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# Colorado Supreme Court Decisions

Dicta Editorial Board

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(EDITORS NOTE.—It is intended in each issue of the DICTA to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of.)

APPEAL AND ERROR—DIVORCE.—No. 12,180.—*Taylor vs. Taylor.—Decided December 24, 1928.*

*Facts.*—Defendant in error won a divorce in the lower Court, and plaintiff in error seeks to have this decision reviewed, but defendant in error moved to dismiss the writ because the notice in such cases required by Section 5605 C.L. 1921, was filed prior to the final decree and not within five days after the decree.

*Held.*—It is jurisdictional that the notice be filed as required by statute. This has not been done here and the Supreme Court cannot review the case.

*Writ of Error Dismissed.*

CHATTEL MORTGAGE—TAKING POSSESSION — AFFIDAVIT OF TRADE NAME.—No. 12,198.—*Rocky Mountain Seed Company vs. McArthur.—Decided November 26, 1928.*

*Facts.*—McArthur held a mortgage, recorded in Weld County, on an automobile, of which the maturity was extended to July 1, 1927. On Dec. 5, 1927, the Seed Company's execution was levied on the car in Adams County, and the constable took it into possession, and thereafter, on January 7, 1928, sold it under execution. In February, 1928, McArthur made formal demand for the car, and thereafter started this replevin action under his trade name; he had not filed the affidavit required by Sec. 2457, C.L. 1921.

*Held.*—When the constable first took the car, McArthur became entitled to possession without making any demand. When the mortgage was made the car was in Weld County, and constituted constructive notice to the Seed Company. Non-compliance by McArthur with the trade name statute was not pleaded by the Seed Company, and the point could not be raised otherwise.

*Judgment Affirmed.*

DECREE OF ADOPTION—PROVISION AGAINST DISINHERITANCE —JURISDICTION OF COUNTY COURT.—No. 12,124.—*In the Matter of Purported Will of Schmidt.—Decided December 3, 1928.*

*Facts.*—In 1908 the deceased adopted Dillingham by decree of the Denver County Court, which stated that deceased promised not to disinherit Dillingham. This was one of the conditions of the decree of adoption, and thereafter the adoptive father died, leaving a will which attempted to leave all of his property to Schmidt, Defendant in Error. Dillingham is the sole heir at law, and contends that she is entitled to the entire estate.

*Held.*—Dillingham is entitled to all the property left by deceased; the agreement not to disinherit, as set forth in the decree of the County Court, is valid; and Dillingham's filial obligations to deceased, her natural parents' relinquishment of their rights, and the change in her circumstances constituted sufficient consideration. The promise not to disinherit was a finding of fact which the County Court had jurisdiction to make. Furthermore, Schmidt is not in a position to contest the validity of the decree, because it is not subject to collateral attack. Dillingham, however, has the right to contest the will by caveat.

*Judgment Reversed.*

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EMINENT DOMAIN—JOINT ASSIGNMENTS OF ERROR. — No. 11,888.—*Town of Palisade vs. Orchard Mesa Irrigation District.—Decided December 24, 1928.*

*Facts.* — Defendant brought this action to condemn a right-of-way through the baseball park owned by the Town, and through a farm owned by Yager. Negotiations for purchase of the tract needed by the District failed and an *ex parte* order was entered giving it possession. The Town and Yager joined in this writ of error.

*Held.*—The assignments of error alleged, particularly the one relating to the right of the District to take land of a municipal corporation, are not common to all the plaintiffs in error and therefore cannot be considered as to any of them.

The entering of the order of possession *ex parte* does not contravene the Constitution of the United States.

*Judgment Affirmed.*

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EQUITY—RESULTING TRUST — ILLEGAL AGREEMENT. — No. 12,018.—*Genth vs. Gardner.—Decided December 17, 1928.*

*Facts.*—Gardner brought this suit against Genth to enforce specific performance of an agreement under which Genth was to acquire a homestead to certain lands in her own name, but for the joint use of herself and Gardner. Genth acquired the title, using some of Gardner's money for the purpose, but refused to convey any interest to him.

*Held.*—The Homestead Act (U.S.C.A. Title 43, Section 162) provides that an applicant for a homestead shall make an affidavit that he is taking title to the land for himself and not for any other person. The agreement alleged by Gardner contravenes this statute. The doctrine of resulting trusts does not apply and equity will not assist either party.

*Judgment Reversed.*

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FRATERNAL ORDERS—SIMILARITY OF NAMES—INJUNCTION. —No. 11,875. — *Most Worshipful Prince Hall Grand Lodge, Free and Accepted Masons of Colorado and Jurisdiction vs. Most Worshipful Hiram Grand Lodge, Free and Accepted Ancient York Masons of Colorado and Jurisdiction, National Compact Prince Hall Origin.—Decided December 10, 1928.*

*Facts.*—Plaintiff in error, plaintiff below, filed its articles of incorporation July 14, 1923; defendant in error filed its articles January 26, 1926. Both parties have functioned as negro lodges. Plaintiff claims (1) That defendant is not entitled to the use of the name adopted because of its similarity to that of plaintiff; and (2) That defendant is not entitled to use Masonic emblems or insignia.

*Held.*—(1) Plaintiff has the superior right to its name and may exclude others from using the same or similar names. Defendant's name infringes on plaintiff's rights and plaintiff is entitled to an injunction. (2) Plaintiff also has priority in

the use of the insignia and emblems in dispute and has the right to exclude defendant from them.

*Judgment Reversed.*

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GASOLINE TAX—GENERAL TAXES—PRIORITY.—No. 12,059.—*State of Colorado vs. City of Denver.—Decided December 24, 1928.*

*Facts.*—The State recovered judgment against the Shield Oil Company for $2952.00, and receiver was appointed and the Company's assets impounded and sold for $1923.00. The City claimed a lien of $426.00 for general personal property taxes and asserts that they are a lien prior to the gasoline tax.

*Held.*—The gasoline tax takes priority because S. L. 1923 Chapter 153, makes this tax a first and prior lien, while the general tax is by Section 7375 C.L. 1921, only a perpetual lien.

*Judgment Reversed.*

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HIGH SCHOOL DISTRICTS—STATUTORY CONSTRUCTION.—No. 12,215.—*Hotchkiss vs. Montrose County High School District.—Decided December 24, 1928.*

*Facts.*—Hotchkiss, a resident of the Montrose County High School District, brought this action to recover $7.35 paid as tuition to the Ouray County High School, where she attended as a pupil under S.L. 1927, chapter 156. This statute provides that when the high school of a district is inaccessible to a resident of the district, such resident may attend another high school and recover a sum not greater than the tuition paid to the District containing the school attended. The defendant in error has attacked the validity of the statute.

*Held.*—The statute is void because it contravenes Section 2 of Article 9 of the Colorado Constitution which provides that school districts of convenient size shall be organized and that the directors shall have control of instruction in the public schools in their respective districts.

*Judgment Affirmed.*

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MECHANIC'S LIEN—COMPLETION OF WORK.—No. 12,209.—*Roofing Company vs. Fisher.—Decided Nov. 26, 1928.*

*Facts.*—Fisher employed Soderberg to repair a building.

Soderberg employed the Roofing Company to repair the roof. The contract between Fisher and Soderberg was not filed for record, as required by Secs. 6444 and 6450 C.L. 1921, so the Company's status is that of principal contractor. Its lien statement was filed August 10, 1927. The strips of roofing were laid during April and May, 1927. Then the workmen were taken off the job and returned July 5, 1927, to "mop the seams", which had not been done before.

*Held.*—There was evidence that "mopping the seams" was part of the original job, and there was nothing to contradict this. Therefore, the trial court's finding of facts was erroneous. The work was not completed until July 5, and the lien statement was filed in time.

*Judgment Reversed.*

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MISREPRESENTATION—EXCHANGE OF PROPERTY.—No. 11,978. —*Cahill vs. Readon.—Decided December 3, 1928.*

*Facts.*—Cahill owned a house in Denver, in which she lived and which brought her $90.00 a month income in cash. Readon owned a building in Lusk, Wyoming, which she represented to have a rental value of $100.00 a month. It was vacant at the time, but Readon told Cahill that she had several prospective tenants and named two of them. This statement was false, but Cahill was ignorant of this fact and traded her Denver house for the Lusk property. Thereafter it was found that the Lusk property could not be rented for any price at all, and Cahill started suit to cancel the exchange.

*Held.*—It is immaterial whether Readon misrepresented the sale value of the property in Lusk. Under the facts in this case, the misrepresentation as to rental value is sufficient to set aside the exchange.

*Judgment Reversed.*

## NOTICE

This being the season of battles with income tax reports, Dicta believes it may be of interest to members of this Association to learn that we have been advised by the office of the Commissioner of Internal Revenue that no deduction can be made for contributions to the Association such as those made in connection with the Judicial Salaries Amendment, passed last November.

The Association is a business league under Section 103(7) of the Revenue Act of 1928 and Section 231(7) of the prior Acts. Contributions to such are not deductable in the manner and to the extent provided in Section 23(n) of the Revenue Act of 1928 and similar provisions of prior Acts, and the ruling published as I.T. 1882, C.B. II-2, page 201, cited as a precedent for the conclusion that such contributions are deductable has been revoked.