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VOTING TRUST AGREEMENTS[1]

By JOHN H. SHIPPEY, *of the Denver Bar*

THE necessary elements of a valid voting trust agreement are that it be set up under a legal mechanism, and that it be for a valid purpose.[2] The principal consideration in the cases on such agreements is whether or not they violate public policy *per se*.[3] Inasmuch as there is, in Colorado, a statute (Session Laws 1931, Ch. 70, Sec. 28, p. 253)[4] providing for voting trusts limited to a period not to exceed ten years, such agreements, if properly in accord with the statute, will, as to their validity, depend upon the purpose for which they were entered into,[5] the purpose being considered in the light of public policy. Under the modern rule, voting trusts are not considered *per se* unlawful,[6] and the rigor of the older cases[7] is much relaxed.

Agreements have been held valid which secured a certain business policy for a specific term of years,[8] gave control of the management in consideration of loans to the corporation[9] or were set up with a provision requiring subsequent purchasers of trust certificates to become members of the trust;[10] each agreement running to the common benefit of all the stockholders and the corporation, and not merely to the advantage

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[1]Defined—*Manson v. Curtis*, 223 N. Y. 313, 119 N. E. 559.

[2]*Bowditch v. Jackson*, 76 N. H. 351, 82 Atl. 74, LRA 1917A, 1174.

[3]*Carnegie Trust Co. v. Security Life Ins. Co. of Amer.*, 111 Va. 1, 68 S. E. 412, 31 LRA N. S. 1186 and note 1199.

[4](a) May be established by one or more stockholders.
(b) One or more trustees or corporation authorized to act as trustees.
(c) For voting or other lawful purpose.
(d) Grants similar right to any other stockholder to become a party.
Similar statutes in New York and Delaware.
See *Tompers v. Bank of Amer.*, 217 N. Y. S. 67, 217 App. Div. 691.
Tompers v. Bank of Amer., 214 N. Y. S. 643, 126 Misc. Rep. 753.
Chandler v. Bellanca Aircraft Co., ... Del. ....., 162 Atl. 63, 31 LRA (N. S.) 1199 note.

[5]*Smith v. San Francisco & North Pac. R. R.*, 115 Cal. 584, 47 Pac. 582, 35 LRA 309.

[6]*Carnegie Trust Co. v. Security Life Ins. Co. of Amer., supra*, see note No. 3.

[7]*Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32 (1890); *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847 (1891).

[8]*Boyer v. Nesbitt*, 227 Pa. 398, 76 Atl. 103.

[9]*Windsor v. Commonwealth Coal Co.*, 63 Wash. 62, 114 Pac. 408, 33 LRA (N. S.) 63.

[10]*Smith v. San Francisco & North Pac. Ry. Co., supra*, see No. 5.

of the parties thereto.[11] When the agreement only seeks to secure an office for a party to the agreement as its sole purpose,[12] runs only to the benefit of the parties thereto,[13] perpetuates the parties and their successors in office, or gives a minority the right for an indefinite term to name a majority of the directors,[14] it is invalid as a violation of public policy.

In setting up a voting trust agreement, special attention must be given to insure the creation of an irrevocable trust. Where the right to direct the trustees is reserved by the stockholders or where by provision in the agreement it is revocable at any time,[15] or gives the trustees only a bare right to vote, and no beneficial interest, the trustees are only holders of proxies or trustees of a dry trust.[16] An irrevocable trust must be an active one,[17] giving some duty and discretionary power to the trustees, or giving them the voting power, coupled with a beneficial interest,[18] and in view of this, although search has discovered no cases on this subject, in Colorado the voting trust statute, *supra,* contemplates the creation of an active, irrevocable trust.

A valid voting trust agreement must be a combination of stockholders, not merely a pooling of stock in the hands of trustees for a period,[19] and the stockholders on becoming parties to the agreement, must give assent.[20] It has been held that the mutual promises of the stockholders in making the agreement is sufficient consideration,[21] and that extended credit and loans to a corporation together with the mutual promises of

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[11]*Shepaug Voting Trust Cases, supra,* see note No. 7;
Cone v. Russell, supra, see note No. 7;
Boyer v. Nesbitt, supra, see note No. 8.
[12]*Hellier v. Achorn,* 255 Mass. 273, 151 N. E. 305, 45 LRA 788.
[13]*Palmbaum v. Magulsky,* 217 Mass. 306, 104 N. E. 746.
[14]*Marel v. Hoge,* 130 Ga. 625, 61 S. E. 487, 16 LRA (N. S.) 1136.
[15]*Venner v. Chicago City R. R. Co.,* 258 Ill. 523, 101 N. E. 949.
[16]*Bowditch v. Jackson,* 76 N. H. 351, 82 Atl. 74, LRA 1917A, 1174.
[17]*Brightman v. Bates,* 75 Mass. 105, 55 N. E. 809;
Ecker v. Kentucky Refining Co., 144 Ky. 264, 138 S. W. 264;
White v. Snell, 35 Utah 434, 100 Pac. 927;
Contra—Harvey v. Linville Impr. Co., 118 N. C. 693, 24 S. E. 489, 32 LRA 265;
Contra—Luthy v. Ream, 270 Ill. 170, 101 N. E. 373.
[18]*Boyer v. Nesbitt, supra*—see note No. 8.
[19]In Re Pittock's Will, 102 Ore. 159, 199 Pac. 633, 17 LRA 218, Trust created by will.
[20]*Lebus v. Stansifer,* 154 Ky. 444, 157 S. W. 727.
[21]*Carnegie Trust Co. v. Security Life Ins. Co. of Amer., supra*—see note No. 3.

the parties in making the agreement is likewise sufficient consideration.[22]

The trustees need not be disinterested.[23] They are usually stockholders themselves, and their position as trustees under an active trust is not inconsistent with their holding office in the corporation, or with being stockholders. The powers granted to trustees need not necessarily be restricted to continued control and direction of the corporation or to voting, but may provide for the dissolution of the corporation,[24] for its merger or reorganization, for the mortgage or sale of the corporate assets, or for any other acts which a stockholder or stockholders could do as such.[25] The agreement, however, cannot be such a one as would grant the trustee a power inconsistent with the duty of the stockholders of the corporation, and no trust agreement is valid which embraces in its provisions anything which would unreasonably prevent a stockholder from entering the agreement at the time of its adoption or later during its existence.[26] Likewise, a voting trust agreement cannot validly be created as a means of activity, control or voting of its own stock by a corporation.[27]

The validity or invalidity of a voting trust is not subject to question by a third person. It is necessary that the trustees be made parties in any question involving the agreement. Only an equitable interest remains in the stockholder after the creation of a voting trust, by the issuance of assignable trustees' certificates and this equitable interest is one not subject to execution.[28] The trust cannot be in existence for an unlimited duration of time,[29] although it may be extended after the expiration of its term,[30] and during the duration of the trust, the trustees have a lien on the stock to which they have the legal title for their services in administering the trust.[31]

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[22]*Clark v. Foster*, 98 Wash. 241, 167 Pac. 908.

[23]*Thompson Starrett Co. v. E. B. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017.

[24]*Bowditch v. Jackson, supra*—see note No. 2.

[25]*Butler v. Butler Bros.*, 186 Minn. 192, 242 N. W. 701.

[26]*Tompers v. Bank of America, supra*—see note No. 4; *Hellier v. Achorn, supra*—see note No. 12.

[27]*Clark, et al. v. National Steel & Wire Co.*, 82 Conn. 178, 72 Atl. 930.

[28]In Re Selway Steel, Fence Post Co.'s Receivership, 198 Iowa 950, 200 N. W. 621.

[29]*Canda v. Canda*, 112 Atl. 727, 92 N. J. Eq. 423, affirmed 113 Atl. 503.

[30]*Water v. DeMossen*, 164 N. Y. S. 82, 176 App. Div. 711.

[31]*Clark, et al. v. National Steel & Wire Co., supra*—note No. 27.

On the question of public policy relative to voting trusts, the existence of the statute in Colorado cannot be considered wholly declarative. A statute such as this cannot remove the legal objections to voting trusts which would tend to create a monopoly,[32] act in restraint of trade, or to defeat competition,[33] but an agreement under this permissive statute would be presumed to be for the benefit of the members, stockholders, and corporation and not for an unlawful purpose[34] in view of the more recent cases,[35] rather than be considered void as against public policy *per se*.

[32] *State v. Standard Oil Co.*, 49 Ohio 137, 30 N. E. 279.
[33] *Clarke v. Georgia Cent. R. Co.*, 50 Fed. 338, 15 LRA 683.
[34] *Day v. Hecla Mining Co.*, 126 Wash. 50, 217 Pac. 1.
[35] The change to more liberal views is best seen in *Carnegie Trust Co. v. Security Life Ins. Co. of America, supra*—see note No. 3.

DID YOU KNOW?

On February 25, 1935, a suit was brought in the District Court by The International Trust Company to foreclose a mortgage upon the Equitable Building in the city of Denver. Many of the occupants of this building are doubtless holding under leases, therefore the Colorado statutes relating to redemptions, by lessees, from foreclosure sales, are of current interest.

The law of 1929 (p. 538) as amended in 1931 (p. 696) makes provision for redemption by the owner of the mortgaged property, within the period of six months. Then there is a provision to the effect that if no such redemption is made by the owner, an encumbrancer or lienor may redeem.

At page 541 of the laws of 1929 the following appears: "for the purposes of this Act, a *lessee* of the premises or portion thereof shall be considered as a lienor."

This provision of the redemption statute is seldom used and is easily overlooked.

Many of the occupants of the Equitable Building are lawyers, who may wish to redeem if the property is sold under the mortgage, and their attention should be called to this stat-

ute of 1929 in order that they may ascertain whether the mortgage in question comes within its provisions.

The amount claimed in the foreclosure suit is $995,052.28.

Respectfully, JESSE H. SHERMAN.

(Picture any lawyer tenant the morning he receives Dicta and learns the golden opportunity before him—business of excitedly summoning his secretary: "Miss Smith, get me a certified check for One Million Dollars. I am going to redeem the Equitable Building. I might need the rest of the check for small change.")

And in order to make the redemption simple, swift and sure, Mr. Sherman also advises that:

The case of Hittson vs. Davenport, 4 Colo. 169, is of interest at the present time.

In an action brought upon a promissory note payable in gold, the court says:

Page 174, "the contract was to pay so many dollars in gold. In the absence of any waiver of this condition, payment in gold would alone satisfy the contract."

Page 175, "the objection that the judgment was for 'gold dollars' instead of so many dollars generally, is not well taken. The cases cited, supra, are sufficient authority for saying that as it was the clear intent of the contract that payment should be in gold, the indebtedness should have been found in gold dollars and the judgment entered accordingly."

Mr. Albert L. Vogl clipped the following interesting article from the issue of the *London Sphere* of February 2, 1935:

SHORTHAND IN THE HIGH COURT

If Lord Sankey succeeds in introducing the practice of shorthand notes to take the place of the judge's longhand notes of evidence, it is my belief he will go some way to speed up the course of justice without damaging its efficiency. The older practice is very long established. The points *for* its continuance now boil down to one only—that the trained mind of the judge concentrates on, and records, only what is relevant and vital in the given evidence. The points in favor of a full shorthand note are many:

(1) A draft of the day's evidence could be supplied to the judge the same evening, and while his memory was fresh he could edit the notes and underline his essentials as well as, or better than, he could do it contemporaneously.

(2) The exact words used by a witness are often of more value *in an appeal* than the judge's own *precis* of the essentials of that evidence.

(3) The judge would be free at last to observe the witness' demeanor, a very important aid to a judge of character in separating truth from falsehood.

(4) The evidence would be disposed of far more quickly.
(5) A complete record of every word given in evidence would remain on record until the case was finally disposed of—a vital safeguard against miscarriage of justice.
(6) A heavy weight of legal experience at bench and bar has long favored the reform.

CANDIDATES FOR THE JUDICIARY

(A California Constitutional Amendment)

The full text of the amendment of the California constitution which was adopted in the recent November election, and reported in the December number of this *Journal*, is available in the December (1934) number of the Los Angeles Bar Bulletin. In our report there was omission of an important feature of the amendment, namely, that the judges of the appellate and supreme courts are subject to the provisions of the amendment from the time of its adoption.

The result is that appellate and supreme court judges will no longer be chosen by the accustomed method of popular nomination and election. These judges will, on completion of present terms, have the privilege of having their names placed on the ballot without competition, and a majority vote in favor of retaining them in office will give them an additional term. This will afford operation and experience under the new plan from the beginning.

Application of the plan to the superior court judges depends first on adoption of an enabling act to prescribe the conditions under which the people of any county may vote on the question of adopting the new system. The amendment intended for the relief of Los Angeles County, which was defeated at the election, provided that a vote of two-thirds of the members of the board of supervisors would result in submission of the proposal to adopt the appointing plan. It seems unreasonable to require so large a majority for the mere purpose of affording opportunity for a popular expression. The cost of placing the question on the ballot is trivial and a majority vote of the supervisors should be considered sufficient for the initial step.

VOTES RECEIVED BY FOUR AMENDMENTS

The following are official figures on the four initiated amendments affecting the administration of justice which were approved by the voters:

Selection of judges—yes, 810,320; no, 734,857.

Making attorney general chief law enforcement officer—yes, 1,063,290; no, 449,075.

Permitting judges to comment on evidence—yes, 1,087,932; no, 406,287.

Pleading guilty before committing magistrate—yes, 1,173,838; no, 317,090.

REMARKS ON MOVING THE ADMISSION OF A CLASS OF CANDIDATES FOR THE BAR

By CHARLES P. MEGAN*

May it please the Court: I have the honor of moving the admission of these young men and young women to the bar of Illinois.

This is the first step in the process by which older lawyers turn over to the new generation the profession of which we are trustees for them, and they now for *their* successors. As fathers see their sons coming upon the field of battle, full-armed, eager for the fray, there is an agony of desire to help the young men in some great way, to pass on the wisdom of the ages, to make the fight less terrible, the outcome more sure, to give the sons what their fathers never had—security, a place in the sun, a key to the maze, opportunity without fear, a roll of honor with no casualty list, the palm of victory without the dust. We know this cannot be done, and it is better so; the young men would not thank us for a life without conflict; when all is over, they will have "lived and worked with men"; their lives will have been spent in the finest fellowship on earth, doing the most important things in the world, lives rich and full and dangerous, the lives of *men*.

It *is* a great fellowship, but its tests are merciless and its judgment unerring. The weak are known, and the strong, the timid and the brave, the mean and the great-hearted. Is this profession of the law, then, a great monster without heart, as cold as Fate? On the contrary, nowhere else shall we find the individual counting for so much, and the new lawyers will see, too, that the bar is friendly and helpful.

Will they also find that it is honorable and true? This is the question that cartoonists put on the front page and editorial writers in their columns. Lawyers sometimes answer too quickly, confess too much. At the recent meeting of the American Bar Association at Milwaukee, visitors observed a large painting that was hung in the lobby. It portrayed that strange medieval cult of the Flagellants—men, women, even young children, who flogged themselves cruelly for their souls'

*This brief address was made upon moving the admission of a class of candidates for the bar, in the Supreme Court of Illinois, at Springfield, October 11, 1934. Reprinted from the *American Bar Association Journal*.

sake, "a form of exalted devotion" which "occurs in almost all religions." It struck a friend of mine that this was a most appropriate subject for the keynote of a lawyers' meeting that was all too self-condemnatory. The salvation of the bar lies elsewhere—in something positive and active, in the conscience of the individual lawyers.

Let me say a word on this, and have done. The origin of the idea of conscience, something guiding us from within, not from without, is obscure. That "silent yet prophetic people who dwelt by the Dead Sea" had glimpses of it, in their moments of communion with the Most High, and in the thirteenth century of the Christian era the idea began to be generally understood, and became a dominant factor in the life of man. It is no longer regarded simply as a negative, a reproving force; it is the mainspring of our movement upward, the creative force of all professional associations that have not in them the seeds of decay. Let these young men allow the cartoonist, the editorial writer, and the public speaker to do their *thinking* for them, if they must, but I beg of them, in the name of their profession, not to let anyone do their *believing* for them. They must be assured that the courts, ever the guardians of the moral standards of the profession, will be the first to respect and sustain them in their independence.

We talk of the *quality* of a man's conscience, but we do not sufficiently reflect on the importance of the *quantity* of conscience in a community, a state, a nation, or a profession. "The Greeks," said John Morley, "became corrupt and enfeebled, not for lack of ethical science" (there were *thinkers* enough among them), "but through the decay in the numbers of those who were actually alive to the reality and force of ethical obligations." This is the true battlefield; does it not thrill us; can we not see in our mind's eye, from afar, the scene in many an obscure law office, where a brave man is proving to himself—for there are no spectators to cheer and inspire him that he will sacrifice all, that he will endure all things, sooner than give up the faith of his fathers, the ideals into which he was born.

This is what leaders of the bar reckon on, in times of stress—that when any moral question is put squarely up to

the bar the reaction is always right—no man who relied on this ever had his confidence betrayed. Here then is waiting for these young men and young women, in the hour of their country's greatest need, for the preservation and glory of their profession, a field of use for the best and most characteristic thing they have, their own most precious possession, far above all intellectual gifts, which does not fail from use, but grows ever clearer and stronger—the unspoiled conscience that came to them from on high.

If it please the Court, on behalf of the State Board of Law Examiners, I move the admission of this class to the bar.

NEW RULES OF SUPREME COURT

The Supreme Court has recently adopted four new rules and amended two, all effective April 8, 1935.

One pertains to calling a new trial judge, where the regular judge is disqualified. Another relates to the preparation of the record on review, providing particularly that the record must be presented in chronological order. Also the preparation of records from Industrial Commission which must contain a table of contents. Another allowing oral arguments on application for supersedeas where the case is to be determined on such application. One relates to the fees for examination for admission to the bar and another provides that an attorney convicted of a felony will be summarily suspended until cleared of such charge, or until the further order of this Court.

These rules are put out in the form of riders which may be placed in the rules of 1929 and copies may be had from the clerks of the district courts and the clerk of the Supreme Court.

For the general information of attorneys, Mr. F. D. Stackhouse advises us that there is now in the Law Library of the District Court, American Law Institute: publications on Contracts, 2 volumes; 2 volumes Agency; 2 volumes Tort and just received 1 volume of Restatement of the Law.

ABOU BEN HILLIARD

By an Anonymous Contributor

ON April 6, 1917, the American Congress debated a resolution to engage in the World War. At that time the Central Powers had resorted to unrestricted submarine warfare and it was only a question of time when the supplies of food to the Allies would be cut off by a tremendously effective under-seas blockade. We were expected to come to the rescue. Inflammatory propaganda had been steadily at work disseminating lies concerning German atrocities. Only fifty members of Congress and six senators voted against war. Among them was Ben C. Hilliard of Colorado. Orders were at once given for the political stretcher bearers to convey Ben's remains out of the party boundaries. He was pronounced politically dead. He returned home and became a candidate again but was easily defeated. Members of his own party would have none of him. Eggs were a dollar a dozen or his public appearances might have had unpleasant consequences. He ran for Congress twice more and finally seemed swallowed up in political oblivion. There were none so poor as to do him justice.

Then, lo! A change came. Woodrow Wilson went to France and wrote the preamble of the Peace Treaty and stated explicitly therein the reason the Allies went to war was because Germany violated the boundaries of Belgium. Men inquired if that was true why we had not objected at the time? Wilson was then President. Prompt notice to the Central Powers that the high offense against treaty obligations would cause us to send two million men overseas would have prevented war. But Bryan was booked solid for the fall and winter with his Prince of Peace lecture which would not go so well if he appeared on the platform with a battleship under his arm. Eight million men went to their deaths; more than twenty-three billion dollars was checked out of the United States Treasury for war; we loaned eleven billions more to the Allies. Was it possible that, after all, the fifty members of Congress could have been right?

Only one lone congressman went into the army. Johnson from South Dakota served as a private after voting no. Congressman Hilliard's sons went and so did sons of other congressmen who voted against war.

And now by a turn of fortune's wheel the same forces of public opinion that denounced Congressman Hilliard render him praise akin to homage! Why? It is the same Ben Hilliard. He has courageously stood by his guns all through, honor and truth and high principle his only consolation. If he suffered he let concealment, like a worm i' th' bud, keep the secret. Time has not changed him: it seems to have changed us.

How keen are the sufferings of those whose hearts are made sick by hope deferred! Napoleon's dust laid twenty years on a dismal rock in a lonely sea before France took him to her heart again. John Howard Payne, who wrote Home, Sweet Home, laid in a neglected grave in a foreign land for nearly a generation. Lincoln bravely introduced the "spot resolutions" in Congress and President Polk's followers gleefully conducted his political obsequies. The flattery that we are told cannot soothe the dull, cold ear of death could do the soldier or the poet little good. In the case of Lincoln his elevation to the presidency must have been exceedingly gratifying coming as it did when the stone was rolled from his political sepulchre.

Eighteen years is a long time. The law of compensation enters up judgment after great delay. Ben Hilliard with these tardy laurels on his brow and the stars of glory on his breast must find something extremely amusing in it all. He possesses an exquisite sense of humor. Laughing last he laughs best. The general impression seems to be that he ought to be extremely gratified. If he is it is probably at learning that his fellow citizens can finally come to their senses, given time. After eighteen years we conclude that instead of a pro-German slacker and traitor to his country, Judge Ben C. Hilliard is a right honorable gentleman who loves his fellowmen. He must have been aware all the time what he was and what we were.

Abou Ben Hilliard may his tribe increase!

Dictaphun

By B. C. HILLIARD, JR.

"I WEEP FOR YOU," THE WALRUS SAID, "I DEEPLY SYMPATHIZE"

"Albert J. Gould, Jr., public administrator, has his problems. Six or seven years ago that office meant big compensation. Gould now has the same work and overhead, but the compensation is almost negligible * * *"—*Denver News,** March 29, 1935.

"AND, AS THE COCK CREW, THOSE WHO STOOD BEFORE THE TAVERN SHOUTED, 'OPEN THEN THE DOOR.' "

J. E. Robinson, Esq., addressed the chair, and upon being recognized remarked:

"Senate Bill No. 115 approved by the governor on March 16th provides that 'every person, except a *manufacturer* not engaged in selling poultry eggs directly to the consumer,' engaged in the business of selling eggs, shall obtain a license.

"Does a hen come within the exception, or does she not?

"The hen does not 'sell poultry eggs directly to the consumer.' She lays the egg when and where the spirit moves her, without regard to the ultimate destination of the product. She just doesn't care.

"As the assembly declared that an emergency exists, the question should speedily be determined. The future of the hen is at stake."

"LOW AMBITION AND THE THIRST FOR PRAISE"

In 12 DICTA 116 Erl H. Ellis, Esq., indited† an article labeled "Did You Know?" Horace N. Hawkins, Esq., in writing, advised Mr. Ellis that "I did not know and am glad to be informed," and added a pious wish that the author would "do some more of the same kind of writing for DICTA." Mr. Hawkins' letter reached us, with an addenda per Mr. Ellis to this effect:

"Am forwarding the above letter to you just with the idea that you may be glad to learn that the new 'Did You Know?' department seems to have an occasional admirer."

*The paper with a new name but the same old circulation.

†No, Erl, this has no reference to grand juries.

"WORDS ARE BUT EMPTY THANKS"

The Divide Review, journal par excellence, and purveyor of the news of Kiowa, proud capital of Elbert County, on March 8 last gives to the world, under the caption "Card of Thanks," this wail:

"We wish to thank the vilifying people of this community for the uncordial remarks that have been said about us.

"Bobbie Doppler and Ethel Erickson."

"WHO FIRST INVENTED WORK, AND BOUND THE FREE AND HOLIDAY-REJOICING SPIRIT DOWN?"

Although we tasted gravel in the address, "What Fun Dept., DICTA," we nevertheless present this memorial to the researches of David Brofman, Esq.:

"Neill, J. * * * It is no wonder that this is his character, and that he cannot find work to suit him, for his father is in the lumber business, owns two lumber yards, a fine residence, is rated to be worth $43,000, has his life insured for $25,000, and pays him a salary for doing nothing, which stops when 'he accepts a position.' This salary, as he calls it, seems mightily 'like getting money from home.' Yet he is a good man; and his wife loves him so well, she says, that she 'would wade to the very bottom of Hell for that man.' If it should ever become necessary for her to perform this heroic act in manifestation of her affections we cannot help inquiring where would be Elsy Dean during the excursion, if her custody should be awarded this woman and her husband?"—*White v. Richeson*, 94 S. W. (Texas) 202.

EDITOR'S NOTE

The many classical allusions, found in the captions of Dictaphun this month, are from the ninth edition of Barlett's Familiar Quotations. We are definitely advised that the Editor of Dictaphun acquired the volume from his father, who is no longer in practice.

LAWYERS' AND DOCTORS' BANQUET!

The annual Doctors' and Lawyers' Banquet will be held at the University Club, May 4, 1935, at 7 P. M. The price of the tickets will be from $1.50 to $2.00, depending upon what the committee agrees should be served.

Supreme Court Decisions

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.*