J. D. FREDERICKS.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,

IN AND FOR THE COUNTY OF LOS ANGELES.

Dept. No. 11. Hon. Geo. H. Hutton, Judge.

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The People of the State of California,)
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Plaintiff,)
)
vs.) No. 7373.
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Clarence Darrow,)
)
Defendant.)

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REPORTERS' TRANSCRIPT.

VOL. 79

I N D E X.

B. N. Smith,
Official Reporter.

August 2, 1912. 2 o'clock P.M.

Defendant in court with counsel.

CLARENCE DARROW on the stand for further cross-examination.

THE COURT: You may proceed, gentlemen.

MR FORD: Attracting your attention to an ink mark --

THE COURT: I want to look at that paper, Mr Ford, so I can understand your questions.

MR FORD: I attract your attention to an ink mark opposite the word "Glendale", the name of H. D. Crutcher. Did you make that mark there? A No.

Q I attract your attention to a circle --

MR ROGERS: Just a moment. I wish to be permitted time to object.

THE COURT: Strike out the answer for the purpose of the objection.

MR ROGERS:" Object to the interrogation upon the ground it is not cross-examination. This document, if it is a document of verity, and is the real document, should have been produced at the time of the examination of Mr Franklin, who was interrogated concerning it. The testimony, as observed in the matte r, shows that Mr Franklin was interrogated about a list, and about some marks on it. It isn't so much the matter of itself, but it is the principle of allowing the prosecution to split its case, which is never permitted, your Honor, in a criminal case.

They must produce evidence, we meet it --
THE COURT: I don't think that question is up with this question here propounded, Mr Rogers. This question, I think, is permissible, recognizing the force of your objection, I think it is nevertheless permissible as an explanation of the -- as a further explanation of the explanation that the witness gave of the marks on the paper at the time it was in his hands. On that theory the court will allow it. Objection overruled.
MR ROGERS: Exception. Add to my objection, to preserve the record, please, add, as I intended to, it is incompetent, irrelevant and immaterial, and no foundation laid, and if the document is admissible at all, it having been referred to in the direct case of the People, and testimony having been given concerning it, it should have been presented at that time, if at all. Now, it is too late.
THE COURT: I had no intention of heading you off in your objection.
MR ROGERS: I understand that. I possibly should have presented my objection first, and then proceeded to argue it; but exception to the ruling.
THE COURT: Yes.
MR FORD: I attract your attention to a check mark in ink opposite the word "Glendora" and the name William E. Cullen. Did you make that check mark? A No remembrance of ever seeing it; no idea I ever made it.

Q I attract your attention to the figure 3 just above the check mark in pencil. Did you make that figure? A No.

Q That is not in your handwriting?

MR ROGERS: Just a moment. I would like to have my objection follow this matter through.

THE COURT: It will be understood that your objection as just stated and the court's ruling overruling your objection, will apply to each of these questions and your exceptions following it.

MR FORD: I attract your attention to the figures 101, 102, 103, 104 and 105, in pencil, being the only figures on that page in pencil. Did you make any of those figures? A No remembrance of ever seeing it. I will say I did not.

Q I attract your attention to an ink circle, small circle made opposite the name of Davisson, one opposite the name of Dolly, one opposite the name of Elliott; and one opposite the name of Freeman, and one opposite the name of James Hay; did you make any of those circles? A I will say I did not.

Q You are positive that you did not?

MR ROGERS: Wait a moment. It is not a correct cross-examination question. Objected to as not cross-examination.

MR FORD: The question is a qualified one, your Honor--I mean the pevious answer was a qualified one,,"I will say

I did not." Now, I will ask you are you positive you did not? A I think it is answered.

THE COURT: He said he did not.

MR FORD: I attract your attention to some figures on the second sheet of the document which has been marked 49 for identification. I will attract your attention to the figures in lead pencil, figure 4 opposite the name of A. J. Krueger; figure 106 opposite the name of Edward A. Richards, the cigure 107 opposite the name of Charles S. Sanderson, the figure 108 opposite William A. Sackett; did you make any of those? A I have no recollection of ever seeing them. I will say I didn't make them. I am very positive I did not.

Q I will call yourattention to a line in ink about an inch long, drawn horizontally on the page opposite the name of A. J. Krueger, and one of the same character opposite the name of George N. Lockwood. Did youdraw those ink marks?

2s A No recollection of ever seeing them before. I will say I did not draw them.

Q I attract your attention to some check marks on the left of the page opposite the name of A J Krueger and George N. Lockwood. Did you make those check marks? A I make the same answer to that.

Q And likewise with the check marks opposite the word "Palms"and "1350 Newton Street"; do you make the same answer?

A The same answer.

Q And with regard to all the other check marks and ink marks--check marks in ink and the circles in ink on that page, will you make the same answer? A I make the same answer.

Q Now, you heard Mr. Steffens testify that when you handed the list to Mr. Lockwood, that you pointed to some names on the list without mentioning the names. Do you recall such testimony in substance?

MR. ROGERS. Wait a moment. Let's have that testimony if he can dig it up.

A My recollection is he didn't say that.

MR. ROGERS. Wait a moment, Mr. Darrow Let's have that testimony.

MR. FORD. I haven't Steffens's testimony right handy.

MR. ROGERS. Let him get it, if you are going to quote.

MR. FORD. I will not.

MR. ROGERS. I object to it as a misstatement of the testi-

mony, misquoted.

MR. FORD. Withdraw the question. Q Do you recall Mr. Steffens testimony with regard to your handing a list to Mr. Franklin? A I would want to see the testimony.

Q Do you recall the testimony first without seeing it?

THE COURT. He has a right to see it.

MR. FORD. Would your Honor kindly lend the witness the testimony?

THE COURT. Yes, sir. It is available.

MR. ROGERS. Point it out, let's see where you get it.

MR. FORD. I withdraw that question for the time being and not waste time on it.

MR. ROGERS. I take an exception to its being asked, if it is a waste of time.

MR. FORD. Q Did you at the time you delivered the list of jurors to Mr. Franklin, did you point at that time to any names on that list? A I have no recollection of pointing to any names.

MR. FORD. Will you let me have that book?

MR. GEISLER. What page do you want?

MR. FORD. On Lockwood.

Q What is the first time you distinctly recall that you looked at the report of the name of George N. Lockwood in this book, Mr. Darrow? A The first time I recall was since this trial began.

Q About how long ago? A When did you begin on this, a

year or so ago?

Q The indictment-- A I say, the trial.

Q Three months and a half ago? A Two months and a half ago.

Q Since the 15th day of April.

THE COURT. The 15th day of May.

Q The 15th day of May, that is the first time you recall having looked at the name George N. Lockwood inthis big book, or for a report onthe name of George N. Lockwood?

A You say, the first time I recall having looked at it. What do you mean? Do you mean whether I ever looked at it before that time?

Q I believe you testified you may have looked at it but you have no recollection, so you said? A I certainly did.

Q If you did you had forgotten it? A Probably.

Q Do you recall you ever looked at the book, after Franklin arrest, up to the time the trial began? A I am pretty positive I never did.

Q You never did? A I know I never did.

Q After the trial began was the first time you looked at this report? A Yes.

Q That you distinctly recall? A You mean the first time after Franklin's arrest, I take it?

Q The first time since Franklin's arrest that you looked at the book? A Yes.

MR. FORD. We offer the report in evidence, your Honor. I

have no desire to take their property from them and with the consent of counsel I will read the report itself in evidence.

MR. ROGERS. That is a good idea.

THE COURT. No objection. He may read it.

MR. FORD. (Reading) Page 224 of the book, "George N. Lockwood, Age 60; Baldwin Park; Amer; Ranch; G.A.R.; Repub.; Methodist; owns 10 acres ranch; Times; occasionally Express; pers.; party seemed to be a man of few words and did not seem to be willing to express his views on any subject. Looks to me as if he is a Times man. I do not think he would give U.L. more show than compelled to. 9/28/11." (Holmstrup) and to the left appears the word "Personal" in parenthesis. Q That word "personal" indicates that the-- A The man saw Lockwood himself.

Q The man saw Lockwood personally? A Yes.

Q And the word "Holmstrup" indicates that is the name of the investigator? A That is the interviewer.

Q The 28th of September, 1911, indicates the date that the visit was made by that investigator? A Yes.

Q Now, at the time of Franklin's arrest, all that you knew about Lockwood was what you learned inthe newspapers and what Franklin had told you about him, calling on him athis office, and about meeting him former --such as you testified?

MR. ROGERS. Let us look at that question.

A That is not all I testified about--

MR. FORD. I will withdraw it and put it in this way--

MR. ROGERS. Let me heave it read, please, sir.

MR. FORD. I have withdrawn it.

MR. ROGERS. I would like to have it read.

THE COURT. Wait a minute.

MR. FORD. I do not think I ought to be interrupted merely because he desires it read.

THE COURT. He has a right to have it read.

MR RORD: When it is not before the court?
THE COURT: He has a right to have it read.
MR FORD: Your Honor refused me that privilege, the same privilege.
THE COURT: That was a different proposition. Read the question. (Question read.)
MR ROGERS: The witness has not testified that at the time of Franklin's arrest, Franklin told him about his calling at his office.
THE COURT: There is only one reason for having it read, and if you want to avail yourself of it --
MR ROGERS: Yes sir --
THE COURT: -- if you want to --
MR ROGERS: No, I want to call attention to the misstatement of the testimony.
MR FORD: At the time Franklin was arrested, you learned in the newspapers something about the man Lockwood?
A Yes sir.
Q And you have testified here Franklin told you some other things about Lockwood? A Yes.
Q Did you never make any personal investigation to find out who Lockwood was? A Never -- when do you mean?
Q After the arrest of Franklin, did you direct that any investigation be made as to who Lockwood was, any investigation independent of Mr Franklin? A Why, everybody knew who he was.

Q Well, you suspected that Mr Franklin was a party to some frame-up within a week after his arrest, is that correct? A I suspected it?

Q Yes. A I would like to ask to answer that question you asked me, you will ask me another covering it, and I do not like to leave it.

MR ROGERS: Go ahead and answer it.

MR FORD: Do you desire to modify your answer, your present answer? A I do not, but you started it and withdrew it, and there is an inference drawn.

MR FORD: There is no question unanswered.

THE WITNESS: Will you please make a note as to whether I ever heard of Lockwood before the 28th -- outside of this record --

MR ROGERS: I will.

MR FORD: You have testified before, Mr Darrow, that you possibly had heard something about him. If that is what you are aiming at you may make the explanation now, I do not care to take any advantage of you on the subject, or I do not care to try to. A I will watch just the same, though.

Q I beg your pardon? A I will watch just the same, though. I had that report about Lockwood and the chances are that I had a personal report from Franklin about him outside of it, before the 25th day of November.

Q Do you recall whether that personal report made by Mr

Franklin was favorable or unfavorable? A I do not.
Q Did you at that time regard this report that was in the book favorable or unfavorable? A As it stands alone I would not regard it as favorable, not especially unfavorable, in view of the unfavorable list we had to choose from, but it probably did not stand alone at that time.
Q Unfavorable? A I say, it probably did not stand alone in my mind at that time.
Q Do you recall that the general tenor of all the reports you had on Mr Franklin at that time was favorable or unfavorable? A I am not speaking of all the reports I had on Mr Lockwood, but on other jurors that were unfavorable. I cannot recall any other report I had on Mr Lockwood, but presume I had a special report from Mr Franklin on him.
Q Do you recall whether or not you regarded Lockwood favorably at that time or not? A I do not recall.
MR ROGERS: At what time?
MR FORD: That is what I wanted. A--I knew then, but I don't now.
Q You say you may have had a special report from Mr Franklin? A I say I probably had.
Q Were those special reports in writing? A Sometimes, and sometimes orally, generally orally.
Q Where are those special reports? A I have not any of them, probably never kept them.

Q What became of them? A Generally verbal and they passed out, and if they were written they were probably destroyed at the time; I had no occasion to keep them.

Q That is, destroyed after the McNamaras plead guilty?

A Sometimes and sometimes right at the time.

Q Did you make any notice as to the general character of the reports, other than what appears in this book? A I probably did on the list from time to time, sometimes made my notations, I sometimes made my notation on the jury lists from a special report, and sometimes from a general report in the book; if there was a special report I gave that the preference over the general report.

Q After Mr Bain had been passed by both sides for cause, it was sometime before peremptory challenges were exercised?

A yes.

Q Did you between the time Mr Bain was passed for cause and the time of exercising the peremptory challenges have any special report made on Mr Bain? A I got a number of them.

Q You recall that distinctly, do you? A No.

Q Where are those reports? A Mostly oral, probably all of them.

Q And from whom? A Anybody who could find out, from Franklin, from other people connected with the office. I was very careful to get all the reports I could possibly get, after anybody was passed by both sides subject

to peremptories. I do not think there was an instance where I did not send repeatedly. I could give you several of them that occurred at this time, where I have had special reason for remembering.

Q How long did you preserve those special reports?
A They were generally in my head and I would not preserve them very long, because more important matters would take their place.
Q Mr. Bain was accepted as a permanent juror. Did you keep in reserve your reports so that you might judge his conduct after he was sworn? A Probably not, excepting as I had them in my memory. I would hardly forget a juror while I was taking him or before them, I don't think I ever did that.
Q You have testified in chief, Mr. Darrow, about a conversation had with Mr. Harrington on your front at your residence near Echo Park in this city in September, the latter part of September.
A I testified in chief that no such conversation ever took place.
Q You have testified he called at your house and you talked with him at that time, did you not? A I did not say at that time, there was no "That time".
Q Mr. Harrington did call on you after his return from San Francisco on the grand jury proceedings? A He used to eat there quite often before and after.
Q I am referring to the occasion that his daughter ate there also. A His daughter ate there more than once, they both ate.
Q You say you did not have such a conversation as Mr. Harrington related in the latter part of September? A I say I

never had at any time.

Q I am referring specifically to that time.

THE COURT. You mean December?

MR. FORD. September.

A September.

MR. FREDERICKS. The conversation in regard to the roll of bills.

A Where he said I showed him $10,000.

MR. FORD. Q Mr. Harrington was arrested about September 11, 1911, on a contempt charge, in San Francisco? A I think so..

Q And returned to Los Angeles, September 20th? A I think so.

Q Did you meet him at your house during that week, he being accompanied by his daughter? A I have no remembrance on the subject. It is entirely probable.

Q You met Mr. Harrington in February, 1912? A I did.

Q At the Hayward Hotel in this city? A Yes.

Q Did you meet John R. Harrington in room 431 of the Hayward Hotel in this city on February 14th, and have a conversation with him there from approximately 2:25 P.M. to 3:09 P.M.

MR. ROGERS. Objected to as incompetent, irrelevant and immaterial and not cross-examination, and I call your Honor's attention to the fact this is doubtless this dictagraph business, and in view of your Honor's ruling

made at the time it was presented, I think it is too late to bring it in now. We demanded it; asked for it; produced the witnesses here upon cross-examination; asked for it; can't get it; couldn't get it; Now, couldn't have had that; Harrington didn't ask Darrow anything about it. On Cross-examination I go into it a little with Harrington. That doesn't admit it in this fashion. It is part of their main case and it is not cross-examination. The matter has been thoroughly briefed. I am sorry Mr. Appel is not here, but where admissions, statements and confessions are claimed on the part of defendant, those are a part of the main case and cannot be used for cross-examination. We have constantly, as your Honor knows, demanded that dictagraph. We put Mr. Falloon on the stand--

MR. FREDERICKS. No, we put him on the stand.

MR. ROGERS. Yes, he was put onthe stand, admission to it was refused, and we were not permitted to get the matter at all, therefore no foundation has been laid and it is not cross-examination.

MR. FORD. The court please--

THE COURT. First of all, what subject opened up on direct examination is this directed to?

MR. FORD. The subject concerning which the witness has testified just now and which he testified to on direct examination. He denied that he had a conversation with John R Harrington at his home near Echo Park inthe latter

part of September, 1911, and the witness having denied that, we have the right to show that the witness made a statement since then, which is contradictary to that evidence. If this witness admitted later at another time, at another place, that he did make such a statement to John R. Harrington, or did show the money and that he did make the remark which he made at that time, we have a right then to direct his mind to the conversation and to put to him the words of the statement which he made on that occasion.

MR ROGERS: He has not denied --

MR FORD: May I make my argument without being interrupted.

THE COURT: Yes.

MR ROGERS: Sure, but you misstate.

MR FORD: In the case of People versus Schmidt, the question came up as to whether the cross-examination of the defendant in that case was proper. The court held that the cross-examination in that case was improper, simply for this reason, and no other: that the defendant had testified only as to certain matters in chief, and that upon cross-examination he should only be cross-examined upon those matters. The court said that as to whatever matters he testified to in chief, could be fully cross-examined, and that the law with regard to the examination of a defendant when a witness was the same as that of any other witness. The court said, page 359, 7th Cal. App. "The Penal code provides that no person can be compelled in a criminal action to be a witness against himself", and, further, section 1323, "But if a defendant offers himself as a witness, he may be cross-examined as to all matters about which he was examined in chief." Quoting from the statute, and then the court says, "The defendant, by placing himself upon the stand, became subject to the rules that govern any other witness, except as expressly provided in the code. He was subject to the rules for

impeachment that apply to all witnesses. He was subject to cross-examination fully as to all matters about which he had been examined in chief."

Now, I direct your Honor's attention to this sentence. "He was subject to the rules of impeachment that apply to all witnesses." Now, the witness may be contradicted by showing that subsequent to the occasion about which they gave testimony, that they made a statement that was inconsistent with their present testimony concerning the events and transactions of the occasion in issue. This witness has testified that he did not give John R. Harrington or did not show John R. Harrington any roll of bills whatever, and he did not say, "I have got $10,000 that I got from Tveitmoe's bank in San Francisco." He denies that he said he was going to get a couple of jurors, and denies the conversation in toto. Now, Harrington has already testified as a witness, as to what did occur on that occasion. That is one contradiction. We have already put that in, and we couldn't put in Harrington's testimony as to what actually occurred on that occasion, but we may impeach this witness by showing that since the transaction happened he made a statement in February in which he practically admitted -- in which he made statements that are absolutely inconsistent with his present testimony, and that is what we are seeking to do at this time.

Now, as to what the People may do by way of rebuttal,

we will cross that bridge when we come to it. The question at the present time is; have we a right to impeach this witness? Have we a right, on cross-examination, to impeach him the same as any other witness? Have we the right to put the impeaching questions to him? If he admits that he said the things which we are about to ask him, that ends the occasion for rebuttal. If he denies it, then, why we may introduce the dictagraph stuff or any other testimony that we may be able to produce, will be a proper question to get at at that time. We don't want to cross that bridge until we get to it. At the present time the only question before the court is, have we a right to put an impeaching question to this witness? We claim that under the rule laid down in People versus Schmits, that the defendant, by placing himself upon the stand, became subject to the rules that govern any other witness, and that he was subject to the rules of impeachment that apply to all witnesses. We have a right to put our impeaching question to him. If he admits it, that is the end of the matter; if he deniesit, why, we will cross the bridges when we come to them.

MR ROGERS: It is just as well, if your Honor please, when you are arguing before a jury, to tell what occurred, correctly. Counsel has said he has got one contradiction from Harrington. Let's see. 3042: "When you said to Darrow, 'Why, you told me you had $10,000 to bribe

jurors with,I or something of that sort, Darrow said to you, 'I did no such thing', or words to that effect, did he not? A -- Yes sir."

MR FREDERICKS: That is part of it.

MR ROGERS: Now, then, so far as asking about showing money,-- now, they are going to show that Harrington asked him if he asked him about the matter --

MR FORD: " Oh, splitting hairs and quibbling.

MR ROGERS: Quibbling about nothing, but I am not standing up here deceiving people about what is in the record. Do you tell me I am quibbling. "I did not tell him. He told me about $10,000. Q -- Didn't you say there in the room I saw it? The Witness -- Saw what? Counsel -- The $10,000? A -- I only saw what he said was $10,000. Q -- All right, didn't you say there in that room that you saw what he said was $10,000? A -- I don't think I did."

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Now, if he said there that he didn't say that he saw the $10,000 or what was like it and he says here in his testimony that Darrow denied, absolutely denied that he said any such thing to him at that time, where do they stand? Do they want to contradict Harrington? I will admit Harrington is a liar. There needn't be any words wasted about that.

MR. FREDERICKS. We have no desire to contradict Harrington.

MR. FORD. We have a question before the court.

MR. ROGERS. If your Honor pleases, we will take the case of People against Schmitz which I have just sent for, and see if counsel can quote law. Your Honor will remember that Schmitz was put upon the stand and Mr. Ruef is called to contradict him, Reuf. And your Honor will see on page 353--

MR. FORD. That is the cross-examination of Reuf?

MR. ROGERS. It is not the cross-examination of Reuf, it is the direct examination of Reuf.

MR. FORD. Very well.

MR. ROGERS. In contradiction of Schmitz: "These rulings were erroneous and highly prejudicial to the defendant", and so forth, and it was held that it was not rebuttal, had never been rebuttal. Now, then, "The prosecution under the claim that it was rebuttal called for the first time the witness Reuf who was allowed, under defendant's objection and exception, to testify," and so forth. "That he gave the defendant $2500 and at another place $1500 in currency,"

and that certain conversations and statements were made between Reuf and Schmitz. Now, "The evidence could not possibly have been rebuttal except for the purpose of contradicting the statement elicited from defendant on cross-examination; and as we have already held that such cross-examination was erroneous, it is not necessary to discuss the question in this regard further." Now, the cross-examination of the defendant Schmitz--"On the cross-examination the prosecution asked, and defendant was compelled to answer the following question: 'Did Reuf pay you any part of the $5,000 that had been testified he received from the French Restaurant?' The question was repeated in many ways and forms, and defendant was always compelled to answer it." That is only one part of the criticism. "In our opinion the cross-examination was entirely improper, and was not confined to the matters about which defendant had been examined in chief. The Penal Code provides (Section 688) that no person can be compelled in a criminal action to be a witness against himself, and that further (Section 1523): but if the defendant offers himself as a witness he may be cross-examined as to all matters about which he was examined in chief.' The defendant, by placing himself upon the stand became subject to the rules that govern any other witness except as expressly provided in the code. He was subject to the rules for impeaching that apply to all witnesses. He was subject to cross-examination fully as to all matters about which he had been examined in chief.

The cross-examination was as to whether Reuf paid defendant any of the $5,000 which it was claimed Reuf received. Let us ask the plain, common sense question as addressed to a person of ordinary understanding--was defendant examined in chief about the $5,000 or the payment of any part of it to himself? The answer is no. If the defendant was examined in chief about the payment of money to himself by Reuf how does it appear? The conversation with Regan about the French Restaurants all being bad and that they should be closed, was not about the payment of money to defendant by Reuf. The conversation as to Regan's visit to the Poodle Dog was not about the payment of money to defendant by Reuf." "The decisions are uniform that under the section quoted the cross-examination of a defendant cannot be extended beyond the subject matters concerning which he was examined in chief."

"We have carefully examined the case of People vs Gallagher, relied upon by the prosecution, but find nothing in it in any way inconsistent with what has been said. The question in cross-examination of the defendant in that case related to sums of money being changed into currency in San Francisco in company with and in connection with one Bieggs who was particeps criminis, and as to defendant going to 16th street with $3,000 at Bieggs's dictation, but defendant in his direct examination has testified about meeting Bieggs by appointment, that he did

not advise Bieggs to draw the money from the bank or to go off with him, nor suggest nor consent to his doing so. It is plain that the cross-examination related to the very matters--Bieggs, 'the money' and 'going away with it', which had been testified to by the witness in chief. We fully agree with the statement inthat case that if the question 'would have a tendency to elucidate from him the whole truth about any matters upon which he had been examined in chief', they would be proper ; but the reasoning does not apply to the facts in this, because this defendant was not examined about the matter in chief."

"Cross-examination being erroneous, the error was not cured by the witness answering the question in the negative, for the reason that the prosecution subsequently used this examination of the defendant for the basis of introducing certain evidence of Ruef, which properly was a part of the case of the People in chief. Negative answers were perhaps what the prosecution expected, so that under the guise of rebuttal, they could call Ruef to the stand to contradict the defendant, and that is what was done. It is evident by the rules of law, and that regard to fairness which characterizes every criminal trial, if the prosecution had evidence to prove that defendant took or accepted part of the money extorted by the conspiracy and pay to his accomplice Ruef, such evidence should have been produced as a part of the case for the prosecution. The defendant had the right to hear the evidence against him before being required to meet it. The evidence and all the evidence tending to show his guilt should have been produced. If Ruef paid or gave defendant money, part of the proceeds of the crime, the prosecution should have produced the evidence as a part of its case. The defendant would then have had the right to meet the evidence as part of his defense. In this case Ruef was not placed upon the witness stand, nor was any evidence given as to any money being paid to the defendant; but the evidence was held back until defendant was asked the questions in

cross-examination. Then, in the guise of rebuttal, the evidence of Ruef was brought fourth, under the claim that itwas to contradict the defendant, but really for the purpose of proving facts which were part of the case for the prosecution in the first instance. Such practice would be a great injustice to a defendant. It would be contrary to the way criminal trials are usually conducted in our courts. It would be contrary to every man's sense of right and justice. It is of much more importance that every defendant should have a fair and impartial trial under the rules of evidence laid down by the ablest judges and established by centuries of experience, than that a defendant in some particular case should be convicted. It is important that a defendant, if guilty of the crime with which he is charged, should be convicted; but it is of greater importance that the constitutional right of each and every one to a fair trial, under the rules of evidence and the forms of law adopted in the light of experience, shall be preserved inviolate. It goes to the very foundation of our republican institutions."

Now, if your Honor please, they held there, as I have indicated to you, that where it is proper in diredt examination and part of their main case, in the guise of rebuttal or in the guise of cross-examination for the purpose of introducing rebuttal, as is said in that case, they cannot put in their case that way.

Now, let's hark back to the early days of this case some few years ago -- I beg your pardon, weeks ago. We will see what happened about these very conversations. Never at all was there any suggestion or examination about the Hayward matter, about the dictagraphic scene, about his being introduced down there in that room for the purpose of being interrogated by his one-time guest and friend, who had broken bread and eaten salt with him, into that room, into the Hayward he was induced, and there we are told that Detective Foster of the Erectors Association was comfortably ensconced in one room, accompanied by two certain shorthand reporters, some of whom cannot pass the examination and conversations occurred. That is all they told us. Then, your Honor, we demanded it. We demanded it for the purpose of cross-examining Harrington. We interrogated Harrington as to whether Mr Darrow had ever admitted he bribed a juror, or that he had anything to do with bribing jurors or that he had said out there on the porch -- that if he didn't deny in that room that he had ever said such a thing to Harrington, and Harrington said all that is true. Now, what do they want to do with this defendant? We haven't touched on the subject on direct. We have not gone into that matter with this defendant at all. If they had produced, according to our demand, the dictagraph stuff at the time your Honor intimated and indicated we ought to have it, why, then it would have been a different propo-

sition, but in the guise of rebuttal, they are trying to do the same thing, or in the guise of cross-examination, to be followed by rebuttal, as is said in this Schmitz case, they are running close to matters that have been said in this case to be a constitutional right, one of the most important rights guaranteed to us, a right which no court has the power or the liberty to take away from a defendant, and your Honor will further remember that you said that if they didn't produce that dictagraph record by the time their case closed, I will hear from you. Now, they didn't produce it, by the time the case closed. That is in record, if your Honor please. Now, where do they stand now? Holding back document after document for the purpose of cross-examination in order, if your Honor please, to snag this defendant, if so they may, in order to put him between two cars, if they can, but you know what the Supreme Court said about that procedure right here. "It would be contrary to the way criminal trials are usually conducted in our courts. Such practice would be a great injustice to the defendant. It would be contrary to the way criminal trials are usually conducted in our courts. It would be contrary to every man's sense of right and justice. It is of much more importance that every defendant should have a fair and impartial trial under the rules of evidence laid down by the ablest judges and established to centuries of experience, than that a defendant in some particular case should be convicted."

Of course, that is elementary. Sometimes a layman wonders why a case is reversed by one of the Appellate Courts saying, "Why, the man was clearly guilty, but as Justice McFarlane said, if a man cannot be legally convicted he ought not to be convicted at all." To hold otherwise is to provide ways and means for the conviction of the innocent, so we have our established rules. Now, if they had this as we demanded it, as we stood here before your Honor and fought for it for days, and couldn't get it, how are they going to use it now. If the defendant ever admitted anything, they started out proving admissions; they proved them by Harrington, didn't they? If anybody would believe Harrington, they proved them by Franklin, didn't they, if anybody will believe Franklin. They proved the admissions of the defendant from one time to another, if he ever made them, by such witnesses as they were able to produce. Having opened up the subject of defendant's statements, may I ask your Honor, how does it come now in the guise of rebuttal, in the guise of the cross-examination, preceding rebuttal, as is said in the Schmitz case, they are able to do what the Supreme Court in that case denounces as absolutely against common right and justice and against every law of the land.

Now, if your Honor please, having closed upon the subject of defendant's statements to Harrington, ought they to be able, as has been so fully denounced in this opin-

ion, ought they be able to split their case in two? We are entitled, as this opinion says, to know what we have got to meet. They must put in their case. Now, we have put in our case. They are trying to come back with something that we are not called upon to meet. Then, we come on and meet that. Then, when we meet that, we will see what happens then. Then they put in something else. It is against all orderly procedure, but more than that, if your Honor please, it is against every man's sense right and justice. Now, we ought to try this case right. This is not a game, if your Honor please. This is not a chess board. We are not playing here for a prize. We are defending a man for what means his life, for that is what it means to this defendant. Now, if your Honor please, we ought not to be euchered in this fashion, because they can get an advantage from us in this way, if they had it, and it is true, why didn't they bring it in when we stood here day after day and demanded it? Why did they object to our getting it from Falloon, if it is true? And why now, against what the Supreme Court says is contrary to every man's sense of right and justice? Why now can they come back with their main case? It has never been permitted and your Honor ought not permit it in this case for the first time in criminal history.

MR APPEL: Just a moment. Your Honor, your rule is so strong in reference to that that it is even applied in

civil cases, and your Honor knows that the code provides that the rules of evidence in civil cases are the same as in criminal cases only when not otherwise provided for.

Now, in the case of Young against Brady, your Honor please, which is cited in the 94th California, the Supreme Court said this: it is a short case. (Reading:) "Action of assumpsit for money alleged to have loaned by the plaintiff to defendant. Judgment for defendant," and so forth. (Reading:) "The evidence of plaintiff tends to prove money paid or expended for the defendant, rather than money loaned; but no point is made on this ground. Whether the money had been paid for the defendant, or at his request, and whether he had promised to repay it, were the principal questions contested at the trial. The defendant testified that no money had been paid or expended by plaintiff for him or at his request. On cross-examination, he testified that he was at plaintiff's house probably half a dozen times while he was building a house on a piece of public land, which he had entered as a preemptioner in the vicinity of plaintiff's residence, and that he was at plaintiff's house on the evening after he entered the land. He was then asked the following question: 'Do you recollect having any conversation there with Mr Young (Plaintiff), in the presence of Miss Green, during this time, in reference to how thankful you were that he had secured this claim (the preemption

claim) for you, and that you were going to reemburse him as soon as you could? A -- No sir, never had any such conversation.' The plaintiff called Miss Green in rebuttal, who testified that she had lived with plaintiff since she was a child, and recollected the time defendant took possession of the land; that she had heard conversations between plaintiff and defendant at the plaintiff's house, at different times, within 10 days after defendant took possession of the land, about that land, or the purchase of land. She was then asked whether, at any of those times, she heard a conversation between them 'in reference to repaying Mr Young the money Young had advanced to M rs Barton, x x x wherein the defendant stated that he was exceedingly thankful to Mr Young for obtaining for him the land, and that he would endeavor to pay him the money which plaintiff had paid to Mrs Barton as soon as he possibly could, -- at least, by the time he would make his proof upon the land;' and asking the witness to confine herself, 'to the conversation in reference to his thankfulness to Mr Young for securing the land, and that he would pay the money that he had paid Mrs Barton as soon as he could, or by the time that he would make his proof upon the land.'

Upon objection of defendant's counsel, the court excluded this proffered testimony, on the ground -- 1. That, as admissions of the defendant, they were part of plain-

ant's original case, which should not have been withheld for the purpose of rebutting the evidence on the part of the defendant, and, 2, that as evidence to impeach the defendant, the proper foundation had not been laid for its admission. The propriety of this ruling is the only question presented. The court was not asked to permit the plaintiff to reopen his case for the purpose of introducing this testimony; therefore, the court did not err in excluding it as a part of plaintiff's original case. "

THE COURT: Give me that citation, Mr Appel.

MR APPEL: The 95th Cal., at page 130, is the decision.

9p In the case of Kohler vs Wells Fargo & Company, reading from page 613, 26 Cal.; "And this is the more remarkable from the fact that the plaintiff himself, who of all men, best knew, and who, alone, in all probability, had positive knowledge as towhether he did deposit the lead bar or not, was the leading witness on his own behalf and examined at length and yet said nothing at all upon the point; nor indeed was he questioned upon that subject. Here he had in his power the means of introducing direct testimony upon the point as to whether he deposited the lead bar or not, and did not even offer it, but seemed carefully to avoid the subject. This, certainly, is a significant fact, when considered in connection with the legal proposition that some proof on the point was essential to his recovery We think for this defect of proof, if for no other reason, the plaintiff should have been non suited at the close of his testimony. He was not, however, and the defendants introduced their testimony. While the defendants introduced much testimony without objection, tending strongly to show that the lead bar was deposited by plaintiff, not a particle was introduced which tended in any degree to supply the defects inthe plaintiff's proofs, so that, at the close of defendant's case, there was no testimony before the jury which tended to show that plaintiff did not ship the lead bar, and consequently no testimony tending to show that he paid his money without consideration. "

"After the close of defendant's testimony, the plaintiff offered, as rebutting evidence, to prove by Q. A. Chafe, who was bookkeeper for plaintiff on the 19th of March 1859, the time when said lead bar was charged to have been deposited, that on that day, plaintiff deposited with Wells Fargo & Company, to be forwarded by their express, a gold bar of the value and description named by Mr Kelly (defendants's witness) as being of the value and description marked onthe wrapper of the package which Mr. Kohler left there, and that this gold bar was purchased of Wells Fargo & Co., the defendants, on the same day, and that they received the value thereof in cash."

"The defendants objected onthe ground that this evidence should have been offered onthe plaintiff's original case before he rested. The court sustained the objection and plaintiff excepted. This ruling presents the most important question in the case. It must be borne in mind that the plaintiff had offered no proof at all on this point; yet it was a point upon which proof was essential to his recovery. He did not now, so far as appears by the record, show to the court that he had, through any mistake in law, or from any inadvertance, omitted to introduce evidence onthis point, and upon some reasonable cause shown, appeal to the discretion of the court to open his case and permit him to supply the defect. But he simply relied upon his right to introduce the testimony by way of rebuttal. It was testimony that clearly belonged to the

original case of the plaintiff, and should have been introduced before he rested; for if it tended to prove anything material, it was that Kohler did not deposit a lead bar. A Plaintiff has no right to keep back all of his testimony on any material point until he draws out the testimony of the party, and then come in with his own. This would give him an undue advantage contrary to the rules of law, and if he does so reserve his testimony deliberately and wilfully, the courts will not allow him to come in after the defendant rests and make out his case. But whether the plaintiff will be permitted to reopen his proofs or not, is a question which rests very much in the discretion of the court below, upon consideration of the circumstances surrounding the particular case. As testimony in rebuttal, it did not rebut any evidence that was material to the defense, and as the case stood on Plaintiff's testimony. Nor did it rebut any testimony upon any affirmative defense set up by defendants. We think there was no error in excluding the testimony."

Now here, your Honor, they have this man Harrington, who was their witness, plaintiff's witness in this case, the people's witness inthis case, they put him there upon the stand and ask him concerning the admissions or declarations of Mr. Darrow on the night that they sat on the porch at Mr. Darrow's home.They did not care to ask him whether or not at any other time and place, but the witness was put upon the stand--whether Mr. Darrow had made

any admissions in character and in substance similar to the one that he testified about; they have it in their power to ask him for that further admission. They didn't do that If they considered it essential, as they do now to their case, they should have put it in in harmony with all sense of decency and with all sense of justice to this defendant. We were forced to ask the witness whether, while he was undertaking, in an effort with others, to get the defendant in a room down there at the Hayward, whether or not the defendant had made any admission with respect to that matter and he said then and there that Mr. Darrow denied it absolutely; we were forced to do that, and the matter is in the record. Now, they undertake to ask Darrow concerning that same admission at some other time and place, when in view of the testimony here before the court, coming from the very lips of Mr. Harrington, he says he denied it. And, reverting back to the decision I read to your Honor in People vs Teshara, that statements made to the defendant in his presence or transactions leading up to admissions are not, where it is denied, or where he has denied it himself are not admissible in evidence even on direct testimony or in the matter of a material fact, where the people are making the case. Let me have that Teshara case. So that not only is this evidence inadmissible because it is not cross-examination, it is not admissible as a part of their case, and it is inadmissible because Mr. Harrington himself has said that he denied all com-

plicity inthe matter. Section 607 of theCode of Civil Procedure provides, concerning the order of proceedings on trial, when the jury has been sworn, the trial must proceed in the following order, "Unless the judge for special reasons otherwise directs, the plaintiff, after stating the issue and his case must produce the evidence on his part," mind the language. It does not say he must produce a part of the evidence, or a mere scintilla of the evidence, but "he must produce the evidence." What is it? The evidence to prove his whole issue. "The defendant may then open his case", not open his case at any particular time, but open his case, "after the plaintiff has produced the evidence" and all of the evidence--"which tends to prove the issue that the plaintiff is contending for", and not until then is the defendant called upon to produce his evidence. The defendant may then open his case and offer his evidence in support--in support of what? In support of his defense. Now, Section 2042, "the order of proof must be regulated by the sound discretion of the court. Ordinarily the party beginning the case must exhaust his evidence before the other party begins." Now, are these provisions of the code so trifling that we can cast them aside? Were they ever provided in this code for the ascertaining in a proper and regular way and a just way? The truth of the contention before the court, or are they to be disregarded entirely in this case?

Now, inthe case of People vs Teshara, 134 Cal., page 544--now, your Honor, the record shows, and Mr. Rogers read it to your Honor, that Mr. Harrington said that Mr. Darrow, in that conversation up there in that dictagraph room, that Mr. Darrow denied having made any assertion upon which they are interrogating him here. Now, what does this case say? Beatty, Chief Justice: "This is a companion case to that of Manuel Amaya, just decided." "The court also erred in refusing to strike out the evidence of Patton and Mullen as to the accusation made by Loucks, when Amaya and defendant were brought to his bedside. The statement made by Loucks at that time was hearsay and Teshara made no admission of its truth, either expressly or tacitly. He expressly denied it. The court and the District Attorney seem to have lost sight of the fact that it is not the accusation but the conduct of the accused, that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct." Now, mind you, there was there no conduct on the part of the defendant tending to show his condition of mind or consciousness of guilt or innocence one way or the other, and in this case the case is much stronger, for this case here was an absolute and complete denial, that is the testimony of Mr Harrington, it is in the record here already "What did he do? He expressly denied it." That is what Harrington said, Mr. Darrow expressly denied it. "The Court

and the District Attorney seem to have lost sight of the fact that it is not the accusation, but the conduct of the accused, that is evidence insuch cases, and that the only reason for admitting the accusation is to explain the conduct." Not only that but it should not have been admitted in evidence--

"The District Attorney should not have offered this evidence, knowing, as he did, that Teshara had not remained silent under the accusation, but had repelled at the time it was made."

We cannot shut our eyes to the evidence of Mr Harrington, he said that Mr Darrow denied it; that is the language he used, and I say, it is as not fair to offer it or to ask the witness here. Why ask him for the purpose of offering it, offering to prove by the evidence of the defendant, or to lay a foundation for offering in evidence which the District Attorney knowingly, because it is a matter of record here, is not admissible in evidence, and there are other cases here to the same effect. This case has been followed; the people against Long, that case of people against Long is another case in the 7th California, 122, Cal., 490, 54 Cal., 491. And the Amaya case, I think is here. Yes, People against Amaya: "Within an hour or two after Loucks was shot, the appellant and Teshara were arrested and brought to his bedside, where, in response to questions by the officers he pointed to appellant and said, 'There is the man that hit me with a club and shot me'; and pointing to Teshara said, 'There is the man that told him to shoot, and shoot to kill.' To this statement appellant made no reply, but Teshara said, 'Mr Loucks, you surely are mistaken.' Appellant and Teshara were at the time in the custody of a constable,

and the undersherif f, and a number of other persons were present, the prisoners being close to the bedside of Loucks, the others standing near. There is no reason to doubt that appellant heard and fully understood the accusation made against him and that he was as free to reply as a person under arrest ever is. When evidence of these facts was offered by the People, the defendant objected to it as incompetent and hearsay, and because it had not been shown that the circumstances were such that he would feel at liberty to reply, or called upon to make any reply, and because thestatement and conversations were in the presence of thearresting officers and while he was under arrest. This objection was overruled by the court, and the ruling is here assigned as error. It is no doubt true, that to render evidence of this character admissible, the occasion and the circumstances must have been such as to afford the accused person an opportunity to act or speak, and the statement must have been one naturally calling for some action or reply. But in this state it has been uniformly held that an accusation of crime does call for a reply, even from a person under arrest. In other jurisdictions it has been held that silence, when a party is under arrest, does not sustain the hypothesis of acquiescence because the party is not free to speak. The leading authority upon this proposition is Commonwealth versus Kenney, 12 Met. 335, in which the opinion of the court

was delivered by Chief Justice Shaw. This, I say, is the leading authority, not because it sustains the proposition to its full extent, but only because it is the sole basis of all the subsequent decisions which do fully sustain the proposition. A careful examination of Judge Shaw's opinion, however, will show that he did not decide, or intend to be understood, that the mere fact that an accused person is under arrest will always require the exclusion of statements made in his presence. This is what he says: 'In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends on two facts: 1. Whether he hears and understands the statement and comprehends its bearing; and, 2. Whether the truth of the facts embraced in the statement is within his own knowledge or not; whether he is in such a situation that he is at liberty to make any reply; and whether the statement is made under such circumstances and by such persons as naturally to call for a reply, if he did not intend to admit it. If made in the course of any judicial hearing, he could not interfere and deny the statement; it would be to charge the witness with perjury, and alike inconsistend with decorum and the rules of law. So, if the matter is of something not within his knowledge; if the statement is made by a stranger, whom he is not called on to notice; or if he is restrained by fear, by doubts of his rights, by a belief

that his security will be best promoted by his silence: then no inference of assent can be drawn from that silence. Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them; but in this present case he has reported the facts, on which the competency of the evidence depended and submitted it as a question of law to the court. The circumstances were such that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to have been robbed.

12p

The declaration made by the officer who first brought the defendant to the watchhouse he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant, (of which we think there was evidence) was made whilst he was under arrest, and in the custody of persons having official authority. They were made by an excited, complaining party, to such officers who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say anything until regularly called upon to answer.'"

"The defendant's counsel, in cross-examining one of the witnesses who testified to what occurred at the bedside of Loucks, asked him in relation to some previous statements made at the time when Loucks was first discovered in his wounded condition- - statements which it is claimed would have contradicted or qualified the accusations he made indefendant's presence. These questions were objected to upon the ground, among others, that it was not proper cross-examination, and upon this ground the objections were properly sustained. If the defendant had offered this evidence as part of his own case to contradict the dying declaration of Loucks, it would have been clearly admissible onthe authority of People vs Larence, 21 Cal., 371, but the ruling of the

court on the offer as made was correct." If the defendant had offered any testimony--Mr. Darrow has not been examined here concerning that dictagraph circumstance, he has not been asked what he said to Harrington at that time or place or what Harrington said to him. How is it cross-examination? This case of people against Amaya and the companion case of People against Teshara, are leading cases in this state.

MR. FREDERICKS. May it please the court, it is well to get an idea of the issue.

THE COURT. Captain Fredericks, you can confine it to practically one matter.

MR. FREDERICKS. I would like to clear up the facts inthis case, first, your Honor, just briefly. There seems to be some confusion in the minds of counsel as to the demand which was made for the production of what they call the dictagraph stuff. The court will remember that we put the shorthand reporter on the witness stand and endeavored to give that matter to the jury, the entire matter, and the objection was made before the witness could testify, counsel on the other side should have a written-up transcript of it. We refused to give that information to the attorneys on the other side, but we have never refused to give it to the jury, but, onthe contrary , have tried to give it to the jury. Now, the issue is, did Mr. Darrow show Harrington these bills or some bills and have a conversation with him in regard to bribing a jury? That is the issue. Mr. Darrow says he

did not, Mr. Harrington says he did. I am not going to take up the time of the court in arguing the character of these witnesses or their likelihood to tell the truth. When the time comes before the jury I think we will be able to show that they are as truthful as ordinary witnesses. Now, that is the issue, did they say that. Now, Mr. Harrington, on cross-examination was asked in regard to what occurred down at the Hayward, he was asked oncross-examination, "Isn't it a fact that Darrow denied down there having shown you those bills?" And he said"yes, that is true." But, now, we wish to ask this witness if it is not also a fact that afterwards Mr. Darrow admitted having shown him the bills and asked him not to tell about it, not to tell the grand jury about it. We maintain we have a right to ask Mr. Darrow if he had not so stated, and if he denies it, prove that he did so state, as a matter of impeachment. That is our position as to the issue. If there is something further that the court would indicate as to the issue--

THE COURT. Yes, the case of Young against Brady, in the 94th presented by Mr. Appel in the opening of his argument, I thought fit in very closely to the situation presented here.

MR. FORD. On thatpoint we will submit to your Honor the authorities in criminal cases directly applicable to the case at bar. The question before your Honor is this: The defendant here, this witness, has not yet testified ondirect examination to any conversations had between himself and Mr. Harrington in February at the Hayward Hotel; he has not

testified to those conversations. The question is before the court, now on cross-examination, can he be compelled to testify to those conversations or not; the test is, is it cross-examination, and if so in what is it cross-examination? Of what particular testimony that he gave ondirect does this constitute cross-examination? That is the issue that is before the court.

THE COURT. The real question is this, to my mind: Is it laying the foundation to introduce a line of testimony that was not opened up in making your case in chief?

MR. FORD. It doesn't make a particle of difference whether it does or not, your Honor.

THE COURT. That is the serious question in my mind.

MR. FORD. I catch the point and I will answer it. It doesn't make a particle of difference.

THE COURT. And I will conclude, from reading the Young against Brady case, it might have--

MR. FORD. As I stated before, the question of what is introduced in rebuttal is not involved, that is a bridge we ought to cross when we come to it.

Now, in People versus Schmitz, they decided in two divisions of the decision, two important points, in that case. In the sixth division of that opinion they decided the question as to whether or not certain questions propounded to Mr Schmitz were proper cross-examination; in the seventh subdivison of that opinion, they decided the testimony given by Ruef was rebuttal. The court said on the latter point, as to whether the testimony of Ruef was rebuttal or not, would depend on whether it was rebutting something brought out by the defense in their case in proper examination. On page 361 the court said, "The prosecution, under the claim that it was rebuttal, called for the first time the witness Ruef, who was allowed, under defendant's objection and exception, to testify that about January or February, 1906, he gave to defendant at one time $2500, and at another time $1500 in currency, at the same time stating to defendant that it was part of the money he, the witness, had received from the French restaurants as a fee under his agreement with them, and that if defendant would receive it he would be glad to pay it to him; and that defendant did receive it. The evidence could not possibly have been rebuttal, except for the purpose of contradicting the statement elicited from the defendant on cross-examination." Except for one purpose; in other words; the court said that if the cross-examination was proper, then this evidence of Ruef's might have been intro-

duced as rebuttal of that cross-examination, and the only theory upon which the testimony of Ruef in that case could be rebuttal was upon the theory that it rebutted the testimony brought out on cross-examination. But, as the court said, "And as we have already held that such cross-examination was erroneous, it is not necessary to discuss the question in this record further." That is the point upon which the court held that the testimony of Ruef was improperly admitted in that it rebutted something that should never have been permitted in evidence. The point was that Schmitz had been improperly cross-examined and for that reason the rebuttal of improper cross-examination should not be permitted. It was not for the reason that Ruef's testimony might have been given on direct examination on the direct trial of the case. The court goes on, and discussing the questions that were asked of Mr Ruef during his examination on rebuttal --

THE COURT: I am going to excuse the jury for the afternoon recess, and if you gentlemen want to continue to argument -- but I prefer to take the rest, too.

THE COURT: All right. Gentlemen of the jury, bear in mind your former admonition. We will take a recess for 10 minutes.

(After recess.)

THE COURT: Proceed, gentlemen.

MR FORD: Now, in the Schmitz case, your Honor, the court

did not discuss the question as to whether Ruef's testimony should be introduced in chief; it did not discuss that question in connection with the question of rebuttal testimony. The objection to Ruef's testimony being put in not rebuttal, was based solely upon the ground that there was no foundation for the introduction of such rebuttal testimony, that it was offered in rebuttal to a cross-examination, which was improper. In the Schmitz case, if your Honor will remember, the connecting link between Torono, or whatever his namevas, and Malafanti and the various French restaurant keepers, vas through Ruef, and in order to connect Schmitz with that crime, Ruef's testimony was absolutely essential. The prosecution, evidently believing that they were going to trap the attorney Farrell, who defended in that case, let Ruef off the stand, expecting that Schmitz would have to take the stand and would have to testify on some other matters which would give them an opportunity to put Ruef on rebuttal. That was not done. Farrell, -- I think it was Farrell who defended Schmitz on that occasion --

MR ROGERS: Campbell.

MR FORD: Wasn't Farrell one of the attorneys in that case?

MR ROGERS: He came in afterwards.

MR FORD: Didn't he handle that particular part of it?

MR ROGERS: No, Barrett did.

MR FORD: Whoever he was. He was wise enough to conduct the examination in chief of Schmitz to matters which would not permit a cross-examination as to the relations with Ruef and the prosecution in that case were compelled to lay some foundation for Ruef's testimony, and they attempted to do so, but they did so by an improper cross- examination. The court said that if the prosecution wanted Ruef's testimony in that case it was up to them to put it in on direct examination on the direct trial of their case; they could not bring it out by an improper cross-examination of Schmitz. That was the point in that case. The defendant in that case had testified --

THE COURT: That was not the case I asked you about, Mr Ford. The case of Young against Brady, I am particularly anxious to get your views on.

MR FORD: I will analyze that after I cite some authorities on this side of the question.

THE COURT: All right, proceed in your own way.

MR FORD: The cross-examination was as to whether Ruef paid the defendant any of the $5000, which it was claimed Ruef received. "Let us ask the plain, common-sense question as addressed to a person of ordinary understanding. Was the defendant examined in chief about the $5000 and the payment of any part of it to himself? The answer is no."

"If the defendant was examined in chief about the payment of money to himself by Reuf, how does it appear? The conversation with Regan about the French Restaurants of being bad, and that they should be closed, was not about the payment of money to defendant by Reuf. The conversation with Regan to the effect that Regan told the defendant that he had been told that $28,000 had been raised as a fund by the French restaurants was not about the payment of money by Reuf to defendant. Whether or not Regan had made such a statement was the subject about which the defendant had testified." The defendant's testimony was about a statement made by Regan and that was the subject concerning which the defendant had testified. Regan had testified he informed the defendant of a certain report. Defendant denied that such information was given him by Regan. "The decisions are uniform, that under a section quoted the cross-examination of a defendant cannot be extended beyond the subject matters concerning which he was examined in chief." Beyond the subject matters, is the question before your Honor, so that the question presented to your Honor at this time is this: Is the subject matter, are the dictagraph conversations the same subject matters as the defendant's denial that he had actually shown a bunch of something, money or whatever it was, to Harrington on the porch at his house, and the same subject matter as his denial that he had ever told the defendant that he had $10,000

and he was going to reach a couple of jurors? That is the question that is before the court. "We have carefully examined the case of People vs Gallagher, relied upon by the prosecution and find nothing inconsistent in any way with what has been said." I am going to read that case to your Honor. "The question of cross-examination of defendant in that case related to ~~the~~ sums of money being changed for currency in San Francisco in company with and connection with one Bieggs, who was particeps criminis and as to defendant going to 16th street with $6,000 at Bieggs dictation, but defendant in his direct examination has testified about meeting Bieggs by appointment, that he did not advise Bieggs to draw the money from the bank, or to go off with it, nor suggest nor consent to his doing so. It is plain that the cross-examination related to the very matters, 'Bieggs', 'the money' and 'going away with it' which had been testified to by the witness in chief. We fully agree with the statement in that case that if the questions 'would have the tendency to elucidate from him the whole truth about any matters upon which he had been examined in chief,' they would be proper."

The statements made by Mr. Darrow to Mr. Harrington involved, would have a tendency to elucidate the whole truth about the transaction on his front porch in the latter part of September, 1911, and if that be true, then they are relating to the same subject matter. And to get

a proper cross-examination, as the court says here on page 360--"The reasoning does not apply to the facts in this case, because this defendant was not examined about the matter in chief. The cross-examination being erroneous, the error was not cured by the witness answering the questions in the negative, for the reason that the prosecution subsequently used this examination of the defendant as a basis for introducing certain evidence of Ruef, which properly was a part of the case of the people in chief." As it undoubtedly was inthat case, and if the People wanted the testimony of Ruef in that case it was their duty, as the court properly said, to put it in in chief, so that the defendant might meet it at that time.

MR. ROGERS. Why not read the rest of it?

MR. FORD. You have read it once to the court, and it is the court we are addressing and I think the court understands me. Now, inthe case of People vs Gallagher, inthe 100th Cal., the defendant offered himself as a witness in his own behalf to testify that he was not sure whether he saw Bieggs on the Saturday next before the 6th of June or not, and that onthe following Sunday he did see him, that he met him about 1 or 2 o'clock onthat day and was with him until 11 o'clock inthe evening, that when they separated that night they made an appointment to meet onthe following day, Monday, June 6th, 1892, between 11 and 12 o'clock in the morning at a certain location in Oakland, across the

street from the First National Bank; that there was nothing said about Bieggs drawing money from the bank, and that there was no particular purpose for which they were to meet. He also testified, "I did not on the Saturday just referred to, or at any time or at any other time, or ever, advise him to take the funds from the bank, the corporation of which he was Secretary, and appropriate them to his own use."--in this case the defendant was charged with embezzlement--

"Nor did I then or ever suggest to him that he might do that or that he and I might do that, or that we might go to Canada or to some place, or that we would divide the funds equally after we got away. I did not at any time advise him to draw this money from the bank to go off with it not did I ever suggest doing so, nor did I consent to it. Nor did I ever agree with him to go off with the money of the bank or of the corporation on deposit in this bank." Now, your Honor will see he denies a conversation there. On cross-examination he was asked "Didn't you and Bieggs at or previous to the time you met in the saloon on the 6hh day of June, 1892, agree to take this $8500 which Beiggs had drawn out of the bank and go to San Francisco? A --No sir. Q -- Did you not further agree that you should take this money to San Francisco and change it into currency? A -- No sir. Q -- And did you not agree that after the money was changed into currency you should take the train which goes at 7 o'clock towards Portland, Oregon, and take the money with you, and go to Sacramento? A -- He spoke about going to Sacramento on the 7 o'clock train. Q -- I am asking you if you did not agree with him to do that before 1 o'clock of June 6th? A-- We agreed to go to Sacramento, yes, but did not agree to take the money." So far as this being cross-examination as to a conversation concerning which he testified on direct examination, in the present case, the situation is exactly

the reverse, the witness has testified to an occurrence and we are going to direct his mind to a conversation covering the same subject matter, the situation being the exact reverse to that in the people versus Gallagher, in which he was asked about a conversation, and on cross-examination he was asked about an occurrence, and the court held the occurrence was the same subject matter as the conversation. "In this case we hold that the conversation is the same subject matter as the transaction", and that is the point I am trying to bring before your Honor, that the conversation in February is the same subject matter as the transaction in September, and counsel for the prosecution then asked the following questions:

THE COURT: I am going to ask you, Mr Ford, if that is the subject that you are directing this line of argument to, I think you need not go any further with it. I have very little doubt as to its being the same subject matter, but the serious question raised by the Brady decision and that line of authorities is as to whether or not it is an impeaching question, and is one that you can go into at this time, not having gone into it in your case in chief.

MR ROGERS: If your Honor pleases, having gone into it as to the same subject matter in their case in chief, if they had asked if it was the same subject matter as the conversation of September, then they open the subject mat-

ter and having opened the subject matter, they must have completed it. Counsel is arguing in a circle.

MR FORD: We are not attempting to introduce rebuttal testimony. I think these questions are elementary, but we have to discuss them. I propose to read this case, which seems to be to the same point; the People had covered the subject matter in the Gallagher case on their side of the case without introducing evidence tending to show that the defendant was guilty of the offense with which he was charged, then the defendant takes the stand and denies a conversation, or, rather, denies in chief, the conversation had with the defendant.

THE COURT: Well, present it in your own way.

MR FORD: Then, on cross-examination, he goes right into that subject matter and the counsel for the prosecution then asks the following questions: "Q -- I will now ask you if you did not go to San Francisco with Mr Beggs on Monday afternoon, Monday, the 6th day of June, 1892, and take with you $8500 which Mr Beggs had drawn from the First National Bank of the City of Oakland, belonging to the Oakland Consolidated Street Railway Company?", to which the witness answered, "Yes". "Q -- Did you not, when you arrived in San Francisco, assist Mr Beggs in changing about $1300 of that money into currency? A -- I changed $1300 of that money into currency, I did not do so in order to make it easier for Mr Beggs and myself to flee with

this money." The very matter involved in the crime, the very matter concerning which testimony had been introduced by the People in the direct trial of their case, before resting, and here was the time, the defendant had been on the stand and had testified he didn't have a conversation, and then they go into that very subject matter concerning which testimony had been given by the People, by the prosecution, in their direct case, and if it is not a case like the one in court, I never saw one.

16s "Q Did you not return to Oakland, bring back this same money with Mr. Bieggs and leave Mr. Beggs somewhere near Oakland Point and you go to the 16th Street station, taking with you $6,000 of his money? A We returned to Oakland, and I went to the 16th street station with the money at Beggs's dictation.' These last three questions were objected to by the defendant's counsel upon the ground that they were not proper cross-examination, not having reference to any matter testified to by the witness in his examination in chief." You will recall that the examination in chief of the witness, the defendant, was in reference to a conversation, not as to the occurrence, it was in reference to an occurrence from which the occurrence ensued. He denied having the conversation, then the people sought to impeach by cross-examining him as to his actions. The very point in issue before the court. (Reading.) "The court overruled the objection, and upon the witness declining to answer the questions onthe further ground that the answers would tend to criminate him, the court preemptorily ordered him to answer, and thereupon the above answers were given. These rulings of the court were properly excepted to and are now assigned as error."

"We are of the opinion that the court did not err in overruling the objections. Section 1323 of the Penal Code provides, 'A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be

cross-examined by the counsel for the people as to all matters about which he was examined in chief.' The effect of the latter clause of the above is to take from the court any discretion which it might ordinarily exercide in allowing the range of a cross-examination to extend beyond the matter brought out on the direct examination. (See People vs Rozelle, 78 Cal.) and to prevent the prosecution from questioning upon the case generally, and in effect making him its own witness (People vs O'Brien, 66 Cal.) the statute does not, however, place any limitation or restriction upon the extent or character of his cross-examination 'as to all matters about which he was examined in chief'; and upon those matters he may be cross-examined as fully as ny other witness. Any question which would have a tendency to elicit from him the whole truth about any matter upon which he had been examined in chief or which would explain, or qualify, or destroy the force of his direct testimony, whether it be to give the whole of a conversation or transaction of which he had given only a part, or to show by his own admissions that he had made contrary statements, or that his conduct had been inconsistent with the statements given in his direct testimony, and thus throw discredit upon them, would be legitimate cross-examination."

Now, this witness has testified that the occurrence did not happen as Harrington testified in September, and we have a right to destroy the force of his testimony,

to qualify it, to modify it by showing his conduct since that time hasnot been consistent with the testimony now given upon the stand. We have a right to elicit the whole of the evidence in this case, which will bring out the facts truth about that transaction. We have the right to show that he had a conversation with Harrington in February, which would destroy the force of his present testimony, because it relates to the same subject matter. If the conduct of the defendant in the Gallagher case was admissible to show that the conversation concerning which he testified was not correctly given by him upon the stand, then vice versa, the conversation which he had given might have been introduced to show that he had not correctly related what his conduct had been. The point established in the Gallagher case is that the conduct and conversations had about it both relate to the same subject matter, and here was a case in which the people had introduced their evidence, as they have in the present case, and had closed their case, and the defendant had started inwith theirs. The mere fact that they might have been privileged, and we did attempt to put it in but under a ruling of your Honor, which we disagreed with at that time, and still disagree with, we were not permitted to put it in, and perhaps we will have the same trouble when the matter comes up for rebuttal if the conversations are denied, and that is the only way it can come up. We may have the same trouble and may never

Q And didn't Mr. Harrington say to you, "I know what I promised my family, that I would not perjure myself, I promised that I would not do it," and did you then reply, "Well, don't tell it," and didn't Mr. Harrington say, "I wont do it unless they absolutely force me to", and did you not say, "Suppose they do?" A Tell what.

Q Tell about the conversation on the porch. A There was not any.

Q Then you didn't have this conversation with Harrington at that time and place? A I didn't say that, I asked you to "tell what"?

Q Did you or did you not have this conversation at that time and place? A I had no such connected conversation that had reference to any such matter. There were a good many matters spoken of there, as you know, if you have any notes at all.

Q Did you or did you not have that conversation, without regard to what subject it was connected with? A I think I have answered it.

MR. FORD. The witness has said, your Honor, "I didn't have that conversation with reference to that subject matter." Now, it may be he intends to admit he did have such a conversation and denies he referred to any such subject matter? A I don't think there is any doubt about its being a denial as to having said those words, in that connected form.

be able to put it in . That is a bridge, however, we will cross when we come to it The question here before your Honor is not the admissibility of rebuttal testimony. Your Honor is not going to rule upon the admissibility of rebuttal testimony until that question is presented. Your Honor is going to rule merely upon this question, is this cross-examination? Are the questions directed to the same subject matter?

It is true they are directed to a different time and to a different place, and to a conversation instead of a transaction, as is shown clearly in this case, a conversation and a transaction may be both classed under one and the same heading as subject matter.

Referring again to the people against Gallagher: (Reading:) "The 'matter' about which the defendant had been examined in chief," -- that was the conversation, remember -- (reading:) "was whether he had cooperated or acted in consert with Beggs in appropriating to his own use and converting the money in question; and although he had stated in categorical terms that he had not done so, his answers were not conclusive in his favor, nor did they prevent the prosecution from showing through the medium of cross-examination that they were false, and for this purpose the prosecution was not limited to a repetition of the questions propounded upon the direct examination." And that is what they are seeking to do here. They are trying to limit us to merely repeating the questions that were propounded on direct examination, and even though it is the defendant, that is not the rule. (Reading:) "Or to asking him whether his answers to those questions were correct or not. Neither was the right of cross-examination limited to the mere questions that his counsel has asked him upon the direct examination, or to the replies which he had made to those questions, but it

extended to the entire matter, 'about' which he had been examined in his own behalf, viz: whether he had given to Beggs any advice or suggestion or aid in appropriating the money. By offering himself as a witness he waived all objection to his constitutional right to claim exemption from giving testimony against himself upon all the matters about which he should volunteer to testify." And this witness, when he took the stand cannot hide behind the rule or general principle of law that the answer would criminate himself. He has waived that insofar as he has testified, that is, as to all matters concerning which he has given testimony in chief. He has waived his right, not to incriminate himself by refusing to answer questions as long as they are confined to the same subject matter. (Reading:) "By offering himself as a witness he waived all objection to his constitutional right to claim exemption from giving testimony against himself upon all the matters about which he should volunteer to testify, and as to those matters he opened the door for the most searching investigation by cross-examination as to the accuracy of his testimony as fully as any other witness who might have given the same testimony. The right of cross-examination affords the most effective mode of testing the accuracy or credibility of the witness, and should not be restricted beyond the requirements of the statutes. It was not the intention of the legislature to give to a defendant the opportunity of

making any statement upon his direct examination which he might choose, in reference to the issue before the court, and to preclude the prosecution from showing out of his own mouth that such statement is false.

In People vs. Rozelle, 78 Cal., it was held that the defendant might be cross-examined upon a letter which he had written, and about which no questions had been asked him upon the direct examination, upon the theory that the letter tended to contradict the denials which he had made on his direct examination. The statutes of Missouri authorizing -- " The people versus Rozelle was a California case --

THE COURT: Wait a moment, Mr Ford. I stated to you sometime ago that the court was strongly inclined to agree with you, saw no reason to differ with you on the subject you have been arguing about. But there is another branch of this subject I thought you were coming to very quickly -- there is no use wasting time on these matters. I announced sometime ago when you started on this line of argument, that that is not the real question before the court, and stated what it was.

MR FORD: Then I misunderstood your Honor altogether.

THE COURT. The reason I interrupted you again, I thought you must surely have misunderstood. You are not taking up the real question before the court, which is whether or not the question now under discussion can serve any other purpose except to lay a foundation for the introduction, on rebuttal, of testimony that ought to have been offered in chief.

MR. FORD. Yes, your Honor.

THE COURT. I have not yet seen any reason to assume that this is not cross-examination, except for that reason. I think it is cross-examination if you can overcome that other difficulty.

MR. FORD. I don't know what is inthe mind of the defendant, your Honor. I can't say what his answers will be.

THE COURT. It is of no consequence what his answers will be so far as this question is concerned.

MR. FORD. If he will answer that he did have conversations such as we offerd to him and asked him about, that is an end of the matter. The testimony is in. There will be no need for any rebuttal. If he should deny that he had the conversations it would be then up to us to introduce rebuttal testimony. The point we are seeking, your Honor, is not-

THE COURT. But you had a chance in your case in chief to show those admissions.

MR. FORD. Supposing we did, that doesn't shut us out from cross-examination.

THE COURT. That seems the question decided in Young vs Brady.

MR. FORD. I regard the decisions being read by Mr. Appel as having no pertinency or bearing upon the case, and I didn't--

THE COURT. Perhaps it does.

MR. FORD. I know, at least, in my own opinion, that while what he read was good law, it had no application to this case, and I didn't pay very close attention to Young vs Brady when he was reading it. Young vs Brady, I think it is in the 94th Cal. If the Court will bear with me just a moment I will take the time.

MR. ROGERS. The very matter that your Honor referred to is in People vs Schmitz, "Negative answers were perhaps what the prosecution expected, so that under the guise of rebuttal they could call Ruef to the stand to contradict the defendant, and that is what was done."

MR. APPEL. I have other criminal cases, your Honor, right squarely in point. They are short. They don't need any facial expressions--

THE COURT. I am going to assume, so far as it being a proper question oncross-examination that it is. There is another serious question to dispose of, however.

MR. FORD. Why, it has got absolutely nothing to do with it. Now, Young vs Brady, if the Court please, the question was asked of the defendant--the question was for loaning money--the plaintiff sued the defendant for money loaned or expended

on behalf of the defendant. Plaintiff had testified to those facts, or the facts upon which he raised his claim, and then the defendant took the stand and was asked the following question: "The defendant testified that no money had been paid or expended by plaintiff for him, or at his request. On cross-examination he testified that he was at his house probably half a dozen times while he was building a house on a piece of public land, which he had entered as a preemptioner in the vicinity of plaintiff's residence, and that he was at plaintiff's house onthe evening after he entered the land. He was then asked the following question : 'Do you recollect having any conversation there with Mr. Young (plaintiff), in the presence of Miss Green, during this time, in reference to how thankful you were that he had secured this claim(the preemption claim) for you, and that you were going to reimburse him as soon as you could? A No, sir; never had such a conversation.'"

Now, your Honor will notice that no objection was raised to the asking of that question of the defendant. There was no question about its being a proper cross-examination, and that is the question that is before the court at this time.

MR. APPEL. Just read on.

MR. FORD. Just keep easy, I will read the whole of it. The question presented in the Brady case was a question of

rebuttal testimony, to which we have not come yet and which we will never come to inthis case. (Reading) "The plaintiff called Miss Green in rebuttal, who testified that she had lived with the plaintiff since she was a child, and recollected the time defendant took possession of the land; that she had heard conversations between plaintiff and defendant at plaintiff's house at diffdrent times, within ten days after defendant took possession of the land, about that land, or the purchase of land. She was then asked whether, at any of those times, she heard a conversation between them 'in reference to repaying Mr. Young the money Young had advanced to Mrs. Barton ~~i i i~~'

wherein the defendant stated that he was extremely thankful to Mr Young for obtaining for him the land, and that he would endeavor to pay him the money which plaintiff had paid to Mrs Barton as soon as he possibly could -- at least by the time he would make his proof upon the land;' and asking the witness to confine herself 'to the conversation in reference to his thankfulness to Mr Young for securing the land, and that he would pay the money that he had paid Mrs Barton as soon as he could, or by the time that he would make his proof upon the land'".

Now, your Honor will observe that the question that was asked Miss Green was not -- no proper foundation was laid for its asking as an impeaching question, and that is the only purpose for which it could have been introduced at that time.

THE COURT: Is that the point upon which the court decided it?

MR FORD: If your Honor will let me get through, I will get through very quickly. It could not have been asked in that form as an impeaching question. The only other ground upon which it would have been admitted, would be on the direct trial of the case. It could not be offered on rebuttal for any other purpose, except by way of impeachment of the defendant, and it was not proper by way of impeachment of the defendant, therefore the only other purpose that it --- the only other ground upon which it

could be admitted in the case was as part of plaintiff's main case against the defendant. It is true the plaintiff might have asked the court, in his discretion, to open his main case and admit it anyway, but it was not offered for that purpose, and the objection was made by defendant's counsel. I didn't mean to be discourteous to the court, and I hope the court didn't so understand it.

THE COURT: Oh, no.

MR FORD: (Reading:) "Upon objection by defendant's counsel, the court excluded this proffered testimony on the grounds, first, that, as admissions of the defendant, they were part of plaintiff's original case, which should have been withheld for the purpose of rebutting the evidence on the part of the defendant; and, second, that as evidence to impeach the defendant, the proper foundation had not been laid for its admission. The propriety of this ruling is the only question presented. Now, with regard to the first ground, the court was not asked to permit the plaintiff to reopen his case for the purpose of introducing this testimony; therefore the court did not err in excluding it as a part of plaintiff's original case." If it was admissible as part of plaintiff's original case, they should have asked permission of the court to reopen it, if they wanted to get it in. They couldn't offer it in rebuttal as part of their original case upon that ground. They might have offered it by way of impeachment --

MR APPEL: They couldn't offer it at all.
MR FORD: They might have offered it by way of impeachment if they had laid the proper foundation, notwithstanding the fact that it might equally have been admissible on direct opening of the case by the People.
MR APPEL: Does the decision say that? Let's see if the decision says that.
MR FORD: I would ask the court to put some sort of a quietis on counsel.
THE COURT: That is the question there. I was about to ask the same one. What does the decision say?
MR FORD: I am coming right to that; I am reading it. (Reading:) "As evidence to impeach the defendant, a proper foundation had not been laid for the admission of any material part of it. The defendant had not been asked, whether, in any conversation with plaintiff, in the presence of Miss Green, or at plaintiff's house, he had said anything about reembursing or repaying plaintiff for any money advanced or paid by plaintiff to Mrs Barton; " -- Now, the court does not say that it would not have been admissible as an impeaching question, because it was equally admissible as a part of plaintiff's main case. This case does not say and there isn't another case in the whole United States that will say that. The court said or conceded, not in express words, but concedes it by the language it uses , that if the proper foundation had been

laid, that it would have been admitted, but the court excludes it merely on the second ground, merely because the proper foundation has not been laid as evidence to impeach the defendant. The proper foundation had been laid for the mere -- the defendant had not been asked whether in any conversation with plaintiff in the presence of Miss Green, or at plaintiff's house, he had said anything about reembursing or repaying plaintiff for any money advanced or paid by plaintiff to Mrs Barton; nor anything as to the nature of the favor or service the plaintiff had done, for which he (this defendant) had said he was thankful. That the defendant was thankful for some undisclosed favor or service in assisting him to secure his land claim, and for which he intended 'to reemburse' plaintiff, was wholly irrelevant to any material issue. It had no tendency to prove that plaintiff had loaned money to defendant, or paid or expended money for or on account of the defendant, and therefore the answer of the defendant to the question of plaintiff's counsel as to this collateral irrelevant matter was conclusive upon the plaintiff."

Now, if the defendant had taken the stand in the Young vs Brady case and had been asked a question, and had denied it and that question constituted a material adission on his part which would have established the plaintiff's case, the plaintiff would have been precluded from impeaching upon that point, merely because he might ako have offered it inthe direct trial of his case.

Your Honor has the discretion under the law to stop evidence along a certain line when it becomes merely cumulative; whenever your Honor thinks evidence has been offereed on one point- whenever enough evidence has been offered on one point, the prosecution is not required to keep on and get all the evidence inthe world that can possibly be broughtin to establish that one point. They are not required to do it. If they did attempt to do it your Honor could stop them from doing it. Your Honor could say, "There is enough evidence submitted on that point. You don't need to bring any more evidence on that point: proceed with some other branch of the case, and we would be compelled to do so. Supposing, your Honor, this defendant had gone out and had made admissions to A and B and C and D and down through the whole alphabet, and the prosecution desired to prove some of those admissions by way of establishing his case, it would go and get A and it would get B and it would get C and it would put them on the stand, and having got A , B and C, they might think they had enough on that point, and then they might

not call D to Z at all, they would leave them off the stand. Suppose the defendant then when it comes to his side of the case calls X and puts him onthe stand to testify to the transaction. Suppose X was present at one of these conversations with the defeddant, at which the defendant had said something that was absolutely contradictory to what X had testified onthe stand. Would your Honor hold we could not ask X if he had not heard the defendant say this and that at such a time and place? Would it prohibit us from calling Y who was also present at that conversation, and Z who was also present at that conversation, and have them testify that the defendant did make those admissions; would your Honor as long as we laid the proper foundation, of course, we would have to lay the foundation--your Honor would not say, why, you cannot impeach this witness. You had a right to call Y and Z on you r direct case and make them testify to that point. We had the right, but we are not compelled to do it, and the mere fact we are satisfied we have furnished sufficient evidence on that, doesn't preclude us from impeaching a witness who takes the stand. If this defendant had never taken the stand and had never testified to this transaction, I don't say for a moment we could come back and attempt to put that dictagraph evidence in, or would attempt to do it. If this defendant had not testified with regard to this particular conversation, and then we

attempted to go into this conversation, if the witness had not testified to the transaction of September at his house between him and Harrington, why, we could not go into this conversation at all. We would not be allowed to. We would be in the same position as the prosecution was in People vs Ruef. Your Honor would say to us, if we desire to introduce this dictagraph, "We should have done it upon the main branch of the case." This witness had not testified to the transaction of September 20th, why, we couldn't ask him about the transaction of September 20th, and we couldn't go into that subject matter at all, and we would have been in exactly the same position as the case of People vs Schmitz, but we are not in that position at this time. The case of Young vs Brady, just as I surmised it would be, is a good law on matters therein stated, but has no application to the present case.

In case of People vs --however, I think your Honor, with all due deference to the court, that the only question before the court is cross-examination, and that all discussion as to whatmay come up on rebuttal is purely a moot question at this time. When the matter comes I will present it more fully, if necessary.

THE COURT. Let me see the 94th. I think, Mr. Appel, there is a good deal in what counsel says. This Brady case applies to more what comes up on rebuttal, as far as its application is concerned, it might be more pertinent at that time than at present.

MR APPEL: Well, let me see. Can't lay the foundation -- can't ask the witness anything you can't impeach him on, and certainly if it is part of the main case, they must show it themselves. Now, this case, "Upon objection of defendant's counsel, the court excluded his proffered testimony on the ground, first," -- Now, this is the important part -- "That, as admissions of defendant, they were part of plaintiff's original case, which should not have been withheld for the purpose of rebutting the evidence on the part of the defendant; " Now, that is the important part in the discussion.

Now, let us see. If, as a part of the admissions of the defendant -- as the admissions of the defendant was a part of the main case, that they should not have been withheld for the purpose of introducing them in rebuttal; very well. Now, let us see. If the Supreme Court held in that case, your Honor, that the testimony of this witness, put upon the stand, Miss Green, was not admissible as against the defendant, why are the original testimony of the defendant himself admissible against himself as a part of the case in chief against him? What difference does it make whether they try to prove it by the defendant himself, or whether they try to prove it by a third party. Is there any difference -- if it isn't admissible at all, what difference does it make whether you try to prove it by a man who is dark or by a man who is a blonde? That

is the point here. Mr Darrow was put upon the stand and he said what? In answer to questions propounded to him by his attorney, that no such conversation occurred between him and Harrington over there at his home sometime between December 9th or 10th, and Christmas time. At the time that Mr Harrington was up there with his daughter enjoying the hospitality of -- it was at the time he was here attending the grand jury, at the time that he was called here and subpoenaed as a witness before the grand jury the first time, your Honor -- no, September, your Honor. Now, that is what they gave us notice of we had to answer, yet, this was considered by them as an admission on the part of this defendant that he was guilty of this crime, you see, your Honor; they considered it important. Their own position in introducing that evidence strengthens the position that we take here and absolutely proves that the position taken here by the District Attorney is the purest rot. Why, why didn't they introduce it then? They considered it an important part of their own case. Very well. They introduced it. Now, the defendant says, "I didn't have any such conversation." Now, they want to ask him whether or not in February, at another time and place, whether or not he made an admission of that kind, a similar admission. Is that cross-examination, your Honor, of the denial of the defendant that he made any such admission as they claim, to the testimony of Harring-

ton away down in September? Can you prove, your Honor, by the defendant himself a fact against him that he was not examined at all? Counsel has said subject matter. Your Honor will see that in one instance where he probably found the decisions to the effect that he cannot be examined concerning any matter that he did not testify to in chief, that he changed that, a s expressions sometimes will be made in the decisions, to "subject matter" -- concerning the "subject matter". Your Honor will see that they have no right to ask him because you say that in September you had no such conversation as Harrington claims -- is it cross-examination to ask him, "Did you have that conversation with Harrington at any time and at any place"? It is not cross-examination. Now, if it is not cross-examination, they have no right to ask it as a matter of cross-examination, and if it is a matter which they want to introduce as a part of their main case, they have no right to prove it by the defendant, nor by any other witness, and if they have no right to prove it by the defendant or by any other witness, then they cannot cross-examine him at all. If they have no right to contradict him upon a matter of that kind, which is collateral, and which was a part of their main case, they have no right to ask him the question at all, because it would serve no purpose. What is the object of asking him this question? The object of asking him this question is that if he denies it

that they can introduce evidence to contradict him. See? Evidence to comradict him, but counsel has stated here a little while ago that they didn't propose to offer it in rebuttal. Didn't he? And I asked the reporter to put it down there and see if he would take it back.

Driven from the position, your Honor, that they established here by these authorities, he was constrained to say that they didn't propose to use it in rebuttal. He said so. I will leave it to your Honor. It is in the record there. Didn't you say that?

MR FORD: I don't know whether I did or not.

MR APPEL: Now, he don't know whether he did or not.

MR FORD: I don't care.

MR APPEL: Oh, he don't care. That is as much as he cares for a stipulation or an assertion that he makes here to the court or to the jury from one minute to the other. The words, "I don't care" clearly illustrates the whole conduct in this case.

22s1 It has as much truth as when they told this jury that
2 Foster had nothing to do with this case; that Burns had
3 nothing to do with this case--
4 MR. FORD. He hasn't, either one of them.
5 THE COURT. Let's go on.
6 MR. APPEL. They haven't, and yet the evidence is here
7 absolutely and uncontradicted that Mr. Fredericks was trying
8 to hear from the east to see what instructions he could
9 get as to what pleas should be taken from J J and J B.
10 THE COURT. We are not trying Mr. Fredericks or Mr. Ford.
11 MR. APPEL. No we are not trying them, but conduct of the
12 counsel is as much a part of the trial as their state
13 ments and assertions, as much of the trial as evidence.
14 THE COURT. We want to get at this question.
15 MR. APPEL. We want to get at this question.
16 THE COURT. The court agrees with you.
17 MR. APPEL. Isn't that a fact? I heard your Honor say to
18 this jury that counsel, what they said here, and what they
19 stated had nothing to do with this case, for that reason
20 I call your Honor's attention. We have a right--
21 THE COURT. You have a right at the proper time to be heard.
22 MR. APPEL. At this time and every time.
23 THE COURT. The court agrees with you, as to the statement
24 you made.
25 MR. APPEL. Now, this decision says that his admissions
26 of the defendant, they were part of plaintiff's original

case, which should not have been withheld for the purpose of rebutting the evidence onthe part of the defendant. Now, rebutting the evidence onthe part of the defendant, your Honor, does that exactly mean that it is rebuttal by way of offering the evidence on the part of the People here? No, you can rebut the evidence of the defendant that he gives in chief on cross-examination by asking him whether or not at some other time or place he made assertions and contradictions contrary to that which he has testified in chief. Does the word rebuttal mean that it must be made at any particular time? Does it refer to time and place, to a particular time during the course of the case? No. A witness upon the stand says "I was not at San Diego on such and such a time," you may rebut that testimony by asking him at that time, your Honor, "didn't you say to me that you had been there." That would be rebuttal if he said Yes, it rebuts his statement which he made immediately before. Isn,t that rebuttal?

MR. FORD. May I interrupt you right there?

MR. APPEL. Yes.

MR. FORD. Suppose he denies he said that?

MR. APPEL. Suppose he denies he said that, you can offer it in evidence ina proper case, but it is part of your case, it is your duty not to hold a concealed card up your sleeve and to trick him, to convict a man by any such a dirty method as that, which are absolutely

condemned by every court inthe United States.
MR. FORD. I am assuming, your Honor, counsel is addressing himself to the court--
MR. APPEL. You asked me a question and I answered.
MR. FORD. He used the words "dirty methods". If he is addressing himself to me I would like to know and have your Honor take some action on it.
THE COURT. Is there any question to raise? I think he used it as an illustration.
MR. APPEL. I say dirty methods, the Supreme Court says they are dirty inasmuch as they are not in harmony with a proper regard for the liberty and rights of an individual. I say that everything is dirty which is a trick, that is what I say. That doesn't mean that--to rebut the testimony of a witness doesn't necessarily mean that. What does rebuttal mean there? It means a contradiction and such contradiction cannot be introduced by original evidence, then it cannot be introduced by asking the defendant for the very strong reason that the defendant is not required to be a witness against himself, second, because he didn't touch upon that subject and third because it would not be admissible at all, and he says he talked to X and F and B and A and if I have three witnesses that can testify to establish my case, or 4 or 5 witnesses it is my duty to put them on. It is not my duty to put only one, and if the defendant comes on the stand and denies what that witness said, and say to

him, Why, didn't you at another time and place say such and such words yourself? No. Didn't you say at another time and place, say to this other witness so and so? No. That doesn't rebut the evidence of the defendant that he didn't say that to the first witness. It is not cross-examination of that, and that was the only matter upon which Mr. Darrow testified.

MR ROGERS: I wanted to call your Honor's attention to one or two facts that I have gotten out of the record that may change the aspect of things somewhat, and if your Honor is not familiar with this record --

THE COURT: There are many things in this record I might not be entirely familiar with.

MR ROGERS: If your Honor permits, I call your Honor's attention to the testimony of the witness Waldo Falbon, called by them. They sought to introduce admissions, so-called, or stated by the defendant on direct examination. Your Honor sustained our objection to the introduction of Waldo Falloon's account of that so-called conversation, upon the ground that they had not furnished us, as required by section 2047, did not furnish us with the memorandum by which he refreshed his recollection. They having it in their power to do so, they refused to comply with your Honor's order. Mr Fredericks saying here, in a number of places which I have just read, that he would not comply with your Honor's order to give us a copy of the conversation as taken down by Waldo Falloon. You remember, if your Honor please, that when this same subject matter came up, they passed over this unintelligible and fragmentary notes, and the record contains an argument upon the record, whether a fragmentary part of a conversation might be introduced, it being said by the witness he did not hear all of it, therefore your Honor refused to permit, upon

two grounds, as I understand your Honor's ruling, the testimony of the witness Waldo Falloon to be given, first, that they did not comply with section 2047, and give us the memorandum in an intelligible form, where it was in their power so to do, where they could have done it very readily, and your Honor has so said, and your Honor finally said if before their case closed the matter should come up, we would be entitled to it. Your Honor remembers we demanded it, and they would not give it to us, and therefore, they opened up the conversation of this conversation. They put a witness on who testified to part of it, or started to testify concerning it and your Honor forbade it. Now, the question comes up on that record as to whether or not, having once started into the subject and launched into it, as it were, taken it up in their direct case -- now having abandoned it voluntarily, for the last statement is, "We withdraw the witness from the stand". I merely mention that, but Mr Frederkcks' last statement is, "We withdraw him from the stand." Why, they cannot take it up now, having been a subject started into. Now, that is the state of the record upon that. I think, your Honor, there cannot be any doubt about it under the authorities. I have just brought in Wigmore here to look over. I don't think there is any doubt upon that at all. I think by that statement of the record to the court our objection will be understood.

MR FORD: As I understand it, the court rules that this is proper subject matter for cross-examination, but you desire to know whether the prosecution is debarred from asking an impeaching question where they had the right, if they saw fit to do so, to offer evidence of the same character on the direct part of the case? I think counsel for the defendant ought to submit some authorities showing an impeaching question cannot be asked of the defendant, or of any of his witnesses, where the subject matter is the same as that covered on the direct trial of the prosecution's case. If there is any such decision on the whole world, why, let them introduce just one decision and your Honor will have something to sustain their point on.

MR ROGERS: Mr Ford hasn't yet comprehended our position.

MR FORD: No, I have not.

MR ROGERS: I will try again. This is the defendant, you know, and his statements, if against his interests are admissions. Ad missions of the defendant are part of the main case. Admissions of the defendant are those that can be used in evidence against him. They started in on the subject, if your Honor please, with Harrington, and with Falloon; they took it up. They opened it up. Now, they want to do something, if your Honor please, which the law especially forbids, and having taken up part of it with Harrington himself, and with Falloon, and having declined to submit to your Honor's very proper ruling, and

having declined to act fairly under the law, having refused to permit Mr Falloon, who sat here with the transcript in his pocket, having refused to permit him to give us that transcript, as your Honor ordered them to do, and pass over to us the unintelligible and erased and changed notes which we could not read, your Honor refused to permit them to go on with the testimony unless they complied with your Honor's ruling.

THE COURT: I think you go a little too far in saying the court ordered them to produce it. I would not let them go into that unless they did produce it. They would not be permitted to ask the witness the question, and exercised a right which they have --

MR ROGERS: Now, your Honor having once said to them you may introduce this testimony, it is the same thing exactly. Your Honor having said once to them, you can introduce this, and their having said, we will not comply with your Honor's ruling, not only in action, but in so many words, for here it is in the record in so many words. Now, having refused to go on then, having already entered with Harrington for one, they try with Falloon for another, and having refused to be fair and lawful and legal in the matter, your Honor said, you cannot go on with this. Now, then, you comply with my order, so, hiding behind that statement, they try to back in now. They got in wrong end to on this matter. I think the importance of the matter, it

is well to consider the authorities.
THE COURT: I want to get an outline of them, Mr Appel. It is nearly 5 o'clock. I expect to consider them again.
MR APPEL: Your Honor has heard counsel here, and as I sat here also, I have paid particular attention to the language he uses when he is explaining to your Honor the right of cross-examination of the defendant upon the stand, and he has said to your Honor, that a defendant may be cross-examined upon the subject matter of his cross-examination, and I don't know whether it was done purposely or whether loosely, as many such expressions are used in decisions. Now, the best rule by which we can guide ourselves is to look at the statute's words, and in People vs. Wong Ah Leong in the 99th Cal: the Supreme Court have italicized the words of the statutes, and they say this, your Honor, "The appellant was a witness in his own behalf, and in his testimony in chief merely gave an account of how he happened to be near the stairway at the time of his arrest. His narrative stopped at the point of his arrest. He said nothing about anything that occurred afterwards, and made no allusion to the episode of the pistol. But on cross-examination the prosecution immediately commenced asking him about the pistol, the very first question being, 'Did you ever see that pistol before?' To this appellant's counsel objected as not 'in cross-examination', and also as irrelevant and immaterial, and 'calculated to convict

the defendant of another and different charge.' The objection was overruled and appellant excepted. The ruling was clearly erroneous. By section 1323 of the Penal Code a defendant who offers himself as a witness can be cross-examined only as to 'matters about which he was examined in chief'. As the cross-examination was not as to a matter about which Appellant had been examined in chief, and as it was not admissible for the purpose of impeaching his character, we cannot conceive of any theory upon which it can be justified." As to matters, not subject matter. The subject matter may be a great deal broader, your Honor, than matters or particular things; that is what it means.

Now, Mr Darrow was examined concerning the particular conversation which Mr Harrington testified to. The subject matter of money, your Honor, was gone into in a general way as the subject matter. The whole case involves the subject matter of the payment of money by one at the instance of another. It was a matter of their main case; they went into that fully. They could not add or take from it by the testimony of the defendant when it is not cross-examination as to matters about which he was examined in chief, as the cross-examination was not about the matter on which he was examined in chief. As the cross-examination was not as to matter about which appellant had been examined in chief, and as it was not admissible for the purpose of impeaching his character, we cannot conceive

of any theory upon which it can be justified."

Your Honor, the case was reversed. Now, the witness there testified, your Honor, about what had occurred there at the time of the alleged transaction, and in that case of people against Rozelle, it was considered in the 96th Cal. in another case in the People against O'Brien. The O'Briens seem to be numerous in cases in the Supreme Court. "During the cross-examination of the defendant, he was required against his protest to admit before the jury that he had participated with Reese in the alteration of a record other than that charged in the indictment in this case. Reese, also, in his examination, although protesting that such testimony would tend to criminate him, was compelled to answer similar questions. In the case of Reese, the evidence was not admissible to impeach him nor to show that the defendant had committed other offenses of the same kind about the same time. A witness cannot be impeached by evidence of particular wrongful acts. And while it is true that in certain cases, like forgery and embezzlement, it is permissible to introduce evidence concerning other acts of the same nature for the purpose of establishing a guilty intention, no such rule applies in cases of this kind, where the very ground upon which the prosecution relies for a conviction is that the performance of the acts mentioned in the statute, constitutes a crime, regardless of any fraudulent intention.

The ruling of the court is the cross-examination of the defendant upon this subject was erroneous, for th e additional reason that the questions propounded to him were not proper cross-examination as to anything related in his examination in chief." Related by him, things said by him. (Reading.) "So far as the defendant is concerned, the court is not allowed that discretion as to the extent and scope of the cross-examination which it is permitted to exercise in the examination of the other witnesses." Citing People versus Rozelle. I know all about the Rozelle case. Rozelle was put upon the witness stand. It was claimed, your Honor, that he had induced his wife to throw acid in the face or over the face of a certain man who visited her while hiding in a closet. He said he didn't know anything about it. That is what he said; that he was not there and didn't know anything about it; couldn't have known anything about it. Of course, when he said that, the People took up a letter that he had written and they showed it to him and he admitted having been there and having gotten his wife to do that. That was cross-examination and was proper rebuttal. It was cross-examination upon the point that he said, your Honor, that he didn't know anything about what occurred in the room. It was cross-examination of the fact that he said he was not present. It was cross-examination of the fact as testified to by him in chief, that he didn't induce or get his wife to

do that thing. It happened here in the city of Los Angeles, and I was present at that trial. Of course, here is a letter written by Mr Rozelle to someone in which he said everything that he had denied, was cross-examination. Itwas right to be introduced in rebuttal.

MR FORD: May I ask you a question there?

THE COURT: What is that case?

MR APPEL: The 78th Cal., 92.

MR FORD: In the Rozelle case there wasn't a letter written after the occurrence.

MR APPEL: That makes no difference when it was written. What difference does it make? That is after the occurrence what difference does it make?

MR FORD: Just like this case, that is all.

MR APPEL: Now, now, now. I told you it is absolutely impossible for a great many of us, say myself, it is absolutely impossible, perhaps because con stituted as I am, to be able to distinguish authorities and to be able to distinguish the line of reasoning in authorities. That may be due to my ignorance, but such things as that occur somewhere else, too. We are not all so brilliant and so smart, and we haven't got all of the intelligence of the world. God was very good and he scattered about a little intelligence. He didn't give it all to one person, and certainly he denied giving it to the representative of the people here in this case.

THE COURT: This is a very important question, gentlemen. There are two or three authorities I want to examine before passing upon it. Mr Appel, you cited the Gold Bar case there.

MR APPEL: Your Honor, I will give you a memorandum. I suppose your Honor will take this matter under advisement. I will give you a memorandum of all the authorities I have. (Discussion.)

MR FORD: I want to call your Honor's attention to a line of authorities: People vs. 41st Cal., --

THE COURT: You can give me some authorities.

MR FORD: I will give you a few of the leading cases right on the subject in cross-examination, which is the only subject. People vs. Rozelle, 78 Cal., which counsel has just read. People vs. Gallagher, 100 Cal.; People vs. Arraghin, 122 Cal., page 126; and then there is a case of erroneous cross-examination in People vs. Morton, 139th Cal., page 727. (Discussion.)

Jury admonished. Recess until 10 o'clock August 3rd, 1912.

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