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Recent Trial Court Decisions

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Recent Trial Court Decisions

(Editor's Note.—It is intended in each issue of the Record to print decisions of all the local Trial Courts decided within the preceding thirty days upon novel questions of law or upon points as to which there is no Colorado Supreme Court decision. The co-operation of the members of the Bar is solicited in making this department a success. Any attorney having knowledge of such a decision is requested to phone or mail the title of the case to the Secretary of this Association, who will digest the decision for this department. The names of the Courts having no material for the current month will be omitted, due to lack of space.)

DISTRICT COURT

DIVISION II JUDGE DUNKLEE

Mandamus—Defenses to: Discretion of appointing power:

Deputy Prohibition Agent, discharged by order of Governor abolishing Prohibition Department, brings mandamus for month's salary following abolition order. The defendants, the Governor and Auditor, rely on Section 3723 Colo. C. L. 1921, as authorizing Governor to create or abolish Prohibition Department at will.

Held: Under Section 3723, Colo. C. L. 1921, the Governor is given the power to enforce the State Prohibition Laws as he in his discretion may deem proper. It being a discretionary matter with the Governor as to how said Prohibition Law shall be enforced and the power to appoint a Prohibition Enforcement Department being discretionary with the Governor, the power to abolish said Department is an incident thereto. Mandamus does not lie to compel the exercise of discretionary powers and this entire matter being one of discretion, the alternative writ was quashed and the complaint dismissed with costs. (Written opinion in files).

Lee vs. Morley et al. No. 92687.

DIVISION III JUDGE BUTLER

Contributory Negligence

It is negligence for a person to drive an automobile in the dark at such a rate of speed that he cannot stop his car within the distance that a sand and gravel pile four or five feet high straight ahead in the street can be seen by the light of the automobile.

Arps v. Denver et al., No. 87741.

Negligence. Suit by Purchaser of Cause of Action against his Co-Tort-Feasor.

The automobile of A was injured by the combined negligence of X and Y. A sold and assigned to X, A's cause of action against Y. Held, that X is not entitled to judgement thereon against Y.

Id.

Mechanics Liens. Sufficiency of Lien Statement.

A lien statement was signed by the claimant. A notary public certified to verification regular in form, reciting, in effect, that the claimant swore that the matters stated in the lien statement are true. The claimant did not sign the verification. Section 6449 of Compiled Laws provides: "Such statement shall be signed and sworn to by the party . . . claiming the lien. . . ." Section 6460 provides: "That provisions of this act shall receive a liberal construction in all cases."

Held, that such lien statement was "sworn to," within the meaning of the statute, and a complaint disclosing these facts is good on demurrer.

Fisher v. Howard et al., No. 92,378.

DIVISION IV. JUDGE STARKWEATHER

Mandamus—De Facto Officer:

Dr. Jones was nominated for position on Health Board by Governor. Senate confirmed nomination. Governor issued commission to Dr. Jones. Dr. Jones served nine months on Board. People thereupon brought mandamus maintaining that Dr. Jones was not a member of said Board because of certain alleged defects in proceedings leading to his nomination and confirmation.

Held: The attempted nomination and attempted confirmation by the Governor and the Senate respectively of a member of the Health Board followed by attempted issuance of commission to him by Governor and nine months service as a member of said Board, all without objections, constituted him a De Facto member of said Board and quo warranto and not mandamus was the remedy by which to test the right of Dr. Jones, a De Facto officer, to hold said position. The title of a De Facto officer must be tested by quo warranto and not by mandamus.

People ex rel Ralph Jones v. St. Bd. of Health No. 92,704.

Execution and Garnishment: Procedure vs. Receiver of National Bank, as Garnishee:

The plaintiff had judgment against defendant, Ames. In aid of execution, garnishee summons was served on L. B. Bromfield, Receiver of the Globe National Bank, as agent of the Comptroller of the Currency, who answered that he was indebted to the defendant in a certain sum which was about twice the amount of the judgment. On application by the plaintiff, the following written orders were entered by the Court:

1. That judgment enter against the Receiver for the sum mentioned, in favor of the defendant, Ames, for the use of the plaintiff.

2. That L. B. Bromfield, Receiver, and as agent of the United States Comptroller of the Currency, be instructed to pay into the registry of the Court dividends due and to become due to the said Ames out of the assets of the Globe National Bank, as distribution is made, the said dividends to be applied herein until the judgment of the Credit Finance Corporation against Ames, et al, is satisfied in full.

The Receiver was then served with a certified copy of the order.

Credit Finance Corporation vs. Ames, et al No. 90849.

**DIVISION V. JUDGE SACKMAN
Tax Deed—Affidavit of Publisher**

In suit to quiet title based on tax deed, the affidavit of the publisher of notice of sale of lands in the City and County of Denver, Colorado, at the sale held in

November, 1921, for the taxes of the year 1920, and the attempted amendment of said affidavit both held to be insufficient and invalid and tax deed issued pursuant thereto set aside upon payment of taxes, interest and penalties.

Walker vs. Fleming, No. 88950.

Probate—County Court Original (Sole and Exclusive) Jurisdiction:

It was alleged that an administratrix of an estate of a decedent had obtained her discharge as administratrix of said estate by means of an alleged insufficient if not false showing as to payment of claims and without publication of notice of final settlement. Several years after the attempted discharge of administratrix, a creditor who had filed his claim against the estate of decedent, which claim had been allowed but not paid, filed this suit in the District Court against the former administratrix, individually, and asked for an accounting of certain funds, (which, it was alleged, had come into her hands through ancillary proceedings conducted in another estate) and for the application in equity of said funds to the payment of his claim.

Held: The District Court is without jurisdiction to entertain such a suit for the reason that the State Constitution confers "original" jurisdiction in probate matters upon the County Court, and the word "original" means "sole and exclusive" jurisdiction. This being a probate matter, the creditor's remedy is to apply to the County Court to set aside the attempted order of discharge and there to present the matters mentioned above.

Bailey vs. Jester, No. 89,490.

First Annual Report Legal Aid Society

Following is a resume of the first annual report of the Legal Aid Society of Denver, compiled by Harry C. Green, secretary and general attorney for the organization:

The Legal Aid Society was formally organized February 26, 1925, when articles of incorporation were issued by the Secretary of State. Those who signed the articles are: Halstead L. Ritter, representing the Community chest and social agencies; Judge Charles C. Butler of the judiciary; L. Ward Bannister for the Chamber of Commerce; Albert A. Reed, representing the financial world; George C. Manly for the law schools; Stanley T. Wallbank for the Bar association; and

Horace N. Hawkins, and those already mentioned, all representing the lawyers of Denver.

Last year the Society was supported almost equally by the members of the bar and the Community Chest, together with contributions from members of the board of directors, and other sources, including some fees paid by clients, after services rendered. The Society has been invited to make application for membership in the Community Chest for next year, which has been done. This cooperation comes in the face of the fact that out of about fifty Legal Aid organizations in the country, only five or six are supported by the Chests, while the remainder are sup-