

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. 68

I N D E X.

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

Argument regarding challenging
of Juror Leavitt, 5429

LeCompte Davis 5509

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B. N. Smith,
Official Reporter

LOS ANGELES COUNTY

MONDAY, JULY 22, 1912: 10 A.M.

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3 Defendant in court with counsel. Jury called; one
4 absent.

5 THE COURT. Gentlemen, I have a telephone message from Dr.
6 Faylen of El Monte, saying that Juror Leavitt is sick and
7 probably has appendicitis. He doesn't give much en-
8 couragement of his being back this afternoon or tomorrow,
9 but the court deems it proper, under the circumstances, out
10 of an abundance of caution, to send a doctor of the court's
11 own choosing, to send in a report. I do not happen to know
12 the doctor. He telephoned in and telephone messages are
13 always more or less unsatisfactory. I feel, out of an
14 abundance of precaution, a doctor should be selected by the
15 court and sent out to make a definite report. After con-
16 sulting in chambers with the attorneys, they do not object
17 to the gentleman I have in mind. I am going to appoint
18 Dr. Beckett, of this city, whom I have not communicated with,
19 but assuming that he will be available, I shall ask Dr.
20 Beckett to make a trip to El Monte, as soon as possible
21 and make a thorough examination of the juror and report
22 here at 10 o'clock tomorrow morning.

23 MR. ROGERS. Might I suggest to your Honor an alternate
24 might do if Dr. Beckett cannot go?

25 THE COURT. In case Dr. Beckett is not available I will
26 make another selection, and would probably select Dr.

Leymone Wills--

1 MR. ROGERS. That is agreeable to us.

2 MR. FREDERICKS. That is agreeable to us.

3 THE COURT. I trust one or the other of these gentlemen
4 will be available, if not I will make another selection,
5 but will communicate with the attorneys on either side so
6 if there might be the relation of attorney and client he
7 might not be able to act. I think there is nothing to do
8 here but adjourn until tomorrow morning at 10 o'clock.

9 Gentlemen of the jury, you have heard the reasons
10 stated and understand the reasons. As much as the court
11 regrets it, it will be necessary to adjourn the further
12 hearing of this case until tomorrow morning at 10 o'clock.

13 (Jury admonished. Recess until July 23, 1912, 10
14 o'clock A.M.)

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1 July 23, 1912. 10 o'clock A.M.

2 Defen dant in court with counsel. Jury called; one absent.

3 THE COURT: Gentlemen, in regard to juror Leavitt, Dr Beckett
4 puts himself to a good deal of inconvenience yesterday and
5 complied with the request -- it was not an order of the
6 court, but a request, and went out to El Monte, and as he
7 had some operations to perform at this hour, he asked to
8 make his report a written one, which is as follows, ad-
9 dressed to me, dated yesterday: "At your request I have
10 just visited Mr A. L. Leavitt at his home in El Monte,
11 with his family physician, Dr Saylin." I call your at-
12 tention to the fact I misstated the name of the doctor
13 yesterday. I stated it as I got it over the telephone.
14 It is Dr Saylin, whom I happen to know very well.

15 (Reading:) "I find that he has suffered with three attacks.
16 of acute abdominal pain in the region of the appendix
17 and right kidney, during the past three days. These
18 attacks have been of short duration and he has been prac-
19 tically well during the intervals. When I saw him today
20 at about 12 o'clock, he had recovered from a very severe
21 attack of pain this morning and was resting very comfor-
22 tably in bed, with no abdominal tenderness and with a nor-
23 mal temperature and pulse.

24 Inasmuch as he had so improved from his morning condi-
25 tion, Dr Saylin and I thought that a surgical operation
26 today to relieve his condition is not advisable. However,

1 we felt it best for him to remain quietly for a day or two
 2 untkl we are assured he is not liable to have a return of
 3 his trouble. It is our opinion that he might be able to
 4 return to court within two or three days, and may, as during
 5 the past two weeks, remain free from any further disturb-
 6 ance. However, his condition is such that a return of his
 7 attacks might take place. On the other hand, he might go
 8 for a number of weeks without any trouble whatever. "

9 I will leave this with the clerk so it may be referred
 10 to. In addition to that, I had a telephone message from
 11 Dr Isaac Saylin this morning in which the Doctor tells me
 12 that the patient is still in bed, but doing well; and that
 13 he deems it quite probable that he could be here tomorrow
 14 morning at 10 o'clock, if we adjourn until that time.

15 I might add that subsequent to the telephone message from
 16 Dr Saylin I had a telephone message from the wife of the
 17 patient, who insists quite vigorously that he will not be
 18 able to return, but as Dr Saylin and Dr Beckett both
 19 seem to be of the opinion that he may come back tomorrow,
 20 the court deems it best that the case go over for another
 21 day, and for those reasons, unless counsel on either side
 22 desire to be heard on the matter --

23 (Mr Fredericks and Mr Rogers consult with the court.)

24 THE COURT: The order of continuance will be made until
 25 tomorrow morning at 10 o'clock. I might say that I expect
 26 to personally see the patient during the day and from these

1 conflicting reports, to be able to exercise a little bet-
2 ter judgment as to the real facts, and I shall make it a
3 point to visit the juror's home and consult himself and
4 his family during the day sometime, and from the statement
5 of both of the doctors, I hope he will be in court tomorrow
6 morning at 10 o'clock, but, under the circumstances, I deem
7 it best to have this further continuance.

8 Gentlemen of the jury, you have heard the reason stated
9 and it is unnecessary to go over them again.

10 (Jury admonished, recess until July 24, 1912, at 10
11 A.M.)

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1 July 24th, 1912. 10 o'clock A.M.

2 Defendant in court with counsel. Jury called; one
3 absent.

4 THE COURT: Gentlemen, in regard to the juror Leavitt,
5 pursuant to the statement made from the bench yesterday
6 morning, I motored out to the juror's residence yesterday
7 afternoon in company with Juror Williams, and visited Mr
8 Leavitt. He had just had a consultation with his physi-
9 cian and they were both of the opinion that if the patient
10 could remain under treatment for another day, he would
11 be able to come here tomorrow morning. That information
12 was confirmed by telephone message again this morning;
13 both from Mr Leavitt, personally, and from Dr Isaac
14 Saylin, his physician. I am aware of the fact that the
15 unusual habits of life have been very hard on all of the
16 jurors, not only Mr Leavitt, but the others. I am sat-
17 isfied that the few days of rest and outdoor exercise on
18 their roof-garden and motoring, has tended to bring up the
19 general standard of health of all of the jurors, and
20 under the circumstances stated, the judgment of the court
21 is that it is better that the matter go over until to-
22 morrow morning at 10 o'clock.

23 Gentlemen of the jury, you have heard the reasons stat-
24 ed, and will again bear in mind your former admonition
25 to refrain from talking about this case among yourselves
26 or permitting any other person to talk to you and refrain

1 from expressing any opinion concerning this case until
2 the whole matter is submitted to you. The further hear-
3 ing of this case will now adjourn until 10 o'clock tomor-
4 row morning.

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1 July 25, 1912. 10 o'clock A.M.

2 Defendant in court with counsel.

3 THE COURT: Gentlemen, I have convened court in the ab-
4 sence of the jury this morning at the request of Mr Rogers.
5 Just a moment. I will make a statement in regard to the
6 absent juror. I have a telephone message saying that he
7 left his home in El Monte at 25 minutes of 10, and should
8 be here in 10 or 15 minutes.

9 MR ROGERS: If your Honor please, with respect to Juror
10 Leavitt --

11 THE COURT: I will amplify that just a little. In
12 the communication, Mrs Leavitt stated that Mr Leavitt was
13 better, but very nervous, but would be here the best he
14 could. That is my entire information on the subject.

15 MR ROGERS: If your Honor pleases, the return of Juror
16 Leavitt presents two considerations which the defendant
17 desires formally to present to your Honor as they have been
18 intimated to your Honor in chambers.

19 Upon the sickness of Juror Leavitt, as those things do
20 come in the case, every man in the practice understands
21 how they do come, there have been persons of good repute
22 in the community in which Juror Leavitt resides, who are
23 persons related to him by blood and marriage, who have
24 placed in the possession of defendant, information concern-
25 ing the situation which we believe justifies us in
26 asking your Honor's intervention at this time. I state

1 frankly that we have issued subpoenas for certain of the
2 persons, and in view of the fact that certain of the infor-
3 mation came to me only as late as 7 o'clock this morning,
4 I have not been able to subpoena all we desire to pro-
5 duce. For instance, the brother-in-law of Juror Leavitt
6 came to me this morning at 7 o'clock, and said that Juror
7 Leavitt was pæjudiced against the defense, and that he
8 had expressed himself to him, Mr Hill, his brother-in-law,
9 as being bitterly and intensely prejudiced against union
10 labor and everything that union labor stood for or repre-
11 sented. I received a telephone from El Monte from a very
12 reputable citizen there, saying much the same thing, and
13 after notifying your Honor that I intended to make an in-
14 vestigation, I went out to El Monte, and there I found wit-
15 nesses who had talked with Juror Leavitt before his qual-
16 ification upon the jury, to whom he had made certain state-
17 ments which indicate a condition and state of mind which
18 precludes his acting with entire fairness and impartiality
19 in this case. I am not sure that the law has provided ,
20 or that there has been decision to provide a method by
21 which this matter can entirely be reached, but knowing
22 that your Honor's disposition throughout this case has
23 been to insure absolutely a fair and impartial trial,
24 in view of this information which has reached us since
25 the sickness of Juror Leavitt, brought the matter to public
26 notice, I believe it right to call your Honor's attention

1 to these facts. I understand from the man himself, that
2 Juror Leavitt said to Jeff Steele of El Monte, that he be-
3 lieved certain things concerning the defendant, Darrow,
4 which if he believed, as he expressed himself to this wit-
5 ness, precludes his acting with entire fairness and im-
6 partiality in the matter, and precludes the possibility,
7 if he adheres to the views which he then expressed, of
8 the defense receiving from him a fair and impartial trial.
9 I understand, if the court please, he expressed the same
10 thing to Albert Kerns, a resident of El Monte, of high stand-
11 ing and high character, a man who has been a juror in your
12 Honor's court, a man who has from time to time been called
13 to act as a juror in other departments of the Superior
14 Court. I understand he made something of the same state-
15 ment to Mr Sloan, his next-door neighbor. These are all
16 neighbors of his. I have sent subpoenas out to produce
17 these witnesses with the exception of the brother-in-law,
18 who came to me this morning, of his own volition, to
19 inform me of the situation.

20 Now, this presents a condition, if your Honor please,
21 which gives us all some pause and gives us some reason
22 for pause; it is within the possibilities that Juror Leavitt
23 honestly did believe that he could sit fairly and impar-
24 tially in this case, and that his verdict, perchance, might
25 be received, no matter which way it went, as his own honest
26 and impartial verdict; it is within the possibilities,

1 further, that in view of the testimony that has come in --
2 it is within the possibilities, I do not say it is a fact,
3 because there is but one person in the universe who knows
4 whether such is the fact or not -- it is within the possi-
5 bilities upon the presentation of the issues as they have
6 appeared in this case, particularly the testimony of Mr
7 Steffens, that the prejudices which Juror Leavitt expressed--
8 if the statements of these witnesses are correct -- have
9 revived in him an idea that he ought, perchance not to sit;

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1 and it is within the possibilities that he has desired to be
2 excused from jury duty upon the ground that his condition of
3 health was such that he ought not to go on. At any rate, the
4 defendant feels that an investigation ought to occur. If
5 this verdict is to have the sanctity and approval by the
6 court and by that greater jury still, the people, it must
7 be rendered by men who have no prejudices and no feeling and
8 no bias; if this defendant is to be convicted, his conviction
9 is to carry with it the certitude of exact justice, that
10 conviction must occur before men who are fair and without
11 bias and without prejudice.

12 This presents a unique consideration, one that
13 has arisen in my practice but once before, and it occurs to
14 me, sir, in view of the situation and condition of Juror
15 Leavitt's health and the statement of Doctor Beckett and
16 the statement of Dr. Saylan, that his malady, if such there
17 there be, may return at any moment, and may again cause a
18 cessation of the trial, that it is quite within your Honor's
19 discretion, it may seem a matter of discretion, to replace
20 Juror Leavitt with the thirteenth juror and occasion us no
21 further delay. The Code provides, if your Honor pleases,
22 upon the disqualification of a juror for reason, that he may
23 be replaced by another juror, even where the 13th juror has
24 not been in attendance. The Code has taken that matter under
25 consideration and has provided for it. It has been suggested
26 that our only remedy was to await a verdict and take advantage
of these matters after verdict, but the consideration

1 of the authorities has given Mr. Appel the opinion, with which
2 I concur, that we cannot present the matter after verdict,
3 that the matter of qualification must be presented before
4 verdict, and therefore, desiring to take advantage of this
5 situation, we feel it our duty to call it to your Honor's
6 attention.

7 THE COURT. Let me inquire of you, Mr. Rogers.

8 MR. ROGERS. Yes, sir.

9 THE COURT. Have any of these statements you have referred
10 to been made since this trial began?

11 MR. ROGERS. None that I am able to prove, but I propose to
12 interrogate, if I may be permitted, concerning the actions
13 and conduct of an employ of the District Attorney's office
14 who resides near Juror Leagitt and who is an intimate
15 friend of his. I desire to interrogate with reference
16 to whether that person has in any wise interfered. I may
17 not be able to prove it, but I have been informed that this
18 gentleman is a very intimate friend of Juror Leavitt's, that
19 he has been in the employ of the District Attorney's office,
20 not only generally at times from one occasion to another, but
21 in this very case, and I have been informed--whether truth-
22 fully or not--that this person has seen fit to see members
23 of Juror Leavitt's family. I may not be able to prove
24 that and I do not state it with a view of causing any fric-
25 tion--

26 MR. FREDERICKS. Then, why should counsel state things like

1 that?

2 MR. ROGERS. If you want to produce Robert Hicks, I will
3 cross-examine him.

4 MR. FREDERICKS. We do not want to produce Robert Hicks,
5 and there is absolutely nothing against him.

6 MR. ROGERS. There may be if I cross-examine him.

7 MR. FREDERICKS. There may be, yes. There may be against any
8 man on earth, but ^{you} have not any right to make that statement.

9 MR. ROGERS. I will make it absolutely, I have been informed
10 that Robert Hicks--

11 MR. FREDERICKS' Suppose he has--

12 MR. ROGERS. --who was in the employ of the District Attorney's
13 office went out there and hid in the hayloft out there at
14 Lockwood's--

15 MR. FREDERICKS' What of it--

16 MR. ROGERS. --we want a fair jury, if your Honor please,
17 with some decency about the conduct of the District Attorney's
18 office, and we do not want a man to try this case who has
19 been interrogated and who has been talked to and who has gone
20 as this man Hicks has--

21 MR. FREDERICKS. Robert Hicks has been in the employ of the
22 District Attorney's office for two hours once in his lifetime
23 in this case, that is true, and no other time, and he has
24 not been seen or talked to or had anything to do with this
25 case. I suppose if he is a neighbor of this man, I sup-
26 pose he goes to see him.

1 MR. ROGERS. Robert Hicks has done a lot of talking about
2 El Monte--

3 THE COURT. Now, Gentlemen--

4 MR. ROGERS. I want to ask Captain Fredericks, if your
5 Honor will permit me: When juror Leavitt was qualified on
6 this jury if he didn't know that Robert Hicks was an employe
7 of the District Attorney's office engaged in this case--
8 I ask the District Attorney if he didn't know it, when he
9 qualified Leavitt and didn't know Robert Hicks was a friend
10 of his?

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1 MR. FREDERICKS. I didn't know where Mr. Leavitt lived, I
2 didn't know Mr. Leavitt before he came in, except through
3 reports we all get, and I didn't know he knew Robert Hicks
4 and I didn't know Robert Hicks knew him, and I didn't know
5 him except to know he was a man that lived in El Monte.

6 MR. ROGERS. I expect that the reports received, that were
7 received in the District Attorney's office, probably dis-
8 closed that Juror Leavitt lived at El Monte, and Hicks knew
9 him, and I have been informed that Hicks made some inquiries
10 about Leavitt beforehand.

11 MR. FREDERICKS. Hicks did not make any inquiries for us
12 about Leavitt in any way, shape or form.

13 MR. ROGERS. He didn't make them for us.

14 THE COURT. Now, Mr. Rogers, we have a condition, if I may
15 use the term, and not a theory. The court, which includes
16 the District Attorney and the counsel for the defense, I
17 am sure, all want a fair trial to be had in this case.

18 MR. ROGERS. Yes, sir.

19 THE COURT. I hope there is no one in the sound of my voice
20 or in the community who wants anything else, but courts
21 must act pursuant to the authority of law, and I feel, at
22 least, it is a very grave question whether there is any
23 authority, any power vested in this court to act in this
24 matter at this time. The juror has been interrogated here
25 in open court within the last five minutes; says that he
26 is able to proceed; his doctors have verified that state-

1 ment. I might say at this time, as a matter of fact, that
2 the health of several members of this jury have been a
3 matter of considerable concern to the court, and to the
4 person. There are several men here who are from time to time
5 suffering more or less from the unusual habit of life, and I
6 feel it is very important that the best and wisest thing
7 that can be done should be done, but the sole question/^{now}is
8 whether or not here in the midst of a trial, the trial ap-
9 proaching its close, we have a right to stop and try the
10 qualification of a juror. If you have authorities sup-
11 porting that position I will hear you, but so far as the
12 evading the question by disqualifying the jury on account
13 of sickness I cannot conscientiously do that, consequently
14 I cannot do it at all, without the doctors who have been in
15 attendance, advised by their certificate that such facts
16 exist, the juror himself is here and ready to proceed, I
17 cannot evade the real issue in that way, so it brings it
18 down to the question whether or not we have a right at this
19 time, without legal authority, to stop and try the qualifica-
20 tion of the juror, especially as it appears that those quali-
21 fications or disqualifications existed prior to his being
22 called on the panel.

23 MR. ROGERS. In order to present the matter to your Honor
24 in legal form, I offer to call witnesses to prove that
25 directly after the McNamara sentence and judgment, and I
26 refer to the case of J.B. McNamara and J.J. McNamara, that

1 juror Leavitt said to Jeff Steele, who was then working
2 for him on his place, among other things "that they would
3 have hung Hayward and Moyer if that scamp," meaning the
4 defendant, "had not bought the jury." I further offer to
5 prove at the same time and place and to the same person, the
6 Juror Leavitt said that Harriman and all those attorneys
7 knew that McNamara was guilty and that they all ought to
8 have been hung, including the lawyers. I offer to prove
9 that he made the same statement, in substance, (I cannot
10 give the words) and effect, to Albert Kerns, a near neighbor.
11 I offer to prove, I am not sure as to the words, but the
12 same substance, that he made the same statement to his
13 neighbor Sloan. I cannot give you the first name. I fur-
14 ther offer to show by the brother-in-law of the juror
15 Leavitt that Mr. Hill, that previous to the Juror Leavitt
16 being impaneled on this jury he had frequently expressed
17 bitter hostility towards labor unions and socialism, and
18 those who believed in labor unions and socialism, and par-
19 ticularly against Job Harriman, one of the witnesses in this
20 case. I think that will present the issue. And I offer
21 to show by those statements made to those persons that the
22 statements made by Juror Leavitt upon his qualifications--
23 upon his interrogation to determine his qualifications, he
24 stated these things were not true, and that the information
25 had come to us since the impanelment of Juror Leavitt upon
26 the jury. I offer further to show that we did not know

1 these matters and things at the time the juror was im-
2 paneled and sworn, and that if we had known them we would
3 have challenged him either for cause or preemptorily.

4 THE COURT. Just a moment, Mr Ford. I still feel, gentle-
5 men, that the question is unanswered as to the legal au-
6 thority to go ahead and do these things.

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1 MR APPEL: We contend, your Honor, under the authorities,
2 that notwithstanding that the juror has been sworn to try
3 the case, that if during the trial of the case it appears
4 from facts and to the satisfaction of the court, that a
5 juror has committed perjury, in answering the questions,
6 either for one side or the other, that if a juror has shown
7 a desire to get upon the jury when he felt that he was dis-
8 qualified in his own mind, and according to his own con-
9 science, when he should have known that he was disquali-
10 fied, that when he has practiced a fraud--I don't mean
11 voluntarily; I don't mean maliciously--I mean a fraud in
12 law, what would amount in law to a fraud on the court and
13 the attorneys on either side, whether he be a juror that
14 had prejudice against the prosecution or

1 whether he be a juror that had prejudice against the de-
2 fense, it makes no difference on which side, if he has
3 gone upon the jury box and qualified -- swore that he was
4 qualified that he had no bias or prejudice or interest,
5 that he had no feeling against either side, that when the
6 court has discovered that those facts were untrue, that
7 there is such a wrong committed against justice; such a
8 wrong committed -- suppose the juror was against the
9 prosecution, I say that it would be so absolutely unnat-
10 ural and unjust for the prosecution that the court has a
11 right to perge the jury of that sore, of that stain, that
12 the court has a right in its discretion to say that the
13 juror was disqualified from the beginning, that he should
14 be set aside, that he should -- that the thirteenth
15 juror examined here, and who has heard the evidence, he
16 should be put in his place.

17 Now, in a great many cases, even where a juror has al-
18 ready been sworn, either side may be allowed to bring the
19 question of the qualification of the jury before the court
20 and the court has taken action. It is too late, and it
21 would be too late, we knowing these things to exist, and
22 we have reason to believe that they do exist, it would be
23 too late for us to complain after a verdict was rendered.
24 We could not complain; the other side could not complain,
25 but now is the time and the place, and we offer to show
26 these things for the purpose of showing that the juror is

1 disqualified. I don't say, your Honor, in justice to this
2 juror, that your Honor will come to that conclusion absolute-
3 ly from the evidence. I don't wish to anticipate your
4 Honor's opinion about the matter, and I don't wish to con-
5 demn the juror and do an injustice in advance, but at least
6 we, believing in good faith, we can show these things, that
7 if we show, because it will be a disqualification in law,
8 we offer to show it at this time. We must make an offer.
9 It is our duty here to make an offer to perge this jury
10 of one whom we honestly believe to have been disqualified
11 from the beginning -- maybe we may fail. It may be that
12 this juror is absolutely innocent of anything of this kind,
13 but if he is innocent, if he is innocent of any imputa-
14 tion or prejudice against this defendant, why, it will be
15 so much to his credit; it will be so much credit to the
16 verdict that may be rendered here; we will have confi-
17 dence in the integrity of the whole jury, but your Honor,
18 it is, I say, the highest duty of the court to investi-
19 gate this matter. Now, I say the court has a right all
20 along through the trial up to the time that a verdict is
21 rendered, has a right to control any action or any step
22 in the trial that will produfe and promote justice. Your
23 Honor has entire control over that matter. There isn't
24 any law -- the code says your Honor has the absolute con-
25 trol of the trial. There isn't any section of the code,
26 there isn't any rule of law that limits your power in that

1 regard. On the contrary, the code gives you a very wide
2 discretion; it gives you the right to exercise your judg-
3 ment in the widest manner, provided it is a discretion,
4 and it is an action of the court leading up to the promo-
5 tion of exact justice. We cannot complain of these
6 things after a verdict -- I can cite authority after
7 authority. Now, could it be said, your Honor, that sup-
8 posing a juror went upon the witness stand and said that
9 ~~he~~ didn't know the defendant; that there was no relation
10 nor blood relationship or kinship between the juror and
11 the defendant; that his name was not Darrow; that he had
12 nothing to do with the family of Mr Darrow. Suppose he
13 went upon the stand and swore that his name was John Jones;
14 that he didn't know anything about the case, and suppose
15 that he heard evidence here in this case from the begin-
16 ning to the end, and it should be discovered that he was
17 the brother of the defendant. Now, under the code a party
18 who stands in the relation of brother or father or any
19 kinship is disqualified by law. He has no right to sit
20 there upon that jury. Suppose the District Attorney found
21 that out. Do you say that the hands of the court are
22 so tied up by the absence of any direction in the code
23 that the District Attorney should not have the right to
24 say, "I have discovered this fact, and it is a fraud upon
25 the People; we want this jury perged, because the jury is
26 constituted through the fraud of this man, through the

1 misrepresentation of this man in such a manner that ex-
2 act justice cannot be done to the People."
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5s 1 Your Honor would not have the right, having the absolute
2 control of this case, to say, Mr. Juror, is this a fact?
3 Mr. Juror says Yes. Would your Honor allow him to sit
4 there? Wouldn't it be a wrong? Wouldn't it be contrary
5 to all rules of decency and justice to allow that juror to
6 sit there and prevent a verdict to be rendered in accordance
7 with the facts, and in accordance with the law against the
8 defendant, if he did agree to such a verdict, would your
9 Honor sit idly by and the District Attorney sit idly by
10 and allow a case to be tried under those conditions? Where
11 is there any rule; where is there any authority of law
12 that would prevent your Honor to say you shall purge this
13 jury from the imposition upon it and upon the court and
14 upon the people and upon the attorneys representing the
15 people here? You have a right to discharge that juror.
16 Would jeopardy attach? I say it would not attach. The
17 defendant, your Honor, could not claim that by allowing
18 his own brother to go upon that jury; would take advantage
19 of his own wrong and have that juror discharged. He
20 couldn't come into court and say, "I have brought about these
21 conditions and made it possible for the court to dis-
22 charge the juror and I claim jeopardy." A defendant, fol-
23 lowing that rule of law, if I may call your Honor's atten-
24 tion to the principle, is just the same that when a defend-
25 ant expects to be charged with a serious crime goes in
26 a Justice's court and pleads guilty to a misdemeanor, a mis-

1 demeanor included in the greater charge, and gets fined
2 there purposely, voluntarily, cannot afterwards come into
3 court and plead once in jeopardy or former conviction or a
4 former acquittal to the information against him for the
5 greater crime because of his fraud.

6 Would not the District Attorney, under those
7 conditions, have a right to say, to call your Honor's
8 attention to the fact that a juror has gone into that jury
9 box who ought not to be there, and I say your Honor has
10 control of this case, and here is the time, here is the op-
11 portunity, an opportunity for a fearless judge to act in
12 accordance with the best principles of justice.

13 You say there is no precedent. The decisions
14 point that way and who would ever anticipate, your Honor,
15 who in the world would ever anticipate that conditions of
16 this kind would ever arise in any civilized community?
17 Who would anticipate that a Christian gentleman, who would
18 anticipate that an honorable citizen would go upon a jury
19 having a feeling against a human being, and disclaim the
20 condition of that feeling, the existence of his prejudice,
21 try to get upon a jury to convict his fellowman. Our Code
22 provisions are made from time to time as cases may arise,
23 but what legislature would ever think that there would be
24 such a man in the world? I do not say this about Mr. Leavitt,
25 I have no right to say this, but I am supposing that in case
26 there should be any such thing as that--but our Code says

1 that the court may adopt any mode of procedure or take any
2 action, wherever there is no provision in this code point-
3 ing out the specific mode of procedure--the court may adopt
4 any mode of procedure which may tend to promote justice,
5 and that code is there, and that provision of the code is
6 made for the purpose of supplying that in which the code, by
7 express provisions, is deficient. Why, your Honor, I do
8 not know, of course--courts must, as I know, have respect
9 for the strict rules of law and strict procedure, that is
10 very true; they do have, but technical law, strict proce-
11 dure, has no place in any court when an exceptional case
12 comes up, when the possibility of an injustice being done
13 to one side or the other comes up, through no fault of the
14 court, through no fault of counsel on either side, and then
15 that sound judgment, that sound discretion must be exercised
16 in the interest of justice. If we are true in our conten-
17 tion here--and I am not asserting, so far as my own personal
18 knowledge goes that we are right--I am only showing what the
19 conditions are or what conditions may possibly exist--but
20 if we are right, your Honor, what is the use of trying this
21 case? If the District Attorney thinks, or your Honor
22 thinks, that we can take advantage of this position after
23 verdict and that a verdict against us would be a nullity,
24 then that in your wise discretion again--for the Code says
25 in granting a new trial to the defendant the court may do
26 it out of his discretion, and a great many matters which are

1 decided upon motions for new trial are purely made at the
2 discretion of the court--

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1 A man is convicted on evidence which, the court appeals
2 is not convincing, and in his discretion, in the exercise
3 of his discretion, he will grant him a new trial, and the
4 Supreme Court will not in any instance, interfere with
5 that legal discretion. Hardly ever they do that. But,
6 where a state of facts such as we claim exist in this case,
7 is presented to the court before verdict, I say, there is
8 no rule of law that prevents the court from finding some
9 way of putting a jury there against whom no imputation can
10 be made, against whom no reflection can be justifiably
11 made, and we want to feel, your Honor, that when we get
12 through with this case, that the case that has taken so
13 much, that it will not be said that anyone on either side
14 of this case, including the court, had anything to do with
15 bringing about a verdict which would be a shame to our
16 jurisprudence. That however that verdict may be, for
17 the People or for the defendant, there ought to be a fin-
18 ality to a case of this kind; the People are interested
19 in seeing that we only have a final trial, that there
20 should be no abortive verdict here that may entail the
21 trial of this case anew. That is, that kind of a trial,
22 a trial of that kind is what brings disrespect from the
23 public to the courts, and I say, your Honor, both sides
24 ought to join here, and if this juror should be discharged
25 and we agree that the thirteenth juror go upon that jury,
26 because that we do not delay -- no advantage would be

1 gained by either side, certainly. I do not know, if
2 I were District Attorney, and a man went into that jury
3 box who entertained the hostility towards the defendant,
4 I would not want him in there, the highest duty of a Dis-
5 trict Attorney, your Honor, is to present the facts and
6 in presenting his views, vigorously and honorably and
7 honestly, to aid the court in bringing about a proper ver-
8 dict. In People against / 18 California
9 Appellate, the Appellate Court says this, speaking of a
10 matter of this kind, it is a trite saying, and its repe-
11 tion seems not uncalled for, "that a fair trial for a de-
12 fendant should invite and receive from the District At-
13 torney, the same solicitous consideration as a conviction
14 of the guilty; if the District Attorney should be more
15 anxious to win a victory in the lower court than to accord
16 the defendant the rights he is entitled to under the
17 constitution, he must not be surprised if his success comes
18 to naught in the higher forum," and cites a great many
19 other cases. I think such a spirit as that, such a feel-
20 ing as expressed here, such an idea as that must natur-
21 ally prompt counsel on the other side in joining us in
22 allowing your Honor, without objection, to exercise the
23 discretion which the law has decided in a matter of this
24 kind, which is a unique, I must say, situation, and which
25 I say, is not contrary to the spirit of the code, now ex-
26 pressly provided in the code, for such a condition as

1 this, as could not possibly be anticipated. I submit
2 the matter, your Honor.

3 MR FREDERICKS: If the court desires to hear any authori-
4 ties from our side on the matter, Mr Ford will present them
5 I wish to assure counsel that the District Attorney's of-
6 fice, while we may at times get a little heated in our per-
7 sonal controversies, they are personal sparks, and noth-
8 ing more, and the District Attorney's office desires only
9 a fair trial and a fair verdict, and I very much regret that
10 I believe the law to be such that Mr Leavitt cannot --
11 that this action cannot be tried, because I am just as
12 thoroughly convinced that Mr Leavitt is an ordinarily
13 fair juror as counsel on the other side may be to the con-
14 trary, and I think that if the matter were submitted it would
15 so appear. To us, Mr Leavitt is simply one of thirteen
16 jurors, nothing more and nothing less. As to the law
17 on this matter, we had occasion at this time to look it up,
18 and we had occasion on a previous occasion, to look it
19 up, when we were very vitally interested, as we thought at
20 the time, in getting a juror off under similar circum-
21 stances, and we found that the law did not provide for
22 such a contingency and we are satisfied that it does not,
23 and we feel counsel must be satisfied also, as he has
24 cited no law and no authorities. A thirteenth man is a
25 new thing, is a new situation. The law remains as it
26 always was, that a man must be tried by twelve men and

1 twelve men are selected for that purpose,

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7p 1 they are the first 12 and the 13th man is no more a part
2 of that jury, for the purpose of bringing in a verdict,
3 than any spectator in the court room, unless the contin-
4 gencies arise as specified in the code, and it is those
5 contingencies, which alone give him his power and authority.
6 They have not arisen in this case and, therefore, the au-
7 thority has not been given him. If this could be, as
8 counsel argue for here, it would place an absolute bar
9 against the conviction of any man for a crime. With due
10 respect to Mr. Appel's argument that this defendant would
11 not be in jeopardy, I think he has not cited a parallel
12 case: This defendant is now in jeopardy and if we were to
13 open the case now and go into this question and attempt to
14 get the juror off and get him off, this trial would have
15 to stop. This trial would be a mistrial, we could never
16 try this case again, because this defendant would be in
17 jeopardy; it would not be analogous to the case which Mr.
18 Appel has cited wherein the defendant, by his own fraudulent
19 act and by his own fraudulent knowledge had gotten his
20 brother on the jury, or wherein by his own fraudulent
21 act he had plead guilty to a lesser offense, where he was
22 he was really guilty of a greater one, because that is not
23 analogous to this case at all. But, whether or not he has
24 cited the law correctly there is not a matter we need to
25 argue. I am inclined to think, and I know in one instance,
26 because I looked it up, and I rather think this position

1 would be maintained to a certain extent in the other, but that
2 is not this position here. As I said, I am sorry that
3 we cannot go into this matter of Mr. Leavitt's qualification,
4 but if we could go into them then a defendant could get a man
5 on the jury who could pass, a man on the jury, mark you, by
6 slight examination, for instance, whom he knew had made
7 statements previous, and get him on the jury, let the trial
8 get started, the jury completed and let the trial get
9 started, then bring in the point that the man made these
10 previous misstatements, that a mistrial would result, and the
11 defendant would go free. Now, feeling entirely satisfied
12 that this juror, although I do not wish to be considered as
13 defending him or apologizing for him,--he is simply one of
14 13 men, he is no more to me than any other one of the 13 men,
15 but being satisfied as good a jury has been selected as we
16 could possibly hope to select, and that Mr. Leavitt is a
17 fair average juror and a conscientious man, and is going to
18 bring in a verdict for the defense, if he believes, or if
19 he doubts the defendant's guilt, and is going to bring in a
20 verdict for the prosecution if he believes the defendant is
21 guilty beyond a reasonable doubt, and having that belief, we
22 would be very much opposed to going on with any such dis-
23 cussion as might be brought up here. However, as the law
24 is as it is, there is no need of us, unless the court wishes
25 us, to cite the law that has been cited in numerous cases,
26 one particularly right in point. Mr. Ford will give the

1 court the authorities, if the court wishes for it.

2 THE COURT. Let me have the panal code.

3 MR. APPEL. I was going to say, your Honor, we do not
4 wish to be foreclosed from showing authorities right
5 square in point on this matter, as I think there are. I am
6 almost certain we can find them.

7 MR. FREDERICKS. We have not been able to find them.

8 MR. FORD. Section 1089 of the Code of Civil Procedure, which
9 is the only law in this state providing for the dismissal of
10 one juror inthe course of trial and the substitution of an
11 alternate juror is confined to the cases that are enumer-
12 ated.

13 THE COURT. That is 1089 of the Penal Code?

14 MR. FORD. Yes, your Honor.

15 THE COURT. I think you said Code of Civil Procedure.

16 MR. FORD. I probably did but I should have said Penal Code.
17 In that case the alternature juror can act only in case one
18 of the regular juror dies--

19 THE COURT. I have it right before me and I will read it so
20 we will all get it. The last clause of the Section,
21 1089 of the Penal Code, reads, after providing for an alter-
22 nate juror: "If, before the final submission of the case a
23 juror dies or becomes ill so as to be unable to perform his
24 duty, the court may order him to be discharged and draw the
25 name of an alternate who shall then take his place in the
26 jury box and be subject to the same rules and regulations as

1 though he had been selected as one of the original jurors."
2 I presume the term "draw the name of an alternate" con-
3 templates where two alternates are selected in the first
4 place?

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1 MR FORD: Yes, your Honor. Now, the question presented
2 here, is not that case, your Honor. Your Honor has already
3 stated the jury here has returned and is ready to go on
4 with the trial, and to dismiss him for any ground other
5 than the grounds enumerated in section 1089 would be to per-
6 mit this defendant to be tried by some person other than
7 the original juror selected to try him, which, without
8 argument, will appear upon its face, to be no trial at all
9 A juror can only be removed upon a challenge, either for
10 cause or for a lack of qualifications as specified in the
11 code. In this case, if this juror is removed, he must be
12 removed by challenge, and the law specifically provides
13 the time when that challenge must be interposed, it must
14 be interposed before a jury is sworn, under the provision
15 of 1068, except that the court may, if good cause appears,
16 during the examination of the jury, may, before the jury
17 is completed, permit, even after a juror is sworn, per-
18 mit the examination of a juror to be reopened, and if
19 the court sees fit, may allow the juror to be removed,
20 even after he has been sworn, but that case is confined
21 expressly to a case where the jury has not yet been com-
22 pleted. I call your Honor's attention to the case of Peo-
23 ple versus Sanford in the 43rd Cal., page 31, People versus
24 Coffman, 24 Cal., page 234, People versus, Evans, 124
25 Cal., 210; People versus Stonsoffer, 6 Cal., 409, and in
26 all of those cases, discussing the objections to the compe-

1 tency of jurors, the court held that the law provided a
2 time when the challenge upon those grounds must be taken,
3 and that it must be taken at that time and cannot be taken
4 at any other time, even if the facts were unknown to the de
5 fendant until after the trial had ended. One of the
6 grounds enumerated in the statute upon which a defendant
7 may object to the competency of a juror is that he is an
8 alien. The law provides that he must be a citizen of the
9 United States. In People versus Chung Lit, in the 17th
10 Cal., page 320, it developed in that case the defendant
11 had been convicted of murder, and one of the jurors who sat
12 upon the panel was an alien. They made a motion for a
13 new trial, and subsequently -- although the motion was
14 based upon affidavits by the juror that he was an alien,
15 and he was not aware that this disqualified him, and that
16 he did not communicate the fact to the defendant until af-
17 ter the verdict, and also upon affidavit by defendant's
18 attorney that he did not know the juror did not know he
19 was an alien until after the verdict, the court held in
20 that case that the law provided a time when the challenge
21 should be interposed, and even though the defendant and his
22 attorney did not know, were not aware of the incompetency
23 of the juror, still that fact could not be permitted to
24 disturb the verdict, and there was a good reason for it,
25 and before discussing the reason, your Honor, I want to
26 call your Honor's attention to the case almost exactly in

1 line with the case at bar, People versus Fair, 43 Cal.,
2 beginning at page 145. In that case the defendant, a woman,
3 had been found guilty, and the defendant learned, after
4 the verdict, that one of the trial jurors had expressed
5 himself as unfavorable to the defendant, extremely and
6 unqualifiedly prejudiced against the defendant.

7 (Reading:) In impaneling the trial jury, Henry M.
8 Beach, being examined as to his qualifications to serve
9 as a juror, stated in substance, he had read in the news-
10 papers an account of the homicide, that he had not expressed
11 any opinion about it, he had heard but little said upon
12 the subject; that he had neither formed nor expressed an
13 unqualified opinion as to the guilt or innocence of the
14 prisoner; that his mind was entirely unimpressed upon
15 that point, and that he could give the prisoner a fair
16 trial and he was thereupon accepted and sworn as a juror.

17 A verdict of guilty having been rendered by the jury,
18 the prisoner moved for a new trial upon many grounds,
19 among them was the ground raised that Beach was not a com-
20 petent juror--he having in fact, as the prisoner alleged,
21 both formed and expressed an unqualified opinion, before he
22 was called as a juror, that she was guilty of murder in
23 killing Crittenden, and that she ought to be executed.

24 Numerous affidavits were produced and read at the hearing
25 of the motion, which tended to show that Beach had, in point
26 of fact, shortly after the killing, openly declared that he

1 considered it a wilful murder, and that if he should be upon
2 the jury he would consider that the offense of the prisoner
3 was murder in the first degree and would hang her. Counter-
4 affidavits were also produced and read, going to show that
5 the statements contained in the affidavits, upon behalf of
6 the prisoner, were incorrect and untrue. The alleged dis-
7 qualification of Beach to serve as a juror is relied upon
8 here; and it is claimed that in view of the affidavits in
9 the record the court below should have set aside the verdict
10 on that ground. We think, however, that in this respect the
11 motion was properly overruled. The right of the prisoner
12 to move for a new trial in a criminal case is given by
13 Section 440 of the Criminal Practice Act, and the grounds
14 upon which such a motion are to be made are therein pre-
15 scribed and enumerated." And Section 1181 of the Penal
16 Code is practically a reduplication of Section 440 of the
17 Criminal Practice Act as it existed in 1872, prior to the
18 adoption of the code. "The statute declares that such a
19 motion when made, must be made based upon one or more of the
20 following grounds in that section mentioned--'in the follow-
21 ing cases only' is the expression--and it clearly excludes
22 all other grounds whatsoever."

23 This mere reference to the term exclusion employed by
24 the statute would be sufficient to dispose of that point,
25 but in *People versus Plummer*, 9th California, 298, it was
26 held by this court, under this statute, "An objection to the

1 competency of a juror, may be made by the prisoner for
2 the first time after the verdict is rendered, and may be
3 relied upon as a ground upon a motion for a new trial.

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1 In People versus Plummer, 9th California, is the only de-
2 cision in this state that even squints at the position
3 taken by the defendant in this case, and the case of
4 People versus Plummer, was subsequently overruled in this
5 case of People versus Fair. (Reading:) "We have care-
6 fully examined the elaborate and able opinion rendered
7 in that case, and we find in it nothing whatever as to the
8 construction or interpretation of section 440 in the par-
9 ticular already referred to. It is undoubtedly true, as
10 there remarked by the court, that every citizen has a
11 right 'to demand that all offenses charged against him
12 shall be submitted to a tribunal composed of honest and un-
13 prejudiced men, who will do equal and exact justice
14 between the government and the accused, and, in order to
15 do this, weigh impartially every fact disclosed by the
16 evidence.' The right of trial by jury is unquestionably
17 a sacred right, and one secured by the guarantees of the
18 constitution; and this is much, if not all, of what is said
19 in the opinion delivered here in the case of Plummer.
20 But when this proposition of constitutional law is con-
21 ceded, we have advanced but a little way toward the point
22 of practice involved here, and in the Plummer case as well.
23 The jurors should undoubtedly be indifferent, omni majores
24 excetione. But they may not, in fact, be so;" the jury
25 should be unbiased and unprejudiced; the law contemplates
26 they should be, but they may not be infact. (Reading :)

1 "and if not, the question is, at what time in the pro-
2 gress of the case, and through what method, of procedure,
3 may the prisoner be heard to allege that fact? Undoubt-
4 edly, if the case be known to him and he makes it appear
5 before the juror is sworn, he may interpose a challenge
6 for cause. But if the prisoner do not know the fact of
7 disqualification, or knowing it, is still unable to es-
8 tablish it before the juror is sworn, what steps may he
9 subsequently take to avail himself of the objection? May
10 he make it a ground of a motion in arrest of judgment,
11 under section 442? Certainly not -- no one pretends that
12 he could, because the statute itself has undertaken to
13 enumerate the grounds upon which the judgment may be ar-
14 rested and the incompetency of a juror not being one of
15 these, the intention to exclude that and all other non-
16 enumerated grounds must be apparent. But in reference to
17 a motion for a new trial, the statute has not only enum-
18 erated the grounds upon which it may be made, but has ex-
19 pressly excluded all others. A single decision of this
20 court, in which the provisions of the statute upon the sub-
21 ject, though cited in argument, appear to have been wholly
22 overlooked, cannot prevail against the words of the sta-
23 tute unmistakably expressing the legislative intent.
24 The case of the people vs. Plummer, insofar as it holds
25 that an objection to the competency of a juror, taken for
26 the first time after verdict rendered, may be availed of

1 on motion for a new trial, is therefore overruled."

2 Counsel has cited the case of the defendant procuring
3 his own brother to sit on the jury, and alleges that in a
4 case of that sort, the fraud upon the court would be set
5 aside and that the defendant could again be tried for the
6 offense. I differ with him entirely. The law does not pro-
7 vide that that remedy may be taken. The defendant, even
8 though his own brother has sat upon the jury, can avail him-
9 self of the verdict of that jury, and the verdict cannot be
10 set aside, because it is the duty of the People to object
11 to the competency of that brother when he sat upon the jury,
12 and they could only remove him upon challenge, and they
13 would have to introduce the challenge at the time prescrib-
14 ed by law. A case upon the other side, in volume 139,
15 People vs. Boren, beginning at page 210, the portion which
16 I will read to the court, beginning at page 215. In that
17 case, an uncle by marriage of the District Attorney
18 was a member of the trial jury. The defendant was con-
19 victed of having wilfully and feloniously broken and in-
20 jured a public jail, and also with having suffered a prior
21 conviction of the crime of robbery, and an uncle of the
22 District Attorney -- uncle by marriage, sat upon the jury.
23 They made a motion for a new trial, and subsequently appeal-
24 ed, and one of the grounds upon -- (Reading:) "Another
25 ground upon which it is contended a new trial should have
26 been granted is, that an uncle by marriage of the District

1 Attorney , was a member of the trial jury; that this fact
2 was unknown to the defendant or his counsel until after
3 the trial; that defendant's peremptory challenges had not
4 been exhausted; and that if these facts had have been
5 known, defendant would have challenged him peremptorily.
6 These facts appear by affidavits, but constitute no
7 grounds for a new trial. Section 1181 of the Penal Code
8 specifies the only grounds upon which a new trial may be
9 granted, and this objection is not included in the grounds
10 there stated."

11 Of course, your Honor, the situation here before the
12 court at the present time is that objection has been taken
13 before the verdict is rendered. That defendants are citing
14 that this ground would not be one of the grounds upon
15 which a new trial could be obtained, but are asking your
16 Honor to legislate upon this subject and permit them at
17 this time to make the objection to the competency of the
18 juror to interpose a challenge and to remove him, and I
19 am reading these cases merely for the purpose of showing
20 your Honor that in each one of them the court constant-
21 ly refers to the fact that the objection to the juror must
22 be taken before the jury is sworn, as is the law, and be-
23 fore the jury is completed. This section winds up,
24 after deciding that the objection raised by the defendant
25 is not one of the grounds for a new trial. (Reading:)
26 "An objection to a juror must be taken before the juror is

1 sworn to try the cause; but the court may, for cause, permit
2 it to be taken after the juror is sworn and before the
3 jury is completed. (Penal Code Section 1068.) "

4 Now, your Honor, one of the fundamental rules of sta-
5 tutory interpretation is that the expres^{sion} of one thing
6 means the exclusion of all other things. Section 1068 has
7 expressly provided that the juror must be challenged be-
8 fore he is sworn, but renders only one exception to that,
9 and that is that the court may in its discretion, for cause,
10 permit challenge to be interposed after he is sworn, but
11 before the jury is completed, and that interposition of a
12 challenge to the juror be required by law to be before the
13 jury is completed, is so clear, so definite that I suppose
14 in the whole of the United States that it has been left
15 for ingenious counsel in this case to raise the point for
16 the first time, that the challenge to the juror may be
17 interposed before the conclusion of the case and after
18 evidence has been heard, and that ~~is~~ cannot be true.

19 Now, I think, if the court please, that this provision of
20 law is a wise one; it is a wise one to prevent a challenge
21 to the juror being interposed after the jury is completed.
22 The law guards with zealous care, the right of this defend-
23 ant. He cannot be convicted upon^{the vote of} any one of twelve men
24 sitting in that box. The law permits and provides an op-
25 portunity to the defendant to examine into qualifications
26 of each one of the 12 men on that jury. It is possible,

1 owing to the weakness of human intelligence or the weakness
2 of the means by which they can gather information, as to
3 each individual qualification of each juror, Once in a
4 great while some juror may remain on that jury who does
5 not possess the fair mind and lack of prejudice which the
6 law requires, but the law guards him against the act of
7 that one man. That one man cannot convict him. It requires
8 the unanimous verdict of each man on that jury, and even
9 though the man should get there in defiance of the law,
10 what the law has provided, still the rights of the de-
11 fendant will not suffer. The penalty for the violation on
12 the part of the juror of the duty which he owes to the
13 state and the duty which he owes to the defendant, is one
14 which must be taken up between the court and the juror.
15 It cannot be permitted to interrupt the trial of the case,
16 and there is reason and strong substantial reason for it.
17 I think that the legislature and the experience of judges
18 in the years past, has undoubtedly led them to the conclu-
19 sion that the trial of a case should not be interrupted
20 by such issues. That the verdict of the juror should not
21 be altered in any method by an attempt to terrify or
22 intimidate or attack the integrity of the man upon the
23 jury by going to his family and present charges against
24 the member of that family who happens to be upon the jury,
25 thereby seeking to intimidate the juror, and ^{that} can
26 be so readily done, that the law has wisely provided that

1 it should not be allowed; that the integrity of the juror
2 should not be attacked after the jury has been completed.
3 Your Honor can see how readily a juror might be influenced
4 by an attack upon his integrity; how members of his fam-
5 ily might be scared and terrified so they would desire
6 him to stay off the jury and prevent him from ^{doing} the duty which
7 he owed to the People and to the defendant as well.
8 If after the jury has been sworn, the jury has been com-
9 pleted, counsel for the defendant is allowed to visit the
10 home and the neighborhood of one of the jurors to dig into
11 utterances which may have been so loosely made that they
12 were absolutely forgotten by the juror, if they are allow-
13 ed to go out and convey to the members of the family, by
14 inquiries or by direct assertions to the members of the
15 family, that the juror lied; that he committed perjury;
16 that he has no business to remain on that jury; if they are
17 allowed to go and to be permitted to attack a juror at
18 this time, and that information comes to the juror or comes
19 to the family of the juror, it may be the means of scar-
20 ing him, of intimidating him, or preventing him from
21 rendering a fair and impartial verdict in the case, to
22 which the People in this case are entitled, and I don't
23 believe, your Honor, that this matter -- that should be
24 allowed -- should be tolerated in any court, that a juror
25 might be asked in a method not provided for by law, I
26 don't believe, your Honor, if the complaint is made in

1 good faith, and if they are convinced of the law on their
2 side, I don,t believe that they ought to come into court
3 and make charges of this character without submitting
4 some authorities which shows your Honor that your Honor
5 has authority to make it, and charges have been made here
6 reflecting upon people that have absolutely no connection
7 at the present time with the offices of the District At-
8 torney, and never did have any connection, except upon the
9 case of the arrest of one Franklin long before the incep-
10 tion of the Darrow case, of a man who has not been consult-
11 ed since the investigation of the Darrow case began, and
12 has had nothing to do with it and whatever may be true of
13 that man, whoever he is or whatever he is, I don,t know
14 that I know him personally, I don,t remember having met
15 him, but perhaps I have, but whatever he has done, the
16 District Attorney should not be charged with what he has
17 done whether it is good or whether it is bad, and as long
18 as those charges have been made, your Honor, I think we
19 have equally the right to show that this can have only one
20 object, and that is the purpose of intimidating and inter-
21 fering with the dme admonistration of justice in this par-
22 ticular case.

23 Your Honor, these defendants had the same rights to
24 investigate this juror before the trial began that they
25 have now. They did have investigators out and they had
26 the right to make thorough investigation at that time as

1 they saw fit to make. Certainly, they cannot be permitted
2 to excuse a juror here; if they were not satisfied with the
3 juror, in their minds, that they can afterwards go out any
4 time they feel a juror is against them, any time they sus-
5 pect that a juror is not being impressed with the story
6 that they are giving them -- with the evidence that they
7 are presenting to them, any time they feel that, that
8 then it will be a good time to take up some other juror
9 and ask the court to discharge them. The law does not
10 contemplate it to be done, and I am sure your Honor will
11 not allow it in this court.

12 MR APPEL: Just a moment as to the law; Mr Rogers will
13 answer as to the facts. Counsel promised you he would site
14 authorities showing that such a proceeding we are contend-
15 ing for here has been expressly overruled by the Supreme
16 Court.

17 Now, your Honor, will notice that in every one of those
18 decisions it is not applicable to this case at all. We
19 are all very familiar with those cases. He cited the case
20 of People against Fair. I think I read of that law when I
21 was about 14 years of age -- tried by the man under whom I
22 studied law, Judge Alexander Campbell. In all those cases,
23 your Honor, the complaint made by the defendant is always
24 after trial. After trial. Everyone of those cases after
25 verdict. There isn't a single one of those cases in which
26 the defendant didn't come up and file affidavits after

1 the verdict was rendered against him. He came over and he
2 had to file affidavits showing that he didn't know these
3 facts before verdict. See? He, himself, comes into court
4 and says, "I didn't know that this man was prejudiced or
5 had expressed his opinion. I didn't know that this man
6 on the jury was a brother-in-law of the District Attorney
7 until after the trial;" he has stated that. "Until after
8 trial". "Until after the verdict." And now, here is
9 a different case, your Honor. Here we say to your Honor in
10 our statement, and we are willing to substantiate it, that
11 since this juror -- now, this is a case standing by itself.
12 These cases have no application. I stated that the law
13 was we could not raise that question after trial, your
14 Honor. Nor, could we raise it after trial, especially
15 when we come into court and tell your Honor that during the
16 trial we found it out; we would be estopped from doing
17 that. We cannot sit here and see this defendant
18 tried by a juror, assuming we are right about it --
19 I am not charging the juror with anything; your Honor
20 will see. Assuming that we were right on the evidence
21 and we ask your Honor to hear it, we cannot sit here idly
22 by, after learning during the trial that the juror was
23 disqualified from ^{the} beginning, and afterwards come to your
24 Honor -- and take chances of getting him to favorably de-
25 cide in our favor during the trial up to the time of ver-
26 dict, and if he decided against us, we cannot be heard to

1 come in here and say to your Honor, "We have found out
2 this juror was prejudiced against us, and we ask for a new
3 trial." It would not be fair to the court. That would
4 be a trick on the part of the defendant, and we don't
5 propose to simulate here a great solicitude for exact jus-
6 tice and allow a juror to remain in the jury box that is
7 going to decide in our favor. We leave that to the other
8 side. Everyone of those cases, your Honor, the defendant
9 came in and said, "I didn't know anything about this until
10 after verdict." So, with one single statement of that
11 kind, we brush aside all the decisions of ingenious counsel.
12 They don't apply to this case, and I say I challenge counsel
13 to show here a single decision or a decision of any court
14 that has ever said that when, in a trial of this kind, or
15 even in a civil suit, that the court would be justified in
16 tolerating a put-up job on the court; a put-up job on either
17 party. It is so fraught with fraud, your Honor, that no
18 court ought to tolerate it, provided, as I say, we are
19 right. The rules of law, the provisions of our code, are
20 not to promote an injustice. This section 1068 says that
21 a challenge may be interposed to a juror even after he is
22 sworn and before the jury is completed, applies in all
23 those cases in which the parties are in a condition, from
24 knowledge of the circumstances, to either exercise their
25 challenge or not to exercise it, but it doesn't foreclose
26 the defendant from calling your Honor's attention to a

1 case not even within the provisions of that clause. Peo-
2 ple against Reynolds, 16th Cal., page 134 says this:

3 (Reading:) "The question of actual bias is necessarily
4 more difficult of solution upon any general principles.

5 It is impossible to prescribe the particular instances
6 which constitute grounds of challenge for this cause.

7 The statute thus defines it 'the existence of a state of mind
8 on the part of the juror, in reference to the case, which,
9 in the exercise of a sound discretion on the part of the
10 trier, --' on the part of your Honor -- 'leads to the
11 inference that he will not act with entire impartiality.'

12 The ascertainment of this state of mind is left with the
13 triers --" left with the court -- "and no appeal is given
14 from their decision. It does not follow, because, as a
15 conclusion of law, a juror is not disqualified by the ex-
16 istence of certain facts that the triers may not reject him

17 The statute makes the expression of an unqualified
18 opinion, in law, bias, which cause excludes of itself such
19 jurors; but the expression of a less decided opinion does
20 not, as matter of law, exclude the juror; but it may be
21 sufficient of itself, or in connection with other proof,
22 to exclude him, if, in the judgment of the court --" I will
23 put the court in the place of the word "triers". (Read-
24 ing:) "From what they can discover of the character of
25 the juror, this expression or these other circumstances
26 would render him not entirely impartial. Less than this
sort of expressed or formed opinion, for example, a mere

1 hypothetical opinion, is not a rule of exclusion, but may
2 be a cause -- a law, knowing the diversities of human char-
3 acter, refusing to assign to such an influence any determ-
4 inate effect upon the conduct of all men, and yet, refus-
5 ing to hold that such an influence is necessarily without
6 effect upon any man. It leaves the effect of these and
7 the like matters to be determined by those who are made
8 the judges of the character of the particular juror
9 examined. A self-conceited, weak man, with violent preju-
10 dices, expressing himself, however loosely, about a case,
11 would not be a safe juror; while a man of sense and truth-
12 fulness, might be safely trusted, though he had more
13 sstrongly committed himself before being put in possession
14 of the entire issue to be tried. In other words, it
15 is as if the legislature said, 'Some men, having formed
16 or expressed an opinion loosely or heard rumors, are so
17 prejudiced that they cannot act impartially; others can.
18 We make no general rule upon the subject, but appoint men
19 who understand human nature and the law, whose business
20 it is thoroughly to examine the jurors expressing such
21 opinions or hearing such reports, and who shall decide
22 whether the particular men examined will act with entire
23 impartiality. It seemeth to us that an opinion, fully
24 made up and expressed, against either of the parties, on the
25 subject matter of the cause to be tried, whether in civil
26 or criminal cases, is a good cause of principle challenge;

1 but that ^{an} opinion formed or an opinion merely hypothe-
2 tical -- that is to say, founded on the supposition that
3 facts are as they have been represented or assumed to be--
4 do not constitute a cause of principal challenge", and so
5 on. So that in this case it is ^{left} greatly to the discretion
6 of this court. And in People against Durant, a celebrated
7 case in this state, and that case of People against
8 Boren, which counsel cited, is not in point. just let me
9 show your Honor that it is not in point. "A new trial
10 cannot be granted for disqualification unless the court
11 permits it to be taken before the jury is completed."
12 Now, can we show that in this particular case where we are
13 raising this question? Can we say that we could raise this
14 question before the jury was completed? Can we say that
15 such a decision as that will bar us from raising the ques-
16 tion whenever up to the time of submitting this case to the
17 jury for deliberation, we have discovered the grounds
18 upon which we should raise this question, your Honor?
19 Can they cite a decision of this kind against our motion
20 here when we were not in possession of facts, either at
21 the time the jury was sworn or immediately before, to bring
22 us within the provisions of section 1068 of the Penal Code?
23 This supposes, your Honor, a case in which the defendant is
24 in possession of facts before the jury is completed,
25 when he must exercise his challenge. We are here pretend-
26 ing to say up to a few days ago and after this jury was

1 sworn, that we came into the possession of facts which made
2 that juror, in law, disqualified to sit upon this case.

3 In the 116th Cal., People vs Durrant, the court says this -
4 Now, let's see, your Honor, what the court has said. Let's
5 see if they have cited the law to your Honor: (Reading:)

6 "The court has power to permit the reexamination of a juror
7 upon matter coming to the knowledge of the People or de-
8 fendant after he has been accepted and sworn as a juror,
9 and before the jury is completed, and may, in the exercise
10 of its discretion, permit a peremptory challenge to be
11 interposed after such examination, though the examination
12 may disclose no sufficient ground of challenge for cause;
13 and it will not be presumed to have abused its discretion
14 nor will its ruling be disturbed, where it cannot be said,
15 under the circumstances shown, that any injury resulted to
16 defendant from the ruling, or that the court abused its
17 discretion. The only right of the defendant is to a fair
18 and impartial jury, and not to a jury composed of any par-
19 ticular individuals; and when it appears that a fair and
20 impartial jury was obtained, it is the general rule that
21 an error of the court in allowing a challenge and permit-
22 ting a juror to be excused is not subject to review."

23 Now, that is an instance in which the juror, had been sworn
24 to try the case. The People asked to reexamine that
25 juror; he was reexamined, and although there was no dis-
26 closure of facts from his reexamination, constituting a

1 cause for a challenge for bias, yet the District Attorney
2 was allowed, after having waived his right to challenge,
3 was allowed to peremptorily discharge the juror for good
4 cause shown. Now, there is a deviation entirely from the
5 provision of the code. There is an entire departure from
6 the provisions of the code in that. The code provides
7 peremptory challenge shall be made alternatively, yet,
8 your Honor, after the juror had been passed and had been
9 sworn and had been constituted a member of that jury, the
10 court, at the instance of the People, allowed a reexamina-
11 tion of that juror and the court allowed him to be dis-
12 charged. Now, there was an instance, your Honor, in
13 which the facts -- the peculiar facts of the case, the
14 Supreme Court said, that the court might exercise its dis-
15 cretion in allowing such a thing to be done. In People
16 against Montgomery, they held the same thing, that the court
17 in its sound discretion might allow the prosecution to
18 enter a peremptory challenge to the juror after he had
19 been sworn. It is in the discretion of the court entire-
20 ly.

21 MR FREDERICKS: That is before the completion of the jury
22 in each instance.

23 MR APPEL: After he is sworn, but before the completion of
24 the jury.

25 MR FORD: Just exactly what the code provides for.

26 MR APPEL: That is not this case. I am simply showing

1 that there is --

2 THE COURT: I don't think Mr Appel's argument was mis-
3 leading at all.

4 MR APPEL: I am not saying that is applicable in this case.
5 I will just say that the discretion is left with the court,
6 in cases not specifically enumerated.

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1 Now, your Honor, let's take the argument of counsel in respect
2 to the danger of bringing up this question at this time.
3 In order to bring up that question, your Honor, at this time,
4 counsel assumes first that we had discovered in advance of
5 knowing these facts that the juror is against us, and that
6 having discovered that the juror is against us that then we
7 have gone down there to find out any facts upon which we can
8 disqualify him--

9 MR. FORD. Pardon me, Mr. Appel, I didn't say that.

10 MR. APPEL. No, you didn't say that, but your premises
11 for arguing that mean that and I say that your premises are
12 all wrong. Now, the facts are not that. We have shown to
13 your Honor that first information came to us without seeking
14 it, to the effect that this juror had expressed his opinions
15 and his beliefs concerning Mr. Darrow before he was impaneled
16 here as a juror. Now, we having received that information,
17 Mr. Rogers stated to your Honor that he went down there himself
18 and talked to these people who claim to have knowledge of the
19 fact that he had so expressed himself before he was impaneled.
20 Now, those are the facts before this court and any other
21 construction given to the fact is either absurd or it is
22 wilfully false. Now, you can select either chance and
23 accept it in that respect.

24 THE COURT. The court is accepting the position of the defend-
25 and with the highest good faith.

26 MR. APPEL. Your Honor can see that the argument of

1 counsel is erroneous and untenable in that respect. No one
2 except a member and employ^e of the District Attorney's
3 office ever went over there to find out to see if an ex-
4 pression could be gotten from the family of that juror.

5 MR. FREDERICKS' No employe of the District Attorney's office
6 did, Mr. Appel.

7 MR. APPEL. Mr. Fredericks, you don't know, you see that I
8 am careful in making the assertion, but I will say to you
9 that if you bring Mr. Duni on the stand and ask him why he
10 went behind this juror, went down there when the juror
11 first got sick and he went down there around the neighbor-
12 hood and why people down there, friends of mine, immediately
13 informed down here they were trying to find out--Mr. Duni
14 himself, whether an expression had been let out of the
15 juror's family, if that be true then we are correct in as-
16 suming that, if we are not true we are not correct in as-
17 suming that.

18 MR. FREDERICKS. You are not correct in assuming it.

19 MR. APPEL. But it may be just as true as the fact that
20 two employes were not up in the Trenton House down there
21 from the beginning that the jury went over there, but
22 however that may be, that has nothing to do with this argu-
23 ment, your Honor, and I don't care for that. I am only
24 answering the impassioned assumption of absolute in-
25 nocence and angelic innocence or white winged innocence of
26 my friend Ford, that is all. We will stipulate he is a

1 virgin, so far as innocence is concerned, but here is a
2 proposition, your Honor, if we could sit here after learning
3 these facts and not offer to raise this question now, why,
4 your Honor will see we cannot raise it after verdict, and
5 we ask your Honor that even if your Honor should rule--
6 if your Honor should rule that we are not entitled to rid
7 this jury of the particular juror in question, that we be
8 allowed to introduce the facts here upon which we claim the
9 right to have that juror excluded. We ask your Honor that
10 we be allowed to put those witnesses on the stand that
11 this record may be made up. But, if your Honor says, not-
12 withstanding whatever evidence we might introduce here,
13 that your Honor is powerless to act, why, of course, our
14 offer may be rejected, and your Honor may rule against us,
15 and we may have the right hereafter to show in the record
16 by affidavits what were the facts that we could have proved
17 here before your Honor, so that some other court, in case
18 it should be necessary, might rule upon this question.
19 I say there is nothing in the code and there is nothing in
20 any decision, and I am of the opinion that with a little
21 time and a little patience I could cite decisions, what we
22 claim here has been done before. I think I can find cases
23 to that effect. I have that impression, and I am assured
24 that somewhere in Indiana that there are some cases directly
25 in point. It may be that we cannot get any from San/
26 or Patagonia, but that doesn't preclude other states from

1 having decided the question. I will admit that there are
2 no decisions from south of First street, but there might be
3 some from other states and some other countries. Anyhow,
4 we have placed our position here squarely before the court
5 and counsel here has something to say.
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1 MR ROGERS: Just replying, if your Honor will permit me,
 2 to the contention of Mr Ford, that this is done for the
 3 purpose of intimidation, and just replying further, not
 4 to the charge, but to the intimation that his family was
 5 approached, I take it upon myself to incorporate into the
 6 record the facts, according to my statement, which may
 7 be proven, if so desired, that his family has not been
 8 approached; studiously has that been avoided by us.
 9 On the morning when the most definite information came to
 10 me, I took the precaution to come to your Honor's cham-
 11 bers and state to your Honor I purposed doing certain
 12 things. I didn't wish to be criticized for it, and that
 13 I purposed going myself, in order that I might be abso-
 14 lutely sure that no indiscretion was committed by failure
 15 to follow directions. His family has never been seen by
 16 any member of our staff or any person connected with us or
 17 ever has been made to intimidate him or to carry news to
 18 him or to his family. The only member of the family who
 19 has been talked to was this morning, and that came up by per-
 20 circumstance, and it transpired that his brother-in-law
 21 was working within 150 feet of my house, and he came over
 22 to see me, a neighbor having already telephoned me early
 23 in the morning that such conditions did exist as the
 24 brother-in-law informed me of. I would have been derelict
 25 in my duty if I had not ascertained from this relative by
 26 marriage, what the conditions were as he understood them,

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1 but it was done simply by pure circumstance, and by vir-
2 tue of the fact that the telephone was received by me this
3 morning as early as 7 o'clock, telling me that this broth-
4 er-in-law had made certain statements after Mr Leavitt
5 was sworn in on this jury, to-wit, if Leavitt was on that
6 jury the defendant would never be acquitted. I would have
7 been derelict in my duty if I didn't find out what the
8 brother-in-law, as a matter of fact, had to say. We dis-
9 claim any intimidation or disclaim anything except as I
10 stated to your Honor before any investigation was made,
11 that facts had come to our attention which we deemed it our
12 duty to investigate, and we have investigated it, without
13 in anywise attempting to reach the juror or his family or
14 intimidate him or terrorize him. We have not, if your
15 Honor please, followed any juror about to ascertain what
16 he said upon the leave of absence granted by your Honor.
17 We have never sent a person to endeavor to find out what
18 the jury may, perchance, have said to any person. We have
19 had no member of any family seen by any person in our em-
20 ploy, nor have we any knowledge of any such circumstance
21 whatever. On the contrary, I am informed that persons --
22 I am not prepared to make any contention in that regard --
23 persons have gone behind jurors who have been allowed to
24 go to their home and have talked to persons with whom
25 jurors have talked, for the purpose of ascertaining what
26 they say, and, if your Honor desires any proof on that --

1 followed them into restaurants and one place and another
2 for the purpose of overhearing their conversation. If
3 it becomes necessary to prove that, I stand ready to prove
4 it. As far as intimidation or any matter of that kind is
5 concerned, it is an old thing that is well said many years
6 ago, people who live in glass houses should at least pull
7 down the blinds. Now, that counsel has said we are intim-
8 idating the juror, or that this has been done for that
9 purpose, it might be well to observe that two employes
10 of the District Attorney's office lived on the same floor
11 with this jury, and dined as close as circumstances would
12 permit at every meal, for the purpose of overhearing.
13 We have done nothing of that kind, and we simply have pre-
14 sented to your Honor what we believed to be the conditions,
15 appealing to your Honor's sense of justice and discre-
16 tion. I am not prepared to cite a case in point in
17 California, because I am satisfied that a condition of this
18 kind has never been presented to the Appellate Court, so
19 that it might be placed in the records, where it might be
20 available to us, and therefore, we cannot bring authorities.
21 This condition did exist in one case in which I appeared
22 as counsel; a juror was sworn in -- true, the jury had
23 not been completed, but counsel for the prosecution was per-
24 mitted to step in and challenge three jurors without any
25 showing whatever, except that he desired to exercise his
26 peremptory challenge. If, in that court's discretion --

1 THE COURT: I think that very thing happened in the selec-
2 tion of a jury in this case.

3 MR ROGERS: But there was an issue made in this case, and
4 there was no issue made, simply a desire stated to the
5 court, that he be permitted to exercise his peremptory
6 on information received by him.

7 THE COURT: That is going somewhat further.

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16s 1 MR. ROGERS. Your Honor, we disclaim absolutely any desire
2 to interfere with the due administration of justice. We
3 disclaim any desire to bring about any condition which will
4 not conduce to the welfare of society and the proper
5 respect due the court and judicial officers. We disclaim
6 any desire to bring prejudice upon this administration. We
7 have offered to show to your Honor evidence to a certain
8 effect. If that evidence, if produced, would not be of any
9 use, if your Honor could not act, if the evidence were pro-
10 duced, the proper rule would be the rule that would present
11 the point we desire to present. Your Honor, it isn't a
12 question so much of what this juror will do, unless the cir-
13 cumstances are very much exaggerated in my opinion, unless
14 the psychology of things are differant from what I believe
15 it to be, we will not have a verdict from this juror in our
16 favor at least. The great difficulty is that his persuasive
17 power, his opinion formed as it has been formed, according
18 to our information may, perhance, be used to influence and
19 sway other members upon the jury.

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Alp 1 It is not the casting of one vote that might
2 be detrimental to the proper administration of justice, it is
3 however, the right of the juror to be present during deli-
4 beration and to advance argument for the consideration of the
5 other jurors. We have a right, if your Honor pleases, to
6 ask for an acquittal just as much as we have to ask for a
7 hung jury, for a divided verdict; we have a right to ask for
8 an absolute acquittal by a jury, which is absolutely
9 fair and entirely unbiased, and without opinion or prejudice,
10 feeling or inclination whatsoever.

11 If these matters had been presented before the
12 jury went into the box and we should have made the showing
13 which we offer to make now, the juror would have been ousted
14 from his position forthwith for cause, beyond a question.
15 Now, the only matter before your Honor is whether or not
16 at this time we shall go through what we believe to be a
17 farce in the proceedings from now on, if what we tell you
18 is true and what we offer to prove is true, we are doing an
19 idle and useless thing here, and the law does not ask us to do
20 an idle or useless thing, it does not presume courts sit
21 for the purpose of doing an idle and useless thing. If
22 this jury has a state of mind as we believe and offer to
23 prove, we are going along because, perchance, we have no
24 opportunity whatever to get a verdict in our favor and that
25 the law presumes we are entitled to have, if, perchance, the
26 evidence so justifies it or if there is a reasonable doubt
raised, if this juror is in the condition of mind indicated

1 by his previous statements, we are simply trying a moot case
2 herè, if your Honor pleases, and what is worse than a moot
3 case, we are taking the defendant along to a verdict which
4 when rendered against him will not satisfy the conscience
5 of the public, will not satisfy the conscience of the court
6 and will not satisfy, in my judgment, any one who has a
7 sense of the fitness of things, or of right or justice.
8 The defendant is entitled to have 12 men absolutely unbiased
9 to hear his case, and if this juror has not that condition
10 of mind, we are doing an idle and useless thing in one
11 respect, and worse than that, we are doing an unjust and a
12 criminal thing. If your Honor pleases, how can Mr. Darrow sit
13 here and expect a verdict from a man who has said, according
14 to our information, what I have offered to prove he did say?
15 We sit here with our fingers twiddling, trying our case, it
16 is true, but with no expectation of a successful issue.
17 That, under the circumstances, is not the position the law
18 expects us to be put in and I go back many years, before any
19 codes were written and any decisions were handed down, to
20 the old maxim of the old law which was written in the latin,
21 in the old law books, wherever there is a law there is a
22 remedy. That is a wrong, any one with a sense of justice
23 must understand, any one with a sense of fitness of things
24 must realize. I believe not a person who sees the situa-
25 tion but what will acquiesce in the statement we ought not
26 to be tried by a man in that condition or frame of mind.

1 Now, the question is, because there is no speci-
2 fic statement in the code or no specific holding in the
3 courts, are our hands absolutely tied? Must we go on
4 here to an unrighteous verdict or to no verdict at all?
5 It does not seem to me we are that halpless, it does not
6 seem to me your Honor sitting up there to do justice to all
7 persons, have to sit there and you must stand by and see
8 injustice done to this defendant. If what we attempt to
9 prove is proved, does it not outrage your sense of the
10 fitness of things to endeavor to sit here and endeavor to
11 pass upon the guilt or the innocence of this defendant if
12 a juror has that opinion against him? If it does outrage
13 your Honor's sense of justice and fitness of things--because
14 we were not fortunate enough to discover this matter before
15 --if your Honor's sense of justice is outraged, are your
16 hands tied? Must we go on to the verdict that will not be
17 convincing to a defendant, which will not be of any gain
18 to the prosecution, and which will have no persuasive effect
19 upon the public mind whatsoever?

20 I suggest, if your Honor pleases, that if a way
21 can be found, and it ought to be found, if these facts are
22 true, by the consent of the District Attorney, because he
23 is as much counsel for the defendant as I am--if a way can
24 be found by his consent it ought to be done. If those
25 facts are true, which I have offered to produce evidence on--
26 it seems to me, if your Honor pleases, that all persons

1 engaged in upholding the integrity of our jurisprudence
2 should coincide that something ought to be done, and if it
3 can be done in this case without a delay of a moment, if
4 it occasions no loss of jurisdiction and if once in
5 jeopardy the doctrine thereof does not apply, it seems to me
6 one of the easiest things in the world to say, "Very well,
7 we do not want an unrighteous verdict, and we do not want
8 a jury hung here on such means and by such methods," it
9 seems to me the District Attorney might well stand up and
10 say, "Very well, your Honor, if this is proven to be true,
11 I will listen to the truth--if it is proven to be true I
12 want 12 fair and impartial men to try the defendant and I
13 do not want a verdict against this defendant unless in the
14 eyes of God and man it is a true verdict." That seems to
15 be the situation and a solution of it. If that is not
16 true, if I cannot prove these things, then no harm is done,
17 but if I can prove it, it seems to be a sense of justice
18 and of the fitness of things appeals to every man that
19 hears it. The defendant ought to have some relief and if
20 your Honor cannot give it, I appeal to the District Attorney
21 to give it to us in justice and fitness, and I disclaim, as
22 I have stated to your Honor, a lack of good faith, and I
23 submit to your Honor, if anything had been done or had been
24 intended to be done by way of intimidation I certainly would
25 not have told your Honor before I went to El Monte why I
26 went there and what I proposed to do, and whom I proposed

1 to see.

2 MR. FORD. The question is simply one of whether your Honor
3 has a right to inquire at this time into things which, if
4 true, would be a grounds for challenge. We do not contend
5 or concede for one moment that these--

6 THE COURT. The defense has the closing of this argument--

7 MR. FORD. I thought they had made an offer and we had made
8 an objection and, therefore, we had the closing upon our
9 objection to their offer, as I understand it.

10 MR. ROGERS. I moved that your Honor do hear such testimony--

11 MR. FORD. And we objected to that and I was proceeding
12 upon that theory that I had the closing. If I am wrong,
13 however, I have just a word to say, your Honor.

14 In civil cases the jury is not sworn in until
15 the jury is completed and there is nothing in the Code of
16 Civil Procedure with regard to the impanelment of jurors in
17 civil cases which prevents the court from removing one of
18 the jurors for cause after the jury has been completed, al-
19 though that could not be done in criminal cases. In fact,
20 our courts have held in civil cases that a juror might be
21 challenged after the jury was completed, in two cases, one
22 of them being the case of Lawler vs. Linfort--

23 THE COURT. There is a very different rule here--

24 MR. FORD. I only want to call your Honor's attention to that
25 fact, for the reason that the procedure is contrasted. In
26 the case of the People vs _____, in the 105 Cal., in People

1 vs. Linforth, a civil case the juror had been challenged
2 after the jury had been completed, and the court held that
3 the allowance of the challenge was not error. There is
4 nothing in the Code of Civil Procedure preventing the court
5 from doing that, but in a criminal case there is a law
6 which expressly prohibits the court from doing it. After
7 the jury is completed, for any cause. In a criminal case
8 the court had seen fit to remove a juror after the evidence
9 had begun to be heard and in People vs Ward the court says,
10 "In civil cases it has been held that a juror may for cause
11 be excused by the court after having been once accepted."
12 Citing Grady vs Earle, 18 Cal, 109, and Lawler vs Linforth,
13 72 Cal., 105, not only where the juror had been accepted
14 but the jury completed. Then the court says: "But in
15 criminal cases challenges, preemptory or for cause must be
16 taken when the juror appears and before he is sworn to try
17 the case, but the court may for cause permit it to be taken
18 after the juror is sworn and before the jury is completed."
19 Constrasting the sections that obtain, one in a criminal
20 case and one in a civil case. Now, that principle, without
21 discussing it, your Honor, has been cited in a number of
22 cases, which I cited to your Honor during the examination of
23 the jury in the first instance. In the case of People vs.
24 123 Cal., 482; People vs Durant, which has
25 just been cited by counsel in the 116 Cal; People vs.
26 Beverly in the 87th Cal; People vs Montgomery, 53 Cal.;

1 People vs. Rodriguez 10 Cal; People vs. Scoggins,
2 37 Cal; People vs Ward, which I have just read, and the
3 case of People vs Schmitz, in the 7th Appellate, 346.

4 Now, your Honor, counsel has stated all of the
5 cases read by us were referring to some situation other than
6 the situation now presented to the court. That is true
7 with the manner in which it arose, but the court discussed
8 the very question which is now before the court, "When can a
9 challenge be interposed?" and just by way of illustration,
10 I will read one short paragraph from something I already
11 read to your Honor. After reciting that the juror should be
12 unprejudiced the court says, "But that may not in fact be so
13 and if not the question is, at what time in the progress of
14 the case and through what method of procedure may the
15 prisoner be held to allege that fact. Undoubtedly, if the
16 fact be known to him and he makes it appear before the juror
17 is sworn, he may interpose a challenge for cause, but if the
18 prisoner had or did not know the fact of disqualification, or
19 knowing it is still unable to establish it before the juror
20 is sworn, what step may he subsequently take to avail him-
21 self of the objection?" That is the particular point that
22 is being discussed in People vs Fair , and it holds,
23 "There is only one time at which he may do it and that is
24 before the jury is completed." Now, that is the only
25 question of law that is before your Honor, it is not a
26 question of legislation for your Honor in any way, shape or

1 form. Your Honor has to accept the law as it is; your
2 Honor assumes, for the sake of discharging the duties of
3 your office, that there is some wise purpose either in the
4 existence of non-existence of law governing particular cases
5 If there is any inequality in the law there is a method
6 provided by which they may correct it, in a pardon
7 by the government, which was intended originally not as an
8 act of clemency, but intended to correct mistakes which the
9 law might make in individual cases by reason of its Uni-
10 versality. However, I think there is a good reason for
11 the law at the present time, I think the law is a wise one
12 and the point I was trying to make to your Honor was this:
13 That whether the defendant intends to intimidate a juror
14 or not, the mere fact that charges have been made will in-
15 timidate him and prevent him from discharging his duties,
16 with that fairness and impartiality which the law aims at;
17 whether the charges be true or false, whether they may be proven
18 or not, whether they desire to intimidate or not, they
19 cannot fail to have that effect and I think that is the
20 reason the law prohibits it. They cannot fail to have
21 that effect and would undoubtedly often be taken advantage
22 of by defendants who if guilty of one crime would not hesi-
23 tate to commit another. At this time, however--

24 MR. ROGERS. Do you mean to accuse me of committ^{ing}/a crime?

25 MR. FORD. I have not made any accusations like that, and
26 the record will so show.

1 MR. ROGERS. You say a man that is committing one crime
2 will not hesitate to commit another and I do not like that
3 expression--

4 THE COURT. It does not convey that impression to me--

5 MR. FORD. I did not mean anything--

6 MR. ROGERS. The accusation was made that I was intimidating
7 this juror and if a defendant will commit one crime he
8 would not hesitate to commit another, and I would like to
9 disclaim that statement.

10 MR. FREDERICKS. Mr. Ford is citing hypothetical cases,
11 reciting especially from this--

12 MR. FORD. If you will read the whole of it--I will say,
13 regardless--

14 THE COURT. I will dispose of this. Mr. Ford, have your
15 remarks any personal application whatever?

16 MR. FORD. Absolutely none, they are addressed to the court
17 by way of argument and they cannot bear any possible applica-
18 tion.

19 MR. DARROW. It has been said so many times is the reason,
20 in the presence of the jury--

21 MR. FORD. The point is at this time it is the law that
22 I have been discussing and the effect that charges of this
23 character--I have expressly said, it matters not whether
24 they be made in good faith, it matters not whether they be
25 made in the belief that they have a right to make them or
26 with the belief there may be some other object to be

1 obtained by it--it does not make the slightest particle of
2 difference, my point is it is a wise omission of the law,
3 because regardless of what the defendant may desire in that
4 matter it cannot but fail to have the effect to influence
5 a juror in his verdict and in his deliberations, and that
6 is why I believe that it has been admitted, and to make the
7 matter clear I want to expressly say I am not making any
8 charges, in making that argument to the court, against in
9 any way, shape or form, and I submit the matter to your
10 Honor on the pure question of law which is before the
11 court.

12 MR. FREDERICKS! In regard to counsel's admission that
13 there was no law justifying the matter or saying if there
14 was none he appealed to the District Attorney--the District
15 Attorney is an officer of the law and charged with the
16 duty of enforcing the law as it is and charged with the duty
17 of doing what he conceives to be for the best interest of
18 society, and that is what I am trying to do in this matter,
19 and especially at this time, in opposing this motion, or
20 by whatever name the action may be designated. Counsel
21 puts several ifs in his suggestion which were, if the
22 defendant would not be in jeopardy and all that. As I have
23 read the law and come to the conclusion not only in this
24 case but in others, any move such as counsel suggests
25 would be an absolute dismissal of this case, absolute dis-
26 missal of the case, for, if the jury brought in a verdict of

1 guilty it would be brought in not in accordance with law
2 and could be set aside at will and certainly no defendant
3 would submit to it--

4 MR. DARROW. May I ask a question?

5 MR. FREDERICKS. Certainly, Mr. Darrow. I don't know whether
6 I can answer it or not, but you can ask it.

7 MR. DARROW. You can. Supposing you were inclined to do
8 this--I don't say you ought to, that is your business--

9 MR. FREDERICKS. Yes.

10 MR. DARROW. --but, here is a juror who has been ill, and
11 has delayed the trial several times, has doctor's certifi-
12 cates and all that, who may be ill again tomorrow. Suppose
13 on request of the defendant you stipulate with us that on
14 account of the illness of this jury, the 13th juror takes
15 his place, is there any possible chance that we could raise
16 a question about it?

17 MR. FREDERICKS. Yes, I think so. The juror has been in
18 court here and said he could go on.

19 MR. DARROW. That would not make any difference.

20 MR. FREDERICKS. I am thoroughly satisfied with the rectitude
21 of this man, although he is an absolute stranger to me, I am
22 thoroughly satisfied with him and I do not believe it is a
23 question that there should be any such precedent as this
24 established. I know it would not stand if the defense
25 lost the suit and they had the right to appeal, I know it
26 would not stand a moment, and we have got to drive along

1 according to law. We had our time, we examined the juror,
2 both sides, we shot our bolt, now let us drive on.
3 THE COURT. Gentlemen, this is a very unfortunate incident
4 in a good many ways. It is unfortunate that there should
5 be any suggestion of an imadversion against counsel
6 for the defense in making the investigation. It was done
7 with my knowledge. Mr. Rogers came to my chambers yesterday
8 morning, as he has stated, he had proposed to make such an
9 investigation unless forbidden to do so; it was not for-
10 bidden. I had been in touch with counsel on both sides and
11 had several conferences with counsel on both sides in regard to this matter,
12 and had had it very much on my mind, especially all day yes-
13 terday and last night. The defendant asks to have the juror
14 who had heard much of the evidence in the case tried at
15 this time as to his qualifications to act. The prosecuting
16 attorney states that he wishes such an investigation if it
17 could be legally made; the court shares in that attitude
18 with counsel on both sides, if such an investigation as
19 this could be made within the law it would certainly be done
20 in this case but I do not believe it can be done, gentlemen.

21 From the examination that I have made of the law
22 and the argument which has been presented here this morning,
23 I am satisfied that the examination as to the qualifications
24 of the juror to serve in a given case, speaking now of cri-
25 minal cases, must be made before the jury is sworn; that the
26 challenges upon either side must be presented before that

1 time, failing that parties must hold their peace until
2 after the case has been submitted. It is unfortunate that
3 either party should present this case to either a judge or
4 a jury where there is any question in the mind of the party
5 as to whether or not his case will be determined upon the
6 evidence and facts and the law as duly presented; that to
7 my mind is the most regrettable part of this incident. The
8 Supreme Court, however, has held out the comforting statement
9 that frequently happens that the man may have previously
10 expressed similar views or given loose expressions to some
11 statements before he is impaneled on the jury and yet be
12 able to put those expressions and views aside and to be
13 able to render a just and true verdict. I trust, and per-
14 haps it is but fair to say, that I believe and hope that
15 in the case of the particular juror involved here that
16 such is the case; I believe such to be the case and we will
17 simply have to abide the event and determine the suffi-
18 ciency of that belief. I believe that this juror will,
19 from my observation here in the court, and my visit to his
20 house the other day when, of course, the subject of this
21 trial was not discussed, the general appearance and quality
22 of the man's mind, I believe he can put aside any opinion
23 he has, when he is rendering a verdict here according to
24 the law and the evidence. At any rate, I am satisfied
25 that the power does not exist in the court at this time to
26 stop the trial and enter upon a trial of the qualifications

1 of this juror. The application to present evidence upon
2 that subject is therefore denied. I want to make the
3 ruling very full, Mr. Rogers, and if that is not sufficient--
4 MR. ROGERS. I was about to suggest, if your Honor pleases,
5 I desire to have it appear that I offered to call these
6 witnesses who are under subpoena and in attendance upon this
7 court.

8 THE COURT. I have so understood the offer, Mr. Rogers.

9 MR. ROGERS. Yes.

10 THE COURT. The court will now adjourn until 2 o'clock this
11 afternoon.

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1 AFTERNOON SESSION. July 25, 1912; 2 P.M.

2 -----

3 Defendant in court with counsel.

4
5 THE COURT. Call the roll of the jurors, Mr. clerk.

6 (Roll call of jurors by clerk.)

7 THE CLERK. All present, your Honor.

8 THE COURT. You may proceed, gentlemen.

9 MR. FREDERICKS. I wanted to ask Mr. Steffens another ques-
10 tion. You had him here sometime.

11 MR. ROGERS. When would you like him?

12 MR. FREDERICKS. I am ready any time.

13
14 L E C O M P T E D A V I S,

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

17 DIRECT EXAMINATION.

18 MR. APPEL. Q You may state your name, please.

19 A My name is LeCompte Davis.

20 Q Do you reside here in the city, Mr. Davis? A I do.

21 Q What is your business, occupation or profession?

22 A Lawyer.

23 Q How long have you been practicing law? A 21 or 22
24 years.

25 Q You were one of the attorneys on the part of the defense
26 in the case of the People against J. B. and J. J. McNamara

1 and others? A I was .

2 Q Do you know the witness George Behm? A I do .

3 Q Do you remember when you first became acquainted with
4 him, about what time?

5 MR. FREDERICKS _ I didn't catch that name .

6 A George Behm .

7 MR. FREDERICKS' Oh, yes .

8 A it was sometime near the beginning of the trial of the
9 case, just shortly before, in the Superior Court .

10 Q You are a member of the firm of Davis and Rush? A I am .

11 Q With offices here in the city of Los Angeles on Spring
12 Street and second? A the northwest corner of Spring and
13 Second, Bryson Building .

14 Q You became one of the attorneys of the McNamaras about
15 what time? A I presume it was sometime along in June of
16 last year .

17 Q You continued to be one of the attorneys until what time?

18 A until the plea of guilty was entered .

19 Q Do you remember about the time when George Behm was
20 subpoenaed as a witness to appear before the grand jury, or
21 was called there as a witness before the grand jury?

22 A I do .

23 Q During that time and prior thereto and thereafter, how
24 often and with what frequency were you in company with Mr.

25 Darrow? A Well, from the time Mr. Darrow came here until
26 the close of the case I was practically with him every time

1 he was here. I do not suppose there was a day went by I
2 was not with him, and I was with him most of the time.

3 Q Now, do you remember any meeting between you and Mr. Darrow
4 and Mr. George Behm, at the time he was to appear before the
5 grand jury? A yes.

6 Q You may state whether at that time in your presence, Mr.
7 Darrow did or did not instruct the witness Behm to testify
8 in any particular manner or to answer any particular question
9 that might be propounded to him before the grand jury in any
10 particular way.

11 MR. FREDERICKS. I presume this refers to the first time he
12 appeared before the grand jury? He appeared twice. I do
13 not wish to object to it if it is clear.

14 A You mean to give a particular answer to a question?

15 MR. APPEL. yes, sir. A No, except to tell him to answer
16 that question, and there were certain questions that Mr.
17 Darrow and myself both told him to say to the grand jury,
18 when they asked him that question, that it was incompetent,
19 irrelevant and immaterial and did not concern the case, but
20 he could not remember or did not remember enough to say
21 incompetent, irrelevant and immaterial, and so we finally
22 told him to say, when that question came up, "That does not
23 concern the case," and refuse to answer.

24 Q Now, you may state whether or not you or Mr. Darrow or
25 in your presence or in the presence of each other at any
26 time stated to Mr. George Behm to deny any fact concerning

1 which he was to be asked or to deny the truth of any fact
2 or to make any declaration contrary to the truth of any
3 fact that he might be inquired of? A Neither of us did.

4 Q Now, you remember that after the first time that Mr. Behm
5 went before the grand jury that there were some proceedings
6 wherein he was cited to appear before the court in contempt
7 proceedings? A Yes, I remember it distinctly.

8 Q Now, after those proceedings were instituted do you rem-
9 ember of his going before the grand jury a second time?

10 A I do.

11 Q Who represented Mr. Behm in those proceedings? A Why, as
12 nearly as he was represented by anybody I did.

13 Q Before the second time, say the night before the day when
14 he went before the grand jury the second time, and after the
15 institution of those contempt proceedings, did you and Mr.
16 Darrow and Mr. Behm have a consultation together upon that
17 evening? A We did.

18 Q Where was that consultation? A My recollection is
19 that it was in my office, in the library of it. I think
20 we first met at Mr. Darrow's office and went from there
21 over to my office; wanted to look up some authorities,
22 there is where we had the conversation.

23 Q Do you remember whether or not Mr. Behm had furnished
24 you, had with you there at the consultation a citation and
25 an affidavit of the foreman of the grand jury wherein
26 appear the questions that had been propounded to him and

1 which he had refused to answer, upon the occasion prior to
2 that time when he was examined before the grand jury .

3 A I would not say that Mr. Behm furnished it, though that
4 is my recollection, we had it there before us.

5 Q I will attract your attention to a document here which
6 has been introduced in evidence and which is marked People's
7 Exhibit Number 21. I wish you would be kind enough to look
8 over it so that I may state a question to you in reference
9 to that. A When you say look over it, do you mean read
10 it all?

11 Q Well, just examine it in a general way. A I have
12 examined it, Mr Appel.

13 Q Now, I assume in my question that that is only a copy--
14 MR. FORD Pardon me just a moment.

15 MR. APPEL.. --of the paper served upon George Behm.

16 A I don't know, I think that I put the marks that you
17 will find upon it there in those questions, they look like
18 my hieroglyphics.

19 Q Now, at that consultation-- A I mean when I say the
20 marks, I mean those in front, a cipher and the other marks
21 and not those that are to the right of the sheets. I didn't
22 put those on, I don't know who did.

23 Q Now, at that time when you and Mr. Darrow and Mr. George
24 Behm were present, the night before he went before the grand
25 jury the second time, what is your best recollection in
26 reference to whether or not you had a copy of some such

1 document as you have examined now there at that con-
2 sultation.

3 MR. FORD. Referring to Exhibit Number--

4 MR. APPEL. 21..

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1 A We had some such instrument there. It seems to me,
2 there, that probably those answers were made after we talk-
3 ed with him in this particular instance, so I want be sure.

4 Q Anyhow, it wa s a document which had been served upon
5 him requiring him to appear -- ^{A--} Requiring him to appear and
6 show cause why he should not be punished for contempt,
7 and setting out the questions that had been asked him, and
8 his refusal to answer them.

9 Q His refusal to answer. Very well. Now, did you per-
10 sonally go over with Mr George Behm each one of those
11 questions? A I did.

12 Q Now, did Mr Darrow join in discussing those questions
13 with Mr Behm at that meeting? A He did.

14 Q Now, you may state to the court and jury whether or
15 not at that time, either you or Mr Darrow instructed the
16 witness to deny the truth, or give any answer contrary to
17 the truth of any of the facts referred to in each one of
18 those questions which was then before you? A We did not,
19 in each one of them or in any of them. I can briefly
20 state to you what was said.

21 Q State what was said to him. A After discussing the
22 matter and reading it over, why, I took up the paper and
23 read him the questions and when any question didn't concern
24 the case, or in the opinion of either of us, it was not
25 relevant to the issue, Mr Darrow said to him, "Answer
26 that that doesn't concern the case", and refuse to answer.

1 Whenever we came to a question that we thought was relevant
2 and material, Mr Darrow said, "Answer that question,"
3 without saying anything else.

4 Q Were there any other or different instructions than
5 you have indicated now, given to him at that time?

6 A At no time that I knew of.

7 Q Now, upon that evening, after that consultation was
8 over, do you remember whether any appointment was made
9 with Mr George Behm for the following morning before he
10 should appear before the grand jury? A There was.

11 Q Was that appointment kept, do you know? A It was.

12 Q Who kept it? A Myself and Mr Behm.

13 Q Was Mr Darrow there present at that time? A He was
14 not.

15 Q Where did you meet Mr Behm? A At my office.

16 Q Mr Behm came to your office? A Came to my office.

17 Q Do you remember whether or not, you and Mr Behm went
18 anywhere after that? A My recollection is we went be-
19 fore the grand jury at the time he came, that is, he went
20 before the grand jury, and I went to the door in front
21 of it, the ante-chamber.

22 Q You went where? A To the lobby of the court house in
23 front of the grand jury room.

24 Q In front of the grand jury in the old building there?

25 A Yes sir.

26 Q Now, from the time Mr Behm came to your office on that

1 morning succeeding your previous night consultation on
2 the day before you went before the grand jury, ^{and} up to the
3 time he entered the room of the grand jury, you may state
4 whether or not from the time you first saw Mr Behm that
5 morning to the time he entered the grand jury, whether
6 Mr Darrow spoke to him at all? A He did not in my pre-
7 sence, and I know Mr Darrow was not there in my office at
8 that time.

9 Q With reference to the appointment, where was the ap-
10 pointment to be kept, at whose office? A My office.

11 Q And Mr Behm, as you say, came there? A Came there.

12 Q From the time he came there, up to the time you went to
13 the grand jury lobby with Mr Behm, was Mr Darrow present
14 at any time in the presence of Mr Behm? A No sir.

15 Q Did you and Mr Behm talk over these questions again
16 that morning? A I don't know whether we did or not, but
17 that is my recollection that I went over the paper with
18 him again.

19 Q Now, did you at that time, or any other time, succeeding
20 your meeting him in your office, on the morning that he
21 went before the grand jury, the second time, give him
22 any other or different instructions than you have already
23 indicated that was given to him the night previous to that?

24 A I did not.

25 Q Now, prior to Mr Behm being called before the grand
26 jury the first time, were you ever present at any conver-

1 sation had between George Behm and MF Darrow, in your pre-
2 sence, in reference to his going to the county jail?

3 A Yes, I have been present at various confersations
4 with them both.

5 Q Now, during any of those conversations, you may state
6 whether or not Mr Darrow or yourself instructed or asked
7 Mr Behm to go to Mr McManigal at the county jail and get
8 him to change any testimony or any statement that he
9 might have given before, or that he was supposed to give,
10 or to retract any statement that he might have given be-
11 fore, or alleged confession that he might have given before

12 MR FREDERICKS: We object to that on the ground no founda-
13 tion is laid, hearsay, irrelevant and immaterial.

14 THE COURT: Objection overruled.

15 A Never.

16 MR APPEL: You may state now to the jury, what, if any-
17 thing, was said by you or by Mr Darrow to Mr Behm in re-
18 lation to his visits to the jail at any time that you
19 were present?

20 MR FREDERICKS: We object to that on the ground it is hear-
21 say, no foundation laid; irrelevant and immaterial; self-
22 serving, if admissible at all, and no foundation laid if
23 it is an impeaching question, and, in fact, negative testi-
24 mony. The fact that this never occurred when Mr Davis
25 was present would be no denial of the fact that it did oc-
26 cur at some other time.

Darrow

1 THE COURT: Overruled.

2 A Why, Mr Behm said that he would go over to the jail
3 and have a talk with Mr McManigal with reference to the
4 case, and M^r Darrow said to him that we would like to
5 know very much what he had to say about the matter, and
6 that if he wanted him or us to defend him, that he was
7 willing to do so, and M^r Behm said that he was sure that
8 Mr McManigal had made statements that was attributed to
9 him under menace and threat and that it was not true, and
10 that he was sure that if he talked with Mr McManigal he
11 would say so. That is about the substance of it.
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1 Q Can you fix about the time of those conversations?

2 A Prior to the time that he was taken before the grand jury.

3 Q And with reference to the time that he came here, between
4 those two times, how shortly after he came here and how
5 shortly before he went before the grand jury, if you rem-
6 ember? A I remember two or three conversations, and
7 they occurred between that time, the first one shortly after
8 he came here, and I presume the last one shortly before he
9 went before the grand jury.

10 Q Were there any instructions given to Mr. Behm in any
11 of those conversations to say anything to terrorize him or
12 to induce him to change his testimony, or anything of that
13 kind, from you or Mr. Darrow?

14 MR. FREDERICKS. We object to that upon the ground it is
15 hearsay, calling for a conclusion of the witness; no
16 foundation laid; and negative testimony. As I have not
17 the testimony of Mr. Behm entirely in mind, I do not now
18 recall that he claims to have had any such conversations
19 in the presence of this witness.

20 THE COURT. I think the objection it calls for a conclu-
21 sion is well taken. Sustained on that ground and no other.

22 MR. APPEL. We take an exception.

23 MR. APPEL. Q Was there anything said with reference
24 to Mr. Behm in your presence by Mr. Darrow or by yourself in
25 reference to any coercion, intimidation, inducement or in-

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1 fluence to be exercised by him upon McManigal at the
2 county jail or elsewhere or in effect or purport, or any-
3 thing purporting to mean the same thing?

4 MR. FREDERICKS. Objected to upon the ground that no founda-
5 tion has been laid and that it is irrelevant and immaterial.
6 As I remember the testimony of Behm he made no claim of
7 any such statement being made in the presence of Mr. Davis.

8 MR. ROGERS. The purport of Behm's testimony, if your Honor
9 please, was the statement that Mr. Darrow had endeavored to get
10 him to go to McManigal and get him to change his testimony.
11 Your Honor will remember he rang that one phrase through,
12 "Change his testimony."

13 MR. FREDERICKS. But it was all with Mr. Darrow.

14 MR. ROGERS. We purpose to show that Mr. Davis and Mr. Darrow
15 were together when Mr. Behm talked with Mr. Darrow, and under
16 no other conditions. We will connect it up later in that
17 behalf.

18 THE COURT. I think you are entitled to it on that theory.

19 MR. FREDERICKS. Of course, if they intend to show that Mr.
20 Behm never talked to Mr. Darrow except when Mr. Davis was pre-
21 sent, why, my objection, possibly, would not be well taken,
22 but I did not so understand it.

23 THE COURT. Can you give me the page of Mr. Behm's testimony?

24 MR. ROGERS. I can't do it without a few moments.

25 MR. APPEL. It commences, your Honor, at 2252, Volume 28,
26 that is the portion that I spoke of.

1 THE COURT. The objection is overruled.

2 A Nothing.

3 MR. APPEL. Nothing was said. Now, I wish you would be kind
4 enough to state to the court and jury whether at any conver-
5 sation you had with George Behm or that Mr. Darrow
6 had with George Behm in your presence between the time that
7 he arrived in the city of Los Angeles and the time that he
8 first went before the grand jury, you or Mr. Darrow stated
9 to George Behm to go to Ortie McManigal and to get Ortie
10 to come across, or words to that effect or any such language
11 as that?

12 MR. FREDERICKS' Objected to upon the ground that no founda-
13 tion has been laid. The testimony of the witness, as I
14 remember it, was to the effect all conversations that he
15 had about Mr. McManigal were had with Darrow alone and not
16 in the presence of any one else, and therefore a denial
17 that he had such conversations in the presence of this witness
18 would be immaterial and no foundation laid.

19 MR. ROGERS. We purpose to show that all conversations of
20 any consequence or importance were held with Behm by Mr.
21 Davis and Mr. Darrow conjointly.

22 MR. FREDERICKS. I think that ought to be shown first before
23 it is material.

24 MR. ROGERS. Can't show everything all together.

25 MR. FREDERICKS. Then we ask leave to cross-examine the
26 witness on that point.

1 MR. ROGERS. I don't know as there is any authority for that
2 procedure. The only cross-examination permitted is cross-
3 examination as to foundation.

4 MR. FREDERICKS. That conversation that is being read now
5 by Mr. Appel, as I understand his conversation, which Mr.
6 Behm said occurred with Mr. Darrow alone at his house.

7 MR. APPEL. I know, but if the witness says he had a con-
8 versation with me alone I have a right to show that someone
9 else was present.

10 THE COURT. Mr. Appel, the court has admitted a great deal of
11 testimony on the avowal of the District Attorney that he would
12 make the testimony connect up in a certain way, under his
13 intention to make a certain showing. The avowal of the
14 defendant is equally good and must have the same respect.
15 It is a matter of the order of proof. When counsel states
16 he will make that showing I expect he will do it.

17 MR. FREDERICKS. Would your Honor take into account the
18 almost physical impossibility of this witness saying that
19 Mr. Behm did not have private conversations with Mr. Darrow
20 about which this witness knows nothing?

21 MR. FORD. This is a conversation at the house of Mr. Darrow
22 in Chicago before Mr. Davis came into the case even.

23 THE COURT. I had forgotten about that Chicago conversation.

24 MR. ROGERS. If your Honor please, the testimony of the
25 witness Behm to the effect that his conversations were with
26 Mr. Darrow alone, we purpose to controvert, we purpose to

1 show that his conversations were, as a matter of fact, not
2 only with Mr. Darrow but with Mr. Davis, but with other
3 members of the attorneys of the defense, and that his state-
4 ment that he had conversations with Mr. Darrow alone is not
5 true. We know how easy it is, according to the Code, the Code
6 says evidence of the oral admissions or statemen^{ts}/of a party
7 are to be received with caution. Because we all realize how
8 easy it is to say I met a man at such and such a time and
9 had a conversation with him. We purpose to show by circum-
10 stances and by the testimony of all witnesses of the defense
11 who have knowledge of the subject that Mr. Behm's statement
12 and conversations were not held with Mr. Darrow alone but as
13 a matter of habit held not only with Mr. Darrow but with all
14 members of the attorneys staff, particularly the witness
15 upon the stand.

16 MR. FREDERICKS. We maintain that such a foundation, in
17 order to make this testimony competent, would be physically
18 impossible, and a moral improbability.

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1 Mr Darrow, according to the testimony that is now before
2 the court, at any rate, came out here after a first meeting
3 with Mr Darrow -- Mr Behm had that meeting with Mr Dar
4 row in Chicago. Now, it would be impossible for this wit-
5 ness to say that Mr Darrow, who Mr Behm says brought him
6 out here, didn't have private conversations with him
7 at various times, all of which this witness knows nothing
8 at all, and for this witness to say that he could overhear
9 these things certainly is not admissible at all as proving
10 that Behm didn't say that. Now, it is true, ^{if} Mr Behm had
11 said I was conversing with Darrow alone on a certain day
12 in August at a certain place, at his office at a certain
13 hour, and he and I were there alone, and this conversa-
14 tion occurred which I am relating, then it would be proper
15 to show that Mr Davis was there, if he was there at
16 that time in that place, and that that conversation did not
17 occur at all, but to ask this witness if he ever heard Mr
18 Darrow tell Behm to do these things, which we maintain are
19 unlawful, why, it doesn't prove that Mr Darrow didn't do
20 them, because Behm himself says that they were not done in
21 the presence of this witness, and we think that it does
22 not go to the weight of the testimony at all. It goes ab-
23 solutely to the admissibility of it. It is negative tes-
24 timony. I might take the stand or your Honor might take
25 the stand or a thousand people might take the stand that
26 know Mr Darrow and see him every day, and we would say,
Behm never had any such conversation with Darrow, in our

1 presence. That wouldn't be admissible to prove that Dar-
2 row didn't have a conversation with Behm privately and
3 alone.

4 MR FORD: The witness -- or the question that is now ad-
5 dressed to the witness is for the purpose of a contradic-
6 tion of the alleged declaration of the defendant which Mr
7 Behm testified occurred in Chicago at the house of Mr Dar-
8 row, there being present at that time Mr Darrow, Mr Behm,
9 Mr Harrington, Mrs McManigal and the defendant. On page
10 2268 --

11 THE COURT: I have it.

12 MR FORD: -- from which the conversation is taken.
13 Now, there can be only one effective way to disprove the
14 statement of Behm, and that is by putting Harrington or
15 Mrs McManigal and some of the other persons present who
16 were there and heard the conversation, or to prove that
17 on that occasion there was another party present whom the
18 witness did not mention, put that party on and let him tes-
19 tify. They couldn't disprove that conversation by saying
20 that sometime after that -- after Mr Davis had come into
21 the case, this conversation having occurred long before Mr
22 Davis had any connection with the case, according to the
23 records in this case, Mr Davis, according to the records
24 which are on file here, at least as far as the court was
25 concerned, is not associated until after that conversation
26 had been held.

1 MR APPEL: Now, then, of course, I don,t know anything
2 about what counsel thinks, but certainly he cannot think
3 for me nor for any of us.

4 THE COURT: Just a moment. I want to look at the record.

5 MR APPEL: I call to your Honor's attention, to set you
6 right, and to set him right.

7 THE COURT: All right. Go ahead.

8 MR APPEL: Mr Behm has testified here for the People, and
9 he has stated, your Honor, that he came down here on the
10 27th day of June, and that he went over and saw Ortie Mc-
11 Manigal on the 30th day of June the first time. That is
12 three days after he came here; he has testified that the
13 first day that he came here he had no particular conversa-
14 tion with Mr Darrow; that on the second day when he came
15 here, which would be about the 28th, the second or third
16 day, he had a conversation with Mr Darrow at the Higgins
17 Building, that he went down and saw Ortie McManigal, that
18 he came back and he said to Mr Darrow, after seeing Ortie
19 McManigal on the 30th day of June, that he said to him,
20 "I cannot do anything with Ortie McManigal", and that Mr
21 Darrow says -- "I said to him, the boy is stubborn, I said
22 he had not going to come across and Mr Darrow, he got up and
23 walked backwards and fowards on the floor as if he was
24 very uneasy, jumped up, he says, 'God, truth or no truth,
25 you have got to get him to come across.'" Now, he says
26 that conversation occurred on the 30th day of June after

1 he left the jail and came down to the Higgins Building and
2 talked to Mr Darrow, and we propose to show that on that
3 day, on the 30th day of June, all of the day that Mr Davis
4 was with Mr Darrow at all conversations with that man,
5 and that Mr Darrow did not say anything of the kind.

6 Nowhere has Mr Behm said here in this particular conver-
7 sation that he was alone with Darrow; we not only propose
8 to show by Mr Davis that he was there present at that
9 conversation, but we propose to show that others were
10 there present at other conversations with Mr Behm, after
11 Davis left there -- and that no such statement was made
12 at either of those conversations with Mr Darrow.

13 THE COURT: With that offer on your part, I think that en-
14 titles you to it.

15 MR APPEL: Here is the testimony, page 2280.

16 MR FREDERICKS: That does not entitle him to the question
17 before us. He is arguing another matter.

18 MR APPEL: I am trying to argue that, I am trying to dis-
19 prove, and you are trying to shove me on Chicago. I don't
20 know anything about Chicago.

21 THE COURT: I think it does.

22 MR KEETCH: I asked counsel for the page, and he gave me
23 2268, and that relates to a conversation in Chicago.

24 MR APPEL: I won't go to Chicago.

25 THE COURT: The conversation referred to is on page
26 2280.

1 MR KEETCH: If her efers to page 2280, that is an entirely
2 different matter.

3 MR FREDERICKS: Will the court indulge us to have the ques-
4 tion read?

5 THE COURT: yes.

6 THE REPORTER: Mr Smith has the question.

7 MR APPEL: I would put it in this way, Mr Davis. Do you
8 remember being present at any conversation after George
9 Behm came here from Chicago? A I do.

10 Q In the Higgins Building after George Behm -- where he
11 reported he had been to see Ortie McManigal.

12 A I rememb er he reported several times he had been
13 to see Ortie McManigal.

14 Q Now, after that, on the day that he reported that, were
15 you present there in the Higgins Building with Mr Darrow,
16 and did Mr Darrow say to him, "God, truth or no truth,
17 you have got to get him to come across", or words to that
18 effect or in substance?

19 MR FREDERICKS: That is objected to on the ground no foun-
20 dation has been laid. Mr Davis' reply to the previous
21 question was that he was there several times that he came
22 back from the jail.

23 MR APPEL: I can only take one at a time.

24 MR FREDERICKS: Mr Davis' attention has not been drawn to
25 this time and place and circumstance and the persons pre-
26 sent.

1 MR FORD: And no foundation has been laid showing Mr Davis
2 was present at every conversation between Mr Darrow and
3 Mr Behm.

4 MR APPEL: We have a right to put the defendant on the
5 stand to show that at no time after Mr Behm came home and
6 talked to Mr Ortie McManigal, that he talked with him
7 alone. He has a right to say every time he talked with
8 him Mr Davis was present.

9 THE COURT: I think so. Objection overruled.

10 MR APPEL: Read the question.

11 MR FORD: That is evidently an avowal they are going to
12 show he was not present alone.

13 THE COURT: yes sir, that avowal has been made.

14 MR APPEL: Never mind that, we have a right to show that.

15 A I think I remember the question, unless you want to read
16 it.

17 MR APPEL: yes sir. A He did not.

18 Q He did not? A No sir.

19 Q Did Mr Darrow at that conversation or at any other when
20 you were present, state to Mr George Behm, referring to
21 Ortie McManigal, "We got to get him; we got to get him to
22 save the McNamara boys; to save the disgrace on his family,
23 and all you people, we have got to get him to come across"?

24 MR FORD: What page is that, please?

25 MR FREDERICKS: That is objected to on the ground no founda-
26 tion has been laid in that Mr Behm never said anyone else

1 was present except himself at the time he had such conver-
2 sation.

3 MR APPEL: Are we bound by his testimony?

4 THE COURT: Objection overruled.

5 MR FREDERICKS: I am making my objection, that is all.

6 MR FORD: We would like the page.

7 THE COURT: As to the foundation, I would like to have
8 that, Mr Appel. I do not want to rely on my memory.

9 MR APPEL: You mean by "foundation", I have not called at-
10 tention to the language, I suppose? Page 2283, commencing
11 with line 8, 17, down to the end of the page, line 26.

12 THE COURT: Objection overruled.

13 MR APPEL: Now, read the question.

14 A He did not.

15 Q Did he then, in addition to that, did Mr Darrow say in
16 addition to that, "You have got to go back again, George,
17 and see what you can do with him"?

18 MR FORD: We object to that on the ground no foundation
19 is laid for the asking of the question, that it does not
20 contradict the testimony given by Mr Behm or anyone else.
21 Mr Behm's testimony being, line 8, page 2283, there was
22 nobody present at all at that time, except Mr Darrow.

23 THE COURT: Objection overruled.

24 MR APPEL: Go ahead. A No.

25 Q Did Mr Darrow in any of those conversations that you
26 were present, say to George Behm that he, George Behm --

1 MR FORD: What page?

2 MR APPEL: Page 2285 -- "should keep going back
3 there and visit McManigal as often as he could for fear he,
4 McManigal might weaken and then did Mr Darrow say, "You
5 can get him that way", or words to that effect?

6 MR FREDERICKS: That is objected to on the ground no foun-
7 dation has been laid; that it does not serve to impeach
8 any of the testimony given by Mr Behm, Mr Behm having
9 expressly stated that conversation occurred between him
10 and Mr Darrow alone.

11 THE COURT: Objection overruled.

12 MR APPEL: You can see why he said that. A He did not.

13 Q Did he at that time or any other time between the
14 27th day of June, and the time that George Behm was call-
15 ed before the Grand Jury the first time, in your presence,
16 at any conversation had between you and Darrow and Behm,
17 did Darrow say to him, "Keep going, keep him in good humor,
18 and if you see any points where he is weakening towards
19 coming across at any time --"

20 MR FORD: What page?

21 MR APPEL: 2286 -- or words to that effect?

22 MR FREDERICKS: That is objected to --

23 A No, -- excuse me for answering before you object.

24 MR FREDERICKS: All right. That is objected to as no foun-
25 dation laid in that it does not impeach any testimony
26 given by George Behm, George Behm having said that such

1 conversation occurred between him and Mr Darrow when they
2 were alone, and the denial of this witness that he ever
3 heard such conversations, would not serve to impeach Mr
4 Behm.

5 THE COURT: Objection overruled.

6 A No, he did not.

7 MR APPEL: Do you remember whether at any time when George
8 Behm made any statement to you in the presence of Mr Dar-
9 row, about his having taken the children somewhere in the
10 vicinity of the jail, McManigal's children, and passing by
11 there --

12 MR FREDERICKS: We object to that as hearsay, immaterial.

13 MR APPEL: I am drawing his attention to a particular
14 conversation --

15 MR FREDERICKS: If it is merely preliminary, withdraw the
16 objection. I presume it is a yes or no question?

17 THE COURT: All right.

18 A I remember him saying at one time, I wouldn't say
19 whether Mr Darrow was there present at that time or not,
20 but he said at one time he went down the street with a
21 little child beside him, the father saw him out of the
22 window --

23 MR FREDERICKS: We move to strike out the answer as
24 not responsive. That is a preliminary question that
25 should be answered yes or no.

26 THE COURT: Strike out the answer. You can answer the

1 question yes or no. A I would not be positive whether
2 Mr Darrow was present.

3 MR FREDERICKS: I didn't understand that that was included
4 in the question.

5 A Read that question again.

6 MR APPEL: I asked if you remember whether he having re-
7 ported that fact, that is, Behm having reported that fact?

8 A Well, as I understood the question it included myself
9 and Mr Darrow both. I remember his having reported the
10 fact, but whether or not Mr Darrow and I were both togeth-
11 er at that time, I don't know.

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1 MR. APPEL. Now, at that time, when he reported that fact,
2 was Mr. Darrow present and did Mr. Darrow say to him--didn't
3 McManigal say he didn't take the boy over to see his
4 father McManigal, I didn't pay any attention to McManigal's
5 hollering to bring the boy, and did Darrow say, that is right,
6 God Damn it, tease him and then he will come across. Did
7 you hear any statement made by Darrow at that time or any
8 other time?

9 MR. FORD. Objected to upon the ground it is a compound
10 question.

11 MR. FREDERICKS. Objected to upon the ground that no founda-
12 tion has been laid for the asking of the question. Two
13 questions, hearsay and no foundation been laid for impeach-
14 ment; persons present, they are not the same as those
15 referred to in the testimony of Behm.

16 THE COURT. Objection overruled.

17 A Mr. Darrow never said that to Mr. Behm in my presence at any
18 time.

19 MR. APPEL. Q Was anything said to him at the time the
20 report was made by you--

21 MR. FORD. The question is not fully answered. There is
22 another part of the question not answered: Was Mr. Darrow
23 present when the report--

24 MR. APPEL. I asked him that question.

25 THE COURT. I thought he had. I thought the witness said he
26 was not sure whether Mr. Darrow was present.

1 MR. APPEL. He said he was not sure. We have a right to
2 show Mr. Darrow as there.

3 THE COURT. Go ahead, the question is answered.

4 MR. FREDERICKS. We call the Court's attention to the phrase
5 of our objection is this: Mr. Behm never said that he made
6 such a report to Mr. Davis, and the impeaching question
7 there is--what this question is founded on was the talk
8 that Behm had with Darrow, according to his statement.
9 Now, the mere fact that Behm may have told that same thing
10 to Davis or a dozen others at another time and another
11 place, with other people present, or didn't tell it to them,
12 would not serve to impeach Behm. They should be asked--
13 Mr. Davis cannot say that he didn't say this to Mr. Darrow
14 and Mr. Darrow to Behm, if Mr. Davis was not there.

15 THE COURT. Under the defendant's declaration of what he
16 intends to do I think the evidence is competent. It will
17 be received upon that theory. Proceed. The question has
18 been answered.

19 MR. APPEL. Q Do you remember whether or not in talking
20 to Mr. McManigal or Mr. Behm in your presence in respect to
21 his examination before the grand jury, do you remember
22 whether or not Mr. Darrow said to George Behm, "now, George
23 you ain't afraid to go to jail, are you?" and George said,
24 "No, not unless it is necessary," that is, he would not be
25 afraid unless it was necessary. Well, he says, meaning
26 Darrow, "We are not going to let you go to jail if we can

1 possibly help it, but Mr. Darrow said you may go to jail for
2 this, and did Mr. Behm say, "I don't want to go to jail, looks
3 kind of bad for my folks back home to go to jail for what I
4 came out here for," and did Darrow say, "We will take care of
5 you; we will get you out of here if we have to carry it
6 up to a higher court," or words to that effect, or any such
7 talk as that when talking to him about what he should testify
8 before the grand jury or not testify? A I don't remember
9 Mr. Darrow ever having said so. I said to him myself, if
10 you want to know what I said.

11 Q I want to know what Mr. Darrow said. A I never heard
12 Mr. Darrow say anything of the kind that I can remember. I
13 know what I said to him in reference to it.

14 Q What did you say to him? A I said to him to refuse to
15 answer those questions that we said to him, and if they
16 sent him to jail I would see that I got out a writ of
17 habeas corpus and got him out, if I possibly could.

18 Q Did you or Mr. Darrow undertake or try or attempt to drill
19 Mr. George Behm on questions they were going to ask him and
20 drill him as to how he should answer any questions except
21 those that you instructed him on to answer, "That don't
22 concern the case"?

23 MR. FREDERICKS. That is objected to upon the ground it is
24 immaterial as to whether this witness attempted to drill
25 him or not, and it is a conclusion as to whether Mr. Darrow
26 attempted to drill him or not.

1 THE COURT. Objection sustained.

2 MR. APPEL. We take an exception. We offer to contradict
3 the statement of the witness Behm introduced here by the
4 prosecution, which he made during the examination in direct,
5 brought in by the District Attorney in the following words:
6 "They undertook to drill me on those questions. They should
7 ask me and how I should answer."

8 THE COURT. That was stricken out by the court upon your
9 motion, following on there.

10 MR. APPEL. We ask that we be allowed to contradict it any-
11 how. Now, we go one better.

12 THE COURT. I assume you are not serious about that. Objec-
13 tion sustained.

14 MR. APPEL. I don't know, if this is stricken out I guess
15 I will have to strike out my question. Yes, I see the
16 District Attorney here says "don't use that expression."

17 Q Did you at that meeting with Mr. Behm, did you ask Mr.
18 Behm questions and then did Mr. Darrow suggest to Behm how he
19 should answer them?

20 MR. FORD. Now, this is the conversation before the first
21 appearance of Behm before the grand jury?

22 MR. DARROW. His second appearance.

23 MR. FREDERICKS. Before the second appearance?

24 MR. APPEL. Yes.

25 A Only in the manner I have indicated, that he told him
26 to answer those questions we didn't think were relevant

1 by saying to the jury that he refused to answer them on
2 the ground they had no connection with the case, and other
3 questions he told him to answer without telling him how to
4 answer.

5 Q Did Mr. Darrow in your presence the night before Mr. Behm
6 was examined before the grand jury the second day, did Mr.
7 Darrow or yourself in your presence state to Behm, page 2315
8 "You answer those," meaning the questions, "all with the
9 exception of the question they ask you concerning what you
10 said to McManigal, as to what answer you got out of Mc-
11 Manigal, and what you told McManigal, so that in the fall
12 term of court he, Darrow could use him for a witness against
13 McManigal's testimony," and did Darrow in that connection
14 say to him that those questions they would ask him would be
15 just the same as they had already asked him, and that he,
16 Behm, should fix it up in his own mind the way he should
17 answer so as to keep him, Darrow, out of trouble and him-
18 self, and deny all questions asked of him about what he told
19 McManigal, and that he, Darrow, would do for him if he changed
20 his testimony, or words to that effect? A No.

21 Q Do you know whether or not Mr. Behm at that conversation
22 stated to you and Mr. Darrow whether or not he desired or
23 wished that he had McManigal in front of his engine, or words
24 to that effect, what he said in reference to that?

25 A I don't remember it.

1 MR. FREDERICKS. Just a moment--I object upon the
2 ground--

3 A I didn't remember it anyhow, Captain.

4 MR. FREDERICKS. All right.

5 MR. APPEL. You are acquainted with John R. Harrington?

6 A I am.

7 Q Of course, you were acquainted with Judge McNutt?

8 A I was.

9 Q One of the attorneys for the defense also in the McNamara
10 case, that right? A He was.

11 Q On the afternoon of the 28th day of November, 1911, that
12 being the day when Franklin was arrested in the morning of
13 that day, did you and Judge Cyrus McNutt see Mr. Harrington
14 over at his office in the Higgins Building? A We did,
15 on the day of the arrest of Mr. Franklin, whatever that day
16 was, but I think that was the 28th.

17 Q Was that on the afternoon? A In the afternoon.

18 Q Did or did not Mr. Harrington say to you and Judge McNutt,
19 you three being present, that he was satisfied that there
20 was no foundation for any charges of bribery against any
21 one connected with the case, that he had known Darrow for
22 years and had been closely associated with him during all
23 of the case and had never seen the slightest suspicious
24 thing connected with any bribery or any corrupt practice, or
25 words to that effect, in connection with the case, and that
26 he was sure that no one connected with the case had anything

1 to do with the bribery or with any illegal act either in
2 connection with jurors or witnesses or with any matter
3 connected with the case, or words to that effect or in sub-
4 stance? A In substance that.

5 Q He said so? A In substance, yes, sir.

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1 Q I will ask you whether or not at that time you had been
2 very intimately acquainted with Mr Harrington, that is, hav-
3 ing met him often in the place? A A relative term of
4 what intimate connection is, or acquaintance. I met him
5 probably every day for a short time during the course of
6 the trial, sometimes he would be away at San Francisco or
7 elsewhere when I would not see him for a day or two, such
8 an acquaintance as a man would have with one with whom he
9 is working.

10 Q Did he consult you about the case, or did you consult
11 him? A Frequently.

12 Q Do you remember, during the preparation of the case
13 having heard of a witness by the name of Diekelman?

14 A I do.

15 Q Do you remember any report being brought to you in
16 reference to that witness Diekelman? A I do.

17 Q Do you remember having heard a report being brought to
18 you concerning the quality and character of his testimony,
19 that he might be able to give in reference to the case?

20 A Yes sir.

21 Q Did you then find out in any way, where the witness
22 was?

23 MR FORD: We object to that as calling for hearsay, and
24 no foundation laid, showing from whom the report came or
25 whether it was a written or verbal report, or the source of
26 it.

1 MR APPEL: It is simply leading up to the principal sub-
2 ject, your Honor.

3 THE COURT: Preliminary?

4 MR APPEL: We do not introduce hearsay evidence here, we
5 go up to the main issue or point.

6 THE COURT: It is preliminary?

7 MR APPEL: It is laying the foundation.

8 MR FORD: He is asking now for the substance of the report.

9 MR APPEL: Not at all.

10 MR FORD: Pardon me. The way he asks it whether in form
11 or not, the substance, he is doing that.

12 THE COURT: He has clarified it by saying he is not asking
13 for the substance.

14 MR FORD: Please read the last question and I will explain
15 the point to your Honor.

16 THE COURT: Read it.

17 (Last question read.)

18 THE COURT: It calls for an answer yes or no. Answer
19 the question yes or no.

20 MR FORD: Whether he found out or not would be in the re-
21 port, I gather, and it is giving the substance of the re-
22 port or a portion of the substance.

23 A I don,t know that I understand exactly what counsel
24 wishes, whether he wishes me to answer whether I learned
25 at that time or subsequently.

26 MR APPEL: At that time or subsequently to that time?

1 A At that time, that same report, I learned where the
2 witness was supposed to be.

3 Q Where was he supposed to be?

4 ~~MR FORD: We object to that on the ground no foundation~~
5 ~~has been laid showing from whom this report was; as far~~
6 ~~as we know at the present time, it is purely hearsay, and~~
7 ~~there is no foundation laid showing whether the report~~
8 ~~is a written report or in existence or not.~~

9 MR APPEL: I do not care whether it is written or oral.

10 MR FORD: Therefore, calling for secondary evidence, if it
11 was a written report, and we are entitled to know these
12 things, in order that we may frame our objections properly,
13 if we then have any, after the preliminary questions have
14 been asked leading up to it. Here is a witness who
15 says he learned from a report certain things; he just now
16 stated he learned from the report itself, where the wit-
17 ness was, and we are entitled to know what is in that re-
18 port, where that report came from, so that we can meet
19 the situation.

20 MR APPEL: It doesn't make any difference how he learned
21 it.

22 MR FORD: So that we can decide for ourselves whether or
23 not we want to believe the witness on that point, whether
24 there was such a report, or not.

25 MR APPEL: Whether you believe the witness is immaterial.

26 ~~MR FORD: We object to that on the ground it is incompe-~~

1 tent, immaterial and irrelevant; calling for hearsay; no
2 foundation laid for the introduction of the contents of
3 that report, until after it has been shown what the re-
4 port was and what has become of it.

5 MR APPEL: I offer to show by the witness that he learned
6 where this witness was supposed to be -

7 MR FORD: From the reporter

8 MR APPEL: And I offer to show what action he took with
9 reference to getting that witness and protecting him,
10 getting him away from the Burns Agency; I propose to show
11 that the insinuations here of the District Attorney con-
12 cerning this witness, your Honor, concerning the action
13 of Mr Darrow with reference to that witness, was a mat-
14 ter which was initiated by someone else except Mr Darrow,
15 and why it was done. There was nothing wrong about it.
16 I want to show that.

17 MR FORD: We object to the witness being interrogated on
18 any written documents or the contents of any document.

19 MR APPEL: We are not asking him about any written docu-
20 ment.

21 MR FORD: Until the document has been exhibited to us, and
22 as far as we know -- because at the present time we have
23 a right to assume --

24 MR ROGERS: It seems to me puerile, when they have been sho-
25 ing he was in Albuquerque by their own witnesses.

26 THE COURT: The objection is overruled. Answer the ques-

1 tion. A Read the question.

2 (Question read.)

3 A Albuquerque, I think, New Mexico.

4 MR APPEL: Now, upon learning that, -- what other facts
5 in connection with his being in Albuquerque, did you learn
6 concerning that witness?

7 MR FORD: What is the question?

8 (Last question read.)

9 MR FORD: From this report?

10 MR ROGERS: We are not talking about a report.

11 MR FORD: We object to that on the ground it is hearsay,
12 calling for the contents of a written report without exhibit
13 ing the report to us; no foundation laid.

14 THE COURT: Objection overruled.

15 A Well, I would have to tell the whole report in order
16 to tell you what it was.

17 MR APPEL: Go ahead. A One morning Mr Darrow took me --
18 I went over to the office, and he took me into his room
19 where was some gentleman that ran a boarding house -- what
20 his name was, I don't know, but Mr Darrow says, "This
21 gentleman has reported to me there is a witness by the
22 name of Diekelman, who roomed at his house until a short
23 time ago", and that Diekelman was a clerk in one of the
24 hotels here in the city of Los Angeles, that he had been
25 to see Jim -- and that Jim McNamara was said to have regis-
26 tered there under the name of Brice, that the witness had

1 been to see Mr McNamara, James McNamara, and said he was
2 not the man who had registered under the name of Brice,
3 that one of Mr Burns' detectives had taken him from the
4 boarding house and taken him to Albuquerque, New Mexico,
5 and that, as I understood him to say, he had just learned a
6 few days before that Mr Diekelman was at Albuquerque,
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p 1 and that if he was present he would testify that James
2 McNamara was not the J. B. Brice who had registered at his
3 place. He also said that the detective was with him. There
4 upon we held a consultation which resulted in sending a
5 gentleman there to get this witness.

6 Q Sandwhom? A Well, his name is Bert Hammerstrom, if I
7 do not forget the last name--it was Hammer-something, he
8 was a brother-in-law of Mr. Darrow.

9 Q Who, if any one, gave any instructions to Hammerstrom?

10 A I think both of us did.

11 Q What instructions were given to him by both of you?

12 A To go there and ascertain the truth of this report that
13 was made to us by this gentleman who ran the boarding house
14 and if it was true to get the man.

15 Q Get the witness? A Get the witness and see that he
16 was here at the trial, to get the witness and to see that he
17 was here for the trial, to get him a position there or else-
18 where--in Chicago or elsewhere, and to see that that man
19 would be here at the trial, if the story that the man told
20 us in the office was the truth.

21 Q Now, was Hammerstrom instructed by you and by Mr. Darrow to
22 keep the witness out of the jurisdiction of this court?

23 A He was instructed to bring him in the jurisdiction of
24 this court for the trial.

25 Q How long was this before the trial, Mr. Davis?

26 A My recollection is we were in the trial then. I wont
be sure whether we had begun the trial or whether we had not.

1 but it was sometime during the course of the time I was
2 connected with the defense.

3 Q What you mean by having him here for the trial was
4 after the-- A At the time we needed him.

5 Q You needed him to produce the testimony in court?

6 A To testify, yes, sir.

7 Q That period of time never came through? A never came
8 through.

9 THE COURT. Gentlemen of the jury, bear in mind the former
10 admonition of the court. We will take a recess for ten
11 minutes.

12 (After recess)

13 THE COURT. Ready to proceed, Gentlemen?

14 MR. APPEL, Mr. Davis, are you acquainted with Bert H. Frank-
15 lin? A yes, sir.

16 Q How long have you known Mr. Franklin? A Oh, a great many
17 years, Mr. Appel. I couldn't give you within 5 or 6 years.

18 Q During the time that Mr. Franklin was employed here in
19 assisting the Darrow defense, the preparation of the case you
20 may--the McNamara case, do you remember whether or not Mr
21 Franklin consulted with you and the other attorneys in the
22 case? A Daily.

23 Q In reference to the impanelment of the jury, what was the
24 custom or the practice or the rule followed by you and Mr.
25 Darrow and the other attorneys in the case appearing for the
26 McNamaras in reference to consultation with Mr. Franklin con-

1 cerning each juror as to whether he should be allowed or
2 kept on the jury or not? A We first consulted his
3 report on the jury in a book that we had, then we also
4 asked him if he had learned anything subsequent concerning
5 that juror. If he knew any reason why we should let him go
6 or any reason why he thought we should keep him.

7 Q Do you know whether or not he made special reports on
8 jurors from time to time as he learned facts or not?

9 A Many times there were a great many jurors that his
10 report to us showed were absent when he went to see them or
11 other persons went to see them for him, our report would
12 simply show absent, out of the country or out of the county,
13 and when the panel was issued by the court and we found them
14 on the list, why, we consulted him and told him to make a
15 report upon that juror, we saw by the return he was here
16 now.

17 Q Well, where you had reports already on the juror or
18 jurors or any particular juror, do you remember whether or
19 not there ^{were} any reports required of him or not?

20 A yes.

21 Q Now, Mr. Pavis, do you remember whether or not you visited
22 Mr. Franklin at his office on the afternoon of the 28th day of
23 November, 1911? A I don't remember of visiting him at his
24 office. I remember visiting him at the jail.

25 Q Do you remember at any time after his arrest, after the
26 28th of you and Mr. Parrow visiting him in company with Judge

1 McNutt or without the presence of Judge McNutt at his
2 office? A yes.

3 Q Can you state whether or not Mrs. Franklin was present,
4 I mean-- A ~~When~~ Mrs Franklin was present?

5 Q Yes. A I wouldn't be sure whether Mrs Franklin was
6 in the room or not. She was there around the office some-
7 where.

8 Q Mr. Darrow was present, was he not? A Yes.

9 Q Did Mr. Darrow at that conversation say to Mr. Franklin,
10 after asking him how he felt, did Mr. Darrow ask Mr. Frank-
11 lin if he, Franklin, felt sore at Mr. Darrow? A No.
12

13 Q Mr. Davis, did you go to see Mr. Franklin over at the
14 jail? A At what time?

15 Q Immediately after his arrest or shortly after that, the
16 28th? A In the early part of the afternoon, yes, sir.

17 Q Was that visit to Mr. Franklin before or after you and
18 Judge McNutt saw Mr. Harrington at the Higgins Building?

19 A That was before.

20 Q How did you happen to go to see Mr. Franklin, Mr. Davis,
21 at the jail? A In response to a telephone or message that
22 we received at the office.

23 Q Which office? A Mr. Darrow's office in the Higgins
24 building.

25 Q Do you remember from whom that telephone was? A Reported
26 from Mrs. Franklin.

1 Q It was reported from Mrs. Franklin?

2 MR. FORD It was reported that it was from Mrs. Franklin?

3 MR. APPEL. I say that it was reported that it was from

4 Mrs. Franklin. That is, reported there at the office of

5 Mr. Darrow to you and Mr. Darrow? A Yes, sir, and was

6 reported that way when we came into the office, Shortly

7 afternoon, and then while we were sitting there talking the

8 telephone rang and Mr. Darrow answered the telephone and I

9 know that he reported to me what was said to him and then

10 we went over.

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1 Q To the jail? A I went over to the jail -- no, we went
 2 over first, to Mr Franklin's office, and Mrs Franklin was
 3 there.

4 Q Was there any requests then made of you that you
 5 should go over and see Mr Franklin? A Yes.

6 Q By Mrs Franklin? A Mrs Franklin.

7 Q Now, when you went over to the jail, and saw Mr Franklin
 8 do you remember whether or not at that conversation at
 9 that meeting you said, "Well, Bert, how are you feeling?"
 10 Did you say to him, "Don't worry, a complaint will be is-
 11 sued and we will get you out on bail or on bond", or words
 12 to that effect? A Mr Appel, I think that whatever
 13 conversation that I had there with Mr Franklin is a ques-
 14 tion between myself and Mr Franklin. He is still on trial-
 15 he is not on trial, but there is still a complaint against
 16 him in this court, and I don't think I should answer that
 17 question.

18 Q Now, when did you -- did you furnish bail for Mr
 19 Thompson? A I did.

20 Q Now, before you furnished the bail, did you report to
 21 Mr Darrow what, if anything, had been said by Mr Franklin
 22 down to the jail? A I told him the substance of the
 23 conversation I had had with Mr Franklin.

24 Q In connection with the question of furnishing bail,
 25 what, if anything, did you say to Mr Darrow? A I said
 26 to Mr Darrow, I didn't think Mr Franklin was guilty.

1 that Franklin desired me to go on -- see if I could get him
2 some bondsmen, and I told Mr Darrow that I was willing
3 to go on his bond, and spoke with Judge McNutt about it.
4 He was there present at the time, and Judge McNutt said
5 he couldn't go on account of his wife, the property being
6 in his wife's name. Then I suggested to Mr Darrow that if
7 there was enough money in the fund -- of the defense
8 fund, that we should put -- let me have it, and if he
9 wanted me to, I would guarantee him for any loss against
10 it, and he said he didn't need any guarantee, if I said
11 that I was satisfied about the matter go ahead, put it up.
12 He gave me a check and I went and put it up.

13 Q Put up the cash, didn't you? A I did.

14 Q About what time of the day did you get him out, more or
15 less, as near as you can? A I wouldn't be sure; I think
16 it was set for 2 o'clock, and went over there and he was
17 not present. We waited for a considerable time and Mr
18 Ford came over, and with some gentleman went down in an
19 automobile and brought Mr Franklin up to the court.
20 Must have been in the neighborhood of 3 or half past 3
21 o'clock, by the time it was all done.

22 Q Now, after his arrest, and upon the next day, do
23 you remember having met Mr Franklin and Mr Darrow together
24 at Mr Darrow's office? A Yes.

25 Q Was there anything said by Mr Darrow then, at that
26 conversation to Mr Franklin in reference to the effect

1 that Mr Franklin's arrest upon Mr Franklin's wife and
2 family as to how they took it, and as to how the arrest
3 affected the friends of Mr Franklin, if you remember?

4 MR FORD: Objected to upon the ground that it is leading
5 and suggestive. I think the best way is to let this wit-
6 ness tell what occurred, if anything, what conversation
7 was had, and then if he is through, he has stated that is
8 all the conversation, perhaps it is admissible for counsel o
9 to put these other questions. I think at the present
10 time the court should not permit a leading and sugges-
11 tive question until the witness has exhausted his memory
12 on the matter.

13 THE COURT: Objection overruled.

14 A Nothing of that kind that I remember, sir.

15 MR FREDERICKS: This was a conversation the next day after
16 the arrest?

17 MR APPEL: Yes.

18 Q Did you, on the day of Mr Franklin's arrest or before
19 his arrest or after his arrest, receive any telephone mes-
20 sage from anyone informing you that Mr Franklin was about
21 to get in trouble? A I did not.

22 Q Did you phone to Mr Darrow on the morning of the 28th
23 or say to him that you had received a telephone message
24 that Franklin was about to get into trouble, and that he,
25 Darrow, had better notify him? A I did not.

26 Q Now, after the preliminary examination of Mr Franklin,

1 you and Mr Darrow being present, did you have any conver-
2 sation with Mr Franklin in the presence of Mr Darrow, in
3 the Higgins Building, at the office of Mr Darrow, in
4 which Mr Darrow or you said that arrangements could be
5 made or had been made for him, Franklin, to plead guilty
6 to one count in the attempt to bribe George W. Lockwood,
7 and that he, Franklin, would be fined \$5000, which you or
8 Darrow or the defense would pay, and that he, Franklin,
9 would be furnished, for the protection of his family
10 until he could rebuild himself in the community, the sum
11 of \$3000 or any words to that effect? A No.

12 MR FREDERICKS: We object to that -- A Excuse me.

13 MR FREDERICKS: Object to that on the ground the proper
14 foundation is not laid as to the place.

15 A I understood him to say the Higgins Building.

16
17 MR FREDERICKS: The foundation that is laid in Mr Frank-
18 lin's question was Mr Davis' office, as I understand it.

19 MR APPEL: No sir.

20 THE COURT: What is the page?

21 MR APPEL: The matter commences at page 586, your Honor,
22 line 17. Now, there he states a conversation, then, your
23 Honor, on page 587, he continues that conversation at
24 the bottom of the page, then the next time, at page 588
25 and when and where -- "Well, now, the first time that
26 matter was broached by the defendant, when was that and

1 where? A -- At his office, to the best of my recollec-
2 tion, in the Higgins Building. Q -- Was it before or af-
3 ter your preliminary examination? A -- It was after my
4 preliminary examination."

5 MR FRED ERICKS: But, doesn't that refer to conversation
6 between Mr Darrow and Mr Franklin alone?

7 MR APPEL: No sir. Now, wait a moment. "Q -- About how
8 long after the second one? A -- I should say it was a mat-
9 ter of two weeks, or three, perhaps. Q -- At what place?
10 A -- His office in the Higgins Building. Q -- Who else
11 was present besides yourself and he, if anyone? A -- Mr
12 Davis."

13 MR FREDERICKS: I withdraw the objection. My memory was
14 defective.

15 THE COURT: The objection is withdrawn. Answer the ques-
16 tion.

17 A No.

18 MR APPEL: Did Mr Darrow make such a statement at any time
19 or place in your presence, to Mr Franklin? A He did not.

20 Q Did you ever make any such statement to Mr Franklin,
21 either in the presence of Mr Darrow or not? A No.

22 Q Did you -- A I will modify that to a certain extent.
23 There was something at one time said to him about pleading
24 guilty, but nothing about paying a fine of \$3500.

25 Q That was in conversation between you and Mr Franklin
26 alone? A Yes.

1lp 1 Q I mean when Mr. Darrow was present. Did you at that time or
2 any other time say to Mr. Franklin that you had serious doubts
3 as to whether your plans for Franklin's pleas of guilty and
4 fine would be accepted by the District Attorney? A Mr. Appel
5 that matter, anything I said to Mr. Franklin or Mr. Franklin
6 said to me in the presence of Mr. Darrow or any third person
7 I do not object to answering--

8 Q I am going to ask you that. Was such a conversation as
9 that had in the presence of Mr. Darrow? A Never at any time.

10 Q Did he, in the presence of Mr. Darrow, ask you at that
11 time what would be the best procedure in case the District
12 Attorney did not accept it, and did you say then to him
13 that you would not concede your defeat along that line, that
14 you were going to do everything you could to get Franklin
15 out on a plea, but in case that could not be done, that
16 in your opinion it would be better if arrangements could
17 be made that he, Franklin, should enter a plea of guilty and
18 ask for probation, and did you then, at that conversation,
19 turn to Mr. Darrow and say to Mr. Darrow, "Mr. Darrow, we will
20 agree if that takes place to give the sum that he would
21 have been fined, namely \$5,000, together with \$3,000 pro-
22 mised before," and that you further said, "wont we, Mr.
23 Darrow," or words to that effect? A No, I never had any
24 control over the defense funds whatever of any kind.

25 Q Did you make any such proposition to Mr. Darrow in the
26 presence of Mr. Franklin? A No, sir.

1 Q Did you ever make such a proposition as that to Mr.
2 Franklin at any time or place? A As I have said before,
3 any conversation I have had with Mr. Franklin, I think,
4 outside of the presence of Mr. Darrow, with reference to
5 giving him any money or furnishing him any money, never at
6 any time.

7 Q That is what I want. Did Mr. Franklin at that time, in the
8 presence of Mr. Darrow and yourself, say that with Mr. Gage
9 as his counsel, that he had absolutely no fear of convic-
10 tion and he was ready to go to trial at any time, and did
11 you then respond that you would look into the matter and
12 let him know at a later date, or words to that effect, in
13 the presence of Mr. Darrow? A No.

14 Q Now, I have asked you concerning conversations of Mr.
15 Franklin after the two preliminary examinations that he had.
16 Now, carrying you along to the Sunday the 14th day of Jan-
17 uary, 1912, I will ask you whether or not you remember
18 having met Mr. Franklin by previous appointment had with
19 you the day before, in some office--at your office, in Mr.
20 Rush's room, when Mr. Darrow was present?

21 A Yes, I remember that conversation.

22 Q You remember how or in what manner or what brought Mr.
23 Darrow there to the office at that consultation? A I did.

24 Q At whose invitation was it? A My own.

25 Q On that day, on the 14th day of January, 1912, you may
26 state whether or not Mr. Franklin and Mr. Darrow discussed in

1 your presence the possibility of Mr. Franklin being sent to
2 the penitentiary. A We had a conversation there about his
3 case. I don't know that there was any discussion as to the
4 possibility of his being sent to the penitentiary.

5 Q Was there anything said at that time by you or Mr. Darrow
6 or by both of you or by either of you to Mr. Franklin as to
7 what kind of a statement Mr. Franklin should make to Mr. Ford
8 concerning his connection with the bribery of jurors?

9 A There was not.

10 Q Did Mr. Darrow suggest at that time to Mr. Franklin that
11 he, Franklin, should say that the money he had used to bribe
12 jurors was obtained by him a third party or from a party
13 from San Francisco or any words to that effect? A No.

14 Q Did you at that time--

15 MR. DARROW. Just a moment--read that question.

16 (Last question read by the reporter.)

17 MR. APPEL. Q Did you in that conversation say in the
18 presence of Franklin and in the presence of Mr. Darrow that
19 if he, Franklin, could convince Mr. Ford that there had been
20 another party who acted as a go-between, between Mr. Darrow
21 and Franklin, and that if he, Franklin would give a des-
22 cription of that man, and where this man claimed to be
23 from and the name/^{that} this man gave him, that is, to Franklin,
24 that Ford might believe a statement of that kind, and would
25 relieve Franklin a great deal and relieve Mr. Darrow from any
26 complicity, for the reason that it would leave him en-

1 tirely out of the matter, or words to that effect? Did
2 you make any such suggestion? A No, nothing like that,
3 especially the latter part.

4 Q And then did Mr. Franklin say to you that Ford would never
5 believe a story of that kind, and that it would be the same
6 old story of the boy stealing a bicycle and saying he
7 bought it from somebody and didn't know who it was, or words
8 to that effect or in substance? A No, he did not.

9 Q Did you at any time ^{or place} suggest any such thing to Mr. Franklin?

10 A No, sir, never at any time or at any place.

11 Q Then didn't Mr. parrow speak and say, "If you mention my
12 name I want you also to tell what you know about Job
13 Harriman?" A No, that was not what he said.

14 Q What did Mr. Darrow say--wait a moment, I will ask you
15 afterwards, I know where that comes in. Did Mr. Franklin
16 there in the presence of Mr. parrow say to you that if you
17 could assure him that he would not get over two years in
18 the penitentiary that he would plead guilty and say nothing,
19 and did you then say to him, "I will let you know in a day
20 or two?" A No.

21 Q Now, Mr. Davis, you may state now what if any conversation
22 you and Mr. Darrow and Mr. Franklin had there on that day.

23

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1 A Mr Franklin came up to the office and Mr Darrow and I
2 were in the office, and we went into Mr Rush's room and
3 had a conversation. Mr Franklin said that Colonel Tom
4 Johnston had come to him from Mr Ford and made the propo-
5 sition that if he, Franklin, would come through with what
6 he knew against Mr Darrow, that they would let him plead
7 guilty and pay his fine out of the money that had been
8 taken from Mr Franklin at the time of his arrest, and Mr
9 Darrow spoke up and said, "Well, why do they want me any
10 more than they do Job, or any of the other attorneys?"
11 Mr Franklin said, "Wait a minute", and he said, "Colonel
12 Johnston said that Mr Ford said that if you know anything
13 about any other local men that you can keep your mouth
14 shut; that we are after Mr Darrow." Now, that was the
15 conversation with reference to Job Harriman that was had
16 by Mr Franklin and Mr Darrow, and Mr Franklin said, "I told
17 the Colonel that I would not. That Mr Darrow knew noth-
18 ing about it and had nothing to do with it, and that he
19 had been the best friend I ever had, and to return that
20 answer to Mr Ford, and to tell Mr Ford if he wants to see
21 me to come to my office." Now, that was exactly what
22 Mr Franklin said.

23 Q Do you remember whether or not in that statement Mr
24 Franklin did say or not that he had told Colonel Johnson
25 that if he was to say anything against Mr Darrow concerning
26 bribery of any jurors, that he, Darrow, knew anything about

1 it, that he was a God damned liar if he said so?"

2 A I don't know that he used the words, "God damned liar",
3 but he said that he told Colonel Johnston he was not going
4 to tell a lie about it, and he would not say that Mr Dar-
5 row had anything to do with it when he had not. That was
6 the statement he made at that time in the presence of Mr
7 Darrow.

8 Q Did you the next day after the arrest of Mr Franklin,
9 a day or two following his arrest, or the next day after
10 his arrest, did you go to Mr Franklin's office and say
11 to him that you had made arrangements or attempted to
12 make arrangements whereby he could plead guilty to attempt
13 to bribe juror Lockwood, and that that would mean a fine
14 of \$5000 or one year in the penitentiary, or both, and
15 that you thought that you could get him off with a fine?

16 A That question, Mr Appel, I refuse to answer.

17 Q The witness himself has testified to that. A What?

18 Q Mr Franklin -- I will ^{finish} the question -- and that
19 you thought you could get him off with a fine, and that
20 you would work to that end, and that you would see that
21 he would be paid a sufficient sum, that you then men-
22 tioned \$1000 at that time, and that he could have some-
23 thing to live on until he had lived down what he had done.
24 This being the conversation testified to by Mr Franklin at
25 page 815 of volume 10? A I did not.

26 Q Or that in substance or effect? A No.

1 MR APPEL: There are several notes I have here, and I want
2 to get at the important ones; that is the reason I am
3 looking over this.

4 Q Do you remember whether or not Mr Franklin had any
5 conversation with you in reference to whether or not Juror
6 Lockwood had come over to his office and solicited a bribe
7 from him?

8 MR FREDERICKS: We object to that on the ground it would be
9 hearsay and no foundation has been laid for it.

10 A I could not answer that anyhow, Mr Appel, unless it
11 was placed in the presence of some third party.

12 MR APPEL: You object to answering it, do you? A Yes,
13 unless you were to state in the presence of some person.

14 Q Mr Franklin stated this: "Q -- Did you not say any-
15 thing to Mr Davis as to whether you had done it or not,
16 and what circumstances were surrounding it? A -- That is
17 not what you asked me for; you asked me what Mr Davis had
18 said. Q -- What did you say? I did ask you if you did
19 have any conversation. A -- I told Mr Davis he --" Refer-
20 ring back several questions, "he, Lockwood, had come to my
21 office and solicited a bribe." A I have not anything to
22 say about that.

23 Q Did he tell you that when Mr Lockwood came to his of-
24 fice to solicit a bribe, that his wife and daughter --
25 his daughter and son, he not being sure which one it was,
26 was present?

1 MR FREDERICKS: We object to that as irrelevant and imma-
2 terial, no foundation laid, hearsay.

3 MR APPEL: Mr Franklin testifies, your Honor, page
4 821 -- A. I refuse to answer it anyhow, Mr Appel.

5 MR APPEL: -- Mr Davis asked who was there -- A As a
6 privileged question.

7 MR APPEL: Wait a minute. "Mr Davis asked who was there--"

8 MR FREDERICKS: If Franklin admitted it, it certainly is
9 immaterial.

10 THE COURT: 821, what line?

11 MR APPEL: yes sir, line 19.

12 MR FORD: The time, place, and persons present must now
13 be put into therecord, your Honor.

14 MR APPEL: This is an old story, and I am tired of hearing
15 that. I have a right to take the testimony of Franklin
16 and ask whether it is true or not. A Well, Mr Appel--

17 MR APPEL: I am not saying whether you should or should
18 not answer, but I am asking you, asking you this question,
19 quoting the language of Mr Franklin at page 821, of volume
20 10, commencing with line 19 --

21 MR FORD: There is no contention it is incorrect as to lan-
22 guage --

23 MR APPEL: Your Honor, I insist on being allowed to ask
24 my questions.

25 THE COURT: yes, go right ahead.

26

13p¹ MR. FREDERICKS. There is a question asked and an objection
2 pending upon which the court has not ruled and for some
3 reason counsel wants to read into the record, I don't know
4 what the reason is--

5 THE COURT. What is the question pending? I understood
6 the question was withdrawn and counsel is reframing another
7 question. Am I correct in that?

8 MR. APPEL. There were three objections and to avoid those
9 objections for fear some of them should be of some legal
10 efficacy, which is contrary to all possibilities, and prob-
11 abilities, I am asking now a new question.

12 THE COURT. And the other question is withdrawn, is that
13 correct?

14 MR. APPEL. Yes, sir.

15 MR. KEETCH. Was that statement necessary?

16 MR. APPEL. Counsel wants to know if it is necessary. Yes,
17 it is absolutely necessary to disabuse my mind of what was
18 running through it.

19 THE COURT. Let us have the question.

20 MR. APPEL. Q I will ask you this question, quoting now the
21 language of Mr. Franklin found at page 821 of Volume 10,
22 commencing with Line 19: "A--Mr. Davis asked who was there
23 at the time," and he says that "Lockwood came over to ask for
24 a bribe at his office," "I told him that my wife and daughter,
25 I think I said my daughter or son, I am not sure which--"
26 now I am asking you whether he made any such statement to

1 you or not.

2 MR. FREDERICKS' We object to that on the ground no founda-
3 tion has been laid, it is not competent, relevant or
4 material, that it is hearsay.

5 A And I claim a personal--

6 MR. FREDERICKS' Just a moment. Let us take them one at a
7 time, Mr. Davis, please.

8 A All right, sir.

9 MR. FREDERICKS. The court may sustain my objection.

10 MR. FORD. The witness must now be asked by the attorney who
11 is examining him about the date and the persons present and
12 the place.

13 MR. FREDERICKS. Even so, it is not anything that Franklin
14 has denied.

15 THE COURT. The objection of the District Attorney is over-
16 ruled.

17 A Now, your Honor, I claim a personal privilege in that
18 in this regard: That this conversation is not placed in the
19 presence of any third person, it directly concerns a case
20 that is still pending in the court against Mr. Franklin and
21 anything that he might have said to me with reference to
22 that thing is privileged, and notwithstanding what he may have
23 said, I have no right to disclose anything he may have said
24 to me. I don't know whether he said that, what he said, but
25 if he did it would not relieve me.

26 THE COURT. Do you insist on the question?

1 MR. APPEL. You will notice, Mr. Davis, that the only reason
2 why I ask you that is because the witness says himself
3 that his daughter and son were present.

4 A When it occurred?

5 MR. APPEL. yes, when that occurred--

6 MR. FREDERICKS. No, not when the talk between Mr. Davis and
7 Franklin occurred.

8 THE WITNESS. If that is a fact, I will answer the question.

9 MR. FREDERICKS. No, I think the witness misunderstands Mr.
10 Appel.

11 THE COURT. I show the witness my copy of the transcript.
12 (Handing same to witness.)

13 MR. APPEL. No, I do not want to mislead the witness, Mr.
14 Fredericks is right, the witness does not say he told you
15 that in the presence of any one, he says he told you that
16 when Lockwood came there and asked for the bribe, that his
17 son or daughter and his wife were present.

18 THE COURT. Let the witness look at the transcript.

19 A I understand you are perfectly fair, but I do not think,
20 Mr. Appel ought to insist on my answering that question.

21 MR. APPEL. I am not insisting, I am simply asking you the
22 question.

23 A (After reading transcript.) He places it directly
24 between himself and myself and does not place anybody else
25 there, what he may have said with reference to what his
26 wife and daughter said or anybody else would not make any

1 difference in the rule, I do not think, Mr. Appel.

2 MR. APPEL. Very well. I am simply asking you. I suppose
3 the objection is sustained, your Honor, under those condi-
4 tions?

5 THE COURT. No. If you insist upon an answer then the court
6 will rule upon it, whether or not it is the duty of this wit-
7 ness to answer the question. The Court has not ruled
8 upon any of the claims of personal privilege that this
9 witness has made here but will if counsel insists upon an
10 answer.

11 MR. APPEL. Well, your Honor, this is to be followed by other
12 questions and in view of Mr. Franklin's statement I don't
13 think it would be privileged. He says--I will ask you this
14 question just in order to get the ruling of the court.

15 A I don't want, Mr. Appel, to be placed in any position of
16 seeming stubbornness. I hope you don't place me there.

17 Q I will ask you whether or not it was a fact that from the
18 time that you became Mr. Franklin's attorney--

19 MR. FORD. The preceding question I understand is withdrawn?

20 MR. APPEL. I am laying the foundation. I will ask you whe-
21 there or not it is a fact from the time you became Mr.
22 Franklin's attorney in the case against him for bribery, whe-
23 ther it is true that you were acting as a go-between between
24 Mr. Darrow and himself? A I never was.

25 MR. FORD. He has not answered the question before the court.

26 MR. ROGERS. The record stands as it is; we are not obliged to

1 withdraw or put in; the record stands as it is.

2 MR. FORD: It is before your Honor for a ruling then.

3 A I beg your pardon for answering so quickly.

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1 MR APPEL: Did you, during that time or at any time, act
2 under instructions from Mr Darrow, in any way, shape or man-
3 ner, in your dealings with Mr Franklin in that case or in
4 any other case pertaining to matters concerning Mr Dar-
5 row.

6 MR FORD: Objected to as calling for a conclusion of the
7 witness as to the result of whatever may have transpired
8 between them. We are entitled to know what transpired be-
9 tween them, not the witness' conclusion whether he was a
10 go-between, or whether he was acting upon instructions.

11 THE COURT: Objection overruled.

12 A Only with reference to getting the bail back after
13 he was going to plead guilty.

14 MR APPEL: That is, then, you only acted with Mr Darrow
15 with reference to getting the bail money back? A Yes sir.

16 Q That was the only subject upon which you acted for Mr
17 Franklin or Mr Darrow, in connection with Franklin's case,
18 and outside of that you acted on your own responsibility?

19 A My own initiative.

20 MR FORD: I think the record ought to stand as it is. Let
21 them correct it by questions to the witness.

22 MR DARROW: Read it; read Mr Appel's question. (Last
23 question read by the reporter.) A I can see it is mis-
24 leading in respect to that. I acted for Mr Franklin as at-
25 torney right along.

26 MR APPEL: Now, Mr Davis, did you ever say to Franklin or

1 suggest to him that he should say that the money -- he had
2 got the money he had used in the bribery of Lockwood, that
3 he got it from a San Francisco man? A I did not.

4 Q Did Mr Franklin say to you that he got the money from
5 a San Francisco man? A I refuse to answer the question
6 on the ground it is absolutely privileged.

7 THE COURT: You insist on the question?

8 MR APPEL: Here is the situation. I will put it to Mr
9 Davis. All depends on how he takes it. Page 824.

10 MR FORD: If the court please, we object to any argument
11 on the matter, they either insist on asking it or don't.

12 THE COURT: It is a question of personal privilege, I
13 think it is proper.

14 MR APPEL: See if he considers it privileged or not.

15 THE COURT: I think that is quite right.

16 MR APPEL: At page 824, the question was asked of Mr
17 Franklin, line 8, "Did you tell Mr Davis, when he asked
18 you at any conversation or at any place or at any time
19 when he asked you whether you got the money-- where you
20 got the money, that you got it from a Chicago man, but
21 we have corrected that by S.F., San-Francisco, man?"

22 A No sir.

23 Q --You did not? A -No sir, Mr Davis told us that.

24 Q -- Mr Davis told you that? A -- Yes sir. Q -- Now, that
25 is where I want it. A -- Not a Chicago man, but there
26 was a man going between Mr Darrow and myself. Q-- Where

1 was that and when was it, when Mr Davis told you? A --
2 He told me, once or twice, when we were alone and
3 we talked and discussed it, at the time, on the 14th day of
4 January, when Mr Darrow was present. Q -- Once or twice

5 alone. When first alone? A -- I don't remember." A I
6 have answered that portion, Mr Appel, fully, about whether
7 I told him so and whether it occurred at the time when--
8 on the 14th of January, in my office, but whether he ever
9 told me so or not, I refuse to answer on the ground that
10 it is a privileged communication between an attorney and
11 his client. It seems to me you could see when the indict-
12 ment is still pending against him that I should not.

13 Q I will ask you this question: Did he say to you in
14 the presence of Mr Darrow on the 14th day of January, 1912,
15 that he got the money from a San Francisco man or a
16 Chicago man or any words to that effect?

17 MR FORD: Objected to upon the ground it has already been
18 answered.

19 THE COURT: Overruled. A No, he said that Darrow had
20 nothing to do about it, and he said to Colonel Johnston
21 that if he told the truth about it, Mr Ford would not be-
22 lieve it, as to who it was. Now, that was the statement
23 he made in the presence there.

24 MR FORD: Will you read the whole of that answer and see if
25 the witness has got it correct?

26 THE COURT: Have the answer read. (Last answer read.)

1 MR FORD: Was all this before what he said to Colonel
2 Johnston? A On January 14th?

3 Q The very first portion? A Let me understand that
4 question.

5 Q The very first sentence of your answer; I want to know
6 if Franklin said he said to Colonel Johnston or whether
7 it is an independent statement? A It is what he made
8 there in the presence of Mr Darrow as to what he had re-
9 plied to Colonel Johnston when he brought the proposition
10 from you.

11 Q The very first sentence of that answer, if you will
12 just tell us about that. A Well, read the first sen-
13 tence of the answer. (First part of answer read by
14 the reporter.)

15 Q Was that an independent statement or what transpired
16 between Colonel Johnston and him? A That is the state-
17 ment he made in our presence on the 14th day of January,
18 when Colonel Johnston brought him this. He said Darrow had
19 nothing to do with it and he told Colonel Johnston so and
20 if he were to tell you -- he said he told Mr Johnston if
21 he were to tell you the truth about who gave him the money,
22 that you would not believe him.

23 MR APPEL: Now, referring back to the time that you went to
24 see Mr Franklin in Jail on the day of his arrest, did you
25 say to Mr Franklin, "Why didn't you send for somebody," and
26 did he say to you, "I knew somebody would come to my aid

1 sooner or later", or something to that effect? A I never
2 said anything to him like that. What he said to me does
3 not concern this matter at all.

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15s 1 MR. DARROW- The question is not what Franklin said to
2 him but did he say this?

3 MR. APPEL. Q Did Franklin say anything like that to you?

4 A What?

5 Q "I knew that someone would come to my aid sooner or
6 later"? A No, that was not the statement.

7 Q That was not his statement. Mr. Davis, when did you first
8 have any conversation or knowledge that any arrangements
9 were being made or about to be made to bring about a plea
10 of guilty on the part of the McNamaras? A It was some-
11 time in the latter part of November, the day before Mr.
12 Fremont Older came to the City of Los Angeles.

13 Q About how long was that before Mr. Franklin's arrest?

14 A About a week, something like a week before Mr. Franklin was
15 arrested.

16 Q And from whom and where did you first get any knowledge
17 or information concerning that fact? A The first know-
18 ledge that I had from it I got from Captain Fredericks.

19 Q Now, that, you say, was the day before Fremont Older came
20 from San Francisco? A The day before Fremont Older came
21 from San Francisco.

22 Q Now, where was it that you got that information?

23 A At the Captain's office.

24 Q What did Mr. Fredericks say to you at that time? A He
25 said to me, "Why don't you come through and let these boys
26 plead guilty and quit your horse play?" And I said to
him--I thought it was all in fun at the time, I said I was not

1 hired for that purpose and I said they didn't hire me to
2 enter a plea of guilty. He said, "You know you are going to
3 do it, why don't you do it?" I said, "I don't know anything
4 of the kind Captain." Well, he says, "Now, you must know
5 about it because a proposition has been put to me to let
6 them plead guilty," and I said, "By whom?" He said, "Oh,
7 you know all about it." I said, "I don't know all about it."
8 He said, "If you don't they are keeping something away from
9 you and keeping you in the dark, the defense." And I said--
10 "Who?" He said, "Well, there are negotiations going on,
11 a committee is being consulted about it, and I have had a
12 proposition put up to me," and I said, "I don't know any-
13 thing about it, what is it?" And he said that the propo-
14 sition had been put to let both of them plead guilty, one
15 of them to take life and the other one was to take a term of
16 years. I said, "Who is to fix the term of years," and he
17 said, "John McNamara, the court would have to fix it for."
18 I told him I had never heard anything about it. Well, he
19 says, "That is a fact," and he offered to get a piece of
20 paper and show me the terms but he didn't do it, and I went
21 away. Now, that was the day before Mr. Fremont Older came
22 here.

P 23 Q Now, when did you next have any conversation with any one
24 connected with that arrangement with reference to the
25 matter? A I never thought anything about it any more until
26 the next morning or the next day, when Mr. Fremont Older was

1 here. Mr. Darrow, when I went to the office--I don't know
2 whether it was in the forenoon or afternoon, and went into
3 the office, he took me to one side and said, "Mr. Older is
4 here and I want you to come in and have a talk, there are
5 some negotiations on for a settlement of this case."

6 THE COURT. Mr. Darrow took you to one side?

7 A Yes, sir. That was in the office, right adjoining his
8 private office.

9 MR APPEL. Q Well, now, do you remember whether or not
10 that was on the 23rd day of November? A I would not be
11 positive whether it was on the 23rd, but it was the day Mr.
12 Fremont Older came here and it was somewhere along about
13 the 20th, 22nd or 23rd--it was a week before--it was
14 during the week before the arrest of Mr. Franklin and about
15 the middle of the week.

16 Q Now, were you present at the conversation between Mr.
17 Darrow and Mr. Older and Mr. Steffens? A I was.

18 Q And do you remember what, if anything, was said by Mr.
19 Darrow at that time in reference to the responsibility of
20 allowing that plea to be entered? A Yes, I remember what
21 he said.

22 Q State now what was said? A Well, I objected on the
23 ground that I didn't think it was proper without consulta-
24 tion with other people--

25 MR. FRIDBERICKS. We object to the question because it is
26 not clear as to what is meant by "That plea". Now, at this

1 time, of course, that plea might refer to the plea of both
2 of them or it might refer to the plea of one of them.

3 MR. APPEL. We will develop it.

4 THE COURT. The witness has just defined what he meant by
5 it and has referred to the plea and counsel says, "That
6 plea", and I suppose it is the one he is referring to.

7 MR. FORD. The first plea with reference to Captain Freder-
8 icks in which he says both were to plead guilty.

9 THE COURT. That is the plea the court assumes he refers
10 to in this question.

11 MR. FREDERICKS. That is the time I am calling the attention
12 of the court and the witness to, in order that the witness
13 may know--

14 MR. APPEL. We will show what is meant by it, the whole
15 thing will be explained.

16 THE COURT. The whole thing is clear.

17 MR. FREDERICKS. It is not clear, according to my idea of
18 the facts.

19 MR. APPEL. Q Just state what was said there by Mr. Darrow
20 and all of you.

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1 A Well, I went into the room with Mr Older and Mr Dar-
2 row and Mr Steffens and Mr Darrow began to explain to Mr
3 Older -- it was new to me also, -- that Mr Steffens had
4 been negotiating with a committee, and my recollection
5 now is that Mr Lissner, Mr Earl and Mr Gibbon and somebody
6 else, and that he had made an arrangement with that com-
7 mittee that Jim McNamara, J. B., should enter a plea of
8 guilty and take life, and that there should be no prose-
9 cution of John McNamara or anyone else concerned with the
10 case. I then spoke up and said to them I didn't believe
11 that arrangement could ever be entered into, from what
12 Captain Fredericks had said to me on the day before, and
13 I told them that Captain Fredericks, too, had an entirely
14 different idea of the proposition, from what Mr Steffens
15 had said about it, and Steffens spoke up and said, "There
16 is no question about it", and he pulled out a little piece
17 of paper, and he says, "This is what the committee gave
18 me themselves; that that would be satisfactory", and upon
19 that was two or three or four lines, I cannot repeat the
20 words, but in there, the substance of it was that J. B.
21 was to plead guilty and take life and that there would
22 be no prosecutions of any other kind instituted or pro-
23 ceeded with, that had been instituted.

24 Q Now, what was said about whether those arrangements
25 could be carried out and who should take the responsibil-
26 ity of doing it? A I said myself, I didn't believe it

1 should be allowed to enter a plea of guilty without some
2 consultation with the other people.

3 Q What other people? A Well, with the men who were
4 paying the money for the defense, and Mr Darrow said that
5 he considered that his first interests were to the clients
6 themselves, and I said I thought we owed another inter-
7 est to someone else, and I said to him, "Mr Darrow, it
8 would be the worst thing for you that could happen",
9 that it would ruin him with the labor organizations
10 throughout the United States, and I said, "not taking
11 into consideration anybody else but yourself, I feel in-
12 clined to object to entering into an agreement without
13 consultation about it", and he said, "I am willing to take
14 the responsibility, I am willing to shoulder the burden
15 with labor, and if anybody suffers by it it will be me,
16 not you", and I said, "Mr Darrow, you are leading counsel
17 in the case, and I will have to submit to what you say,
18 but I think you better think it over and consult with
19 somebody else except the boys."

20 Q What did you mean by the "boys"? A J. B. and John
21 McNamara.

22 Q What did Judge McNutt say about it while you were
23 there? A Judge McNutt came into the conversation shortly
24 after wards, and he entirely agreed with Mr Darrow, and
25 I entirely disagreed with him at that time.

26 Q When were you next consulted about the matter? A I

1 was not consulted about it any more until Sunday night, but
2 I knew of the negotiations that were going on with Mr Dar-
3 row and Mr Steffens and Judge McNutt, by just hearing Mr
4 Steffens say he had talked with so and so and reported.

5 Q Now, what happened on Sunday night? A What happened
6 on Sunday night?

7 Q Yes. A Well, Sunday night my telephone rang and
8 Judge McNutt -- I answered the phone, and Judge McNutt
9 said "Is this Mr Davis?" I answered it was, and he
10 calls, "Is this Le Compte?" I said, "Yes", and he said,
11 "I want you to come over to my house immediately, Mr Dar-
12 row has had to go away to make some address of some kind,
13 and he wanted me to see you and to have a conference with
14 you about what we had done today", so I went over to Judge
15 McNutt's house on Sunday night.

16 Q What were you informed there?

17 MR FREDERICKS: We object to the conversation between
18 Judge McNutt and Mr Davis as being hearsay.

19 MR APPEL: We propose to show, your Honor, that Judge McNutt
20 was then acting in entire accord with Mr Darrow's instruc-
21 tions and understanding, and that we want to follow from
22 that what Mr Davis was requested to do and what he did do
23 in the matter.

24 MR FORD: There is no foundation laid as to persons pre-
25 sent.

26 MR APPEL: I don't care for the persons present, he says

1 Judge McNutt and he.

2 MR FORD: If there is any other person present --

3 MR APPEL: Yes, there might have been the servant girl
4 in the kitchen.

5 A Nobody else was present at all.

6 THE COURT: He says that nobody else was present. Ob-
7 jection overruled.

8 A Judge McNutt says, "Now, we had a conference with the
9 boys today in the county jail; we couldn't get you; we
10 telephoned for you two or three times before we went
11 there, and we couldn't catch you, and we left word for
12 you to come to the county jail, and we had a conversa-
13 tion with the boys with reference to this plea of
14 guilty", and I said, "Have you agreed upon the terms
15 with Captain Fredericks any more definite than had been?"
16 Well, he says, "According to the returns of Mr Steffens we
17 have, but", he said, "we made arrangements in either
18 event". And I said, "What did you do?"

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17p 1 He said, "We had a talk with them and J. B. McNamara con-
2 sented to enter a plea of guilty and take life, but" that
3 J. B. would not consent to John entering a plea of guilty and
4 take anything and" he said, "we had a conversation with
5 John McNamara himself where John McNamara said that he would
6 plead guilty and take a term of years not to exceed ten
7 years and that if J.B. would not consent to it, let J.B.
8 receive his sentence and he, John, would then come in and
9 enter a plea of guilty and take his sentence and go to the
10 penitentiary and be satisfied with 10 years." Now, he said,
11 "We do not think from what Mr. Steffensesaid that he will
12 have to enter any plea of guilty at all, we do not think
13 he will have to accept any years, but if what Captain
14 Fredericks said to you is true and is insisted upon that
15 John will take his ten years and go to the penitentiary"and
16 he said, "that is the agreement between Mr. Darrow and myself
17 and the boys," and he says, "I don't think you have any
18 right to stand out against an agreement of that kind," and I
19 said, "Did you ask the boys whether it would be satisfactory
20 to labor?" and he said, "We did and they said it would be
21 satisfactory and they would explain the matter satisfac-
22 torily." I said, "Under that statement, if that is true, I
23 am willing that they may enter a plea of guilty."

24 Q What did you do the next day with reference to that mat-

25 ter? A The next day?

26 Q Yes, sir. A Monday?

1 Q At whose request? A I went up to see Captain Fredericks
2 about it.

3 Q At whose request? A On Monday, myself, on the suggestion
4 of Mr. parrow and Judge McNutt, then I took up and said
5 "What was that proposition?"

6 Q Monday, in the morning did you go up? A I don't know
7 whether it was noon or whether it was in the afternoon or
8 what time it was.

9 Q You went on Monday morning? A I went up there sometime
10 and I said, "What was this proposition you told me that had
11 been made to you?" and he related the same proposition, and
12 I said, "The boys never would plead guilty and let the
13 judge fix the sentence of John unless they knew the Judge's
14 idea as to what that sentence would be."

15 Q When he said that he told to you the same proposition he
16 had stated before, what was that? A That Jim would have
17 to take life and J.J. would have to take a term of years, and
18 that the judge would have to fix it.

19 Q What did you say to that? A I said that I didn't think
20 we could ever get the boys to consent to that arrangement
21 and I said, "What is your idea of a term of years?" And he
22 finally said, "Ten years," that he would be satisfied with
23 ten years.

24 Q What did you say--

25 MR. FREDERICKS. On Monday?

26 A That was on Monday, Captain.

1 MR. APPEL. Q Well, what did you say? A I said, "I will
2 see what I can do with the boys with reference to it."

3 Q You knew before hand that they had agreed to ten years?

4 A I knew what they had agreed to do, but we were trying
5 to get the best terms we could with reference to the matter.

6 Q Yes, sir. A I was trying to get the very best terms
7 and, if possible, to get John off, and Captain--he said that
8 he would not consider letting him go at all and he says,

9 "There is no use of your talking to me about him going free,

10 John", and he said he had received some information from the

11 east that would not be satisfactory and there was no use

12 talking about it under any circumstances, so I left him,

13 saying that I would see what I could do with reference to

14 getting the boys to take a sentence of ten years and the

15 Captain said they would have to plead guilty at the same

16 time. I knew that there would be difficulty to bring

17 J. B. to consent to John pleading guilty at that time.

18 Q Mr. Davis, are you sure at that time Mr. Fredericks on

19 Monday stated to you that they would have to plead guilty

20 at the same time? A My recollection is that he said so at

21 that time and so I reported back.

22 Q Now, wasn't that on Wednesday? A Yes, that was on Wednes-

23 day when he said it would have to be at the same time. He

24 said at that time, "have to take the ten years," and I said

25 "I will see what we can do with the boys."

26 Q Now, what did you say to him then about delaying

1 the plea? A I never said anything at that time.

2 Q Now, what did you do then after that? A I reported
3 back to Judge McNutt and Mr. parrow just exactly what the
4 Captain said.

5 Q Did you then say to Mr. McNutt and Mr. Darrow and Mr.
6 Steffens being present, that Mr. Fredericks would be satis-
7 fied with a plea on the part of J. J. of guilty, with a
8 sentence of ten years, and the other one with a plea of
9 guilty with a life term imprisonment sentence? A I reported
10 that Captain Fredericks said J.B. would have to take life
11 and J.J. would have to take at least 10 years.

12 Q And what did all those persons then say? A They said
13 that was the only thing to do under the circumstances, and
14 that they would accept the proposition themselves and take
15 it up the next morning.

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1 Q Take it up the next morning? A Yes sir.

2 Q What did you say? A I said, all right. I was to re-
3 port back the next morning.

4 Q Report to who? A Until in the evening late, we held
5 a consultation about it. I was to report to Captain Fred-
6 ericks next morning, that will be Tuesday morning. *see 21*

7 Q Now, the next morning -- now, what was J. J. to plead
8 guilty to, if you remember? A He was to plead guilty --
9 I don't know whether at that time it had been agreed which,
10 but my understanding -- I believe it was at that time or
11 subsequently agreed he was to plead guilty in the Llewellyn
12 case.

13 Q Your answer is at that time or subsequently? A At
14 that time or subsequently it was agreed -- I don't know
15 whether it was at that time or at a subsequent date.

16 MR APPEL: Now, on that Monday, you say the consultation
17 lasted until late that night. Now, after they all agree-
18 ing, as you have said, with such a plea as that, and such
19 a term of imprisonment should be accepted, was there any-
20 thing said about any further efforts to get better terms?

21 A I was to take it up next morning or next day with
22 the Captain and see if we couldn't get any better terms
23 still, if we couldn't, then to accept those terms.

24 Q Now, what did Steffens do? A What did he do about
25 what?

26 Q What did he do? A He was to see the committee and

1 have a talk with them, and I reported to the second conversa-
2 tion, that Captain still said that, and Mr Steffens pro-
3 duced this paper showing -- he said, "I assure you upon my
4 Honor, that this was given by me ", and I think he said,
5 Mr Lissner, but I know by one of the committee, "and that
6 is all they demand. Well, I said, "That is not all that
7 the Captain demands," and I insisted that they send one
8 of the committee to see Captain, and they said they would
9 get Mr Harry Chandler to do it, whether they ever did or
10 not, I don't know.

11 Q Now, you were to report back to Mr Fredericks the next
12 day, Tuesday morning? A Yes sir.

13 Q And you were at the same time, to try to get, if pos-
14 sible, better terms? A Better terms, if not get five
15 years, if possible.

16 Q But you had in your mind then that if no better terms
17 could be obtained, that plea, as arranged, and passed by
18 Mr Fredericks, should be entered? A There was no question
19 about it.

20 Q Now, that was the condition of -- well, that was in
21 your mind on Monday night? A Tuesday morning, too.

22 Q Tuesday morning, too. Now, on Tuesday morning, what
23 did you do? A On Tuesday morning, the arrest of Mr Frank-
24 lin occurred, and I stated to Mr Darrow and Judge McNutt,
25 "It is all off". I said, "Nobody will take a plea of
26 guilty after this has occurred." And we had consultation

1 and consultation, and talked about it, and finally Mr
2 Steffens came around in the afternoon or late in the even-
3 ing and said that the committee said it would make no dif-
4 ference, that they had talked with Mr Harry Chandler and
5 the others, and they said it would make no difference, and
6 they said then that I must take it up with the Captain
7 the next morning.

8 Q That was on Wednesday? A On Wednesday. And so I
9 went to the Captain. I said, "Captain, does it still go
10 what you told me, or is it all off?" And he says, "That
11 if they plead guilty, take life for one and ten years,
12 it can go through just the same." Q-That was on Wednesday.

13 A That was on Wednesday.

14 Q Well, what did you say to him? A I told him that I
15 would do it, of course. I would go and report it back
16 that we would do it, and to let us have a chance, then --
17 then is when I said to him about the difficulty of bring-
18 ing Jim to consent to John taking any sentence. He said,
19 "They both got to plead guilty at the same time." Then,
20 I said, "If they do, we have got to have a talk with them
21 and talk with Jim about it." He said, "Well, you have to mor-
22 row -- tomorrow is Thanksgiving day and you can have all
23 day to talk it over with him, if you want to, and I am
24 going out to the golf club, and you can phone me at my
25 home tonight, or Thanksgiving night, and let me know."

26 Q What did you do on Thanksgiving day? A I went over

1 for the first time to talk with the boys about their plea
2 of guilty.

3 Q Well, whatever happened there, was it finally agreed
4 that plea -- that they should both plead guilty together?

5 A Why, Jim first said that he would plead guilty himself,
6 but he would never consent to John pleading guilty, and
7 they talked with him and then I took him off to one side,
8 and I said, "Do you want to be hung?" and he said, "I
9 don't care whether I am hung or not", he said, "it is a mat
10 ter of indifference to me, but I will never consent to my
11 brother John taking a year." Then I said, "Do you want
12 your brother hung, too?" I said, "It looks like that
13 to me; you want to hang your brother, too".

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1 With that he began to cry and he finally said, "Bring John
2 in." And brought John in and I stayed there talking with
3 him and the others did, and Jim said, "Well, under those
4 circumstances it is the best I can do, go ahead and do it."

5 Q They agreed then to plead together? A They agreed then
6 to plead together.

7 Q Did you report that to Captain Fredericks? A I reported
8 to him Thursday night when he came home that we would enter
9 a plea of guilty, take ten years for John and take life
10 for J. B. and he said--I said, "Now, will you assure us that
11 is all he will get?" He said, "I will assure you tomorrow
12 morning and what I tell you then you can rely on." He
13 said, "I think there will be no difficulty about the ten
14 years." The next morning I went to see him--

15 Q That was Friday? A Friday morning, when it was to come
16 up at 10 o'clock, and he told me, he says, "I will have to
17 change," he says, "It will have to be 15 years." He
18 says, "I can't make it 10 years," says, "15 years would not
19 mean quite 10 years of actual service." I said, "That was
20 not what we understood." Well, he says, "I am not to
21 blame." I said, "I am satisfied of that, Captain, but"
22 I said, "It makes a different change in the situation, and
23 I will have to talk with the boys again." "We had diffi-
24 culty to get Jim to consent to that," and then the matter
25 was continued over until 2 o'clock, and at another talk
26 we finally consented to 15 years.

1 Q The plea was not entered in the morning on account of
2 that change? A On account of that change.

3 Q And it was postponed to come off at 2 o'clock in the
4 afternoon? A 2 o'clock in the afternoon is my recollection
5 of the hour.

6 Q Between the morning and 2 o'clock the McNamara boys
7 agreed to this modification? A They agreed to the modi-
8 fication.

9 Q And they came in and plead guilty that afternoon?

10 A Plead guilty that afternoon.

11 Q In accordance with the modification and the request of
12 the District Attorney? A With that understanding that
13 it was to be 15 years and the other, but they were not
14 sentenced at that time. I tried to induce Captain Freder-
15 icks to have them sentenced on the same day but he said,
16 "No," it would have to go over. ✓

17 MR. APPEL. We ask your Honor for an adjournment at this
18 time.

19 THE COURT. Yes, it is 5 o'clock. (Jury admonished.
20 recess until July 26, 1912.) Just a moment, call the
21 court to order. The witness has requested the court to
22 convene a little earlier tomorrow morning in order to
23 accommodate him because of his professional duties.

24 MR. DAVIS. I will state this, unless Captain says he is
25 going to take more than half a day, then if he does I don't
26 care to come before 10. If by coming at half past nine we

1 could get through at 12 o'clock, it will be a great favor
2 to me and I know to the court, because this is the second
3 time they have adjourned on my account.

4 MR. FREDERICKS. Well, if--have you any further questions?

5 MR. APPEL. A few.

6 MR. FREDERICKS. I doubt if we can get through. If I find
7 when it comes to 12 o'clock that half an hour would put
8 us through then we can take that half hour after 12, but
9 I doubt if it will do any good.

10 THE COURT. Very well, the order of arjournment stands.

11 (Adjourned to 10 A.M. July 26, 1912.)

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