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Supreme Court Decisions

Dicta Editorial Board

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PERSONAL INJURIES — NEGLIGENCE — EVIDENCE — INTEREST ON JUDGMENT—*American Insurance Company, et al. v. Naylor*—No. 14348, No. 14349—*Decided January 30, 1939*—*District Court of Boulder County*—*Hon. Claude C. Coffin, Judge*—*Judgments amended and affirmed.*

HELD: 1. "Assuming as an abstract proposition of law that the contention of defendants that they were entitled, under authority of Denver City Tramway Co. v. Gustafson, 21 Colo. App. 478. 121 Pac. 1015, Pawnee Co. v. Powell; 76 Colo. 1, 227 Pac. 836, and other cases cited, to have the jury instructed that if the testimony introduced by plaintiff disclosed contributory negligence on the part of himself or his agent, that defendant was relieved from showing contributory negligence by his evidence, we think the failure so to instruct was not error in this case."

2. Evidence examined and found sufficient to sustain verdict that defendant, R, was acting within scope of his authority as agent for co-defendant, the insurance company, at time of accident.

3. Evidence examined and found sufficient to sustain verdict that accident was proximate cause of death of plaintiff's wife.

4. Interest on a judgment for personal injuries, whether or not resulting in death, may be recovered from date of filing of complaint.

5. The title to an act as follows: "An act providing for interest on damages for personal injuries," is sufficient to cover actions for damages resulting from both fatal or nonfatal injuries.

Opinion by Mr. Justice Young. EN BANC.

HABEAS CORPUS—CRIMINAL LAW—SPEEDY TRIAL—*In re: Application of Anthony Russo. Russo v. Guthner, etc.*—No. 14513—*Decided March 13, 1939*—*Petition for Writ of Habeas Corpus. Writ denied.*

HELD: 1. Where it appears that a criminal information was filed against petitioner on January 21, 1937, that for 60 days police made diligent search for accused, that they took into their custody and held his car for over a year, that petitioner was arrested May 20, 1938, that on June 4, 1938, he filed motion to dismiss the information on the ground that he had not been accorded a speedy trial as required by section 16, article II, Colorado Constitution, and that motion was heard and denied December 24, 1938, it is more apparent that the delay was in apprehending petitioner than in giving him a speedy trial.

2. The facts in this case do not bring it within section 485, chapter 48, C. S. A. 1935, which provides that, "if any person shall be *com-*

mitted for any criminal * * * act, and not admitted to bail, and shall not be tried on or before the expiration of the second term of the court having jurisdiction of the offense, the prisoner shall be set at liberty * * *."

Opinion by Mr. Justice Bock. EN BANC.

CONTRACTS WITH STATE—PURCHASING AGENT—BIDS AND AWARDS —NOTICE—TAXPAYER AS PLAINTIFF—PLEADING—*John H. McRoberts v. Ammons, et al.*—No. 14523—*Decided March 13, 1939—District Court of the City and County of Denver—Hon George F. Dunklee, Judge—Reversed.*

FACTS: A taxpayer's suit seeking to enjoin various state officials from accepting the delivery of, or paying for, certain trucks, snow plows and other equipment which the complaint charges the defendants have contracted to purchase for the state highway department, contrary to the provisions of the administrative code of 1933, chapter 3, 1935 C. S. A., pertaining to the purchasing of equipment for state departments. The trial court refused to grant the injunction. No allegation of fraud or collusion appeared in the complaint.

HELD: 1. Section 33, chapter 3, 1935 C. S. A., although decreeing no precise method of advertising or notification for bids on equipment to be purchased for the state, clearly imports that the purchasing agent shall receive competitive bids under standard specifications prior to the awarding of orders or contracts for the purchase of state department supplies, materials and equipment.

2. Where the only contacts with prospective sellers of such machinery, or equipment is by the purchasing agent personally over the telephone, or under his direction by representatives of the state highway department, there has been no compliance with the law.

3. The discretion given to the state purchasing agent in awarding the orders does not allow him to dispense with the receiving of bids as required by statute.

4. "The mere calling for prices by telephone or personal contact on trucks and equipment of predetermined make and brand, exclusively from dealers selling such makes and brands and the issuance of purchase orders to these dealers on the prices quoted, * * * does not even approximate the statutory requirement for competitive bids and award to the lowest responsible bidder."

5. Contracts made contrary to the provisions of the statute concerning bids and awards are invalid.

6. The defense theory that the plaintiff was without right or capacity to sue, because he had no litigious right or interest, since it was not established that his burden as a taxpayer would be increased appreciably by the contract, even if it was unauthorized, might be avail-

able in some situations; but it is not applicable to this case where the illegality of which complaint is made was ministerial and administrative in its nature and no question of interference by the courts in the exercise of the political or executive discretion of state officials is involved.

7. Where the answer to the complaint denies the allegations of a particular paragraph in the complaint, and goes on to state that "on the contrary," the head of the state highway department did call for competitive bids, and that prior to the purchase, he and the state purchasing agent, did ascertain from divers and sundry dealers, their best prices for the equipment, and that in every instance the lowest responsible bidder was awarded the contract, such was not new matter, but merely a reiterated denial of the allegations in the complaint.

8. The trial court erred in ruling that it was new matter and therefore admitted as true because the plaintiff filed no replication. Since, under the trial court's ruling no evidence was introduced by the defendant on this point, the injunction will not be granted, but the case reversed and remanded.

Opinion by Mr. Justice Knous. Mr. Justice Bakke dissents. EN BANC.

CRIMINAL LAW—MURDER—VERDICT—IMPEACHMENT OF VERDICT BY AFFIDAVIT OF JUROR—APPEAL AND ERROR—*Wharton v. People*—No. 14511—*Decided May 8, 1939—District Court of El Paso County—Hon. John M. Meikle, Judge—Remanded with Directions.* EN BANC.

HELD. 1. It is the general rule that a verdict may not be impeached by the affidavit of a member of the jury.

2. But there may be circumstances where it would be impossible to refuse such affidavits.

3. Where it appears that in a murder trial eleven jurors were for the death penalty and the twelfth was for life imprisonment only, and after many hours of deliberations the single juror acquiesced, and shortly after the verdict was received and the jury discharged, voluntarily went to attorneys for the defendant and made affidavit of the coercion and force used upon him to make him change his mind, the trial court erred in sustaining the district attorney's objection to the reception and consideration of the affidavit without inquiry into the facts.

4. The trial court is to determine if the facts set out in the affidavit are true. If they are, the fundamental rights of the defendant have been violated since the law of the land requires 12 jurors, not eleven, to fix the penalty.

5. It is not within the province of the appellate court to pass upon questions not acted upon from which appeal is taken. The lower court is therefore to set aside the judgment and sentence and proceed to a determination of the truth of the affidavit.

Opinion by Mr. Justice Bock. Mr. Justice Bouck dissents.

THIS PAGE TO BE CUT OUT AND PASTED OPPOSITE PAGE 35 OF FEBRUARY, 1939, ISSUE

INDEX TO ARTICLE ENTITLED:

"CURATIVE STATUTES OF COLORADO RESPECTING TITLES TO REAL ESTATE" IN FEBRUARY AND MARCH, 1939, ISSUES OF DICTA

Note—In connection with subjects "Liens—Extinguishment of," on page 71, and "Limitations—Lien Barred when Indebtedness Is Barred," on page 73, see Birkby v. Wilson, 92 Colo. 281.

STATUTES RELATING TO TITLE TO REAL ESTATE PASSED BY 1939 SESSION OF COLORADO LEGISLATURE

H. B. No. 841—Relating to joint tenancies in real estate and amending Sec. 4, Chap. 40, 1935 C. S. A. so as to permit a joint tenancy in real estate to be created by deed from the owner to himself and another. This is not retroactive.

H. B. No. 1082—Relating to tax deeds to county and permitting several parcels owned by same person or persons to be included in one application for tax deed and in one tax deed to county, although sold separately.

H. B. No. 200—Relating to issuance of tax deeds to county and to leasing and sale of real estate conveyed to county by tax deed.

S. B. No. 265—Relating to the application of statutes of limitations to persons under legal disability.

S. B. No. 401—Concerning acknowledgments to deeds and other instruments relating to or affecting title to real property; this act re-enacts Sec. 1, Chap. 123, 1937 Session Laws, adding thereto the language that was through mistake omitted from the 1937 act. This is the statute referred to on page 81 of March, 1939, issue of DICTA.

S. B. No. 402—Concerning foreclosure of mortgages, deeds of trust and other liens where owner of the property has died or has become a mental incompetent or where the indebtedness secured constitutes a claim against the estate of a decedent or against a mental incompetent and amending Secs. 65, 66, 67 and 68, Chap. 40 and Sec. 208, Chap. 176 and repealing Secs. 209 and 210, Chap. 176, 1935 C. S. A. This is the statute referred to on page 48 of February, 1939, issue of DICTA.

S. B. No. 404—Authorizing recording of certified copies of papers and orders in bankruptcy proceedings, in order to come under the provisions of Sec. 21 (g) of the Chandler Act (which is the Federal Bankruptcy Act of June 22, 1938).

S. B. No. 582—Relating to joint tenancies in real estate and providing that no will or other testamentary disposition of one of the owners in joint tenancy of real estate shall destroy or affect the joint tenancy. The purpose of this act was to relieve the situation caused by language in the opinion in the case of Estate of Liden, 103 Colo. 58, 65 that a will (which speaks as of the time of death which is later than the instrument creating a joint tenancy) which is inconsistent with joint tenancy and survivorship will control over the instrument creating the joint tenancy.

S. B. No. 403—Revising the entire Chapter XXXVI of the Code of Civil Procedure relating to the perpetuation of testimony.

Robert McCreary was recently elected vice-president of the Young Democrats organization of Larimer County.

Dale E. Shannon of Fort Collins is the newly-appointed Conciliation Commissioner in Bankruptcy for the counties of Larimer, Grand and Jackson.

David Miller of Greeley became a father on March 31. It was a boy, named Walker David Miller.