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.
)
Clarence Darrow,)
)
Defendant.)

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REPORTERS' TRANSCRIPT.

VOL. 89

I N D E X.

	Direct.	Cross.	Re-D.	Re-C.
Mrs Lucy F. Franklin,	7235			

B, N. Smith,
Official Reporter.

AFTERNOON SESSION. August 9, 1912; 2 P.M.

Defendant in court with counsel.

M R S. L U C Y F F R A N K L 1 N,

called as a witness on behalf of the People, in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

MR. FREDERICKS. Q State your name, please? A Mrs. Lucy F Franklin.

Q Where do you live, Mrs. Franklin? A 812 West 17th street.

Q You are thewife of Bert Franklin? A I am.

Q And calling your attention to the 28th day of November, last--

MR. ROGERS. Would your Honor kindly say to the witness I purpose to object and she should not answer until I have that opportunity.

THE COURT. Yes, Mrs. Franklin, do not answer until counsel has a chance to object.

MR. FREDERICKS. Q Calling your attention to the 28th of November, I will ask you when you first had a conversation with the defendant, Mr. Darrow, that day, over the telephone? A It was about noon time, about 10 minutes after 12.

Q And you talked to him personally? A I did.

Q What was that conversation?

MR. ROGERS. Objected to as incompetent, irrelevant and immaterial, no foundation laid and not a proper impeaching question; not rebuttal in that if there is any statement of defendant by way of admission or confession, it is part of their case in chief.

MR. FREDERICKS. That is not an admission or confession.

MR. FORD. If the court please, the defendant has testified to the occurrences--

THE COURT. Is it an impeaching question?

MR. FORD. In a sense, your Honor, but there are two classes of impeaching questions. The witness may be impeached under the provisions of Section 2051 of the Code of Civil Procedure by contradictory evidence. Now, he has testified as to what occurred onthe 28th day of November, 1911.

THE COURT. That is the purpose of your offer?

MR. FORD. We may impeach him by contradictory evidence, if we want to show some other occasion he made different statements than he did in court, we will have to go under 2051.

MR. ROGERS. The statement, of necessity, must come within the rule of contradictory statements, which must be shown to him, time place and personspresent and the foundation laid, otherwise it may be direct evidence, but if it is statements, then it must be laid by foundation.

MR FORD. If the Court please, what Mr. Darrow did and said on the 28th day of November as to any statementmade by him

on that date are not statements or narratives of past events, but are facts which occurred.

THE COURT. I think you are right, Mr. Ford, I think you are entitled to it. Objection overruled.

MR. ROGERS. Exception.

THE WITNESS. Will you kindly state the question?

MR. FREDERICKS. Read the question, Mr. Smith.

(Last question read by the reporter.)

MR. ROGERS. Will you read my objection?

(Objection read by the reporter.)

A I asked what is the trouble, or is there any trouble? And Mr. Darrow said, "Yes." He says, "You go over to Mr. Gage's office and I will see you there." And I said, "What is the trouble?" He said to go over there to Mr. Gage's office, and then I asked him where it was and he told me that it was across the street from the building where I was in. That is not the exact language of the conversation, but that is the substance.

MR. FREDERICKS. And you were in your own office at the time you telephoned? A Yes, sir.

Q And what did you do then? A I closed up my office and went across the street to the Mason Building.

Q To Governor Gage's office? A Yes, sir.

Q About how long did you remain there at that time?

A I was there sometime.

Q State whether or not Mr. Darrow came in while you were

there? A Mr. Darrow came up there, yes.
Q Who all came up? A Mr. Darrow, Mr. Davis, Judge McNutt and Mr. Scott was there.
Q Did you see Governor Gage or Mr. Foley, his partner, at any time that day there? A I did not.
MR. ROGERS. Wait a moment, that was answered before I had an opportunity to object.
THE COURT. Strike out the answer for the purpose of the objection.
MR. ROGERS. I object to that on the ground it is incompetent, irrelevant and immaterial; not rebuttal; no impeachment matter, a matter of the case in chief if at all, and no foundation laid.
THE COURT. The objection is overruled. Restore the answer.
MR. ROGERS. Exception.
MR. FREDERICKS. Q What occurred there?
MR. ROGERS. We object to that for the same reasons, your Honor pleases, as last stated.
THE COURT. Objection overruled.
MR. ROGERS. I do not need to repeat them?
THE COURT. No, it will be understood the same objection, the same ruling and the same exception. Mr. Reporter, I would like to have the last answer over again, if you please.
(Last question and answer read.)
A I do not understand your question, Captain Fredericks. You want to know from the time I came up there until I

went away?

MR. FREDERICKS. Q Yes, from the time you went up there that time until you left. A When I first came up there I met Mr. Scott,

Q You need not state what Mr. Scott said.

MR. GEISLER: . Let us have it all.

MR. FREDERICKS. That can be brought out oncross-examination.

MR. ROGERS. No, let us not make fish and fowl.

MR. FREDERICKS. No, I will bring it out, only I thought it was hearsay and counsel would object to it. Very well. State everything that was said.

MR. ROGERS. It certainly is incompetent.

A When I firstwent up there I met Mr. Scott and Mr. Scott told me the Governor was not in, they had sent messengers all around for him and they had not been able to locate him and he said that it would be necessary for me personally to engage Governor Gage, because he was an old fashioned attorney and would require that I engage him.

MR. ROGERS. That is Mr. Scott?

A Mr. Scott.

MR. FREDERICKS. Q Yes, go ahead. So he led me into what I think was the reception room of Governor Gage and told me to wait there and he himself would go out and see if he could find the Governor, and I waited there and the two clerks and the lawyers came in, the defense, the other lawyers, the lawyers of the McNamaras came in.

Q Who were they? A Mr Darrow, Mr Davis, Mr McNutt and I don't think Mr Scott accompanied him then, I think he came in later, and they saw me and called me into another room, which I suppose was Mr Gage's private office, I don't know.

MR ROGERS: Just a moment. I move to strike out the conversation upon the ground that the statements of Mr Scott which have been related by the witness, not being in the presence or hearing of the defendant, no foundation having been laid, therefor, they are not material as against the defendant; Mr Scott, Mr McNutt --

MR FREDERICKS: We think the objection would have been good to it. Let it go out.

MR ROGERS: The question was what occurred there that day, and naturally of necessity our objection to that did not include this idea that I am now presenting to Mr Scott's statementto the witness.

MR FREDERICKS: Let it go out.

MR FORD: We consent that it may go out.

THE COURT: It goes out by consent.

MR FREDERICKS: Go ahead from there, Mrs Franklin.

A We went to what seemed to be the private office of Governor Gage and the lawyers talked in an undertone and I expressed a desire to see Mr Franklin, and Mr Darrow says, "Mr Davis, you better take Mrs Franklin over to the jail to see Bert", and Mr Davis said, "All right", and Mr Davis

went with me to the jail and I saw my husband, and Mr Davis called my husband and talked to him, I don't know what was said --

MR ROGERS: I understand Mr Darrow was not present, when Mr Davis went over with Mrs Franklin to the jail to see her husband who was incarcerated, and Mr Darrow not being present, of necessity, he would not be responsible.

MR FREDERICKS: She says she doesn't know what was said, so she could not relate it.

MR ROGERS: If your Honor pleases, that came out of the statements of Franklin on his direct examination.

MR FREDERICKS: Also Mr Davis.

MR ROGERS: Of course, but that was in reply to the direct examination of Mr Franklin, who was interrogated concerning these matters. Now, you cannot make two bites of it, if your Honor please, it is either direct or rebuttal.

MR FORD: WE don't care anything about that.

THE COURT: You consent to a motion to strike out?

MR FREDERICKS: There is no motion to strike out, yet.

MR ROGERS: I object to it as not rebuttal.

MR FREDERICKS: Well, after you left the jail, who did you leave the jail with? A Mr Davis.

Q And where did you go from there? A Back up to the office where the lawyers were.

Q To which office? A Mr Gage's office.

Q And on the way back state whether or not anything was

said to you by Mr Davis in regard to employing Governor Gage. A Mr Davis says --

MR ROGERS: Wait a moment. We make an objection, no foundation is laid, incompetent, irrelevant and immaterial; if by way of impeachment no foundation has been laid for it, and is hearsay, not rebuttal; incompetent, irrelevant and immaterial.

MR FORD: Mr Davis testified as to what occurred on the way back from the jail, and this is by way of contradictory evidence.

MR ROGERS: Then the foundation was not laid?

MR FREDERICKS: Yes it was, laid by Mr Davis.

THE COURT: Objection overruled.

MR ROGERS: Exception.

A Mr Davis also advised me to personally engage Governor Gage, he also asserted that he had old fashioned ideas and while it would be all right, at the same time it would be better for me personally to engage Governor Gage to defend my husband.

MR ROGERS: I move to strike out the answer because, if your Honor pleases, Mr Davis was interrogated about that on cross-examination and therefore it was an immaterial and collateral matter, collateral as respects this defendant, and they are bound by their answers, which they drew out on cross-examination from Mr Davis.

MR. FORD. If the Court please, the defendant wants to show he never engaged Governor Gage and he qualified his answers each time, however, by saying "we did not engage Governor Gage for this particular transaction," or words to that effect-- I do not pretend to quote the exact language, but your Honor will remember each time he was asked if he employed Governor Gage he would say, "Do you mean for Mr. Franklin?" And then say, "No." I am not quoting the exact words, but that is the substance of it or the effect of it.

THE COURT. Where is Mr. Davis's testimony, what page?

MR. FREDERICKS. I don't know. I asked Mr. Davis that question, your Honor.

THE COURT. Can you refer me to the page?

MR. FREDERICKS. No, I haven't it, but I remember asking it very particularly, because I had it in mind.

MR. DARROW. I wish to make an objection, because the record is misquoted. He asked whether we engaged Governor Gage and paid him and I said not a cent, and they asked if we engaged him and I said Never in this matter. Mr. Ford started to ask me in what, and Captain Fredericks called him off. I stated it had no reference to this matter, and neither did it; no such inference should be or could be drawn in this case. They were at perfect liberty to ask me.

MR. FREDERICKS. Well, that is the record.

MR. DARROW. You know you had a perfect liberty to ask me.

MR. FREDERICKS. That is the record.

MR. DARROW. It is not fair to draw any such inference.

THE COURT. Now, what is the question? Let the reporter read it.

THE REPORTER. I haven't it, Judge.

THE COURT. I remember the substance of it. Let it go. Motion to strike out is denied.

MR. ROGERS. Exception.

MR. FREDERICKS. Q Then you went back up to the office, did you--up to Governor Gage's office and who did you find there?

A Mr. Darrow, Mr. McNutt and Mr. Scott.

Q And how long did you remain there? A Only just a very short time.

Q And what then occurred?

MR. ROGERS. Objected to as incompetent, irrelevant and immaterial and no foundation laid and not rebuttal. If the matter had any relevancy at all it related to their case in chief and not to any contradiction, and if it is by way of impeachment then, the proper foundation has not been laid or the impeaching question put, either respects Davis, McNutt, Scott or the defendant.

MR. FORD. She is testifying about occurrences and declarations of verbal acts.

THE COURT. Yes.

MR. ROGERS. What becomes of our rule?

THE COURT. Why didn't it come in in the case in chief?

MR. FREDERICKS. I can ask the question that was asked of Mr. Darrow--

MR. FORD. For the reason they didn't come into the case in chief, your Honor, it was not necessary. It is not necessary for us to put in proof that is merely cumulative and there are many things that Mr. Darrow may have done that might have been introduced and have not been introduced in the case; things that we might consider as having some value, but when we think we have sufficient, that ends the matter. When Mr. Darrow takes the stand, however, and testifies and denies something--contradicts that something is true, then that fact, of course, is dmissible by way of rebuttal to impeach the witness by contradictory testimony. The law provides under Section 2051 that he may be impeached by contradictory testimony, to show that he did some act that was inconsistent with the testimony that he has given concerning that date.

Now, Mr. Darrow testified to what occurred at that time, many things which we didn't consider of any importance in our case in chief, but in view of denials as to certain occurrences made onthat date, by Mr. Darrow as witness, we have a right to contradict his testimony, not for the purpose of showing the guilt or innocence of the defendant, as to the main transaction, but by way of impeaching his veracity as a witness inthis case.

When the defendant takes the stand, his veractity as a witness, the truth of his testimony may be attacked in the same manner as any other witness, and in rebuttal we are offering this testimony by way of impeaching his veracity. It may be true that it might have been introduced as cumulative proof inthe main case, but that doesn't destroy its admissibility as evidence tending to affect his veracity.

THE COURT. Mr. Ford, can you refer me to the page in the transcript that testimony occurs?

MR. FORD. Page 6270. "When youfirst met Mr. Franklin that morning--"

THE COURT. I will read it if you will give me the page.

MR. FORD. Beginning with line 22--23, and also going over onto the next page. Page 6271, your Honor, the witness, at line 22, makes a specific denial of anything of the sort, and then follows several pages of argument as to whether it was sufficient. On page 6271, line 22, the witness, the defendant, at that time made an omnibus denial of anything of that sort having occurred.

MR. ROGERS. Before your Honor rules I want to make a few observations on that.

THE COURT: Yes, I will look at the testimony a moment. All right.

MR ROGERS: If your Honor please, I confess myself quite unable to understand any reasoning by which such a proposition should stand. In the first place, counsel could not maintain for a moment, if we had, for instance, a homicide, and there are seven eye witnesses. They call two eye witnesses and then deeming the matter to be cumulative, they fail to call the other five, but they have --

THE COURT: I don't think they are claiming to do that.

MR FREDERICKS : No, it is another matter.

MR ROGERS: Now, they take it --

THE COURT: The Court wouldn't let them if they offered to.

MR ROGERS: That is precisely the point here. They have opened this subject; they put certain witnesses on, Mr Ford confesses they didn't deem certain matters of particular importance, so they didn't call them. Now by way of subtefuge they come back in -- by way of contradicting the testimony they go over the same matters they go over in direct. They can't do that any more than they can in a murder case, not a particle. You can't by a subterfuge impeach a defendant's testimony, produce witnesses to contradict him, which witness testified to the same set of matters and state of circumstances which were testified to on direct.

THE COURT: I think there is no doubt about that. They must

make their case in chief.

MR FORD: Simply attacking the witness' veracity.

MR ROGERS: You cannot attack the witness' veracity, by showing matters of which their testimony in chief would attack. We will say they call two witnesses in a murder case and the defendant says,I shot in self defense, and thereupon they call five other eye witnesses to show he didn't. Of course, under the subterfuge and guise of contradicting the witness'veracity this would be proving their main case.

THE COURT: Read the question.

(Last question read by the reporter.)

THE COURT: Objection sustained.

MR FREDERICKS: On the way out of the office, state whether or not Mr Darrow dropped behind the others and in the corridor made this remark to you or this in substance, Don't feel hard towards me or don't feel hard on me in regard to this matter?"

MR APPEL: We object to that upon the ground it is not redirect; it is incompetent, irrelevant and immaterial for any purpose; it is not rebuttal. It is hearsay, it is collateral to any issue in this case. The statement itself on its face being a matter purely collateral, and it is part of the chief case, if at all.

Counsel having stated already it is merely cumulative, therefore they must have introduced circumstances and facts

in the record relating to that matter in their case in chief, ahd being cumulative it is only a matter and thing added to their main case, and it is not rebuttal.

THE COURT: I think both of those objections are good. Objection sustained.

MR FREDERICKS: Your Honor, I didn't go in to this in the case in chief, and we couldn't go into it. It is a question that was asked Mr Darrow and he denied it. Now it is not a collateral matter; it is adirect matter. We asked him if he didn't make that statement, and he denied it. Now, we bring witnesses to testify -- to contradict him that he did make the statement, and it is not a collateral matter at any rate. It certainly cannot be a collateral matter.

THE COURT: It was part of the case in chief.

MR FORD: We are not offering it as part of the case in bhief. We are not offering it as indicating the guilt or innocence of the defendant. We are offering it singly and solely for one single purpose, and that is to contradict the veracity of this witness on a material point, a point upon which he testified, and he testified to the transaction of the 28th day of November, to the occurrence in which he was engaged. He was then asked concerning those occurrences, did he not then say to Mrs Franklin, I don't want you to feel too hard towards me, or words in substance to that effect. Now, we have a right, not byway of indicating his guilty of the charge of bribery, but by way of indicating

he is not speaking the truth, that his testimony is not reliable, that he is concealing facts from this jury, we have a right to show when he said that upon the stand, that he said that which was not true, and that he said it wilfully. Now, that is the purpose for which it was offered, and we offer to prove that the statement --

MR ROGERS: Just a moment, the statutes of this state, and the Constitution --

MR FORD: We offer to prove --

THE COURT: One at a time.

MR ROGERS: I am going to make an objection to the offer to prove --

MR FORD: We offer to prove, -- and I object to being interrupted -- that the defendant's statements --

THE COURT: Hold on, it is impossible for both lawyers to talk at the same time. Now, Mr Ford is making an offer to prove, and there is no way by which the Court can invade the province of an attorney and say to him, You shall not say this or shall not say that, until he has stated it. I don't know what he is going to say.

MR ROGERS: Would your Honor permit a suggestion, that the Supreme Court has said, time and again --

MR FORD: I don't want him to argue it --

THE COURT: The Court has allowed Mr Rogers to make a suggestion.

MR. ROGERS. My suggestion is, the Supreme Court has held time and again, and we can produce authorities to that effect in a minute or two, that an offer to prove, after an objection has been sustained to testimony on the part of the District Attorney is Misconduct, and it must not be permitted, it being an effort to get before the jury statements which the court already has sustained objections to, and therefore, it is nothing but an evasion of the Court's ruling and ought not to be permitted.

THE COURT. I think Mr. Rogers is quite right, Mr. Ford, in calling attention to the fact. The Objection was sustained and Mr. Rogers is quite right in calling attention. Now, if Mr. Ford desires to be heard in the matter, I will set aside the ruling.

MR. FORD. We offer this testimony for the purpose of proving that Mr. Darrow did not tell the truth upon the stand in regard to the occurrences of that day, that those statements were wilfully false, and that being wilfully false his testimony is to be distrudted, as the code provides that it should be, when a witness's testimony is wilfully false. We are offering it for that purpose alone. We are offering it to show that he did say to this witness at the time and place specified in this case, he did say to her, "Don't feel too hard towards me," or something in substance or effedt like that, and we are offering it for the purpose not of showing his guilt or innocence of the charge, but for the purpose of impeaching his credi-

bility as a witness and as provided in Section 2051. That is all. Now, whether we might have laid a foundation and have used it for some other purpose is entirely outside of the subject, because we are not offering it for that purpose, we are offering it for an entirely different purpose, and the admissibility of testimony must be judged by the purpose for which it is offered. The law provides, under Section 2051, that a man may be impeached by contradictory evidence; now, when can we introduce that contradictory evidence? When can we contradict him? We cannot interrupt the defense during the trial of their side of the case, during the putting in of evidence ontheir side of the case, we cannot contradict on the main case when we are getting in our evidence, because we do not know what he is going to testify to, and we cannot contradict him there, and, therefore, the only place for us to introduce this contradictory testimony is in rebuttal. There is no other place left, common sense is sufficient without referring to decisions.

THE COURT. Of course, you are quite right about that, the statutes are supposed to be the embodiment of common sense. The place to introduce this testimony, if it is evidence against the accused, is in the case in chief.

MR. FORD. We admit that.

THE COURT. And if it is now offered by way of impeachment it is impeachment upon a collateral matter and not admissible.

The objection is sustained.

MR. FREDERICKS. Is it collateral matter if a witness makes an admission or statement that would tend to show his guilt or guilty knowledge?

MR. APPEL. There you are.

MR. FREDERICKS. You have to step on one stone or the other, you cannot step on both.

THE COURT. I do not think the court has made any mistake in that ruling, Captain Fredericks. I do not feel at liberty to discuss the evidence here.

MR. FORD. Why, then, we ask leave at this time to put this testimony in, onthe part of this witness, as part of our main case, we ask permission of the court at this time to reopen the case and put in the testimony in chief.

MR. APPEL. They have to come on the stand and show a foundation for that. The Code provides, and the authorities provide that if counsel knew of these statements during their case in chief and knew all about it that mere forgetfulness or negligence on their part is the grossest kind of negligence and the court will not relieve either side from that situation; they will have to testify here themselves that they did not know of this admission during the case in chief, and in view of the fact, your Honor, that Mr. Franklin was put upon the stand and testified to facts from which they undertook to draw the inference that Mr. Darrow had engaged Mr. Gage to defend Mr. Franklin and in view

of the fact they went into all the circumstances surrounding Mr. Darrow's movements onthat morning and where he went to and all about it, they cannot now add this to the case in chief at that time, unless willing, in order to allow your Honor to exercise that discretion, to show that it is an offer made in good faith, that it is in furtherance of justice and there is some excusable neglect on their part to have introduced it in their case in chief.

Now, one of them said it was only cumulative, one of counsel said it was cumulative and the other one said it was offered for the purpose of showing the guilt of the defendant. Now, they took both positions. If one is cumulative, the statement of one counsel is true, it is cumulative,it is not admissible in evidence at this time, because that necessarily implies that there was some evidence in chief to which this evidence was addressed, some matter in chief to which this evidence was addressed; if it is to show the guilt of the defendant then it is a part of their case in chief, again, so either horn of the dilemma, whether they step upon one corn upon one foot, or whether they step upon all their feet together, they are out of court on that proposition, your Honor. Now,it is a purely collateral matter, absolutely, the mere statement of a person to another one, "I hope you wont feel hard of me." Does that tend to prove,--"I hope you won't feel hard towards me", does that prove that Darrow made any confession of guilt on that? Under the circumstances it was clear and apparent a mere expression of sympathy of feeling, and if that were true, does that show any fact that can contradict any material portion of his evidence? Not at all. Did he deny that he saw Mrs Franklin? No. Did he deny that he talked to Mrs Franklin? No. The subject of the inquiry of Mr Darrow at that time was in order to show, your Honor, that he was then active in defending Mr Franklin and Mr Darrow has stated,

and so has Mr Davis stated, that Mr Franklin, being connected with the case, it was natural and proper for them to take some interest in the case, inasmuch as the evidence here shows what was then going through the mind of Mr Darrow, and in view of the fact that Mr Franklin came to Mr Darrow before that statement ever was made at all.

MR FREDERICKS: That is an argument on facts and should not be permitted.

MR APPEL: I show how you went into it.

MR FREDERICKS: That is an argument on facts,and it should not be permitted.

MR APPEL: Mr Franklin testified in reference to these matters; he said that he did not engage Mr Gage, and he left the inference he did not pay him they must have paid him, if at all, that is,Mr Darrow must have paid him,if at all. That was his statement as I remember it.

THE COURT: I remember the testimony, Mr Appel.

MR FORD: Now,if the Court please, at this time we avow our ignorance, at the time the case was being tried, we were ignorant of the fact the defendant would deny his relationship with Franklin in this regard; we were ignorant of the fact the defendant would deny,that he would take the stand at all, we were ignorant of the fact if he did take the stand he would testify upon the subject in the manner in which he did; we were ignorant of the fact, your Honor was going to rule as he did on the character of rebuttal testi-

mony, and we are taken by surprise at this time, we therefore ask your Honor to exercise his discretion provided for in Section 607 of the Code of Civil Procedure, and permit us to reopen our main case for the purpose of putting in this testimony, in order to meet your Honor's rulings upon this point; and in support of the proposition that your Honor has the legal discretion, I cite your Honor to the case of Douglas vs Willard, in 129 Cal., at page 38, holding that only in cases of abuse of discretion will the order of the lower court allowing testimony to be introduced be interfered with.

THE COURT: That makes it all the moreimportant that the Court be careful in the exercise of that discretion.

MR FORD: Yes, your Honor. That the reopening of the case after submission, for the introduction of additional evidence is within the discretion, and the authority, there is a long list of authorities (Reading same.)

THE COURT: Don't read over all that list.

MR ROGERS: I submit, if Mr Ford permits a question -- if he read any one of those cases he is reading off so glibly.

MR FORD: Not recently.

MR ROGERS: If at all.

MR FORD: Counsel has no right to make such a statement.

THE COURT: They are cited under that section of the code, I take it?

MR FORD: Yes, your Honor.

THE COURT: Now,as to reopening the case, I think that the Court has that authority; I do not think the reasons as stated by counsel in his avowal are good reasons; I am not so sure that the Court ought,in its discretion, to allow the prosecution to reopen the case and introduce a small piece of evidence of this kind, for the simple reason presented by this large volume of testimony that is cumulative, and there is no great wonder that counsel on either side should leave out a piece of important testimony, and if I reopen it it will be in the exercise of the discussion upon that ground. If counsel for the defense desire to be heard on that ground I will hear from you.

7p

MR. APPEL. Yes, your Honor. In People against Quick, it is a good case a Michigan case, it says this: "Respondent was convicted of stealing a watch from the person of one David Wright. The case was up before some conviction upon a former trial, which was set aside, and further trial was had and the case comes up upon several assignments of erro, which are within the well settled rules of law. We shall not take all them up, but points such as may be good. We have held on several occasions that defendant has a right to know in advance of the trial what witnesses are to be produced against him, so far as then known and to have any new witnesses endorsed on the information as soon as discovered. The object of this is not merely to advise a respondent what witnesses will be produced on a main charge, but to guard him against the production of persons which are unknown and whose character he shall have an opportunity to canvass. It is as important to impeach a rebuttal witness as any of them. Inthe present case the witnesses who were received as rebuttal witnesses were not such ; they were called to prove what went to the People's case in chief. Cases may sometimes arise when testimony which could not be had in the opening may be let in upon good cause shown thereafter; cases may arise when testimony which could not be had in the opening may be let in upon good cause shown thereafter, but it is not proper to divide up the testimony upon which the people

propose to rest their case, and nothing which tends to prove the commission of a crime itself or its immediate surroundings can be classed as rebuttal evidence under ordinary circumstances, if at all." In this case that rule was repeatedly violated. In the case of Williams Against Commonwealth--

MR. FORD- Will you pardon me for making one more statement as to our reasons, so that you may argue it at the same time?

MR. APPEL. I object to his stating any more reasons; we allowed him to state them, your Honor, that he didn't know a thing.

THE COURT. Mr. Appel has the floor and he is entitled to it.

MR. FORD. I want to state one more reason so that he can argue it, that is all.

THE COURT. Mr. Appel has the floor.

MR. APPEL. He has stated the reasons upon which he undertakes to introduce this evidence, and that is they did not know whether Mr. Darrow was going to deny this statement or not.

THE COURT. The court has set that aside.

MR. APPEL. I know, your Honor, but I want to say to your Honor that is a mere nonsense, because they know when an indictment is read to a defendant and he enters the plea of not guilty that that plea of not guilty raises the burden

of proof upon them as to every fact necessary to make their case.

THE COURT. Do not address yourself to that subject, it is out of the argument, as far as this argument is concerned.

MR. APPEL. What a mere childish subterfuge that is for any lawyer to make.

MR. FORD. We object to such language.

THE COURT. Mr. Appel--

MR. APPEL. I say, it is childish, not a child that ever read a law book would make such a statement.

THE COURT. Mr. Appel, there is no occasion for that remark at all, that is out of the case entirely; the sole question here is whether or not the court will, for the reasons stated from the bench, open up this matter for new evidence upon the case in chief.

MR. APPEL. You will open it?

THE COURT. I say, the only question is whether or not it will be done, simply because of the vast accumulation of evidence here and it might in the nature of things, they might overlook some evidence.

MR. APPEL. That is the reason it should not be done.

THE COURT. I will hear youon that, that is the question.

MR. APPEL. Is it denied here, your Honor, that it was within their knowledge? Is it denied that they had not talked to this lady before them upon their case and before they closed it? Is it denied that the chief prosecutor,

the man who would like to see Mr. Darrow behind the bars, that he shall go free, would not under the most ordinary conditions have told them what his wife had said to him? When it is to be presumed that they were persons mostly interested in seehing him go free?

THE COURT. The court presumes that the prosecution knew all this testimony--

MR. APPEL. Then what excuse can they have for reopening their case? Could not we then, if they had put it in in chief, have taken the precaution to go more accurately into that question? Mr. Darrow did not testify to anything of that sort in his examination in chief, he did not respond to it because he was not asked about it; it was not cross-examination; when they asked him about that it did not tend to impeach hisposition at all, it did not tend to impeach anything that he said to Mrs. Franklin or what Mrs. Franklin said to him; it is not anything to which he responded in his examination in chief, and on cross-examination they asked him that question and your Honor will see that we strenuously resisted it. Let us see what they asked him.

THE COURT: Yes, I have it here, page 6241, it is right here.
MR APPEL: But, as a matter of cross-examination, it might have been proper to allow it,but being a collateral matter, being an expression, if you please, if it were true, that he had expressed some concern for Mrs Franklin's feelings --
THE COURT? That is already disposed of. The Court has ruled finally that it is a collateral matter and cannot be asked for that purpose; the only question is whether or not the Court should exercise its discretion and let them re-enter upon this branch of the case as a part of their case in chief, ofor the reasons stated here.
MR APPEL: Then they may reopen upon any collateral matter?
THE COURT: The court is not taking that position, it is merely asking you the question.
MR APPEL: In the case of Bannon vs Warfield, page 39, 42 Maryland Reports, the Supreme Court says: "The question presented is one of practice and relates to the order and manner in which parties are required to introduce their evidence in support of the issues to be tried, the observance of fixed rules upon the subject is of great importance,not only as a means of avoiding confusion -- " that is the very reason. Are we to thresh, your Honor -- your Honor will see, there is a vast amount of evidence both upon collateral issues and upon the main case, pro and con,on both sides. On cross-examination and on direct examination there is

to some extent a confusion of what the evidence is in this case.

Now, the mere fact we have a confusion of that evidence in our minds, does that entitle them to come in here with a piece of evidence which they claim is substantive evidence, because if they don't claim it is substantive, tending in some degree to effect some of the parties to this case, then it is not material, and it is not rebuttal, and if it is not substantive evidence they have no right to introduce it in chief. Is it to be wondered at that such a confusion has arose here from the mass of evidence. Wouldn't it be greater when this evidence is in? Have we got to wade through this mass of evidence and see wherein we have to respond to that? Haven't we got a right to call other witnesses on the stand, to show that no opportunity to speak to Mr Franklin in the manner indicated by the question occurred? Have we a right to call Mr Davis back to show that no conversation was had with Mr Darrow alone, and that he was present all the time? Have we got to go through the evidence of Mr Davis to see where it would cross the evidence of Mrs Franklin in that respect? Have we got to wade through the evidence of Mr Darrow, that occupied days and days of cross-examination, in order to do so would n't that incur upon us a greater burden than the justice of the case, in introducing this evidence would admit, and cast upon us. Isn't it a greater injustice to reopen this

case and introduce that evidence and put upon us the burden of wadigg through this mass of evidence to show wherein this matter has been responded to and wherein we have failed to meet it by other evidence or other circumstances which may be at our hand? Must we go out and search facts tending to contradict Mrs Franklin at this time, and wasn't it proper that [illegible] weeks ago when they closed their case this evidence should have been there; it should have been in. If it is substantive, if it is not substantive it has no place in chief or on rebuttal or on cross-examination. This court says: (Reading) "The question here presented is one of practice, and relates to the ordely manner in which parties are required to introduce evidence in support of the issues to be tried. The observance of fixed rules upon the subject,which is of great importance,not only as means of avoiding confusion, but to the necessary administration of Justice".

And those two things are of importance here. It is important that the fair administration of Justice should not be trifled with, either by neglect or by lack of memory or by a subterfuge, that the defendant would not be called upon to answer a piece of substantive evidence. No man has a right to say that the defendant would not be convicted by such evidence as this. No District Attorney would have a right to say that the defendant would be instructed to admit such a thing as that. Well, must they rely on a fact,and noth

introducing the evidence, and say when Darrow goes on the stand we will ask him this, and he admits it, what sort of reasoning is that? How does that conduce to a fair administration of Justice? Isn't that a mere subterfuge, as thin as air, and should have another construction, which for the dignity of the Court, counsel for the defense is not entitled to express it in the language it deserves. (Reading). "Much of course depends upon the form of the issues joined, and upon whom the onus rests. The parties must not be allowed to break up the evidence they may intend to offer on any particular issue, and introduce it at different stages of the case in piecemeal, as the various emergencies of the case may seem to require. Such practice would not only greatly prolong trials, but would frequently lead to surprise and injustice. According to a well established practice, the plaintiff has the right to begin, must put in the whole of his evidence upon every point or issue which he opens, and the defendant then puts in evidence his entire case; and in reply the plaintiff is limited to such new points and questions as may be first opened by the defendant's evidence."

ls 1 We did through the evidence of Mr. Darrow there, your
2 Honor. Could we have asked in chief, "Mr. Darrow, did you
3 have any conversation with Mrs. Franklin upon the time and
4 question here, and did you then have any conversation
5 wherein you said anything to her that she should not feel
6 hard towards you? No." We could not have asked him
7 that in chief. Why? Because we were not put upon notice
8 in the case in chief.that should a fact would be claimed by
9 the other side. On cross-examination they asked him con-
10 cerning this collateral matter. We objected to it because
11 it was not cross-examination. We had not touched upon that.
12 Why? Because we had no notice.
13 THE COURT. That is out of this question now, the collateral
14 part of it. The court has ruled in your favor.
15 MR APPEL. There is no reason for that. There is no good
16 cause to reopen a case upon matter of this kind.
17 THE COURT. I think I have your point now. You wish to be
18 heard further upon the matter?
19 MR. FREDERICKS. No, it is a matter in the discretion of the
20 court. We submit it.
21 THE COURT. I do not feel, gentlemen, especially in view
22 of the very broad latitude that the court allowed the Dis-
23 trict Attorney in producing this case, the doors were
24 wide open for the introduction of all substantive testimony,
25 and until the case in chief was closed. When the District
26 Attorney closed his case in chief it closed the door to that
line of testimony. I believe it is offered. The

application to reopen the case is denied.
MR. FREDERICKS. Q Did you ever meet Governor Gage?
A Never did.
MR. ROGERS. Objected to as not rebuttal; incompetent, irrelevant and immaterial and no foundation laid and hearsay, calling for a conclusion or opinion.
THECOURT. Did I hear that question correctly? Read it.
(Last question read by the reporter.)
THE COURT. I don't know how there could be any conclusion or opinion about that.
MR. ROGERS. It is incompetent, irrelevant and immaterial.
THE COURT. Well, I presume it is preliminary. Objection overruled.
MR. FREDERICKS. Did you ever pay him anything or employ him in any way for your husband's defense?
MR. ROGERS. Objected to as incompetent, irrelevant and immaterial and not rebuttal and no foundation laid. part of the case in chief.
THE COURT. I think that is part of the case in chief. That is the same question again. Objection sustained.
MR. FREDERICKS. That is all. Just a moment. If there was a receipt introduced in here I have forgotten the number. I think it was 51. Probably was the last one. I think it was not introduced--maybe--I am not sure whether it was introduced or not. I show you here a receipt which has been marked People's Exhibit 51 and ask you--

MR. ROGERS. Mr. Fredericks, I didn't see that.
MR. FORD. It is the one counsel had photographed, I think.
MR. ROGERS. Did it look any better inthe photograph than it does this way?
MR. FREDERICKS I don't know. Q I will ask you if the body of the receipt is in your handwriting, Mrs Franklin?
A It is.
Q And you know when this receipt was given by Mr. Mayer?
A I couldn,t tell you just exactly.
MR. APPEL. Wait a minute.
MR. ROGERS. She just said she can't tell exactly.
MR. FORD. She hadn't finished her answer.
THE COURT. Have you finished your answer?
A I couldn't tell when Mr. Mayer signed the receipt.
MR. FREDERICKS. Q About what time, if you know?
MR. ROGERS. Objected to as calling for a conclusion or opinion; incompetent, irrelevant and immaterial and not rebuttal and not the way to show the execution of a written instruction, and no foundation laid.
THE COURT. Objection overruled.
MR. ROGERS. Exception.
A Why, I think along about the first of the year, but I couldn't say exactly.
MR. FREDERICKS. Q Along about the first of the year?
A Yes, sir.
Q But you can't say exactly. Was it before Mr. Ford came

to your house in january--Sunday the 14th of January?
MR. DARROW. We object to that; it is leading; she has answered the question, and leading and suggestive; the question has already been answered.
THE COURT. Objection sustained onthe ground it is leading and suggestive.
MR. FREDERICKS. With reference to the date, the 14th of January, when Mr. Ford came there, was it before or after that, if you know?
MR. ROGERS. Now, if your Honor please, the only good or use of this document is to refresh the somewhat--
THE COURT. What is your objection, Mr. Rogers?
MR. ROGERS. That it is not rebuttal, incompetent, irrelevant and immaterial and not within the issues here, calling for a conclusion of opinion and leading and suggestive.
In that regard I desire to call your Honor's attention to the fact that the only object of this alleged receipt is to fix a date, namely the 27th day--
THE COURT. I know the object. The question in my mind is to the relevancy or materiality.
MR. ROGERS. Now, if it has any relevancy at all to this case it is to show that on the 27th day of November the witness Oscar Henry Frederick Mayer received some money. Well, now, they didn't date the receipt onthat day, then he didn't make the receipt on that day.
MR. FREDERICKS. It is dated on that day.

MR. ROGERS. The only way that the code permits one to refresh his recollection as to the time is by a document made by himself at the time or so soon thereafter that the matter was fresh in his recollection or under his direction at the time. Now, if this is way along a long time afterwards all the virtue passes out of this document, because it is a created document--created later.

THE COURT. Well, that goes to the weight of it. Objection overruled. Go ahead and answer the question.

MR. FREDERICKS. I wish you to look at it, Mrs. Franklin.

MR. ROGERS. I suppose they want to exculpate counsel because it was Mr. Ford came.

(Last question read by the reporter.)

A I couldn't say, it was the first of the year, that is as near as I can put it.

MR. FREDERICKS. Q Why do you think it was the first of the year?

MR. ROGERS. Objected to as trying to cross-examine their own witness. They witness says she don't know whether it was before or after the 14th, she couldn't say. Along about the first of the year.

THE COURT. Objection sustained.

MR. FREDERICKS. Q Did you make any other memorandum yourself of the payment of the $5.00 referred to there?

A I did.

MR. APPEL. Wait a moment now.

MR. ROGERS. We object to that as incompetent, irrelevant and immaterial and not within the issues, no foundation and not rebuttal. She didn't make the payments--

MR. FREDERICKS. I am not asking her when she made the payments.

MR. ROGERS. Rather a singular proposition, I will admit.

MR. FREDERICKS. I don't see anything singular about it. If there is counsel can argue it to the jury at the proper time.

THE COURT. The question is where is it rebuttal.

MR. FREDERICKS. We introduced the receipt in rebuttal, and under the testimony of the witness Mayer was when he received the payment, onthe 27th. He didn't know when the receipt was actually signed, but it shows the payment of $5.00 to him on the 27th, and I am asking her if she knows anything about the payment of the money referred to in the receipt, or whether she made any other entry in regard to the matter from which she afterwards compiled the receipt.

THE COURT. Read the question.

(Last question read by the reporter.)

THE COURT. Objection sustained.

MR. FREDERICKS. Q Did you make an entry in your card system in which you kept accounts at about the 27th day of November of the payment to Mr. Mayer of this $5. referred to inthe receipt?

MR. ROGERS. Objected to as not the best evidence, incompetent, irrelevant and immaterial and not rebuttal.

THE COURT. Objection sustained.

MR. FORD. If your Honor is sustaining it onthe ground it is not rebuttal, we wish to say that this witness kept her husband's books, that she copied the account in the ordinary course of business of the moneys expended by him inthe performance of his duty as chief investigator for the defense inthe McNamara case, and that she made an entry upon the system of books kept by her at that time showing that on the 27th day of November, 1911, that the sum of $5.00 was paid by them--by her husband to Mr. Mayer, and that Mr. Franklin at the time that money was paid directed her to make that entry in the book, andshe did make it; that the books were kept inthe ordinary course of business, and they are presumed to be correct.

Now, that evidence we offer by way of corroborating Mayer. Mayer's testimony was rebuttal testimony. His testimony was to the effect she went up there onthe 27th

day of November, and that he there received $5. Now, by way of corroborating his testimony this witness is offered as a corroborative witness, to show that the sum of $5 was paid to Mr. Mayer onthe 27th day of November, and to show that she had a memorandum made by herself at the time in the ordinary course of business at that time.

THE COURT. Well, nobody in the world has denied it that I know of. Seems to me it becomes immaterial and cumulative on that theory.

MR. FORD- It is corroborative. It adds to the weight of the testimony. They will argue before this jury that this receipt, not having signed by Mr. Mayer--

THE COURT. I don,t care what they argue or what conclusions they draw. The question is whether at this time and place this particular evidence is admissible. I do not think it is. Objection sustained.

MR. ROGERS. Counsel has made an offer of testimony, and done in the presence of the witness what he desires to prove which, of course, is not well regarded by the Supreme Court, and is excepted to, in the presence of the jury and the witness.

MR. FREDERICKS. Q Well, at any rate, Mrs. Franklin, the receipt is in your handwriting, all but the signature, is that correct? A It is.

Q And you do not remember the time or the occasion when it was given?

MR. ROGERS. That has been asked and answered, if your Honor please, and is objected to on that ground.

THE COURT. Objedtion sustained.

MR. FREDERICKS. Q Did you make that receipt for the purpose of assisting anybody in testifying or fixing the date or anything of that kind or was it simply an ordinary transaction in the course of your bookkeeping?

MR. ROGERS. Objected to as leading and suggestive. Counsel seems to be getting ready to sustaina document--

THE COURT. Objection sustained onthe ground it is leading and suggestive.

MR. FREDERICKS. Q For what purpose did you make the receipt?

MR. ROGERS. That is objected to for the same reasons last given, leading and suggestive, incompetent, irrelevant and immaterial and not rebuttal and calling for a conclusion or opinion, and hearsay and no foundation laid.

THE COURT. Objection overruled.

MR. ROGERS. Exception.

A Why, I wanted a written instrument of his having received the money.

MR. FREDERICKS. That is all.

MR. ROGERS. You can come down.

MR. FREDERICKS. That is all, Mrs. Franklin.

MR. ROGERS. Is Mr. Mayer hereabouts?

MR. FREDERICKS: I don't know.

MR. ROGERS. We want to recall him for a question.

THE COURT. Just a moment, gentlemen, my attention is on some other matter. I guess we will take the afternoon recess at this time for 15 minutes.

(Jury admonished. Recess for 15 minutes.)

(After recess.)

THE COURT: Do you rest Captain Fredericks?

MR FREDERICKS: Yes, your Honor, the People rest.

MR ROGERS: The defendant rests.

THE COURT: Now, I do not feel that it is an enonomy of time to call upon counsel to start the argument at this time, it is now almost four o'clock Friday afternoon, and I am satisfied from experience and observation, we will save time by adjourning until Monday, but in order to be sure that the case will be submitted to the jury not later than next Friday the court will make its order limiting the argument of counsel to two and one half days apie ce, two and one half days on each side; the prosecution can use their two and a half days as they see fit, and the defense can use their two and a half days as they see fit, and either side, upon request the day before, can have the session of court begin at 9 o'clock in the morning, whenever they want to use it; I do not mean by that that the prosecution can have it begin or force the defendant to begin at 9 o'clock, or vice versa, but, if, for instance, the defendant is going to address the jury the next day and prefer to begin at 9 o'clock they can have the six hour day instead of the five hour day, if they want it; I will not force them to it, but they can have it, either side.

MR DARROW: The prosecution should use half their time in the opening, it would not be fair to make a short opening

and save the time for the closing.

MR FORD: We will probably take a day in opening and we will not leave more than a day and a half in closing.

MR DARROW: They ought to use half their time.

MR FREDFRICKS: We will not agree to use half our time,but we will approximate it, that is our intention --

THE COURT: They cannot do that, but it ought not to be less than a day, anyway.

MR DARROW : It ought to be substantially half of the time, because all of us have to reply to the opening,and we have no chance after the closing argument, and the closing argument ought to be shorter, if anything; that has always been the rule, as far as I have ever heard.

MR FREDFRICKS: It is not the rule here.

THE COURT: It is difficult for the Court to anticipate that. Of course, counsel for the prosecution might use a day of their time in opening, and might close in an hour.

MR DARROW: Well, I know,your Honor,but the argument in closing ought not to be more than one half the time.

THE COURT: Of the time allotted.

MR FREDFRICKS: That wont do at all.

MR FORD: Sometimes we waive our opening argument.

MR FREDFRICKS: This opening argument will be full,counsel need not be afraid.

THE COURT: With that assurrance , I think that is sufficient, it will be a full statement of the prosecution's views and

conclusions of the case.

MR DARROW: We reserve the right to call the attention of the court to it again,if it is not satisfactory to us.

THE COURT: Yes, the court will act upon it,if attention is called to any matter in that line. Anything further, gentlemen, before court adjourns?

MR FREDERICKS: Nothing for the people.

THE COURT: Gentlemen of the jury,you have heard the statements and understand the situation, and I am sure it is encouraging to you, after your long stay here.

(Jury again admonished.)

The Court will now adjourn until 10 o'clock next Monday morning.

(Here the court took an adjournment until Monday, August 12,th, 1912. at 10 o'clock A.M.)