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CASE

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Court of General Sessions of the Peace,
Part III.

-----x
The People of the State of New York

-against-

DAVID KENNEDY.

Before

M. D. McMAHON,

Judge,

And a Jury.

-----x
March 8th, 1905.

Indicted for Robbery in the First Degree,
Grand Larceny in the First Degree,
Assault in the Second Degree, and
Receiving Stolen Goods.

Indictment filed February 15th, 1905.

Pleaded "Not Guilty" February 16th, 1905.

Charles C. Nott, Esq.,

Henry G. Gray, Esq.,

For the People.

C. M. Kiefer, Esq.,

For the Defendant.

Peter P. McLoughlin,
Official Stenographer.

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A jury was duly impanelled and sworn, and a recess then taken until 2 P.M., the judge first admonishing the jury as required by the Code.

(AFTER RECESS).

OLIVER MAGNAN, called as a witness for the People, being duly sworn, testified as follows :

D i r e c t - E x a m i n a t i o n

BY MR. NOTT :

Q Now, Magnan, I want you to speak up so the jury can hear all you say. How old are you? A Twenty-three,-- twenty-four.

Q I don't believe they can hear you. A Twenty-four.

Q Who do you work for? A Henry Xiques.

Q How do you spell that name? A X-i-q-u-e-s.

Q Where do you work? A 174 Eighth Avenue.

Q In this county? A Yes, sir.

Q County of New York? A Yes, sir.

Q Were you working for him on the eighth day of February, 1905? A Yes, sir.

Q And working in that store? A Yes.

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Q Now what kind of store is it? A Cigars, with a pool-room in back.

Q What is in the back? A Pool tables.

Q Are there two rooms there, is there a partition dividing the store and the poolroom? A There is a partition divides from the poolroom to the cigar store.

Q Where is the counter? A The counter is right in front.

Q And what are your duties there? A My duty was clerk and attendant at the pool table.

Q Did you have a cash drawer there? A Yes, sir.

Q Where is that? A Behind the counter toward the wall.

Q How is that fastened there? A Fastened with five keys.

Q What? A Five keys underneath it.

Q And you have to operate these keys in a certain way to open the drawer? A Yes, sir.

Q Now, did you see this defendant on that date, the eighth day of February, 1905? A Yes, sir.

Q Had you ever seen him before that time? A Yes, sir.

Q How many times? A About half a dozen times.

Q Where? A In the same place.

Q In the store? A Yes, sir.

Q Used he to play pool there? A He often; yes, sir.

Q What name did you know him under? A Kid Curtis.

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Q At what time did you see him on the eighth? A Well, he was in about half-past two or three o'clock.

Q In the morning or afternoon? A Afternoon.

Q And what time did this occurrence take place? A Four o'clock.

Q In the afternoon? A Yes, sir.

Q Well, when he was in there at half-past two, did he stay there or did he go out? A He stood there, yes.

Q All that time? A Yes.

Q Which room was he in? A In the back room, in the pool parlor.

Q Which room were you in? A I was in both, in and out.

Q In and out? A Yes.

Q Now tell the jury what happened there about four o'clock.

A He was behind the counter, and he demanded me to open the drawer.

Q Where were you? A I was inside.

Q Inside of what? A Towards the poolroom.

Q Well, were you in the front room or in the pool parlor?

A Back in the pool parlor.

Q What? A In the pool parlor, in the back.

Q You were in the pool parlor? A Yes, sir.

Q And where was the defendant? A He was in there, the

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back too, first.

Q Yes. A Then he walks out.

Q Yes. A And he comes to the front.

Q Comes into the front room? A Yes.

Q Did you go into the front room? A Afterwards, yes.

Q Yes. A I went to the front to serve the customer.

Q Yes, and did you go behind the counter? A Yes, sir.

Q Now, where did the customer go after you served him? A
Went out.

Q Did you open the cash drawer? A I opened it; yes, sir.

Q Did this customer pay you anything? A Yes, sir.

Q What did you do with what he paid you? A Put it in the
drawer.

Q Then what did you do with the drawer? A Shut the drawer
again.

Q Then did this defendant say anything to you? A Yes.

Q What did he say? A He said, "Open the drawer". I said,
"I will not." He said, "Open it; I will show you if
you will or not."

Q You haven't answered my question. My question was not
What did he say to you, but What did he do? A The only
thing he done, he had a revolver in his hand.

Q Did you see him pull his gun? A Yes, sir; he had the gun

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in his hand.

Q Where did he pull it from? A Out of his pants pocket.

Q What did he do with the gun when he pulled it? A He kept it there.

Q Where? A (No answer).

BY THE COURT:

Q In his pocket or his hand? A In his hand.

BY MR. NOTT:

Q Then did he point it at you? A Yes.

Q Then what did he say? A He said, "Open the drawer", and he went to pull the drawer open, and I tried to stop his hand, and he pointed the revolver at me again, and then I says? "Well, I suppose I will have to: one and four", and he opened the drawer himself.

Q What does "One and four" mean? A One and four is the combination. One is this key here (illustrating), and four this one here (illustrating). When you press those two keys the drawer opens. He took the money out with his left hand, and put it in his pants pocket.

Q How much money was there in the drawer? A About ten or eleven dollars.

Q Whom did it belong to? A Henry Xiques.

Q What kind of money was it? A All in silver.

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Q And you saw him put this money in his pants pocket? A Yes, sir.

Q Then what did he do? A Then he walked out of the place.

Q What did you do? A I stood there.

Q How long did you stand there? A I stood there about fifteen or twenty minutes, and then I sent around to the station-house for an officer.

Q Was there any one you could have left in the store and have gone yourself? A Well, I could, but I would not trust anybody in the store.

Q Well, you sent somebody around to the station-house?

A Yes.

Q Did any officers come to the store? A Yes, sir; two officers.

Q Then what did you do? A I told them who the party was, and how he had held me up, and everything, and they went out to look for him.

Q When did you see him next? A That night in the station-house.

Q What time was that? A About nine o'clock, or half-past eight in the evening.

Q Nine o'clock that night? A Yes.

Q About five hours after this happened? A Yes.

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Q What station-house did you see him in? A Seventeenth--
twentieth precinct.

Q What happened in the station-house? A There was four or
five men standing in there, and I turned my back to them,
and they brought him up from downstairs, and asked me to
identify him, and I identified him as Kid Curtis.

Q How many other men were there in this line? A About
five or si x.

Q Any of them in uniform? A No, sir.

Q All in citizen's clothes? A Yes.

Q Any of them young men? A All young fellows.

Q And you picked this man out? A Yes, sir.

Q Did you hear him say anything? A No, sir.

Q Now, could you identify the revolver that he pointed at
you if you saw it? A Well, I could, but then I could
not swear to it, because I did not look at the revolver
at all. All I seen was him pointing it at me.

Q Now, at the time you gave him the combination and he took
the money, were you in fear of bodily injury? A Well,
yes, sir.

Q He was pointing this revolver at you? A Yes, sir.

Mr. Kiefer: That is a conclusion, and I
object to it.

The Court: Oh, conclusion or not; it does

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not make any difference. He can answer it whether he was in fear or not.

BY THE COURT:

Q Were you in fear? A In fear of getting hurt?

Q Yes. A Yes, sir.

BY MR. NOTT:

Q Now, during the times that this man has been in this store before, have you ever had any trouble with him? A No, sir.

Q He never said anything to you before, or you to him?

A No, sir.

Q Never had any trouble or dispute with him? A No, sir.

Q This was in the County of New York? A Yes, sir.

BY THE COURT:

Q What did you say his name was? A Kid Curtis, under the name of Kid Curtis.

Q Kid Curtis, that is the name you knew him by? A Yes.

Q Did you know him by the name of Kennedy? A Well, I did not until the officer told me he was arrested before under that name.

Q Under the name of Kennedy? A Yes.

Cross Examination

BY MR. KIEFER:

Q Now, Frenchy, how many names have you got? A How many

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names have I got?

Q Yes. A Only one.

Q Only one? A Yes.

Q Do you go by the name of Frenchy? A No, sir; my name is Oliver Magnan.

Q Did you never hear that name Frenchy applied to you? A Yes, that is a nickname; they call me by in all poolrooms I worked at.

Q How many other names have you got? A Only Frenchy.

Q How many people were in the store, Frenchy, on that afternoon when you claim this defendant held you up?

A Well, I do not know; perhaps a dozen.

The Court: You must not call him Frenchy, counsellor. His name is Magnan.

The Witness: Oliver Magnan.

Q Well, Magnan, how many people were in the store. You say a dozen? A About a dozen.

Q What were they doing? A Just standing around fooling around, the same as they always do.

Q Did you say the defendant took all the money out of the cash drawer? A A-l but twenty pennies; he left twenty pennies laying there. He took all the rest of the money was in there.

Q Are you sure it was ten dollars or eleven dollars? A Yes.

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Q How do you know? A Because he left money for coal, and when I counted up at one p.m. there was eight dollars and twenty cents, and I could swear I sold two dollars worth of stuff since that.

Q Then there must have been ten dollars? A Over ten dollars; yes, sir.

Q Now, what did Kennedy do after he took the money? A Walked out of the place.

Q How long did he stand at the door? A Didn't stand at the door.

Q Did he stand a minute at the door? A No, sir.

Q Walked right out? A Walked right out.

Q Now, is not it a fact that there are three partitions in that room? A Three what?

The Court: Partitions.

Q Three partitions? A Three partitions?

Q Yes. A No, sir.

Q Only two partitions? A There is only two partitions; yes, sir.

Q What did you say the other people were doing in the room?

A Standing fooling around; fooling around.

BY THE COURT:

Q Was that in the poolroom or in the front room? A In the

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poolroom.

BY How large is this room?

Mr. Nott: Which room do you mean?

Mr. Kiefer: I mean the entire room with the partitions in it.

A Oh, well, about twelve feet wide and about twelve long.

Q Twelve by twelve? A Yes.

Q Now, he didn't point the revolver at you first then, as the District Attorney testified, or made mention, to the jury in his opening address, did he? A He didn't first, but when he took the money he pointed the gun towards my face, and I was afraid that it would go off in my face.

Q Yes. Now, did you ever have any conversation with Kennedy at the times when you had seen him before? A No, sir.

Q You never had a word to say to him? A No, sir.

Q Never a word? A No, sir. Well, of course we often talked together.

Q What do you mean --

The Court: Now, let him answer. He has not finished his answer.

(Witness continuing): We often talked together, of course, the same as anybody would do to talk with your customers as they come in.

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The Court: Well, he asked if you ever had any conversation with him.

Q Yes, that is just it. You denied that you had any conversation with him at first, did you not? A Yes, sir; I did; yes, sir.

The Court: He probably did not understand what the word conversation meant, Mr. Kiefer.

Mr. Kiefer: That may possibly be so.

Q Now, didn't you tell him on that day that you were going to get square with the boss? A No, sir.

Q You did not? A No, sir.

Q Didn't you tell him you wanted him to do this job? A To do that job?

Q Yes. A Well, if I did that what would I want to get him arrested for?

Q Well, answer the question. Didn't you tell him you wanted him to do this job? A No, sir.

Q Who was the other man talking to you just before, as you testified to, what was his name? A Nobody was talking to me.

Q Didn't you say there was a customer in there just before this thing happened? A Yes, sir.

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Q Did you ask him to do this job for you and divide the spoils?

A No, sir.

Q But you knew the amount of money that was there all right?

A Pretty near.

Q Now, then, you say you stayed twenty minutes after Kennedy took the money out of the cash drawer? A Yes.

Q And there was no money in the cash drawer? A Twenty-one pennies ; twenty-one or twenty-two pennies.

Q And all around you was a dozen people? A Yes, sir; all talking.

Q All talking? A Yes.

Q In a twelve foot square room? A Yes.

The Court: I thought that was in the poolroom, according to the witness.

The witness: Well, after this thing happened, they all came out in the store to see what was the matter.

The Court: Well, why don't you tell these things? You give us a few facts, and then come out later with other facts that seem to be at least equally important.

Mr. Kiefer: I do not understand it now.

The Court: He says that after the de-

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endant did this thing, the others came out from the poolroom into the store.

The Witness: They all came out to see what was the trouble.

Q Well, why didn't you tell them? A Well, I did tell them.

Q Instead of waiting twenty minutes for them to come out, why didn't you call them when he first went to the cash drawer?

A They went out in the street.

Q Answer my question. Why didn't you holler when he pointed the gun at you?

Mr. Nott: Is that a fair question?

The Court: Yes, that is all right.

BY THE COURT:

Q Why didn't you make an outcry when he pointed the gun at you? A Because I was afraid he would shoot it at me.

BY MR. KIEFER:

Q Didn't you see that that gun was not loaded? A No, sir; I did not.

Q Then you didn't make an outcry? A No, sir.

Q Not one word? A I could not make an outcry.

Q Did he hold your mouth? A No, sir.

The Court: Well, now, witness, you must answer the question as to what you did or did not do. Do not say what you could do, or

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what you could not do. Answer what you did.
That is sufficient.

Q Do you say you stood twenty minutes, Ma-man? A Yes.

Q And then you made an outcry? A Yes.

Mr. Nott: Now, I object to this. He
has not so stated.

The Court: He did not say he made an
outcry; he merely said he sent around for a
policeman.

Mr. Kiefer: Very well, I will leave it
this way. He waited twenty minutes, and then
sent around for an officer.

The Court: Yes, he testified to that.

Q Now, do you know a man by the name of Tony who frequents
your place up there? A Tony?

Q Yes. A Little Tony?

Q Sir? A Little Tony?

Q Little Tony. A Yes, sir.

Q Do you know Little Tony? A Yes, sir.

Q Did you tell Little Tony to do this job for you or try
to get Little Tony to do this job for you? A No, sir.

Q What has been your business up to the present time? A What
has been my business?

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Q Yes. A What kind of business do you mean?

The Court: Oh, what do you make a living at?

The Witness: Oh, anything at all.

Q Anything at all? A Yes, sir.

Q Now, have you ever been convicted of crime? A No, sir.

Q Now, is not it a fact that you gave this man that revolver and told him to put that bluff up on you, and then afterwards you would divide the spoils? A No, sir.

Q It is not? A No, sir.

Q Was Tony in the house on that day, or in the store on that day in which you allege this robbery occurred? A No, sir.

Q He was not? A No, sir.

Q When did you last see him before that time? A That I could not tell.

Q Have you seen him since? A Yes, sir.

Q Were you drunk on this day Tony--pardon me, Magnan, Mr. Magnan? A No, sir.

Q You were not? A No, sir.

Re-Direct Examination

BY MR. NOTT:

Q This room that you say is twelve by twelve, was that the front room or the poolroom? A Front room.

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- Q And the poolroom is back of that? A Yes.
- Q Now you say that after Kennedy, or Curtis, left, the others came into the room? A Yes.
- Q What did they do? A They all stood and said, "What is the matter, what is the matter?"
- Q What did they do, I asked you? A Nothing, only just said that and looked about.
- Q Did anybody go out? A One of them wanted to see where he went.
- Q Did he find him? A No, sir; he had disappeared.
- Q About twenty minutes later you sent around to the station-house? A Yes.
- Q Did you ever own or see the revolver which I now hand you? A I never owned it; no, sir.
- Q Did you ever see it? A I see a revolver in his hands, but I could not swear that is the one.
- Q You never saw that to know it before? A No, sir.
- Q Where are you working now? A Well, I aint just working at present, I am laid off until this case is over.
- Q Whom did you work for before you worked for Xigues?
- A Before I worked for Ziques? The Penny Arcade in Thirty-ninth Street and Eighth Avenue.
- Q How long did you work for Xigues? A Xiques? Three months

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I have.

Q How long did you work at the Penny Arcade? A Four months.

Q Where did you work before that? A Poolroom 41st Street and Eighth Avenue.

Re-Cross Examination

BY MR. KIEFER:

Q What is the man of the man that went out? A That man?

Q The man that you said went out? A (No answer).

The Court: You said one of the men went out after Kennedy.

A Oh, I don't know.

Q You don't know? A No, sir.

Q Is he here today? A I do not know--no, he aint here today; no, sir.

Q He is not here? A Not that I know of.

Q An unknown man went out for you to find a burglar or a robber, did he?

The Court: He did not say he went out to find a burglar or a robber; he said he went out to look where this man went.

BY THE COURT:

Q Did he come back? A Did he come back?

Q Yes. A I do not know.

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BY MR. KIEFER :

Q You do not know? A No, sir.

Q How near the window is the cash drawer from Magnan? A
How near is the window?

Q Yes, how near is the window--I did not say how near is the
window. I said, How near to the window is the cash drawer
that faced the street or on the street. A Well, eight
or ten feet.

Q Eight or ten feet. Is that in full view of the passersby
on the street? A Full view.

Q Could they see it? A There is a counter turns this way
(illustrating), so that you can't see the drawer.

Q Could they see a man with a revolver pointed at your face
if that occurred at all? A If they stood in the door
they could; no, sir.

Q This is about where on Eighth Avenue? A Eighth Avenue.

Q Near Eighteenth Street? A Between eighteenth and
nineteenth streets; one door from Nineteenth Street.

Q What time did you say it was? A Four o'clock.

Q Four o'clock. How do you fix the time? A How do I fix
the time?

Q Yes. A Well, it happened to be five minutes to four
before it happened, and four o'clock, I remember to be the

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time because I looked at the time.

Q I see. A (Continuing): After he went out.

Q What time was the boss to get there that day? A He didn't get there until six o'clock.

Q Answer my question, please. What time was he to get there?

A Well, he never does come until five o'clock.

Q Then you were sure of an hour at least? A Yes, sir.

BY THE COURT:

Q Where this occurred does the counter there on which the money drawer was run from the street, or is it parallel to the street? A No, it runs this way (illustrating). Here is the partition here, and the counter runs like that, and then it turns right away.

Q I see. And on what part of that counter was the money drawer, at which end? A Right here (illustrating).

Q The other end? A Yes, sir.

Q Farthest from the door? A Farthest, inside; yes.

BY H. KIEFER:

Q Just a moment. The counter, as I understand it, is at right angles to the street, that is, that part of the counter in which the cash drawer is located is at right angles to the street, is it not? A Well, this is the way the counter goes (illustrating).

The Court: Well, he may not know what right angles are.

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The Witness: I do not understand what you mean.

BY THE COURT:

Q Precisely. What he means is that the street runs that way (indicating), and the counter runs this way (indicating)?

A Yes, sir.

Q Is that it? A Yes.

MATTHEW T. ADAMS, called as a witness in behalf of the People, being first duly sworn, testified as follows:

D i r e c t - E x a m i n a t i o n

BY MR. WOTT:

Q Are you a member of the Municipal Police Force of the City of New York? A Yes.

Q What precinct were you attached to on the eighth day of February, 1905? A Seventeenth.

Q Were you in plain clothes or uniform? A Plain clothes.

Q Did you go on the afternoon of that day to Mr. Xiques cigar store at 174 Eighth Avenue? A I did, sir.

Q That time did you go there? A At four-thirty.

Q Did anybody go with you? A Yes, Officer Clark went

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with me.

Q After you got there whom did you see? A I saw this young man who just was here, Mr. Magnan.

Q Yes, have any talk with him? A Yes--

Q Now, don't state what he said to you. After this talk, and in consequence of it, where did you go? A I went out looking for a person known as Kid Curtis.

Q Yes, where did you look? A I looked all through the poolrooms there, through my own precinct, through the twentieth precinct, and through the nineteenth precinct, for I was given to understand that that was his general hangout, in poolrooms.

Mr. Kiefer: I move that that last be stricken out.

The Court: No.

Q Did you find him? A Found him in a poolroom at 214 Seventh Avenue.

Q Which precinct was that? A In my own precinct.

Q And what time was it when you found him? A About 9:30.

Mr. Kiefer: What was that? What time?

Mr. Nott: 9:30, he said.

The Witness: 9:30.

Q P.M.? A Yes, p.m.; that night about five hours later.

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Q When you found him did you search him? A Yes, sir; I searched him.

Q Where did you search him? A When I got him out of this poolroom I got him out on the sidewalk, and I understood he carried his pistol in his front pants pocket, and I felt the front pants pocket, and he put his hand in his right-hand overcoat pocket, and I ordered him to take it out or I would make him take it out. When I put my hand in that pocket there was the pistol.

Q Now look at this revolver I show you, and state whether that is the revolver you took out of his pocket? A Yes, sir.

Q Now, after you took the revolver out of his pocket, state if any chambers were loaded, and if so how many. A There was four chambers loaded with full cartridges, which I extracted from the pistol.

Q Now, after that where did you take him? A I took him to the twentieth precinct station-house.

Q Did you have any further search of him there? A Yes, I searched him there in front of the sergeant, and found four dollars and some odd cents in silver.

Q All in silver? A Yes.

Q Now, did you have any conversation with him about that?

A Yes, I asked him why he did it. "Why", he said, "I simply asked him to open the drawer, and I saw the money

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there," he says, "and I took it".

Q That was in the station-house? A In the station-house; yes, sir.

Q After that did you see Magnan at the station-house? A Yes.

Q What time did he come around there? A He got around I guess about fifteen minutes later.

Q What happened when he got there? A I made him face the front of the station-house towards the street with his back towards the prisoners, and I brought five prisoners up from downstairs, and put this man among them. "Now", I said, "is the man there that held you up?" He walked over and picked out this Mr. Curtis.

Q He was in the line? A He was in line with five other prisoners.

Q Were any of those other prisoners in uniform? A No, sir.

Q All citizens' clothes? A All citizens' clothes.

Q Were any of them young men? A All young men.

Q They had been in the station-house previously? A Yes, sir.

Q That is the 17th precinct station-house? A Yes, sir; west twentieth street.

Cross - Examination

BY MR. KIEFER:

Q Where ~~are~~ the cartridges, officer? A Well, I left them in an envelope in the station-house. Officer Reilly

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brought the things down. He may have forgotten to bring the envelope with the cartridges.

Q Is that the usual way you do things? Should they not have come with the revolver? A Sir?

Q Should not the cartridges go with the revolver? A No, sir; we put them in an envelope separately; we took them out always for safety's sake.

Q This revolver has passed through nobody's hands but yours? A Nobody's hands but Officer Reilly and myself.

Q Don't you know as a fact that that revolver is no good?

Don't you know that don't work in any way, shape or form?

A I know nothing of the sort, sir.

Q What? A I know nothing of the sort.

Q What do you know? A I know that was loaded when I found it.

Q But you have not got the cartridges here? A No, sir; I have got them in the station-house.

Q Who brought the revolver down? A Officer Reilly.

Q Is he here? A Yes, sir.

Q Now you say that you searched this man yourself? A Yes, sir.

Q Yes. A Yes, sir.

Q Well, your story sounds very well. That is all.

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BY THE COURT:

Q Officer, did you go before the magistrate with him? A I did, sir.

Q What did he say there, if you heard it? A He said that--well, that night, he would not say anything after that

Q After he said he opened the drawer and took the money--"I saw the money and I took it". A Yes.

Q Yes. A And the next morning when we got up before the magistrate he waived examination.

Q He did waive examination? A He waived examination.

Q Would not say anything? A Yes, would not say anything.

Re - Direct Examination

BY MR. NOTT:

Q Now, officer, just take that revolver and point it down--it is not loaded, but one can't be too careful--and see if the trigger works. A (The witness complies).

Mr. Kiefer: The chamber don't work, Mr. Nott.

The Witness: Yes it does.

Mr. Kiefer: It does not.

The Witness: Yes it does.

Mr. Nott: I don't see why it does not.

I see it going round.

I have neglected to offer the revolver

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in evidence. I offer it now.

There being no objection, the revolver is admitted in evidence and marked People's Exhibit A.

WILLIAM V. REILLY, called as a witness in behalf of the People, being first duly sworn, testified as follows :

Direct Examination

BY MR. NOTT:

Q Are you a member of the municipal police force? A Yes.

Q What precinct were you attached to on the eighth day of February, 1905? A Seventeenth precinct.

Q And did you accompany the last witness to the cigar store of Mr. Xigues? A No, sir.

Q Did you accompany him after that? A Yes, sir.

Q Where did you go with him? A I got the proprietor of the place, Mr. Xigues, or whatever his name is, and Xigues and me and officer Adams went around and searched the precinct, and searched the poolrooms for to find this man.

BY THE COURT:

Q Was Mr. Xigues with you? A Yes, sir. And we had only

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one more poolroom to search, that was 214 Seventh Avenue, and we went down into the basement of this poolroom, and as soon as we got down into the basement of this poolroom Mr. Xigues said, "He is over there", and I went over and got him by the arm and said, "Come along, I want you." He said, "What do you want me for?" I said, "Never mind; I will tell you when I get you to the station-house." So we went through him, and Officer Adams found that revolver in his pocket.

BY MR. NOTT:

Q (Pointing to Exhibit A)? A Yes, sir.

Mr. Kiefer: He has not identified it.

Mr. Nott: It has the tag on it. Look at it. Is that the revolver?

The Witness: Yes.

Q Did you see the revolver when it was taken from the defendant? A Yes, sir; I saw Officer Adams take four loaded cartridges out of it.

Q Then what did you do with the defendant? A Why, I stayed there, and Officer Adams searched him, and when he searched him he got over four dollars and some odd cents in silver in his pants pocket.

Q And then what did you do with him? A Then we sent around

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for this Magnan, and he came around to the station-house, and we got four other persons from downstairs, and we told this Magnan to face out and look at the sergeant, ~~look~~ at the desk. We took this Curtis and put him in the middle of the other four prisoners. Then we turned this Magnan around and said, "Now pick out the man that pointed the gun at you." He walked right over and picked Curtis out.

Q Did you hear Curtis make any statement, either before or after he reached the station-house? A He made a statement in the station-house that he was the only one that was in it. We thought the others were implicated with him.

Q What others? A Three other prisoners. He said, "I am the only one that did it. Don't blame them."

Q Who thought the others were implicated, and what others?

A The men that were with him on the line. He thought that we had arrested them for being implicated in this crime.

C r o s s -Examination

BY MR. KIEFFER:

Q Where are the cartridges, officer, have you got them?

A No, sir; they are at the station-house, I guess; we never bring cartridges like that when we have the pistol.

Q This is the first case I have ever seen where they have not been brought when they were found. It is part of the testimony, corroborates the other witnesses. Now you did

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arrest two other people before, did you not? A Yes, sir.

Q They were discharged? A One of them was fined ten dollars and the other discharged.

BY MR. NOTT:

Q Was the other fined ten dollars for carrying a revolver?

A Yes.

BY THE COURT:

Q You say you arrested them? What did you arrest them for? Anything connected with this case? A No, sir; it was another case that happened in the same place previous.

BY MR. KIEFER:

Q What? A Another case happened in the same place three or four days previous.

Q And one of these prisoners was fined for carrying a revolver?

A Yes. Fined ten dollars; corporation ordinance.

Q What is his name? A Kane.

HENRY XIGUES, being first duly sworn, testified as follows:

Direct - Examination

BY MR. NOTT:

Q Mr. Xigues, are you the proprietor of this cigar store and poolroom, 174 Eighth Avenue? A Yes, sir.

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Q Now, you have got to speak a little louder. How old are you? A Twenty-two.

Q And were you the proprietor of it on the eighth of February?

A Yes, sir.

Q Was this witness Oliver Magnan in your employ? A Yes.

Q What time did you get to the store that afternoon?

A Well, I was telephoned for; I got there at half-past seven, at least eight o'clock at night.

Q And what time was it that you were telephoned for? A Well, about half-past seven.

Q Did you know who telephoned for you? A My brother.

Q Yes. Now did you go to the store? A Yes.

Q Did you see Magnan? A Yes.

Q Well, after you saw Magnan, what did you do? A He explained to me --

Q I say, what did you do? You are not allowed to say what he said to you. A Went around to the station-house.

Q Yes. A Explained my case to the sergeant.

Q Yes. A He told two officers to go out and look for this man.

Q Did you go with them? A Yes, sir.

Q Where did you go? A All through the poolrooms around there, and several beer saloons.

Q Had you ever seen this man before? A Which man is this,

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sir?

Q The defendant? A Yes, sir.

Q Where had you seen him? A Once or twice in my place.

Q Under what name did you know him? A Under Kid Curtis.

Q Did you see him that evening? A When he was found, that was all.

The Court: Well, that is the answer.

Q I asked you did you see him that evening? A Yes.

Q Where did you see him? A Down in this basement poolroom.

Q Did you see the officers place him under arrest? A Yes.

Q Did they bring him up on the sidewalk? A Yes.

Q Then what happened? A We were walking alongside of him, and all at once I see one of the officers have a gun in his hand which he took from this Kid Curtis.

Q Did you see the gun? A Yes.

Q Was it unloaded or loaded? A Well, that I could not say until I went to the station-house.

Q Well, did you see it in the station-house? A Yes, sir.

Q Was it loaded or unloaded? A Yes, sir; it was loaded.

Q Did you see the defendant say anything at any time?

A No, sir.

Q Did you see Magran at the station-house? A Yes, sir.

Q What happened when Magran got there? A Well, they turned

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his back towards the street, and then they brought up several prisoners from downstairs, placed them in line and put Curtis among them, and then the sergeant, I believe, asked Magnan to point out the man who had held him up.

Q What did Magnan do? A Pointed Kid Curtis out.

Q What kind of men were the other men in the line? A All young fellows.

Q Were you resent when the defendant was searched in the station-house? A Yes, sir.

Q Did you see anything taken from him? A Just only the revolver, that was all.

Q Did you see any money taken from him? A ~~No, sir.~~

Q Well, you say the revolver was taken from him in the street?

A In the street; yes, sir.

Q I asked you if you saw him searched in the station-house.

A Searched? No, sir. I was sent around to get Magnan to help identify him.

Q You went around to get Magnan? A Yes.

Q How long were you gone when you went for Magnan? A About five minutes.

Q What street is the station-house? A In Twentieth street.

Q And your place is where? A Eighteenth and Nineteenth streets.

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Q Was the property in the cash drawer that afternoon, the money, your property? A Yes, sir.

Q Did you examine the cash drawer when you got back that evening? A Yes.

Q What was in it? A Just a few pennies and three or four five cent pieces ; something like that.

Q What time did you leave the cigar store in the afternoon?

A Well, I had not showed up that day at all.

Q Had you sent any money there? A No, I left money there.

Q How much money did you leave? A Something like six fifty, six seventy-five.

Cross - Examination

BY MR. KIEFER:

Q So you say that you go there at 7:30? A Between seven-thirty and eight o'clock.

Q And at that time there was a few pennies and a few nickels in the store? A Yes.

Q Now, what kind of man is Kid Curtis here?

Mr. Hott: I object to the form of the question.

Mr. Hott: Objection sustained.

Q What kind of place do you keep up there? A Just a cigar store and billiard parlor.

Q What class of people frequent your cigar store and pool

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parlor? A Well, laboring boys, all laboring boys.

Q All laboring boys? A Yes, sir.

Q Do you keep a fence for thieves up there? A No, sir.

Q Do you have a place where cocaine is sold to boys to snuff?

A No, sir.

Q And get drunk on? A No, sir.

Q Did you ever in your life since you owned that store know of cocaine being given to boys in order to snuff and get drunk on and get hilarious? A No, sir.

Q They lead a gay life up there, don't they?

Mr. Nott: I object to that.

The Court: Objection sustained.

Q Do you have women in your place? A No, sir.

Q Do you have whiskey there? A No, sir.

Q Did you ever use cocaine yourself? A No, sir.

Q Do you know Mr. Magnan's habits, the man you employ?

A Nol I know his habits?

Q Yes. A Well, only--

Q Do you know if he uses cocaine? A Never in front of me.

Q Did you ever hear of cocaine ever being used as a snuff?

A No, sir.

Q The first time you ever heard it in your life is now?

A Well, I have heard it since I have been in that place

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over there.

Q Oh, you have heard it? A Yes.

Q And the first news that you heard of your place being robbed was when you were telephoned for between 7:30 and eight o'clock? A Yes, sir.

THE PEOPLE REST.

Mr. Kiefer: If the court please, I move for a dismissal of the indictment and the discharge of the defendant on the ground that the People have not proved their case beyond a reasonable doubt.

The Court: Motion denied.

THE DEFENSE.

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

Direct - Examination

BY MR. KIEFER:

Q Well, Dave, you are charged with using a revolver, that revolver (indicating People's Exhibit A) feloniously or wrongly with intent to commit the crime of robbery and to

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steal from the cash drawer ten dollars. Now just tell the jury what occurred on that day. A I came in this poolroom about four o'clock. I went in and I bought a pack of cigarettes, and this Magnan was standing in the front. After he gave me the pack of cigarettes he stood a moment in the front near the counter where there is a big partition. He walked around there, and he stood in front with me and another man--I can't exactly place him. I think it is --

Q Did you know Magnan some time? A I did.

Q Yes. A And I stood there talking to him, and he said to me, that he was very sore about an affair that had happened and which he told me the night previous or a couple of nights previous, and he said, "I am so sore on this Jew boss of mine that I would like to get even on him, as I am going to leave him Saturday." So he said, "If you don't mind, Curtis, I will show you how I open the drawer", and I walked around and I said, "Show me how to do it", and he opened it and closed it, and then opened it again. "Now", he said, "here is a chance to get even with the boss", but besides that the revolver is there. He said, "Take the revolver", and I was to meet him in the evening and divide the money. And I didn't meet him, and to get square himself he went and had me arrested.

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Q That is the whole story? A Yes.

Q What kind of a place is this poolroom and cigar store that Xiques keeps? A It is a place where they have people who don't work and don't do anything but sit around there day and night, cocaine snufflers and all that thing.

Q You have been in the place how often, do you think? A Oh, I have been in there regular for two or three months.

Q By the way, you were convicted of a crime at one time, were you? A Yes, sir.

Q And you paid the penalty by serving your sentence at Elmira Reformatory? A Yes, sir.

BY THE COURT:

Q What was the crime? A Grand larceny in the second degree.

BY MR. KIEFER:

Q How long ago was that, David? A 1899.

Q Six years ago? A Yes, sir.

BY THE COURT:

Q How long did you stay there? A Five years.

Cross - Examination

BY MR. NOTT:

Q What is your real name? A David Kennedy.

Q Is that your real name? A Austen Phillips is my real name.

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Q Is that your real name? A Austen Phillips.

Q Now is Austen Phillips your right name? A Yes, that is my right name.

Q Did you ever go under the name of Austen Curtis? A That was when I was convicted.

Q Then you did go under that name? A Yes.

Q What other names have you gone under? A David Kennedy, that is all.

Q David Kennedy, Austen Phillips and Austen Curtis? A Yes.

Q Now, you were discharged from Elmira on parole, and you broke your parole, and were sent back, weren't you?

A Yes, sir.

Q How long did you serve before you broke your parole?

Mr. Kiefer: Well, if the court please, we have put bad character in evidence, and I object to any further questions.

The Court: Oh, you can put bad character in evidence, and the People can put worse character in evidence.

Mr. Kiefer: Now if your honor will pardon me, I can show to your honor a decision of the Court of Appeals where they state that where bad character is proven it is immaterial

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to prove anything else. We admit bad character in this case.

Mr. Nott: But we want to show how bad it is.

The Court: The People have the right to prove that this man not only was convicted of a crime similar to this, but that he also broke his parole, and they can prove any other thing that proves worse character than you have shown.

Mr. Kiefer: Well, if your honor please, I submit that.

The Court: And they can also prove that he was five years in the Reformatory.

Q How long were you there before you violated your parole?

A Oh, I violated or gave my parole?

Q You got out on parole, didn't you? A Yes.

Q And you broke it and were sent back. Now how long were you there the first time? A About two years.

Q And how long have you been there the second time? A About three years.

Q What have you been doing for a living since? A Stenographer and bookkeeper.

Q For whom? A James L. McDermott.

Q When did you begin to work for him? A Just as soon as I

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came out of the Institution.

Q How long did you continue working for him? A Up to the day I was arrested.

Q That day was it you were arrested? A It was on a Wednesday.

Q What time were you arrested? A At half-past nine, I believe -- nine o'clock.

Q Did you used to get off from your work at four o'clock?

A No, sir.

Q How did you happen to get off at four o'clock this afternoon? A I was to Twenty-third Street as a witness in a suit between McDermott and Converse, and the case was adjourned till the next day, and I took that afternoon off.

Q Had you ever taken off any other afternoon and been in this poolroom? A No, sir.

Q That is the only time you were in there in the afternoon?

A When I go to my dinner I have been there to get a pack of cigarettes.

Q Yes. Now just show your hands to the jury. A (Witness complies).

Q Are you working right along? A Yes.

Q How many cigarettes do you smoke a day? A That is done that way (indicating trembling of witness's hands) from smoking over in the Tombs.

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Q You have done it all since then? A Yes.

Q Did you ever smoke cigarettes before you went to the Tomb?

A Once in a while.

Q You just said you used to go in there and get cigarettes?

A Well, I just said I smoked once in a while.

Q Only once in a while? A Yes.

Q Is Mr. McDermott here? A Yes, sir.

Q Now, how often had you spoken to this boy Oliver Marnan?

A A number of times.

Q Well, how often? A Well, I can't say exactly; I have known him for two months.

Q Well, how many times during that two months had you seen him? A Two, two or three times a week I guess.

Q Yes. You were quite a friend of his? A Just going in; not any friend; just going in and talking to him and playing pool with him.

Q Did he know that you were working as a stenographer and bookkeeper? A Yes.

Q And do you mean to tell this jury that, knowing that you were working as a stenographer and bookkeeper, he picked you out from all the boys there to put up this job?

A Because I was very full at the time.

Q Very full? A Yes.

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Q What had you gotten full on? A A little whiskey that I drank.

Q What time did you leave that court? Were you full when you were there as a witness? A No, sir.

Q What time did you leave? A About twelve o'clock I think it was.

Q Don't you know? A Well, between twelve and one.

Q Why didn't you go back to your work? A I went downtown to 346 Broadway to Counsellor Rosenbach's office with Mr. McDermott.

Q Why didn't you go back to your work then? A Well, it was about three o'clock when I got ~~there~~ through there.

Q Don't you work after three o'clock? A No, sir; we quit at five o'clock.

Q So you went off and got full? A Yes.

Q Were you drunk when you were arrested? A Yes.

Q Sure of that? A Yes.

Q Do you often get drunk? A No, sir.

Q Only happened to do that this afternoon? A Yes, sir.

Q How long was it since you had been drunk before? A That was about the second time since I have been discharged.

Q How long have you known Patrick Connelly, who was sentenced here this morning? A Patrick Connelly? I do not know

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him, sir.

Q What? A I do not know him, sir.

Q Do you swear to that? A Yes, sir.

Q You swear that you do not know Patrick Connolly or Pattie Connolly? A No, sir.

Q Did you tell him to write to this complaining witness?

A No, sir.

Q Do you know a man named Paddie Con? A No, sir.

Q What! Just look at this letter (handing paper to witness).

Mr. Kiefer: Well, at this stage I object to it as irrelevant and immaterial.

The Court: Well, I cannot tell until I know what the letter is.

The Witness: (Returning paper to People's counsel).

Q Do you know whose handwriting that is? A No, sir.

Q What? A No, sir.

Q Did you write it? A No, sir.

Q Well, can you explain now it is that somebody wrote to Magran about this case if you didn't tell him to? A Unless Magran has had somebody do it for him.

Q I see. You think that is it? A Yes, sir.

Q And have they signed the name Paddie Con? A Yes, sir.

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Q Didn't you know Connolly up in Elmira? A Connolly?

There is a number of Connollys up there.

Q Don't you know him? A I do not know which Connolly you mean, sir.

Q Have you seen a man named Connolly there in the Tombs since you have been there? Both been there at the same time?

A Not around in the Tombs; no, sir.

Q Did you see him? A No, sir; not a Paddy Connolly in the Tombs.

Q Did you see anybody named Connolly in the Tombs?

Mr. Kiefer: If he can remember, if he knows.

A I do not remember, sir.

The Court: You must not prompt the witness, Mr. Kiefer.

Q You do not remember whether you saw him or not. Did you know anybody named Connolly in Elmira? A There has been a number of Connollys in Elmira.

Q Did you know any of them? A Yes, sir; I know some of them.

Q Did you know any of them named Patrick or Paddie? A No, sir. I do not know anybody by the first name up in Elmira.

Q You only knew the second names? A Yes.

A Did you instruct a man named Connolly to write this man

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named Mangnan, and tell him to blow away or say he could not identify you? A No, sir.

Q Did you instruct him to say "P.S. This party will fix you up all right if you do this"? A No, sir.

Q What? A No, sir.

Q Did you notice that this letter says--it is dated February 28th, is not it? A Yes, sir.

Q And it says, "I was up for trial to-day but was put back." Now do you still say that Mangnan got that letter written? A I suppose so; yes, sir.

Q Do you know that on February 28th there was a man named Connelly in the Tombs?

Mr. Kiefer: I object to this.

The Court: What is that?

Mr. Kiefer: I object to this.

The Court: To what?

Mr. Kiefer: It is not connected in any way. It is immaterial and irrelevant. He has answered that he knows nothing about the letter.

The Court: It will doubtless be connected later on. The question now is as to the admissibility of the letter.

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Mr. Kiefer: Well, I object to that.

The Court: Very well, I overrule the objection and you can have your exception.

Q (Question repeated as follows: "Did you know that on February 28th there was a man named Connelly in the Tombs?") A

No, sir.

Q Now, what time was it when you say Magnan asked you to come out where the cash drawer was? A About four o'clock, I guess.

Q And was anybody in the front room? A There was a man in the front of the counter with him.

Q And did he have this conversation when this man was present? A Yes, sir; he was speaking to him.

Q Did he have this conversation with you when this man was present? A Yes, sir.

Q He had that in the presence of a third party and you were drunk? A Yes, sir.

Q What is this man's name? A I do not know any of them around there by name, only--

Q Do you know the man's name? A No, sir.

Q Had you seen him there before? A Yes, sir; I have seen him.

Q And you want this jury to believe that Magnan asked you to rob this cash box in the presence of a third man? A Yes, sir.

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Q And what did you say? A I went and looked there. I was intoxicated at the time.

Q Well, you went and looked? A Yes.

Q What did you see when you looked? A He opened the door and there was the silver there.

Q I thought you said you asked him to show you how to open the drawer? A No, sir.

Q Didn't you say, show me how? A No, sir; he says, "I will show you how".

Q Well, did he show you? A Yes.

Q Did you open it? A I didn't open it, no, sir.

Q What did he show you? A He opened it again.

Q What did he show you? A He showed me how to open it.

Q How did he show you? A Put his fingers under.

Q Did you put your fingers under there? A Yes, sir.

Q What was under there? A Clamps, I believe they call them.

Q Did you press on them? A Yes.

Q And the drawer opened? A No, sir.

Q Didn't open? A No, sir.

Q Well, then, did he open it again? A Yes, sir.

Q What was in it? A There was some silver in it.

Q How much did he take? A I do not know how much was in there.

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- Q How much did you take? A I do not know; I could not say.
- Q Do you mean totell this jury you do not know how much money you took? A Yes, sir; I do not know how much money it was.
- Q Well, did you take it with both hands or with one hand? A Well, I could not exactly say that.
- Q Where did you put it? A I put it in my side pocket.
- Q At the time you took it you knew it belonged to Mr. Xigues, didn't you? A Yes, sir.
- Q Do you mean to plead guilty now to larceny? A No, sir.
- Q You don't? A No, sir.
- Q Why, you took his money, didn't you? A Yes, sir.
- Q What? A Yes, sir.
- Q Where was this revolver? A He had it lying outside the counter.
- Q On the counter? A At the back of the counter behind the counter.
- Q Was this third party there? A yes, sir.
- Q Was he helping you? A No, sir; he stood outside the counter.
- Q What was he doing? A He stood there.
- Q Was he aiding and abetting while this larceny was going on? A No, sir; he stood right in front of the counter.

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- Q Did he say what was being done? A I believe he did; yes, sir.
- Q Saw you take the money? A Well, he could not see me take the money. The counter is very high, and the cash register on the drawer is on this side (indicating). Now it is impossible for him to see over there.
- Q And you want the jury to believe you were drunk at that time? A I was intoxicated at the time; yes, sir.
- Q What did Magnan do with the revolver? A He gave it to me and I put it in my side pocket.
- Q What did he do that for? A He told me to take it.
- Q Did he make you a present of it? A He said, "Take it; it is there", and I took it.
- Q Why? A (No answer).
- Q Did you ever carry a revolver before? A No, sir.
- Q Never in your life? A No, sir.
- Q Have any license to carry it then? A No, sir.
- Q Where did he take this revolver from? A It was lying beside the cigars or something there; I do not know exactly what it was.
- Q Was it on top of the counter? A Well, the counter is between--the cigar counter is a big counter; it was lying on the back counter.

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Q Well, in perfectly plain sight? A Yes.

Q And lying there in perfectly plain sight you thought he wanted to hide it, is that it? A I do not know that he wanted to hide it, but he told me to take it.

Q Did he give you any reason why he wanted you to take it?

A No, sir; he said "It is there, take it."

Q Just said it was there. Then where did you go with it?

A I went and I had supper.

Q Where did you have supper? A In a restaurant around that neighborhood.

Q Whose place? A I do not know who owns the place.

Q What did you have for supper? A Had a steak.

Q Yes. Anything to drink? A Nothing.

Q Did you buy that out of this money? A No, sir; out of my own money.

Q What money did you have? A I had about forty dollars of my own.

Q How much? A About forty dollars.

Q Forty dollars? A Yes, sir.

Q In bills? A Yes, sir.

Q Was that on you when you were arrested? A Yes, sir; my inside pocket.

Q Was it taken from you? A No, sir.

Q Wasn't found? A No, sir.

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- Q Were you searched? A No, sir.
- Q Where is the money now? A I have used it for my living in the Tombs, the most part of it.
- Q How have you spent it? A Buying food to eat.
- Q What wages were you getting from Mr. McDermott? A Fifteen dollars a week.
- Q And this was Wednesday? A Yes.
- Q When were you paid? A Paid Saturday.
- Q And you had forty dollars on you? A Yes.
- Q And the ordinary fare over there in the Tombs is not good enough for you. You spent forty dollars on extra food, is that it? A Oh, no; I paid something to my counsellor.
- Q Yes, paid him part of it? A Yes, sir.
- Q Now, after you had supper what did you do? A I went to Mr. McDermott's house.
- Q What time were you there? A To find out what time to be in court in the morning.
- Q What time were you at Mr. McDermott's? A Well, I could not say; about half-past six I guess.
- Q Now do you want this jury to understand that when you were drunk you went around to your employer's house? A Yes, sir; I was just full enough to go around there; yes, sir.
- Q And you were drunk when you went in there? A Yes.

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- Q What did you say to him? A I asked him what time the case was coming on in the morning, and he told me I had better go home. That is all he said.
- Q He didn't tell you what time it was coming on? A Yes, sir.
- Q What time did he tell you? A He told me to be in court at ten o'clock in the morning.
- Q What court? A Twenty-third Street civil court.
- Q You remember all that? A Yes.
- Q Then where did you go? A I walked around; I do not know exactly where I went; I walked around.
- Q Well, when you left Mr. McDermott's office in the afternoon about three o'clock, they didn't say anything about being in court? A What is that, sir?
- Q I say that nothing was said to you about being in court the next morning when you left Mr. McDermott's office that afternoon at three o'clock? A No, sir; I did not pay any attention. Mr. McDermott was sitting inside in the private office with Mr. Rosenberg.
- Q How many poolrooms did you go to that night? A How many poolrooms?
- Q How many poolrooms did you go to after you left Mr. Xigues? A One.
- Q And were you there until you were arrested? A No, sir.

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- Q Where were you arrested? A In this poolroom.
- Q Then you were to more than one? A No, sir; just this poolroom I was arrested in.
- Q I asked you if you were there until you were arrested?
- A No, sir; I was not there until I was arrested. I only came in about ten minutes before I was arrested.
- Q Then you were there until you were arrested? A Yes.
- Q You were arrested and were you taken to the station-house?
- A Yes, sir.
- Q Did you ever take cocaine? A No, sir.
- Q How do you know they did it around there? A I have seen them use it.
- Q But you didn't do it? A No, sir.
- Q And you only smoked a very few cigarettes at that time?
- A Yes, sir.
- Q Now when you got to the station-house, did you tell them there that you had taken this money? A No, sir.
- Q Did you say that you had not taken it? A No, sir; I did not make any statement at all.
- Q Didn't say anything about it at all? A No, sir.
- Q Weren't you in the same pen with Connolly to-day and yesterday? A I do not know Connolly; I do not know his name, sir.

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Q Well, did you have any talk with any man down in the pen?

A Well, we all talked down there.

Q Well, now, what talk did you have with a man down there about this case? A About his case?

Q Your case. A Well, I haven't talked with anybody about my case.

Q Don't you know that there was a man down there who was sentenced to a year and ten months in State prison?

Mr. Kiefer: I object to this as immaterial and irrelevant. It has nothing to do with the case.

The Court: It has everything to do with it. If he shows that the man is not telling the truth he can prove it by admissions or conversations.

Mr. Kiefer: But it is irrelevant and immaterial.

The Court: No, not at all; it affects his credibility as to whether the jury will believe him or not. There is no use in discussing it. I overrule your objection and you may take an exception.

Mr. Kiefer: We will take an exception.

Q Did you have any talk with that man? A No, sir.

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Q You swear to that? A Yes, sir.

Q Did that man tell you he knew Oliver Magnan? A No, sir.

Q And you tell this jury that you do not know what his name is? A Yes, sir.

Q Did you ever see that man in Elmira? A Well, I could not say; the fact is I have seen so many there it is impossible for me to remember any man's face that was there.

Q Do you know whether you saw him there or not? A I could not say, sir.

Q You want say you did not see him there? A No, sir, and I can't say that I did.

Q You went to Elmira in 1899? A In 1899; yes, sir.

Q And were there over three years the first time? A Yes, sir; three years.

Q Well, now, if a man served there all of these three years with you wouldn't you know him?

Mr. Kiefer: Well, it has not been shown that he did serve there. I object to this.

The Court: Objection overruled.

A No, sir.

Q What? A No, sir. For the first twenty-seven months I was there I was in the hospital, and never met a man only those that were admitted to the hospital, so it would be

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impossible for me to meet any of the inmates.

BY THE COURT:

Q Were you the only one in the hospital? A No, sir; I was hospital clerk at the time.

Q Were any of the inmates in the hospital at that time?

A Yes, sir; quite several.

Q Why did you say, then, that it would be impossible for you to meet any of the inmates? A Well, I wasn't down in the wards; I was only down in the hospital office.

Q Well, would not the hospital clerk see the inmates that came to the hospital? A Well, we are not supposed to see any of the inmates.

BY MR. NOTT:

Q Have you ever had any trouble with this man Magnan? A No, sir.

Q Now when you took the money did you take all the money that was in there? A Well, I could not say that, sir.

Q What? A I could not say that.

Q Well, you have told us just where he got this revolver?

A Yes.

Q Where it was lying and just where everything was. Now can't you tell what money was in there? A I do not remember how much money. There was a sliding drawer there. May have

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been something in there for all I know.

Q Well you put your hand in and took the money? A Well, there was little holes; I took the money from.

Q Did you leave anything in those holes? A I could not say, sir.

Q And the money you took out you put in your pocket?

A My side pocket; yes, sir.

Q Did you give any of it to Magman? A I did not have time to see him.

Q Well, did you? A No.

Q Why didn't you have time? A I didn't have time. I wanted to wait until he got off.

Q Why? A I was to see him when he got off.

Q And then divide up? A Yes.

Q Now, do you still tell the jury you didn't commit larceny?

Mr. Kiofer: I object to that. That is a different charge.

The Court: Well, I will sustain the objection to that. The thing speaks for itself.

I am going to adjourn to-day a little earlier than usual because the jurors may have difficulty in getting home.

(To Court Captain): Give instructions

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that until this man's cross-examination is finished he shall not be allowed to communicate with anybody except his counsel, of course.

Mr. Nott: I do not think that even his counsel should be permitted to interview him until the cross-examination is finished.

Mr. Kiefer: It is a constitutional right of counsel to visit their clients at any time, and to have the free privilege of communication with them.

The Court: I have made the exception in your favor, Mr. Kiefer, as a matter of courtesy, but since you claim it as a matter of right, I feel impelled to withdraw that exception. That is a rule made in this court over and over again that when a witness is under cross-examination he is not allowed to talk to his counsel. That rule was laid down by the Late Recorder Smyth, and has been followed by the present recorder, Goff.

Mr. Kiefer: Well, it is a hardship, your honor, to say the least.

The Court (continuing): And the

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Captain is now instructed that counsel is to be excluded as well as every one else until the cross-examination is finished.

Gentlemen: I am obliged to renew the ordinary statutory cuation not to talk with each other about this case or to allow any one else to speak to you concerning it, until it is finally submitted to you. You will adjourn until tomorrow at half-past ten.

Mr. Kiefer: Your honor, may I have an exception on that last ruling of yours?

The Court: Certainly, but I want to re-state the ruling before I consent to an exception. I rule that he shall not communicate with anybody during or pending his cross-examination.

Adjourned to Thursday, March 9th, 1905,
at 10:30 A.M.

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March 9th, 1905,

(Morning Session, 11 A.M.)

DAVID KENNEDY (Continued):

Cross-Examination

BY MR. NOTT:

Q Do you know that man (pointing to a prisoner)? A Not by name, sir; no, sir.

Q I didn't ask you if you knew him by name. A I saw him in the pen yesterday.

Q Where else have you seen him? A Only in the pen, sir.

Q Didn't you see him in Elmira? A I do not remember his face.

Q What? A I do not remember his face.

Q Wasn't he in the hospital ward in Elmira, sir? A No, sir.

The Court: He didn't say he was in the hospital ward; he said he was clerk in the hospital.

Q Well, was he in the hospital at any time? A No, sir.

So if he says he was he says what is not so? A Yes, sir.

Q Isn't it a fact that you and this man assaulted a police officer after you came out? A No, sir.

Q Do you know a man named "Lefty" Boyle? A There is a man

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in my pen by that name.

Q Have you known him? A Only meeting him up there.

Q Did you ever know him before that? A No, sir.

Q Never knew him? A No, sir.

Q Did you tell this man to write the letter that was put in yesterday? A No, sir.

Q That was shown to you, I mean. It was not put in. A No, sir.

Q Do you know a man named McCarty? A I know several McCartys; yes, sir.

Q Well, do you know--did you ever meet a man named McCarty in this cigar store up there? A No, sir.

Q What? A No, sir.

Q Didn't know any such man? A I could not say if I met a man named McCarty in the cigar store or not.

Q Did you know any one there? A No, sir.

Q Did you tell a man named McCarty to offer this man Oliver Magnan ten dollars not to testify? A No, sir.

Q Do you know a drugstore near Seventh Avenue and Twentieth Street? A No, sir; I do not remember any drugstore.

Q Isn't it a fact that you got that revolver there? A No, sir.

Q Where did you get it? A In Magnan's place; that poolroom

Q Isn't it a fact that you went into that drugstore and took

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some money there and took this revolver from that drugstore?

A No, sir.

Q What? A No, sir.

Q And you tell this jury that you do not know any man named McCarty that was in the cigar store on February eighth?

A I do not remember any such man, sir.

Q To the best of your knowledge there is no such man there?

A Mr. Kiefer: I object to that form of the question, if the court please. It is misleading to the witness. He may know a man named McCarty but he may not know a man by that name.

The Court: The question is put to the best of your knowledge you do not know there was any man there at that time named McCarty. That is all right.

Q Is that right? A Yes, sir.

Re-Direct Examination

BY MR. KIEFER:

Q Just one minute. Who did you say you were employed by?

A James L. McDermott.

Q And how long did you work for him? A About eleven months.

Q And is he in court? A I believe so.

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Q What is his business? Is this Mr. McDermott (Pointing to a man in the court-room)? A Yes, sir.

Q What is his business? A New York Supply Company.

Q You worked steadily for him for eleven months up until the day of your arrest? A Yes, sir.

Mr. Kiefer: Now, if the court please, the District Attorney has offered a letter, and spoke about certain events of the letter, and I ask, in fairness, that I may see that letter.

Mr. Nott: He can see it if he will admit it in evidence.

The Court: He has got to see it before it is admitted in evidence.

Mr. Kiefer: I wont see it on that condition.

The Court: I say you can see it, if the District Attorney offers it in evidence; then you can object or not, as you please. If the District Attorney does not intend to offer it in evidence, then, of course, you are not entitled to see it.

Mr. Nott: Do you consent to have it go in evidence?

Mr. Kiefer: No, I do not.

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JAMES MCCARTY, called as a witness in behalf of
the defendant, being first duly sworn, testified as
follows :

D i r e c t E x a m i n a t i o n

BY MR. KIEFER :

Q McCarty, were you in this poolroom on the day that this
alleged crime was committed? A Yes, sir.

Q That is, you know the defendant here at the bar, the defend-
ant David Kennedy. You know him by sight, do you? A
Yes, sir.

The Court: Don't lead him that way.

Q How do you know him ?

The Court: I will not stand for that,
counsellor; it is only wasting the time of the
court. If you want to take the stand, very
well. If you know these facts that you assert,
take the stand.

Q Do you know the defendant at the bar? A I know him by
sight from seeing him in the poolroom when I first met him.

Q How often have you seen him up there? A In Eighth Avenue?
I have not seen him over four times in Eighth Avenue.

Q Four times. Now, then, did you see the defendant here,
David Kennedy, and a fellow by the name of Magnan that goes

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by the name of Frenchy on that day back of the counter?

A Yes, sir.

Q Were they talking together?

The Court: I will insist that you ask your own witnesses what he sees and not suggest the answer.

Mr. Kiefer: All right.

Q How long were they back of the counter, that is approximately, as nearly as you can tell? A As nearly as I can tell, as long as it takes to open the drawer.

Q As long as it takes to open the drawer? A Yes, sir.

Q And what occurred then, what next followed? A Mr. Kennedy walked from behind the counter, and goes outside the door. When he is outside the door he stands and hesitates, and then goes ahead.

Q Then he walks away? A Yes, sir; he walks away uptown.

Q What did Magnan do then? A Magnan said "He took the money with him."

Q How soon after did he say that? A He hollers out, "There goes the money; the Kid has gone with the money."

Q Previous to that time--Now previous to that time you were in the store, were you? A Yes, sir.

The Court: I cannot see, counsellor, why

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you do not obey the mandates of the court.

Mr. Kiefer: I mean to be most respectful to the court.

The Court: You will frame your questions so that each one suggests the answer.

Q How long before that had you been in the store, then?

A I entered the store about ten minutes past three.

Q And did you notice what time Kennedy came in? A I was not there when he came in; he was there ahead of me.

Q He was there ahead of you? A Yes, sir.

Q Did you hear any remarks about robbing the till, or to that effect? A

The Court: I will not stand for this. I do not understand why you should persist. Do you understand me? You do not seem to understand. You must not ask him, Did you hear this thing? You can ask him, What did you hear? but you can't ask him, Did you hear him say this, or that?

Mr. Kiefer: I did not mean it in that way.

Q What was said in regard to the till, then?

The Court: You have asked the question, and he knows how to answer it now.

Q What was said, if anything, in your hearing, about the

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money drawer?

The Court: Leave out about the money
drawer. What was said?

Q Well, then, what was said? A I was in the rear. Some
one made a remark. Who it was I do not know, as the remarks
were in the front room--"Go on, Kid, learn the combination
and you can rob the boss some night."

Q After that what did you notice? A Kennedy went behind
the counter.

Q Who was with him? A No, one; Magnan was behind the
counter already.

Q Now, you say when Kennedy went out he hesitated at the
door. A Outside the door there; as soon as he closed
the door he hesitated on the outside, then walked uptown.

Q How many people were in that room? A As near as I can
guess there was a dozen at least.

Cross-Examination

BY MR. NOTT:

Q Where do you live? A 130 West Twentieth.

Q What? A One thirty West Twentieth.

Q How long have you lived there? A I have lived there
for a week and a half now.

Q Who did you live with before that? A With my mother and

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father.

Q Where did you live before that? A 200 Seventh Avenue.

Q What do you do for a living? A I do not do anything at present.

Q How long have you been out of work? A Since Christmas.

Q How often do you go into that poolroom? A Well, I do not go in there very often.

Q Well, how often? A May be once or twice a week.

Q Go into other pool rooms? A Yes, sir.

Q Where do you get the money to live on? A Get the money home.

Q From your other? A Yes, sir.

Q What work did you do at Christmas? A China packer; I worked at.

Q How long did you work? A Eight months I worked.

Q You say that you have seen this man Kennedy four times on Eighth Avenue. Whereabouts on Eighth Avenue? A In the poolroom.

Q Under what name did you know him? A Kid Curtis.

Q Who told you that name? A I only heard it from other people calling it to him.

Q What? A I only heard it from other people calling it to him.

Q How often? A I only heard it from other people calling it to him.

Q How often? A I only heard it from other people calling it to him.

Q How often? A I only heard it from other people calling it to him.

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- Q So that is the name he went by there? A Yes, sir.
- Q What did you call him Kennedy here for then? A So he would be recognized among the others; they would not know him if I called him Kid Curtis.
- Q Who are they? Who would not know him by that name? A Counsellor, or may be you.
- Q You think they would not recognize him if you called him that. You say you have only seen him four times on Eighth Avenue. Where else did you see him? A I didn't hear what you said.
- Q You say you have only seen him four times on Eighth Avenue. Where else have you seen him? A I have seen him in Nineteenth Street, 144 West. There is a poolroom there.
- Q And how often have you seen him there? A That I do not know.
- Q Very often? A Quite often.
- Q How many times a week? A May be four, three or four night out of a week.
- Q What did you just tell the jury for that you went into a poolroom about once a week? A I said in the Eighth Avenue one once a week.
- Q How often are you in poolrooms, every night? A Mostly, but lately I haven't.

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Q When did you stop? A About a week or so.

Q I see. Well, was he known as Curtis down at this other place? A Yes, sir.

Q Who told you his name around there? A I just heard it, as I said, from other people calling him it.

Q Do you mean to tell this jury that you saw him three or four nights a week in one poolroom and several times in another, and didn't speak to him? A No, sir.

Q Then you have spoken to him? A Yes, sir.

Q Then you did know him? A On sight; just to say hello, that's all. If he would ask me a question, for a cigarette or for amatch, I would say yes, or no.

Q Did you use to smoke cigarettes much? A Yes, sir.

Q Did he? A Not very much that I know of.

Q You said he used to ask you for one? A Once in a while.

Q How many times have you spoken to him? A That I do not know.

Q Did he tell you his real name was Kennedy? A No, sir.

Q Who did tell you that? A I only knew it from the counsellor.

Q Now on this afternoon what time was it that you got to the poolroom? A Ten after three.

Q How do you fix that time? A When I left the house it was half-past two. I got up at half-past two.

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Q What time did you go to bed? A At night early.

Q What time? A About half-past twelve that night.

Q And stayed in bed until half-past two? A Yes, sir.

Q Then you got up and went around to this poolroom? A Yes, sir ; on Eighth Avenue.

Q So it could not have been any later? A As I happened to go in the store I pulled out my watch.

Q Have you got your watch? A Yes, sir.

Q Got it on now? A Yes, sir.

Q Noticed it was ten to three? A Yes, sir.

Q And when you got there he was already there? A Yes, sir.

Q Have any talk with him? A No, sir.

Q Where was he? A Playing pool.

Q Did you watch the game? A Yes, sir.

Q Did you take part in the game? A No, sir.

Q Was he playing pool all right? A No, sir; he could not handle the cue.

Q Was drunk? A He was intoxicated.

Q Ever seen him drunk before? A No, sir; never.

Q How many were there in the back room there? A They all were up in the back room at that time.

Q How many were there? A I believe about the same as before, a dozen.

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Q Did you hear any talk going on there? A No, sir; I heard none.

Q There wasn't any talk? A There might have been before I entered, but not while I was there.

Q Everybody keeping quiet? A They were talking about other matters; but I can't remember.

Q Did you hear any talk? A Yes, sir; but not relating to this case.

Q Did you hear anybody say how long Kennedy had been there? A No, sir.

Q Did you play any pool? A No, sir.

Q What were you doing? A I was standing by the fire.

Q Doing nothing? A Doing nothing.

Q How long did Kennedy play? A He played for at least a half hour while I was there.

Q Yes. After he stopped did you get in? A No, sir; I didn't.

Q How many tables are there there? A I believe there is four in the back and one in the front.

Q Were they all full? A No, sir; that was the only table playing at the time.

Q Then was Magnan in there or in the front room? A He was in the end room while they were playing pool. I was standing by the fire.

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Q Who went out of the room first, Magnan or Kennedy?
A Magnan, to wait on a customer.

Q Then Kennedy went out? A Yes, sir.

Q Into the front room? A Yes, sir.

Q Anybody else go there? A No, sir; as far as I can remember, no, sir.

Q Were you still standing by the fire? A No, sir.

Q In what part of the back room is the fire? A First comes the cigar store, then the room with the pool table, and down a few steps like that is the back room.

Q How far is the fire away from the store? Is the cigar store as far as from you to me? A Farther.

Q How did you come to go from the fire to the front room?
A I took a cue out of the rack and started to fool with the balls at the first table.

Q How did you come to go to the front room? A Just like that; while Magnan was behind the counter.

Q There are two rooms there? A Three rooms, cigar store, another room with a pool table, and a large room with all the pool tables.

Q You were in the middle room then? A Yes, sir.

Q Magnan and this man were in the front room? A Yes, sir.

Q Did you go in the cigar store? A No, sir.

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Q And the first thing that attracted your attention was when you heard Magnan holler that the Kid was gone with the money? A I did not say Magnan.

Q Somebody? A No, sir; my first attention was called when somebody made the remark, "Come on, Kid, learn the combination and you can rob the boss some night."

Q And you were in the middle room? A Yes, sir.

Q And that remark was made in the front room? A Yes, sir.

Q Did he shout it? A Yes, sir.

BY THE COURT:

Q You all heard it? A Yes, sir.

Q Everybody heard it? A Yes, sir.

BY MR. NOTT:

Q Then how long was it after that remark that he raised this shout that the other man had gone with the money? A Well, a short while; I could not exactly tell what time it was.

Q What took place in that time you do not know? A No, sir.

Q Have you seen Magnan since this case? A I have seen him in the court building here.

Q Anywhere else? A Yes, sir; I have met him on the street.

Q What street? A On Nineth Avenue, one night.

Q Have any talk with him? A No talk; just exchanged a few words.

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- Q What were those words? A I asked him how the case was
going out.
- Q What did he say? A Getting along all right ; hadn't
come up yet.
- Q Any other talk about the case? A No, sir.
- Q Isn't it a fact that Curtis told you to tell him that Curtis
would give him ten dollars if he would drop out of the case,
and that you did tell him that? A I told him I had heard
so.
- Q Now who did you hear that from? A A man who is not
in court.
- Q What is his name? A Murphy.
- Q What is his first name? A I do not know.
- Q Where had you seen Murphy? A In Nineteenth Street.
- Q Whereabouts, in that same poolroom? A No, sir; outside
the railing.
- Q In that poolroom? A Not in the poolroom.
- Q Well in that premises? A Yes, sir.
- Q 140--144 West Nineteenth Street. How often have you
seen him? A How often have I seen Murphy?
- Q Yes. A I have seen him quite often; I know him personally.
- Q And yet you can't tell what his first name is? A Yes,
yes; he has other brothers.
- Q Do you know his other brothers? A I know two of them;

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one by sight and the other to speak to.

Q Where does Murphy live? A Murphy lives--I aint sure of the numbers--between Eighteenth and Nineteenth Street, on Seventh Avenue. I am not sure of the number; I do not know the number.

Q Did Murphy tell you to tell this to Magnan? A No, sir; he just told me that.

Q Isn't it a fact that he told you to go there and tell Magnan that? A No, sir.

Q How did you come to tell it to him? A Just because I seen him I told him.

Q Does Murphy know Magnan? A He might.

Q Could not Murphy have told him himself then? A Yes, sir.

Q What did you go and put in your car for then? A Because I heard it.

Q The day you saw him on the street did you tell him? A No, sir; in this building.

Q Just before the case was brought on for trial? A Yes.

Q And you say Murphy is not here? A No, sir.

Q How many times have you been down here? A The third time.

Q Which time was it that you told him? A The second.

Q What date was that, yesterday? A Yesterday morning.

Q How many times before that was it that Murphy told you this? A I believe it was Saturday.

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Q Now, how do you know how Murphy knew this? A No, sir.

Q He didn't tell you how he had heard it? A No, sir.

Q Have you ever been convicted? A No, sir; never been convicted.

Q Ever been tried? A No, sir.

Mr. Kiefer: I object to that; it is rotten.

The Court: Objection sustained.

Re - Direct Examination

BY MR. KIEFER:

Q How many men in charge of this store, if you know, McCarty?

A As far as I noticed there was but one man in charge.

Q That is Magnan? A Yes, sir.

Q That is all.

JAMES L. McDERMOTT, being first duly sworn
in behalf of the defense, testified as follows :

BY MR. KIEFER:

Q Mr. McDermott, what is your business? A My business is builder; I am interested in several other concerns besides builder.

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Q Where is your place of business? A 10 East Fourteenth Street.

Q Do you know the defendant at the bar, Mr. Kennedy, David Kennedy? A I do.

Q How long have you known him? A He has been in my employ very nearly eleven months; I think between eleven and twelve.

Cross-Examination

BY MR. NOTT:

Q Mr. McDermott, under what name have you known the defendant?

A Under Austen Phillips.

Q What? A Under Austen Phillips.

Q Is that the name he gave when he took employment with you? A That is the name.

Q Is that the first time you ever knew him? A That is the first time I have ever known him.

Q Never knew him before he was in Elmira? A I took him out of Elmira.

Q Had you known him before he went there? A I knew his relatives.

Q Was their name Phillips? A What is that.

Q Was his relatives' name Phillips? A I do not want to

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bring his relatives into this.

Mr. Kiefer: I object to that.

The Court: (To the witness) It don't make any difference whether you do or not.

Q I didn't ask what the names were, I asked whether they were Phillips? A Some are Phillips.

Q Were there any named Kennedy? A Not as I know of.

Q You heard him testify Kennedy was his right name?

The Court: No, he said Austen Phillips.

Mr. Nott: I beg pardon; that was right then.

BY THE COURT:

Q Mr. McDermott, when you say you took him out of Elmira you mean you applied for his bail or took him on parole?

A That was after he served his term up there. I think he did five years up there, and I assisted him after he came out.

Q Did you know he came out on parole? A Yes, I am acquainted with his relatives.

Q Do you know what he went to Elmira for? A I can't say that positively; I know it was a case of larceny; I did not go into detail on it.

Q Did you know that he went back for breaking parole? A Only what he told me.

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BY MR. KIEFER:

Q What were his duties? A He was my confidential clerk, stenographer and bookkeeper.

Q Did he have charge of moneys?

Mr. Nott: I object to that.

The Court: Objection sustained.

Q His duties were general office duties? A General office duties.

Q Very well, that is all.

Mr. Kiefer: That is the defendant's case, your honor, and I want to renew my motion.

Mr. Nott: I want to recall Mr. Xigues for a moment please.

IN REBUTTAL.

HENRY XIGUES (recalled in behalf of the People):

BY MR. NOTT:

Q How long has Magnan been in your employ? A About three or four months.

Q What had been his duties with you? A My cashier while I was away, and while I was there he came into the back part of the place and attended to it.

Q Have you ever left him in charge? A Yes, sir.

Q For how long for a time? A Two or three days sometime.

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Q Did you have a bank account? A Yes, sir.

Q Ever send him to the bank with money?

Mr. Kiefer: I object.

The Court: Objection sustained.

Q Now look at this revolver, People's Exhibit One. Have you ever seen that in your place? A One Saturday night.

Q Where did you see it? A In Curtis's hand.

Q Was that previous to this occasion? A Yes, sir.

Q How many days previous? A Three days I believe it was; three or four days.

Q Have you a revolver of your own in the place? A Yes, sir.

Q Is this it? A No, sir.

Q Was that revolver there on the day of this robbery? A Mine was locked up in a drawer in a room where I often lay down in the afternoon, a small room off there, entirely different.

Q It is not in the cigar store? A No, sir; it is in the middle, between, the middle--between the cigar store and the last part of the building.

Cross-Examination

BY MR. KIEFER:

Q How do you identify the revolver, Xigues? A Because it laid on the pool table.

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Q How did you identify the revolver, Xiques? A On Account of some rusty part of it.

Q Where is that rusty part? A Right near the round part, the rolling part.

Q Where do you mean? A Right around the part ~~of~~ the balls goes in it.

Q Rusty around there (indicating)? That is all right?

A No, down near the crigger.

Q Down near the trigger? A Yes.

Q How much rusty part did you see there? A I should think about three-quarters of an inch.

Q Did you ever accuse another man of having a revolver in your store on that Saturday night? A Yes, sir.

Q Who? A I do not know his name.

Q You do not know his name? A No, sir.

Q Then how many people have you accused? A Two.

Re - Direct Examination

BY MR. NOTT:

Q That other man you accused was fined ten dollars for carrying a revolver, wasn't he? A Yes.

Q That is all.

Mr. Keefer: That is unfair.

Mr. Nott: Why so? You are trying to make

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the jury believe he is making unjust accusations.

Re-Cross Examination

BY MR. KIEFER:

Q Isn't it a fact that it is a man named Kane you accused?

A Yes, sir.

Q And when he was arrested there was no revolver found on him? A This was Saturday night.

BY THE COURT:

Q Did you understand that question? Did you accuse any one of having that revolver? You didn't accuse him of having that particular revolver? A No, sir.

BY MR. KIEFER:

Q Did you accuse him of having a revolver? A Yes, sir.

Q And when he was arrested was there a revolver found on him?

A This was three nights after this.

Q And there was no revolver found on him? A Yes, sir.

Q And he was fined ten dollars? A Yes, sir.

Q You mean Kane? A Yes, sir.

Q What was done with the other man you were accusing? A I did not have any other man accused; he was just arrested with this man.

Q Who was arrested with this Kane? A The other man; there was three arrested that night.

Q And he was let go? A Yes, sir.

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OLIVER MAGNAN (recalled on behalf of the
People) :

D i r e c t E x a m i n a t i o n

BY MR. NOTT:

Q Is it true that you first asked Kennedy to take this money,
and that you would go halves with him? A No, sir.

Q Is it true that this revolver, People's Exhibit 1, was
lying on the counter, and that you gave it to Kennedy?
A No, sir.

BY THE COURT:

Q Or that you told him to take it? A No, sir; I have a
revolver home and I will bring it down if you want me.

Mr. Kiefer: I object to this, and ask that
it be stricken from the record.

The Court: Yes.

C r o s s E x a m i n a t i o n

BY MR. KIEFER:

Q Do you know Duces, Thirty-third and Thirty-fourth Street?
A Yes, sir.

Q Did you ever work there? A Yes, sir.

The Court: I wont allow you to go out
beyond the rebuttal.

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Mr. Kiefer: Very well. I would like, if your honor would allow me, to ask him one more question.

The Court: Then you must ask him as your own witness.

Mr. Kiefer: Very well, I will do that.

The Court: If you ask him questions that are not in surrebuttal, why you make him your own witness to that extent.

Q What were your duties then at this place, clerk? A Clerk.

Q Where did you stand? A Always in the cigar store, and out in the back too, running the pool parlor and the cigars.

Q Then you were not employed there as a lookout? A No, sir.

Re - Direct Examination

BY MR. NOTT:

Q Did you see this letter I show you (Handing witness letter)?

A Yes, sir.

Q Do you know who wrote it? A I do not know who wrote it; no, sir.

Q When did you receive it? A On February twenty-eighth, the same day that this case was postponed.

Q The day of this occurrence, February eighth, did you see this young fellow McCarty in the front room at the time

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this happened? A At the day it happened; yes, sir.

Q At the time it happened? A Yes, sir.

Q Where was he? A In the back.

Q Did you see him in the front room? A No, sir.

Q Have you had any talk with him since? A Yes, sir;
on Ninth Avenue.

Q About this case? A Yes, sir.

Q What did he say to you? A He said to me, "Are you
going to send him away?" I said, "I do not know". He
wanted to know if I was going to send him away, and not to
give him any information I told him I did not know.

Mr. Kiefer: I object to that.

A (Continuing:) After that he meets me again, and then he
wanted to know if I was going to send him away. He said
that people were willing to give me fifty dollars if I
would pull him. And they told me another man named
McDermott came in the store the night it happened and he
said he was a Central Office man, and he said, "Who is this
Kid Curtis?", and then he goes back and said, "I will find
out where he is", he said. I said, "You are a Central
office man?" He said, "Yes, sir." Then I asked him
about O'Shea, Jerome's man, and he told me he travels
with them, and then he went out.

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Q Well, you never did get any money, did you? A No, sir.

Q How much did you earn there at the poolroom? A Ten dollars a week.

BY A JUROR:

Q After the occurrence, the taking of this money, how soon thereafter did you notify anybody of it? A Twenty minutes or half an hour.

Q You went around to the police station? A No, sir; I sent a boy around.

Q Did you tell the people in the store you had been robbed?

A Yes, sir.

Q How soon did you do that? A No more than he got as far as the door. I said, "It is all off; he stopped me off with a canon and took my money off me." I mean with a gun.

Cross-Examination

BY MR. KIEFER:

Q There are lots of officers on Eighth Avenue? A I know.

Q You didn't look for one on Eighth Avenue, did you?

A No, sir.

BY A JUROR:

Q Did a policeman come in the store? A No, sir.

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BY THE COURT:

Q How far is the store from the station? A About a block and a half.

Mr. Nott: The People Rest.

Mr. Kiefer: If the Court please I renew my motion.

The Court: Denied.

After the summing up of both counsel for the defense and counsel for the prosecution, the Judge charged the jury as follows :

Gentlemen of the Jury: The defendant is charged, first, with the crime of robbery in the first degree. That consists in the taking by force, violence or by putting in fear from the person of another property of any value. The defendant is also charged with grand larceny in the first degree. That is taking from the person and immediate custody of another property of any value in the daytime.

Mr. Kiefer: If the Court pleases, the indictment that I have here charges petty lar-

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ceny.

The Court: This one charges on the endorsement robbery in the first degree, grand larceny in the first degree, assault in the second degree, and receiving.

Mr. Kiefer: This one charges simply robbery in the first degree and petty larceny.

Mr. Nott: That is a copy and not the original.

Mr. Kiefer: That is the one I had in mind.

The Court: This indictment is wrongly endorsed. It charges robbery in the first degree, and larceny without naming the degree, and also assault in the first degree. Those are the counts in the indictment. And also with criminally receiving stolen property.

Now, I have given you the definition of robbery in the first degree.

Larceny is the unlawful taking, or felonious taking, from another, property; of value exceeding twenty-five dollars, would make it larceny in the second degree; if over five hundred dollars, larceny in the first degree; if

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under twenty-five dollars, petty larceny.

Assault in the first degree is the assaulting of another with a loaded firearm or other weapon with intent to kill. So you will see that the intent to kill is the essential element of assault in the first degree. An assault-- if a person points a pistol at another, it is undoubtedly an assault. Whether the intent to kill or to inflict grievous bodily injury exists, it is for the jury to say; and if they find there was not an intent to kill, but an intent to inflict grievous bodily injury, whether with or without a weapon, and the assault was committed by this defendant unlawfully, then they would be justified in bringing in a verdict of assault in the second degree.

If they bring in a verdict of larceny, it must necessarily be petty larceny, inasmuch as no proof of the value of the property taken is given, and there was not such a taking from the person, if it was larceny, as would constitute larceny in the second degree.

Now, then, the defense is an extraordinary one; and the contentions laid down by the

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learned counsel for the defense are somewhat extraordinary too. He charges that there are but two witnesses in the case, and that the word of one is just as good as the word of another one, but that in this case the word of the accused is better than the word of the other, and that the word of an accused person is always better than the word of the accuser, for the simple reason that the law absolutely declares him innocent until he is proven guilty. It is true that the law has not made any such declaration, that the word of the accused is better than the word of the accuser because the law places the presumption of innocence upon him. Every man is presumed to be innocent, it says, whether he is accused or not. But in this case the accuser is the People of the State of New York; and counsel's proposition is that in weighing the character of the accused you must weigh it in comparison and in proportion to the character of the accuser. Well, the accuser here is the People of the State of New York.

Now, the one thing for you to determine is

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the truth of the facts testified to by the complaining witness, and how far he is corroborated by others, and of the facts as stated by the defendant. The complaining witness states that this man came and threatened him with a revolver held up to his face and commanded him to deliver his money or to open the drawer, and that he thereupon opened the drawer, and that the defendant then took the money. The defendant claims that he did take the money, but that he did it by collusion with or conspiracy with the complaining witness. He knew, of course, that the money belonged to the proprietor of the place; he knew he had no right to take it; and, his explanation of that is that he was drunk. As I say, drunkenness is no excuse for crime, unless the drunkenness is of such a character as to render the person absolutely and technically insane, that is to say, unless it is of such a character, or so marked, as to deprive him of all will power or of all reasoning power. It is for you to say whether that was his condition at the time this money was taken. We need not

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describe in detail how it was taken, or how the keys of this drawer were used, where the revolver lay, and many other things. But after he had taken the money, according to his own account, he walked out. The complaining witness, it is alleged by the defense, remained for some twenty minutes to notify the police. But in explanation of that he states that there was not one of all the ten or twelve people who were in that room whom he dared trust in charge of the place, which, from the testimony on both sides, I should think is true. And therefore he had to wait until he got an opportunity to send for a police officer. That is his explanation of that.

But the testimony is so fresh in your minds, and it has been carefully summed up on both sides, that it is only for you to determine whether the taking of that money was done by force and violence and by putting in fear, or whether it was taken by collusion and conspiracy with the person in charge of it. If you find there was force and violence by a putting in fear, then your verdict should be robbery in the

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first degree. If you find that it was taken by collusion with the complaining witness in the manner told by the defendant, then your verdict should be larceny in the second degree.

Mr. Nott: What?

The Court: Petty larceny, I mean.

And if you find that there was an assault made with a deadly weapon, loaded firearm, or a weapon likely to produce grievous bodily injury, you may find assault in the second degree. If you find there was an intent to produce grievous bodily injury, it is for you to say whether there was such an intent, and to determine from all the circumstances as best you may whether, in case this money had been refused, this defendant would have carried out his threat and inflicted grievous bodily injury. If you find that that was true, then your verdict should be assault in the second degree.

Again, there is a further count in the indictment, which is well for you to consider in connection with the case. That is the count of knowingly criminally receiving stolen goods,

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knowing the same to have been stolen. Now, then, if this theft was committed by the complaining witness and not by this defendant, then you could find the defendant guilty, if you believe that he received the money, of criminally or knowingly receiving stolen goods, knowing the same to have been stolen. That is, if the theft was accomplished by Magnan, and, of course, if accomplished under circumstances narrated by the defendant and by Magnan, then of course he necessarily knew that the goods were stolen. That fact he does not deny at any stage of the proceedings.

Mr. Kiefer: It is at that point, if the court please, I desire to state to the jury that on the statement of an accomplice they could not convict.

The Court: Without the corroboration?

Mr. Kiefer: Yes, sir.

The Court: It is for the jury to say whether the corroboration offered by the People, or the testimony is corroborative, whether it is sufficient to corroborate. And you have the other witnesses who were present at the time.

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You have the other witnesses. And even the witnesses for the People, one of them states that the complaining witness called out so that all of those in the room and the next room heard him-- "You go in and learn the combination, and then you can rob the boss." So two other witnesses testified as to ^{the fact} that, that immediately after the taking of the money, the complaining witness called attention to the fact that the money had been taken, and that the others came into the room. All of these are testimony offered in corroboration. Now the law will not permit a man to be convicted upon the testimony of an accomplice uncorroborated or unsupported by other testimony tending to connect him with the commission of the crime. Now if you find that Magnan was an accomplice, then that principle of law would come under consideration. If, however, you find he was not an accomplice, and had nothing to do with the taking, but that it was taken from him by force or violence or putting in fear, then, of course, you need not trouble yourselves with the lack of

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corroboration or with the supporting of corroboration.

The People are obliged to make out their case beyond a reasonable doubt. If they have failed to do so, the defendant is entitled to the benefit of a doubt, and to an acquittal. But please remember, gentlemen, that the words reasonable doubt mean precisely what they say, that is a doubt based upon a sufficient reason, such a doubt as would influence men of good judgment and sound sense in important affairs in their daily lives and control their action-- not a mere surmise or hypothesis or a suggestion of this or that, but a doubt arising on the case and on the evidence in the case.

The case is in your hands, gentlemen.

The Jury then retired.

After deliberation, the Jury returned a verdict of guilty of robbery in the first degree.

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