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CPLR 4111: Jury May Impeach Its Own Verdict in Respect to Misconduct Outside Jury Room

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that no appeal lies from an order made on a ruling given during the course of trial,¹²⁴ it proceeded to discuss the case as if the merits were before it.

Plaintiff sued for specific performance of a contract for the sale of real property and for damages. At the close of plaintiff's main case, subject to the calling of an additional witness, defendant moved to dismiss. Plaintiff then indicated that he would pursue only the cause for damages. The trial court did not dismiss the first cause and defendant proceeded with his case. During examination of his first witness defendant moved for a jury trial of the second cause. The court ruled that this was not a timely motion within the meaning of 4103.¹²⁵

Anopol provides one of the first illustrations of what will be deemed a waiver under 4103.

CPLR 4111: Jury may impeach its own verdict in respect to misconduct outside jury room.

At common law it was settled that jurors could not by affidavit impeach their own verdict, even if misconduct outside of the jury room was involved.¹²⁶ A recent case, *Bainton v. The Board of Education of the City of New York*,¹²⁷ illustrates that the common-law rule has been eroded. In *Bainton*, a personal injury action, two jurors made separate and unauthorized visits to the scene of the accident. The court held that this highly improper conduct was so inherently prejudicial as to require a new trial.

The court relied heavily upon the Court of Appeal's decision in *People v. DeLucia*,¹²⁸ which was decided in light of the United States Supreme Court's decision in *Parker v. Gladden*.¹²⁹ In *DeLucia* the Court of Appeals stressed that the purpose of the common-law rule was to prevent juror harassment but reasoned that the sixth amendment right to a trial by a fair and impartial jury must be counterbalanced against the older rationale. The result of the misconduct in *DeLucia*, (i.e., several jurors visited the scene of the crime and re-enacted it), was that these jurors became, in reality, unsworn witnesses against the defendants in violation of the sixth amendment.

Since the court in the instant case deemed the visit in and of itself to be inherently prejudicial, it is arguable that several older

¹²⁴ See 10 CARMODY-WAIT 2d, CYCLOPEDIA OF NEW YORK PRACTICE §§ 70:37, 70:38.

¹²⁵ Actually, it appeared unlikely that defendant had such right anyway for the major thrust of the case was in equity. See 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶4101.37 (1965).

¹²⁶ *People v. Sprague*, 217 N.Y. 373, 111 N.E. 1077 (1916).

¹²⁷ 57 Misc. 2d 140, 292 N.Y.S.2d 229 (App. T. 2d Dep't 1968).

¹²⁸ 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967).

¹²⁹ 385 U.S. 363 (1966).

cases which took into account the lack of any subsequent prejudice are overruled.¹³⁰

ARTICLE 52 — ENFORCEMENT OF MONEY JUDGMENTS

CPLR 5203: Prior unrecorded mortgage has priority over docketed judgment.

CPLR 5203 allows a judgment creditor to establish a lien on the judgment debtor's real property by docketing the judgment in the county of the property's location. A question may then arise as to whether the docketed judgment has priority over other interests in the debtor's real property, for example, a prior unrecorded mortgage.

In *Suffolk County Federal Savings & Loan Ass'n v. Geiger*,¹³¹ defendant, judgment creditor, asserted the superiority of its lien as a defense against a foreclosing mortgagee. The mortgage in question had been given after judgment had been rendered in defendant's favor but before it was docketed. However, the docketing preceded the recording of the mortgage. In deciding for the mortgagee the court reasoned that a judgment has only such lien effect as is given it by statute, for at common law judgments were not liens upon real estate.¹³² That plaintiff recorded subsequent to defendant's docketing was of no moment since the rationale behind the recording act is to protect those who part with value, *i.e.*, subsequent purchasers and mortgagees, not judgment creditors.¹³³ Thus, while the judgment did not become a lien on the property until it was docketed, the mortgage became a lien on the day it was made "as between the parties and against all others

¹³⁰ *Davis v. Lorenzo's, Inc.*, 258 App. Div. 933, 16 N.Y.S.2d 624 (4th Dep't 1939) (juror made outside investigation that was deemed harmless); *O'Connor v. Ames Transfer Co.*, 187 N.Y.S. 111 (Sup. Ct. Kings County 1931), *aff'd*, 200 App. Div. 845, 191 N.Y.S. 941 (2d Dep't 1932); *Haight v. City of Elmira*, 42 App. Div. 391, 59 N.Y.S. 193 (3d Dep't 1899) (jurors visited scene of accident after snow and ice had melted, unlike conditions at time of accident).

¹³¹ 57 Misc. 2d 184, 291 N.Y.S.2d 982 (Sup. Ct. Suffolk County 1968).

¹³² *See H.R. & C. Co. v. Smith*, 242 N.Y. 267, 269, 151 N.E. 448, 449 (1926); *Atlas Refining Co. v. Smith*, 52 App. Div. 109, 64 N.Y.S. 1044 (4th Dep't 1900).

¹³³ *Savings & Loan Ass'n v. Berberich*, 24 App. Div. 2d 187, 264 N.Y.S.2d 989 (3d Dep't 1965); *Blum v. Krampner*, 28 N.Y.S.2d 62 (Sup. Ct. Suffolk County 1940), *aff'd*, 261 App. Div. 989, 27 N.Y.S.2d 1000 (2d Dep't 1941). In R.P.L. § 290 "[t]he term 'purchaser' includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate." R.P.L. § 291 states that "[e]very such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquires by exchange. . . ."