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Supreme Court Decisions

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PENSIONS—APPEAL FROM ORDER OF BOARD OF TRUSTEES—*Charles E. Bjork, Plaintiff in Error, v. Board of Trustees of the Firemen's Pension Fund of the City and County of Denver, State of Colorado, Defendant in Error*—No. 13467—*Decided February 25, 1935—Opinion by Mr. Justice Hilliard.*

The plaintiff, a fireman in the City and County of Denver, as a result of attending a fire, caught a cold and became ill. He was granted a leave of absence with pay and later a leave without pay. He failed to report at the end of his second leave, and later when he reported was informed that he would not be restored to the service. After eleven years he made a formal demand on the defendant for a pension for permanent disability incurred in line of duty. The Board disallowed his petition, and on a review the District Court affirmed the findings of the Board.

1. The Board determined that the petitioner did not suffer injury in the line of duty. That determination, unless the Board abused its discretion, is conclusive. The record shows that the Board did not abuse its discretion.—*Judgment affirmed.*

DAMAGES—COMPENSATORY AND EXEMPLARY—*Starkey et al. vs. Dameron*—No. 13386—*Decided February 25, 1935—Opinion by Mr. Justice Holland.*

In an action for damages for injuries received by the plaintiff as the result of the discharge of a spring gun set by the defendants, where a verdict was returned against the defendants in the sum of $900 compensatory damages and $1,500 exemplary damages, it was held that the award of exemplary damages was not excessive or disproportionate to the actual damages allowed.—*Judgment affirmed.*

APPEAL—FINDINGS OF TRIAL COURT WILL NOT BE DISTURBED UPON REVIEW WHERE THERE WAS A SUBSTANTIAL CONFLICT IN THE EVIDENCE—*Thomas L. Bartley, Receiver vs. The Colorado National Bank of Denver*—No. 13456—*Decided March 4, 1935—Opinion by Mr. Justice Bouck.*

Bank was owner of a first encumbrance and Grigsby Company, for whom Bartley was receiver, was the owner of a second and third. Property went to tax sale and the bank threatened foreclosure because of such sale. Grigsby Company purchased outstanding tax certificate, and with the bank placed the same in escrow. By reason of subsequent defaults the bank foreclosed through the courts and had a citation issued requiring the escrow holder and Grigsby Company to deliver the tax certificate to the treasurer for redemption. Bartley as receiver claimed reimburse-

ment for the amount paid on tax certificates under an alleged agreement with the bank.

The trial court found in favor of the bank, and there being a substantial conflict in the evidence, its findings will not be disturbed.—*Judgment affirmed.*

PENSIONS—POLICE OFFICER—DEATH NOT IN LINE OF DUTY—IMMORAL CONDUCT—MUNICIPAL CODE—*People, ex rel. Axtell vs. Milliken, etc.*—No. 13327—*Decided March 4, 1935—Opinion by Mr. Justice Holland.*

Pension benefits are not payable to the widow of a police officer where it appears, first, that such officer died while not engaged in the line of his duties, and second, that the death of such officer was the result of his own immoral conduct, or his immoral and intemperate habits, within the provisions of Section 1576 of the Municipal Code of the City and County of Denver of 1927.—*Judgment affirmed.*

MARRIAGE—PRESUMPTION OF VALIDITY—BURDEN OF PROOF—EVIDENCE—PROCEDURE—*Boze vs. Boze*—No. 13662—*Decided March 4, 1935—Opinion by Mr. Chief Justice Butler.*

This controversy arose over the right to be appointed administratrix of an estate, which raised the question as to which of the parties was the widow of decedent. Decedent and defendant were married in 1905, and separated in 1914. In 1923 decedent went through a marriage ceremony with plaintiff and thereafter they lived together as husband and wife. In 1926 and thereafter defendant was living with another man whom she introduced as her husband, and, while living with him, defendant gave birth to a child.

1. There is a *prima facie* presumption that decedent's marriage with plaintiff was valid, and, therefore, that his prior marriage with defendant had been dissolved by divorce. The burden of proving the contrary rested on defendant. To overcome such presumption more is required than the mere presumption that decedent's marriage to defendant continued to exist.

2. The fact that defendant thereafter lived with another man, whom she introduced as her husband, raised another *prima facie* presumption; namely, that she was lawfully married to such man, and that their child was legitimate. This, in turn, includes the *prima facie* presumption that defendant's prior marriage with decedent had been dissolved.

3. The case should have been submitted to the jury; and a directed verdict for defendant was improper.—*Judgment reversed, and cause remanded for a new trial.*

ABATEMENT—ACTION FOR MALICIOUS PROSECUTION—DEATH—*Stanley vs. Petherbridge*—No. 13398—*Decided March 4, 1935*—*Opinion by Mr. Justice Holland.*

The death of defendant abates an action for malicious prosecution under the exception set forth in Section 5383 Compiled Laws of Colorado, 1921.—*Judgment affirmed.*

CRIMINAL LAW—ROBBERY—EVIDENCE—ADMISSIBILITY—IMPEACHMENT—*Dockerty et al. vs. The People*—No. 13557—*Decided March 4, 1935*—*Opinion by Mr. Justice Young.*

Dockerty and others were convicted below of aggravated robbery.

1. Impeaching question should be framed in the same form or substantially the same form as they were asked when the foundation for impeachment was laid.

2. Where defense witness testifies a conversation and on cross-examination is asked, without objection, if the conversation did not relate to an entirely different matter, that of the commission of another crime, by the defendant, the defendant cannot complain that such testimony was given.

3. Where rebuttal evidence incidentally points to the commission of another crime, the defendant cannot complain thereof where he fails to ask for an instruction limiting the effect of such evidence to rebuttal alone.

4. Evidence that defendant invested $1,500 shortly after the robbery, is admissible without tracing the investment to the specific money stolen.

5. Conviction of criminal contempt is admissible against a defendant upon the theory that it is a former conviction of a crime.—*Judgment affirmed.*

GARNISHMENT OF TRUSTEE—COMMON LAW ASSIGNMENT—POWER OF ATTORNEY—PREFERENCE—ESTOPPEL—*Bentley M. McMullin vs. Keogh-Doyle Meat Company*—No. 13473—*Decided March 4, 1935*—*Opinion by Mr. Justice Young.*

The grocerman in failing financial circumstances executed and delivered to McMullin, an attorney at law, as trustee, an instrument in writing whereby the grocerman, "Does hereby bargain, sell, deliver, assign and set over unto said trustee all the stock of merchandise and fixtures" in trust for the benefit of the creditors of the debtor. Not all property of the debtor was included in the assignment. Notice was sent to all creditors and the next day Keogh-Doyle Meat Company filed its claim with the trustee, as did some twenty-five other creditors. A representative of the Keogh-Doyle Meat Company made an offer to the trustee for the fixtures which were sold to another party who offered more and Keogh-Doyle Meat Company became disgruntled over that sale and, disregarding the claim it had filed with the trustee, filed suit in

Justice Court for the amount of its claim and took the position that the assignment was invalid and of no effect whatsoever. After obtaining judgment against the debtor, Keogh-Doyle Meat Company caused garnishee summons to be served upon McMullin, the trustee, who answered that he owed nothing to the debtor. The answer of the garnishee was traversed and, upon a hearing, judgment was entered in favor of the Keogh-Doyle Meat Company and against McMullin on the theory that the assignment was invalid. The case was appealed to the County Court where the judgment of the Justice Court was affirmed.

HELD: First, the instrument in writing and the acts of the parties thereunder constitute this transaction a common law assignment for the purpose of authorizing McMullin as trustee to dispose of the property and prorate the proceeds among creditors in pro tanto satisfaction of their claims. Second, under a common law assignment, such as that in this case, the assignee is merely the agent of the assignor and in the absence of any act on the part of the creditor consenting to or ratifying the assignment, he may proceed against the debtor without regard for the assignment. However, in this case the Keogh-Doyle Meat Company filed its claim, recognized the assignment and the trustee, the debtor and other creditors had a right to rely on that action, so the Meat Company is estopped to deny the validity of the assignment. Third, since all parties who filed claims with the trustee were bound by the assignment, it follows that McMullin, as trustee, had no funds or property of the debtor in his hands that could be reached by garnishment proceedings by one who had filed a claim.—*Judgment reversed.*

WORKMEN'S COMPENSATION—REOPENING—AWARD—NECESSITY OF NEW EVIDENCE TO SUSTAIN JUDGMENT—*The Rocky Mountain Fuel Co. vs. Sherratt*—No. 13669—*Decided March 11, 1935*—*Opinion by Mr. Justice Burke.*

On June 29, 1933, Sherratt was granted an award of compensation by the Industrial Commission for an alleged injury growing out of and in the course of that employment. The case was appealed to the District Court and the award vacated by the Court, and on appeal to the Supreme Court was affirmed, and thereafter the Commission on its own motion made a supplemental award on its own motion after hearing with no change in the evidence, made an award for compensation.

1. The Industrial Commission is not authorized to enter an award for compensation on a rehearing where it has formerly denied the award when no additional evidence is offered.

2. Where no additional evidence is offered on the rehearing it is evident that the award of compensation is flatly contradictory of the previous finding and award.

3. The award of the Industrial Commission setting aside a former finding must be based upon changed conditions, fraud, error or mistake and not upon mere whim and caprice.—*Judgment reversed.*