

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.

---o---

The People of the State of California,)

Plaintiff,)

vs.)

No. 7373.

Clarence Darrow,)

)

Defendant.)

---o---

REPORTERS' TRANSCRIPT.

VOL. 71

I N D E X.

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

Dr. Isaac Saylin 5758

Dr. R. Wernigk, 5762

J. J. Petermichel, 5770

W. J. Ford, 5824
5877

Horace Appel 5830

Clarence S. Darrow, 5884

**LOS ANGELES COUNTY
LAW LIBRARY**

B. N. Smith,
Official Reporter

scanned by LALAWLIBRARY

1 Monday, July 29, 1912. 10 o'clock A.M.

2 Defendant in court with counsel. Jury called; one ab-
3 sent.

4 THE COURT: Gentlemen, in regard to the absence of Juror
5 Leavitt, the deputy sheriff in charge of the jury informed
6 me on Saturday afternoon Juror Leavitt had been taken
7 sick and had another spell Friday night. I thereupon at-
8 tempted to communicate with Dr Beckett, but was unable
9 to do so, to make arrangements with him, but did reach Dr
10 Wernigk. Dr Wernigk and I made a trip to the juror's home
11 yesterday morning and there met Dr Saylin, the family
12 physician; both of those doctors are in court this morning,
13 and I am going to call them to the stand to state the
14 facts in regard to the juror's condition. Dr Saylin, will
15 you take the stand first, please.

16
17 DR ISAAC SAYLIN, a witness being first duly
18 sworn, testified as follows:

19 THE COURT: I will ask the witness a few questions, gen-
20 tlemen, and if you desire to further interrogate him, you
21 may do so. Your name is Dr Isaac Saylin of El Monte,
22 I believe? A Yes sir.

23 Q And you are a regular practicing physician and surgeon
24 of this county? A Yes sir.

25 Q And licensed to practice by this state? A Yes sir.

26 Q You have been acting as family physician for juror

1 Leavitt, near El Monte, have you not? A Yes sir.

2 Q And will you state to the court the history of his
3 present ailment and his present ailment as you have observ-
4 ed it and diagnosed it? A The ailment of Mr Leavitt is
5 just a simple case of appendicitis. He has had three at-
6 tacks or four attacks, and his last attack is such as to
7 preclude any possibility of him leaving his bed for some-
8 time, and it makes an operation almost imperative. I
9 have advised an operation, and probably he will be oper-
10 ated on today.

11 THE COURT: Any questions?

12 MR FREDERICKS: How long have you known Mr Leavitt, Doc-
13 tor? A For three years.

14 Q How long have you -- did you ever attend him before?

15 A Yes.

16 Q In other illnesses? A Yes.

17 Q Of this nature? A No, not of this nature.

18 Q When was he first taken sick this last time since
19 court Friday? A I was called Friday evening sometime
20 between 8 and 9 o'clock.

21 Q To his home? A To his home.

22 Q He was at home. And then what symptoms did you find?

23 A The usual symptoms in these cases. There is very se-
24 vere pain and great rigidity over the region of the
25 appendix, and some fever, quite a pulse. These symptoms
26 sometimes subside, but that doesn't mean that the case is

1 ready to be dismissed from the physician's observation
2 and care. Sometimes it winds up into an abscess. At any
3 rate, the patient should be kept under observation. How-
4 ever, under all conditions, the appendix is better out
5 than in. You can never tell when it will become explo-
6 sive, and the patient will have to be rushed to the hospi-
7 tal.

8 Q How does his condition last Friday, compare with his
9 condition on the previous Friday? A It was much more severe

10 Q But was it the same thing? A Oh, yes -- well, it
11 was more distinct. It was easy to recognize it. There
12 was some obscure symptoms the previous attack, but this
13 last attack was very plain.

14 Q To what school of physicians do you belong, Doctor?

15 A I am regular.

16 Q Graduate of what institution? A University of Buffa-
17 lo, New York.

18 Q And how long have you been practicing? A About 13
19 years -- 14 years.

20 Q How long have you been practicing here? A Oh, probably
21 about eight years.

22 Q Always at El Monte? A No.

23 Q Where else? A I have been identified with the Santa
24 Fe work for a time in Los Angeles; then I took charge of
25 the work at Albuquerque, New Mexico, and then came back
26 to Los Angeles, and finally settled in El Monte, opening a

1 hospital.

2 Q You have a hospital at El Monte? A I have a hospital
3 at El Monte.

4 Q Do you remember what his temperature and pulse were
5 Friday? A Yes sir, his temperature was 101 and his pulse
6 was 100, at 5 o'clock.

7 Q Were you there when Dr Wernigk was there? A Yes-
8 terday morning.

9 Q How was his pulse and temperature then? A His pulse
10 had subsided in frequency; it was about 80; his temper-
11 ature was 99.2.

12 Q That wasn't very different from normal, was it?

13 A Oh, yes, that is different from normal.

14 Q What is your opinion about whether he would be able
15 to sit as a juror in this case? A Whether he would be
16 able what?

17 Q To sit as a juror in this case? A Well, I don't
18 think that he will -- he ought ^{not} to be permitted to get
19 out of bed until he has had that operation performed on
20 him, and in that event, it might take weeks. We never
21 can tell what we are running up against in opening up the
22 abdomen. If it is a clean case, he may be all right in
23 the course of two weeks, then, it would be a question of
24 whether he would be able to resume his duties here, and
25 again it might be weeks, possibly six weeks or longer, if
26 we have to drain the abdominal cavity, if there should be
an abscess there.

2p 1 MR. FREDERICKS. That is all.

2 THE COURT. Any questions, Mr. Rogers?

3 MR. ROGERS. Doctor, you found physical symptoms, did you,
4 of the existence of appendicitis? A Yes, sir.

5 Q Rigidity and tenderness and accelerated pulse and
6 increased temperature? A Yes, sir.

7 MR. ROGERS. That is all.

8 THE COURT. That is all.

9

10 DR. R. WERNIGK,

11 a witness called, being first duly sworn, testified as
12 follows:

13 THE COURT. Q State your full name, please? A R. Wernigk.

14 Q You are a regularly licensed practicing physician and
15 surgeon in this city and county and state? A Yes, sir.
16 been

17 Q Have you[^] for some years? A I have been here for 25
18 years.

19 Q Yesterday morning you made an official visit with me to
20 the home of Juror L. A. Leavitt at El Monte. Will you state
21 the condition in which you found the juror and your diag-
22 nosis of his condition? A I found the juror in bed and
23 he is evidently suffering from catarrh of the appendicitis,
24 an attack--there was tenderness and a good deal of rigidity
25 over the region of the appendix, his temperature was
26 slightly above normal, his pulse did not indicate anything
under the circumstances. He told me that he had been

1 coming all day before and from the history that I got
2 from Doctor Saylen and the patient, why, it just simply
3 confirmed my diagnosis; he is subject to catarrhal attacks
4 of appendicitis which may at times, at some time or other
5 become quite serious.

6 MR. FREDERICKS. Q What do you think of his ability to go
7 on with his work here tomorrow? A I advised against it.
8 I would not go myself. If I were in the same fix I would
9 not.

10 Q You do not think it would be safe, eh? A I think
11 he would be taking great chances. It might turn out all
12 right, I would certainly advise against it and I would
13 not certainly go myself.

14 MR. ROGERS. Q Dr. Wernigk, you found physical symptoms
15 indicating these symptoms? A Rigidity and tenderness--

16 Q Rigidity and tenderness, and the pulse would not
17 indicate much and the temperature might not indicate much?

18 A Of course, a little temperature, you can have it under
19 all kind of circumstances, but the rigidity and tenderness
20 and the history undoubtedly points to it.

21 Q You think it would not be fair to him to come down and
22 sit here? A I do not think it would be right.

23 MR. ROGERS. That is all.

24 THE COURT. That is all; unless counsel desire to be heard
25 the court will make an order pursuant to the last clause of
26 Section 1089 of the Penal Code.

1 MR. FREDERICKS. It is a matter for the court to determine.

2 THE COURT. It appears to the court, from the testimony of
3 Dr. Isaac Saylen and Dr. R. Wernigk, who have examined
4 Juror L A Leavitt, that the juror is ill, afflicted with
5 appendicitis and unable to perform his duty in this court,
6 the court therefore orders him to be discharged and draws the
7 name of the one alternate juror who was selected, Mr.

8 Blakesly. What are your initials, Mr. Blakesley?

9 MR. BLAKESLY. A. M. Blakesly.

10 THE COURT. A. M. Blakesly, and calls upon the said alter-
11 nate, Mr. A. M. Blakesly, to take the place of Mr. Leavitt
12 in the jury box and be subject to the same rules and regula-
13 tions as though he had been selected as one of the original
14 jurors, and orders that the trial proceed before the 12
15 jurors as now constituted. Call your next witness.

16 MR. ROGERS. If your Honor pleases, pursuant to provisions
17 of Section 1000 of the Code of Civil Procedure, and in com-
18 pliance therewith the defendant now moves your Honor to order
19 the District Attorney and the prosecution in this case within
20 a specified time, to wit, as soon as the circumstances will
21 permit, and before the defendant Darrow takes the stand, to
22 give to the defendant an inspection of the copy or permis-
23 sion to take a copy of all letters in their possession,
24 memoranda or documents, telegrams, or entries or books or
25 papers purporting to or claiming to be either in the hand-
26 writing of or signed by the defendant Darrow, and the same

1 permission to inspect a copy or take a copy of all documents
2 purporting to be addressed to or to have come to the
3 knowledge or claimed to be addressed to or come to the
4 knowledge of the defendant Darrow, the same being, if evidence
5 is required to that effect, in the possession of or under
6 the control of the District Attorney, which said documents
7 contain evidence relating to the merits of the action or
8 the defense therein. I understand, if your Honor please,
9 and it is claimed that within the control of the prosecu-
10 tion and now in their possession--

11 MR. FORD. Claimed by you?

12 MR. ROGERS. Is that a question?

13 MR. FORD. I beg your pardon, you said it is claimed. I don't
14 know claimed by whom?

15 MR. ROGERS. It is claimed by us and sundry newspaper
16 pronouncements attributed to the District Attorney's office
17 that they have documents signed by Mr. Darrow and docu-
18 ments which came to his knowledge or to his observation
19 relating to the merits of this action and some relating
20 to the defense thereof, before Mr. Darrow takes the stand
21 I ask a compliance with the requirements of Section 1000
22 to enable us to examine our witnesses therefrom, and for the
23 purpose of producing substantive evidence in this case on
24 behalf of the defendant. I take it your Honor is familiar--
25 THE COURT. Let me have my copy of the section, I would
26 like to read it over first.

1 MR. ROGERS. Yes, sir. The matter of notice, if your
2 Honor pleases, is only a requirement that sufficient time to
3 comply with the order shall be given.

4 MR. FORD. This, briefly is that the notice is not suffi-
5 cient, your Honor.

6 THE COURT. I will hear you in a moment, as soon as I read
7 the section. Now, Mr. Ford, I will hear you if you want to
8 be heard.

9 MR. FORD. I call your attention to State vs. Merritt,
10 100 Pacific, page 637: "Documents of the State's Attorney,
11 the defendant has no right to see." As I understand it,
12 this is confined merely to telegrams?

13 MR. ROGERS. You have a very wrong apprehension of the request
14 I said letters, documents, papers.

15

16

17

18

19

20

21

22

23

24

25

26

1 whether signed by him, memorandum whether signed by him,
2 claimed to come to his knowledge or in his handwriting,
3 or purporting to be by his authority. The 100 Pacific
4 holds only that documents of certain nature cannot be call-
5 ed for.

6 MR FORD: In case of Morrison vs. State, your Honor, in the
7 51st S. W. Rep. page 358, and there is one in the 40th Tex.
8 criminal, page 473, it was held the accused was not entitled
9 to an inspection of his own letters before trial, and argu-
10 ing merely the proposition of law, held that it was not
11 applicable to criminal cases, but was a case between par-
12 ties to a civil action, and they are making a demand ^{not} upon
13 one of the parties in this case, but upon the District
14 Attorney, who is merely counsel for the prosecution, and
15 further than that, your Honor, the notice is not sufficient
16 there as to time or particularity. They must describe
17 the documents which they desire ~~an~~ inspection of, and if
18 the People refuse to give them an inspection of those docu-
19 ments, then two courses are open to them: one of them to
20 excuse the People from putting the document in and the other
21 to compel the court and jury to accept the document in the
22 form they claim that they exist. Take their statement
23 as to their contents as evidence, but in either event, the
24 application belongs entirely to a civil case, and not a
25 criminal case, and the notice itself, is not sufficient,
26 and I have not the authorities here at hand -- we would

1 like about 15 or 20 minutes to present authorities on
2 this -- I mean a recess of 15 or 20 minutes to gather our
3 authorities.

4 MR ROGERS: If the court desires evidence upon the propo-
5 sition, I will call Mr Ford. Please take the stand.

6 THE COURT: Just a moment. It is not a question of evi-
7 dence -- Mr Ford has asked for time in which to prepare
8 authorities. Now, we will have to take a little recess
9 a little later. Have you a short witness you can produce
10 at this time?

11 MR ROGERS: I can, but that matter -- I purpose to call a
12 witness, one very short witness, but I think that will
13 divert us into another matter where counsel will doubt-
14 less have some argument to make, and I don't think they
15 will be looking up authorities while we consider that.
16 However, I will call Mr Petermichel, if your Honor desires
17 me to. That will raise another important matter.

18 MR FORD: What is that, an inquiry into the grand jury
19 minutes?

20 THE COURT: Counsel will show that when it comes up. I
21 think you better take this matter up again at 2 o'clock
22 this afternoon. In the meantime counsel will have a
23 chance to get his authorities together, and consider the
24 application, and unless counsel desires a ruling at once
25 the court will rule upon the matter at 2 o'clock. If you
26 insist upon a ruling at this time, we will go into the mat-

1 ter at this time.

2 MR APPEL: Your Honor, allow me a suggestion.

3 THE COURT: It is only a matter of saving time.

4 MR APPEL: That is just exactly what we wish to do. We
5 wish to present our right to these documents, that is,
6 for the purpose of enabling us to hasten the examination
7 of Mr Darrow.

8 THE COURT: I will do better, then. I will take the mat-
9 ter up after the regular morning recess. In the mean-
10 time, somebody from the District Attorney's office can
11 be preparing and looking up the authorities.

12 MR APPEL: The other matter, your Honor, is also a mat-
13 ter which will probably -- that is, the next matter after
14 this will probably be a matter which will consume, in
15 all probability, just as much time as this question, and
16 if we put the other matter on it would not give them any
17 advantage, as far as time is concerned.

18 MR FORD: I think the law covers both matters and is
19 practically the same. In arguing one matter, we will argue
20 the law covering the other matter.

21 MR FREDERICKS: It would be well that we would have notice
22 of these points when they are coming up. We can work nights
23 on them and not have to have them brought to our at-
24 tention at 10 o'clock.

25 MR ROGERS: I spoke to Judge Hutton about taking it up
26 yesterday morning, and making the application in court --

1 I mean Saturday morning, I beg your pardon -- Judge Hut-
2 ton indicated that the situation was such that he could
3 not be here, and Judge Willis had not yet returned --
4 you remember your Honor directed me to apply to Judge
5 Willis. Judge Willis had not yet returned from Imperial,
6 so I was not able to present the matter on Saturday morning.
7 I am going to demand an inspection, when the documents are
8 right here in court.

9 MR FORD: You wanted to do it right in front of the jury.

10 THE COURT: No, no; there is no occasion -- this is a cold-
11 blooded proposition of law, that the defendant is entitled
12 to or he is not, irrespective of what anybody thinks
13 about it. I think, in order to save time, that the court
14 will accept Mr Rogers' offer to put on Mr Petermichel at
15 this time, and take up this other matter at the close of
16 the forenoon recess.

17 MR FORD: I think the putting on of Mr Petermichel is go-
18 ing to involve the same proposition.

19 MR FREDERICKS: We will have the information then what
20 to look up.

21
22 J. J. PETERMICHEL, a witness called on be-
23 half of the defense, being first duly sworn, testified
24 as follows:

25 DIRECT EXAMINATION

26 MR ROGERS: Your name, please. A J. J. Petermichel.

1 Q What is your occupation? A Official reporter in the
2 Superior Court, Los Angeles County, State of California.

3 Q You have been official reporter attending upon the
4 grand jury in the taking of testimony? A In some por-
5 tions of it, yes sir.

6 Q Did you take the testimony of O. A. Tveitmo before
7 the grand jury?

8 MR FORD: We object to that as incompetent, irrelevant
9 and immaterial, and an attempt to get into their possession
10 a copy of the statements made by the witness before the
11 grand jury, which, under the law, they are not entitled
12 to.

13 THE COURT: This is only a preliminary question; to bring
14 it up squarely, he might answer that question yes or no;
15 then I will hear you on the next question. Answer that
16 question yes or no, Mr Petermichel? A I did, yes sir.

17 MR ROGERS: Did you transcribe the testimony of O. A. Tveitmo
18 as taken by yourself, as you have described, before the
19 grand jury?

20 MR FORD: Now, if the court please.

21 THE COURT: That is also preliminary. He can answer
22 that yes or no. A I did, yes sir.

23 MR ROGERS: Have you a copy of it in your possession at
24 this time, upon the stand? A I have.

25 MR ROGERS: Let me have it.

26 MR FORD: We object to any transcript being handed to

1 counsel of the proceedings before the grand jury, and
2 furthermore, your Honor, I don't believe things of this
3 sort should be written up without notice to the grand
4 jury -- without notice to the District Attorney, what is
5 occurring before that grand jury.

6 THE COURT: That is a matter to be taken up some other
7 place. I will hear you on your objection only.

8 MR FORD: Under the case of People vs --

9 MR ROGERS: Just a moment, before the whole matter is ar-
10 gued, I desire to make one further inquiry. The testimony
11 of O. A. Tveitmoe, which was taken before the grand jury,
12 state whether or not you gave a transcription thereof, a
13 copy thereof, to the District Attorney? A I did.

14 I gave the original to the District Attorney.

15 Q That is the original transcription? A Yes sir.

16 Q How long ago?

17 MR FORD: We object to that. The law provides that it
18 should be delivered to the District Attorney.

19 THE COURT: Overruled.

20 A I couldn't say definitely, Mr Rogers. Within a
21 few days after the testimony was taken, probably a week.

22 MR ROGERS: At what time was the testimony taken? A Feb-
23 ruary 16th of this year.

24 Q It was in this case, was it not?

25 MR FORD: Objected to upon the ground it is calling for
26 the conclusion of the witness, and your Honor has already

1 decided that matter.

2 THE COURT: Objection sustained.

3 MR FORD: The testimony of Mr Tveitmoe having been taken
4 after the indictment was returned in this case.

5 MR ROGERS: Exception. I desire to show, if your Honor
6 please -- it was in relation, was it not, to the matter
7 now under investigation in this case?

8 MR FORD: We object to that as calling for a conclusion
9 of the witness, and an attempt to get at the subject mat-
10 ter of the testimony, which is absolutely improper, incom-
11 petent, irrelevant and immaterial, and the very matter
12 I desire to argue at this time, that they have no right
13 to inquire into the nature of the testimony or anything
14 about the substance of the testimony.

15 THE COURT: The objection that it calls for a conclusion
16 is sustained.

17 MR ROGERS: I ask for an adjournment in order that I may
18 produce it and show that the testimony itself related to
19 the very issues and subject of the matter now pending be-
20 fore this jury. If your Honor will listen to me just a
21 moment, I think you will get the view of it that will show
22 positively the aspect of things, somewhat. We desire to
23 show, under the provision of the code, that where testi-
24 mony is within the power of the party to produce, and he
25 doesn't produce it, it is under instruction of the court
26 to the jury to be deemed to be against him. Now, they

1 called Mr Tveitmoe to the stand, according to the record,
2 and they asked him to come to the stand as their witness;
3 they swore him; asked him his name; asked him his address,
4 and then excused him, in their case. Now, they will at-
5 tempt to argue to this jury that we should have called
6 Tveitmoe. We desire to show that they suppressed all of
7 this which was within their power, and which they had in
8 their possession, taken before the grand jury, which re-
9 lated to the merits of this action, and that they did not
10 produce it before this jury, in order that the jury might
11 have the benefit of it, whatsoever it might have been.
12 Under the law, as they contend for it, Mr Tveitmoe is sworn
13 not to reveal to us what he testified before the grand jury.
14 They sit here in possession of that testimony, transcrib-
15 ed by the official reporter, and defy us to do anything.

16
17
18
19
20
21
22
23
24
25
26

1 They called Mr. Tveitmoe to the stand and swore him as one
2 of their witnesses; simply asked him his name and address
3 and then excused him, knowing exactly what he would testify
4 to, if, perchance, he testified as he did before the grand
5 jury, or if he did not, subject to their correction; sub-
6 ject to the production of the document before the grand
7 jury asking him if he did not so testify at a certain time
8 and place. Now, your Honor will be called upon to instruct
9 this jury that where evidence is wilfully suppressed by a
10 party it is deemed to be against them and therefore they
11 cannot argue that the testimony of Mr. Tveitmoe, if produced,
12 would be in their favor. Not only do we want the testimony
13 to go to the jury but we want the fact to go to the jury;
14 they had the testimony in their hand which was forbidden to
15 us; that they have denied to us, and which they have sworn
16 the witness not to reveal to us, and which ^{they} have sworn this
17 reporter not to reveal to us; that they have in their pos-
18 session testimony relating to the merits of this action
19 which they have refused to produce, and under the law they
20 cannot either argue that the testimony would be favorable to
21 them or that we should have called for, or that the presump-
22 tion is in their favor, on the contrary, we purpose to show
23 that the presumption is against them.

24 Now, if your Honor please, the burden of proof is at
25 all times on the prosecution, always. We are not bound to
26 produce witnesses to testify to facts in our favor. They

1 must produce their case and all the evidence germane and
2 relevant to the proposition, it has been held in this
3 state that they are duty bound to produce substantial and
4 meritorious facts in their favor and in our favor as well,
5 relating to the merits of the action.

6 Now, if your Honor please, they sit here and decline
7 to permit us a copy of that testimony; decline to permit
8 the witness, under his oath and subject, perchance, to a
9 contempt of court, decline to allow that witness to tell us
10 what he testified to before the grand jury, and as it were,
11 dogs in the manger, prevent us from giving testimony and
12 prevent us from producing it where right there on that
13 witness stand is that testimony sworn to before the grand
14 jury and right in that box is a duplicate of that testimony;
15 is that fair? That is our evidence; we are entitled to
16 show the suppression of this testimony, when, as they did,
17 they called Mr. Tveitmoe to the stand and then withdrew him,
18 as a substantive fact in this case.

19 MR. FREDERICKS. Now, may it please the Court, it is
20 awfully hard to regard Mr. Rogers seriously in a matter of that
21 kind. Here is the history of this Tveitmoe business.
22 Against all ordinary procedure Mr. Rogers wished to retire
23 from the court room in order that Mr. Johannsen and Mr.
24 Tveitmoe might be put on the witness stand, there to tell
25 what occurred, possibly, in regard to the taking of Mrs.
26 Caplan out of the state. I believe that was a matter that

1 was uppermost in the matter of investigation, and the court
2 generally permitted the entire procedure to be set aside, and
3 permitted Mr. Johannsen and Mr. Tveitmoe to be put on the
4 stand by the defense in order that they might tell what they
5 knew about the taking away of Mrs. Caplan. It having been
6 assumed that Mr. Rogers probably had in the year before,
7 gained some information in regard to this matter by reason
8 of his affiliations with the prosecution in another case.
9 Mr. Johannsen took the stand, as the court will remember, and
10 gave his testimony, and was cross-examined, and when he had
11 finished, they decided that they would not put Mr. Tveitmoe
12 on the stand. I suppose they had their own good and suffi-
13 cient reasons for it. At any rate, they so decided that
14 they would not put Mr. Tveitmoe on the stand. He was here;
15 held here by them, one of their co-agitators and assistants,
16 requested by them, that the court permit him to sit here in
17 the court room and hear all the testimony because he was
18 one of their assistants; exempted from the rule excluding
19 witnesses, in order that he might be here and assist the
20 defense in preparing the defense and putting on their wit-
21 nesses. Well, when they failed to put Mr. Tveitmoe on the
22 witness stand on that occasion, and decided that they would
23 not go any further into that matter than they had gone with
24 Mr. Johannsen, we called Mr. Tveitmoe to the witness stand,
25 thinking that, peradventure we might ask him ourselves in
26 regard to the matter, and after having done so we concluded
that--we read the section to him in regard to the testimony,

1 and we concluded that as he was so closely affiliated by the
2 defense we would not put him on the stand but would permit
3 the defense, if they ever chose to put him on the stand,
4 in order that we might have the benefit of cross-examination.
5 Now that is the history of Mr. Tveitmoe being on the witness
6 stand.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1 Now, in regard to this matter, it appears that Mr Tveit-
2 moe gave some testimony -- it has been argued heretofore
3 before the court -- he gave some testimony before the
4 grand jury after Mr Darrow had been indicted. Mr Tveit-
5 moe, is alive, I presume; is within reach of the defense,
6 and if they want to use him, to give that testimony here on
7 the witness stand, or to give any other testimony, they
8 can secure him and put him on. It makes no difference what
9 he swore to before the grand jury, that is not testimony and
10 could not be introduced here as testimony. The testimony
11 must come from the living lips of Mr Tveitmoe on the wit-
12 ness stand, and this document, which the witness holds
13 in his hands, is not testimony. It could not be used
14 here as testimony while Mr Tveitmoe is available, and can
15 be put on, in fact, it could not be used as testimony in
16 any event, probably, so we are not suppressing any testi-
17 mony when we object to the defense getting ahold of the
18 written-up statements that Mr Tveitmoe made before
19 the grand jury. If they are the truth, his memory would
20 assist him in making those same statements here; if they
21 wish to interrogate him about them, and they will get
22 all the benefit of them. Now, that is the point that is
23 before the court. That is the way Mr Tveitmoe came to
24 be on the witness stand, and that is the view of what the
25 witness now has -- that it is not testimony and could not
26 be used as testimony, but that the defense wishes to get

1 it in their possession in order that they may see what
2 Mr Tveitmoe did swear to before the grand jury. Now,
3 that is, we believe, all that this is for.

4 MR ROGERS: Just a moment; I am going to make a statement--

5 MR FORD: If the court please, I am entitled to finish
6 side by side --

7 THE COURT: Now, who is going to have the floor --

8 MR ROGERS: Only replying to certain questions of fact.

9 THE COURT: You will have an opportunity to reply on
10 both questions of law and fact at the proper time, but I
11 must hear this argument.

12 MR ROGERS: We have been deprived so often of our posi-
13 tion in argument by attempts at interruption, and so forth,
14 that it is well for us, if your Honor please, to require
15 that the conditions of the argument and the facts be
16 stated frankly before we go into the argument.

17 THE COURT: I will see to it that you are not interrupted,
18 Mr Rogers, but I will hear Mr Ford first, and then I will
19 hear you fully.

20 MR FORD: If the court please, I would like to ask the
21 witness a few questions before taking the argument up.

22 MR ROGERS: That is agreeable.

23 THE COURT: Go ahead.

24 MR FORD: When did you write this document up that you
25 have in your hand? A I think sometime within a week af-
26 ter it was taken, Mr Ford.

1 Q And it has been in your possession ever since? A It
2 has.

3 Q It was made at the same time that the original was
4 made up? A Yes.

5 Q And is a carbon copy of the original? A A carbon
6 copy of the original.

7 Q Been in your possession all the time? A Yes sir,
8 under lock and key and a secret place known only to my-
9 self.

10 Q No one else has had access to it but yourself? A No
11 sir.

12 Q How did it happen you had it in your possession this
13 morning? A I was subpoenaed by the court to produce --
14 here is a copy of the subpoena which will probably speak
15 for itself. I might modify that statement as to no one
16 else seeing it. I did have my assistant sworn as assist-
17 ant reporter, in order to transcribe the testimony for me
18 and he did transcribe it, and outside of my assistant and
19 myself no one else has seen it.

20 MR FORD: Now, if the court please, there are two means by
21 which a document is brought into court; one under sec-
22 tion 1000 Code of Civil Procedure, and the other under
23 section 1985, of the Code of Civil Procedure, a subpoena
24 duces tecum, which has been served on this witness al-
25 ready. The ^{document} which the witness holds in his hand
26 is not evidence. It is a statement made by the witness

1 out of the presence and hearing of the defendant. It could
2 not at any time be used as evidence against the defend-
3 ant, he not having been present not at any time read it or
4 declared that it was authentic, or did anything with re-
5 gard to the statement itself, which would make it admis-
6 sible, therefore, the document is not legal evidence be-
7 fore any court as far as the defendant is concerned. It
8 cannot be used by the People at any time unless Mr Tveit-
9 moe takes the stand in which case it could be used for im-
10 peachment of the witness, provided he made a statement dif-
11 ferent from that contained in the statement which he has
12 there. The only object, your Honor, of getting a statement
13 of this character, on the part of the defendant in this
14 case -- I don't wish to be personal -- the only object
15 which a defendant in an ordinary case could have in ob-
16 taining a statement of this character would be to enable
17 the person who had previously testified to something, to
18 testify in the same manner, and prevent his being tripped
19 up, to enable him to fabricate a story which would not
20 permit of his being impeached by a statement of this
21 character; to make his testimony conform to the statements
22 previously made by the witness before some other tribunal.
23 This very question, your Honor, was up --

24 THE COURT: I was about to say, Mr Ford, this question has
25 been substantially in its present form, came up here a
26 few days ago, and the court at that time ruled upon

1 the question as then presented, and the burden of showing
2 that the present situation is so different as to call for a
3 different rule, I think, even, is with the defense.

4 MR FORD: I called your Honor's attention at that time,
5 I believe, to the case of People vs. Glass in the 139th.

6 THE COURT: I think you better let them assume the burden
7 in that way, and they might be able to show that the sit-
8 uation is so different as to call for a different ruling,
9 but that is a burden they have to assume, and ought to be
10 given a chance to carry.

11 MR ROGERS: Now, if your Honor please, counsel is absolutely
12 mistaken in saying that this document could never be used
13 because of the absence of the defendant. The case of
14 People against Bird in the 132nd California, I read from
15 page 263 -- holds among other things, that the defendant
16 may waive his right of confrontation and cross-examina-
17 tion to produce testimony taken in his absence. I
18 presented that case myself to the Supreme Court --

19 MR FREDERICKS: But the People cannot use it.

20 MR ROGERS: The People cannot use it, but we can use it.

21 MR FORD: " You could use this statement in place of Mr
22 Tveitmoe? I guess not.

23 MR ROGERS: I understood, your Honor, I was going to have
24 the floor.

25 MR FORD: I beg the court's pardon and I also beg counsel's
26 pardon. It was so astonishing I could not refrain.

1 MR ROGERS: Then I will astonish you a little more.

2 (Reading:) "Under the title of the 'Rights of defendant
3 in a criminal action', it is provided that a defendant
4 shall have the right of confrontation of the witnesses
5 against him, saving in those cases where the charge has
6 been preliminarily examined by a committing magistrate,
7 the testimony taken down by question and answer in the
8 presence of the defendant, who, either in person or by
9 counsel, has cross-examined or had an opportunity to
10 cross-examine the witness, or where the testimony of a wit-
11 ness who is unable to give security for his appearance has
12 been taken conditionally in like manner in the presence of
13 the defendant." That, of course, is an exception to the
14 ordinary rule, on the part of the People; they may intro-
15 duce testimony taken under those circumstances. (Reading:)
16 "It is here to be noted that the section is declarative of
17 the rights of the defendant, and in so defining those
18 rights, limits the evidence, and the mode and manner of
19 its production and introduction, which may be employed
20 against him. In effect, therefore, and as our decisions
21 hold, it deprives the prosecution of the right, which
22 theretofore in it enjoyed, of introducing against a defend-
23 ant the evidence of a deceased or absent witness, unless
24 taken before a committing magistrate, or by deposition in
25 the mode prescribed. It forbids the introduction of the
26 testimony of such witness, absent or deceased, which may

1 have been given upon a former trial of the case. Why
2 the legislature should have so modified the common law
3 rule, we need not now stop to inquire. Sufficient to say
4 that it is quite plain that it has done so. But, upon
5 the other hand, there is in this, no restriction upon
6 the rights of a defendant. The rule as to him is the same
7 as it was before the adoption of the codes, and as it stood
8 at common law. He may waive his right of confrontation,
9 if he so desires, and introduce in evidence, testimony of
10 such dead or absent witnesses, whether that testimony was
11 given at the preliminary examination, or upon a former
12 trial of the cause."

13 Now, there a defendant waived his right of confronta-
14 tion. In this instance, I might observe to your Honor
15 that Mr Fredericks' statement that they called that wit-
16 ness; that they put him on and then withdrew him, think-
17 ing that they would reserve to themselves the right of cross-
18 examination. Now, we offer to show, if your Honor please,
19 by witnesses, that they produced Mr Tveitmoe before the
20 grand jury and took his testimony, which was against them;
21 testimony which they dare not read to this jury, but they
22 brought Mr Oscar Lawler into this court room and sat him
23 right down behind them when Mr Tveitmoe was to be called to
24 the stand. It has appeared in this case, if your Honor
25 please, that Mr Tveitmoe is under indictment by the Federal
26 grand jury; he is also under indictment by this grand jury

1 of this county, as I am informed, and the District Attor-
2 ney, therefore, desires the privileges of cross-examination,
3 which would effect that witness' own personal rights,
4 which would subject him in this case to a cross-examina-
5 tion which might be introduced against him in his own trial,
6 because under your Honor's ruling, you have permitted
7 t h e m to interrogate every witness from the commence-
8 ment of his life down to the present time of taking the
9 stand, as to all his relations and every aspect and fea-
10 ture in this case, and of the dynamiting cases of the Mc-
11 Namaras, and all other cases allied thereto. Now, was it
12 right, if your Honor please, that they should withdraw him
13 from the stand for the purpose of cross-examining him, and
14 with Mr Oscar Lawler sitting behind them, the man that is
15 going to demand of Mr Tveitmoe, his life, maybe, possibly
16 years in the penitentiary, was it right that they should
17 sit back here and say, "We are going to cross-examine him,"
18 where, if they call him themselves, they could not so do.
19 Thereupon Mr Tveitmoe being advised by his own counsel,
20 not by us, he sat here, declined to go on the stand for
21 cross-examination; declined to sit here on this witness
22 stand, and put his own life and his own liberty in jeo-
23 pardy by a cross-examination of every aspect of his own
24 case, with Mr Oscar Lawler sitting here ready to take ad-
25 vantage of every word and syllable; we offer to show, if
26 your Honor please, that he refused to take the stand for us

1 under those conditions and under advice of counsel, coun-
2 sel making the statement to us that they would not permit
3 him to go on and be cross-examined by Mr Oscar Lawler,
4 through the intervention and mouth of W. Joseph Ford.
5 I don't blame him; if I were his counsel, I would say,
6 "You cannot do it", but they had already taken his testimony,
7 and we stand here to waive our constitutional rights,
8 as in the case of People against Bird says, "But upon
9 the other hand there is no restriction of the rights
10 of the defendant. He may waive his right of confronta-
11 tion, if he so desires." And we do waive it. Now, what
12 they were trying to do, if your Honor please, was to
13 trick us, I might say, to out-play us, to euchre us into
14 this condition of things, when they called Mr Tveitmoe,
15 as Mr Fredericks has just now admitted to your Honor,
16 in his last statement, that they called Mr Tveitmoe, and
17 then finally concluded, after a momentary consultation,
18 knowing the rule of law that they could not cross-examine
19 him if they called him themselves, that they could not
20 furnish Mr Oscar Lawler with all the information that
21 he sat here to get; they concluded that they would, if
22 your Honor forced us to put him on, so they could cross-
23 examine him and deprive him of his rights personally, as
24 the defendant in the cases pending against him. Now, that
25 is the situation in a nut-shell. I cannot put Mr Tveit-
26 moe on to be cross-examined, because his counsel won't

1 let him go on, but they have got evidence there, and
2 unless they they are working for the benefit of Indian-
3 apolis, unless they are working for the benefit of Mr Os-
4 car Lawler, they might well have called him upon this is-
5 sue alone, which they would have a right to interrogate
6 him about, if he were their own witness.

7 It is hard for a layman to understand these matters.
8 They don't understand, if your Honor please, that the de-
9 fendant has a right to refuse to be cross-examined; to
10 refuse, if your Honor please, to speak and furnish evi-
11 dence against himself, and it may not be evidence against
12 himself, but evidence which may be used against him,
13 and therefore, his counsel, very properly, as your Honor
14 would have done, as I would have done, and as Mr Ford
15 would have done, said, no, not with Mr Oscar Lawler back-
16 ing this thing up, shall you go on the stand to be cross-
17 examined for days and days, prejudicially to your own trial
18 in Indianapolis or before the grand jury -- I mean, be-
19 fore a jury in any court. You have that right; it is your
20 own personal right. If, however, they had called him as
21 they originally intended to do, then all they could have
22 asked him about was this case, and we could not have cross-
23 examined him about anything else, but they seeking an
24 undue and unfair advantage of Tveitmoe, seeking to ap-
25 prehend -- seeking, as it were, to portend his own
26 trial, they brought Mr Oscar Lawler into this court room,

1 and they said, no, we will cross-examine him, thereby,
2 as I said, depriving him of every right sacred to a defend-
3 ant and guaranteed by the constitution of this state and
4 of the union, and I might say, of every state. Now, if
5 your Honor please, are we toys to be moved around
6 as impotent pieces
7 in the game they play, your Honor? I think not. So, if
8 they may put him on there; they had a right, and they call-
9 ed him, but Mr Fredericks has confessed to your Honor
10 that he didn't intend to call him in this case alone.
11 What he wanted was to cross-examine him and you and I know,
12 sir, what that meant. Now, if your Honor please, here sat
13 Mr Slossinger of San Francisco, Mr Tveitmoe's attor-
14 ney, and refused to put him on or refused to allow us to
15 call him, and so, if we did call him, he would not testi-
16 fy under those circumstances. We were ready to show that
17 and we offer to show it by competent evidence, and we
18 demand the right to put in the testimony which he gave
19 under the interrogation of the District Attorney himself
20 before the grand jury, and under oath, waiving our con-
21 stitutional right of confrontation, and depriving them of
22 the right which they sought, to convict Mr Tveitmoe in
23 Indianapolis, if so they might, with Mr Oscar Lawler and
24 themselves getting the testimony here. I will call wit-
25 nesses to that effect, if it is necessary so to do, and
26 Mr Appel has some circumstances which he desires to present.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

MR APPEL: If your Honor please, the legal question which is presented to your Honor is in effect, what is legal evidence under our code --

THE COURT: Before you begin, we better take the morning recess, Mr Appel.

(Jury admonished. Recess for 5 minutes.)

Alw 1 (After recess.)

2 THE COURT. You may proceed, Mr. Appel.

3 MR. APPEL. If your Honor please, the question that is
4 presented is whether or not we are entitled to show, first,
5 that we are in a position of absolute inability to produce
6 a fact or to produce evidence which is in our favor; second,
7 whether or not we have a right to present the omission upon
8 the other side of this case, of a party to this litigation,
9 to this suit, an omission which, if proven properly, may
10 be considered by the jury as evidence in our favor; third,
11 whether or not, by proof of facts and circumstances, whe-
12 ther or not we have a right to present to the jury such chain
13 of circumstances as that the jury may reasonably draw an
14 inference of fact in our favor; fourth, whether or not, by
15 the introduction of these circumstances which we seek now
16 to introduce, we are entitled to the specific instructions
17 of this court, the matter of law, that the State, people of
18 the State, represented by the District Attorney here, are
19 estopped absolutely from contradicting or claiming a differ-
20 ent state of facts than that which would have come out in
21 the evidence had they not suppressed the evidence.

22 Now, those are the propositions of law and in-
23 ferences and presumptions which arise upon facts which may
24 be shown in the case.

25 Why, a party to a litigation who claims the
26 applicability of a presumption of law provided by the Code,

1 must show, he has a right to show, the act, circumstances,
2 declarations and contradictions from which that presumption
3 necessarily arises, or from which that inference of fact
4 necessarily arises, or from which either party to the suit
5 may be estopped from ever denying the truth of the facts.

6 Now, let us first see what the rules of evidence
7 are in this state and elsewhere. Section 1102 of the
8 Penal Code provides: "The rules of evidence in civil actions
9 are applicable also to criminal actions, except as otherwise
10 provided in this code." So we say, your Honor, that where-
11 ever a fact can be proven in a civil action by showing the
12 omission upon the other side to do that which in good con-
13 science he ought to have done, wherever that may be shown
14 in a civil action, we say that we have the same right in a
15 criminal action to show that omission on the part of the
16 people, just as they have a right to show an omission on our
17 part, were they contending for that proposition on the part
18 of the people.

19 Let me illustrate it. Your Honor has had great
20 experience in equity cases. A man gets upon the witness
21 stand — one side puts a witness upon the stand and
22 questions him concerning his remembrance of the circum-
23 stances surrounding a transaction. He sits idly by. He
24 holds in his pocket a document which is directly contrary
25 to the evidence he undertakes to establish by oral evidence.
26 The other side says, "Well, your Honor, we understand

1 that there is a document which establishes the fact in-
2 disputably, and such a document as that ought to be pro-
3 duced." Why? Because the oral evidence of this witness,
4 in view of the existence of a document, will be evidence
5 of less weight, because the memory of man is so fallible
6 that there may be a mistake in his testimony as to the
7 exact import and the exact action of the parties, or the
8 exact connection of the parties with the facts. We demand
9 that that document be produced. The other side sits idly
10 by, and either denies the existence of the contention upon
11 the other side or denies the existence of the document.
12 Would your Honor hesitate a moment in allowing the party
13 contending for the existence of a written document, would
14 your Honor deny them the right to show the existence of
15 a written document, and that the written document went into
16 the hands of the other side, and that it was their duty
17 to account for its loss? Even if they contended that there
18 was no written document, would your Honor not have the right
19 to allow the side contending that there was higher evidence
20 of the fact than that which comes from the oral testimony
21 of the witness, /to show that fact,
22 /for the purpose of relying upon the pre-
23 sumption provided by Section 1963 of the Code of Civil
24 Procedure, which says--subdivision 6, Section 1963, that,
25 "Higher evidence would be adverse from inferior being pro-
26 duced"--that the higher evidence would be adverse, from
inferior being produced?

1 Let's see, what inferior evidence was introduced
2 here against this defendant? Harrington, you know, came
3 upon the stand, your Honor. First, let me take it up in a
4 logical way--first they produced the evidence of a banker
5 down there in San Francisco, who testified that upon a
6 certain time Mr. Tveitmoe came into the bank with some other
7 person, probably Mr. Damm, that he requested the cashing of
8 a check for the sum of \$10,000, and that he requested that
9 that money should be given to him in large bills; and they
10 show by circumstances that that money went either into the
11 possession of Mr. Tveitmoe or went into the possession of the
12 person that he requested the money should be given to.
13 They introduced that fact. They stop there, your Honor.
14 They stop there. Ordinary decency, ordinary consideration
15 for the rights of the people of the State of California,
16 the impulses of any common, honest human being, would demand
17 that the truth should be shown in this case, would have
18 demanded of any labor or layman, or any honest person
19 on the face of the earth, that Tveitmoe should be then put
20 upon the stand and asked, "Tveitmoe, you got this \$10,000,
21 did you? What did you do with it? Did you give it to
22 Darrow?" That would have been the ordinary way to follow
23 up that fact, your Honor, by the merest tyro in the
24 detective business, by any one that had learned the fact
25 that that \$10,000 was given to Tveitmoe. Now, then, let's
26 go on and see what Tveitmoe did with that money.

1 Ah, your Honor, Tveitmoe appeared before the
2 grand jury. That is admitted here in evidence. Tveitmoe
3 appeared before the grand jury. Will they deny that they
4 questioned him? Let them make the denial here in open
5 court, as professional men, as professional attorneys, as
6 men who are sworn to do their duty to their state, to
7 their fellowmen and to their Gods, let them stand up here
8 and say that Tveitmoe was not examined before the grand
9 jury in the presence of Mr. Ford, that he testified as to
10 what he did with this \$10,000.

11 It is the duty of a lawyer, it is the duty of
12 any man, ^{independent of} whether he is a lawyer or not, that he shall not
13 deceive, or sit silently by and lead to a deceit upon the
14 Court, or upon a constituted part of a court, this jury,
15 sworn and constituted as a part of this court.

16 Now, let us say that Tveitmoe did give them
17 that information. We have a right to know what that in-
18 formation was. Was it against us? Let it come out, that
19 Darrow may go upon the stand and meet that testimony. If
20 it is for us then, your Honor, we are entitled to show that
21 fact. And why are we entitled to show what that testimony
22 was? For the reason that we must show ^{it} in order to raise
23 this presumption that higher evidence would be adverse from
24 inferior evidence being produced. How are you going to
25 apply that presumption of law in our favor? Does it not
26 become incumbent upon us, your Honor, to show that higher

1 evidence existed of that fact, and how are we going to
2 show it except by showing what Tveitmoe told, under the
3 solemnity of an oath, before that grand jury, to the District
4 Attorney, and to the authorities having in charge the
5 prosecution of this defendant? It stands in the same
6 category that we have a right to show that a document ex-
7 isted, written evidence of a fact, your Honor. How are
8 we going to apply this presumption to which we are entitled?

9 Why, if we asked your Honor to instruct the jury
10 upon that point, you will say to us, this instruction is not
11 applicable. Why? We ask you. Because you have not shown
12 that there was higher evidence which should have been intro-
13 duced, instead of inferior evidence introduced. Now, what
14 is the inferior evidence? Let us see. The law is that
15 admissions of a defendant or confessions of a defendant
16 concerning his complicity in a crime or in a criminal trans-
17 action are of the lowest, of the meanest kind of evidence;
18 that they do not rise up to the dignity of being evidence of
19 the fact; that a defendant may come in and make a confes-
20 sion of a commission of a crime, and I say that he could not
21 be convicted or hung or sent to the penitentiary upon his
22 own admissions and from his own confessions, but that
23 there must be independent evidence showing the truth of
24 those statements..

25 And what is this inferior evidence which they
26 have introduced upon the other side? The willing man.

1 The man of general utility. The man who says he is testi-
2 fying under compulsion, and who claims immunity. The man
3 who, according to his testimony, was willing to violate
4 every trust and every confidence that ever was reposed in
5 him. Outside of the merits of this case, a man who has
6 shown himself willing to serve the state--he comes in and
7 says Darrow was down there about the latter part of Sept-
8 ember, over there on the porch at his house, and he,
9 "Showed me a roll of bills, and he said that he was going
10 to get to the jury upon that. He told me got it from
11 Tveitmoe." That is the connection which they undertake
12 to show, your Honor. I say that that evidence is inferior
13 evidence. I say it is so light, I say it is ^{such} absolutely
14 infinitesimal evidence, compared with the testimony of
15 a man who is here shown to have gotten \$10,000 in big bills,
16 or whatever the evidence may be, down there in San Francisco,
17 September 2, 1911, that the evidence of that man Harrington
18 is of an inferior quality. It is of an inferior quality.
19 Now, let us see, your Honor. We have a right, therefore,
20 to lay the foundation to ask your Honor to say to this jury,
21 if the prosecution were possessed of higher evidence con-
22 cerning the transmission of this \$10,000 from Tveitmoe to
23 this defendant here, it was their duty to produce it; and
24 your Honor has a right to know the nature and character of
25 the evidence, and this jury, in order to apply that pre-
26 sumption and principle of equity and justice, have a right

1 to know what it is that they knew that they did not pro-
2 duce.

3 What is it that they knew that they did not
4 produce? We say to your Honor and to this jury, it is the
5 evidence and the information which they had, which was given
6 by Tveitmoe before the grand jury under oath. Tveitmoe
7 was put there under oath for the prosecution. He came there
8 before the grand jury as a witness for the prosecution.
9 The defendant was not heard there. He was not inside of
10 that star chamber proceeding. He was not there to defend
11 himself. He was not there to raise a finger in protest
12 against such iniquitous proceeding. He has a right to have
13 this jury know what that information was. It cannot be
14 admissible in evidence as substantive testimony, but it is
15 admissible to show that fact, to show that higher evidence
16 existed other than the flimsy, windy testimony of Mr.
17 Harrington.

18 Now, upon another principle, your Honor,--let me
19 have that section following 1963 or immediately before--
20 here, I have it. Let's see, your Honor. subdivision 3 of
21 Section 1962--and this is good law, splendid law. These
22 presumptions and this principle of justice are maxims es-
23 tablished by the experience of men. It touches the conscience
24 of men. It is not what every man may do or say in court
25 that ought to be evidence, but it is his act, his suppression
26 of evidence that may be given against him.

1 Suppose it had been in another court, in one of
2 the departments of this court. A man comes in in a case of
3 accounting between individuals and he presents his account,
4 and he says that there is so much of a balance due me from
5 the defendant. The defendant says, "Show me your books,"
6 and the party says, "They have been destroyed by fire. They
7 were stolen from me." The defendant has a right to show
8 that they are in existence, and he also has a right to show
9 by parol evidence what those books showed, and the other
10 side has no right to contradict it. He is estopped by good
11 conscience, he is estopped in equity from establishing the
12 account by those methods, and it is right that it should be
13 so. It is right--it is proper.

14 Now, is that the law? Counsel says in criminal
15 cases this cannot be done. Then, your Honor, the principles
16 of equity and jurisprudence must have been, by some mere
17 will and whim of counsel here, have been entirely eliminated
18 from criminal and civil jurisprudence.

19 Now, let us see if that is so. subdivision 3,
20 Section 1962: "Whenever a party has by his own declaration,
21 act or omission"--now, we have a right to show, your Honor,
22 that here is an act on the part of the State of California,
23 an act of what? An act of suppression. That there is an
24 omission. What is the omission? An omission to show by
25 higher evidence rather than by inferior evidence, a fact in
26 dispute. The plea of not guilty put in here by the defense

1 raises a question as to the existence or nonexistence of
2 every material fact in the case. It raises the question as
3 to whether there is to be deduced by this jury an inference
4 from any fact or omission, whether it would be a fact for or
5 against him. The fact in dispute is, did that money go
6 into the hands of Mr. Darrow? Is the evidence of this man
7 Harrington corroborated? Did Darrow--assuming that he did
8 get it, for the purposes of this argument--that he had got
9 that money from Tveitmoe, what is the inference that should
10 be drawn from it? The witness says he was joking, that he
11 was joking, that that was a pleasantry. The jury have a
12 right to know, and the people should have introduced that
13 fact in evidence, that it was not a joke, that it was true.
14 And when they failed to show by the man who received that
15 \$10,000 from the bank, that he gave it to Darrow, when they
16 failed to show what became of this \$10,000 this jury have
17 a right to know--and they have a right to know whether or not
18 it was deliberately, intentionally, fraudulently kept from
19 the knowledge and possession of this jury; so that the maxims
20 laid down by our code and the legal presumptions of this
21 code may be applied by this jury, when your Honor gives it
22 to them.

23 Now, let us see. Whenever a party has by his
24 own act or omission intentionally and deliberately led
25 another party to believe a particular thing true, and he
26 acts upon such belief, he cannot in any litigation arising

1 out of such declaration, act or omission, be permitted to
2 falsify it. Now, we have a right to show the circum-
3 stances. We have a right to show this jury, first, that they
4 had absolute evidence upon that fact, either one way or the
5 other; second, they deliberately, intentionally, stood here
6 and suppressed that fact, so that the truth of the statement
7 here by Mr. Darrow may not be allowed to be contradicted
8 when he goes upon the stand--in other words, we have a right
9 to establish the facts here upon which we can build a monu-
10 ment which in law is declared to be an estoppel, which the
11 other party has no right to demolish, upon any principle of
12 justice and good conscience and fair dealing. We have a
13 right to build around this defendant such a moqument, such
14 a Gibraltar of truth, that the other side cannot assail it.
15 And we have a right to show that they deliberately, in-
16 tentionally, have undertaken before this jury to lead them
17 to believe that Tveitmoe gave that money to Darrow. And they
18 have done it with the deliberate intantion of making this
19 jury draw that inference from the facts introduced, when in
20 fact they knew that the evidence was against them.

21 And that is good law. It acts upon the con-
22 science of the individual. If a man accuses me of stealing
23 a horse, and he brings witnesses to show that upon the
24 night that the horse was stolen I was seen in the neighbor-
25 hood, and that I was seen riding a horse and leading another
26 one, and if he has evidence of the fact that the horse that

1 I was leading was a horse that I had gotten somewhere else
2 and purchased honestly, he has no right to lead a jury to
3 believe by merely giving those circumstances that that
4 was the horse that was stolen, and that it was stolen by me.
5 Why, your Honor, a juror sitting in such a case, after con-
6 victing a defendant, would have a right to throw his hands
7 up in horror and say to the District Attorney, "My God, man,
8 why didn't you show us the true facts in this case?" Now,
9 we don't want this jury misled, we don't want this court
10 misled. We have a right to show, as an item of evidence
11 in our favor, that they had higher evidence of that fact,
12 and that they were contented with introducing circumstances

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1 intentionally and deliberately leading this jury to be-
2 lieve that Tveitmoe gave that \$10,000 to Darrow.

3 Now, let us go to another provision of the code. Let's
4 see if there is any law upon the subject. There are two
5 classes of indirect evidence. In direct evidence arises
6 by inference from other evidence in the case. Section
7 1957 of the code, states that indirect evidence is of
8 two kinds -- inferences and presumptions. Both of them we
9 have a right to establish here, or the basis for them.

10 An inference is a deduction which the reason of the jury
11 makes from facts proved, without an express direction of
12 the law to that effect. An inference is a deduction which
13 the reason of the jury makes from facts proved. We are
14 asking this jury to infer that it is not true -- I want
15 to be perfectly plain and frank; I might qualify it, in
16 other words, but it is always better to speak out just ex-
17 actly what you mean -- we want this jury, your Honor, to
18 infer the fact, and find the inference to be reasonably
19 drawn from the circumstances, to draw their absolute con-
20 clusion that that money, when it went into the hands of
21 Tveitmoe in San Francisco, never left his hands, and that
22 this defendant never received it. How are we going to
23 show it? We have a right to show it by showing that the
24 other side knows that, that they were told that; that one
25 of the principal links in the chain as against this de-
26 fendant, would have been to put Tveitmoe upon the stand,

1 and that when they failed to put him on the stand, when
2 they suppressed this knowledge that Tveitmoe had given
3 them, that then these inferences may be drawn from the
4 facts proved. Therefore, I have proven four propositions,
5 your Honor: first, that they have a right to draw this
6 inference from the circumstances we are undertaking to
7 show; second, that we have a right to say that they have
8 were in possession of this evidence, that it being of a
9 higher class of evidence, they did, by their own act,
10 introduce inferior evidence, and therefore the presumption
11 is against them; third, that they are estopped to do it --
12 and then comes the important part of it, subdivision 5 of
13 section 1963. How are we going to apply this section,
14 subdivision 5, to the circumstances here, upon which your
15 Honor may instruct the jury as a matter of law that they
16 have a right absolutely to say from the circumstances of
17 this case that if evidence has been suppressed, that that
18 evidence would have been against the side suppressing it.

19 Let's see. Subdivision 5: That evidence wilfully sup-
20 pressed would be adverse if produced -- that evidence will -
21 fully suppressed would be adverse if produced. We have
22 a right to show the circumstances upon which we shall
23 build an instruction from your Honor conveying to the jury
24 that rule of law. Therefore, it is necessary for us to
25 show that Tveitmoe was before the grand jury before this
26 trial commenced; second, that he was examined by the

1 People there in the presence of one of the prosecuting at-
 2 torneys in this case; third, that he was questioned concern
 3 ing this identical money; fourth, what was the evidence which
 4 Mr Tveitmoe gave?

5 Your Honor, in a murder case, ⁱⁿ one of the departments of
 6 this court, a nineteen-year-old boy was charged with
 7 killing a woman with a knife, and charged at the same
 8 time with shooting a man five times through the breast,
 9 and he was upon trial. Five legal gentlemen of the Dis-
 10 trict Attorney's office were prosecuting him -- five of
 11 them; and at the preliminary examination it appeared that
 12 the knife had been picked up there by the side of the dy-
 13 ing woman within a few minutes after the killing. And
 14 they did not introduce it in evidence. We asked for it;
 15 they would not produce it. They said they had the right
 16 to keep it and produce it when they saw proper to intro-
 17 duce it. We insisted -- we begged. No sir; there was ab-
 18 solutely no relief given to the defense. We insisted
 19 that we had a right to show whose knife that was. Was it
 20 the defendant's, or was it the knife of the man who had
 21 been shot in the room? That was an issue in the case. We
 22 had a right to show, to introduce it in evidence, and show
 23 the ownership and the possession of the man who was shot.
 24 We had a right to show whether this woman was killed by
 25 one or the other of the two men engaged in the room there
 26 in that terrible tragedy. The State suppressed it.

1 Well, when we came to trial, after a citation of any
2 number of authorities -- and I say to your Honor, that I
3 could cite a great many authorities here where I ready to
4 present them to your Honor at this time -- we cited
5 authorities to the effect that we had a right to show the
6 suppression of evidence, and after a considerable citation
7 of authorities, the court ruled that we were entitled to
8 show that that knife had been suppressed, and after we
9 got the ruling of the court, we put witness after wit-
10 ness upon the stand to show how this knife had passed
11 from hand to hand, and afterwards we dug it out of the
12 safe of the District Attorney's office, and when the knife
13 was produced, then the witnesses came and identified that
14 knife, and not only did they identify the knife, but we
15 showed by the people who identified the knife that it was
16 the knife of the man who had been shot. It would have
17 been an absolute improbability, the most improbable
18 thing in the world, for that 19-year-old boy in that room
19 with that woman and that man to have deliberately used
20 that knife to carve one of the two into eternity, and hav-
21 ing the knife in his hand, to shoot the other one and use
22 the two instruments of destruction at the same time.
23 The man was acquitted, and acquitted properly. And that
24 is right. We have a right to show what is the nature and
25 character of that testimony. We have a right to show
26 why these men did not put Tveitmoe upon the stand. We have

1 a right to show why they introduced inferior evidence and
2 not the highest class of evidence.

3 Let's see. What right have these gentlemen to stand
4 here, your Honor, and say to your Honor, that you should
5 not make an order? What right have they got to object?
6 What principle of justice, what rule of law is there that
7 justifies them in objecting to every information and every
8 item of evidence which the defense seeks to introduce in
9 evidence here? What right have they to say that
10 this defendant shall not gain possession of every fact and
11 piece of information, and then offer it in evidence? It
12 may be, your Honor, when he offers it in evidence, that
13 the state will have a right to object, as they always have
14 the right to object to the introduction of evidence. But
15 have they the right to say to this court that this de-
16 fendant shall not have the information?

17 In that case that I cited to your Honor heretofore --
18 let me read again, your Honor, what the court say. It
19 is in the case of Aaron Burr, the court deciding upon that
20 question by Chief Justice Marshall. Now, Chief Justice
21 Marshall says: "Now, if a paper be in possession of the
22 opposite party" -- Now, let me say, this paper is not in
23 the possession of the opposite party. They have no con-
24 trol over this paper, your Honor. They have no control
25 over this evidence. They are no more entitled to look at it
26 than we are in any particular case, where there is no

1 reason for the application of that rule. They have no
2 right to object. They have no greater rights than the de-
3 fendant. They occupy no higher plane of jurisprudence than
4 the defendant. The law must equally balanced -- balanced
5 between man and man, between the People of the State of
6 California and the poorest and most humble defendant.
7 They have no right to object here. They do not represent
8 anyone here in objecting to this. Here is a witness upon
9 the witness stand, and we say, "We want you to produce
10 it." But even if it were in their possession, "Now, if a
11 paper be in possession of opposite party, what statement
12 of its contents or applicability can be expected from the
13 person who claims its production, he not precisely knowing
14 its contents? If the opposite party be required to pro-
15 duce his books on a particular subject, it is not necessary
16 that the entries on those books should be stated in order to
17 entitle the applicant to give motion. He cannot be expect-
18 ed to make such a statement. It has always been deemed
19 sufficient to describe the paper required, to express its
20 general purport, and to state its materiality to the case
21 in some degree, even when its contents are known. When
22 a paper is in possession of one party, it is completely in
23 his power, and is required by the other, very strong
24 reasons must be given to justify its being withheld, if
25 it have any relation to the case. Before a court would
26 make a decisive order in such a case, it certainly ought to

1 receive reasonable satisfaction of the probable materiality
2 of the evidence asked for and refused, and of its relation
3 to the pending controversy; but the information to be
4 required must depend on the nature of the case. "

5 They go on and say, "Criminal cases, it is true, are not
6 provided for; but courts will always apply the rules of
7 evidence to criminal prosecutions, so as to treat the de-
8 fense with as much liberality and tenderness as the case
9 will admit. The prosecutor is the representative of
10 the government, the government acts as a party through
11 the agency of the attorney, who directs and manages the
12 prosecution on behalf of government. If there be a paper
13 in the possession of the executive, which is not of an
14 official nature, he must stand, as respects that paper,
15 in nearly the same situation with any other individual who
16 possesses a paper which might be required by the defense.
17 If the executive possesses a paper which is really believed
18 by the accused to be material to his defense, ought it to
19 be withheld? The question will recur, is it really mater-
20 ial to his defense? The only evidence that can be receiv-
21 ed on this point is from the party himself, and he has made
22 his affidavit to its materiality. But that is said to
23 be insufficient; and why? Because the averment is that
24 the letter may be material in the defense. Until the
25 course of the prosecution shall be fully developed, it may
26 not be in the power of the accused to make a more posi-

1 give averment. The importance of the letter to the de-
2 fense may depend on the testimony adduced by the prosecutor."

3 x * x x x "Let it be supposed that the
4 letter may not contain anything respecting the person now
5 before the court. Still it may respect a witness mater-
6 ial in the case and become important by bearing on his tes-
7 timony."

8 If there is anything in the testimony of Tveitmoe here,
9 material to the defendant here, to his defense, isn't it
10 upon the same plane and simple principles of justice that
11 this defendant should be entitled to see it, and, if it
12 be material to offer it in evidence? Then the question
13 of materiality may come before your Honor.

14 Now, this is Chief Justice Marshall, Chief Justice Mar-
15 shall of the Supreme Court, a man who is held in great res-
16 pect by everyone and every jurist all over the world.

17 "I do not think that the accused ought to be prohibited
18 from seeing the letter, but, if it should be thought
19 proper, etc."

20 Now, here is a witness upon the stand, and he has notes
21 of the testimony given before the grand jury by Mr Tveitmoe.
22 We say, and we contend that the other side dares not deny
23 it, that his testimony bears directly upon an issue in
24 this case -- was that money which was paid to Tveitmoe at
25 the bank on the 2nd day of September, 1911, delivered by
26 him to Mr Darrow or not? That is, what did he do with the
money.

1 We said that the other side is suppressing that evidence.
2 We have a right, I say, to show that fact, that that evidence
3 is of a higher nature, we have a right to show to the jury
4 what the evidence is, of the nature and character of it.

5 Now, your Honor, in addition to that an answer
6 may be given, as was given, that that is passing the buck
7 over to the other side. Here is a goat -- you ride it,
8 they say to the defense.

9 Well, I am not a good goat rider, and I don't
10 propose to ride the goat unless I am compelled to; and in
11 this case we could not ride it, anyhow. In addition to
12 showing your Honor, for the purposes of showing that it is
13 impossible for us to produce the witness Tveitmoe, we offer
14 to show your Honor by positive testimony that we got Mr.
15 Tveitmoe down here for the purpose of putting him upon the
16 stand; that Mr. Tveitmoe in answer to a request to go upon
17 the stand refused absolutely, basing his refusal upon the
18 advice of his counsel who represents Mr. Tveitmoe in the
19 matter of indictments pending against him at Indianapolis.
20 We offer to show your Honor that then upon the refusal we
21 insisted upon the attorneys coming here for a conference.
22 We offer to show your Honor that after that conference Mr.
23 Tveitmoe was absolutely prohibited from testifying, and
24 that he said that if he went upon the stand he would rot in
25 jail before he would utter a word that would enable the
26 other side to cross-examine him--not so much concerning the

1 merits of this case, but concerning, your Honor, matters
2 which may be brought against Mr. Tveitmoe in other jurisdic-
3 tions, and I say even in this very jurisdiction. He can
4 show your Honor that in this indictment here before this
5 court it is charged that M. A. Schmidt, J. B. McNamara,
6 J. J. McNamara, William Caplan, John Doe--the old familiar
7 criminal, John Doe and his cousin Richard Roe, and John
8 Styles and Jane Doe--how can it be said whether they do not
9 refer to Mr. Tveitmoe as being one of the persons? Mind
10 you, your Honor, we don't have to go into inference, or
11 into opinions about this. The record here shows, your
12 Honor, the record absolutely shows here, that one of these
13 Does or Roes might be Jane, and Jane might be the one refer-
14 ing absolutely to Tveitmoe. I would not blame Mr. Tveitmoe
15 and this court could not have the power to make Mr. Tveitmoe
16 testify here for or against this defendant upon the witness
17 stand here, except if the people of the State of California
18 put him upon the witness stand, your Honor. They would have
19 a right to limit that examination to one point: "Mr. Tveit-
20 moe, did you get \$10,000 there from the bank on the 2nd day
21 of September, 1911? A--Yes. Q--Did you give that money
22 to Mr. Darrow? A--Yes." They would have a right to stop
23 right there, and nothing that he said would involve him
24 or could be used against him in any case. But if we put
25 Mr. Tveitmoe upon the witness stand and asked him the fact,
26 the other side would have a right to say, "That is untrue,
and we have a right to show his relation to the case.

1 Q -- Now, Mr Tveitmoe, "they would say to him," didn't you
2 know Schmidt and Caplin, and all these defendants? Were
3 you not a party to the conspiracy or to any act which re-
4 sulted in the explosion that wrecked the Times and sent
5 so many people into eternity? Didn't you know the defend-
6 ant so and so, and didn't he say so and so, and didn't
7 you know about the transporting of the dynamite from
8 one state into another? Are you not one of the parties
9 to this conspiracy? By way of showing the relation of Mr
10 Tveitmoe to the case, and then your Honor would have a
11 right to let them ask all those circumstances.

12 Now, your Honor, your Honor can see how important it was
13 for that man to be kept off the witness stand. And
14 we offer to show that by sworn evidence, that ^{it} was ab-
15 solutely beyond ourpower to introduce the fact, the prin-
16 cipal fact, first, that Tveitmoe never gave Mr Darrow any
17 part, parcel or cent of that \$10,000; second, that Tveit-
18 moewent before the grand jury and testified under oath as
19 a witness for the prosecution, that he got this \$10,000,
20 and that he never gave it to Mr Darrow, and said he had a
21 portion of those moneys still at his command, and we of-
22 fered to show, your Honor, that it is by the most indirect
23 way that we have ascertained those facts.

24 MR ROGERS: We expect to call witnesses, if your Honor
25 please, to show the facts, and we would not like to have a
26 ruling upon the general matter until we make our showing.

1 MR FORD: Have you finished your argument, Mr Rogers?

2 MR ROGERS: Well, I don't know yet.

3 THE COURT: We will adjourn until 2 o'clock now.

4 And thereupon the jury was duly admonished and a re-
5 cess taken until 2 o'clock P.M.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1 Afternoon session, July 29th, 1912, 2 P.M.

2 Defendant in court with counsel.

3
4 J. J. PETERMICHEL on the stand.

5 THE COURT: Mr Rogers, you wanted to complete the record,
6 I believe, before the court rules on this motion.

7 MR ROGERS: I purpose to call Mr Appel. He has not come
8 yet. The question now pending, of course, does not
9 raise the question as it ought to be raised.

10 MR FORD: That is the only question that is before the
11 court, of course.

12 MR ROGERS: He can suspend his ruling and allow me to make
13 my offer.

14 MR FORD: Well, let's decide one question at a time.

15 MR ROGERS: Well, of course, the relevancy and materiality
16 of this testimony now offered, depends, to some extent,
17 upon the testimony to be offered in completion of the en-
18 tire offer.

19 THE COURT: Your offer to show -- just state what your of-
20 fer is.

21 MR ROGERS: My offer is to show that the District Attorney
22 called O. A. Tveitmoe to the stand in the course of this
23 trial as their witness --

24 THE COURT: The record shows that already.

25 MR ROGERS: The record shows that already; that they ask-
26 ed him no questions beyond his name and his age and his

1 residence; thereupon dismissed him. That his testimony
2 was taken previous to his calling upon the stand, I think
3 previous to this case being commenced; subsequent to the
4 indictment, and at that time he was inquired of as to the
5 disposition of the \$10,000 cash or bills, which has been
6 referred to in the testimony of the witnesses at this
7 trial, namely, the cashier of the Anglo, London-Paris Bank,
8 and the teller thereof; that he was inquired of concerning
9 the disposition of that money, and at that time before the
10 grand jury being interrogated by the District Attorney,
11 stated that he did not give that money to Mr Darrow, and
12 that Mr Darrow never received it from him; that he had
13 \$7500 thereof, or approximately that sum, or a consider-
14 able and substantial portion of the amount still in his
15 possession.

16 THE COURT: You don't offer to show these things by Mr
17 Appel's testimony, do you?

18 MR ROGERS: I offer to show that after his dismissal by
19 the prosecution and their failure to call him, that it is
20 a part of the record in this case that the District Attor-
21 ney has said in open court, in a statement made before
22 the jury, that the reason he did not interrogate him was
23 he desired to cross-examine him. I further^{will} show that O.A.
24 Tveitmoe is under indictment for matters and things con-
25 cerning the McNamara cases and the issues involved in the
26 McNamara cases in Indianapolis, in the United States Court

1 for that district of Indiana, and has been indicted here
2 in the United States Court for this district for partici-
3 pation in the McNamara case or in the matter which led up
4 to the Mc Namara case. I will further show that he is
5 intended to be the John Doe referred to in the McNamara
6 indictments, according to his understanding and belief.
7 That when we attempted to call him to the stand he re-
8 fused to take the stand and be cross-examined, having been
9 advised by counsel and by your Honor's ruling that he
10 might be interrogated concerning every aspect and fea-
11 ture and every material matter of his connection with the
12 McNamara case, and that that cross-examination was to be
13 held in the presence of Mr Oscar Lawler, his prosecutor,
14 in the United States Court of this district, and assistant
15 in the prosecution of the United States Court of the Indiana
16 District, and that the cross-examination would be used
17 against him in his own case, and that he took advice of
18 counsel, and that, upon advice of counsel, he refused to
19 be called to the stand; refused to testify, so he would
20 not be cross-examined in matters relating to his cases be-
21 fore his cases came to trial, and that his counsel, upon
22 being sent for, and coming here in consultation with us,
23 advised him to our knowledge, and according to their
24 statements to us, and his statements to us, that they
25 would not permit him to be interrogated in this case, upon
26 the ground that the cross-examination sought by the Dis-

1 strict Attorney was not in good faith, but was intended,
2 as a matter of fact, to be used against Mr Tveitmoe in the
3 cases pending against him, not only in the United States
4 Court, but possibly, if the agreement is violated, he might
5 be prosecuted in this court.

6 THE COURT: Then, I understand you offer to bring the
7 matter within the ruling laid down in the Bird case cited
8 this morning, by which Mr Tveitmoe's refusal to take the
9 witness stand --

10 MR ROGERS: Yes sir, and that his counsel advised us, and
11 he stated to us, if called to the witness stand, he would
12 refuse to testify, upon the ground that his cross-examina-
13 tion would be detrimental to his own case, and to his own
14 interests and jeopardize his own rights and his own liber-
15 ty, and he brought his counsel from San Francisco here to
16 discuss the matter.

17 THE COURT: If that is the offer I can dispose of the mat-
18 ter. If that offer should be made good, it will not change
19 the rule of law, as I see it.

1 You will be allowed to make your record complete at such
2 time as you may be advised and which, and you can ask leave
3 at that time to do so. But, I am satisfied from the
4 careful attention I have given to this very important
5 matter this morning--it has been most ably presented, but
6 I am satisfied that the circumstances as presented do not
7 justify the court in changing the ruling and order made a
8 few days ago when this same subject matter came up. The
9 offer by the defendant to introduce a transcript of the
10 testimony of Mr. O. A. Tveitmoe given before the grand jury
11 at a date subsequent to the indictment now being tried,
12 which testimony is in the hands of the witness on the
13 stand, and which offer is objected to by the District At-
14 torney, after hearing the matter fully presented, the court
15 sustains the objection of the District Attorney, and the
16 defendant has leave to amplify the record in the manner
17 he has indicated by his statement at any time he desires
18 before the close of the trial.

19 MR. ROGERS. I offer in evidence, if your Honor please, the
20 testimony of this witness, refreshing his recollection
21 from the notes which he made at the time, to show that Mr.
22 Tveitmoe testified before the grand jury that he did not
23 give any of that \$10,000 referred to in the testimony, to
24 Mr. Darrow, but on the contrary retained it himself, a large
25 portion of it, a substantial portion of it, to wit, about
26 \$7500 or thereabouts, which is still in his possession, and
that such portion of it as was used by Mr. Tveitmoe was used

1 by the defense in the expenses of the defense in San
2 Francisco. I further offer that for the purpose of showing
3 that he so testified before the grand jury when interrogated
4 by the prosecution.

5 THE COURT. Any objection?

6 MR. FREDERICKS. Why, certainly, your Honor. It is the same
7 thing.

8 THE COURT. Make your objection, so the record will be com-
9 plete.

10 MR. FREDERICKS. We object to the introduction of any such
11 testimony, as being secondary evidence, hearsay, incom-
12 petent, irrelevant and immaterial.

13 THE COURT. You object upon the same grounds as the objec-
14 tion to the previous question?

15 MR. FREDERICKS. Yes, your Honor.

16 THE COURT. The question is substantially the same. The
17 objection will be sustained.

18 MR. ROGERS. (To Mr. Darrow) Mr. Darrow, do you waive your
19 constitutional right to the right to cross-examine O. A.
20 Tveitmoe upon the stand and to the confutation of such
21 testimony by the introduction of testimony in your behalf?

22 MR. DARROW. Yes.

23 THE COURT. Of course, I assumed that--

24 MR. ROGERS. Mr. Petermichel, kindly refer there to your
25 notes and ascertain whether or not Mr. Tveitmoe did not
26 testify before the grand jury, when interrogated by the
District Attorney, and in the presence of the District At-

1 torney, yourself and the members of the grand jury who
2 were present, that he did not give any portion of that
3 \$10,000 obtained by him from the London, Paris & American
4 Bank, whatever bank that was, to Mr. Darrow, but, on the
5 contrary, that he had it in his possession at that time,
6 with the exception of a small portion thereof, which had
7 been expended for the purposes of the defense in San Fran-
8 cisco?

9 MR. FORD. Again we object upon the ground it is incompetent,
10 not legal evidence or evidence at all, and if the court will
11 hear me just a moment, subdivision 5 has been read--

12 THE COURT. State your objection. It is substantially the
13 same question, but I want you to make the record clear.

14 MR. FORD. I desire to make our position clear to your
15 Honor.

16 THE COURT. I think it is perfectly clear.

17 MR. FORD. And to the jury. While it is clear to the Court,
18 I haven't the slightest doubt of that, it is charged against
19 us that we have suppressed evidence--

20 THE COURT. Oh, you can argue that to the jury when the
21 time comes. This is an argument to the court. This is a
22 question for the court now.

23 MR. FORD. Objected to simply on the ground it is incom-
24 petent and immaterial.

25 THE COURT. Objection sustained.

26 MR. ROGERS. Exception. (To the witness.) Refer now to

1 your notes taken of the testimony of O. A. Tveitmoe, and
2 state whether or not at the time he testified, he did not
3 testify of and concerning, in answer to questions of the
4 District Attorney, of and concerning the disposition or
5 disposal of the \$10,000 received by him by the cashing of
6 a check at the London, Paris & American Bank, whatever the
7 name of that bank may be, in San Francisco, which was a
8 check upon the Riggs National Bank of Washington for
9 \$10,000 payable to C. S. Darrow?

10 MR. FORD. Objected to.

11 MR. ROGERS. On or about September 2nd.

12 MR. FORD. Objected to on the ground it is hearsay,
13 incompetent, not legal evidence.

14 THE COURT. Objection sustained.

15 MR. ROGERS. Exception. Now, on what date did he
16 testify before the grand jury?

17 MR. FORD. Objected to on the same grounds--irrelevant,
18 incompetent and immaterial.

19 THE COURT. I think that is already in therecord. If it is
20 not, let him state.

21 A February 16, 1912.

22 MR. ROGERS. Q Refer to the record and state whether or
23 not a representative of the District Attorney's office was
24 there present at the time his testimony was taken, interro-
25 gating him?

26 MR. FORD. Objected to as incompetent, irrelevant and imma-

1 terial whether there was or not, the evidence being in-
2 competent.

3 THE COURT. Objection sustained.

4 MR. ROGERS. Exception. Q Was Mr. Ford there?

5 MR. FORD. Objected to on the same grounds.

6 THE COURT. Objection sustained.

7 MR. ROGERS. Exception. Q State whether or not, referring
8 to the record, Mr. Tveitmoe testified that he had a sub-
9 stantial portion of that amount of money received from the
10 cashing of this check of \$10,000 on September 2nd, or there-
11 abouts, at the London, Paris & American Bank, the check
12 being upon the Riggs National Bank, payable to the order of
13 Clarence S. Darrow--state whether or not he did not state
14 he had about \$7500 or thereabouts of that amount in a
15 safety deposit box in San Francisco, in his possession,
16 at the time he appeared before the grand jury?

17 MR. FORD. Objected to on the ground it is hearsay, incom-
18 petent and immaterial.

19 THE COURT. Objection sustained.

20 MR. ROGERS. Exception. We will withdraw the witness.
21
22
23
24
25
26

1 W. J. FORD, recalled on behalf of the de-
2 fense, testified as follows:

3 THE WITNESS: I have been sworn before.

4 THE COURT: Mr Ford has been sworn before. Proceed.

5
6 DIRECT EXAMINATION

7 MR ROGERS: You are assistant District Attorney, are you,
8 Mr Ford? A yes sir.

9 Q State whether or not you were present before the
10 grand jury of this county on or about the 16th day of Feb-
11 ruary of this year?

12 MR KEETCH: We object to that as incompetent, irrelevant
13 and immaterial.

14 MR ROGERS: It is preliminary, entirely.

15 MR FREDERICKS: That would not make any difference whe-
16 ther it is or not, it is immaterial, and the court can see
17 what it is preliminary to.

18 THE COURT: Objection sustained.

19 MR ROGERS: Did you interrogate O. A. Tveitmoe before the
20 grand jury?

21 MR KEETCH: We object to that on the same ground.

22 THE COURT: The objection is sustained.

23 Q Didn't Mr Tveitmoe testify before the grand jury, in
24 your presence --

25 MR KEETCH: We object to that on the same ground -- pardon
26 me --

1 MR ROGERS: -- didn't Mr Tveitmoe testify in your pre-
2 sence that he didn't give any portion of the \$10,000 re-
3 ceived by him for the cashing of the check on the Riggs
4 National Bank, payable to the order of Clarence S. Darrow,
5 on or about September 2nd; didn't give any portion of that
6 money to Mr Darrow, but, on the contrary, retained it him-
7 self, with the exception of an amount there which he had
8 expended for the purpose of the defense in San Fran-
9 cisco?

10 MR KEETCH: We object to that on the same ground.

11 THE COURT: The objection is sustained.

12 MR ROGERS: Exception.

13 Q State whether or not you did not hear him testify to
14 that effect before the grand jury?

15 MR KEETCH: Objected to on the same ground.

16 THE COURT: Objection sustained.

17 MR ROGERS: Exception. State whether or not he did not
18 testify he had in his possession at the time of his ex-
19 amination, in the neighborhood of \$7500 of that \$10,000,
20 the same being in San Francisco under his control and in
21 a safe deposit box.

22 MR KEETCH: Objected to upon the same ground.

23 THE COURT: Objection sustained.

24 MR ROGERS: Exception. You called Mr Tveitmoe to the wit-
25 ness stand, did you not?

26 MR KEETCH: Objected to on the same ground.

1 MR FREDERICKS: Further, the record is the best evidence.

2 THE COURT: Objection sustained.

3 MR ROGERS: ~~Exception~~. You were subpoenaed to produce here
4 certain documents and papers. Have you produced them?

5 MR KEETCH: The same objection.

6 THE COURT: Well, that is a different question.

7 MR KEETCH: Under the rule of the court --

8 MR FREDERICKS: A different question, but it is the same
9 objection.

10 THE COURT: Here is a witness subpoenaed to produce cer-
11 tain documents and papers.

12 MR FREDERICKS: Well, I presume it is preliminary.

13 THE COURT: That is a question that ought to be answered.

14 MR FREDERICKS: The objection to that, I think should be
15 that if he was subpoenaed the subpoena would probably be
16 the best evidence.

17 THE COURT: Oh, yes, it probably is.

18 MR FREDERICKS: He might --

19 MR ROGERS: All right, I will withdraw the question.

20 Were you served with a copy of this subpoena this morning,
21 which document I now show you? A I acknowledge the ser-
22 vice of it. You have shown it to me.

23 Q Have you produced the documents described in such sub-
24 poena.

25 THE COURT: Let me see it.

26 MR FREDERICKS: We object to the question. The court

1 will read the subpoena and see the reason of the objec-
2 tion. We object to the question on the ground it is in-
3 competent, irrelevant and immaterial.

4 THE COURT: Well, this brings up squarely the application
5 made this morning before Mr Petermichel was put on the stand
6 under section 1000.

7 MR KEETCH: Yes sir.

8 MR FORD: And on that point, your Honor, we are prepared
9 to argue the objection.

10 MR ROGERS: Then you can come down and argue and go back
11 and talk again. (Discussion.)

12 MR FORD: If the court please, we object to the produc-
13 tion of the documents called for, among other grounds, and
14 at the present time called for in the subpoena on the
15 ground that the defendant -- that they have come into
16 the possession, if they are in the possession of the wit-
17 ness, that they have come into the possession of such wit-
18 ness in an official capacity, and as representing the pro-
19 secution, and that no notice has been served, as required
20 by law, if section 1000 applies to a criminal case; and,
21 second, that section 1000 does not apply to this case nor
22 to the particular documents which are called for in the
23 subpoena.

24 THE COURT: Let's put aside the question of notice. Notice
25 is a reasonable notice, and unless there is some reason to
26 the contrary, the court will assume that the notice given
at 10 o'clock this morning is sufficient notice.

1 MR FORD: As far as time is concerned, but not as contents
2 and materiality. There is no averment in the notice serv-
3 ed in court this morning nor in the subpoena if it be con-
4 strued as a notice, which shows the materiality of the docu-
5 ments applied for. There must be some showing -- and
6 nothing discloses the identity of the particular documents
7 sought. There must be some showing made to this court that
8 the documents are material, so your Honor may judge whether
9 the defendant is entitled to them. There is no showing
10 any of those documents are of any value to the defendant or
11 that he intends to produce them in evidence. The defendant
12 in any criminal case cannot compel the prosecution to dis-
13 close the evidence which it has in its possession, if there
14 is any document which they desire to introduce in evidence,
15 then it is up to them to serve a notice, describe the docu-
16 ment which they desire to produce in evidence, and then if
17 the prosecution refuses to introduce that document or to
18 produce it for them, they may introduce secondary evidence
19 of its contents and a recalcitrant witness under such cir-
20 cumstances --

21 THE COURT: just a moment.

22 MR FORD: And a recalcitrant witness under such circum-
23 stances, in addition to that, may be punished for a contempt
24 of court, and there is no showing here, either in the sub-
25 poena or the notice, what the documents are, of what mater-
26 ial value they are to the defendant, and that the defendant

1 even desires to introduce them in evidence. All in the
2 world that this amounts to, your Honor, is to find out
3 what evidence the People, the prosecution has in its pos-
4 session, and in case that section 1000 of the Code of Civil
5 Procedure, which, by the way, is merely a means adopted by
6 our Code of Civil Procedure as a substitute for the old
7 bill of discovery in equity proceedings, and is so treated
8 in all the decisions under that section -- has no applica-
9 tion and never did have any application to a criminal case
10 and the history of the section will show it.

11 Attempts have been made in this state by defendants to
12 compel the prosecution to disclose what evidence they have
13 against a defendant, to compel the prosecution to inform
14 the defendant of all the evidence, and our courts have
15 held that they could not do that, and there is a wise rea-
16 son, a wise cause for the existence of such a law. If the
17 prosecution gather evidence to prevent perjury being com-
18 mitted in a trial of a criminal offense, if it prepare for
19 the cross-examination of witnesses who might be produced
20 upon the stand and the defendant in a criminal case can
21 compel the prosecution to give them its material to the
22 defendant and his witnesses, it might be easy for the de-
23 fendant and his accomplices in the commission of a crime,
24 to make up a story which would defy impeachment, to make a
25 story which would bear some semblance of truth, and yet be
26 in accord with the evidence that is in the possession of the

1 District Attorney. In this case, your Honor, we have
2 from time to time --

3 MR ROGERS: Will your Honor permit me -- Mr Ford con-
4 senting -- I do not believe, if your Honor pleases, that
5 the conditionss of the evidence are sufficient at this
6 time to justify the argument being made upon this ques-
7 tion. I desire to produce Mr Appel as a witness upon one
8 feature of the matter. he has just come in and I do not
9 think, if Mr Ford will permit me to suggest, that condi-
10 tions of the record are such that we ought to attempt to pre-
11 sent the matter fully, because I intended to interrogate
12 both him and Mr Appel further in order to present certain
13 considerations of evidence in testimony which will put the
14 matter before your Honor more squarely than has been put
15 by the mere asking if he has produced the documents under
16 the subpoena decus tecum.

17 THE COURT: All right, Mr Appel. Go on.

18
19 HORACE H. APPEL, a witness called on be-
20 half of the defendant, being first duly sworn, testified as
21 follows:

22 DIRECT EXAMINATION

23 MR ROGERS: Your name is Horace H. Appel? A yes sir.

24 Q Attorney at law? A Yes sir.

25 Q Practicing in these courts? A yes sir.

26 Q How long have you been admitted, Mr Appel? A Oh, I

1 don't remember.

2 Q A good many years. A A little over 20 years.

3 Q One of counsel for defendant in this case? A Yes
4 sir.

5 Q: You understand the matter which I shall present
6 to you, and I will therefore not interrogate you by too
7 many questions.

8 MR FREDERICKS: But we do not, Mr Rogers.

9 MR ROGERS: You possibly will in a few moments. Will you
10 please explain and state why the defendant has not called
11 Mr Tveitmoe to the witness stand?

12 MR FORD: To that we object on the ground it is incompe-
13 tent, irrelevant and immaterial; counsel has a right to
14 call a witness to the stand, they had the right to call Mr
15 Tveitmoe to the stand and then it is for Mr Tveitmoe to re-
16 fuse to testify, to give his excuse. It certainly is incom-
17 petent for the witness on the stand to testify to hearsay
18 testimony, and that is all that Mr Appel could do at this
19 time; he could testify what he might have heard other
20 people say, those other people not being under oath, not
21 being here for cross-examination. And if Mr Tveitmoe were
22 here, he would at least be under oath, and we would have
23 an opportunity to cross-examine him, and that is the pro-
24 per way for a witness to decline, and that is the only way
25 that a matter of that sort can get into the record. If
26 your Honor will recall, Mr Tveitmoe was on the stand, he

1 was asked several questions, and then when we demanded
2 that the section of the code be read to him, that an argu-
3 ment arose, and he was allowed to leave the stand.

4 The prosecution at that time might have proceeded to examine
5 him if they so desired, but we did not desire to do so, and
6 we have stated our reasons here several times, simply that
7 we considered him an accomplice and unless the section was
8 read which would prevent him from being prosecuted in this
9 case, and further, unless we have an opportunity to cross-
10 examine him, we did not believe that we could present the
11 full truth to the jury, and did not proceed with the ex-
12 amination.

4p 1 Now, for this witness to testify as to the reasons why Mr.
2 Tveitmoe did not take the stand would be purely hearsay and
3 incompetent, irrelevant and immaterial, and no foundation
4 laid for the introduction of the other testimony, because
5 there can be no foundation laid. If we are correct in our
6 objection to the testimony which is being sought to be intro-
7 duced here, it is impossibility to lay a foundation for it.
8 Our contention is this: That when they seek to introduce
9 a statement made by Mr. Tveitmoe outside of some court, out-
10 side of a court trying the same cause, the same proceeding,
11 outside of the method provided by law for the reading of a
12 deposition, we contend that such testimony is hearsay, is
13 not competent, is not legal evidence and no foundation can
14 ever be laid for the introduction of hearsay testimony, there
15 is no such thing known to the law as a foundation for the
16 introduction of hearsay testimony; and that is all they
17 are seeking to do at the present time. If our position is
18 correct, it is hearsay testimony and there is no necessity
19 of laying the foundation; if we are wrong there is still
20 less reason for laying the foundation, because they can
21 themselves introduce it without laying this foundation, and
22 for the reasons stated, we object to the testimony and the
23 question.

24 MR. ROGERS. If your Honor please, it comes with somewhat
25 of a surprise to me that it is claimed that hearsay testi-
26 mony cannot be introduced. When counsel asked Mr. Biddinger

1 to relate a statement made by J B McNamara to him,
2 Biddinger, before Mr. Darrow ever knew that there was such
3 a person as J. B. McNamara--he didn't know he was on earth,
4 and yet they asked for that testimony. Now, I have not
5 asked him what Mr. Tveitmoe said to Mr. Appel. I have not
6 interrogated the witness as to why Mr. Tveitmoe did not take
7 the stand; the question is, why did not the defendant
8 call Mr. Tveitmoe? Now, in order that the record, which
9 has been inadvertently misstated, may be correctly under-
10 stood, I call your Honor's attention to it, page 2242, Sir.

11 "O. A. Tveitmoe, a witness called on behalf of the people
12 having first been duly sworn, testified as follows: Mr. Ford,

13 I ask to read Section 1324 of the Penal Code to the witness.

14 "THE COURT. Mr. Tveitmoe, at the request of the District At-
15 torney I will read you Section 1324 of the Penal Code of
16 this state which reads as follows:

17 "Mr. Appel. Waitt a moment, your Honor.

18 "Mr. Darrow. I see no occasion for reading this." Mr. Appel
19 makes an argument then Mr. Fredericks says--breaking into
20 the argument, "Just a moment, your Honor. There is a point
21 I would like to consult.

22 "Mr. Ford. I think the section explains it, your Honor, and
23 we would ask that that be read to him anyway.

24 "Mr. Fredericks. . Just a moment, your Honor.

25 "The Court. That is somewhat long and it might be well
26 for the jury to retire while it is being read.

1 "Mr. Fredericks. Just a moment." You see, Mr. Fredericks
2 didn't want this to get away from him. (Reading) "We
3 would like a little further time to consider this matter.
4 there is another witness I can put on.

5 "Mr. Ford. We ask that he be considered under subpoena.

6 "The Court. All right.

7 "The Witness. Mr. Fredericks, do you want me here this after-
8 noon?

9 "Mr. Fredericks. Do you want to get away this afternoon?

10 "The Witness. Yes, I intend to get away this afternoon.

11 "Mr. Fredericks. What time does your train go?

12 "The Witness. I guess about 6 o'clock.

13 "Mr. Fredericks. I will see you at 2 o'clock.

14 "The Witness. All right. (The witness leaves the stand.)

15 "Mr. Fredericks. I am not sure we have another witness."

16 Now, that is the situation. Now, I asked this witness
17 why the defendant did not call Mr. Tveitmoe. It is always
18 proper, if your Honor pleases, to show why a witness is not
19 called. He may say, "Mr. Tveitmoe was stricken with paralysis
20 and could not talk." He might say, "Mr. Tveitmoe was absent
21 from the state." He probably went, but nevertheless he
22 might, and the question would call for such an answer:

23 "Why did not the defendant call Mr. Tveitmoe?" We will stand
24 here, if your Honor please, for an hour, listening to the
25 statements of counsel as to why Mr. Tveitmoe was not produced
26 by us. Now we purpose to spike that gun right now, and we
have a right to do it. We have a right to take from them

1 the ability to argue that we did not call Mr. Tveitmoe because
2 his testimony was against us. We have a right to show that
3 his testimony would have been against the prosecution; that
4 the reason they took him off the stand was because it was
5 against them, and they merely wanted to cross-examine him
6 about the general aspects of the case, and we have a right
7 to show we do not call a material witness in order that
8 they may not argue against us on that proposition, and I
9 put the straight question, "Why didn't you call Mr. Tveitmoel?"

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

5s 1 MR. FREDERICKS. Now, may it please the court, questions of
2 fact are determined by the testimony of witnesses on the
3 witness stand. Each side has the same process as the
4 other side to bring their witnesses and compel them to
5 testify. Whether Mr. Tveitmoe wanted to come or doesn't want
6 to come, the process is in the hands of the defendant to
7 compel him to take the witness stand and then if he refuses
8 to answer he may state to the court and jury why he refuses
9 to answer, rather than to state it to his attorney and have
10 his attorney state it to Mr. Appel or ~~himself~~ to state it to
11 Mr. Appel and Mr. Appel state it to the jury. The question as
12 to why Mr. Tveitmoe didn't take the stand is not an issue
13 in the question of determining the guilt or innocence of
14 this defendant in the manner in which the defense attempts
15 to make it, and it cannot be made an issue in that way.
16 Whatever counsel will argue is a matter to be taken up at
17 the time of argument. We may argue one way and the defense
18 has an equal opportunity to put in an equal number of hours
19 and make more eloquence in arguing why he was not put on the
20 stand for some other reason, and they can give as many reasons
21 as their ingenuity and eloquence is capable of devising
22 and if any of them appeal to the jury, that is the time to
23 use it, and the occasion to apply it, but this statement--
24 an answer to this question by this witness would be merely
25 argumen~~s~~ to the jury as to why a witness was not called.
26 If the defense can do that the prosecution can do it, for the

1 prosecution has an equal right in the matter of bringing
2 witnesses on the stand, and immediately, your Honor, what
3 would be the result? If we didn't call a witness and they
4 put another witness on the stand to testify why that witness
5 said he didn't want to be called, it is immaterial, it is
6 irrelevant, it is incompetent to any issue before this
7 court; it is hearsay, and if there are any other vices or
8 fallacies known to legal objection I would add them too.

9 There is absolutely no reason or warrant in law or pro-
10 cedure for such a question at such a time.

11 MR. FORD. If the Court please, it is perfectly apparent
12 that if this witness is allowed to answer this question
13 that he will answer it in one way, namely, that for the
14 reasons already stated by Mr. Rogers by way of argument that
15 they could not put him on the stand, his attorney would not
16 let him do it, on the other hand--

17 THE COURT. The court is not interested in what the answer
18 will be.

19 MR. FORD. By way of illustration, by way of argument, your
20 Honor. Now, if it is admissible for the defendant to put
21 one of the attorneys on the stand to testify why they didn't
22 call a witness, would we be permitted to also put a witness
23 on the stand and show that the reason we didn't put Mr.
24 Tveitmoe on the stand was that we believed him to be an
25 accomplice of the defendant in the commission of this crime?

26 THE COURT. That question has just been covered, Mr. Ford. I

1 don't want to curtail this argument, but I think it is
2 taking a great deal more time than we ought. Captain
3 Fredericks presented that line of thought.

4 MR. FORD. I don,t think the situation of our putting a
5 witness upon the stand has been presented.

6 THE COURT. I heard it said.

7 MR. ROGERS. In that matter, if your Honor please, if your
8 Honor desires it to be put in another way I will put it
9 in another way; it would save time.

10 THE COURT. I don't think there is any difficulty to the
11 form of the question. The question is whether the substance
12 can be gone into at all and I am unable to agree with the
13 defendant's view in that regard. You can ask it in any
14 other form you wish to amplify the record. Objection sus-
15 tained.

16 MR. ROGERS. Exception. Q Mr. Appl, did you have a consul-
17 tation with Mr. Tveitmoe and his counsel with reference to
18 putting him onthe witness stand after the prosecution had
19 withdrawn him from the stadd, as I have read from the
20 record here?

21 MR. FREDERICKS. The same objection.

22 THE COURT. Objection sustained.

23 MR. ROGERS. Exception. Q Did you have a talk with Mr.
24 Tveitmoe and Mr. Slossinger, his counsel from San Francisco,
25 after he had been withdrawn from the stand by the prosecu-
26 tion, with reference to his taking the stand for the

1 defendant?

2 MR. FREDERICKS. The same objection.

3 THE COURT. Objection sustained.

4 MR. ROGERS. Exception. Q State whether or not you soli-
5 cited Mr. Tveitmoe to take the stand in behalf of defendant
6 and as a witness for defendant with reference to that
7 matter?

8 MR. FREDERICKS. The same objection.

9 THE COURT. Objection sustained.

10 MR. ROGERS. Exception. Q State whether or not Mr. Tveitmoe
11 and Mr. Slossinger told you that he was under indictment at
12 Indianapolis, under indictment in the United States Court
13 here and possibly under indictment in the very indictment
14 which has been introduced in evidence here, and that he
15 would not go upon the stand and be cross-examined as to his
16 connection with the whole McNamara proposition for the
17 reason that it would be used against him in his own case?

18 MR. FREDERICKS. The same objection.

19 THE COURT. Objection sustained.

20 MR. ROGERS. Exception. Q State whether or not you--

21 THE COURT. Mr. Rogers, Mr. Appel wants to confer with you
22 and you may do so.

23 MR. ROGERS. Q You may state what efforts, if any, were
24 made by you in behalf of defendant to get Mr. Tveitmoe to
25 attend this trial as a witness on behalf of the defendant.

26 MR. FREDERICKS. The same objection.

1 THE COURT. Objection sustained.

2 MR. ROGERS. Exception. I offer to prove by this witness in
3 accordnace with my previous statement to your Honor --

4 MR. FREDERICKS. The same matter previously stated?

5 MR. ROGERS. Yes.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1 MR FREDERICKS: The same objection.

2 THE COURT: The objection sustained. I should have added
3 the same ruling.

4 MR ROGERS: Exception.

5 Q Didn't Mr Tveitmoe tell you at the time you consulted
6 him and his counsel with respect to his appearing as a wit-
7 ness, didn't Mr Tveitmoe tell you that if he were not
8 cross-examined with reference to his case and his connec-
9 tion with the McNamaras, and his knowing Schmidty, or
10 M.A.Schmidt, and Caplin and those others, he would testify
11 that he had in his possession at the time, that is, at
12 the time of his consultation with you, the largest part of
13 that money, of the \$10,000, and that he gave a portion of
14 the \$10,000 received by him for the cashing of that check
15 on September 2nd, to Mr Darrow?

16 MR FREDERICKS: The same objection.

17 MR ROGERS: He will be glad to testify to it, if it were
18 not for the fact he would be cross-examined in reference
19 to his whole connection with the matter, for the purpose of
20 effecting his own cases in Indianapolis and here.

21 MR FREDERICKS: The same objection.

22 THE COURT: Objection sustained.

23 MR ROGERS: Exception. I offer now, if your Honor please,
24 to call Mr Tveitmoe as a witness and place him at the dis-
25 position of the court with the understanding that he will
26 not be cross-examined concerning any matter effected by his

1 cases, or in any issue involved in his own cases, either
2 here in the United States Court or at Indianapolis, if he
3 will testify solely concerning the disposition of the
4 \$10,000 received by him on the 2nd of September. Will
5 counsel stipulate to that?

6 MR FORD: Just a moment.

7 THE COURT: Q You can put Mr Tveitmoe on the stand if you
8 want to.

9 MR FREDERICKS: Counsel asked us for a stipulation to
10 that effect, and we refuse to make such stipulation.

11 MR ROGERS:" That is all.

12 THE COURT: Now, Mr Ford, you may proceed with the argument
13 that was interrupted on the question of the production of
14 certain documents and papers and telegrams and other
15 things, under section 1000.

16 MR FORD: I was just remarking, your Honor, when I was
17 interrupted that the law did not permit a defendant, by
18 any means, to drag and go through the prosecution's evi-
19 dence and find out what they had' to go on a fishing expe-
20 dition and find out what they had; that the law presumed
21 that the defendant was entitled to be informed of the na-
22 ture of the charge against him; it was presumed that the
23 defendant, if innocent, and even if guilty, should be con-
24 victed -- or if, guilty, should be convicted by legal
25 evidence, and if innocent he would know the facts as to
26 his whereabouts and what he had done at the time in ques-
tion, and that he could introduce truthful witnesses

1 upon the stand, and it didn't not to permit a guilty man
2 to put perjured testimony upon the stand and to guard
3 those perjured witnesses against cross-examination by des-
4 troying the protection which the District Attorney had
5 built up against such perjured testimony. This is
6 not the first time that people have tried or defendants
7 have tried, to find out what the testimony in the hands
8 of the prosecution was.

9 MR ROGERS: Wait a moment. I take an exception to the last
10 two sentences, and I characterize them as misconduct.

11 MR FORD: Will you read the last two sentences?

12 MR ROGERS: Calling witnesses perjured, and I deny that
13 absolutely that is our purpose and intention. They have
14 documents there which they obtained without Mr Darrow's
15 consent, which they obtained by subterfuge and chicanery,
16 and which Mr Darrow has never seen, some of them, and
17 which they claim to have -- some of them -- and some of
18 them which we want to introduce which we have no copies
19 of, and which were taken from his files, and we do not
20 deserve anything of that kind, and we take an exception.

21 MR FREDERICKS: We have nothing that was taken from the
22 files of Mr Darrow.

23 MR APPEL: No, he states this is not the first time that
24 the defendant has tried to destroy the guards which the Dis-
25 trict Attorney has put around his case to prevent perjury
26 and subornation. How? Perjury to be introduced on behalf

1 of the defense? That is in substance what the statement
2 is, and we say that is absolutely false; it is misconduct
3 on his part, and it should not be tolerated by this court
4 for him to make any such statement as that.

5 MR FORD: Read the last two sentences.

6 THE COURT: If the court understood the remark correctly,
7 it was a general remark applicable to any such case and
8 used to illustrate the conditions that might arise, and
9 if the court had interpreted the remark as counsel for the
10 defense have, it certainly would have reproved counsel at
11 once, but I interpreted it having no more application to
12 the defendant here in connection with the remark than when
13 counsel was talking about the murder case this morning by
14 way of illustration. Perhaps I am wrong.

15 MR ROGERS: Just a moment, sir. "This is not the first
16 time". If that does not bring it down to the present
17 moment.

18 THE COURT: Did he say that?

19 MR ROGERS: yes sir, he did.

20 THE COURT: I would like to have the reporter read it.

21 (Last two sentences read.)

22 MR FREDERICKS: Read the rest of it.

23 (The reporter reading as follows: "It was presumed that
24 the defendant, if innocent, and even if guilty, should be
25 convicted -- or if guilty should be convicted by legal
26 evidence, and if innocent he would know the facts as to

1 his whereabouts, and what he had done at the time in ques-
2 tion and that he could introduce truthful witnesses upon
3 the stand and it did not permit a guilty man to --")

4 THE REPORTER: There is a word there that I cannot make
5 out --

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

7¹ MR. FORD. I will repeat the remark I was about to make.

2 MR. APPEL. No, let the record be read. ~~The~~

3 THE COURT. No, no, let us get what was said.

4 MR. FREDERICKS. It is rather strange if--well, we call for
5 the record--that an attorney can be making an argument that
6 William J. Burns being the greatest suborner of perjury
7 in the United States, and Mr. Ford cannot make a hypothetical
8 case referring to no witness in particular, and using the
9 word "perjury" without committing misconduct--

10 MR. APPEL. That is only a subterfuge; they have referred
11 to this case.

12 THE COURT. Let us get at this record now and see what it
13 is.

14 (Reporter attempts to read record.)

15 MR. APPEL. We will supply by affidavits what we contend
16 was said by the witness and we cannot do it because the
17 record is not correct in our opinion, your Honor, and we
18 now claim the right to a correct record of everything that
19 is said here.

20 THE COURT. You have that right.

21 MR. FORD. Briefly, then, the law does not permit--

22 MR. APPEL. We take an exception to the court's statement
23 and what the statement was and the construction it bears.

24 MR. FORD. Have you finished?

25 MR. ROGERS. Go ahead.

26 MR. FORD. The law does not permit a guilty man and his

1 accomplices to draw a drag net of inspection through the
2 papers and documents of the District Attorney for the purpose
3 of preparing a defense to his case upon perjured testimony
4 and preventing that perjury from being discovered, if the
5 District Attorney desires to build up a series of facts and
6 get possession of evidence which will prevent that from
7 being done, he is entitled to do so, and the law does not
8 permit a guilty man to guard against that protection which
9 the District Attorney has built up. And an innocent man
10 does not need to go through the archives of the District
11 Attorney and guard against cross-examination; a man who is
12 telling the truth on the stand once will tell the same
13 truth at another time or another tribunal before which he
14 may have appeared.

15 MR. ROGERS. I take an exception to the statements just made,
16 if they are in the record, upon the ground they are an un-
17 fair characterization of the defendant and were meant and
18 intended as such and I state it is misconduct; I state that
19 the documents we are after were documents surreptitiously
20 and by chicanery secured from the files of the defendant
21 and we want them and we call for them--

22 MR. FREDERICKS. Then I will say, that we have absolutely no
23 such documents and will swear to it and that will end the
24 necessity for the argument on the question of law. We have
25 not a single, solitary scratch of the pen that bears that
26 description. Now, if that is what counsel wants--

1 MR. ROGERS. Very well, that settles a great deal of it.

2 MR. FORD. May I be permitted to finish the argument?

3 THE COURT. Perhaps this matter is settled now. Let us see
4 if it is. If there are no papers there is nothing to pro-
5 duce.

6 MR. ROGERS. I understand, if your Honor please, that certain
7 telegrams of the defendant, original telegrams sent under
8 the defendant's name, many of them probably not signed by
9 him, as for instance I sent out many telegrams over my name
10 or they are sent from my office, that I never do see, but
11 nevertheless they have procured them from the telegraph
12 companies and we cannot get them, they were brought into that
13 box and we cannot find the telegrams and the telegraph
14 company says they are in the possession of the District At-
15 torney and we want them; telegrams supposed to be delivered
16 to us or to Mr. Darrow or to his office, we want to use them
17 for evidence and we cannot get them; letters that Mr.
18 Darrow is supposed to have sent, some of which he may have
19 signed and some of which he probably never did sign, but
20 which bear his name, just as your Honor sends out many
21 telegrams, just as your clerk signs your Honor's name to
22 subpoenas,--but we want them, and they are not in our files
23 and in our possession; we have a right to them. Now, your
24 Honor, if they have not ^{these} telegrams which answer that des-
25 cription, of course, I take that in the spirit in which it
26 is said, but we want these telegrams which are our property

1 and which we have a right to and which we could have got
2 if they were/^{not}in the possession of the District Attorney,
3 by subpoena to the telegraph company. Now, this question is
4 before the court.

5 THE COURT. That clarifies the matter as to what is wanted.

6 MR. FORD. If the Court please, the denial of the District
7 Attorney was that we had any telegrams that were pro-
8 cured/^{from} the defendant by chicanery and fraud, or from the
9 files of the defendant at all, and it is apparent that what
10 they want is not telegrams that were procured from their
11 files or documents that were procured by chicanery or fraud
12 but they are referring now to documents which were obtained
13 by process of law in a legal manner from the telegraph
14 company, which is an entirely different thing.

15 THE COURT. Counsel for defense should not have used the
16 word "chicanery" and "fraud" at all.

17 MR. FORD. If any such documents were obtained, let it be
18 shown.
19
20
21
22
23
24
25
26

1 MR APPEL: With your permission, your Honor,-- Mr Ford,
2 you do not pretend you have any right to go down here to
3 the telegraph office and get our telegrams, the originals,
4 for instance, and get them into your possession, and then
5 deprive us of the right to get them in some way or other,
6 or use them as evidence, if we can use them as evidence?
7 You do not pretend that would be right, do you? We have a
8 right to get them from you.

9 MR FORD: I am going to argue the question that is now be-
10 fore the court, assuming, for the sake of argument, we had
11 some telegrams signed by the defendant, would we, if we
12 had such telegrams, be required to produce them to the de-
13 fendant? That is the point that is before this court,
14 regardless of how they got into the possession of the pro-
15 secution, and our claim is that the law does not permit a
16 defendant to get his documents, even if they are in the
17 possession of the District Attorney; that it does not per-
18 mit him to find out what was in the possession of the Dis-
19 trict Attorney. I have stated all the grounds upon which
20 the law rests. Now, in the case of People versus Alviso
21 in the 55th Cal., at page 232 of that case, the defendant
22 was indicted for murder, the most serious crime known to
23 our law; that is, one visited with the most serious penal-
24 ties. At least, there are other crimes which might be re-
25 garded as more serious, but this is the one to which is
26 attached the most serious penalty. Before the commencement

1 of the trial, the defendant moved the court that the pro-
2 secution be ordered to furnish to the defense a bill of par-
3 ticulars of the evidence relied on to support the indict-
4 ment, on the ground that they were informed that the indict-
5 ment was found on the testimony of one Eulario Martinez,
6 whose name was endorsed on the indictment, who testified to
7 the killing on a certain day and at a certain place, and
8 was informed that the prosecution might abandon the tes-
9 timony of Martinez and prove it by one Juan Valdez
10 that the defendant was killed at another time at a differ-
11 ent place and under different circumstances, and that by
12 reason of such conflicting information and of the general-
13 indictment, ity of the ~~case~~, the defendant did not know what case
14 they were to meet. In that case they did not ask for
15 the evidence itself, they merely asked for a bill of par-
16 ticulars; they asked for much less than what this defend-
17 ant is asking for, and the denial of the motion by the
18 court is assigned as error. "Our attention has not been
19 directed to any section of the Penal Code directing a bill
20 of particulars to be furnished to a defendant on trial upon
21 a criminal charge, and we do not call to mind any rule of
22 law requiring the same to be done. We see no error in the
23 ruling." Much less than what they are asking for in
24 this particular case.

25 MR ROGERS: Let us see that.

26 MR FORD: That is all it holds, which is a bill of par-
ticulars, which is much less than is asked for here. In

1 the case of State versus Terry, reported in the 55th
2 So. Reps. page 15, a Louisiana case, also found in 128
3 La. at page 680, the defendant in that case was indicted
4 for selling liquor and aiding in the violation of the li-
5 quor laws, rather, by giving a prescription to one who
6 had taken it to the drug store, and had it filled, doing
7 so in violation of the laws of Louisiana, which prohibit-
8 ed a physician from giving a prescription, except in a case
9 where it was absolutely necessary and legitimate. In that
10 case the prescription upon which the liquor had been sold
11 was in the hands of the prosecution, the very prescrip-
12 tion upon which the prosecution was based. The physician,
13 the defendant Terry, demanded that he be allowed to in-
14 spect that prescription, that document which had been
15 signed by himself, in order that he might prepare his de-
16 fense, and meet the accusation brought by the authorities,
17 and the courts held in that case that the defendant was not
18 entitled to an incriminating document signed by himself.
19 That is not the law of Louisiana alone, but is the law of
20 all states; the general rule about production of docu-
21 ments is laid down in Wharton's Criminal Evidence, the
22 latest edition, the 10th Edition, Volume 2, page 1156,
23 page 564 -- in discussing the production of documents and
24 cases where it might properly be produced, the author says:
25 "The first essential to such production is to show to the
26 court that the document sought is relevant to the issue.

1 When this essential requirement is complied with the court,
2 according to the circumstances of the case will order the
3 production of the document", and if your Honor will bear
4 in mind at the beginning we made two objections, one was
5 that there was no showing as to the materiality and rel-
6 evancy of the documents asked for, there was no showing
7 that they desired to introduce them in evidence, the
8 notice was insufficient in that particular. Assuming, for
9 the sake of argument, that they can compel the production
10 of any of the documents, that is one point supported by
11 Wharton here, and we go further than that, we not only
12 claim that the notice is insufficient, assuming that the
13 documents were of a nature to sustain the production of
14 them upon the demand of the defense,

15
16
17
18
19
20
21
22
23
24
25
26

9p
1 and we go further than that, we claim that they cannot,
2 even if they had prepared a sufficient notice, that they
3 could not compel us to produce an incriminating document
4 in a criminal case, that the section has no application to
5 the proposition now before your Honor. As Wharton says
6 in the same paragraph, "However, in criminal cases it is
7 particularly evident that the accused cannot compel the
8 prosecution to produce documents which he himself has made.
9 He is supposed to be familiar with what he himself has
10 made," he is not entitled to have incriminating letters
11 written by him produced for his inspection," and citing the
12 case of Morrison versus the State in the 40th Texas Criminal
13 which I have here, "Nor to have produced a statement made
14 and signed by ^{the accused} himself, even on the ground that such state-
15 ment is material to his defense," citing the case of
16 People versus Fitzgerald, 130 Missouri, "Nor to have produced
17 a statement made and signed by the accused himself, even
18 on the ground that such statement is material to his
19 defense."

20 Now, in the case of Morrison versus the state,
21 that case was a case in which a man who had been formerly
22 a minister, while his wife was living, he traveled about
23 buying or pretending that he was buying cattle, and he met
24 a former sweetheart of his, he told her that the wife whom
25 he had married in his younger days was dead, that the
26 minister of whom she had been hearing was not himself but

1 was someone else, that he was engaged in the business of
2 buying cattle, and under those circumstances he wrote many
3 love letters to her. The motive sought to be established
4 by the prosecution was that the defendant had killed his
5 wife in order that he might marry the sweetheart of his
6 early days and the prosecution had in its possession many
7 incriminating letters written by the defendant to this former
8 sweetheart. The defendant made an attempt to get those
9 incriminating letters--

10 MR. ROGERS. We do not want any incriminating letters, we
11 say that right now, we want letters we want to use our-
12 selves.

13 MR. FORD. They must be either incriminating or self-serving,
14 one or the abother, or else absolutely not material at all.
15 There are only three classes of telegrams which can possibly
16 exist, as far as this defendant is concerned; one would be
17 telegrams containing self-serving declarations which under
18 no circumstances are admissible; the other would be in-
19 criminating letters, and the third class, which would in-
20 clude all those not included in the first two classes, would
21 be telegrams which have no relevancy or materiality to the
22 case at all, so that under all the circumstances, unless
23 they are incriminating telegrams, it is not necessary to
24 discuss the other two, and we want to show that, even in the
25 case of incriminating telegrams, even in the case of evi-
26 dence that is likely to be produced against the def endant,

1 or that could possibly under some contingency be produced
2 against the defendant, things which under all principles,
3 above all others, if he is entitled to at all he ought to
4 be entitled to those, but even as to those, he is not en-
5 titled to that. As the court says, in Morrison against the
6 State, "Appellant's second assignment of error is that the
7 court erred in refusing to grant an order compelling the
8 prosecution to produce the letters requested under
9 defendant's motion to that effect, because he had a right
10 to inspect the same before going into the trial so that he
11 might take the proper steps to prepare his defense." That
12 is exactly the situation here, in order that they may take
13 the proper steps to prepare their defense. Certainly there
14 can be no intention to offer them in evidence in their own
15 behalf, they do not seem to have in mind this any particular
16 letter or telegram, they do not identify any particular docu-
17 ment that they desire the prosecution to produce, they do
18 not state the materiality of it, they do not state the pur-
19 pose of it at all, and under those circumstances the only
20 possible purpose can be, so that they might prepare and take
21 proper steps, take the proper steps to prepare their defense.
22 (Reading) "It appears that these letters, however, were
23 produced upon the trial of the case; the witness Steel and
24 Miss Anna Whittlesby appearing there in ample time to tes-
25 tify upon the trial. We know of no law compelling the prose-
26 cution to disclose the character and kind of evidence that

1 it has against the defendant. Furthermore, it is not made
2 to appear in the record before us in what way appellant's
3 rights were injured, or that he was deprived of any sub-
4 stantial privilege. The evidence showed that all the letters
5 were written by him. This being true, and uncontroverted,
6 certainly he knew the contents of the letters, and could
7 not claim any character or kind of surprise." Paraphrased
8 in this case the defendant could not be deprived of any
9 substantial privilege. The evidence will show that all the
10 documents called for were written by him, certainly he must
11 know the contents of the documents that he is asking for,
12 and this being true he could not claim any character or kind
13 of surprise concerning documents that were written by him-
14 self. (Reading.) "If he could, the record ^{does not} disclose that
15 he did claim any such surprise. We do not think the court
16 erred in refusing to grant the motion, because, at the time
17 the same was made, it could not be complied with; and,
18 besides, appellant had the full right of cross-examination
19 as to these letters during the trial."
20
21
22
23
24
25
26

1 Now, the sweetheart in that case is exactly in the po-
2 sition of the telegraph company in this case. The defend-
3 ant in that case is in exactly the same position that the
4 defendant is in this case. The telegrams in that case or
5 the letters in that case are exactly in the position of
6 the telegrams in this case, and if all he is asking for
7 are documents written by himself -- if the documents were
8 written by him, certainly he knows the contents of them,
9 and the prosecution cannot be compelled to furnish him
10 the evidence that it has, if it has any, that it has
11 against him, and enable him to prepare his defense, and
12 we are holding it, if we have any such matters, we would
13 have a right to hold them until such time as we deem wise
14 or proper to produce them.

15 MR ROGERS: I just ask counsel if he hasn't got right
16 now from the telegraph companies original telegrams sent
17 by Mr Darrow to Samuel Gompers on either the 22nd or
18 23rd, the date when Mr Gompers was informed and asked to
19 send someone out here?

20 MR FORD: When we are compelled to answer that question
21 then counsel can put another question to us. Now, in the
22 case of State versus Fitzgerald, another murder case, your
23 Honor, "The first point relied upon by defendant for^a re-
24 versal of the judgment is the action of the court in re-
25 fusing to sustain his motion praying the production in
26 court of the written statement made and signed by him to

1 the Chief Detective Officer, William Desmond, after the
2 inquest was over." The coroner's inquest. (Continuing
3 reading:) "And he was being held for the homicide, and
4 which was at the time of the trial in the possession of
5 the prosecution. The motion was filed before the taking
6 of testimony was begun. No reason has been assigned where-
7 in there was error in overruling this motion." He was
8 being held for homicide, and which was at the time of the
9 trial, in the possession of the prosecution, a document
10 going to the very merits of the controversy that was be-
11 fore the court, a statement made and signed by the defend-
12 ant himself with regard to that very matter, a document,
13 the possession of which, or the knowledge of which, was
14 of the highest importance to defendant and his counsel,
15 and they made a demand for it, and certainly, if the law
16 ever permitted the defendant to get possession of a docu-
17 ment that was in the hands of the prosecution, that would
18 be the case, and yet the law does not permit it. (Con-
19 tinuing reading:) "It is true that it is said the state-
20 ment was necessary and material to the defendant in the
21 preparation and proper presentation of his defense, but
22 as to wherein or how material, we are left to conjecture."
23 In this case wherein is it necessary or material to the de-
24 fendant, is left entirely to conjecture. He doesn't even
25 specify the documents that he asks for. (Continuing read-
26 ing:) "Nor has it been made apparent to us why it was nec-

1 essary for the purpose claimed by defendant. Moreover, it
2 was the evidence of the state, and if defendant's conten-
3 tion be correct, he could, for a like reason, and upon the
4 same principle, have asked the court to require the state
5 to produce its witnesses before his counsel for their ex-
6 amination in regard to their knowledge of the case, but
7 he might thereby be better prepared to make his defense;
8 something for which no lawyer would contend. At most, it
9 was a matter resting in the discretion of the court, and
10 it did not act unwisely in overruling the motion."

11 In State versus Leard, the 10th Pacific, page 637, I
12 think that is the case which I read to your Honor.

13 THE COURT: Pardon me, Mr Ford, I think you read most of
14 these cases on a former argument.

15 MR FORD: I think I did, your Honor, and I think at that
16 time I called your Honor's attention to the case of Ex-
17 parte Clark in the 126th Cal., read from the syllabus --
18 second syllabus, your Honor, (reading:) "The court is
19 bound to protect a party to an action from undue inquisition
20 into his private affairs, and cannot allow a dragnet of in-
21 spection to be drawn through all of his books and papers,
22 to discover whether they do or do not contain legal evidence
23 infavor of the opposite party." They are not, in this
24 case, entitled to draw their drag-net through all of our
25 books and papers for the purpose of a fishing excursion
26 to find out, if, perchance, it contains some legal evid-
 ence which might be legal evidence infavor of the defendant

1 in this case, nor will a mere suspicion that they contain
2 material evidence warrant an order for their production.
3 The court has no power to order the production of books or
4 papers by one party to be used as evidence for the other
5 party without an affirmative and substantial showing by
6 affidavit or otherwise,

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

11s 1 that they contain evidence material to the cause of action
2 or defense of the party requiring them." In that case an
3 order had been made by the court and the defendant was pun-
4 ished for contempt in refusing to produce the books and
5 papers. The defense raised that there was no material--
6 no averment of the materiality of the evidence requested
7 by the opposite party and that, therefore, the court had
8 exceeded its jurisdiction in trying to compel Clark to pro-
9 duce the documents, consequently the order punishing him for
10 contempt was void. The matter came up on habeas corpus
11 to the Supreme Court and the petitioner was released. The
12 decision covered some 7 or 8 pages, I believe your Honor is
13 familiar with it. I think we read it to you before, in
14 which it settled the question of notice. The Clark case
15 holds, your Honor, that they must specify in detail that
16 which they want and make some showing of its materiality.
17 That has not been done until a moment ago Mr. Rogers asked
18 for the Gompers telegram. Is that the telegram you desire?
19 MR. ROGERS. I desire that among others and I purpose to
20 inquire for all of it. My question was simply, have you
21 produced the documents named in the subpoena. I have not
22 been permitted to show the materiality or description of any
23 of them.

24 MR FORD. I don't have to comply with any request or any
25 order until the documents are shown to be in my possession
26 and are shown that they have some materiality, and that they

1 must be specified in some way in order I may pick out such
2 documents, if I have them.

3 MR. ROGERS. Bring them all here and we will pick them out.

4
5 MR. FORD. I am not doing anything I don't have to.

6 MR. FREDERICKS. We think the first step should be a speci-
7 fication on the part of the defendant just which documents
8 they wish and the^{ir} materiality, and then we will know what
9 to argue from.

10 MR. FORD. I will only content myself on the question of under
11 ex parte Clark page 240, (Reading) "In the case at bar, we
12 are satisfied that the order in question was unauthorized.
13 There was not showing by affidavit or otherwise that the
14 books in question contained any evidence material to plain-
15 tiff's cause; the only evidence on the point was the testi-
16 mony of petitioner when on the witness stand as plaintiff's
17 own witness, and that showed that they did not contain such
18 evidence. In Morrison vs Sturges, 26 How, Pr. 179, the
19 court says: It is not enough that the party believes or
20 is advised that the paper contains material evidence. Facts
21 must be shown to support such belief. Moreover, it was
22 in effect a general omnibus order for the production of all
23 defendant's books, which has always been held to be un-
24 authorized." Just as counsel has now advised me to bring
25 in everything I have in my possession, a general omnibus
26 order. That might answer a very general description given
in the subpoena, and as the court says here: "(Reading)

1 "It has always been held to be unauthorized; for, while it
2 named certain books, yet those constituted all of defendant's
3 books, as appeared from plaintiff's examination of the peti-
4 tioner as to what books the defendant had. Again, the
5 order was in the nature of what Lord Chancellor Hardwicke,
6 over a century ago, called 'a mere fishing bill' and such
7 bills have been universally condemned. It is further
8 evidence that these books were not required to be produced
9 for the direct purpose of introducing them in evidence."
10 The court says right here, and there must be some showing
11 here that these documents which they want to have produced
12 must be documents which they intend to put in evidence.
13 They must show there is some materiality, and avow their
14 intention of putting them in evidence. (Reading) "Plain-
15 tiff would not have offered them or any part of them in
16 evidence unless he found something in the part offered
17 that was relevant and material in support of his side of
18 the case; he merely intended to draw his drag net of
19 inspection through all of these books under the ostensible
20 motive of trying to get something which his witness had
21 testified was not there. In the meantime, all the private
22 business of the defendant--all its dealings with persons
23 other than plaintiff, its methods of conducting its af-
24 fairs, perhaps its financial condition and other matters
25 vitally important to its welfare--would have been exposed.
26 There is no warrant in the law for such a forcible wholesale

1 violation of a persons privacy upon such a showing as was
2 made in this case. A man does not lose all his civil
3 rights because he is brought into court as a party to a
4 suit. As was said by Lord Hatherley: 'A court is bound to
5 protect a defendant against undueⁱⁿquisition into its
6 affairs'; and it would be difficult to imagine a more
7 striking instance of such 'undueⁱⁿquisition' than an order
8 compelling the defendant to produce for inspection all of
9 his books upon the mere suspicion--against positive
10 evidence to the contrary--that they might possibly contain
11 some evidence favorable to the plaintiff, and without
12 pointing to any particular part of all of these books over
13 which this suspicion was supposed to hover.
14
15
16
17
18
19
20
21
22
23
24
25
26

1 The authorities on the subject are innumerable. Many
2 of them arose out of the discussions of the old 'Bill of
3 discovery' and many out of later statutory provisions;
4 but the principles which they declare are clearly to the
5 point that such an order as is here under review is un-
6 authorized: Originally, an order for the production of
7 a paper, document or book was made only when the document
8 was once declared on in the bill or set up as a defense;
9 or where the party asking for it had an interest in the
10 document itself -- as where it was a contract between the
11 parties, and there was only one copy of it which was in
12 the hands of the opposite party, or where the instrument
13 was in the very nature of things, material evidence as where
14 it was alleged to have been forged or altered, and that
15 it would, on its face, show the fact alleged; or where
16 books belonged to both parties and would necessarily con-
17 tain evidence of the issues pending -- as in the case of
18 a suit between partners, or generally between principal
19 and agent or trustee and beneficiary. Afterwards, such
20 orders were undoubtedly extended so as to include other
21 grounds for production of papers, and were in many states,
22 as hereinbefore noticed, regulated by statute and rules of
23 court; but the principles applicable generally to the
24 forced production of papers, are declared in the authori-
25 ties as above stated, and we have been referred to no
26 case warranting such an order as the one now under re-

1 view."

2 The counsel have not, either at this time or when the
3 subject was up the previous times, have not once called your
4 Honor's attention to a case which would warrant an in-
5 spection of the document in the possession of the Dis-
6 trict Attorney, not one authority have they shown where it
7 said a thing of that kind ~~has~~ ever been done. (Reading:)
8 "Many cases are there cited to the point that there must
9 be a substantial showing that the document or book sought
10 for contains material evidence in support of the cause
11 of action or defense, of the party asking for it; and that
12 such a mere suspicion as appears in the case at bar will
13 not warrant an order for the production. But the princi-
14 ple which is determinative of the invalidity of the order
15 involved in the case at bar is stated on page 533, where
16 the author says, 'The right given by statute to discover
17 books, papers and documents relating to the merits of a
18 pending action does not entitle a party to enter into a
19 mere fishing examination of all the books, papers, and
20 documents of his adversary. An inquisitorial examination
21 was not contemplated by the framers of the statute.'"

22 So much for the materiality required under our law.
23 In case of People vs. Glaze, in the 139th California,--
24 THE COURT: It seems to me, Mr Ford, we are wandering into
25 the realms of elementary propositions, whether there is any
26 necessity of it --, ^{as} the presiding judge of this court, pur-

1 suant to section 2020, 21, 22 and 23, I had occasion to
2 pass on the merits of this precise question several times a
3 day for the last year, in the matter of taking depositions.

4 MR FORD: If your Honor is satisfied on the point --

5 MR FREDERICKS: There is one matter --

6 THE COURT: I am satisfied I have read pretty near all the
7 law there is in California on that point.

8 MR FREDERICKS: There is one matter I think will shorten
9 the matter, -- I am never very long in my remarks --
10 counsel has not stated what they want. Now, if there is
11 anything in our possession, any document, or if we can
12 get a hold of any document that this defendant wants to
13 introduce in evidence he shall have that document.

14 MR ROGERS: Very good; why didn't we save all this --

15 MR FREDERICKS: But that is not the point. We declined to
16 turn over to them all of the material that we may have
17 gathered in order that they may fish and finger through
18 it.

19 THE COURT: All right, now. Let's stop with that. We
20 are altogether on that point.

21 MR FREDERICKS: No, we are not. Let them specify what
22 they want, and that they will introduce that in evidence
23 when they get it.

24 MR APPEL: Now, your Honor, just one moment --

25 THE COURT: Now, let me see if I get Mr Rogers' statement.
26 I understood Mr Rogers to acquiesce in that statement.

1 MR ROGERS: No, I did not say I would introduce it in evi-
2 dence. I am not going to introduce in evidence anything
3 I don't see fit to, but I have a right to refresh the wit-
4 ness' recollection -- I have the right to telegrams he
5 sent. The telegrams I do want to introduce in evidence
6 which they have gotten ffrom the telegraph companies and
7 which they have gotten, as I understand it, from our files,
8 which I have a right to have, for the purposes of this
9 case. I am on no fishing expedition; I don't want to
10 wander through all their documents and books. All I want
11 is that which relates to Mr Darrow. When, On Saturday, I
12 began largely in detail for examination of Mr Darrow, I
13 found the absence of documents where they ought to be,
14 from the telegraph companies, and from the files, and I
15 found them in the possession of the District Attorney.
16 What am I going to do but ask for them just as I have asked
17 the telegraph companies?

18 MR FREDERICKS: Just let counsel specify just what he
19 wants, then it may be, -- I am not saying we will --
20 if he will specify just exactly what he wants --

21 MR ROGERS: Just exactly -- I cannot always do.

22 MR FREDERICKS: And show its materiality --

23 THE COURT: Let me make a statement here that may shorten
24 the argument a little. I have had this question so many
25 times, as I have said, under section 2021, which provides
26 for the taking of depositions, and have constantly refused

1 to issue any order for the issuance of a subpoena except
2 when the affidavit discloses, at least, upon information
3 and belief, that the witness whose deposition the affiant
4 sought to take, or the party sought to take, testified to
5 some material fact. Now, that is practically this point--
6 if it is different from this point, let's have the dif-
7 ference.

8 MR APPEL: Now, your Honor, we contend that sections 2019
9 and 2020, and 2021 have absolutely no application to this
10 question. Our contention is this, your Honor; that if
11 the telegraph company had telegrams there that Mr Darrow
12 had sent on a certain occasion on a certain date, that we
13 would have a right to call the telegraph company to pro-
14 duce that telegram here, either to show some verbal act of
15 the defendant, some substantive fact or by the telegram
16 made by him to refresh his memory therefrom, just exactly,
17 your Honor, as document.-- several documents were used in
18 evidence here by the People, gotten from different insti-
19 tutions, which refreshed the memory of witnesses upon the
20 stand. Your Honor will remember you even admitted those
21 documents, although the statute says that the memorandum
22 itself is not evidence of the facts contained in it, and
23 as has also been said in the case of People against Lanter-
24 man, but they went in evidence. Now, that is on the part
25 of the prosecution, they were used for that purpose. Our
26 contention is that if the telegraph company had a tele-

1 gram sent by Mr Darrow on a certain day to any individual,
2 which that telegram and the fact of sending it was so
3 connected with and so related to some fact that he would
4 testify upon the stand, we would have a right to say to the
5 telegraph office, "Come into court with that telegram",
6 and when Mr Darrow was on the stand, we certainly would have
7 a right to show him the telegram to either refresh his
8 memory, or to corroborate any fact that he was going to
9 testify to by the fact that he had sent the telegram in
10 reference to any matter that he may disclose upon his tes-
11 timony. I didn't suppose anyone would contend that could
12 not be done. Now, we issued a subpoena here and we go
13 to the telegraph office and we ask for the production of
14 such a telegram of such a date. They answer they haven't
15 got it. Well, who has got it? The District Attorney.
16 Who is the District Attorney? The District Attorney is a
17 person that has come down there and taken that telegram.
18 Can't we do the same thing with the District Attorney?
19 Can't we come to him and say, "Produce that telegram?" The
20 question as to whether we can use that telegram or not,
21 your Honor, may not -- is not the matter under inquiry.
22 The question whether we can introduce that telegram in evi-
23 dence is not at all involved in this issue. The question
24 is whether we are going to be deprived of evidence which
25 we, in good faith, say we can use on the examination of
26 our witnesses here, perchance, because the District Attorney

1 has gotten ahead of us and taken it from the place they were
2 or by whatever means they got it, that is the sole ques-
3 tion here. Now, counsel says, "Let us have the law;
4 let us have the law; let's have the law." Section 1000
5 says what? "Any court in which an action is pending--"
6 this is an action pending -- "or a judge thereof may, upon
7 notice, order either party to give to the other, within
8 a specified time, an inspection and copy, or permission to
9 take a copy of entries of accounts in any book, or of any
10 document or paper in his possession, or under his control,
11 containing evidence relating to the merits of the action,
12 or the defense therein." I don't care for the Missouri law,
13 California is good enough in this section. I don't care
14 for the love letters of the ex-preacher to his sweetheart.
15 They may have been proper under circumstances that the
16 love affairs of a minister to one of the congregation
17 should not be disclosed in evidence. It might be possible
18 that it was right to presume. I don't care for that; I
19 don't care for that murder case in which a defendant said
20 before trial, "Give me particularly all the evidence that
21 you have --" a bill of particulars. I don't say he was
22 entitled to it; nobody would contend that it was foolish for
23 any man to ask for any such thing as that, but here we are
24 introducing evidence on the part of the defense, and we say
25 certain documents which we need, either to refresh the
26 memory of the witness or which contain inherent substantive

1 evidence is necessary to our case, and we find these docu-
2 ments gone. Now, we contend that we can call ^a witness
3 on the stand and ask him, "Have you got that document",
4 and he says, "Yes", When the court orders its production
5 in court, and then the District Attorney says we must intro-
6 duce it in evidence. I say that anyone who has ever read
7 this code, your Honor, the merest tyro in the profession --
8 my 16 year old boy knows better than that. Section 1939
9 says explicitly that we don't have to introduce it in
10 evidence. Section 1939: "Though a writing called for by
11 one party is produced by the other, and is thereupon in-
12 spected by the party calling for it, he is not obliged to
13 produce it as evidence in the case." And all the decisions
14 are to that effect, so by what right or by what law do
15 counsel on the other side undertake to get from us, and by
16 what right has this court a right to say to us if these
17 documents are produced you must introduce them in evidence?
18 A clear violation of the plain, simple provisions of the
19 statute. What was this section passed for? Why, section
20 1000 and section 2021 and so on, has received the most
21 liberal construction in our state --

22 THE COURT: Just a moment, Mr Appel. I will have to inter-
23 rupt you for a brief recess.

24 (Jury admonished. Recess for 10 minutes.)

25 (After recess.)

26 THE COURT: It seems to me, gentlemen, that we can dispose of

1 one branch of this work right now. I haven't any doubt
2 but what the defense here would have a right to call the
3 custodian of these documents from the Western Union or
4 Postal, as it might be, put him on the witness stand, and
5 call for the document and examine him and introduce such
6 of them as he saw fit, if the fact appears, temporarily,
7 some other person has them, whether that person happens
8 to be Mr Ford or someone else, the same rule should apply.
9 They are records and files of the Western Union office.
10 They are not records and files of the District Attorney's
11 office. They don't belong to the District Attorney's of-
12 fice. They are temporarily there, and the Western Union
13 are entitled to have them returned at any time on a proper
14 showing. They belong to the Western Union.

15 MR FREDERICKS: We haven't any such telegrams, your Honor.
16 I don't think we have got any.

17 THE COURT: Haven't we been wasting a good deal of time dis-
18 cussing the matter.

19 MR FREDERICKS: I think that we can know where to go and
20 get them, if they want them, and it is quite possible we
21 have copies of them, and I am not going to say this un-
22 qualifiedly, because we have so much truck in this thing,
23 but I don't think that we have any of those telegrams, but
24 if counsel will specify just what telegrams he wants, we
25 will endeavor to get him copies of them anyhow.

26 THE COURT: Well, he has specified one particular tele-

1 gram.

2 MR FREDERICKS: That is all right. I think there is such
3 a telegram, although I have never seen it. I think I have
4 seen a copy of it, and I will be glad to help him to get
5 it.

6 THE COURT: You will produce that copy?

7 MR FREDERICKS: I don't know that I could get it right
8 now.

9 MR ROGERS: I can't specify. They say if we will specify.
10 We were talking in there and trying to reach something. I
11 can't specify date and day. All Mr Darrow can remember,
12 not having his files with him, is that he remembers to have
13 sent some telegrams of such a nature, and a man who was
14 engaged as he was cannot give exact dates and days.

15 THE COURT: As I understand your position, you want to look
16 at those telegrams and refresh his memory.

17 MR ROGERS: Yes sir.

18 THE COURT: I agree with you.

19 MR DARROW: We want all of them.

20 MR FREDERICKS: All what?

21 MR APPEL: Put the witness on the stand, and if he hasn't
22 got them, he has seen them. He knows who has got it. We
23 want the information so we can get it.

24 THE COURT: I guess that will make a better record.

25 Mr Ford, take the stand.

26 MR FREDERICKS: All the telegrams that are received in

1 this office are skeleton copies. You can get --

2 THE COURT: All right, proceed with the examination.

3 MR ROGERS: I take it, Mr Ford, in answer to the last
4 question, if you have produced any documents, what would
5 your answer be? A-- Has the court overruled the objection
6 to that question?

7 THE COURT: Well, now, what is that question?

8 MR ROGERS: That is preliminary; it is asking him if he has
9 produced the documents referred to in the subpoena. Now
10 then, he has a right to --

11 THE COURT: Yes, as to that question. The question now is
12 Have you produced the documents called for in the subpoena?

13 A The subpoena not having specified any particular docu-
14 ments, from believing the law requires a subpoena to spe-
15 cify such documents, I have not attempted to gain access to
16 any documents and have not produced any documents.

17 MR ROGERS: Have you any documents such as telegrams purport-
18 ing to be sent by the defendant, Darrow, while he was
19 here in Los Angeles during the McNamara case or immediate-
20 ly before, between July and the 2nd day of December, 1911?

21 A Read that question. (Last question read by the re-
22 porter.) Well, now, I don't want to quibble. I haven't
23 possession of any document. I have had access to some
24 documents. I have seen some documents purporting to be
25 signed by the defendant, and I have made notes of numer-
26 ous documents purporting to be signed by the defendant.

1 Q Where did you see those documents? A Well, in the
2 District Attorney's office, I have seen them.

3 Q In the District Attorney's office? A Yes.

4 Q Well, you have had charge of the preparation of this
5 case, haven't you? A Assisting Captain Fred ericks in
6 preparing the case.

7 Q Well, who has those documents now which you have seen?

8 MR FREDERICKS: If you know?

9 MR ROGERS: If you know?

10 A I don't know.

11 Q When did you last see them? A From time to time I
12 have seen different documents that I was interested in.
13 I have made copies of such documents as I am interested
14 in, and I usually worked from the copies, and didn't care
15 anything about the originals.

16 Q When was the last time you saw these documents?

17 MR FREDERICKS: By these documents, your Honor, is too
18 general.

19 MR ROGERS: The documents he is talking about.

20 MR FREDERICKS: Even so, that is pretty general.

21 A I have at various times since the termination
22 of the McNamara case, seen documents purporting to be sign-
23 ed by C. S. Darrow or Clarence Darrow.

24 MR ROGERS: And in whose possession were they when you saw
25 them? A When I saw them they were in my possession.

26 Q To whom did you deliver them after seeing them?

1 A To the person from whom I got them.

2 Q From whom did you get them? A Whenever I wanted to
3 see them, I sent some attache of my office to get them
4 wherever they were, and at the time they were gotten.

5 Q Where did you send this attache to get them? A I told
6 him to find out.

7 Q You told him to find out? A Find out where they were.

8 Q What attache did you send to find out and get them
9 for you? What is his name, aside from being an attache?

10 MR FREDERICKS: Oh, I suppose, your Honor, there is no
11 use fussing about it. These telegrams were, I think, got-
12 ten by the United States grand jury. When we wanted them
13 we sent down there and got copies of them; sometimes got
14 the originals.

15 MR APPEL: Down where? That is the point.

16 MR FREDERICKS: The United States District Attorney, I
17 think. I told counsel if he would specify what he wanted -
18 they all have to be gotten by subpoena from the telegraph
19 office. The telegraph office will not give up telegrams
20 without a *duces tecum* subpoena for them as I understand
21 it.

22 MR ROGERS: Of course, I would like Captain Fredericks to
23 take the stand if he is going to testify. He is doing bet-
24 ter, a whole lot better than Mr Ford.

25 THE COURT: He is conceding these matters; that is what
26 you are after, is information.

1 MR ROGERS: Isn't it a fact you have in your possession
2 right now, telegrams, original telegrams purporting to be
3 signed by Mr Darrow, written or dated between July and
4 December 2nd, 1911? A In my physical possession, you
5 mean?

6 Q No, I mean under your control as one of the counsel in
7 this case? A I don't think there are any in that box,
8 there might have been one or two, I am not sure.

9 Q Under your control, Mr Ford? A Well, I have always
10 been able to get them whenever I wanted them.

11 MR APPEL: Now, your Honor, that don't answer the question.

12 A To that extent, they are under my control.

13 THE COURT: Let the witness finish his answer.

14 MR APPEL: Your Honor can see --

15 THE COURT: If he had answered the question, I will hear
16 your objection. He has not finished his answer.

17 MR APPEL: We want you to direct him to answer, if your
18 Honor please.

19 MR FREDERICKS: What is the use of taking up time. I
20 think these things are in the United States District At-
21 torney's office. If we wanted them we have got them there.
22 What is the use of taking up time.

23 THE WITNESS: You have asked for my conclusion whether
24 they were under my control. I was endeavoring to give you
25 the fact. To a limited certain extent, I suppose they are
26 under my control. I never had any difficulty in getting

1 them, anything I have got to do with. If you will specify
2 what particular one, I will get it.

3 MR ROGERS: I want all Mr Darrow's telegrams you have got-
4 ten from the telegraph company, Postal or Union, between
5 the 1st of July, 1911, and December 2nd, 1911.

6 MR FREDERICKS: Now, then, may it please the court, that
7 would not do counsel any good, because he hasn't any --

8 MR ROGERS: Then, I will take copies.

9 MRFREDERICKS: That is different. If you want copies, we
10 can possibly get them together for you.

11 THE COURT: That is what is wanted. How soon can you get
12 them?

13

14

15

16

17

18

19

20

21

22

23

24

25

26

Alp 1 MR. FREDERICKS. Oh, that will take some time, your Honor,
2 we can have them ready--that is a pretty big job.

3 THE COURT. Well, how big?

4 MR. FREDERICKS. Well, we have about a hundred thousand
5 different documents and one thing and another there, and
6 we can have them at 10 o'clock tomorrow morning.

7 MR. ROGERS. I specify further--

8 MR. FREDERICKS. Yes, specify a whole lot.

9 MR. ROGERS. Yes, sir, here goes the other barrel. Have
10 you in your possession or under your control any letters
11 signed by Mr. Darrow relating to the McNamara case, either
12 to, I think it is L. M. Rappaport, or Ryan, or Harrington
13 or Gompers or Nockles, Ed Nockles or Samuel Gompers, or
14 Morrison of the Riggs National Bank, which letters bear the
15 signature of Mr. Darrow or purporting to bear his signature,
16 which relate to or refer to the McNamara case or this case,
17 if any? A I have not.

18 MR. FREDERICKS. That is not a question, Mr. Witness, that
19 is a request, and so far as possible, we will--

20 A I have not anyway; I have not anyway.

21 MR. ROGERS. Q Those letters are the same as the telegrams,
22 aren't they, that is to say, you have them under your control
23 to a certain extent? A No, I have not.

24 MR. FREDERICKS. No, we have not to any such extent, we have
25 not now--

26 MR. ROGERS. Or the copies?

1 MR. FREDERICKS. We will give you all we have.

2 MR. ROGERS Some we want--

3 THE COURT. Captain Fredericks has stated in open court he
4 will produce all he has tomorrow morning at 10 o'clock.

5 MR. FREDERICKS. We would kind of like to know what they
6 want.

7 MR. ROGERS. Further, I understand they have in their possess
8 ion some documents which were taken from the defendant's
9 office and which relate to the McNamara case which were in
10 his files, affidavits and lists of letters of one kind or
11 another, which we want, the names of witnesses and memo-
12 randa.

13 MR. FREDERICKS. All right, if we have any you can have them

14 MR. ROGERS. All right, sir.

15 THE WITNESS. Any cross-examination?

16 THE COURT. No, that is all.

17 MR. DARROW. Why cannot we have those tonight so that we
18 can examine them tonight?

19 MR. FREDERICKS I will give them to you as fast as I can.

20 MR. ROGERS. If you give them to me at 10 o'clock you will
21 dump a bunch of stuff on me and I cannot go through it.

22 MR. FREDERICKS. We will get them for you as fast as we
23 can.

24 THE COURT. Mr. Sheriff, there is too much levity among the
25 people inside of the rail and I will instruct you to sit
26 less people inside the rail, and if that does not serve the
purpose--

1 MR. DARROW. I think if the court calls attention to it
2 that is sufficient.

3 THE COURT. I have called attention to it in this way and
4 I hope that is all that will be necessary.

5 MR. DARROW. I think so.

6
7 C L A R E N C E S. D A R R O W,
8 the defendant, called in his own behalf, being first duly
9 sworn, testified as follows:

10 DIRECT EXAMINATION

11 MR. ROGERS. Q Your name is Clarence S. Darrow? A That
12 is my name.

13 Q How/^{old}are you, Mr. Darrow? A I will be 56 the next time,
14 in April.

15 Q 56 in April? A Yes, sir.

16 Q Where have you been living the last 25 years? A Most
17 of the time in Chicago until I came out here a little more
18 than a year ago.

19 Q What is your profession? A Lawyer.

20 Q How long have you been admitted to practice law? A About
21 36 years.

22 Q To what courts have you been admitted? A Well, every-
23 thing from the Justice of the Peace up to the Supreme
24 Court of the United States.

25 Q You may, in your own way, and without my taking the time
26 to interrogate you with reference to each one, you may state

1 the cases that you have been engaged as counsel in or as
2 arbitrator or as arbitor, whatever you call it.

3 MR. FREDERICKS. We object to that on the ground it is
4 immaterial--oh, I will withdraw the objection.

5 A Well, I have been--I was general attorney for the Chicago
6 & North Western Railway 5 or 6 years; in the active
7 corporation of the city of Chicago, corporation counsel of
8 the city of Chicago--

9 Q What does that mean? A It is the chief law officer
10 of the city.

11 Q The same as city attorney? A Yes. For a considerable
12 time. I was city assessment attorney of the same city for
13 a considerable time before and assistant corporation before
14 that, and special attorney for the city of Chicago after
15 this, I suppose, altogether, 5 or 6 years, covering two or
16 three different administrations; I have been counsel for
17 the Sanitary District in a number of cases, of Illinois--

18 Q What is the Sanitary District, Mr. Darrow? A That is the
19 drainage district that was provided for by special act of
20 congress in the legislature for the drainage of Chicago
21 and the ship canal, also, and I have represented most of
22 the elevated railroads there in condemnation cases and other
23 cases, and mandamus cases on their account and against
24 them. I have represented pretty much all of them at dif-
25 ferent times in those matters; I have, for a good many
26 years, been connected with most of the important labor

1 cases in the middle west and perhaps in this country;
2 was the attorney for the coal miners of the anthracite
3 regions at the time President Roosevelt appointed a com-
4 mission to settle their controversy.

5 Q Just a moment on the arbitration. That was the anthra-
6 cite coal strike, was it not? A Yes.

7 Q In which President Roosevelt appointed a special arbitra-
8 tion to sit? A Yes.

9 Q Who were the members of the board that President Roosevelt
10 constituted?

11 MR. FREDERICKS. We hardly think that is material.

12 MR. ROGERS. It is not taking any time.

13 MR. FREDERICKS. All right. Withdraw the objection.

14 A Judge Gray.

15 Q Judge Gray of Delaware? A Federal Court of Delaware;
16 Bishop Spaulding of Illinois; Mr. Clark, who is a member of
17 the Interstate Commerce Commission; John Wilson of the
18 regular army and two or three more whose names I do not
A2p19 recall at this moment.

20 Q And you appeared for the coal miners in the adjustment of
21 that strike? A Yes, sir.

22 Q It was adjusted by this board of arbitration? A Yes, and
23 stayed adjusted ever since.

24 Q And stayed adjusted ever since? A Yes.

25 Q Aside from appearing before this arbitration board of
26 President Roosevelt in that matter, state what other arbi-

1 tration boards you have appeared before in labor matters?

2 A Well, I was attorney for the Firemen of all the western
3 roads inthe arbitration before the Federal Board, that
4 lasted some two or three months; attorney for the switch
5 men of all the western roads in thesame kind of an arbi-
6 tration in the last three years.

7 Q Did those stay arbitrated? A They have so far.

8 I was arbitrator between the newspapers and the typographical
9 union, chosen by both sides in Chicago, not long before I
10 came here; arbitrator before the breweries and the employes;
11 National Brick Company and their employes, and I was chosen
12 as a n arbitrator by both sides;and settled the clothiers
13 strikes in Chicago.

14 Q What do you mean by clothiers strikes you settled in
15 Chicago, arbitrator? A Well, that was a strike that in-
16 volved all the manufacturers of clothing in Chicago, I
17 think some 40,000 men and women.

18 Q 40,000 garment makers? A And both sides agreed to all
19 the terms arbitrated.

20 Q Were you the sole arbitrator? A No, but we had one
21 more, but we got along with^{out} choosing a third and settled
22 it without.

23 Q You settled that strike. Did that stay settled?

24 A It has so far. Then I was one of the arbitrators in the
25 controversy between the street railroad companies of Chicago
26 and the employes. I don't know, I have had a good many arbi-

1 trations of that sort, also as counsel or arbitrator; I
2 was one of the attorneys in the Moyer, Haywood and PettiBone
3 case, one of them in the Debs case, and the Kidd case, which
4 was a rather well known labor case. I have been in pretty
5 much all of those cases.

6 Q I am particularly referring to the matter of your being
7 constituted an arbitrator to settle labor questions, and
8 how much of that you have done and how many of those
9 arbitrations you have been in, either as sole arbitrator
10 or as one of the members of the arbitrators. Can you think
11 of any other strikes you have settled as an arbitrator?

12 A Yes, the brick company and the employes referred the
13 question to me alone without anybody else, and I suppose
14 I have had a dozen of them.

15 Q In which you settled the controversy between employes and
16 employers? A Yes.

17 Q Well, those arbitrations involved the bettering of
18 conditions for the working men who were on strike or out, and
19 involved wages, whether they should be paid higher wages
20 or not, and things of that sort? A I think we got better
21 conditions in most all of them, I guess all of them.

22 MR. FREDERICKS. That was not the question. The question
23 was was that the question involved?

24 A That is right.

25 MR. ROGERS. Q The question that was involved. A Strike
26 out that answer. The question of wages and hours and con-

1 ditions of labor were involved, and the recognition of
2 unions.

3 Q Well, now, in your practice did you have anything to do
4 with the franchise matter, that is the franchise for the
5 street railroads of Chicago. I think there was a contro-
6 versy which came up at the time Mayor Dunn was elected
7 Mayor of Chicago, that is, whether or not the franchise
8 of all the street railroads had expired and what was to be
9 done with them? A I was special counsel for the city of
10 Chicago in the controversy between the railroads and the
11 city wherein the railroads claimed a perpetual franchise
12 and the city claimed the franchise had expired. I think
13 that lasted about two years and went to the Supreme Court
14 of the United States, involved a great deal pf property,
15 fifty to one hundred million dollars.

16 Q You appeared for the city? A Yes.

17 Q What was the outcome of that case? A Well, the Supreme
18 Court held our way in that, that the franchise had expired.

19 Q Held in your favor? A Yes.

20 Q Now, can you think of any other cases that you have
21 been counsel of or arbitrator and how you have occupied your
22 time? A I have had pretty near every kind of a case;
23 I suppose nine-tenths of my practice has been civil practice
24 and perhaps one-tenth of it criminal and about one-third
25 of it charity for the last twenty years.

26 Q Have you been engaged in any work other than practicing

1 law in these labor difficulties or where you have acted as
2 arbitrator, any other, what you might call an avocation?

3 A I have written a few books of more or less value, prob-
4 ably less, generally.

5 Q You may name some of the books which you have written
6 which you consider of less value, and some of us may differ
7 with you about. A Volume of essays, a couple of novels,
8 and another volume, two volumes of essays, mainly.

9 Q Any other? A I have done a great deal of that sort of
10 work as a vacation only.

11 Q Well, Mr. Parrow, what time did you come out here to
12 California this time, with reference to the McNamara case?

13 A About the first day of July.

14 Q State whether or not you went into the McNamara case
15 desiring to do so, or whether you went into it because it
16 appeared your duty to do so?

17 MR. FREDERICKS. That is objected to on the ground it is
18 immaterial.

19 MR. ROGERS. Withdraw the question. Q In that regard,
20 how did you come to go into the McNamara case? A I was
21 first requested to go into it in May, I think requested by
22 the national organization, shortly after the men were
23 kidnapped. I refused the best I could, told them they
24 ought to have somebody that was younger and I didn't want the
25 burden of it. Finally the American Federation of Labor took
26 it up and asked me to go to Washington to meet them. I had
always been their friend and stood for their cause; most of

1 them were my friends; I plead with them the best I could
2 to get someone else, I knew about what was involved, I
3 knew how hard the fight was, and I knew how bitter it was, I
4 knew what it meant. They insisted on my taking it and I
5 finally consented to do it. I came out here, first, I
6 think it was in June, stayed a few weeks, a week or two,
7 perhaps; employed Mr. Davis and Mr. Scott--Mr. Harriman had
8 already been in the cases before I was--also employed Judge
9 McNutt, went back east to close up my office and dissolve
10 my partnership, wind up my business the best I could before
11 moving to Los Angeles, which I did. About the first of
12 July I arrived here. I knew nothing about the cases at all
13 except that they were men who were accused, neither of whom
14 I had ever seen or heard of, as far as I knew, nobody
15 with whom I had talked knew anything about it; they simply
16 knew he was secretary of the national organization, or a
17 member of a structural iron workers, and regarded it as
18 most of those contests are, one growing out of a contro-
19 versy between capital and labor, one that would not have
20 happened in any event excepting for it. I got out here,
21 I had presented to me a copy of the testimony before the
22 grand jury, which covered a period of several months, as
23 I recall it, and it was very long and it took a good while
24 to get through with it. I knew about what was involved
25 in the case and, of course, I knew that I would not be able
26 to attend to the details of it or to know much about the
details of it.

1 Q As a matter of fact, what was your condition of health,
2 Mr. Darrow? A It was not very strong.

3 Q Had you had some time previously an operation of severity?

4 A Yes, but I had pretty well recovered from that and I had
5 contemplated retiring from the practice and did not feel I
6 was able to undertake it. However, I had known Mr. Harrington
7 casually for some 10 or 15 years, during which time he
8 had been the evidence gatherer, engaged in preparing cases
9 for the Chicago City Railway Company. That was his business.
10 I had met him a good many times when he prepared the
11 evidence against me. I knew what he could do. I knew his
12 experience and his expertness in interviewing witness and
13 preparing evidence. I had ~~once~~ twice asked him to get
14 witnesses for me in two arbitration cases, railroad cases,
15 the only time I had ever been associated with him that I
16 recall, in business, but he had had a very long experience
17 in that kind of work, he had never been connected with a
18 labor case, or the labor movement in any way, but had
19 been associated always with the railroad company, up to a
20 year or so before that time- I asked him to take hold of
21 it, come out here and prepare the evidence for the case, to
22 organize the office himself, with that branch office.

23 MR. FORD. pardon me, Mr. Darrow, I don't remember the exact
24 question, but it seems to me I have the question--I think
25 we are getting off to a point where it is not responsive
26 to the question before the court.

1 THE WITNESS. Well, perhaps.

2 THE COURT. Any objection?

3 MR. FORD. I think that counsel wants to ask questions--
4 of course--may I have the original question read, Mr. Peter-
5 michel?

6 (Last two questions read.)

7 MR. FORD. He has answered that and I think he is going
8 into what he did after he got into the case.

9 MR. FREDERICKS. There ought to be another question.

10 MR. ROGERS. I think so, possibly. Q Well, Mr. Darrow, you
11 were relating that Mr. Harrington came out here and your
12 relations with him, and that he was to organize an office and
13 take charge of that branch of the work. Please proceed on
14 that line and relate further such circumstances in that
15 behalf as you desire.

16 MR. FORD. That is hardly a proper form of question and I
17 object to it on the ground that it is not competent, irre-
18 levant and immaterial.

19 MR. APPEL. We have a right to show his relation to this
20 witness.

21 THE COURT. Objection overruled.

22 MR. FREDERICKS. I think there is no doubt about that, your
23 Honor, only it will give us an opportunity once in a while
24 to keep track of it.

25 THE COURT. Precisely.

26 A I asked Mr. Harrington to organize his own office and

1 take charge of it, employ whom he wanted to--

2 MR. FORD. Just a moment. /^{if}He is going to relate a conversa-
3 tion between himself and Mr. warrington where these things
4 occurred, we are entitled to the time, place and the cir-
5 cumstances of it. I don't think you can put a witness on
6 the stand and say, "Tell everything that relates to this
7 case, tell everything that occurred," that is not what the
8 law provides for?

9 THE COURT. What is the objection?

10 MR. FORD. Our objection is it is too general, it is not
11 specific, it is calling for a statement--

12 THE COURT. The objection has been ruled on once.

13 MR. FORD. I am objecting to it on the ground it is calling
14 for a statement of the witness--there is no foundation laid.

15 THE COURT. Your only remedy when an objection is overruled,
16 your only remedy is to move to strike it out.

17 MR. FORD. Then I move to strike it out on that ground.

18 THE COURT. The motion to strike out is denied.

19 MR. FORD. If the court please, we certainly do not have
20 to wait for some general question to be asked and let the
21 witness recite for half an hour--

22 MR. ROGERS. Well, he is not reciting.

23 MR. FORD. Well, I use that in no sense--I didn't use it
24 in any offensive sense--that he testified for half an
25 hour. Here is some testimony without the foundation laid.

26 THE COURT. Let us get the testimony of this witness. Too

1 much time has been occupied in argument--

2 MR. FORD. I object to the statement of the court that I am
3 trying to prevent the testimony coming in. I certainly
4 have a right to ask the court to put the testimony in
5 in legal form as we deem it--

6 THE COURT. You have no right at this time to interrupt the
7 witness, Mr. Ford. The question has been objected to and
8 objection
9 /overruled. Your remedy is to wait until the question is
10 answered and then move to strike it out.

11 MR. FORD. I was taking exception to the Court's language
12 as an insinuation upon counsel.

13 THE COURT. The court does not mean to make any insinua-
14 tion that way, it is a fact, that is apparent, almost
15 all this day has been occupied in argument, and it is im-
16 portant to get some testimony. This is not a greater
17 comment upon one counsel than the other, but it is simply a
18 statement of fact.

19 MR. FREDERICKS. We do not wish to be captious, your Honor,
20 we wish to give them every opportunity in the world, but
21 if he goes on and makes a long recital without a question
22 being asked, some of that will be material and some of it
23 immaterial and away at the end of half an hour we are
24 brought to a motion to strike out and I think the witness
25 should get down--

26 THE COURT. If such a condition as counsel seems to be fear-
ful of comes up the court will interfere and prevent its

1 occurrence, three minutes and half an hour are a long ways
2 apart. Proceed, Mr. parrow.

3 A Mr. Harrington was given charge of that department to
4 hire whom he pleased; he employed, amongst others, Mr.
5 Cooney and Mr. Fitzpatrick, neither of whom I had ever seen
6 or heard of before.

7 Q Now, did he come out here after this employment to go
8 to work? A He did.

9 Q Where was his office? A In the Figgins Building.

10 Q Approximately how close to yours? A There was one
11 office between us--it was all thrown open, however--of
12 course, he had other people working for him and I suggested
13 some myself.

14 MR. FORD: I move to strike out the last portion of the
15 answer, "he had other people working for him and I sug-
16 gested some of those myself", as not responsive to the
17 question, which was directed to the location of the office.

18 THE COURT. Yes, it may not be responsive. Strike it out.

19 MR. ROGERS. Q Did Mr. Harrington have other people work-
20 ing for him besides Mr. Cooney and Mr. Fitzpatrick, some of
21 whom you suggested yourself?

22 MR. FORD: We object to that as leading and suggestive.

23 THE COURT. Objection overruled.

24 A He did.

25 MR. ROGERS. Q Well, proceed now. A I presume first and
26 last, a dozen or more. He consulted me very little about

1 those matters--

2 MR. FORD. I move to strike that out as not responsive
3 to the question before the court.

4 MR. ROGERS. That is not responsive.

5 THE COURT. Strike it out.

6 A What is the question?

7 MR. FORD. The question is, did he have other people?

8 A He did.

9 MR. ROGERS. Now, then, Mr parrow, I want to take you back
10 for a few moments, to Bert Franklin. I will try to get
11 into half an hour a matter now, I will take up--

12 A Will you excuse me for suggesting something to you?

13 Q Yes. A As to time, if I took the Behm matter, which
14 particularly occurred in Chicago.

15 Q As you please, Mr. Darrow. A You want to take it up in
16 chronological order and it might be a little easier for me
17 so that I might carry it along.

18 Q All right, if it might be easier, of course, I cannot
19 follow the plan I had because of the cut up time today.

20 A Well, we will take that--

21 Q Do you know George Behm? A I think I do now.

22 MR. FORD. I move to strike out the answer.

23 Q Where did you first meet him--

24 MR. FORD. --as not responsive to the question. The witness
25 has stated something, I think meant something different
26 from what the proper answer is.

1 THE COURT. The motion to strike out--

2 MR. ROGERS. "I think I do now."

3 THE COURT. The motion to strike out is denied.

4 MR. ROGERS. Q When did you first meet Mr. Behm? A I met
5 him at my house in Chicago, I think about the middle of
6 June. I wouldn't say for sure the day.

7 Q Was any one with him when you met him? A Yes.

8 Q Who? A Mrs McManigal, John Harrington a part of the
9 time, and I am not sure that anybody else was there--prob-
10 ably Mrs. Darrow.

11 Q Is that the first time you had ever seen him there at
12 Chicago? A The first time.

13 Q Now, you have heard his testimony here, Mr. Darrow, you
14 have heard what he has said about his coming out here. You
15 may relate the conversation that occurred between yourself
16 and Mr. Behm at your house in Chicago as near as you can
17 remember it. A Mrs McManigal had already talked to me
18 about her husband--

19 MR. FORD. I move to strike that out as not responsive to
20 the question, calls for a conversation between Mr. Behm and
21 the witness at his house, the witness's house, in the middle
22 of June and he is now volunteering a statement about a pre-
23 vious statement had between him self and another person at
24 some other place.

25 THE COURT. Strike it out.

26 MR. ROGERS. I want to be heard on that.

1 THE COURT. All right.

2 MR. ROGERS. I asked for a conversation between himself and
3 Mr Behm and he says Mrs McManigal was present. Preliminary,
4 for the purpose of explaining his answer and putting the
5 jury in possession of the conversation and the relation of
6 it, and by way of how it came about he states preliminarily
7 that Mrs. McManigal already had talked to him.

8 THE COURT. You can get that in a proper question, but
9 not in response to this question.

10 MR. ROGERS. All right. Q You had already talked to Mrs.
11 McManigal, then, go ahead after talking with Mrs. McManigal
12 go ahead and relate the conversation.

13 MR. FREDERICKS. The witness answers yes?

14 MR. ROGERS. Yes.

15 A I had already talked with Mrs. McManigal with reference
16 to my coming to Los Angeles.

17 MR. FORD. I move to strike out the subject matter between
18 himself and Mrs. McManigal as not being responsive to any
19 question, a conversation about her coming to Los Angeles.
20 All that is necessary to a proper understanding of the
21 conversation between the witness and Mr. Behm at Chicago in
22 the middle of June, counsel can very easily go back to the
23 conversation between Mrs. McManigal and the witness, state
24 the time and the place and the people there and it will all
25 be before the court and it will save my making objections
26 which I am loath to do, but we want to have our attention

1 attracted in the questions to the time, place and persons
2 present and to the character of the answer that we may
3 expect in order that we may make our objections, if there
4 are any. It is possible we would not have any objection to
5 make to anything that has appeared or that has been brought
6 out in that conversation between Mrs. McManigal and the
7 witness, but first of all we want to know when and where it
8 occurred and what was said there, in response to proper
9 questions bringing that out, and counsel can save a great
10 deal of time by doing that.

11 MR. APPEL. Your Honor, we propose to introduce our evidence
12 in the manner we understand lawyers who practice law do;
13 there is no rule of law and I venture to say no one can
14 point me out a rule of law, whenever we want to ask about a
15 conversation or the substance of a conversation or ^a fact
16 that we have to state the time, place or the persons present.
17 Now, we want to introduce in evidence substantive testimony
18 of the fact, that at the time he talked with George Behm
19 that he had already talked with Mrs. McManigal upon a cer-
20 tain subject, that is a fact. Then, from that we will show
21 what he said to George Behm and what George Behm said to
22 him in reference to that fact. We lay the premises for the
23 purpose of showing intelligently what the conversation was,
24 for instance, a man says, "I have talked to a man on the
25 street concerning a certain matter and then I met him or
26 another person in my office and there we said this--"

1 THE COURT. You undoubtedly have that right and you can do
2 it.

3 MR. APPEL. We have asked him about it.

4 THE COURT. The question before the court was, "Did you have
5 a conversation with Mrs. McManigal?"

6 MR. ROGERS. No, your Honor.

7 THE COURT. Then I have not the record right.

8 MR. FORD. I moved to strike out a portion of the witness's
9 answer, he said, "I had previously talked to Mrs. McManigal",
10 which was already in evidence, then he adds, "in reference
11 to her coming out to Los Angeles."

12 MR. APPEL. Exactly.

13 MR. FORD. That is that latter part of it, in reference to
14 the subject matter of the conversation, I am objecting
15 to on the ground it is not responsive to the present ques-
16 tion. If it is necessary to bring it out let the question
17 be stated. It is a motion to strike out as not responsive.

18 MR. APPEL. We will submit it to your Honor and we will in-
19 troduce our evidence if it takes a year, we will introduce
20 it just the way we think it proper.

21 THE COURT. It is probable I have not the question. Read
22 it.

23 (Last question and answer read.)

24 MR. FORD. The conversation was about Behm, he stated the
25 subject matter between himself and Mrs. McManigal, and it
26 is that portion I objected to.

1 THE COURT. I think the motion to strike out is well taken
2 and it will be granted.

3 MR. APPEL. We take an exception.

4 MR. ROGERS. Q Had you seen Mrs. McManigal before that
5 and had a conversation with her with reference to her coming
6 to Los Angeles? A I had. She had been at my office.

7 Q Now, then, you may proceed and relate the conversation
8 with you and Mr. Behm. A I ask you, Mr. Ford, do you
9 object to my putting in what was said by Mrs. McManigal at
10 the same conversation?

11 MR. FORD. part of the same conversation?

12 THE WITNESS. I do not want to take any advantage of it--

13 MR. ROGERS. It is part of the same conversation?

14 MR. FORD. Pardon me, at the same conversation?

15 THE WITNESS. At the same conversation with Mr. Behm.

16 MR. FORD. No, I don't have any objection to it.

17 A Mrs. McManigal and Mr. Behm came to my house by appoint-
18 ment, and I also asked Harrington to be present. Mrs.
19 McManigal told me that her husband had been taken from
20 Detroit, taken to the house of a private policeman or detec-
21 tive named Reed in south Chicago with J. B. McNamara and
22 kept there for more than a week.

23 MR. ROGERS. Q That is, in the house of the private detec-
24 tive? A In the house of the private detective, without
25 any authority at law, she claimed, and that he had been
26 bull dozed and given a third degree; that she had been per-

1 mitted to see him once for a few minutes before she started
2 for California--before he started for California-- that he
3 was brought from there to Los Angeles, that Burns and
4 others had purported to give out various statements which
5 she was sure were not true, at least did not believe were
6 true, and that if he ever made them they were made under
7 threats, intimidation and promises; she said at that time
8 that Mr. Burns, through McLaren and others, had repeatedly
9 been to her house and surrounded it and shadowed it and seen
10 her and urged her to come to Los Angeles and bring the
11 children, to stay with her husband and help him in the
12 position he had taken, that they had promised to pay her
13 for it, and give her money to come but that she would not
14 take any such position, she did not believe the stories and
15 she believed he was either crazy or had ^{been} driven or bribed
16 into doing it, she wanted to come to Los Angeles to see him
17 and I wanted her to come, and told her so--
~~_____~~

18
19
20
21
22
23
24
25
26

1 MR FREDERICKS: At that conversation?

2 MR ROGERS: At the same conversation?

3 MR FORD: I move to strike out the words, "I told her so."

4 A I said --

5 MR ROGERS: Let me hear that objection --

6 MR FORD: Let me make my motion.

7 THE COURT: Very well.

8 MR FORD: I told her so". That is the substance of a con-
9 versation without stating what it was.

10 THE COURT: Let it be stricken out.

11 MR ROGERS: No, it won't be stricken out.

12 THE COURT: There is no motion to strike out before
13 the court.

14 MR FORD: Your Honor, I move to strike out the words "I
15 told her so", as not being the language or part of the con-
16 versation, but merely the witness' opinion as to the result
17 of what he said to her.

18 THE COURT: . The motion to strike out is denied.

19 A I said to her, to get what money she could from Burns
20 to pay her expenses, and I would give her the rest to have
21 her come here and interview her husband and that if her
22 husband had made these statements, whatever they were,
23 under threats and promises and wished to tell the truth
24 or another story and wanted me to defend him with the rest,
25 I would do it; but I didn't tell her or anybody else in
26 the 35 years of my practice that I would ever win his case

1 or clear him. That is something no lawyer ever knows.
2 She said she would come and she said she was very anxious
3 to come, she said her health was very poor, and she would
4 like to have the uncle come with her, and I asked him if he
5 could come with her -- she also said one of her neighbors
6 would come to help take care of the children. The uncle
7 said he would come. I asked him how well he knew McManigal
8 and he told me that he had not seen much of him in late
9 years, but he used to know him well, he was his sister's
10 boy, and had once lived with him on his farm. I asked him
11 when he got here to use any influence he had to find out
12 whether the stories that had been printed in the news-
13 papers were true and if not, what the truth was, and if
14 the stories were not true and McManigal said they were not,
15 and he wanted me to defend him I would do it. He promised
16 to come if he would have his expenses paid and be made good.
17 I told him I would pay his expenses, pay for his time that
18 he was getting with the railroad company, and pay for a man
19 to look after his little farm while he was away, and he
20 agreed to come. I gave him \$100 that day. He told me at
21 the same conversation that a brother or an uncle or some
22 relative of his living near Toledo had seen McManigal,
23 and McManigal had told him that he had been working for
24 the Erectors' Association, the only information that I
25 ever had on that subject I got from George Behm.

26 MR FREDERICKS: At this time? A At any time.

1 MR FREDERICKS: I mean you got it at this time? A And I
2 got it at this time and I got it again. That is what I was
3 referring to now.

4 MR FREDERICKS: Excuse me for interrupting you. A I
5 am not sure whether anything was said at that conversation
6 in reference to any cases pending against Mr McManigal in
7 Chicago or not. There might have been or might not. Any-
8 how, I learned somewhere about such cases. I had no conver-
9 sation whatever at that time or any other time with Mr
10 Behm or anybody else on earth in reference to asking him
11 to change his testimony.

12 MR FORD: The last statement of the witness, I move to
13 strike that out as not responsive to the question.

14 THE COURT: Beginning, "I had no conversation at that time",
15 and so on, is stricken out as not responsive to the qu es-
16 tion.

17 MR ROGERS: I take an exception to that ruling.

18 Q Did you have any conversation at that time or any
19 other time in which you told Behm or any other person that
20 you wanted McManigal to change his testimony or refer to
21 it in any way? A I did not. McManigal had never given
22 any testimony, and so far as I know or have ever been inform-
23 ed never has, and I never asked him to have it changed.

24 MR FORD: I move to strike that portion "McManigal had never
25 given any testimony at that time or any other time" as
26 not responsive to the question and hearsay.

1 THE COURT: The motion is denied.

2 MR ROGERS: Did you ask him at that conversation or any
3 other conversation to come here to get McManigal to change
4 his testimony? A I did not at any time.

5 Q Did Behm come here, as a matter of fact? A The next
6 time I saw Behm I saw him in Los Angeles.

7 Q How much money did you give Behm altogether? A About
8 \$400.

9 Q For his time, expenses and payment -- A For his time,
10 his expenses and hiring a man, and he figured the account
11 himself, and then asked me for two or three hundred more,
12 which I didn't give him.

13 Q He figured the account himself. You heard Mr Ford
14 say he purposed to prove you were guilty of subornation of
15 perjury and bribery with reference to ^{Behm} ~~Bain~~. Now, did you
16 ever give him any money whatever as a bribe, or anything
17 else?

18 MR FORD: I move to strike out the statement of counsel as
19 to what he heard me say, and we object to the question as
20 containing two questions; one, as to whether he had heard
21 me make a certain statement and the other asking if he did
22 commit bribery, two separate questions there.

23 THE COURT: Objection overruled.

24 A I heard Mr Fredericks take it back the next day.
25 I never did give him any money for any such purpose, or
26 ask him to do any such thing.

1 Q What was his business, do you remember?

2 MR FORD: I think that would be calling for hearsay.

3 MR ROGERS: Did he tell you what his business was? A You
4 mean here --

5 Q No, Behm? A Oh, he was an engineer, locomotive
6 engineer for the Chicago, Milwaukee & St Paul Railway.

7 Q Did he tell you how much his wages were?

8 MR FORD: We object to that, not being the time, place and
9 persons present -- it is not very material, I suppose.

10 THE COURT: Objection overruled.

11 A He told me, yes, in Chicago or here, I am not quite sure
12 what it was, but I think in the neighborhood of \$150 or
13 \$160 a month, on the average. Of course, they never run
14 exactly the same; they are paid by trips.

15 Q How long was he out here? A That I cannot recall, but
16 I think about a month; I might be mistaken on that.

17 Q Did he tell you how much the wages were for the man to
18 take care of his farm? A He did?

19 Q What? A I don't remember that.

20 Q Well, can you approximate it? A No, except as I know
21 what about such things were, I know what the whole bill
22 was.

23 Q How much was it? A Four hundred odd dollars; I think
24 \$425.

25 Q Do you remember the items that bill included? A Made
26 up of three items, expenses, his wages and the wages for his

1 man on the farm.

2 Q That is what you paid him? A That is all I paid him,
3 all I promised.

4 Q I want to bring up one thing, if you don't mind, to
5 take you off this matter, and we will finish it tomorrow.
6 One thing before we go tonight, I want to ask you.

7 Did you hear Mr Franklin testify here that the first time
8 you ever spoke to him about procuring jurors or talesmen,
9 was on the 5th day of October -- bribing jurors or getting
10 jurors, you heard that statement, did you? A I did.

11 Q You heard him say, did you, also, that after the 5th
12 day of October, namely, the 6th day of October, the suc-
13 ceeding morning after he had talked to you on the 5th
14 about bribing a juror, you gave him \$1000 by check. Did
15 you give him any check on the 6th day of October? A First,
16 ^{as to} after the conversation on the 5th, I never had any such.
17 I never then, or any other time talked to him with refer-
18 ense to bribing Mr Bain.

19 MR FORD: I move to strike that out as not responsive,
20 that is not what he asked the witness, the question is --

21 THE COURT: Strike it out.

22 MR FORD: -- the question is here -- "Did you on the 6th--"

23 MR APPEL: He has answered, and the next thing was "Did
24 you have any such conversation on the 5th", if they want
25 to be technical --

26 A I had no such conversation with him on the 5th.

1 MR ROGERS: Did you give him a check on the 6th? A I
2 gave him no check of any sort on the 6th of October.

3 Q Did you give him any check after the 5th, when he says
4 you talked to him on the subject of bribing Bain?

5 A Well, I did a good while after the 5th, but I did not
6 before the 5th, or 6th -- I suppose about the 15th.

7 MR FORD: What is that?

8 (Question and answer read.)

9 A You didn't get me right. I didn't say I did on the
10 10th, I didn't until many days after the 6th.

11 Q On the day succeeding any talk you had with him about
12 bribing jurors -- he says the 5th -- did you give him any
13 check? A I did not.

14 Q Having heard his testimony which was on the 5th,
15 that he had this alleged talk with you, and having heard
16 his alleged testimony it was on the morning of the 6th
17 you gave him a check for \$1000 -- did you give him any
18 check at that time for the purpose of bribing Bain or any
19 other person? A I never gave him any check for any pur-
20 pose at that time, on the 6th.

21 Q Did you give him a check before the 5th? A I gave
22 him a check on the 4th for \$1000, but exactly as I had
23 given him checks before, and exactly I had given him checks
24 after this.

25 Q That is the day before he says you had a talk with him
26 about the jury? A The day before.

1 Q Have you got that check?

2 MR GEISLER: I have it down at the office.

3 MR ROGERS: On October 4th --

4 MR FREDERICKS: October the 4th --

5 A On October the 4th --

6 MR ROGERS: I would like to stop now.

7 THE COURT: It is only 5 minutes to five. All right.

8 MR ROGERS: I will produce the check in the morning. I
9 supposed that it was here.

10 (Jury admonished. Recess until tomorrow morning at
11 10 o'clock.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26