

some steps to get to the ground? A I did.

Q Tell us something about the height of the steps to the front stoop on Hudson Street.

THE COURT: How is that material?

Q What if anything did you find as you went out in the back door? A After descending the steps and walking about the yard, retracing my steps about three feet east of the bottom step and two feet south, I found a 32 calibre U. S. revolver containing five empty shells.

Q Did you smell of it? A I did.

Q What was the result of that? A It smelled of gun-powder.

Q What did that indicate to your mind? A

MR. BARRA: Objected to as incompetent and immaterial.

THE COURT: You have not laid any foundation for that.

Q During your experience, - how many years on the force did you say? A Going on 13.

Q Have you had experience with fire-arms? A I have had.

Q And instruction in shooting and loading them?

A Not instruction. - Well, instruction at Headquarters, in the shooting gallery.

Q Did you ever observe after shooting a revolver that there is any peculiar odor about it after shooting it

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off? A I have.

Q What is that odor?

MR. BARRA: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

MR. BARRA: Exception, please.

A There is a smokey smell of powder.

Q How long does that smell last about the firearm.

A After shooting it off -

MR. BARRA: Objected to as incompetent and immaterial, no proper foundation laid.

Objection overruled and exception taken.

A For hours.

Q If five shots were discharged would there be more smell?

MR. BARRA: Objected to as a purely hypothetical question, incompetent and immaterial, no proper foundation laid.

Objection overruled and exception taken.

A There would be.

Q When you smelled this revolver that you found in premises 258 Hudson Street and smelled burnt powder did you form an opinion as to whether it had been recently discharged? A I did.

Q What opinion did you form?

MR. BARRA: Same objection on the same grounds

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and no proper foundation laid.

Objection overruled and exception taken.

A That it had been recently discharged.

Q Will you examine this revolver and tell me if that is the one you found? A It is.

MR BROTHERS: We offer it in evidence.

MR BARRA: Objected to as in competent and immaterial, no proper foundation laid.

Objection overruled and exception taken.

Revolver marked in evidence People's Exhibit 4.

Q What is this calibre? A 32.

Q Will you examine the shells in this revolver and tell me whether those are the shells which you abstracted from People's exhibit 4 in evidence? A Yes, here.

MR BROTHERS: We offer them in evidence.

MR. BARRA: Same objection upon the same grounds.

Objection overruled and exception taken.

Shells marked in evidence as People's Exhibit 5.

Q Now, officer, did you make any observation as to the light in the Clubrooms? A I did.

Q Where were the lights situated in the Clubroom; were they on the walls or from the ceiling?

MR. BARRA: Objected to unless the witness knows that the same condition existed at the time of the shooting as when he examined. I submit this question as incompetent, immaterial and improper.

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THE COURT: It is within half an hour, according to the testimony. I will allow him to state where the fixtures were.

Exception taken.

A There was one fixture in what I would call the front room of the Club house, to the front, and also in same room there was another fixture.

Q What part of the room, on the ceiling? A From the ceiling, on the ceiling. And one to the back of the same room.

Q How many fixtures are there? A I observed two from the ceiling.

Q You mean hanging from the ceiling? A Yes.

Q Chandeliers or brackets? A With a sort of electric light attachment.

Q How many lights were there in the fixtures? A I observed one in each.

Q One bulb? A Yes.

Q Are there two doors leading from the room to the hall? A Yes.

Q Where were the two electric lights in that room situated with respect to the doorway? A Can you mark it on the plan where the first one was? A Yes (marking). About in this position from the first door. The other one was practically near the rear door (marking), in the center of the room.

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Q That is in the front in the ceiling? A Yes.

Q How far is that first door from the Street? A
About 11 feet.

THE COURT: Is that agreed upon?

MR. ROSALSKY: Yes.

THE COURT: The first door opens from the Clubroom,
to the hallway, was about 11 feet from the street door?

MR. BROTHERS: Yes sir.

THE COURT: And the second door was where?

MR. BROTHERS: About 12 feet. from the first door;
about 23 feet from the street door.

THE COURT: Where these girls said they were?

MR. BROTHERS: Yes, in other words, the second door
is twice as far as the first door.

THE COURT: Those figures are agreed upon by the
defense and the People, I understand.

MR. ROSALSKY: Yes.

MR. BROTHERS: Yes, there are taken from the plan.

Q Now, while you were there that night did you ob-
serve whether or not the lights in the Clubroom as you have
indicated here upon the plan, threw any light out into the
hallway? A They did.

MR. BARRA: That is objected to on the same ground,
incompetent, irrelevant and immaterial.

Objection overruled and exception taken.

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Q And that light was thrown into the hallway through the open door?

MR. BARRA: Same objection on the same grounds.
Same ruling and exception.

A Yes.

MR. BROTHERS: That is all.

CROSS-EXAMINATION BY MR. ROSALSKY:

Q Was there any light thrown into the hallway from the rear light of the room? A I observed the first light as regards the first entrance.

MR. ROSALSKY: I move to strike out the answer as not responsive.

THE COURT: It is not strictly responsive but I will allow it to stand.

Q Did you observe the second light; did that throw any light into the hallway? A I did not observe the second light as regards throwing light into the hallway.

Q Did you observe whether the first light threw any light into the hallway? A I did.

Q In what condition was the first door when you entered at 11:15? A Open.

Q In what condition was the second door? A Closed.

BY THE COURT:

Q You mean closed and locked? A I could not say whether it was locked. I did not go in or out the second

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door.

Q You do not know whether that door could have been opened or not? A No.

BY MR. ROSALSKY:

Q When you were there the door was locked? A To my observation it appeared as if the door was closed, shut.

Q Did you see a piano there? A Yes, I did.

Q Where was the piano? A Pretty near to the second door.

Q Was it up against the second door? A I could not say.

MR. BROTHERS: I am informed that the second, the rear door was closed and nailed tight so that it could not open. up.

THE COURT: Then eliminate that.

MR. BARRA: That is correct; that is conceded, your Honor.

BY THE COURT:

Q So that if there was any light in the hallway, the only place it could have come from was the front door?

A Yes.

Q If the door was open? A Yes.

BY MR. ROSALSKY:

Q This large room was somewhat like a double-room?

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A It was not divided. It was a large room.

BY THE COURT:

Q It was one large room as shown there on the plan, with two doors leading from it to the hall, and the rear door was nailed tight? A Yes.

Q But the other door was near the street and that was in use? A Yes.

BY MR. ROSALSKY:

Q The light you talk of in the hallway was a reflection of the door being open? A Yes, from the light from the front of the room. It was a ray of light.

Q Did that light from the front room light up the whole hallway? A No.

Q Did it light only a small portion of the hallway?

A A little, as far as I observed that particular portion of the hallway covered by the entrance.

Q Now, did you make an examination of the hallway?

A I looked around the hallway to see if I could find a pistol.

Q Did you look into the hallway to see if you could find any pistols in the hall? A I did.

Q Did you find any? A I did not.

Q How many times were you in those premises? A That was my first and last.

Q Have you been there since? A Not since the night and morning.

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Q You were only there once? A Yes sir, but I went out and came back.

BY THE COURT:

Q You made two examinations for bullets and found none?

A I did not find any.

BY MR. ROSALSKY:

Q Do you know whether there was any pistol found on Sweeney or not? A I do not.

Q You did not make an examination of Sweeney's clothes?

A I did not.

Q Who was the first officer that went to Sweeney's aid, if you know? A I do not know.

Q Was the pistol warm? A Which pistol?

Q The pistol you found in the yard? A No.

Q What time did you find the pistol? A I should say about 11:15.

Q Was it any later than 11:15? A It might have been one or two or three minutes.

Q Now, officer, you have had experience with fire-arms, is that right? A Yes.

Q Don't you know as a matter of fact that after discharging a fire-arm or pistol, it will keep warm for an hour or more? A I do not, but in this particular instance where this pistol was found it was found on what I would call a heap of garbage, upon a mass of newspapers, and other garbage material that filled that yard. The paper there

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was damp, and resting upon a damp piece of paper was this revolver when I picked it up.

Q But it was on paper? A On an old piece of paper.

Q How long will a pistol remain warm after being fired from the knowledge you have of fire-arms? A I should say an hour.

Q Isn't it sometimes more than an hour? A It could be.

Q This pistol was not warm at all? A Not that I recollect.

BY MR. BROTHERS:

Q The length of time that a pistol retains the heat from the explosion depends upon where it is? A Correct.

Q If it is lying outdoors, subject to the air it would cool quicker? A Yes.

Q If it was put into your pocket it would remain warm longer? A Yes.

Q Just like any other warm article? A Yes.

BY MR. ROSALSKY:

Q Have you ever experimented with leaving a pistol exposed to the air?

THE COURT: Is that material?

MR. ROSALSKY: There is a dispute as to whom the pistol belonged to.

THE COURT: There is no proof that it belonged to anyone.

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MR. ROSALSKY: And it might have been there for a long time, that pistol.

THE COURT: That is for the jury to determine.

MR. ROSALSKY: That is all.

MR. BROTHERS : That is all.

THE COURT: You may recall the officer for further cross-examination along that line if you think it is necessary, if it should develop in your opinion, to be necessary.

JAMES J. COLLINS, an officer of the First Branch Detective Bureau, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. BROTHERS:

Q Are you a member of the Police Force of this City?

A I am.

Q Did you arrest this defendant? A I did.

Q At what place? A I arrested him at his residence, 322 West Houston Street.

Q What was the date? A On June 12th, about 12:30 A.M.

Q That was the early morning of that day? A Yes sir.

Q Was he in bed when you placed him under arrest? A He was.

Q Did you search his premises? A I did.

Q And having searched his premises did you have any conversation with him about anything that was in the premises?

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MR. BARRA: I object to that as incompetent, irrelevant and immaterial unless it relates to the charge made in this indictment.

THE COURT: I will sustain the objection to that extent.

Q What if anything did you find in his home? A I found a revolver in a bureau drawer.

Q Will you say if it is in that package (handing package to witness)? A Yes sir, that is the revolver.

Q Did you speak to the defendant about that revolver? after you found it? A I did.

Q Did you ask him whose it was? A I did.

Q What reply did he make? A He told me that a stranger came into his room there one day and he jumped up quick and this person who came in his window was a man and he ran out and dropped that revolver on the floor and he picked it up.

Q Did he say that he kept it ever since that day? A Yes.

Q Did you examine it to see whether or not it was loaded? A I did.

Q What did you find? A I found four loaded cartridges and two empty chambers.

Q By empty chambers, you mean ^{the} chambers in the cylinder had no shells in at all? A Yes sir.

Q Not exploded shells but absolutely empty chambers? A Yes.

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Q Did you retain the shells? A Yes.

Q And are they here? A Yes sir (producing shells).
Those are the shells.

Q What calibre is this pistol? A I believe it is
an 18.

Q Is it marked in any way? A No sir, there is not
any calibre on it.

Q But is it smaller than a 32, is it not? A Yes sir.

MR. BROTHERS: We offer the pistol in evidence
and the bullet

MR. BARRA: Objected as as incompetent, irrele-
vant and immaterial.

THE COURT: I do not see how you have connected
that pistol. I will sustain the objection.

MR. BROTHERS: I offer it for identification.

Marked People's Exhibit 6 for Identification.
(Pistol and Bullet).

MR. ROSALSKY: Will you instruct the jury to dis-
regard what this witness testified to concerning that
revolver, to eliminate it from their minds?

THE COURT: I do.

MR. BROTHERS: Of course, it is connected in this
way, that it was in the defendant's possession five
days after the shooting when he was arrested.

MR. BROTHERS: That is all.

CROSS EXAMINATION BY MR. ROSALSKY:

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Q Officer, was Mrs. Mulcahey there at the time?

A She was.

BY THE COURT:

Q Who is Mrs. Mulcahey? A The wife of the defendant.

Q Did you know the defendant before this time? A
No sir, I did not.

BY MR. ROSALSKY:

Q Did Mrs. Mulcahey call your attention to the window
being nailed since this man came? A No sir, she did not.

Q Are you sure about that? A Yes, I am.

MR. ROSALSKY: That is all.

THE COURT: If further evidence on that point is
not introduced I will grant the motion and strike the
testimony of the officer from the record. I have al-
ready instructed the jury to disregard that, at Mr.
Rosalsky's request but it has not been stricken from
the record before.

F R A N K C A F F R E Y, of 113 Watts Street, a witness
called on behalf of the People, being duly sworn, testi-
fied as follows:

DIRECT EXAMINATION BY MR. BROTHERS:

Q How old are you? A Twenty-four.

Q Are you employed anywhere? A Yes, with John White,
as truckman.

Q Do you belong to the Pioneer Social Club, 258 Hudson
Street? A Yes sir.

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Q Do you know the defendant, James Mulcahey? A Yes sir.

Q Were you in the Club house on the night of June 7, 1917? A Yes sir.

Q What time did you get there? A Around 7 o'clock.

Q What time did you leave? A Around half-past ten.

Q Were you there, do you remember the shooting? A I was in the back.

Q You were in the Club house when the shooting took place, is that right? A I was in the back and I heard a shot and I ran out.

Q In the back of what? A In the back of the Club.

BY THE COURT:

Q How many rooms are there there? A Three.

Q Where are they, point them out on that diagram?

A There is a cloak room in the back and a bedroom.

Q Were you in the large room or the coat room or the bed room? A I was in the rear of the room. It was two rooms.

Q There is a front room and a bedroom and a coat room?

A Yes, I was in that middle room, in the beer room.

Q There is a big room? A Yes.

Q Then there is a door goes into another room in the back? A Yes. Back of that is the coat-room.

Q Which of these three rooms were you in? A In this rear room (indicating).

Q Were you in the bedroom? A Yes sir.

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Q You were in the bed room? A Yes sir.

Q Not in the front room? A No.

BY MR. BROTHERS:

Q That is the room I had my finger on, indicated here as the rear room on the plan? A Yes.

Q What was going on in that room? A Drinking beer.

Q Was the beer being drawn from a keg? A Yes sir.

Q Did you see Mulcahey in the Club that evening? A I seen him sitting down by the piano.

Q How many kegs of beer were brought in that night?

A Two.

Q What time was the second one brought in? A Around ten o'clock.

Q Did you help to bring it in? A Yes sir.

Q When you brought it in did you notice whether Mulcahey was still in the Club? A Yes, he was sitting down by the piano.

BY THE COURT:

Q When you say you brought them in, you brought them in through the front door, back to the bed room? A Yes.

BY MR. BROTHERS:

Q Now, when you were in this rear room serving beer, and drinking it, you heard some shots, did you? A Yes.

Q How many shot do you recall hearing? A I heard one and jumped out of the window and ran out through Dominick Street.

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Q Which way did you go out? A Through the yard.

Q Not the front door? A No.

Q What window did you jump out of? A The coat room.

Q The back window here (indicating)? A Yes.

Q How did you go out of this yard into the street?

A Through that little space.

Q A little alley way? A Yes.

Q Did any other person go out through the yard at the time you did? A Me, Jennings, Buddie and Maloun and Eddie Clark.

Q Are those the only persons that went out through the back with you? A That is all I know.

Q Did you see any of the other men that were in the Club come out that way? A No sir.

Q What street did that lead you on to? A Dominick Street.

Q Did you see Mulcahey again after the shooting?
A No sir.

Q Did you see the shooting? A No sir.

Q Did you know who was shot? A No sir.

Q The first shot that you heard was fired where?
A I don't know where it was fired.

BY THE COURT:

Q Don't you know who was shot, now? A I know Sweeney was shot.

Q You mean you did not know then? A No.

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Q Had you seen Sweeney in the Club house that night?

A No sir, I did not know Sweeney at all.

BY MR. BROTHERS:

Q So far as you know he is not a member of the Club?

A I do not know.

Q Was Mulcahey a member? A Yes sir.

Q Was the first shot that you heard fired in the Club?

A I don't know where it was fired. I was in the back drawing beer.

Q Did it sound near where you were as though it was indoors or out in the street? A I don't know where it was.

Q Then why did you run away? A I jumped out of the window and ran out through Dominick Street.

MR. BARRA: Objected to as calling for a conclusion.

Objection overruled and exception taken.

Q Were you afraid when you ran out of being hurt?

A I run out. I didn't want to get shot myself.

Q Did you see anybody with a revolver in the Club that night? A No sir.

BY THE COURT:

Q How many people were in the Club room that night?

A There was only about six of us.

Q And you had two kegs of beer? A Yes sir.

Q Were there any festivities going on or was it

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just a usual nightly performance? A We got a keg of beer once in a while.

Q There was no party, - no girls there? A No sir.

Q There was no meeting? A No.

Q Just an ordinary evening in the life of the Club?

A Yes sir.

BY MR. BROTHERS:

Q Were the same men there that evening or did some go away and others take their places? A Anglin went away.

Q Are you sure there were only six men there? A That is all I know.

BY THE COURT:

Q Well, there were four in your place? A Yes.

Q And Mulcahey was not in with you, was he? A He came in after.

Q How do you mean after? A Around nine o'clock.

Q Weren't you in the front room in any of that time?

A I only brought a couple of beers out.

Q But you brought beer in you say and carried a keg? A Yes.

Q Where did you get it? A I got it down at Crowley's; me and Bauer got the first keg.

Q That was what time you got the first keg? A Around half-past eight.

Q And the second about ten, you said? A Yes.

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Q You are not sure about the second time, are you?

A No sir.

Q But you and he carried the second keg in? A Me, Buddie Malone and Clarkie.

Q Three of you carried it in? A Yes.

Q And you carried it up the front stoop? A Yes.

Q And in the first door? A Yes.

Q And through the room? A Yes.

Q When you went in with that second keg into the front room how many people were there? A I did not see no people there.

Q You did not see anyone? A No.

BY MR. BROTHERS:

Q Didn't you see Mulcahey there? A He was standing by the piano.

Q Who was with him? A I don't know.

Q Didn't you see anybody there? A No.

Q Was anybody on the front stoop? A Two girls.

Q Who were they? A Katie Flynn and Beatrice Gallagher.

Q How long after you got in with that keg was it you heard the shooting? A About five minutes.

BY THE COURT:

Q Did you see Rogers there? A No sir.

BY MR. BROTHERS:

Q Do you know Rogers?

BY THE COURT:

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Q Did you see a man named Keating there? A I seen Keating.

BY MR. BROTHERS:

Q Do you know John Collins, sometimes called Buster?

A No sir.

Q Do you know him? A No sir,

Q You don't know him at all? A No.

BY MR. ROSELSKY:

Q Did you see Mulcahey have a pistol that night? A No sir.

Q Where was Mulcahey? Where did you see Mulcahey, at the time the shot was fired? A He was sitting in the Club.

Q Did you see him? A I seen him when we came in with the beer.

Q Did you see where Mulcahey was at the time that the shot was fired? A No sir.

MR. ROSALSKY: That is all.

BY THE COURT:

Q How many shots did you hear altogether? A I heard one shot and ran out and jumped out of a window.

Q You did not hear any more? A No.

BY MR. BROTHERS:

Q Did you make any noise going out of the window?

A I broke a couple of windows.

Q Did you four men go out of the same window?

A Yes.

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MR. BROTHERS: That is all.

LAWRENCE CLANCY, of 257 Hudson Street, a witness called on behalf of the People, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. BROTHERS:

Q What is your age, Mr. Clancy? A 52 next birthday.

Q Where do you live? A 257 Hudson Street.

Q What place is that? A James Dugan, undertaker.

Q Do you remember the night of June 7th, 1917, when some shooting took place in Hudson Street? A I do.

Q Did you hear the shots fired? A I heard the reports.

Q Where were you at that time? A I was sitting inside of the saloon at the corner of Hudson and Dominick Street.

Q Is that Mr. Crowley's place? A Yes, it was at that time.

Q When you heard the shots did you take note of the number of them? A No, I did not.

Q About how many do you remember? A Well, there may be three or four. I did not count them.

BY THE COURT:

Q There was more than one? A Yes, your Honor.

Q But the exact number you do not know? A No.

BY MR. BROTHERS:

Q A little later after the shots were fired, did you see a man staggering to the saloon? A I did.

Q What happened to him when he got in there? A He

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raised his hands up and he said, "Oh, I am dying, I am dying," and he went down quite a ways and he fell in the center of the floor. He became unconscious right away.

Q Did you know him? A No sir.

Q Did you see Officer Haggerty there sending him away in the ambulance? A There was quite a crowd gathered around and I walked out to the door, and I met Officer Haggerty and I told him there was a man unconscious inside on the floor.

Q He was taken away to St. Vincent's Hospital? A Well, sometime after there was an ambulance came there and he was removed.

MR. BROTHERS: That is all.

MR. ROSALSKY: No questions.

MR. BROTHERS: I think that is the People's case.

We rest.

MR. BARRA: Your Honor, please, the defendant moves that your Honor takes from the consideration of the jury that part of the indictment which charges murder in the first degree, upon the ground that the People have failed to establish the allegation required to make out that crime, and also the crime of murder in the second degree, and to submit this case to the jury upon the question of manslaughter.

THE COURT: If I submit the case at all I will submit it on the question of murder in the first de-

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gree, but I would like to hear argument on the sufficiency of the evidence. I think, Mr. Brothers, that there is very grave reason for taking this case from the jury.

MR. BROTHERS: Your Honor's judgment is always good, but I think the evidence of Rogers is very clear on direct examination.

THE COURT: It is contradicted positively by two of your own witnesses who said he was not near the place where he says he was.

MR. BROTHERS: The evidence is that he was behind them at one point.

THE COURT: You agree that the case stands or falls so far as the case is concerned on the testimony of Rogers?

MR. BROTHERS: Oh, absolutely, yes.

MR. ROSALSKY: If you take Rogers' testimony at its best, how can any man with any reasonable amount of sense believe the story of Rogers, which seems to be so improbable on his own statement. Here is a man coming within ten feet from the two people, in back of the firing, and he said he heard two shots and he was still looking and two shots were fired by Collins, he said. Then he said in the meantime Mulcahey took out a pistol and started shooting also and that he was

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looking in and that those shots came toward him.

THE COURT: I think that is a question for the jury to determine.

MR. BARRA: There is a flat contradiction. The two young women come into court and contradict absolutely and unqualifiedly the testimony of Rogers, so that he could not have been in the place where he said he was.

THE COURT: Mr. Brothers claims they do not contradict. ^{by} They admit he passed behind them, but they deny he was standing behind their chairs.

THE COURT: I will deny your motion and let the matter go to the jury.

MR. BARRA: I move to strike out the testimony of Officer O'Connell.

THE COURT: I will strike it out.

MR. BROTHERS: Except as to the time of the arrest, the arrest of the defendant. I consent to strike out about the finding of the revolver.

THE COURT: That tends to charge the man with the commission of a crime not connected with this case, the finding of the 18 calibre revolver.

MR. BROTHERS: I consent that that part about the finding of the revolver goes out; that is, the testimony of the police officer about the finding of the revolver, but about the arrest I want to leave that in.

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MR. BARRA: Will your Honor give us an adjournment for about half an hour?

THE COURT: Gentlemen of the jury, we will take a recess until 12 o'clock. In the meantime remember the admonition I have given you, that the law forbids you actually to discuss this case, not only among yourselves but with any stranger. You must not talk about it to one another and you must not form nor express any opinion on the question of the guilt or innocence of this defendant until you hear all the evidence that is to be presented by both sides and until the matter is submitted to you by the Court. You must keep an open mind on that question. Do not decide it until it is given to you to decide at the end of the case.

TRIAL CONTINUED.

12 o'clock.

MR. BARRA: If your Honor please, the defense rests and we renew the motions made at the close of the People's case. We move that your Honor advise this jury to acquit upon the ground that the People have failed to establish the allegations in the indictment that go to make up murder in any of its degrees, or manslaughter, by competent legal proof beyond a reasonable doubt.

By consent of the District Attorney and Counsel for the defense the case is reopened for further exam-

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ination of the witness Peter Rogers.

PETER ROGERS, recalled to the stand,

BY THE COURT:

Q How old are you, Rogers? A 20 years old.

Q Were you a member of this Club? A No sir, I was not.

Q How many times have you been in the Club rooms?

A I was never in that Club-room.

Q You were never in that Club room? A No sir.

Q How long have you known Keating? A About 14 years,
I suppose, when I was a child; when I lived around Vandam
Street he lived at Greenwich and Vandam.

Q How did you happen to be in front of the Club room
that night? A It was my misfortune to go around there
with them fellows.

Q But when did you first meet Sweeney that day? A In
the saloon at Charleton and Greenwich.

Q At what time? A Along 12 o'clock.

Q In the daytime? A Yes sir.

Q You were in his company all that day? A Yes sir.

Q What were you doing? A We were down Staten Island.
We were visiting my brother down at Staten Island jail. He
was in jail down there for disorderly conduct.

Q Was Sweeney working that day? A No.

Q What day of the week was it? A It was a Wednesday,
or a Teusday.

Q It was not Sunday? A No sir.

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Q Sure of that? A Yes sir.

Q It was a working day? A Yes.

Q And you were not working? A No sir.

Q Did you have a position that day? A Yes sir, I worked for my father.

Q What work did you do for your father? A I drove an ash cart for him.

Q Who was driving the ash cart that day? A He had one of his men working.

Q You did not drive the ash cart every day? A Well, every day I was working.

Q Every day you felt inclined to drive, you drove, is that it? A Yes.

Q If you did not feel like driving it you did not drive it? A No sir.

Q On this day you had your day off? A Yes.

Q Was that a frequent occurrence with you? A I don't understand.

Q Do you have many days off, or was this an unusual thing? A It is very seldom I would take a day off, once in a while.

Q Did you meet Sweeney by appointment that day or accidentally? A I met him by appointment because he was down to Staten Island the day before.

Q When did you make the appointment with him? A The night before I left him. This happened on a Tuesday.

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Tuesday night I left him. We were down Staten Island. That night I left him at the house. He said, "I will see you tomorrow."

Q You were down Staten Island the day before the shooting of Sweeney? A Yes.

Q What did you do down there? A Trying to get my brother out.

Q Then you were going to get your brother out. A Yes.

Q Was it your cousin or your brother? A My brother.

Q How could Sweeney get your brother out? A I don't know; he took an interest in my brother and wanted to see what he could do for him.

Q What did Sweeney do for a living? A Sometimes he drove a truck, and worked on the dock, I think.

Q That day he went down Staten Island, he was not working, and you were not working? A No.

Q You were drinking I suppose? A Yes sir.

Q And when you came back to the City you continued drinking? A Yes.

Q You and Sweeney? A Yes sir.

Q And when you parted you agreed to meet in the barroom next day at 12 o'clock? A Yes.

Q And you did meet? A Yes.

Q Did you start in drinking then? A I had one drink then, of beer.

Q You went down to Staten Island? A Yes.

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Q What time did you get back from Staten Island?

A We reached New York about 5 to 9. I reached my girl's house about 9 o'clock from South Ferry.

Q And you left Sweeney? A Yes, - not for the girl's house I did not leave him. From the girl's house I went to 13th and Hudson with him and had a drink, and paid the chauffeur off at Charleton and Greenwich Street.

Q You had an automobile that day? A Yes. We had one the day before, too.

Q Was anyone else with you besides Sweeney? A Yes, Frank Kennedy, and James McGin, a fellow named Charles Underwood from Staten Island and Frank Faber from Staten Island and Sweeney and I.

Q They all went with you to this woman's house? A We left Faber down Staten Island, Faber and Underwood.

Q Who came up from Staten Island in the machine? A Frank Kennedy, Sweeney, Jimmie McGin and I.

Q Describe your movements after you came back from Staten Island. A We went up 13th and Hudson Street went in there and had a drink and from there went down to Greenwich and Charleton, went in there and Sweeney and this McGin paid the chauffeur off.

Q You said something about a visit to a young lady.

A That was after I left the young lady's house. I did not see her. She was not home. I gets out of the car.

Q The car and your companions went with you to call

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on this woman? A They were going to leave me there, but my woman was not in at that time, - my girl. They were going to leave me there.

Q Were you living with her? A No, I only kept company with her.

Q Your relations were perfectly honorable? A Yes.

Q Why did you speak of her as your woman? A I thought I understood you to say woman. I corrected myself.

Q You did not mean anything by that expression, - "your woman"? A No sir.

Q When you went back with them to another barroom and the chauffeur was dismissed. A From my girl's house to this barroom at 13th and Hudson Street, then from there we went to Charleton and Greenwich and paid the chauffeur off at the saloon and let the chauffeur go. Jimmie McGin went with the chauffeur to his girl's house.

Q You, Kennedy and Sweeney remained together? A Yes. From there we went over to the Huron Club, 13th and Hudson Street. He went upstairs, Sweeney, and came down again, he said, "Come on." We walked on the other side, and we passed this Club room, and then as soon as we came to the door Mickish Keating was standing on the stoop.

Q Where were you going? A He was going, looking for some bondsmen to get this Hagan out of jail, Sweeney was.

Q Didn't you say your brother was in trouble? A Yes.

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but after we came from Staten Island; my brother got sentenced that morning, so when we came back to New York we were in the saloon drinking at Charleton and Greenwich and Mulligan said, How about Hogan, he is in jail. I think it was \$5,000 bail he was under. This was in New York. And then Sweeney wanted to get Hogan out on bail so we were going with the intention of looking for a bondsman to get Hogan out on bail.

Q And you were passing this Pioneer Club? A Yes, and got invited in.

Q Did you speak to Keating first or did he speak to you first? A Yes, I spoke to him, I said, "Hello, Mick". He said "Hello." I walked up on the stoop. He said, "Come on in here." He said, "There is plenty of beer." I said, "I got two friends". He said, "All right, bring them in with you".

THE COURT: Does the defense object to this conversation?

MR. BARRA: No, your Honor.

A (continued) So I went down off the stoop to Kennedy and Sweeney.

Q Did Keating say anything about Kennedy and Sweeney?

A No sir.

Q Did he ask you who your friends were? A No. I said, "I got two friends with me." He said, "Bring them in."

Q He could see them? A Yes, he seen them walking

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with me.

Q You had been drinking continually that day. A That day I had about 15 beers that day.

Q Who else was on the stoop? A There were two girls sitting on the top step of the stoop.

Q Were they sitting on the step? A Yes, on the step.

Q On the flag stone? A On the flag stone.

Q They were sitting on the stones? A Yes sir.

Q They were not on chairs? A No sir, I didnot see them on any chairs at all.

Q You did not see chairs at any time that night? A No sir, I did not.

Q Now supposing that the table there is the top step, show this jury how they were sitting. How many steps up were they? A About five or six steps up.

Q Then there was quite a wide step at the top? A Yes, like a flag stone.

Q The way steps generally are? A Yes, that was the top step.

Q Was there a step up from that to the hall? A There was a step up to the hall door, too, but this is where the girls were sitting, they had their legs on the other step down below.

Q How were they sitting with reference to the doorway leading in? A Each one was sitting on each side of the step so people could get through them.

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Q Those girls were sitting on each side of that step?

A Yes.

Q Leaving a passageway into the house? A Yes.

Q Are you sure they were there when you came along with Kennedy? A Yes.

Q What did the girls say to you? A They did not say anything to me.

Q You did not say anything to them? A No.

Q Was there a railing there on that stoop? A Yes sir, an iron railing.

Q On both sides? A Yes sir.

Q There was no other stoop adjoining it? A No sir.

Q The stoop stands alone there? A Yes sir.

Q The stoop of the next house, is that near it?

A No sir.

Q What did you hear those girls say while you were there?

A I did not hear them say a word.

Q They sat there mute? A Yes.

Q You never heard them speak to Keating or anyone?

A No sir.

Q After you spoke to Keating you went down the steps again? A Yes.

Q And you spoke to Kennedy and Sweeney? A Yes.

Q What did you say to them? A I said, "Come on in." He said, "It is all right." I said, "Yes", Mickish said it was all right, so we walked up the stoop.

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Q What happened when you got up on the stoop? Who went first? A The three of us went up together and two went in and I stood out on the stoop there.

Q When did you go into the building? A I did not go inside of the hall at all. I was out on the stoop there.

Q You never went into the hall? A No sir, I did not. I did not go into the hallway at all. I stood right on the stoop there, and Sweeney, Mulcahey and Mickish went inside.

Q And that left what people on the stoop? A I don't know where Kennedy went; I did not take notice if he went inside or went down off the stoop.

Q What did the girls do when you three came along?
A They sat there I think.

Q You think? A I was not paying any attention to the girls.

Q You sat on the stoop and paid no attention to the two girls? A No sir, I don't know the girls.

Q Was this a warm night? A Yes, the 7th of June.

Q You did not pass any comments on the weather with them? A No.

Q You were entirely sober at this time? A Well, I was feeling a little good, not exactly drunk.

Q You had been drinking continually all day? A At the rate of a bout 12 beers or 15 beers; between 12 and 15.

Q You did not keep count, did you? A No sir.

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Q Why did you not go into the Club house? A I don't know, sir. I seen these two walking in together and at first, just for the moment I stood outside.

Q You were asked to bring them up? A Yes. He said, "Come on bring them in".

Q Keating was your friend? A Yes, as much as anybody else. He is a friend of Frank Kennedy's and Sweeney, as I heard. They are supposed to be friends.

Q You never heard of any trouble between Keating and him? A I don't think Keating liked Sweeney. They never did agree.

Q Then why did you ask Keating if Sweeney could go in? A I said, "Is it all right?" He said, "Yes, bring them in."

Q All right for what? A To bring them in.

Q Why you should you bring up at that Club house that night? A We just happened to pass there and we were invited in.

Q You spoke to Keating? A Yes.

Q You spoke first? A Yes, I said, "Hello".

Q What did Keating say? A He said, "Come on inside, there is lots of beer."

Q You did not know there was any beer there? A No sir.

Q You are very fond of beer? A Yes.

Q Why did you not go in to get some beer? A I had two friends with me.

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Q But there was lots of beer there. A I told him I got two friends and he said, "All right, bring them in."

Q He could see your two friends? A Yes.

Q After he said it was all right to bring them in, why didn't you bring them in? A I went down and I told them.

Q You went as far as the top step? A After Mickish said it was all right I went down to tell my friends.

Q Then you went back with your friends? A Yes.

Q But you carefully stayed on the top step? A Yes.

Q Why did you not go in to get beer? A I don't know; it was just at that moment I did not go in, I don't know why. I did not have any suspicion of nothing.

Q Had you suddenly lost your thirst or your love for beer? A No.

Q Had you ever refused a drink that day before? A No, -- I was going to go in.

Q You drink every chance you get? A Yes.

Q ~~you~~^{yet} here was free beer and you had been buying your beer all day? A Yes.

Q And the others? A Yes.

Q You had plenty of money? A Yes.

Q Even if you were not working? A Yes; they had the money. I did not have no money.

Q Then here was a chance to get plenty of beer and you did not go in? A Yes.

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Q You let them go in? A Yes.

Q How near to that door did you go? Tell us that.

A There is like on this plan a little partition from the door to the stoop.

Q You mean a regular door jamb? A Yes.

Q There is a door way there? A Yes.

Q A wooden door? A Yes.

Q And there is a frame for the door? A Yes.

Q That is what you mean by the partition? A Yes.

Q You say there was a step leading up to that? A Yes.

Q And there was a flat stone for the top step of the stoop and then right in the doorway there was another stone I suppose? A No sir.

Q Or was it flat with the top step? A Flat with the top of the stoop.

Q There was no rise at all? A No. There was one rise before you go into the doorway.

Q From the top step? A No. Here is the flagstone and then before you go into the door there is another step like.

Q Which one were you standing on? A On the top, way at the top, before you go into the door.

Q Was that in the doorway? A Yes, it was in the doorway like.

Q You know what I mean by the doorway? A Yes.

Q Do you know what the jamb is? A No sir.

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(At the request of the Court the officer opens the court room door and points to the door jamb).

Q That is the jamb of the door. Do you see where his hand is? A Yes.

Q That is the jamb; do you understand that? A Yes, where you go into the doorway, yes.

Q There are wooden sides for the door to come into, and where the lock is set in? A Yes, like the frame work.

Q How deep were these sides, as deep as those? A No.

Q Show the jury about how deep. A About that wide (witness indicating about 10 inches).

Q What was the color of that door? A I couldn't exactly tell; I think it was black, if I ain't mistaken.

Q Are you sure it was dark, or was it light? A I could not swear.

Q I want to know where that jamb rose up on the sides of the door; - was there a rise from the top step clear into the room or hallway, or ^{was} it just a flat face? A After you go up on the stoop, onto the stoop there is a flag like. Then you go into the doorway and there is another little step.

Q And that is like in the doorway? A Yes.

Q Which of those steps were you standing on? A Like alongside of it.

Q You are sure you were on the step? A On the stoop.

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Q You were standing on the same place where the girls were sitting? A They were sitting on the edge of the stoop and I was back on the stoop, like where that partition comes, the jamb.

Q I want to know whether you were in the doorway along the stoop? A In near the doorway there, like. I was not in the doorway, no.

Q You are quite sure you never went inside of the doorway? A No sir, not inside the doorway.

Q How long did you and those two girls remain on the stoop? A I did not take notice how long those girls sat on the stoop.

Q How long did you stay on the stoop; - the girls were there before you? A Yes.

Q They were there when you came there? A Yes.

Q And they did not go away? A I did not notice that.

Q You were on this small stoop there but you did not notice whether the girls went away or not? A No sir.

Q You are quite sure no other man was there on that stoop? A I did not see any other man.

Q You could not help but see if there was one there?
A No.

Q The stoop was only about five feet wide? A About that.

Q Do you know how much five is? A No sir.

Q Show us with your hands what you think five feet is,

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about. A That is not five feet, that table. (pointing to stenographer's table).

Q Mark out a space as big as the stoop was. A About from here to there (indicating defendant's counsel's table, which after measuring with a tape measure is found to be 52 inches long).

b MR. ROSALSKY: The inside measurement is 3 feet, one inch, but that is the door.

Q Just show us, assuming that is the stoop, the place you have marked, show us where each girl was sitting. A Down here is the flag like, and at the end of this flag there is like a top step. They were sitting on the top step there, right on top of the flagstone.

Q Just put Mr. Cardoni and Mr. Brothers in the position where the girls were. Can you locate the girls? A I did not see them until yesterday.

Q Let us say Mr. Cardoni is one of those girls. Show on about what part of the stoop they were sitting. A They were sitting on this side, one girl here, (indicating) and one on this side (indicating) so that you can leave a passage-way. They were just sitting down like that (indicating).

Q And about that much space between them? A Space enough to let you in.

Q How much space between them? A About that much (indicating about 3 feet space). I stood right behind their backs here.

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Q You did not stand behind both? A No, I was behind one of the girls.

Q You are quite sure they did not have chairs? A Yes sir, I am quite sure they did not have chairs.

Q At any time that night while you remained there? A Not while I remained there.

Q And you never left that stoop from the time you were there until the shooting? A Yes sir, never left there. until after the shooting. Until I seen Sweeney running out, then I left.

Q What were you doing when you heard the first shot?
A I looked into the hallway. Then I seen a fellow coming out gimping.

Q What were you doing when you heard the first shot?
A I was out on the stoop.

Q What were you doing on the stoop? A I just stood there.

Q And you never said a word? A No sir.

Q You stood there leaning against the house or standing there? A Standing right there. I was not right exactly leaning, standing there, looking into the hall.

Q You stood with you back to those girls then? A Yes.

Q All the time looking into the hall? A Yes.

Q Will you state to the jury why you did that when your friends went in and you remained standing with your back to the girls, looking into the hall? A I would

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have went into the place, only I just stood there for that minute. As soon as Sweeney went inside I heard the shot.

Q Yesterday you said it was five minutes, did you not?

A No sir.

Q One minute? A A minute.

Q Just as quick as that? A Yes.

Q And you heard no noise? A Until I heard the report of the gun.

Q And heard no quarrel? A No.

Q There was no loud talking inside? A I did not hear none

Q Well, you could have heard it? A If it was loud enough. It must be very loud talking for me to hear it on the stoop.

Q The doorway was only 10 or 11 feet from the stoop?

A About 10 feet.

Q That is the door from the room? A (No answer).

Q And the windows were open? A I don't know.

Q How many windows were in the Club house, looking out on the stoop? A Two windows, I think.

Q You don't know whether they were open or not? A No, I did not take particular notice.

Q The night was warm? A Yes.

Q You heard no excitement? A No.

Q The first thing you noticed was that you heard a shot?

A Yes.

Q You were looking into the hallway? A Yes sir.

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Q Hadn't you observed anyone coming into the hallway, if you were looking in? A No, I was on the side of the hall.

Q You told me you were looking right into the hallway.

A Yes.

Q When you first went up was there anyone in that hallway? A Only Mickish Keating was standing in the hall like.

Q In what part of the hallway? A On the top of that step like.

Q He was in the doorway? A Yes.

Q And you don't remember when he went away? A When Sweeney, Kennedy and I came up on the stoop, he went in.

Q So that when you were standing in behind the two girls with your back to them and looking into the hall there was no one in the hall at that time? A No.

Q How soon after that did anyone appear in the hallway?

A As soon as I went up on the stoop with Frank Kennedy and Sweeney, Keating was standing there. Then I believe Mulcahey came walking out, They said, "Come on in." They brought him in like. They had him under each arm.

Q Mulcahey came out? A Yes.

Q Came out to the stoop? A Yes.

Q And they dragged him into the Club room? A Yes.

Q I want to know when they reappeared in that hallway?

A When they came in the hallway again?

Q Yes. A I seen Mulcahey and Collins come into the hallway again and when Sweeney was going out, when they

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fired the shots at him.

Q You told me it was a shot that called your attention to him in the hallway. A Yes.

Q Did you see anyone in the hallway before you heard the shot? A Not before I heard the shot.

Q If you were looking into the hall how is it you did not see them come from the Club room into the hallway? A I did not see anybody come out until I heard the report of the gun.

Q You told me you stood with your back to the girls looking into the hallway from the time you got there? A Yes, I seen Mulcahey come out.

Q That is when you first went up? A No, when me, Sweeney and Kennedy went up.

Q When you three went up they went in, Sweeney and Kennedy went into the hallway? A I don't know if Kennedy went in. I seen Sweeney, this here Mickish Keating and this Mulcahey go in with Sweeney.

Q You don't know where Sweeney went? A He went into the Club room I know.

Q You do not evidently understand my question. They went into the hall and they went from the hall into the Club room? A Yes sir.

Q You know the difference between the hallway and the Club room, don't you? A Yes.

Q Then the hallway was empty, wasn't it? A Yes, when

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they went in.

Q And you were looking into the hallway all the time?

A Yes sir.

Q How soon after they went in did anyone come out into the hallway? A About a minute, at the most. As soon as he went in I heard a shot.

Q You heard a shot fired in the room? A In the room, yes sir. Then I seen the fellow coming out limping and go out into the street.

Q Who was that? A This Egan, as I say, he came out. Some fellow came after him and dragged him back and just as they brought him back I seen Mulcahey and this Collins coming out with Sweeney, as soon as they brought Egan back into the room.

Q What did you do after the shooting? A After Sweeney ran passed me and said, "They have got me." he ran past me down to the corner into the saloon. Then I went down Charle-
ton and Greenwich street.

Q You didn't go to the same saloon he went to? A No, I went down Charleton and Greenwich.

Q Then you were arrested? A Five days after the shooting.

Q You were charged with this crime yourself, weren't you? A No sir, I don't know. They did not tell me I was charged with it.

Q What did they tell you? A They told me I was with

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Sweeney the night of the shooting and asked me if I knew about it and I told them.

Q Have you ever had any trouble with Mulcahey? A Yes sir, about 10 years ago we got into some little trouble. I can't remember everything that happened then. It was May 10 years ago.

Q But recently have you had any trouble? A No, I never had no trouble with him.

THE COURT: Any more questions, Mr. Brothers?

MR. BROTHERS: None, your Honor.

THE COURT: Mr. Barra, have you any questions?

MR. BARRA: None, your Honor.

Q Who went off the stoop first, you or these girls?

A I don't know. I didn't see them after Sweeney ran out. They must have went away as soon as he went into the place.

BY MR. BARRA:

Q Before the shot was fired they were away, you mean?

A I told you I don't know if they went away before the shots. I turned my back and paid no more attention to them.

Q Before Sweeney came out the girls left the stoop?

A When Sweeney went past I did not see the girls on the stoop. When Sweeney passed me I was on the stoop. He ran past me down the stoop and I did not see no girls then.

Q Why didn't you go with Sweeney? A He went past me staggering like.

Q Why didn't you go with Sweeney? Didn't you know he

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was seeking help? A I seen the shots and I was afraid of getting shot myself.

Q But the shooting was all over? A No, they kept firing shots when he went out of the hall.

Q When you went down to the sidewalk did they keep on firing shots? A I did not see them come out to the sidewalk after that.

BY MR. BROTHERS:

Q Why didn't you go into the saloon to help Sweeney, or go along with him? A I was afraid of getting shot when they were firing shots.

BY THE COURT:

Q You kept looking in where they firing? A Yes.

Q You were in the line of firing? A No,

Q And you never moved? A No, I let him pass and after he passed me I told the fellows in Charleton and Greenwich Streets, in the saloon.

Q Why didn't you go along with Sweeney to the corner saloon? A I don't know. I did not go along with him.

Q You were not concerned in the shooting itself, were you? You did not take any part in it? A No sir.

Q You did not bring Sweeney there to have him shot? A No sir, I did not.

Q Is that the first time you were in that Club house?
A Yes.

Q It was a mere accident you were there? A Yes.

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Q How long have you known Mulcahey? A For about 10 years, I guess, or 11.

Q What was the trouble you had with him 10 years ago?

A I was a child about 10 years old, and there was a shoemaker at Varick and Canal Streets. I remember taking a bicycle out of there and I got arrested for taking it.

Q You remember stealing the bicycle? A Yes.

Q By taking you mean stealing it? A Yes.

Q What did Mulcahey do? A I don't know. He got arrested and I was brought into the Criminal Court building.

BY MR. BARRA:

Q Y Didn't you say he was the one that stole it, and you did not steal it, before the Grand Jury? Isn't that the charge you made? A I stole the bicycle I said.

Q You said you did not steal it but that Mulcahey did steal it, A I don't remember saying that.

Q You tried to get out of it yourself by putting it on Mulcahey? A No sir, That was ten years ago. I don't remember that.

Q Did Mulcahey ever refer^{ed} that in the ten years? A No.

Q There was no reference ever made to that? A No.

Q How ever did you remember it so well? A I happened to be thinking when you asked me was I ever arrested with Mulcahey, that was the first time I was arrested.

Q You and he were charged with that crime.

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MR. BROTHERS: I think three boys were arrested.

Q Do you know where Keating lives? A 16th Street.

Q You have known him, and met him, since those ten years?

A Keating and Mulcahey.

Q Mulcahey? A Yes sir.

Q You never had any fight with him? A No sir.

Q About this matter? A No.

Q You never referred to it? A No.

Q You never made any threats against him? A No sir.

Q Did you ever hear Mulcahey say or do anything to Sweeney before this night? A I never seen him do anything or hear of him doing anything.

Q You never talked to Mulcahey about Sweeney? A No sir.

Q Did you ever ^{hear} Sweeney say anything about him? A No, until next day down in the bungalow.

Q Before this shooting, you mean? A No sir.

Q How about Kennedy? A No sir; Kennedy used to hang out with Sweeney.

Q You say you went to Elmira? A Yes.

Q You were a friend of Kennedy's also? A Yes.

Q Were you a very intimate friend of Kennedy? A Just as I am to Sweeney, to Mulcahey and Keating.

Q Don't you know Kennedy was an ex-convict also? A Yes, I knew that.

Q He had been sent to State's prison? A Yes.

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Q For what? A I think it was stealing a load of goods.

Q A horse and truck? A Yes.

Q He was a truck thief? A He must have been when he want to away to Sing Sing.

Q Didn't you know that? A I never ^{know} he stole a truck.

Q You saw him steal it, did you? A No, I heard of it.

Q Is that the time he was sent to prison? A No sir, another time.

Q That made no difference to you; he was a good friend of yours notwithstanding the fact he had been convicted?

A Not that he was convicted. I took him as a friend as I would take anybody else that was convicted.

Q How long had he been out of prison on June 7th?

A I don't know. I know he was in Sing Sing prison for stealing a load.

Q That is not very long ago. A I don't remember when he came out.

Q You were with him all day on the 6th of June, you say? A Kennedy was not with us on the 6th of June. He was with us the 7th of June.

Q You went down alone on that day? A No, me and Sweeney and Jennie and Sweeney's wife were down to Staten Island the first day.

Q Was Sweeney ever in prison? A Not that I know of.

Q Kennedy, you know he went to prison? A Yes.

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Q You knew his reputation? A Yes.

Q He went with you on the 7th of June? A Yes.

Q Don't you know how long he had been out of prison?

A No sir.

Q Didn't you ever hear any discussion about a witness against Kennedy? A No sir.

Q You never heard of any plot to kill Sweeney? A No sir.

Q You are quite sure of that? A Yes sir.

THE COURT: Is there any other line of investigation?

MR. BARRA: No.

MR. BROTHERS: We have nothing further.

THE COURT: I think we will take a recess until two-fifteen P.M.

THE COURT: Gentlemen of the jury, we will take a recess until 2:15 P.M., in the meanwhile you will be careful not to discuss this case with anyone, and you must not form nor express an opinion as I have told you, concerning the guilt or the innocence of the defendant until the matter is submitted to you by the Court, if it should be submitted to you. The time for a decision is when you retire, after the case has been submitted to you, and not before that. Keep an open mind on that question until then and come back at 2:15

AFTER RECESS.

2:15 P.M.

MR. ROSALSKY: The defendant renews his

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motions made at the close of the People's case and at the close of the entire case.

THE COURT: I will deny the motions.

MR. ROSALSKY: Exception.

THE COURT: In view of the circumstances, if you wish ^{to} re-open the case and put your defense in, I will allow you to do so.

MR. ROSALSKY: No, the defense rests.

Both sides sum up to the jury.

The Court charges the jury.

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CHARGE TO THE JURY.

THE COURT: Gentlemen of the jury. the indictment in this case charges the defendant with the crime of murder in the first degree.

It is alleged that this defendant and one other person, in the County of New York, on the 7th of June, 1917, with force and arms made an assault upon one Michael J. Sweeney, wilfully, feloniously and of their malice aforethought; and that they pointed at and discharged at said Michael J. Sweeney a pistol wilfully, feloniously and of their malice aforethought and did thereby inflict a wound upon the said Sweeney and that wound was a mortal wound of which the said Sweeney died on the 8th of June, 1917.

And so the Grand Jury of this County charge that Mulcahey and the other person named, the said Michael J. Sweeney in the manner and form and by the means aforesaid wilfully and feloniously of their malice aforethought did kill and murder against the form of the statute in such case made and provided and against the peace of the People of the State of New York and their dignity.

You understand that the indictment is the charge that is made against the defendant. It is not to be

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regarded as any evidence of guilt. The fact that the defendant has been arrested and indicted must not be given any weight by you in determining the question of his guilt or his innocence. That must be established by evidence. This Court is established by law to hold the investigation or trial which results from the indictment. The indictment, therefore, being simply a written accusation, must be kept in mind by you merely for the purpose of letting you know what the charge is.

The Statutes referred to in the indictment are very clear.

Section 1042 is defined as follows:

"Homicide is the killing of one human being by the act, procurement or omission of another."

Section 1043 defines the different kinds of homicide.

"Homicide is:-

1. Murder; or,
2. Manslaughter; or,
3. Excusable homicide; or,
4. Justifiable homicide."

Section 1044 defines murder in the first degree.

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

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1. From a deliberate and premeditated design to effect the death of the person killed or of another."

There are other circumstances under which murder in the first degree may be committed, but that is the only part of the statute that concerns this case, so that I shall not burden you by reading the others.

Under our law, where an indictment is returned charging a man with murder in the first degree it is within the power of the jury, if the evidence warrants it, to acquit him of the crime of murder in the first degree but to find him guilty of some lower degree of the crime, so that I shall call your attention to Section 1046 which defines murder in the second degree.

"Such killing of a human being is murder in the second degree, when committed with a design to effect the death of the person killed, or of another, but without deliberation or premeditation."

Section 1049 defines manslaughter as follows:

"In a case other than one of these specified in Sections 1044, 1046 and 1047, homicide not being justifiable or excusable, is manslaughter."

Section 1050 defines manslaughter in the first degree.

"Such homicide is manslaughter in the first degree when committed without a design to effect death;

1. By a person engaged in committing or attempting

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to commit a misdemeanor, affecting the person or property either of the person killed or of another.

2. In the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon."

I shall not, unless counsel for the defendant requests it, call your attention to manslaughter in the second degree. You must either find the defendant guilty of murder in the first degree or murder in the second degree or manslaughter in the first degree or not guilty.

Section 1041 provides as follows:

"No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of the killing by the defendant, as alleged, are each established as independent facts; the former by direct proof and the latter beyond a reasonable doubt."

The first thing that the People are obliged to prove in a case of this kind, ^{is} the killing of the deceased, -- the death of the person alleged to have been killed, and they have called your attention to the testimony of Dr. Schultze and of the officer and the other persons who saw Sweeney before and after he was shot, as it is said by the People. Dr. Schultze testified as to the cause of death by gunshot wounds, such as he described. That is known as the corpus delicti, the killing.

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That has been proved by direct testimony, by eyewitnesses, by people who saw Sweeney alive and people who afterwards saw him dead, so that the defendant's attorney in summing up said there was no dispute that Sweeney had been killed and killed in the manner alleged by the People, - that is by pistol shot wounds inflicted by the hand of some person.

The People claim that they have further proved the killing by the defendant by evidence sufficient to satisfy you of that fact beyond a reasonable doubt. The mere proof of the killing by the defendant would not be sufficient to constitute a crime, because there are some kinds of homicides that are excusable or justifiable. In this case the defense is a denial that the defendant had anything to do with the killing. The killing would be justifiable if committed in self-defense, or pursuant to the judgment of a competent court or by an officer in the performance of his duty.

Section 1045 defines excusable homicide:

"Homicide is excusable when committed by accident and misfortune, in lawfully correcting a child or servant, or doing any other lawful act by lawful means, with ordinary caution, and without any unlawful intent."

The People here claim that there is not evidence that this homicide was excusable or justifiable, and there is no evidence that it was done in self-defense and that therefore it was a crime and must be regarded either as

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murder in the first degree, or murder in the second
degree or manslaughter.

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If you find, therefore, that Michael J. Sweeney was killed by the defendant and that the killing of him constituted a crime, was not excusable or justifiable, you must fix the degree of the crime. In the first place you must establish whether the killing constitutes murder or manslaughter, and the essential difference between those two crimes is that in murder there must be an intent to kill. Manslaughter is a killing without the intent to kill. If you find that the killing was an intentional one it will be murder in the first degree or murder in the second degree. The difference between those two degrees of murder is that murder in the first degree, as the statute says, ^{is} murder as the result of a deliberate design and a premeditated design. Murder without deliberation and premeditation would be murder in the second degree.

The question arises as to what constitutes premeditation and deliberation. Well, those are old terms that have been adopted by the statute from the Common Law, the old law, which existed before the present statute defining murder was in force. The law does not require that such deliberation and premeditation shall exist for any great length of time before the crime is committed. In the case of Leighton v. The People, the Court said:-

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"If, therefore, the killing is not the instant effect of impulse, if there is hesitation or doubt to be overcome, a choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder."

In The People v. Majone, the Court said:

"Under the statute there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time; but the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for the choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case."

That is, it must be determined by the jury. You must find from all the evidence in the case whether there was a deliberate and premeditated design to kill Sweeney. If you find that there was, and that he was killed in the carrying out of that design, why his killing would be murder in the first degree, and whoever was concerned.

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in it, whoever counselled or advised, aided or abetted
in the killing in that manner whether he actually fired
the shot which caused death or not, would be guilty
of murder in the first degree.

If you have a reasonable doubt as to whether there
was premeditation and deliberation in this case, it will
be your duty to acquit the defendant of that degree of
the crime and then to consider the next degree, murder in
the second degree, which is a killing with intent to
kill, but without deliberation and premeditation.

The question may arise as to what is meant by
"intent". Intent is the operation of one's mind. It
cannot be seen itself; only its physical manifestation
can be seen. If a man placed a loaded revolver in close
proximity to the person of another and intentionally
pulled the trigger and drove the bullet into the body of
the man who dies in consequence of the act, our law is
that you may find from what the man did, he did it with
an intent to kill, because the killing or death would be
the ordinary, natural and reasonable consequence of such
action. If you saw a man come up to another on the street
and drive a dagger into his heart and the man who was
stabbed should die, you would be justified logically and
legally in finding that the man who did that killing
intended to do just that thing, that he sought the death
of the person killed. So that if you believe that this

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defendant or anyone else fired the shots from revolvers in the manner testified to in this case in close proximity to the body of Sweeney, that these revolvers were deadly weapons and that Sweeney was killed in that way, that is evidence as to the intent of the persons who did the shooting; and if that intent was not accompanied with premeditation and deliberation, if the assailant acted without deliberation and premeditation, that killing would not be murder in the first degree, but murder in the second degree. On this question of intent it was said in the case of *The People v. Conroy*, page 77, 99 N.Y.:

"It is suggested that the defendant had no motive for killing Keenan. To this it is sufficient to say that he had no apparent motive for killing anyone, and there is no evidence tending to show that he intended to kill some other person or that he did not intend to kill the person whom he actually killed. The existence of malice is to be inferred from the perpetration of the deed. The corrupt disregard of the person and the life of another is precisely the dole of malice, the depraved and wicked purpose which the law requires and is content with.

In capital as well as in other cases it must be held that a person intends that which is the natural and necessary consequence of an act done by him, and unless the act was done under circumstances which preclude the existence of such an intent, the jury have a right to find

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from the result produced an intention to effect it. Whenever intent is made an element in determining the character of an act, it is in accordance with our general observation and experience to infer its existence by reference to the laws which have usually or generally been found to control human conduct. Indeed, this is the only method by which the intent can be made to appear. The intent formed is the secret and silent operation of the mind, and the only visible manifestation is in the accomplishment of the thing determined upon. The individual whose intent is sought to be ascertained may remain silent, or if he speaks may and probably will if he has a crime to conceal, speak untruly; and thus the mind is compelled from necessity to revert to the actual physical manifestation of the intent exhibited by the result produced as the safest if not the only proof of the fact to be ascertained. This rule is always applied, unless from the circumstances of the case, it affirmatively appears that the will of the actor was subordinate to some controlling and irresistible cause precluding the existence of any voluntary mental action."

In other words, if a man be in possession of his faculties you may infer that he intended to do the thing that he did. If he killed a man and the circumstances showed that the death was the natural and almost inevitable

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result of his act, why you have a right to find that he intended to kill him unless his mind were overwhelmed by passion or so affected by intoxication ~~so~~ that he could not form an intent. and then the killing would not be murder, but manslaughter.

no
There is ^{no} evidence in this case as to the mental condition of Mulcahey. You may find that he was in possession of his faculties unless from the evidence produced before you and the circumstances established by the evidence there is a reasonable doubt as to that fact. Insanity or intoxication are circumstances which must be established by evidence. There is no evidence on that point in this case, and in the absence of evidence you may find that he intended the natural consequence of his act.

The word "motive" has been used in some of the selections that I read to you, and also by the defendant's attorney in his summation. It is claimed that this defendant had no motive to kill Sweeney. Well, the law does not require the People to show whether he had a motive or not. The law does not recognize any right on his part to kill Sweeney except in self-defense, but there is no evidence here that this killing was done in self-defense ~~without evidence~~. No man has a right to take the life of another under the circumstances testified to in this case. Now, what the law concerns itself with is his

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intent. If it be clearly proved that he intended to kill him, the law does not care what his motive was. However, the People may always prove motive, if they can, because it may throw some light on the existence of intent, or the non-existence. Proof of motive may aid in deciding the question of intent, or the absence of motive may help you in determining whether or not there was intent to kill. But, if the identity of the person who did the killing is clearly established the question of motive is not material except as an aid in deciding the question of intent. But if there is sufficient evidence of intent, notwithstanding the failure to prove a motive, that is all the law requires. In other words, you should ^{not} declare the defendant not guilty, merely because the People failed to prove motive. Whether or not Sweeney had offended his assailants or whether they disliked Sweeney for any reason, the law gave them no right to be his executioners, - you understand that. They may have thought they were doing a splendid thing in killing Sweeney or they may have sought revenge, but that would ^{not} justify the killing. I do not say this defendant killed him, you understand; I merely say the law forbids such killing and calls it murder or manslaughter as the case may be. The question of motive and intent were discussed in the famous Molineaux case by a great Judge, Judge Werner, who said:

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"In the popular mind intent and motive are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. Motive is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. When a crime is clearly shown to have been committed by the person charged therewith the question of motive may^{be} of little or no importance. But criminal intent is always essential to the commission of crime."

That is, if a man hates another and seeks revenge against another that constitutes what we call a motive that induces men to commit acts of certain kinds. And then if that motive causes a man to make up his mind to kill another and he takes a revolver for the purpose of killing and discharges that revolver at him in order to kill him, why that is what we call the intent, shooting for the purpose of killing, no matter what the motive may be. We read in the paper the other day that a father shot his daughter dead in Jersey. When he took that revolver and discharged it at her he intended to kill her. That was his intent. The law did not give him any right to do that, no matter what his motive was. His motive was, we assume, to save her from a life that he considered worse than death. He thought that her conduct would lead

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her to a life of misery, degradation and shame, and as a father he would rather have her dead, as any decent father would. But the law did not give him any right to kill his daughter. Do not think that I wish ^{you} to believe that the law approved his act, I merely wish to illustrate to you the difference between motive and intent. When he pulled the trigger and shot his daughter, and killed her, that was his intent to kill. His motive was not harsh. His motive was to remove her from misery. His motive may have been love, you understand that. I am simply trying to illustrate the difference between motive and intent.

Now, in this case no motive has been established. That is not fatal to the People's case. If the identity of the person who did the killing is clearly established no proof of motive is required, but the jury may consider the failure to prove a motive on the question of whether or not this defendant did the killing, or secondly, as to what his intent was when he killed, if the evidence satisfies you that he did the killing. If you are satisfied after weighing all the evidence that he did kill Sweeney, or was one of those who killed him, that he did intend to kill, then he was guilty of murder and if there was deliberation and premeditation as well, it would be murder in the first degree; if a deliberate and premed-

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itated design has not been established, the crime would be murder in the second degree.

If you have a reasonable doubt as to the intent of those who shot Sweeney, why the killing would be manslaughter and not murder.

According to our law, after a man has been indicted and brought to trial the presumption is that he is innocent and not guilty. The burden is on the People to prove his guilt beyond a reasonable doubt; and if they fail to prove him guilty beyond a reasonable doubt he must be acquitted. The rule is that the evidence produced by the People must be strong enough to overcome the presumption of innocence, and to do that it must be strong enough to satisfy the jury of his guilt beyond a reasonable doubt. Now what is meant by reasonable doubt? It is doubt that is based on reason, a reason connected with the evidence or lack of evidence, in the character of the witnesses, the failure to clearly establish all the elements required by law to your satisfaction, so that you cannot say that you are fully convinced to a moral certainty that the defendant is guilty. If your minds are in that state, then your minds are in a state of reasonable doubt. The rule as to reasonable doubt does not justify a juror in being swayed by sympathy or prejudice or caprice, or by a desire to avoid doing a disagreeable

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thing. All such thoughts should be banished from the minds of the jurors. You swore that you would render an honest verdict, that you would take the law from the Court, that you would not consider the consequences of your verdict, that you would merely truthfully say what you think of the evidence, and then your responsibility ends. It is a very great responsibility and on the manner in which juries view their responsibility and discharge their duties, the safety of the State rests just as surely as our own. National safety and honor depend largely on the bravery of our sons. So that the juror who would be swayed by any thought other than the desire to do his duty would be false to the most important trust that the State can ever give him. He would be an enemy to society. It would be a great crime for you to say that this man was guilty unless the evidence satisfied you that he was guilty beyond a reasonable doubt. If, because you did not like to inflict pain or you were prejudiced for any reason against any of the persons connected with this case, you said he was not guilty, whereas in your heart you knew he was guilty, that would be an equally great crime. All the law asks you to do is to be calm, cool and neutral. You are not lawyers. You are not obliged to look after the interest of one side or the other. You are to hold the scales of justice even. The Court has a comparatively unimportant part to play. The Court merely decides

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on the legal questions that arise from time to time, and
if there be a conflict between the attorneys to decide it.
The Court must also instruct you in the principles of law
that should guide you, and I have tried to make them ab-
solutely plain; and then the Court's work is done. The
Court has no power to find any verdict and you will agree
with me that I have not expressed any opinion whatever as
to the guilt or the innocence of the defendant.

There is only one way that facts can be proved.
They must be found by the jury from the testimony of the
witness produced here before us or from testimony in the
form of Exhibits such as have been introduced in evidence.
The jury must coolly, calmly, as I said, neutrally without
any bias, without any thought except the desire to do their
duty, weigh all that evidence, and then each juror will
know in his heart what impression is produced on his mind;
And if that impression is a moral certainty that the de-
fendant is guilty, that is what is meant by proof beyond
a reasonable doubt. The law requires proof to a moral
certainty, not to an absolute certainty. Absolute cer-
tainty cannot be found in worldly affairs. Scientists
may think they are absolutely sure of things, and perhaps
in mathematics there are some things that we may regard
as absolutely certain. We know that two and two make four,
but when we go much beyond that there is no such ^{thing} as abso-
lute certainty. Everything connected with human life is

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problematical. You deal with the future. You have business questions to solve and you consider the different reasons why you should or should not do a certain thing in your business, whether you should embark on an enterprise or not, and you try to convince yourselves of the right thing to do and you make up your minds as to what is the right thing to do, and you produce what we call moral certainty in your minds. If the evidence in this case is strong enough to produce that degree of moral certainty in your mind that the defendant is guilty of any crime, then he is guilty and you should say so. If the evidence falls short of that for any reason, if it fails to satisfy you to that extent, to produce that moral certainty in your mind that he committed a crime, then your minds are in a state of reasonable doubt and he is entitled to the benefit of that doubt. If you are convinced beyond a reasonable doubt that he did commit a crime you must fix the degree of the crime. If you have a reasonable doubt as to the premeditation and deliberation he would not be guilty of murder in the first degree; but you might find him guilty of murder in the second degree, if you find that he killed Sweeney with intent to kill, or was concerned in the killing. If you believe there is not proof sufficient to satisfy you that there was any intention to kill Sweeney, why then his guilt would be manslaughter since there is no evidence in this case that

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the killing was either justifiable or excusable. The killing of Sweeney, it is admitted by the defense, was a crime, but they claim that this defendant was not concerned in it. As I told you, facts can only be proved by witnesses. You must not speculate as to facts. The facts must be found from the words that fall from the mouth of witnesses produced here before you and from no other source. The statements and comments of counsel, the arguments that may have taken place between counsel, and the remarks of the Judge on those motions or discussions do not concern you at all. They relate to matters of law. They are not intended to influence you and they should not influence you. You weigh the witnesses and decide which of them in your opinion are worthy of belief, if any of them are. In other words, you have the great power of passing on the credibility of witnesses. Every witness that appears in a court room is not entitled to be believed merely because he or she takes the stand and swears to tell the truth. It is for the jury to say whether they tell the truth, the whole truth or any part of the truth. In other words, you may reject all of the testimony of any witness as incredible and unbelievable in your opinion, as unworthy of belief, or you may believe it all, or you may reject part of it and believe part of it just as you think the witness told the truth. A witness may tell the truth or a witness may tell what is not true, and yet a witness even

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when telling what is not true may absolutely believe in the truth of his or her statements. In other words, they may be honestly mistaken. Of course, if you think a witness made a mistake, even if he or she intended to tell the truth, you can ignore that part of the testimony and believe the rest. If a witness deliberately testifies falsely on a material point in the case, knowing that he or she so testified falsely, then that witness would be guilty of perjury and you might reject all of the testimony of such a witness, although even in that event you would not be obliged to. Some of the statements made by the witness might be true. So you see how broad your powers are. You are the absolute, sole and exclusive judges of the facts. Your opinion on the evidence is the only one that counts. The Court has not expressed any opinion and you know the Court has not sought to sway your judgment in any way in this case. Your judgment of the credibility of the witnesses is the only one that counts. The Court has expressed no opinion on the credibility of the witnesses. The Court merely desires to bring out the truth.

In this particular case there appears to be a contradiction as claimed by the defense between three witnesses called by the People which was largely on the question of the position of Rogers at the time of the alleged shooting. You will remember Rogers swore that he was on the stoop. The girls swore that he was not.

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Now the presence of Rogers on the stoop is not a material point in the case. The question here is the killing of Sweeney; was Sweeney killed and how was he killed and who killed him, and were the persons who killed him animated by a design to kill him? Did they have a deliberate and premeditated design and intent to kill him or not. Those are the material points in the case. If Rogers knows who killed him, if he saw the killing, whether he was on the stoop or not when the killing took place, you would be justified in believing his story. If Rogers did not see the killing, did not see the shooting, why then he committed perjury. I hope I make that point clear to you. The question whether Rogers saw the shooting or not is material. He says he saw it. He describes it. He is the only one who has been called here who saw the shooting. Now, if he did see the shooting, the place from which he saw it is not a material point in the case, - if he had the opportunity of fully observing the occurrence and if he has told you truthfully what he saw, if he lied about his whereabouts at the time, you may consider that he told a lie on the question of his credibility; you may consider whether or not such lie was the result of a desire to shield himself or some other person, and to place the blame for the killing on Mulcahey. If the girls knew that Rogers was on the stoop and they deliberately testi-

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fied that he was not, they were liars but they were not perjurers; because as I said that is not a material point in the case. You will recall that they said that Rogers went into the house. If they were honestly mistaken on that point, of course, you can ignore their testimony as to that point and consider their testimony concerning the coming of Sweeney to the place, the manner of his coming; the fact he went into the Club room and the fact that Mulcahey was there. That is all they testified to. If they saw who did the shooting and they said they did not, they were perjurers and you may ignore their testimony, although you are not obliged to. It is for you to determine whether or not they have told the truth. So that while it would very materially effect the credibility of Rogers if you believe these girls that he was not on the stoop, still that in itself would not be fatal to the People's case; if you believe that Rogers saw the things that he testified to, no matter where he was standing when he saw them. I hope I make myself perfectly clear to you on that point. If Rogers was not standing on the stoop but saw the shooting from another point, he is a liar and he may have had a motive for his lying which has not been developed. It is for you to say whether he lied on that point or not. But you might still believe the rest of his testimony as to the shooting, if, as Mr. Brothers claims in summing up, his testimony is corroborated by

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the testimony of Dr. Schultze, and by the silent testimony of the pistol wounds and the coat, which it is claimed cannot lie. As said to you by counsel on both sides, you should not act arbitrarily in rejecting the testimony of any witness. You should proceed with great deliberation and caution. You may consider the motive of a witness in giving his or her testimony, - I have explained fully to you what motive is, - whether the witnesses are friendly or hostile, whether they were led by that friendship or by that hostility to state either more or less than the whole truth to you, or to state things as true which were not true; their relationship to the defendant and the deceased or to the whole case; whether they were afraid to testify; whether they were animated by fear, or whether they had a desire to protect some one else whose identity has not been disclosed. These are only tests. They are not given to you as reasons for rejecting it, but merely that you may use the same tests that we ordinarily employ in deciding on the credibility of any person in the ordinary affairs of life. The same rules apply to all witnesses. On cross-examination it is always proper to bring out any criminal, vicious or immoral act in a witness's career. So that the jury may consider that, if he has committed a crime as Rogers had, they may consider him as a drunken, idle, dissolute

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fellow, an ex-convict, but the law permits him to testify because the truth often comes from a very foul source, and crimes like this are sometimes committed under such circumstances that only such people have any knowledge of them. If you were to arbitrarily or improperly exclude their testimony why justice would be defeated very often; so that in the interests of justice you must carefully and calmly consider his testimony in relation to all the other facts and circumstances in the case. You may consider his character, his drunkenness, idleness and his conviction and give it such weight as you think it ought to receive. If you think his testimony should not receive any weight why exclude it all and then acquit the defendant. If you think he has told the truth, notwithstanding his character, why it is your duty to find a verdict accordingly. If on his testimony and the testimony of all the other witnesses in the case you are convinced that Sweeney was killed in a criminal manner and that the defendant was concerned in the killing of him, you must find him guilty. The claim having been made by the defense that two of the witnesses for the People contradict Rogers why it is for you to say whether or not they did contradict him, and how much weight you will give to that contradiction. However, it is not on a material point in the case. If they had contradicted

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him as to the identity of the person who did the killing that would be a material point and I would not submit this case to your consideration if such were the facts.

In submitting the case to you, you will please understand that I have no opinion as to the guilt or the innocence of this defendant. I leave that absolutely to you. My burden is to see that the defendant is tried according to law, and to properly explain the law to you. You must consider inconsistencies, if any, in the People's case and give them such weight as you think they are entitled to receive. Believe such parts of the testimony as your reason and your judgment tell you are true and worthy of belief, and reject the parts that seem to you unreasonable, incredible and unworthy of belief, using your own good sense and judgment. Be animated only by the highest motives to do your duty and if after you have weighed the testimony in that way you are firmly convinced to a moral certainty that Mulcahey killed Sweeney, acting in concert with Collins or any one else, why then he is guilty of a crime, and if that killing was done with the intent to kill, accompanied by premeditation and deliberation, why he is guilty of murder in the first degree. If it were done with intent to kill but without deliberation and premeditation, as a result of a sudden quarrel, then it would be murder in the second degree. If there were a quarrel and no

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intent to kill, but the defendant animated by passion and using a dangerous and deadly weapon, and his act resulted in the death of Sweeney, it would be manslaughter in the first degree. Keep in mind the difference. - the dividing line between murder and manslaughter. Murder necessarily implies intent to kill; manslaughter killing without an intent to kill in the way described in the Statute, and which I will read to you again if you have any doubt about it. I do not think you will need it.

If you have a reasonable doubt as to whether Mulcahey was concerned in the killing, that he was merely on the premises the same as others and had nothing to do with the killing, I say if you have a reasonable doubt of that, if that fact is not established to your complete satisfaction beyond a reasonable doubt, why acquit him.

The verdict therefore, should be either guilty of murder in the first degree, or guilty of murder in the second degree, or guilty of manslaughter in the first degree, - only one crime, understand, one verdict, - or on the other hand, not guilty.

MR. ROSALSKY: Will your Honor charge the jury with reference to the defendant's failure to take the stand?

THE COURT: The law is that the defendant has a right to take the stand or not, as he pleases. The fact that he does not take the stand must not be considered

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by you at all in considering this case. It is not evidence of guilt. In other words, you decide the case on the evidence, - you understand that? His failure to testify is not evidence, so that you must not consider that in any way whatever. You must not draw any inference of guilt from that. Our law is that his failure to take the stand is consistent with his innocence and must not be considered by you otherwise. The evidence of his guilt must be found in the testimony.

Is that clear enough, Mr. Rosalsky?

MR. ROSALSKY: Yes, your Honor. I ask your Honor to charge the jury that there does not appear to be any evidence that any threats were made against any witness and their testimony must be looked upon in that light, unless there is testimony in the case that there were threats made.

THE COURT: I will charge that there is no evidence that any threats were made, but the jury have the right to consider the circumstances under which the witnesses lived, in asking themselves whether or not they had any motive for suppressing part of the testimony, or whether they had any motive for testifying against the defendant. They may always consider the question of motive of a witness on the question of credibility. Of course, if there were direct proof of threats made by the defendant it might be put in evidence, but it would

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be very difficult to put that in evidence legally, unless the defendant himself made a threat; the defendant would not have been bound by the act of any one else who made threats, Mr. Rosalsky, and it is no reflection on the defendant that they may have feared injury. There is no evidence that they have, but the jury must consider the motive of each and every witness and determine how much credence they will give to the testimony of that witness. You may take an exception to that, Mr. Rosalsky. It is not what you request.

MR. ROSALSKY: I am satisfied, your Honor.

MR. ROSALSKY: Also the fact that while the jurors were being interrogated before they were accepted as jurors, they were informed that the defendant had been previously convicted of crime.

THE COURT: Jurors would be criminals if they considered that in any way in this case. I cannot make it any stronger than that. What the defendant did heretofore we are not concerned with. If he were a witness it would be proper to consider it on the question of his credibility. He did not take the stand. He exercised a right our law gives him not to take the stand and therefore it is immaterial who he is. I want to make that perfectly clear to you. It is not a question whether Mulcahey is a good or a bad man; the question is

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as to the evidence in the case, - whether it shows you that he is guilty or not, - and the fact that he was once convicted for crime we are not concerned with, and it has no logical bearing here, and you must not consider it at all. He is entitled to an absolutely fair trial.

MR. ROSALSKY: May I ask your Honor to charge that if the jury believe that Collins did the killing and that the defendant had no connection with it, they must acquit the defendant?

THE COURT: I so charge; but if he was there holding a pistol in his hand when Collins was shooting, why they will have to determine from their own experience whether he was helping or not. It does not make any difference whether the bullets from his pistol or Collins' pistol killed Sweeney. If he was there aiding and abetting Collins and if Collins did the killing why he is just as guilty as Collins.

THE COURT: Mr. Brothers, have you any request?

MR. BROTHERS: None, your Honor.

THE COURT: Gentlemen of the jury, if there are any further instructions you would like, I will give them to you. If not, I will ask you to retire and render an honest verdict, and that is a vindication of the law. Every honest administration of the law, no matter what the act is, whether you find him guilty or not, if it

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is an honest verdict, the verdict is a vindication of
the law.

If the jury desires the exhibits is the defendant
willing that they should take them?

MR. ROSALSKY: Yes.

(Defendant nods in the affirmative).

THE COURT: The defendant consenting, they may
have them if they wish.

The Jury retire at 4:50 P.M.

The Jury return at 8:40 P.M.

THE CLERK OF THE COURT: Gentlemen of the jury.
have you agreed upon a verdict?

THE FOREMAN: We have, sir.

THE CLERK OF THE COURT: How say you, do you find
the defendant guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: Of what?

THE FOREMAN: Manslaughter in the first degree.

THE CLERK: Harken to your verdict as it stands
recorded. You say you find the defendant guilty of man-
slaughter in the first degree, so say you all?

MR. BARRA: Your Honor, may we have the jury polled?

THE COURT: Certainly.

(Whereupon the jury is duly polled by the Clerk,
each and every juror in turn stating that that is his
verdict).

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THE CLERK: Harken to your verdict as it stands recorded, you say you find the defendant guilty of manslaughter in the first degree, so say you all?

The defendant's pedigree is taken.

MR. BARRA: Will your Honor be kind enough to defer sentence in this case for a week and we will then make such motions as we may be advised.

THE COURT: Yes sir, all your rights are reserved. You have one week as you request.

Defendant remanded one week for sentence.

New York, January 17, 1918.

The defendant is duly arraigned for sentence before Hon. Joseph F. Mulqueen, Judge.

THE CLERK OF THE COURT: James Mulcahey, what have you now to say why judgment should not be pronounced against you according to law.

MR. BARRA: The defendant moves that your Honor set the verdict of the jury aside, and grant this defendant a new trial, upon the grounds:

First. That the verdict of the jury was against the evidence, against the weight of evidence and contrary to law.

Second. That the Court erred in denying the defendant's motion to advise the jury to acquit at the close of the People's case and at the close of the entire

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case.

Third. Because the Court admitted illegal and incompetent testimony under the defendant's objections and exceptions, and on the further ground that the Court misdirected the jury upon matters of law as to which misdirections the defendant duly excepted, and upon the exceptions taken during the trial.

Defendant also moves in arrest of judgment on all the grounds stated in the Code of Criminal Procedure.

THE COURT: The motions are denied.

MR. BARRA: Exception, please.

THE COURT: There is some investigation that I am making in this case that I have not yet completed and I will therefore adjourn the imposition of sentence until January 29th. In adjourning this sentence I do not wish to be understood that I am allowing the arrest of judgment. I am denying all your motions, and I am really adjourning the imposition of sentence until I receive a further report.

MR. BARRA: To your Honor's adjournment of the sentence we have absolutely no objections. In point of fact we welcome it.

Imposition of sentence adjourned until January 29th, and defendant remanded.

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COURT OF GENERAL SESSIONS OF THE PEACE
City and County of New York, Part V. :

----- :
: Before
THE PEOPLE OF THE STATE OF NEW YORK :
: HON. JOSEPH F. MULQUEEN,
-against- :
: Judge.
JAMES MULCAHEY. :
----- :

New York, February 1, 1918.

The defendant is indicted for murder in
the first degree.

Indictment filed July 9, 1917.

A P P E A R A N C E S:

For the People: ASSISTANT DISTRICT ATTORNEY BROTHERS, ~~ESQ.~~

For Defendant: C. B. BARRA, Esq., and JOSEPH ROSALSKY, Esq.,

The defendant is duly arraigned for sentence before
Hon. Joseph F. Mulqueen, Judge.

THE CLERK OF THE COURT: James ^lMucahey, what have you
now to say why judgment should not be pronounced against
you according to law.

MR. ROSALSKY: May it please your Honor, the defendant
has been convicted of manslaughter in the first degree.
Heretofore the defendant was convicted of burglary and
sentenced to State's prison for two years. His first plight
was by reason of bad company. The defendant in this case
here protests his innocence despite the fact that the jury
has convicted him of manslaughter in the first degree.

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He has made a statement to the District Attorney, and in that statement he protested his innocence and continues to protest his innocence. He admits he was present on the night of the shooting and that he was in the club, but that he had nothing at all to do with the shooting and did not take any part in it.

The defendant after his release from State prison was in the custody of Father Lynch for about a year, and Father Lynch has spoken very highly of him. The defendant continued to be employed and was employed after his release. He is a married man and father of one child. He has a young wife and an old mother who need his help.

In view of all these circumstances I ask your Honor to give him the mercy your Honor sees fit in this case.

During the trial of the case, your Honor will recall while there was a question of fact for the jury to pass upon, the question of defendant's guilt is very slim and hangs on evidence which is very slim, hangs on evidence that a young man whose reputation is not any too good, gave, and the story which he told was a sort of improbable story. Your Honor in your charge stated that if he were not on the stoop he was in no position to see the shooting.

THE COURT: I did not state any fact. I said that even if he had testified falsely about his position, if he knew of the truth of the statements he made, if he

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was in any other place the jury might believe that part of the story. I said that because two of the People's witnesses said he was not where he said he was, but they might have been mistaken. I think the case was fairly presented to the jury. He had an opportunity to tell the jury all he knew about the case, but he declined to do it. It is rather late for him now to make statements. That was the time to make them when he was on the stand.

I am going to send him to State's prison for 20 years. I think he was previously convicted of crime so he must get a determinate sentence. That is the maximum, and I think he is very fortunate that the jury did not find him guilty of murder in the first degree. It was a cold blooded murder, and he was in it or he was helping someone else that was in it. If he wishes to suffer for him, all right. He knows all about it, He declined to give the jury any information, and left them to consider the evidence which was before them, and I think they rendered a very merciful judgment. This killing of Sweeney was a wilful and cowardly murder. We cannot allow Mulcahey and others to become the executioners of men they do not like. No one is to blame for his present predicament but himself.

That is the sentence of the Court, 20 years in

State's prison.

*I hereby certify that the foregoing
a correct transcript of the proceedings
taken in the trial of Joseph J. Mulcahey*

*Testimony is
L. Lutz,*

Official stenographer.

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