matters in that way? A Did you ask me my opinion?

Q Yes. A Yes.

Q And what did you say on that matter?

MR. FORD. We object to that as not in any way illustrating the defendant's state of mind.

THE COURT. Objection overruled.

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A I said that of course it was all up to the McNamara boys themselves at that time. They didn't know anything about it but I thought if they were agreeable to it that they were the ones to be consulted entirely, their word was to be official, should be the final word as to whether it should be done or not and we all agreed on that.

Q Was that said in connection with the discussion as to what effect it would have on me personally? A I don't remember whether that came in there at that time or not. I am not sure, I think I raised that point about its ruining you with labor if this were done, that labor would not understand it, but I don't remember whether this followed or whether it came before.

Q Do you know whether Davis or Judge McNutt, whether you saw either of those? A Davis was there part of the time and not all of the time. I think Davis said something to you about this ruining you, perhaps it was Davis that said it first and I advised--I seconded what he said.

Q That was in connection with labor? A In connection with you personally, and you said you didn't think you should be considered at all or whether it would ruin you or not, you didn't think we should discuss it, that your duty was to try to save the lives of these men.

Q You went home that same night? A Yes.

Q And that is the substance of the conversation that you recall that we had at that time in reference to it?

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A Yes, I think that is the substance of it .
Q Did you come down again before the plea was entered?
A I don't think I came before the plea. I do not recall that I did.
Q The next time you came was afterwards? A I think so.
Q Did I inform you as to what my purpose was ingetting you down here? A When you telegraphed me?
Q Yes. A Yes.
Q What did I say it was? A Well, you wanted me to-- you wanted to get my judgment onit. I had been sympathetic with you and with what you were trying to do here and I assumed you wired because you wanted me to know what you were contemplating.
MR. FORD. I move to strike that out as a conclusion of the witness.
THE COURT. Strike out after the words, "I assumed."
Q Was anything said? A you wired me.
Q What he assumed, yes. Was anything said as to why I wished you down here with me at that time? A I do not recall that, I do not remember.
Q You were informed, however, when you first arrived, as to why he had sent for you really? A Yes, by Mr. Steffens.
Q And had you any other business here excepting that?
A No.
Q Now, that was onthe 23rd? A 23rd of November.
MR. FORD. I want to make one motion when they are all through.

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MR. DARROW. Just a minute. You state that the question was discussed as to whether there should be any more prosecution of any one in connection with the matter?

A Oh, yes.

Q And what was said as to whether there should be a cessation of prosecutions or anybody should be looked for further? A My understanding was--that was the end of the entire case, all of the cases, and every one connected with it, the men who were being pursued as well as those who had been captured.

Q And those under indictment and something-- A under indictment--

Q And something about where theye were still perhaps indictments? A I beg your pardon--

Q There should be no further action brought in the matter? A No further action against any one. I went away with that firm belief that that ended this.

MR DARROW. You may cross-examine.

THE COURT. Mr. Ford, do you want to make a motion?

MR. FORD. No.

THE COURT. Do you wish to cross-examine?

MR. FREDERICKS. Yes a questicn or two. I wont finish.

CROSS-EXAMINATION.

MR. FREDERICKS. Q At that time, Mr. Older, yousay that neither J. J. nor J. B. McNamara had been consulted in

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regard to the matter. How do you know they had not been consulted? A Only from the attorneys.

Q Now, who told you they had not been consulted? A I think that that was in the general discussion, everybody said that. That seemed to be obvious, there was no question about that.

5p Q By everybody? There were only the three of you?

A Mr. Davis, Mr. Steffens and Mr. Darrow, I don't remember.

Q That was said there? A I don't remember just who said it.

Q It was said there? A Yes.

Q It was said there by someone and not denied by any one else? A It may not have been said that they had not been consulted, but they must be, that they had yet to be consulted.

Q Had yet to be consulted? A Yes.

Q And that situation was agreed upon, that was the understanding, that they had not yet been consulted? A Yes, Mr. Darrow--

Q I beg your pardon. A I started to say that my mind was going back to that, Mr. Darrow did say, however, he was quite sure that the boys, when it was explained to them, the whole situation that they would acquiesce in it, although he had not mentioned it to them.

Q Now, you stated that at the end, as I got it, of this conference, Chandler had said that he would go to Fredericks

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and see if he could put the original proposition through, that is, have J. B. plead guilty and have J. J. go. Now, you didn't mean that Chandler said that there? A Oh, no, I never saw Chandler.

Q Who said that? A Steffens attended a meeting at 2:30, I think probably in Lissner's office.

Q That same day? A That same afternoon.

Q What was the hour of this meeting? A 2:30.

Q What was the hour of your meeting? A At lunch, and after lunch he had left us and Mr. Darrow went to court, I didn't see them until dinner time, and Steffens came back from the conference with that report.

Q And at dinner time Mr. Steffens had told you-- A That Tom Gibbons had got Chandler started off to see you, I think that is the way he put it at dinner, that Chandler had started out to see you, he had either rung you up or was about to ring uyou up and make an appointment with you. Q

Q And Chandler said he would have me accept the proposition of having J. B. plead guilty and J. J. go and that he thought he could do it, or words to that effect?

A That was the point we were discussing, Steffens said Chandler felt quite certain he could bring you around to that point of view.

Q And when was it that Mr. Darrow told you that he had had a talk with me in court and that I didn't accede

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to the arrangement unless J. J. also plead guilty, when was it Mr. Darrow said that? A That was at Levy's at lunch.

Q At lunch time? A At lunch time.

Q Mr. Darrow, I presume, didn't give you to understand this was a court discussion in court? A Oh,no.

Q It was a side discussion? A It was a side remark either before or after, I don't remember--either before the court convened or after recess, I don't remember which.

Q And at the evening discussion, then Mr. Steffens told you that Chandler had gone to see me to get me to give up on making J. J. plead guilty? A Yes, either that or he was about to ring you up, he was out on the job, at any rate, he had started out.

Q At any rate, he was out on that job? A Yes.

Q And Mr. Darrow stated that he and I had not been able to agree on that proposition of J. J. Pleading guilty?

A No.

Q That he had stood for J. J. going free, and He had--

A He didn't say you had not agreed, but merely ralating what you had said, and Steffens picked that up and he said that means I am going to ring them up and we will have another meeting, because it was the agreement then agreed to.

Q It was a typewritten-- A He had a typewritten slip about that wide, upon which was written, as I remember it,

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the memorandum of what the agreement was.

Q That memorandum ran about like this: "J. B. McNamara will plead guilty and take life imprisonment. J. J. McNamara is to be discharged and all other cases are to be discharged," and through the "released and take life imprisonment" wasn't there drawn a pencil line and written "And take whatever sentence the court gives him?"

A Well, now, I couldn't say as to that. There was some point about that. There was some doubt as to what he would-_I think there was some point onthat but I don't remember that it was in this agreement, but it was discussed as to whether or not the Judge would let him go on life imprisonment, but that I believe was stated, I think that was the part of the original understanding that he was to have life imprisonment.

Q Then, at any rate, as you left the situation, you left it up inthe air in that the District Attorney had stood for having J. B. plead guilty and Mr. Darrow had stood for having J. J. go free, and that was up inthe air when you left? A Yes, with this optimistic report.

Q With the optimistic notion of Mr. Steffans? A That Chandler was going to see you.

Q A mere optimistic notion of Mr. Steffens that I would accede to the original proposition? A The original proposition.

Q That was only his notion? A That is all.

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MR. FREDERICKS. That is all I want to ask this witness this evening. This evening I wish to read his testimony.

THE COURT. It is a few minutes to five o'clock.

MR. FREDERICKS. Just one question. Q You left at what time that evening? A I left on the Lark, it must have been 8 o'clock.

Q Never had any discussion of this matter after that until up to the time when they did plead guilty? A No, I didn't see Mr. Steffense or Mr. Darrow until after they did plead guilty.

MR. FREDERICKS. If you want to ask a question?

MR DARROW. There is one I want to clear up. I don't suppose it is in order now.

MR. FREDERICKS. Well, blaze away.

A6p MR. DARROW. Q That question he asked was, that I had disagreed with the State's Attorney, that I was insisting on his going free. Now, what did I say as to J. J. consenting to a plea of guilty on some charge? A In case we were obliged to do so, oh, yes, you said that. I testified to that.

MR. FREDERICKS. Q What did he say, what did Mr. Darrow say? A He protested, he didn't like the idea of J. J. having to go to slaughter, but rather than not have-- rather than break the agreement up he would agree to it, that was my understanding, that he would.

Q You said, "Throw him to the wolves?" A I said

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that inthe first instance.

Q Is that the expression that Darrow used? A No, I used that, that is mine.

Q You used that? A Yes.

JUROR WILLIAMS. May I ask a question, your Honor?

THE COURT. Yes.

JUROR WILLIAMS. Mr. Older, did you know they were guilty at that time?

A No, not definitely. I had no definite knowledge they were guilty at that time.

Q Did you have any legal knowledge? A No legal knowledge, I had just about the impression, I suppose, that the average man had that had been following the case, I had been following the case very closely, and I think I had just about the average man's opinion about it.

Q Then you recommended that one of them plead guilty without-- A Oh, no; Oh, no, When I came down here and this matter was brought up with me, of course, the case was considered to be hopeless and it was the best way out was that these two men should plead guilty, it was utterly hopeless, there was no possibility of their not being guilty or of there being any hope for them from a trial, that was stated also, Mr. Darrow stated that.

Q What did you mean by that expression, "Throwing him to the wolves?" A Well, human blood does not appeal, a group of men taking the life of another man does not appeal

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to me, I do not believe in it. I do not believe in "Eye for an eye, or a tooth for a tooth." That is what I meant, I didn't think that it does any good, I don't think we get anywhere by merely wreaking vengeance on people who offend society's laws.

MR1 FREDERICKS. Q Did you get the idea that this arrangement was a good arrangement onthe part of the defense in that it would save the lives of those men that were charged with murder? A I was taking Steffens and Darrow's fuller knowledge of the case and kept repeating, "Well, if you people think it is the thing to do, go ahead and do it, I don,t know anything about it, but whatever you do I will coincide with and uphold, I don,t know anything about it," and it was such a shock to me and so sudden, without any previous knowledge of it, that Iwas rather dazed, and I was yielding to that better judgment rather than trying to give them mine.

Q But didn,t you get the idea from the conversation with Mr. Steffens and Mr. Darrow that from the standpoint of the defense that this was the best thing to do in order to save the lives of the men they were defending, whereas if they went on to trial they might be convicted and hungor hanged, whichever the proper word is? A yes.

Q you got that idea? A I got that idea, that a human life was going to be saved.

Q And that that was their idea also? A yes, Darrow's

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idea, yes.

MR. FREDERICKS. It is 5 o'clock.

THE COURT. (Jury admonished) The court will now adjourn until 10 o'clock tomorrow morning.

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