

1970

## **The State of Utah v. Lamar Edward Kay And Seldon Clarence Darrow : Appellant's Brief**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,  
*Plaintiff and Respondent*

vs.

LAMAR EDWARD KAY and  
*SELDON CLARENCE DARROW,*  
*Defendants and Appellant*

Case No.  
12104

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## APPELLANT'S BRIEF

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Appeal from conviction, judgment and sentence of the  
Third Judicial District Court for Salt Lake County,  
Honorable Bryant H. Croft, Judge.

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**FILED**

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Clerk, Supreme Court, Utah

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,  
*Plaintiff and Respondent*

vs.

LAMAR EDWARD KAY and  
*SELDON CLARENCE DARROW,*  
*Defendants and Appellant*

Case No.  
12104

---

## APPELLANT'S BRIEF

---

### NATURE OF THE CASE

Defendant-Appellant Seldon Clarence Darrow was charged with the crime of forgery.

### DISPOSITION IN THE LOWER COURT

The jury found the Defendant guilty as charged on which the Trial Judge entered judgment and im-

posed an indeterminate sentence of not less than one nor more than twenty years in the Utah State Prison.

## THE RELIEF SOUGHT ON APPEAL

Defendant-Appellant Seldon Clarence Darrow seeks a new trial.

## STATEMENT OF THE MATERIAL FACTS

The Court called for 16 prospective jurors to be seated in the jury box. (Tr. 3.) The jury list showing the names and numbers of the prospective jurors also reflecting peremptory challenges and listing the eight jurors selected to try this case is annexed as Appendix B. To each juror the Trial Judge asked such general questions as address, employment, employment of spouse, and whether any opinion about the innocence or guilt of the defendant had been formed from any pre-trial publicity from the news media. (Tr. 3-30.) The Court next inquired as to membership in the LDS Church. Twelve prospective jurors of the sixteen then in the box admitted such membership. (Tr. 16, 17.) Subsequently the Court asked Defense Counsel whether he had other questions for the Court to ask. Appendix A attached (R. 26-28) were submitted then by the Defense to the Court for inquiry and certain of the questions were put. (Tr. 31.) In the course of this inquiry, it was learned that Prospective Juror No. 6's brother-in-law worked as a LDS Church architect (Tr. 31, 32.)

She was currently a first counsellor in the Relief Society, her husband was in the bishopric, and her brother was a bishop.

Prospective Juror No. 13 had been M-Men athletic director. (Tr. 32.) His brother was an elder's quorum president. (Tr. 33.)

Prospective Juror No. 10 had been in the elder's presidency, superintendency of Sunday School, superintendent and counsellor of Mutual. (Tr. 33.)

Prospective Juror No. 11 currently was a Sunday School teacher, had been in the superintendency of Mutual, his mother had been connected with MIA, his father had been a scoutmaster, one brother was in Mutual superintendency and another was cubmaster. (Tr. 34, 35.)

Recess was taken after which a prospective juror was excused for an obvious physical problem (Tr. 36, 37) and was replaced by Prospective Juror No. 16. He was not a member of the Mormon Church. (Tr. 41.)

Prospective Juror No. 7 stated that her husband currently taught a Sunday School class and had been in the superintendency of Sunday School, both ward and stake. (Tr. 39.)

The Court noted that eleven of the prospective jurors were members of the LDS Church. (Tr. 40.) Next inquiry was whether any of these eleven made financial contributions to the Church such as tithing,

fast offerings, ward maintenance, welfare or budget. All indicated having made such contributions and all but one was a tithe payer. (Tr. 40.)

At various stages of the voir dire examination concerning Church membership, leadership and financial support, each of the jurors went on record as believing that nevertheless each would be fair and impartial.

At this juncture of the trial five prospective jurors, viz., Numbers 4, 5, 9, 15 and 16, were not members of the LDS Church. The State passed for cause. (Tr. 42.) Defendant challenged each prospective juror who was a member of the Church on three grounds, viz.: (1) membership in the Church, (2) the admitted leadership offices held in the Church and close connection of spouses and close relatives admittedly holding Church offices by some prospective jurors, and (3) their financial interest in the outcome of the trial. (Tr. 42, 43.) These challenges were denied. (Tr. 45.) Defendant exercised all four of his peremptory challenges on Prospective Juror Numbers 8, 10, 11 and 13, each of whom was a member of the Church. (Appendix A.) The jury of eight of whom six were Mormons was sworn. (Tr. 46.) Defendant moved for a mistrial for the Court's failure to sustain the challenges for cause (Tr. 53, 54, 55, 56, 57 and 58), which was denied.

## ARGUMENT

### POINT I

EVERY MORMON<sup>1</sup> ON THE JURY SHOULD HAVE BEEN EXCUSED ON CHALLENGE FOR CAUSE BECAUSE OF HIS PECUNIARY INTEREST IN THE OUTCOME OF THE TRIAL.

Each member of the Mormon Church is a beneficiary of the property of the Church held in trust by the office of the President by virtue of the Articles of Incorporation.<sup>2</sup> The Information on which the Defendant was charged, tried and convicted alleged a specific intent by the Defendant to defraud this entity, and the proof adduced before these jurors showed a felonious loss to this entity chargeable to Defendant of some \$650,000.00.<sup>3</sup> Thus, the jurors undertook to decide a case where property in which they held a beneficial financial interest had been taken by the accused. The Defendant contends he has not had a trial before an im-

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<sup>1</sup> Unless the context requires otherwise the word Mormon is used to denote a member of the Church of Jesus Christ of Latter-day Saints.

<sup>2</sup> "Second: The object of this corporation shall be to acquire, hold and dispose of such real and personal property as may be conveyed to or acquired by said corporation for the benefit of the members of the Church of Jesus Christ of Latter-day Saints, a religious society, for the benefit of religion, for works of charity and for public worship. Such real and personal property may be situated, either within the State of Utah, or elsewhere, and this corporation shall have power, without any authority or authorization from the members of said Church or religious society, to grant, sell, convey, rent, mortgage, exchange, or otherwise dispose of any part or all of such property." (Emphasis supplied.) (Ex. S-2).

<sup>3</sup> Exhibits 1, 3, 5-8, 12, 17, 18, 20, 21, 22, 23, 24, 27, 38, 39, 40.

partial jury guaranteed him by Article I Section 12 of the Constitution of Utah<sup>4</sup> and 77-30-18(2), UCA 1953.<sup>5</sup>

Before this jury was sworn this error was called to the attention of the Trial Court (Tr. 42, 43) and challenge of each Mormon made. (Tr. 42.) After the opening statement by the Prosecutor, a mistrial was requested based on this error. (Tr. 53.) The challenges and motion for mistrial were denied. (Tr. 45, 53-59).

Counsel believes this precise issue is of first impression in this Court. However, this Court has decided that stock ownership in a bank or an insurance company disqualifies one to be a juror in a case where the corporate assets are involved.

The unfairness of a Mormon sitting in judgment of one charged with wrongdoing concerning his Church's and his own property seem patently clear. The spirit and letter of the Constitution condemns such a

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4 "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense." (Emphasis supplied.)

5 "For the existence of a state of mind on the part of the juror which leads to a just inference in reference to the case that he will not act with entire impartiality, which is known in this Code as actual bias."

practice.<sup>6</sup> The Utah Statute on challenges for particular causes is violated.<sup>7</sup> Regarding pecuniary interest, this Court has said,<sup>8</sup> "Clearly one interested in such an insurance company as stockholder or employee would be subject to challenge.", referring to a cause where an insurance company was the insurer of a defendant's liability. Again, in a suit on a promissory note<sup>9</sup> held by a bank, all prospective jurors who were also bank stockholders were summarily excused by the Court without challenge. This Court noted that such persons were properly challengeable because of being "united in interest," and that the better practice and proper procedure would have been to excuse on challenge, not summarily, as the parties could have waived such challenge.

It strains credulity to believe that a member of the Mormon Church could be the kind of juror contemplated by the Constitution and the Statute providing for challenges for cause for bias. This case demands reversal for the failure of the Trial Judge to sustain Defendant's challenges for cause to each Mormon juror.

## POINT II

PREJUDICIAL ERROR WAS COMMITTED  
AGAINST THE DEFENDANT WHEN CER-

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<sup>6</sup> Constitution of Utah, Article I, Section 12.

<sup>7</sup> 77-30-18(2), UCA 1953.

<sup>8</sup> *Balle v. Smith*, 81 U. 179, 17 P2d 224, p. 230.

<sup>9</sup> *State Bank of Beaver v. Hollingshead*, 82 U. 416, 25 P2d 612.

## TAIN REQUESTED QUESTIONS ON JURY VOIR DIRE WERE REFUSED.

The Trial Judge refused to ask of the prospective jurors three of the Defendant's requested interrogatories.<sup>10</sup> (Tr. 44, 45, R. 27.) This refusal inhibited the Defendant's ability to exercise his peremptory challenges.

Defendant contends in Point I of this brief that his challenges to all Mormon jurors should have been granted, but recognizes that this right could have been waived,<sup>11</sup> and that therefor to intelligently utilize his peremptory challenges it was important to him to know the depth of the religious belief of each Mormon juror. That several officers, agents and employees of the Church were to and did testify was obvious. It was not inconceivable that the President or another exalted official would testify, especially in the light of *the statutory*<sup>12</sup> requirement for official action of the Church entity named in the Information.

One need not live in a predominantly Mormon community for a long time to learn that there is in existence

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<sup>10</sup> "13. Do you believe that the President of the Church of Jesus Christ of Latter-day Saints is the latter day prophet, seer and revelator?"

"14. Do you believe that the President of the Church of Jesus Christ of Latter-day Saints is the ordained prophet of God through whom God speaks to Latter Day Saints who are his chosen people?"

"15. If the President of the Church of Jesus Christ of Latter-day Saints were to give evidence in this case on any material matter, would it take less evidence to convince you of the truthfulness of the facts given in evidence because of his position as prophet, seer and revelator as compared with other witnesses?"

<sup>11</sup> **State Bank of Beaver v. Hollingshead**, 82 U. 416, 25 P2d 612.

<sup>12</sup> 16-7-8, UCA 1953.

a wide range of attitude by Church members toward constituted Church authority. Some members are extremely doubtful of the Church's claimed proximity of its President to the alleged divinely revealed word in his role as Prophet, Seer and Revelator. Others accept such as a fact without question. The requested and denied questions were intended to ferret out the depth of a prospective juror's religious fervor so that an intelligent judgment could be made regarding the reception that the jurors would probably give to the Church witnesses as officers, agents and servants of the President and his incorporated entity vis-a-vis other witnesses as well as defense witnesses.

To obtain such information when germane to the issues is a proper function of the jury voir dire examination. In *Balle*<sup>13</sup> this Court said:

“The object of an examination of a juror on his voir dire is to ascertain whether he has the statutory qualifications of a juror, and, having the statutory qualifications, whether there are grounds for a challenge for either actual or implied bias and to enable the party to exercise intelligently his peremptory challenges.”

The statements by each Mormon juror in substance that he would try the case fairly and not give undue weight to the testimony of the Church witnesses are not real substitutes for explicit questions that seek to illuminate the strength of one's beliefs. In this context Justice Larson's note is appropos, in dissent, in *State v. Musser*, 110 U. 534, 175 P2d 724, i.e.:

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<sup>13</sup> *Balle v. Smith*, supra.

*“The juror is not the judge of his own competency, of his own impartiality, and of his own freedom from prejudice. No statute can clothe him with such judicial discretion and power. \* \* \* It is the judge and not the juror who is charged with the duty of passing upon the competency of the juror, and in the discharge of this duty the judge may have recourse to any means of information within his power. In fact he should carefully investigate every source which would be calculated to throw any light upon the competency of a juror, and if the judge is not entirely satisfied of the competency of the juror, he should be excused.”* (Emphasis supplied.)

No good reason is apparent to less zealously guard a defendant's right to knowledge that enables him to challenge for cause as distinguished from knowledge that permits an intelligent exercise of his peremptory challenges.

### POINT III

#### COMPOSITE ERRORS DENIED A FAIR TRIAL TO DEFENDANT.

To distinguish this point from Points I and II it is to be observed that the subject of Point I is pecuniary interest; Point II deals with jury interrogation on voir dire inhibiting the useful exercise of peremptory challenges; both of which are contrasted with this Point III which asserts that a combination of those errors in conjunction with a natural sense of resentment in Mormon jurors toward anyone connected with such an assault

upon the assets of his Church rendered such jurors subject to challenge for cause for bias as being partial.

None of these points is intended to make any attack on the religious beliefs held by any member of the jury, the panel or the array. The right of religious liberty and freedom is under no attack here. What is being aimed at is the state of mind of a person that may lead to a just inference that such a person will not act with the entire impartiality required by the Constitution<sup>14</sup> and Statute.<sup>15</sup> One's religious belief in a theological sense is quite separate and distinct from his sense of pride, affiliation and attachment to his Church's institutions, as, for example, there is indeed slight nexus between one's religious beliefs and one's sense of outrage at a bishop caught stealing the fast offerings or plundering the welfare budget.

The mandate of the Constitution is clear. It is there laid down that one of the constitutionally protected rights of an accused is a speedy public trial by an impartial jury.<sup>16</sup> There is no statutory impingement on this valued right. There is no Utah case law restricting this right. The Utah Statutes<sup>17</sup> pertinent to jury trials and impanelment are confirmatory of this right.

The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial

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<sup>14</sup> Article I, Section 12, Constitution of Utah.

<sup>15</sup> 77-30-18(2) UCA 1953.

<sup>16</sup> Article I, Section 12, Constitution of Utah.

<sup>17</sup> 77-30-18(2) UCA 1953.

by jury guaranteed by the Constitution. Const. of Utah, Art. I Sec. 12; *Casey v. Archbishop*, 143 A2d 627, 72 ALR 2d 893. See ALR note at p. 910; 47 Am. Jur. 2d Sec. 267, Prejudice and Bias, p. 844; *State v. Morgan*, 23 U. 212, 64 P. 356. See also Library Reference General Digest, Jury, Key Nos. 87, 88, 92, 97, 97-3, 131-6, 131-8.

As a general rule, a person otherwise competent is not disqualified as a juror merely because of his religious belief, and inquiries not on this issue are properly excludable on voir dire where there are no religious issues involved or special circumstances which would raise the issue of religious prejudice. 47 *Am. Jur.* 24 *Supra*, Sec. 283, *Religious Beliefs*, p. 857; but religious faith or its lack in a prospective juror is a proper subject of inquiry where religious beliefs are involved in the issues, or where a religious organization is a party in interest or if for the purpose of obtaining information upon which a party can exercise intelligently his peremptory challenges. *Casey v. Archbishop*, *Supra*; 47 *Am. Jur.* 2d, Sec. 283, *Supra*.

The right to inquire into religious beliefs in cases presenting such special circumstances is seen to rest on the right of a party to have a fair trial by an *impartial* jury of his peers as illustrated in the following cases and notes.

In 1881 in the Territorial Supreme Court of Utah in *Miles v. United States*, 2 U. 19, 103 U.S. 304, on a statute indistinguishable from 77-30-18(1) and (2).

UCA 1953, that Court held that upon a charge of bigamy it was not error for the prosecutor to inquire of prospective jurors whether they believed as Mormons that polygamy was ordained of God, and that revelations of it were of God, and those who acted on them should not be convicted by the law of the land. Challenge was made and sustained to a juror who responded in substance that he believed Joseph Smith received revelations from God on polygamy, that such was one of God's laws to his people and that he who practiced it conscientiously, was doing God's will. He also believed that the law of Congress in conflict therewith was the right of Congress to enact, and that in a trial of the practice of polygamy as bigamy he would regard it his duty, if satisfied by the evidence to convict the defendant and that he would do so. The defendant objected to the exclusions of such Mormons from the jury.

The square holding was: *Whether or not that bias was founded on the religious belief of the juror is entirely immaterial if the bias existed.*

In *State v. Morgan*, 23 U. 212, 64 P. 356, the charge was murder. After the verdict was rendered and judgment and execution ordered thereon it was learned that two jurors had lied on voir dire about not having formed opinions of guilt before being summoned for jury duty. A new trial was ordered by the Supreme Court of the State of Utah in 1901 affirming the right of an accused to a fair trial before an impartial jury and commenting that the purpose of voir dire is to ascertain whether there

are grounds for challenge for either actual or implied bias; and also to enable the accused to exercise intelligently his peremptory challenges. The Constitution of Utah, Article I, Section 12, was cited guaranteeing the right of a speedy trial by an impartial jury.

The rights and objects of voir dire of jurors was reaffirmed in *Balle v. Smith*, supra, in 1932 where the *Morgan* case, supra, was cited for the object of examination in which the Utah Court held *that such a business interest as being a stockholder or employee of an insurance company interested as an insurer of defendant's liability in the outcome in a personal injury action is sufficient grounds for challenge for cause, presumably under 104-24-10, UCA 1943, codified in URCP 47(f).* (Emphasis supplied.)

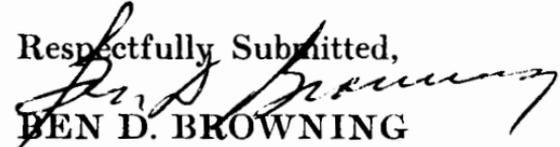
Grounds to challenge for cause lies where prospective jurors are *shareholders of a bank when the bank is a party. State Bank of Beaver County v. Hollingshead*, supra, 1933. The principal is based on the bias arising from unity of business interests creating the presumption of impartiality. See Key No. 92, Jury, of the General Digest. (Emphasis supplied.)

Many courts including the Federal Courts spell out the general rule that especially in criminal cases the duty of the trial judge is to jealously guard the rights of the accused, and an impartial jury is such a right. 47 Am. Jur. 2d, Jury, Sec. 267, p. 844.

## CONCLUSION

The Defendant's challenge for cause to the Mormon jurors was founded on the rational basis that it was not possible in the light of the circumstances existing in this case to justly infer that such jurors could be expected to act with entire impartiality. They were simply burdened with too many responsibilities with reference to the Mormon Church and its ordained officials. Not only were they directly involved as beneficiaries under the filed Articles, laboring under some greater or lessor degree concerning belief in the infallibility of the Prophet, Seer and Revelator from whose agents and servants emanated the principal evidence, and, most undoubtedly harbored some resentment, conscious or subconscious, stemming from the alleged assault on the Church funds, but also, the jurors who were also active members of the Church were subject to the pressures of other active members of the Church, its counsellors, bishops and stake officers with whom they had contact. Their curiosity to learn the "inside stuff" predicted an accountability that could scarcely be ignored. Such a combination of inhibitions in a juror are formidable. If under these circumstances such a person does give affirmative lip service to the Judge's inquiry whether these matters can be laid aside and an impartial judgment made and therefor not excused on challenge, then the constitutional right to an impartial jury appears to rest truly on a very weak reed.

Respectfully Submitted,



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FILED IN CLERK'S OFFICE  
Salt Lake County, Utah  
Jan. 29, 1970

W. Sterling Evans, Clerk of 3rd Dist. Court  
By C. Duane Firth  
Deputy Clerk

APPENDIX A

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IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT IN AND FOR SALT  
LAKE COUNTY, STATE OF UTAH

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THE STATE OF UTAH,

Plaintiff

vs.

LAMAR EDWARD KAY and  
SELDON CLARENCE DARROW,

Defendants

ADDITIONAL QUESTIONS REQUESTED BY  
DEFENDANT DARROW TO BE PROPOUNDED  
TO THE PROSPECTIVE JURORS ON  
VOIR DIRE TESTING FOR ACTUAL OR  
IMPLIED BIAS, AND TO ENABLE DEFENDANT  
TO INTELLIGENTLY EXERCISE HIS  
PEREMPTORY CHALLENGES.

Criminal No. 21817

Defendant Seldon C. Darrow, a defendant herein, requests the Honorable Judge of the Court above entitled to propound the following interrogatories to each of the jurors in addition to those customarily given testing their qualifications to serve in this particular case.

1. Are you a member of the Church of Jesus Christ of Latter-day Saints?

2. Are you employed by the Church of Jesus Christ of Latter-day Saints?

3. Within the past two years have you been employed by the Church of Jesus Christ of Latter-day Saints?

4. Is any member of your immediate family or your spouse employed by the Church of Jesus Christ of Latter-day Saints?

5. Within the past two years has any member of your immediate family or your spouse been employed by the Church of Jesus Christ of Latter-day Saints?

6. Are you, or your spouse, or any member of your immediate family an office holder in the Church of Jesus Christ of Latter-day Saints, such as member of the Presidency? Or of the Council of the Twelve Apostles? Or a holder of any priesthood? Or a member of any stake presidency? Or of any ward bishopric? Or an office holder in any auxiliary organization such as Mutual Improvement Association, Relief Society or Sunday School?

7. Are you currently a tithe payer to the Church of Jesus Christ of Latter-day Saints?

8. Within the past two years have you been a tithe payer to the Church of Jesus Christ of Latter-day Saints?

9. Have you made any charitable contributions to the Church of Jesus Christ of Latter-day Saints within the past two years?

10. Do you now or for the past two years have you contributed to the support of any missionary serving on a call from the Church of Jesus Christ of Latter-day Saints?

11. Do you owe any money to the Church of Jesus Christ of Latter-day Saints?

12. Does the Church of Jesus Christ of Latter-day Saints owe any money to you?

13. Do you believe that the President of the Church of Jesus Christ of Latter-day Saints is the latter day prophet, seer and revelator?

14. Do you believe that the President of the Church of Jesus Christ of Latter-day Saints is the ordained prophet of God through whom God speaks to Latter Day Saints who are his chosen people?

15. If the President of the Church of Jesus Christ of Latter-day Saints were to give evidence in this case on any material matter, would it take less evidence to

convince you of the truthfulness of the facts given in evidence because of his position as prophet, seer and revelator as compared with other witnesses?

16. If the agents or the servants of the President of the Church of Jesus Christ of Latter-day Saints were to give evidence in this case on any material matter, would it take less evidence to convince you of the truthfulness of the facts given in evidence because of their association with the President of the Church of Jesus Christ of Latter-day Saints as prophet, seer and revelator as compared with other witnesses?

**DATED** this 26 day of January, 1970.

**BEN D. BROWNING**  
Attorney for Defendant  
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1020 Kearns Building  
Salt Lake City, Utah

**FILED IN CLERK'S OFFICE**

**Salt Lake County, Utah**

**Jan. 28, 1970**

**W. Sterling Evans, Clerk 3rd Dist. Court**

**By C. Duane Firth**

**Deputy Clerk**

**APPENDIX B**

**Date 1-26-70**

**State of Utah vs. Seldon Clarence Darrow**

**No. 21817**

**D. A. Jay Banks**  
**Attorneys for Plaintiff**

**Ben Browning**  
**Attorneys for Defendant**

**JURY LIST**

1. Pat Jones
2. Lance D. Young
3. Gary M. Unker
4. Margaret M. Collins (State #1 JEB)
5. John E. McCormick Leo Flood
6. Fonda Mellen
7. Elizabeth Montague
8. James A. Kemp (Defendant # 2 BDB)
9. Jane P. Simmons
10. Wesley D. Jarvis (Defendant #3 BDB)
11. Jesse E. Wunderlich (Defendant #4 BDB)
12. Lavon Dangerfield (State #4 JEB)
13. Earl D. Schiffman (Defendant #1 BDB)
14. Clifton A. Jones
15. Erma B. Cowan (State #3 JEB)
16. Kenna H. Smith Darrel G. Rushton
- James Jackson (State #2 JEB)