CASEDAY MUST HANG.

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a fixed opinion as to the merits of the case which it would require strong testimony to overthrow and which would prevent the parties starting on an equal race in the trial, but that if accepted as jurors they could lay aside such prejudice and try the case fairly and impartially. This court reversed the circuit court on this point with the statement that "as we remember the testimony given at the former trial by Mrs. Curtis, who heard the fatal shots fired that made her a widow, we do not believe any persons could listen to her recital of the facts without forming such an opinion as to render him biased as to the merits of the case. Nor could a person hear the witnesses or the jurors tell the story of the homicide, as it was unfolded in court, without forming such an opinion as to the guilt or innocence of the defendant as to render him prejudiced in the matter."

Intelligent men having any local interest in such an occurrence as a supposed murder will usualy form an opinion about the merits by reading newspaper accounts and hearing the average neighborhood discussion of the subject. The administration of justice would become impossible if such an opinion of itself disqualified a juror. This is the reason underlying section 123, L. O. L., supra. An opinion may be satisfactory to the man being examined as a juror, considering the fact that hitherto he has sustained no relation to the case different from any other citizen of the county. While he occupies that standpoint only, he may require testimony before changing his opinion. Under such circumstances his opinion may be in a sense fixed, because he has had no occasion to think otherwise. When a talesman having that attitude of mind is being examined the question is whether, upon assuming the particular relation of juror in the case as distinguished from his previous general relation as a member of the community, he will abandon the concomitants of the latter and submit himself to the conditions and obligations of the former. The doctrine of the statute is that the two relations are not necessarily incompatible but that to disqualify such a juror "the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially."

The examination of Allen, Cook and Howard reveals a mental state in them widely different from that of the jurors under consideration in the of State v. Miller, supra. There they had attended the trial and heard the testimony, had talked in detail with witnesses and jurors of a former trial and had in effect quite thoroughly tried and determined the issue, substantially traversing the same course to be then pursued in the new trial. The tentative opinions of the jurors here fall far short of the standard of actual bias established in that decision. In the last analysis, jury service is voluntary, a duty owing from the people to the government of the people. The process of the court may bring before it any citizen as a juror, but if he is unwilling to serve, he can with impunity easily display such a state of mind as to disqualify him by any fair standard. He is answerable only to his conscience for his dereliction for no one can look into his mind, as into his pocket, and ascertain its contents. The law has left to the court the estimation of a juror's fitness. The presiding judge sees and hears the juror and so can far more wisely determine his qualifications than the appellate court can from a case made upon paper, and unless a strong case of abuse of discretion by the trial court is made to appear, its decision on such a point cannot be disturbed. If a juror is honest enough fully and fairly to state to the court the sources of his information about the case and the conditional or even satisfactory opinion he entertains from that viewpoint, remembering that usually the only testimony available on examination of a juror is his own, we cannot say that the court erred in accepting the juror's pledge to decide the issue according to the law and the evidence as given him upon the trial, notwithstanding his previous mental attitude.

The defendant questions the right of the court to compel him to exercise two peremptory challenges to the state's one until he exhausted the 12 allowed him by section 1523, L. O. L. The defense relies upon Sec. 125, supra, to support his contention that beginning with the defendant, peremptory challenges should be used one by one alternately between the parties. That section was adopted substantially from the laws of the state of Washington by the legislative assembly of 1909, and reads as follows: "The full number of jurors having been called shall thereupon be examined as to their qualifications, first by the defendant and then by the plaintiff, and having been passed for cause, peremptory challenges shall be conducted as follows, to-wit: The defendant may challenge one, and then the plaintiff may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, and such refusal on the part of said party to exercise his challenge in proper turn shall conclude him as to the jurors once accepted by him, and if his right of peremptory challenge be not exhausted, his further challenges shall be confined, in his proper turn, to such additional jurors as may be called. The court may, for good cause, permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted, but nothing herein shall be construed to increase the number of peremptory challenges allowed by other provisions of law." If it is correct to assume, as counsel for defendant apparently contend, that this section applies to criminal trials, the action of the court may be defended on the principle that having adopted the statute of another state, we adopt with it the judicial construction given to the statute by the courts of that state. Crawford v. Roberts, 8 Or. 324; McIntyre v. Kamm, 12 Or. 253; Trabant v. Runnell, 14 Or. 17; Everdin v. McGinn, 23 Or. 15. In State v. Eddon, 8 Wash. 292, 305, the supreme court of that state construed their statute from which section 126, L. O. L., was taken, to mean that the peremptory challenges should be used first by one party and then by the other in proportion to the number allotted to each, working out as a result that where the defendant was allowed 12 and the state six, the former should use two to the state's one of such challenges. Similar statutes have received like construction in Idaho and Montana. State v. Browne, 4 Idaho, 723; State v. Sloan, 22 Mont. 293.

In our judgment, however, it is not necessary to rely on this construction of the law. The code of civil procedure has its origin in the act of the legislative assembly of October 11, 1862, while the code of criminal procedure is embodied in the act of October 19, 1864, and amendments thereto. Deady's Code, pp. 139, 441. They are independent acts having no relation to each other except as provided by references from the latter to the former. In the formation of the jury the criminal code declares that "in criminal actions, the trial jury is formed in the manner prescribed in Chapter II of Title II. of the code of civil procedure, except as otherwise expressly provided in this chapter." L. O. L. Sec. 1520. The criminal code in the same chapter excludes the civil challenge for implied bias (Sec. 122, supra) and substitutes one of its own. (L. O. L. Sec. 1521) besides dispensing with the equality in the number of peremptory challenges designated in Sec. 125, supra, and allowing the defendant in criminal actions double the number apportioned to the state. In these respects the criminal code itself provides otherwise than the civil code. Section 1520, supra, must be construed to be a reference to the civil code as it was at the date of the enactment of the criminal code. It is as if Chapter II. of Title II. of the act of October 11, 1862, except Sections 122 and 125, were reprinted in the criminal code as part of the latter. It is a rule of statutory construction in this state that where the provisions of one statute are incorporated into another by mere reference a subsequent change in the former will not disturb the terms of the latter. Tillamook City v. Tillamook county, 107 Pac. 482; Sika v. C. & N. W. Ry. Co., 21 Wis. 375; People ex rel v. Webster, 28 N. Y. Supp. 646; Shull v. Barton, 58 Neb. 741; Schwenke v. Union Depot, etc., 7 Colo. 512; Ex parte Crow Dog, 109 U. S. 556; Wick v. Ft. Plain Ry. Co., 50 N. Y. Supp. 479. We conclude that the legislative assembly in amending section 126 in 1909 must have had in mind the autonomy of the criminal code as a separate act; that it was otherwise provided therein about the peremptory challenges; and that on account of the disparity between the number allowed to each party in criminal cases it would be impracticable to have them alternate one by one. Thus the criminal code was left intact. Strictly speaking, the court could have required all challenges to be taken by both parties as to each juror before another was drawn from the box(but they were indulged by the court in making their peremptory challenges to particular jurors after the others were examined. The defendant's rights were not abused. He was not deprived of any of the means by which the law allows him to exclude jurors from the panel. The trial jury was legally and properly selected.

It is impossible within the limits of an ordinary opinion to notice in detail each one of the 14 assignments of error noted in the bill of exceptions. The principal contention of the defendant is that the court erred in admitting testimony about the actions and private conferences between the defendants Shields, Green and Caseday in Monument and Hamilton the evening before the killing of Snyder and of the declarations and threats of Shields and his conduct in trying to get different parties to help hang Snyder. This theory of objection runs throughout the case and is the foundation of most of the exceptions to the charge of the court. It is rare that a criminal conspiracy can be proven by direct and positive testimony. Most generally the prosecution is compelled to rely on circumstantial evidence. It is within the discretion of the court not only by virtue of our statute but also in pursuance of numerous cases to regulate the order of proof and it may well happen that the delineation of the res gestae will disclose acts and sayings of co-conspirators in advance of any showing of the connection of a particular defendant with that conspiracy, all without error. A careful perusal of the testimony which is reported in full with the bill of exceptions convinces us that at least prima facie case of participation in the conspiracy is shown as against Caseday.

After the formation of a conspiracy to commit crime, any act or declaration of one of the conspirators which occurs before the actual commission of the contemplated crime, and which tends to prove the guilt of that conspirator is equally admissible in evidence against any one of his confederates in a separate trial of the latter. If not connected with the deeds of those who actually gave Snyder his lethal wounds the defendant Caseday did nothing criminal in itself. Taking the prisoner to the scene of his death was innocent enough when considered alone. It therefore became necessary to the conviction of the defendant to show that this ostensibly blameless act was by him made a part of a criminal scheme in which he and his co-defendants, or some of them, participated with the design to slay Snyder. Hence arose the requirement of proving a conspiracy for that purpose. Further, if the state would impart criminality to this apparently innocent act of the defendant Caseday it was important to prove not only that he thus acted his part in the tragedy but also that the others of the cast, or some of them, performed theirs and to that end anything that tended to show the guilt of any of them was admissible against him provided it happened during the existence of the conspiracy. In the presence and hearing of his brother Earl, armed with a rifle, having in his possession the cartridges returned to him by the defendant saying: "For God's sake, ain't that enough." Emmett Shields declared: "I bet you that man never gets to Canyon." This was surely admissible against the declarant and in conjunction with the other evidence tending to show guilty confederation between him and Caseday it was also competent as against the latter. This is but an illustration of other like circumstances disclosed by the testimony.

It is contended that some of these declarations of Caseday's co-defendants were made before there was any showing of participation on his part in the alleged conspiracy. This cannot affect the case if in fact Caseday did participate in the conspiracy and aided in bringing about the fatal consummation. If a conspiracy is in fact formed and progress is made towards its consummation, when a defendant actively participates in such conspiracy he adopts the previous acts and declarations of his fellow conspirators. In a sense he finds the conspiracy a going concern, adds his ability to its criminal capital and so becomes as much a part of the enterprise as if he were one of its founders. Hence the declarations of a fellow conspirator, although made before defendant joins the lawless association, are admissible in the trial of any one of them. Smith v. State, 21 Tex. App. 96; State v. Crab, 121 Mo. 554; Sands v. Commonwealth, 21 Gratt. 871; Keely v. People, 55 N. Y. 575; Commonwealth v. Waterman, 122 Mass. 43; Krens v. State, 75 Neb. 294; Barrego v. Territory, 46 Pac. 349; Collins v. State, 138 Ala. 57; Trevino v. State, 41 S. W. 609; Wilkerson v. State, 57 S. W. 956; Mercer v. State, 74 Am. St. Rep. 135; State v. Dilly, 87 Pac. 133; State v. Darling, 199 Mo. 168.

The court refused the following instruction requested by defendant:

"Where a conviction for a criminal offense is sought upon circumstantial evidence alone, the state must show beyond a reasonable doubt that the alleged facts and circumstances are true and they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused. If all the facts and circumstances relied on by the state to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, such facts and circumstances are not sufficient to sustain a conviction." This instruction, taken as a whole, is erroneous. The term "absolutely" implies a mathematical demonstration which is a degree of proof impossible in any matter involving the actions of human beings. The law does not contemplate such a degree of certainty but requires only moral certainty to the exclusion of reasonable doubt of the guilt of the defendant. State v. Glass, 5 Or. 73. The latter part of the instruction directing in substance a verdict for the defendant if any reasonable theory consistent with his innocence could be derived from the testimony was otherwise given in the court.

The court also gave this instruction: "Notwithstanding the admissions and confessions of a defendant may be given against him on his trial for crime, such admissions or confessions are no alone sufficient to warrant a conviction without some other proof that the crime has been committed." The defendant contends that this part of the charge is erroneous because it does not state the degree of proof necessary to supplement the original admission or confession. The language is practically that of the code (L. O. L. Sec. 1537) and in that respect differs from the statute of the state of California from which citations are made in support of this assignment of error. The degree of proof, or, in other words, the effect of the evidence is for the jury and under our statute the court cannot weigh the testimony for the jury independent of the admissions or confessions.

The defendant further complains of the following instruction:

"The testimony of some witnesses has been offered by the state to show certain oral statements made by the defendant now on trial, after the death of Oliver Snyder. In criminal law a statement voluntarily made by a person of a fact only, which is as consistent with his innocence as with his guilt, and is made exculpatory, or in explanation of any suspicious or incriminating circumstances, is an admission; but when the statement carries with it a suggestion of guilt, either as to the character of his intent, or the quality of his act, and the statement is made inculpatory, such statement is in the nature of a confession." Taken in connection with the whole of the court's charge, the learned judge was simply distinguishing between confessions and admissions with a view of explaining the latter to the jury. There is abundant evidence in the record to authorize an instruction about admissions, for the witnesses detailed several things stated by the defendant after the killing of Snyder and the distinction made by the court was quite proper within the meaning of State v. Heidenreich, 29 Or. 381, and State v. Porter, 32 Or. 135. Some questions about cross examination of witnesses are raised in defendant's brief, but none of them are meritorious or show any erroneous exercise of the court's authority over those features of the trial as defined by our code. L. O. L. Sec. 856.

At the close of the charge counsel for defendant asked that the jury be instructed as to the crime of manslaughter. Sections 1897, 1898, 1899 and 1900 of our code separately define manslaughter as the same may be committed under different circumstances. The request was general in its terms and did not indicate what particular kind of manslaughter the defendant wished to be explained to the jury. The only indication we find in the brief of the appellant on that point is the quotation of Sec. 1898, L. O. L., viz.: "If any person shall, in the commission of an unlawful act, or a lawful act without due caution or circumspection, involuntarily kill another, such person shall be deemed guilty of manslaughter." We are at a loss to perceive how this section applies to the case in hand unless it be claimed that in proceeding towards Canyon City with his prisoner alone after being warned of a plot to lynch Snyder the defendant performed a lawful act without due care or circumspection on account of which the death of the prisoner occurred.

In our judgment this section does not apply even to such a hypothesis. If the death of Snyder was the direct result of the negligent act of Caseday without the voluntary intervention of any other human agency or, in other words, if his negligence operating as a proximate cause in conjunction only with natural causes resulted in Snyder losing his life, the section quoted would be applicable, otherwise not. There is no theory of the evidence supporting or giving color to such a situation. If we consider the conduct of the defendant as only negligent still it was not the proximate agency which accomplished the death of Snyder. The voluntary act of other persons in shooting him was the immediate cause of his demise so that the actions of the defendant will not operate to increase his mere heedlessness to manslaughter or to reduce to that grade a more serious homicide.

"The rule is well setletd, that on a trial of a person for the crime of murder, if there is no evidence tending to reduce the homicide to manslaughter, it is not incumbent upon the court to charge with reference to the lesser crime." State v. Magers, 35 Or. 520; State v. Megorden, 49 Or. 259. If the defendant honestly thought the alleged threats of his co-defendants were drunken bluff and so started alone with his prisoner, although against the judgment of cooler heads, and the tragedy ensued without his consent, he ought to have been acquitted. Again, if from mere bravado he went on his way intending to overcome all attempts against his charge and at the critical moment his courage failed and he weakly gave up Snyder to his death, still he did not violate the law. But if, on the other hand, having knowledge of and being a party to the alleged conspiracy to kill Snyder, the defendant agreed or consented to take him to the scene of the killing, ostensibly in the performance of a duty enjoined upon an officer of the law, but in real truth as a part the defendant was to act in the tragedy, he was **guilty of a degree of homicide greater than manslaughter.**

In our opinion upon the whole case there is no half way ground for the defendant to occupy between innocence and murder. The trial court went as far as proper in his favor in advising the jury about the degrees of homicide. There being no theory of the evidence upon which to predicate manslaughter, the court was right in refusing an instruction upon that point. To accede to defendant's request in that respect would have been turning the jury loose to speculate outside of the evidence and, as the slang goes, to "return a verdict on general principles." It would have exposed the defendant to a danger not at all justified by the evidence or the law applicable to the case. The alternative of the defendant's innocence or his guilt of the only species of homicide which could be derived from any reasonable theory arising from the testimony was fairly submitted to a jury of his peers and that jury has decided the dilemma against him.

The judgment is affirmed.

Call For Bids.

Notice is hereby given that the undersigned will receive bids up to 5 o'clock p. m. on Monday, May 1st, 1911, for the improvement of 13th street, from the North line of Ferry street to the South line of Marion street, with concrete pavement, according to the plans and specifications adopted for such improvement.

The council reserves the right to reject any and all bids and waive any and all irregularities in the manner of submitting bids in the interest of the city.

CHAS. F. ELGIN,
City Recorder.

4-19-3t

Notice to Property Owners.

Property owners on Ferry street, North Liberty street, South 12th street, North 13th street, and North Summer street, are hereby notified that they must make their water and gas main connection immediately.

Done by order of the Common Council, April 17th, 1911.

CHAS. F. ELGIN,
City Recorder.

4-19-3t