

The Court paid no further attention to this applause than to ask, "What is the matter with you over there?"

In failing to grant the mistrial requested, the Court erred. The motion, taken in connection with the admitted and proven facts, movant contends, clearly show that the defendant was not having a fair trial by reason of the great excitement of the crowd. The court room was in an exceedingly small building, on the ground floor, and was crowded during the whole of the trial and defendant contends that this prejudice and animosity of the crowd against him, as shown by the frequent applause, necessarily reached the jury box and prevented him from having a fair trial.

As permitted by the Court, in his order just aforesaid, we attach hereto in support of this motion for new trial the affidavits hereto attached, marked Exhibits J to AA, both inclusive, and said Exhibits are hereby made a part of this motion for new trial.

65. Because the defendant contends he did not have a fair and impartial trial, by an impartial jury, as provided by the Constitution and laws of this State, for the following reasons, to-wit:

(a) On August 6, 1913, during the trial, the defendant's counsel moved to rule out the testimony of the witness Conley tending to show acts of perversion and acts of immorality on the part of the defendant, wholly disconnected with and disassociated from this crime. The Court declined to rule out said testimony and immediately upon the statement of the Court that he would let such testimony remain in evidence before the jury there was instant, pronounced and continuous applause throughout the crowded court room where the trial was being had, by clapping of hands and by striking of feet upon the floor.

While the jury was not then in the same room where the trial was being had, they were in a room about 50 feet from where the judge was sitting and about 20 feet from portions of the crowd applauding, and so close that perhaps the jury could have heard the applauding.

(b) And again during the trial, Mr. Arnold, one of the counsel for the defendant, in the presence of the jury, objected to a question asked by the solicitor, and the following colloquy took place:

Mr. Arnold: I object to that, your Honor, that is entering the orders on that book merely; that is not the question he is asking now at all.

The Court: What is the question he is asking now?

(Referring to questions asked by the solicitor-general.)

Mr. Arnold: He is asking how long it took to do all this work connected with it. (Referring to work done by Frank the day of the murder.)

The Court: Well, he knows what he is asking him.

(Referring to the solicitor-general.)

Upon this suggestion of the Court that the solicitor knew what he was doing, the spectators in the court room applauded by striking their hands together and by the striking of feet upon the floor, creating quite a demon-