## SUPREME COURT OPINIONS

Mary Ann Rue vs. W. A. Connell, et als. Wills, Interpretation of, Ademption, Intent.

In order to establish an ademption of a specific devise, there must be an alteration in the character of the subject matter made or authorized by the testator himself. Therefore, when there is a devise of certain lands by their known name, concerning which there was a claim under a contract to convey made by some third person, which, in the life time of the testator, had been unsuccessfully contested by suit, and after his death it had successfully been contested, and the purchase price paid to the executors and held by them free from claim of debt of the testator, and it further appearing that the testator died in possession believing he was the owner in fee, his intention will be construed as devising, not only the land itself, but all of his right, title or interest therein; and by the specific devise the proceeds of sale of the lands wil go to the devisee named.

B. R. Gay vs. Roanoke Railroad and Lumber Co. et al.
1. Trespass, Question of Ownership, Evidence.

In an action for damages arising upon the alleged negligence of defendant, through which the timber, etc., upon plaintiff's lands consisting of several tracts, was burned, it was admitted in open court that the plaintiff was the owner and in possession of the land upon which the trespass was alleged to have been committed. Held; It was competent, upon cross examination, for defendant's counsel to ask the plaintiff, a witness in his own behalf, if a certain tract of the land was not owned by some one else at the time of the fire, as tending to show that he had sold it, and thereby impeach his estimate of the damage he had testified to on his direct examination.
2. Contracts, Interpretation of, Independent Contractor, Evidence.

When a party defendant aptly sets up the defense of independent contractor in relation to his co-defendant, and the only evidence thereof is a written contract to that effect, free from ambeguity, the interpretation of the contract involves questions of law alone; and it is error for the trial judge to charge the jury that the paper writing does not establish the relation of independent contractor, but they can consider it in finding whether such relationship exists.
3. Same.

When, under a lawful and clearly expressed contract, one party employs another to do a certain work for him without any supervision or control, and the party for whom the work is done is interested only in its ultimate result, the latter is not liable to third persons in damages for the negligent of the former, provided he has not been negligent in selecting him as a suitable person for the purpose.

State vs. Tobe Wilkes.
Wilful Abandonment of Crops, Revisal 2368, Jurisdiction, Judgment, Arrested.

A court of justice of the peace has final jurisdiction of a wilful abandonment of crop in violation of Revisal, section 2368. A judgment of the Superior Court, to which the indictment was originally brought, will be arrested.

Indictment heard before W. R. Allen, J., term time, of Greene.

F. R. Glascock and Wife vs. T. N. Gray, et al.
1. Executors and Administrators, Foreign Executors, Fund, Deeds and Conveyances, Statutory Requirements, Interpretation of Statutes.

Under Revisal, section 28, declaring that "no foreign executor has any authority to intermeddle with the estate until he shall have entered into a bond" within a year from the testator's death, deeds made by foreign executors to lands in this State, under a power in the will to sell, convey no title until the statutory requirements have been complied with, and they are otherwise invalid.
2. Same, Words and Phrases.

The words "intermeddle with the estate," used in Revisal, section 28, in relation to the authority of foreign executors in dealing with the testator's property here, signify that foreign executors may act, without giving bond, exercise any control over any part of the estate, real or personal, until the terms of the act are complied with.

A. S. Walker vs. Henry C. Venters.
1. Contracts in Writing, Mortgagor and Mortgagee, Parol Evidence, Contraction.

When the vendee of lands has mortgaged them back to the vendor to secure the purchase price in a sum named, and it is expressly stated in the mortgage that a certain number of bales of cotton, weighing 500 pounds each, should be paid in lieu of said sum, at certain times extending over a period of ten years, the notes secured by the mortgage specifying that payment has to be made in cotton accordingly, evidence is incompetent of a parol agreement made at the time of the execution of the mortgage, that in event of payment in full at any one time, or of foreclosure, the specified amount was to be paid in money at plaintiffs' option, as such would be a contradiction by parol evidence of the terms of a written instrument.
2. Contracts, Crop Payments, Mortgagor and Mortgagee, Measure of Damages, Interest.

When under the express terms of a written contract, the purchase price named in a certain sum of money for certain lands, was to have been paid in cotton in certain amounts and at various times, in lieu of an amount specified in the mortgage, upon default the amount due on the mortgage is the value of the cotton at the market price when each instalment fell due, with interest, subject to payments and set-offs, if any.

Action tried before W. R. Allen, J., and a jury, May term, 1908, of Pitt.
Plaintiff appealed.

John A. Poythress vs. Durham and Southern Railway Company.
1. Carriers of Goods, Liability, Notice to Consignee, Reasonable Time to Remove, Warehousemen.

The liability of a common carrier continues until notice is given consignee of arrival of shipment of goods at destination ,and a reasonable time given to remove it. Thereafter the carrier's liability is that of a warehouseman.
2. Same, Requirements of Notice.

Notice of the arrival of a shipment of goods, to relieve the carrier of liability as such, need not be served personally on the consignee by the carrier. The requirements of Rule 1 of the Corporation Commission is applicable: "Notice shall be given by delivering same in writing, in person, or by leaving it at consignee's place of business, or by depositing it in the postoffice."
3. Pleadings, Demurrer, Cause Defectively Stated, Amendments.

A demurrer will not be sustained to a complaint merely because a cause of action is defectively stated which may easily be remedied by amendment if necessary.

S. D. Taylor vs. F. T. Mills and Son.
1. Mortgagor and Mortgagee, Sale of Mortgage Property, Purchaser Surrender in Law, Measure of Damages, Questions for Jury.

Defendant represented to plaintiff that he had a mortgage on a certain horse plaintiff had bought, whereupon plaintiff replied, that if the horse was defendant's property he could go and get him. This defendant afterwards did in plaintiff's absence. Subsequently, plaintiff ascertained that defendant's mortgage had not been registered at the time of his purchase, and brought claim and delivery proceedings. Defendant replevied and then sold the horse. Held; 1. That defendant's taking the horse under the circumstances was not a surrender in law by the defendant. 2. That the question of laches as to defendant's registering the mortgage has no application, as he should have retained the possession until the mortgage was registered. 3. That the amount of recovery should be the value of the horse at the time it was wrongfully taken, with interest therefrom, and the amount paid by plaintiff was only to be considered by the jury upon the question of such value.

Action heard before Biggs, J., and a jury, December term, 1908, of New Hanover.

P. B. Ullery et al vs. Wm. A. Guthrie.
1. Appeal and Error, Assignment of Error of Record, Appeal from Judgment.

An appeal from a judgment does not require a summary of exceptions taken upon the trial Rule 19 (2) before it can be heard on appeal under Revisal 21. Otherwise when a demurrer is sustained or overruled, for Revisal, section 475, provides, that the demurrer shall distinctly specify the grounds of objection to the complaint, or it will be disregarded.
2. State's Land, Entry, Same Lands, Dispute as to County, Procedure.

When the defendant, under Revisal, section 1905, is claiming to lay an entry, and asks a grant for land admitted to be the same as contained in plaintiff's grant, the plaintiffs entering their protest that the land lay in a certain county, and the defendant contending that the protest should be dismissed for that it lay in a different county, relief can be had in the pending cause, and it is not necessary to resort to an action of ejectment after defendant has perfected his grant.

Action heard by Neal, J., May term, 1908, of New Hanover.
Plaintiffs appealed.

Acme Paper Box Factory, et al. vs. Atlantic Coast Line Railroad Company.
1. Carriers of Goods, Consignor and Consignee, Contract to Deliver, Suit by Consignor.

A vendor, who is under contract to deliver goods to a vendee, is entitled to recover the identical goods, or if they are lost, their value and interest, from a common carrier in default to whom they had been delivered for shipment.
2. Same, Evidence, Nonsuit.

It is error in the trial judge to render a judgment of nonsuit, upon the evidence, in an action brought by a consignor against a common carrier to recover the value of a lost shipment, when there is evidence that he was under contract to deliver them to the consignor at destination. In such instances the title and possession of the shipment do not, as a matter of law, pass to the consignee by delivery to the common carrier.

Action tried before Neal, J., and a jury, May term, 1908, of Lenoir.

Melville Dorsey vs. Town of Henderson.
1. Cities and Towns, Grading Streets, Damage to Abutting Owner, Liability of City.

Revisal, section 2980, provides that the commissioners shall keep the streets, etc., of a town in repair "in such manner and to the extent they deem best, and cause such improvements in the town to be made as may be necessary." Therefore, when the commissioners of a town in the exercise of these powers, cause, in their discretion, grading of the streets or sidewalks to be made, whereby the value of plaintiff's property has been decreased, the plaintiff cannot recover of the town therefor, in the absence of statutory authority, if the commissioners have acted within their authority and with due care and skill.
2. Same, Change of Plan, Ratification.

When the street commissioners of a town have changed the original plans of its civil engineer in regard to grading the streets and sidewalks, and damages are claimed by a property owner on that account, the courts are precluded from inquiring into the advisability of the change, when it appears that the town commissioners had adopted and approved it.

Walter H. Briscoe vs. Henderson Lighting and Power Company.
Trespassers, Personal Injury, Children, Invitation, Expressed or Implied, Pleadings, Demurrer.

Owners in possession of lands are not liable for trespassers for injuries received from conditions arising from the lawful use thereof for manufacturing or other lawful purposes; and a complaint alleging that the electrical plant on defendant's premises was alluring or attractive to boys, and the plaintiff, a boy of 13 years of age was injured while going through an opening between two outbuildings on defendant's lands by falling into a well of hot water, negligently covered over, used in the conduct of defendant's business, and there is no allegation that boys usually passed the place where the injury was occasioned, or were in the habit of frequenting the defendant's premises on account of its attractiveness, or that invitation, expressed or implied, had been extended by defendant, the plaintiff was a trespasser and defendant is not responsible for his act thereof, and a demurrer will be sustained.

Action heard upon demurrer to the complaint by Cooke, J., May term, 1908, of Vance.

J. G. Stanton vs. J. G. Godard.
1. Wills, Interpretation of, Remainders, Vested Interests, Child, etc., Living.

By the terms of a will, property is devised to the daughter, but "should she die without child," etc., then it is to belong to G. It appeared that G. and the daughter intermarried and had children who did not survive the mother. At the death of the mother, held: G. could not take a fee simple as no interest vested in the children. This, both by interpretation of the language of the will itself, and the rule in Revisal, section 1581, providing that, unless it is otherwise clearly expressed in the will, the children, etc., must be alive at the death of the first for the interest to vest in them.

Controversy submitted without action, heard before Lyon, J., June term, 1908, of Martin.

Edward Brothers vs. Edwin Erwin and J. M. Piper.
1. Evidence, Telegrams.

When telegrams are introduced in evidence from one party to the suit to the other, telegrams from the other party, received under circumstances clearly indicating they are replies, can be introduced by the same party without further proof, when they are relevant to the inquiry.
2. Same, Harmless Error.

When, of a series of telegrams, one is admitted in evidence as received in reply to those sent by the party offering them, and it does not appear to have any connection with the others, and has no bearing upon the facts at issue, it is harmless error.
3. Judgment, Evidence, Nonsuit, Substantial Damages, Instructions.

When plaintiff has alleged and proved facts which at least entitles him to recover nominal damages, arising from a breach of contract, a motion as of nonsuit upon the evidence will not be sustained upon the theory that no substantial damages, have been shown. The question as to a substantial recovery must be raised by a prayer for instruction.
4. Judgments, Evidence, Nonsuit, Collateral Matters.

A motion as of nonsuit upon the evidence should not be directed to collateral matters, and thereunder the defendant cannot successfully contend that plaintiff obtained a warrant of attachment and alleging a breach of contract sued then complained sued on contract and laid his proof in tort.

Action tried before Lyon, J., and a jury, fall term, 1908, of Wilson.

C. H. Foy vs. James O. Gray et als.
1. Appeal and Error, Docketing Transcript, Motion to Dismiss, Laches of Movant.

When under Rule 5 of the Supreme Court the appellant does not docket his appeal "seven days before the call of the district to which it belongs, and the appellee defers making the motion to dismiss until the call of the district had begun when the transcript on appeal had then been docketed, the appellee has been guilty of laches, and his motion to dismiss will be denied.
2. Appeal and Error, Referee's Findings of Facts, Evidence.

The Supreme Court is bound by the findings of fact of the referee sustained by the trial judge, when there is evidence to support them.

Action from Craven; heard on exceptions to report of Referee by W. R. Allen, J., at Chambers, 22, July, 1908.
Plaintiff appealed.

House Cold Tire Setter Company vs. W. E. Whitehurst.
Vender and Vendee, Contracts, Breach of Warranty, "Opinion Evidence."

In an action to recover the purchase price of a certain machine, the defense being a breach of warranty, it is competent for witnesses to testify, on behalf of defendant, that they had used a machine alike in construction and in all respects to the one in controversy, except as to size, the principle being the same, that the machine could not properly do the work it was intended for, describing why, when it appears that, by training and special opportunity to note and observe relevant facts, they were qualified to give an opinion on the matter in question that was calculated to aid the jury to reach a correct conclusion.

Sarah A. Hargrove et al vs. John E. Wilson.
Lands, Partition, Judgments, Collateral Attack, Fraud or Mistake, Statutory Remedy.

When land is sold, and the sale confirmed, in proceedings for partition of lands, and the record therein is regular in form and on its face it appears that plaintiffs were parties, the proceedings cannot be collaterally attacked for mistake, fraud or collusion, as the remedy is by petition in the cause, under Revisal, section 2613.

R. J. Southerland vs. Atlantic Coast Line Railroad Company.
Judgments, Res Adjudicata, Evidence.

A judgment of a court of competent jurisdiction including an adjudication of a fact controverted in a subsequent action, is perfect evidence of its own validity, and the fact so determined is res adjudicata. Therefore, when judgment has been rendered for damages for the loss of freight in an action against a carrier, the carrier cannot, in a subsequent suit brought to recover a statutory penalty for delay in settlement for the lost freight, introduce evidence tending to show that it had never, in fact, received the goods, as that issue was necessarily covered by the former judgment.

Action heard by Guion, J., upon facts agreed, June term, 1908, of Wayne, brought to recover of the defendant a penalty of $50 for failure to settle a claim within sixty days under Revisal, section 2634.

J. C. Andrews and Rufus Bowen vs. T. C. Grimes, et al.
1. Claim and Delivery, Ownership, Evidence, Issues.

An allegation and supporting evidence, that certain tobacco, the subject of claim and delivery proceedings, was in a house on defendant's land at the time of the alleged sale, and, by agreement, was to be hauled and delivered to plaintiffs by defendant, is sufficient to raise the issue "Did defendant afterwards agree with plaintiff that the tobacco should remain on defendant's land as the property of the plaintiff?"
2. Pleadings, Slight Variations Disregarded, Amendments in Superior and Supreme Courts.

Very slight variation between the allegation and the proof should be disregarded; and when to the contrary, amendment may be permitted by the trial judge to make them conform, Revisal, section 507; and also by the Supreme Court, Revisal, section 1245.
3. Claim and Delivery, Evidence of Ownership, Bailey, Collateral Matters.

As evidence of ownership of a lot of tobacco in dispute, it was competent to show by parol evidence that it had been insured by plaintiff as his own without putting the policy itself in evidence, as it was collateral to the issue.

Action tried before W. R. Allen, J., and a jury, April term, 1908, of Pitt.
Defendants appealed.

**Malaria Makes Pale Blood.**

The Old Standard GROVES' TASTELESS CHILL TONIC drives out malaria and builds up the system. For grown people and children, 50c.

### AFTER THE SMOKE OF BATTLE.

"Democrat" Discusses the Recent Election and Comments on the Causes of the Slump.

To the Editor of The Observer:

The die is cast and we have another Republican President. Never in the history of the nation has there been a more vigorous campaign waged than the one just closed. As the smoke of the battle vanishes, let us calmly as patriotic citizens view the situation and uphold and strengthen the hands of him who has been chosen by a majority of the people to administer the laws of our great republic. While we may not agree on all questions entertained by Mr. Taft and his party, we have in him an able, broad-minded statesman, conservative and just, who like the peerless McKinley will be President of not one but all sections of this country. He has, as indicated by his popular vote, the confidence of the people, and from the reputation he enjoys will redeem the pledges he made to them during the campaign. While it is gratifying to Democrats that the Southern States have been alive to their interests and have maintained their solidity, which is the bulwark of their safety, it is to be regretted that disaffection within their borders is found to exist, which has resulted in the reduction of the Democratic majority. Many are at sea. It seems, as to the cause of the reduction of the Democratic vote, especially in this State. This is easily answered. The Legislature was called in extra session ostensibly to settle the railroad rate question. After its disposition there developed the prohibition question; laws were enacted, date of election named and campaign inaugurated, running the State to expense of thousands of dollars when the question could have been submitted to the people for their decision at the general election a few months later. Not only this, but by legislation the people were deprived of exercising the right of local option. These were factors that caused the slump and one more prohibition campaign will not only give the Republicans a majority of Representatives in Congress, but the Legislature also. It is to be hoped that the Democratic members of the coming Legislature will realise the situation and fall into no more snares, but repair the damage.

DEMOCRAT.
Henderson, Nov. 12th, 1908.

**Constitutional Amendment Passed in Order to Have Sewerage.**

Special to The Observer.

Gaffney, S. C., Nov. 15.—At the general election the people of Cherokee county voted on an amendment to the constitution to allow the City of Gaffney to exceed the constitutional limit of 8 mills in order that it might put in a sewerage system. The amendment carried by a large majority, only two boxes in the county, Blacksburg and Allens, voting against it. The Representatives in the General Assembly will now have it ratified at the next session and the way will be clear to install the much-needed sewerage system.

**Returns to North Carolina.**

Lenoir News.

In a private letter received from Rev. H. C. Marley, of Gentry, Ark., he informs us that he has received and accepted a call from the Baptist church at Murphy, and will be in Murphy this week. We are glad to know that the Rev. Marley is in the Old North State again.