OREGON SUPREME COURT DECISIONS

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Hagestrom, et al Sweeney, et al, Multnomah County.

Decided January 2, 1912.

Pete Hagestrom, Martin Swanson Ole Johnson, Oscar Midbo, Rasmus Midbo, Isaac Midbo, Pete Christiansen, and Robert Thompson, partners, doing business under the firm name and style of Pete Hagestrom & Company, respondents, v. J. W. Sweeney S. M. Blumauer and Isaac Blumauer, partners doing business as railroad builders and contractors, under the firm name and style of the J. W. Sweeney Construction Company, appellants. Appeal from Multnomah county. The Hon. C. U. Gantenbein, judge. Argued and submitted Dec. 13, 1911. Alexander Bernstein (Bernstein & Cohen, on brief) for appellants. M. J. MacMahon, for respondents. Eakin, C. J. Modified.

This is an action to recover compensation for work done upon a contract and damages suffered by a breach of the contract.

Plaintiffs, on July 28, 1909, contracted with defendants to build a railroad grade between certain stations in Washington county, Oregon, and to complete the work by June 1, 1910, for which defendants agreed to pay plaintiffs at certain rates, according to the estimates of the egineer, for removing rock and earth and for doing other work. According to the estimates furnished by the engineer in charge, the work done, as alleged by plaintiffs, amounted to $6,173.40, against which they admit that defendants are entitled to credit for board $1154.50; hospital fees, $50; supplies, $389.05; cash upon the contract $1736.45; tools, etc., $1531.64, less a credit of $34.45. The total, as stated, is $4661.46, leaving a balance due of $1511.94, no part of which has been paid, although demanded.

For further cause of action, plaintiffs allege that it is provided in the contract that "the order to stop and abandon said work shall be made in writing, signed by the contractor, and shall be delivered to the station men * * * 30 days prior to the date when such order shall take effect * * *. When the work shall cease at the expiration of said period of 30 days from the giving of such notice the work shall be deemed to have been finally completed, and payment shall be made therefor in the manner hereinbefore provided in paragraph 7, and this contract shall be regarded as terminated and at an end." That on the 28th day of February, defendants orally notified plaintiffs to cease work; took possession of plaintiffs' tools and implements; and closed the boarding house, so that plaintiffs were compelled to, and did, cease work, and left the camp; that if they had been permitted to proceed with the work until June 1st, they could have accomplished much work; that by virtue of the cancellation of the contract, plaintiffs were deprived of present and future work, to their great damage in the sum of $2,000.

The answer denies every allegation of the complaint and affirmatively alleges the contract briefly as set out in the complaint; that plaintiffs performed work thereunder but that on Feb. 28, 1910, without cause, they abandoned the work, and that defendants have paid and advanced to plaintiffs on the contract the sum of $5,161.18. They also set up a counter-claim for damages.

The reply denies the new matter of the answer, except in certain particulars. Upon the trial before a jury a verdict was rendered for plaintiffs in the sum of $1184.05, and the sum of $1000 damages. Upon a motion for a new trial, and as a condition of its denial, $500 of the damages included in the verdict was, by plaintiffs, remitted, and judgment was rendered accordingly. Both parties appeal.

Eakin, C. J. Defendants assign as error certain rulings of the court in the admission of evidence, which rulings we deem were not prejudicial and they need not be further considered. They also assign as error the instruction given by the court to the jury as follows: "If you find that the plaintiffs were improperly discharged and not permitted to continue the work under the terms of the contract, then you may assess such damages as would reasonably compensate them for the breach not to exceed $2,000," which was duly excepted to, upon the ground that there was not any evidence before the jury upon which to predicate a verdict for damages. There was no proof of specific damages arising out of the breach, the allegation of damages being that they were deprived of present and future work to their great damage in the sum of $2000. Plaintiffs testified that they have been at work during most of the time since being discharged from the job; that they have been continuously at work, which is an admission that no such damages resulted.

Plaintiffs attempt to prove profits that would have resulted to them if allowed to complete the contract, but no proof was offered of facts from which profits could be estimated, such as the amount of rock or earth yet to be removed, or the probable expense of its removal. On the contrary, opinion evidence was offered without proof of any data upon which to base it, and, therefore, was not competent evidence of any danger. Upon breach of a contract, where loss of profit is the measure of damages, relied upon, such probable profits must be established by proof of data from which the extent of the profit, if any, may be computed; 4 Ency. Ev. 5, 14, 21; 8 A. & E. E. L. 621-2, and note; Douglass v. Railroad Company, 51 W. Va. 523; Ramsek, et al v. Holmes Elec. Prot. Co., 85 Wis. 174; Lentz et al v. Choteau, 42 Pa. St. 435; Durkee v. Mott, 8 Barb. 423. The only evidence offered to prove loss of profits is disclosed by the questions to witnesses as to their opinion as to what the profits would have been and the offer was properly denied. This conclusion renders it unnecessary to consider further plaintiffs' appeal, which related only to the damages remitted. The verdict was in favor of plaintiffs in the sum of $1184.05 and the further sum of $1000 damages, which as stated were reduced to $500. As the damages are found in a separate item of the verdict, the amount erroneously found is fixed and we may affirm the judgment on condition that plaintiffs remit from the judgment the amount of damages, namely: $500, following Gardner v. Kinney, —Or.— 117 Pac. 271.

Therefore, it is ordered that if the plaintiffs shall, within 30 days, remit the sum of $500 from the judgment of the lower court, the remainder of the judgment will be affirmed; otherwise, it will be reversed and remanded for a new trial; defendants to recover costs in this court.

Hawkins and Hawkins v. John Doe, et al, Lane County.

Decided January 2, 1912.

Delford S. Hawkins and Margaret C. Hawkins, appellants, v. John Doe, true name unknown, and who is nephew and heir at law of A. J. Black, deceased, all unknown heirs of A. J. Black, deceased, and L. E. Ward, administrator of the estate of A. J. Black, deceased, respondents. Appeal from Lane county. The Hon. L. T. Harris, judge. Argued and submitted Dec. 19, 1911. C. A. Wintermeier, for appellants. L. Bilyeu, C. F. Skipworth and John M. Pipes, for respondents. McBride, J. Affirmed.

This is a suit to compel defendants to specifically perform an alleged oral contract to convey land.

The complaint alleges, in substance, that, on September 25, 1907, plaintiffs entered into an oral contract with A. J. Black, defendants' intestate, whereby they agreed to furnish him board and clothing, and allow him to live with them as long as he should live; to care for him in his last sickness and to stay by him until his death; that he was 75 years of age, had no relation, and that it was necessary for him to have some one to care for him; that, as a consideration of such services, Black agreed to execute a deed to plaintiffs which was to provide that they take and hold exclusive possession of the premises, described in the complaint, and to have the proceeds therefrom as long as Black should live, and that at his death the whole interest should pass to plaintiffs, Black reserving a life-interest in the premises for his own protection; that the premises were to be conveyed subject to the debts of Black; that plaintiffs fully performed their part of the agreement; that Black died on the 6th day of November, 1907; that he failed to execute the deed for the reason that he was stricken with paralysis and thereafter, up to the time of his death, his condition was such that he was unable to do so; that L. E. Ward was appointed administrator of the estate and in February, 1909, the county court made an order directing him to sell the property for the payment of debts, which amounted to about $600; that plaintiffs had been informed by deceased that he had a nephew living California, whose true name is unknown and he is therefore designated by the name of "John Doe, nephew and heir at law of A. J. Black."

Plaintiffs pray for a decree, requiring that the covenant be specifically performed; that they be declared the owners of the premises and that, if the property shall have been sold by the administrator before final decree, they be declared to be the owners of the residue of the money realized from such sale, after the debts and expenses of administration shall have been paid.

There was service by publication against John Doe, who has not appeared, and personal service upon the administrator, who answered denying the alleged agreement, and alleging that the premises had been sold at the administrator's sale and conveyed by a sufficient deed to the purchaser. The sale and conveyance are admitted in the reply.

Upon the trial the court held that after the sale, there being no specific performance possible as to the land, plaintiffs' demand became a mere money demand, not cognizable in a court of equity, and upon that ground refused to find upon the principal fact—the alleged contract—and dismissed the suit. Plaintiffs appeal.

McBride, J. On behalf of defendants, it is claimed that a suit for specific performance is purely in personam, and that the court acquired no jurisdiction by service of summons by publication. We cannot assent to this view of the law. Being to a great extent a federal question, the decisions of the federal courts furnish the safest guide in cases of this character. In Boswell's Lessee v. Otis, 9 How. 336, 348, Mr. Justice McLean says: "It is immaterial whether the proceeding against the property may be by attachment or bill in chancery. It must be, substantially, a proceeding in rem. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem, in ordinary cases; but where such a procedure is authorized by statute, or publication, without personal service of process, it is, substantially, of that character."

To the same effect are Arndt v. Griggs, 134 U. S. 316; Adams v. Heckscher, 83 Fed. 281; Single v. Scott, 55 Fed. 553. For decisions of the state courts to the same effect see Seculovich v. Morton, 101 Cal. 673; Robinson v. Kind, 23 Nev. 330; Corson v. Shoemaker, 55 Minn. 386; Burrall v. Eames 5 Wis. 269. In the latter case the court says: "A suit for specific performance, like that of foreclosure, is of a two-fold character, partly in personam and party in rem. The court may enforce the contract, either by operating upon the person to compel a conveyance, or may pass the title of the land by decree."

It must be conceded that there must be statutory authority for such a proceeding and such is the case in this state. By Sec. 399 L. O. L. service of summons by publication is authorized "when the subject of the suit is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein." Sec. 414 provides that "a decree requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party does not comply therewith, be deemed and taken to be equivalent thereto."

These sections bring this case within the reasoning of the decisions heretofore cited. A contract to purchase land would be a hazardous proceeding, if the purchaser were required to search the civilized world and sue each heir in the place of his residence, in case of the vendor's death, before performance, and we cannot concede that the law requires such an absurd procedure.

Conceding, without deciding, that the administrator's sale was an equitable conversion of the property, we are not satisfied that plaintiffs have made a case sufficient to justify a decree under the pleadings.

Where the contract rests wholly in parol and the alleged promiser is dead, courts should demand clear and satisfactory proof of the terms of the agreement, and its strict performance by the premises. Such cases furnish abundant opportunity for the perpetration of those frauds which it was the object of the statute to prevent, by requiring the contract to be reduced to writing.

The evidence tends to show that deceased needed a home where he could have some one to care for him in his declining years and that he had applied to several persons to look after him, saying that in return for such services he would give them the property at his death. One witness (Wiebke) testifies in substance: "He said he had a small tract of land and didn't have any house on it, and he wanted to know if I would not take the place and let him come and stay with us and live with us. If he would give us the place at his death, provided if we got along all right * * * So he furnished the lumber and built the house on his place, and when he came and stayed with us something over a month I asked him one day if he thought we could get along all right, and he said he was perfectly satisfied, and he said any time that we had time we would go to town and make out the papers. At his death I was to have the place, providing I took care of him in his last illness." The 'making out of the papers' was neglected and finally this witness, by consent of Black, sold out his rights to one Stevens, who succeeded him in caring for deceased. Stevens testifies, in substance, that Black said he was willing to deal with him upon the same terms as he had promised Wiebke. "I was to get the place and I was to take care of Mr. Black and at his death the place was to be mine. * * * He said if we got sick or anything, * * * he would send to town and have his lawyer come out and make out the papers. This witness stayed about a year and three months and Black, although frequently requested, neglected to make out any writings, and the witness finally gave up the contract and moved away. He gives this reason for so doing: "I have got a place down below there on the river just the same as Mr Wiebke, and I got tired running backwards and forwards and considered that the best proposition was to go down on the other place, and I didn't have the papers for the other, and I didn't want to run any risk at all, so I thought I would take the other proposition, which I knew was a safe one."

In relation to the Hawkins contract, William Forrester testifies that Black said to him "He had a home at last * * * that he was going to give Mr. Hawkins the papers just as soon as he got settled down. * * * As soon as they got things straightened around he would make out the papers and they should have the place as long as he lived—that is, they could have the place after he was dead, as long as they took care of him while he was living."

Later Black told Wiebke that he had the same agreement with Hawkins that he had had previously with him.

Williams, who is a son of Mrs. Hawkins, testified that Black applied to him to take care of him, and said that if he would do so he would "make out the papers" that day, but would keep a life lease; that he declined but recommended, to Black, Mr. and Mrs. Hawkins; and that Black afterwards told him that he was perfectly satisfied with them.

The proposal, as Hawkins states it, is as follows: Black said, "If you will take care of me properly during my life and see that I am properly buried, I shall turn that property over to you. It shall be yours. But, before we do that I would like to know that I would be treated right or not, and I would like to stop with you and see if we get along all right or not, for a couple of weeks. If we get along all right, we will make the bargain and agreement. If we don't I will pay you what you are out, and that will end it."

That he came the next Sunday and stayed all night, and the next day said it was all right and that he was willing and ready to make a bargain with us to take care of him. This was on September 30, 1907. After staying with plaintiffs for two weeks, they all moved to Black's place and he said to plaintiffs, "Now, this is yours. All I want is just to be taken care of." Hawkins further testified: "He said he would make out writings that would be satisfactory to both parties, turning the property over to me; that he would want a life interest in it; that he would want to be sure that he wouldn't be beat out of a living while he did live. He simply wanted a life interest in the property and when he was dead it was mine. 'It is yours,' he says, meaning me and my wife."

Mrs. Hawkins' testimony is substantially the same as that of her husband. She testifies that when they moved out to Black's place he said: "This is yours. Everything here is yours. You don't need to consult me about nothing. All I want is care as long as I live and I feel that I will get it. * * * We took perfect possession of the place."

In answer to a question, on cross examination, Mr. Hawkins testified: "He said when we got out there and were settled, we would come back to town and make out the writings." Q. "He wanted to protect himself?" A. "Yes, he said he would make out the deed."

The foregoing is practically the substance of the testimony as to the agreement, except that Mrs. Hawkins testifies that upon his deathbed she asked him if he was satisfied with his treatment, and he answered "Yes." It will be noticed that the last answer above quoted is the only instance in which the word "deed" is used and which the word "deed" is used and witness as to the effect of the conversation than an attempt to repeat Black's exact language. In the answer just preceding it, in narrating the same conversation, he gives it thus: "He said * * * we would come back to town and make out the writings," and it is a significant fact that in all his conversations, as related in the testimony, he never used the word "deed." The witnesses all agree that he said "make out the writings"; "make out the papers"; "make out the agreement." We think the testimony does not indicate that he ever intended to make any conveyance which would tend to deprive him of the title or possession of his property during his life time. His intention was evidently to protect himself and hold the whip hand, so as to secure proper treatment and if, when he felt death approaching, he thought he had received this, to make a will, bequeathing his property to plaintiffs. This is shown by the testimony of Wiebke, with whom he made an identical agreement, and by the testimony of Stevens, who succeeded Wiebke, the latter witness saying, "I was to get the place and I was to take care of Mr. Black and at his death the place was to be mine." Q. "Was this to be in writing?" A. "Well he said if he got sick or anything * * * he would send to town and have his lawyer come out and make out the papers." It is evident that the arrangement was to be tentative, until he could see the very end. The plaintiffs testify that after his two weeks' residence with them in Eugene, he expressed himself perfectly satisfied and ready to make the agreement. But if this were true why did he not then, when he was near a lawyer and notary, make the conveyance? Why delay until they had moved out to his farm and thus necessitate a useless trip to Eugene? He may have been satisfied with the treatment he had received, up to that time, but it remained for him yet to be satisfied that it would continue to the time of his death.

In the tragedy of King Lear, the great dramatist portrays the foolishness of an old man who in his lifetime strips himself of his possessions and depends on the gratitude of his children for support in his declining years. The reports are full of such tragedies, wherein undutiful children, finding themselves possessed of a parent's means of support, forget the obligation of filial love and gratitude and either drive the aged donor from them or make his life miserable with them. To the discredit of human nature such instances are so frequent as the reverse, and if this be so with children of the donor, how much more likely is it to be the case where the transaction is with strangers.

Black was wise enough to wish to protect himself and we do not think the evidence shows that he ever promised or intended to make a deed, but that he probably did intend, if at the close of his life the plaintiffs had not relaxed their efforts to make him comfortable, to remember them by a will and perhaps to leave them all his property; but this is not the case which the plaintiffs have presented by their pleadings.

Where specific performance of an oral contract to convey land is sought to be enforced, on the ground of performance by the vendee, the evidence of the terms of the contract should be clear and satisfactory: 36 Cyc. 689. At common law, and in many of the states, by statute plaintiffs would not have been permitted, after the death of the alleged promiser, to testify as to the terms of the contract, and, while the rule has been relaxed in this state, there are many reasons why the testimony of interested parties, under such circumstances, should be closely scrutinized. It is so easy for self-interest to sway even the honest mind, so that it will give a different meaning to the language used, or construe rather than repeat actual conversations, that disinterested testimony is highly desirable, nay, almost indispensable, in cases of this kind. Our statute requires the judge, presiding at jury trials, to instruct them that evidence of the oral admission of a party should be viewed with caution (Sec. 868, L. O. L.) and if this is the rule as to admissions of parties living and able to explain their language and meaning, with how much greater force should it apply when the evidence is directed to the alleged declarations of one whose lips are sealed in death, and to establish a contract which the law requires to be in writing.

The evidence of plaintiffs' possession is not clear or satisfactory. It is true that Hawkins says he went into possession and his wife says that they took "perfect possession of the premises," but the evidence indicates that their possession was that of tenants, until a final agreement should be consummated, rather than that of persons holding as purchasers. They admit that Black said that he wanted to retain a life estate for his own protection, but this would be a poor protection if plaintiffs had the possession and enjoyment. The reasonable inference which we draw from the statements of these interested witnesses is, that Black intended to keep the property in his own hands so that he would be in a position to expel plaintiffs from it, in case they did not care for him in a satisfactory manner; that he expected them to use and keep the products of the farm without paying for them, except in the way of services to himself; that he intended to part with his right of possession seems almost incredible.

To conclude, we think plaintiffs have not made a showing sufficient to justify us in decreeing a specific performance of this alleged contract. Specific performance can never be demanded as an absolute right, but rests in the sound discretion of the court to be granted or denied as the interests of justice may seem to require: 36 Cyc. 548 and cases there cited.

In the case at bar we think it in the interest of justice to leave the plaintiffs to pursue their remedy at law, which is certainly adequate to compensate them for any services they may have rendered or damages they may have suffered in the premises.

The decree of the circuit court is affirmed.

State of Oregon v. Setsor, Baker County.

Decided December 12, 1911.

State of Oregon, respondent, v. George Setsor, appellant. Appeal from the circuit court for Baker county. The Honorable William Smith, judge. Argued and submitted in Pendleton, November 3, 1911. C. C. McCulloch, (W. S. Levens, Dist. Attorney, on brief) for respondent. Wm. H. Packwood, Jr., (John L. Rand, A. A. Smith, and Wm. H. Packwood on brief) for appellant. Bean, J. Affirmed.

The defendant was indicted for the crime of murder in the first degree for the killing of one John Thomas. He plead not guilty, and upon trial by a jury, was convicted and sentenced to a term of from one to 15 years in the penitentiary, with a fine of $1,000, for manslaughter, from which judgment he appeals.

The jury returned a verdict in the following form: "We, the jury, duly empaneled to try the above entitled cause find the defendant George Setsor, guilty of involuntary manslaughter.

(Signed) R. R. Palmer, Foreman.

Counsel for defendant moved the court to set aside the verdict and discharge defendant, for the reason that by the return of the verdict and the discharge of the jury thereafter, the defendant had been acquitted of he crime of murder in the first degree, murder in the second degree, and manslaughtr; and that the jury was not authorized to return a verdict of guilty of involuntary manslaughter, or any other verdict except not guilty.

The defendant assigns as error the over-ruling of the motion and the judgment of sentence. He does not ask for a new trial, and as we understand the brief and oral argument of counsel for defendant, the only question raised for the determination of this court is, whether or not the judgment appealed from, is void, and whether the defendant should be discharged, for the reason that the verdict of the jury was not in legal form under the statute of this state and did not authorize the trial court to pass judgment.

Our statute making provisions for trials in criminal actions as to the verdict is, in effect, as follows: "The jury may ether find a general verdict, or where they are in doubt as to the legal effect of the facts proven, they may find a special verdict." Sec. 1546, L. O. L.

"A general verdict upon a plea of not guilty, is either 'guilty' or 'not guilty'; which imports a conviction or acquittal of the crime charged in the indictment;" * * * * * Sec. 1547, L. O. L.

"A special verdict is one by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact, as established by the evidence;" * * * * * Sec. 1548, L. O. L.

"The special verdict must be reduced to writing by the jury, or in their presence, under the direction of the court, and agreed to by them, before they are discharged. It need not be in any particular form, but is sufficient if it present intelligibly the facts found by the jury." Sec. 1549, L. O. L.

"In all cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime." Sec. 1552, L. O. L.

"When there is a verdict found, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider their verdict; but if after such reconsideration they find the same verdict, it must be received." Sec. 1554, L. O. L.

The section of our statute which is especially applicable in determining whether or not a verdict is in legal form and should be received, is as follows: "If the jury find a verdict which is neither a general nor a special verdict, as defined in Secs. 1547 and 1548, the court may, with proper instructions as to the law, direct them to reconsider it; and the verdict cannot be received until it be given in some (form) from which it can be clearly understood what is the intent of the jury, whether to render a general verdict or to find the facts specially, and to leave the judgment to the court." Sec. 1555, L. O. L.

We think it is clear from the verdict rendered in this case that the jury intended to, and did render a general verdict; therefore the only contention is in regard to the description of the crime for which defendant was sentenced, is manslaughter. If the adjective "involuntary", contained in the verdict, can be given a signification indicatng an excuse or justification, or any degree of crime less than manslaughter, or any crime not included in the indictment, then it would seem that the position taken by the defendant's counsel is correct. On the other hand, if the word "involuntary" does not have any such signification, then the conclusion must be to the contrary.

Sections 1897 to 1902, inclusive, L. O. L., define the crime of manslaughter; Sec. 1897, L. O. L. as follows: "If any person shall, without malice express or implied, and without deliberation, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, such person shall be deemed guilty of manslaughter." And Sec. 1898, L. O. L., in these words: "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."

Section 1905, L. O. L. makes the only provision for the punishment of such crime, to-wit: "Every person convicted of manslaughter shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by a fine not exceeding $5,000."

Mr. Bishop says: "The language of the verdict, being that of 'lay people,' need not follow the strict rules of pleading, or be otherwise technical. Whatever conveys the idea to the common understanding will suffice. And all fair intendments will be made to support it." * * * * 1 Bishop's New Criminal Procedure, Sec.

Verdicts should have a reasonable intendment and receive a reasonable construction, and should not be avoided unless from necessity, originating in doubt as to their import, from immateriality of the issue found, or their manifest tendency to work injustice. (2 ed.) Am. & Eng. Enc. of Law, 29, p. 1092.

"The test of the sufficiency of a verdict is this: Is it so certain that the court can give judgment upon it?" (2 Ed.) Am. & Eng. Enc. of Law, 29, p. 1025, citing Burton v. Bondies, 2 Tex. 204.

"The verdict is good if its meaning can be reasonably ascertained, and it can be legally carried into effect; otherwise, not." 1 Bishop's New Criminal Procedure, Sec. 642.

We find in the notes to the case of People v. Sullivan, (N. Y.) 63 L. R. A. 353, on page 404, that it has been held that it is competent and proper for the jury in a prosecution for murder, to negative the proposition that the defendant intended to kill the decedent; and a verdict that he did not design or intend the death of the decedent, but he unlawfully killed him while engaged in the commission of some felony, is proper, and constitutes a verdict of murder in the third degree, under Wis. Rev. Stat. Chap. 164, Secs. 2, citing State v. Hammond. And a conviction for involuntary manslaughter in the commission of an unlawful act may be had under an indictment charging voluntary manslaughter; citing Isham v. State, 38 Ala. 213.

Where a verdict was of manslaughter in the second degree, no such degree of manslaughter being specified by the statute, a conviction for manslaughter was sustained, the words relating to the degree being rejected as surplusage. 1 McClain on Criminal Law, Sec. 392.

The verdict should be regarded from the standpoint of the jury's intention when this can be ascertained, if consistent with legal principles, such effect should be given to their findings as will most nearly conform to their intent, and should be construed and applied reasonably in the light of all the proceedings. (2 ed.) Am. & Eng. Enc. of Law, 29, p. 1023.

What then is the meaning of this verdict of the jury, finding the defendant guilty of involuntary manslaughter? Mr. Wharton defines the crime as follows: "Involuntary manslaughter is where one doing an unlawful act, not felonious or tending to great bodily harm, or doing a lawful act without proper caution or requisite skill, undesignedly kills another. According to the old writers it is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed." * * * * * Wharton on Homicide, Sec. 6.

In Words and Phrases, Vol. 4, p. 3762, we find "'Involuntary' as applied to manslaughter, means that the killing was committed by accident, or without intention to take life;' citing United States v. Outerbridge (U. S.) 27 Fed. Cas. 390, 391.

We find here several definitions of involuntary manslaughter taken from various opinions and different statutes. Many, if not all of which are identical with the crime mentioned in Secs. 1898 and 1902, L. O. L.

The trial court instructed the jury as to manslaughter, according to the provisions of Secs. 1897 and 1902, L. O. L.; and in addition thereto, in part as follows: "A homicide is manslaughter, even though committed in doing a n act lawful in itself, if the defendant was guilty of gross or culpable negligence, and such negligence was the cause of the death." * * * * * *

Mr. Justic Moore in discussing a kindred question, the description of a crime in an indictment, in the case of State v. Ayers, 49 Or. 67, makes this apt illustration in regard to defining a crime: "If our statute, * * * * * * * had delineated the commission of an offense and prescribed a punishment as follows: 'If any person shall purposely, and of deliberate and premeditated malice, kill another, such person, upon conviction thereof, shall be punished with death,' the elements of the common law could undoubtedly be examined to ascertain the name anciently given to the classification of such crime;" citing State v. DeWolfe, 67 Neb. 321 (93 N. W. 746). Applying this rule and illustration to the case at bar, it would seem proper for the jury in their verdict, to designate a crime by a well known name as defined by the text-writer, courts and statutes; and if such crime is included in the indictment as well as in the statute, then it is clear what the jury intended, and a judgment upon such verdict would not be void.

In Spriggs v. Commonwealth, (Ky.) 68 S. W. 1087, it is shown that the statute of that state subdivided the common law offense of manslaughter, by carving out of it the statutory crime of voluntary manslaughter, for which a different penalty was prescribed than for involuntary manslaughter, the latter being dealt with as a common-law offense. The jury, in rendering its verdict, swung the pendulum the other way from that in the case now under consideration, and found defendant guilty of manslaughter without designating whether voluntary or involuntary, as they should have done under the law in that state. In that case, as in this, counsel for defendant asked for his discharge and did not ask for a new trial. The court, while clearly of the opinion that there was prejudicial error in the instructions, said:

"Technical rules must exist, and must be applied in cases which come literally and logically within their scope. What we decide is that they will not be applied to cases not within their purview, and that it is not logical to construe a verdict that a man has been guilty of two offenses in which the court instructed the jury erroneously, either as to constituent elements of the offense, or as to the punishment to be inflicted. In such cases this court has granted a reversal. It has awarded the defendant a new trial, but it has not discharged him from custody as acquit. * * * * * * The judgment in this case was clearly within the jurisdiction of the court upon the offense charged in the indictment. Nor is it necessary for us to consider whether the verdict may be helped or cured by intendment. We think the instruction laws erroneous, and, if a reversal had been sought, it would have been granted. But the defendant has carefully precluded himself from that relief, in the effort to obtain total immunity," and over-ruled the motion to discharge.

Counsel for defendant cites the case of State v. Stephanus, 53 Or. 135, 141, where the jury submitted a verdict for what was assumed to be another offense, which had no legal status, differing from the case at bar, which clearly describes a crime included in the indictment as well as in the statute. Our statute, it will be seen, defines both voluntary and involuntary manslaughter. The one is no lower degree of crime than the other. They are designated under the one name of manslaughter, and the statute provides the same penalty therefor. While it is unnecessary for the jury to specify in their verdict the particular kind of manslaughter defendant is guilty of, we do not think that such specification renders the verdict uncertain, or the judgment void. The word "involun-

(Continued on Page 8.)