DIGEST SUPREME COURT DECISIONS

(By Jos. L. Seawell.)

HUTCHINS, appellant v. SCHOOL COMMITTEE. From Durham. Affirmed.

An order of a school committee excluding pupils who do not have a physician's certificate that they have been successfully vaccinated within three years, is held to be a reasonable exercise of the committee's authority.

BOARD OF EDUCATION, appellant v. COMMISSIONERS. From Iredell. Affirmed.

Sheriffs are entitled to retain commissions from school taxes collected by them.

Attention is called to the fact that the machinery act of 1903, chapter 251; makes no provision for commissions for collection of county taxes, and such commissions can be paid only under section 723 of the code.

CHAFFIN v. M'F'G. CO. From Davie.

On petition to re-hear; former ruling affiirmed.

As a riparian owner is entitled to recover nominal damages from one who ponds water on his land to any extent, it was error on trial of action to recover damages sustained from water backed on plaintiff's land by defendant's dam, to instruct the jury that plaintiff was entitled to nominal damages if the dam caused water to be ponded on his land to any "appreciable extent."

ERWIN, appellant v. MORRIS. From Cabarrus. Error.

Where land was mortgaged to secure an usurious loan and the mortgagor afterwards tendered the amount less the usury, which was refused by the mortgagee and the mortgagor subsequently conveyed the mortgaged land, under a contract that the purchaser should pay the mortgagee "the amount actually due," an order restraining a foreclosure of the mortgage on an affidavit of the mortgagor's grantee as to the usury, was improperly vacated pending final hearing.

STATON v. WEBB, appellant. From Edgecombe. Affirmed.

Since the adoption of the constitution of 1868 it is useless to fudge on the ancient distinctions in forms of actions.

A mortgagee, who, after cancelling his mortgage debt by selling the land, pays the surplus to the mortgagor, is not liable for such surplus to a subsequent mortgagee or judgment creditor; but the rule does not entitle the mortgagee to apply the surplus to his own unsecured debt due him by the mortgagor, to the exclusion of a subsequent creditor, notwithstanding the mortgagor's agreement that the surplus should be so applied in consideration of the mortgagee's services in procuring a purchaser for the mortgaged land at a price in excess of the mortgage.

Unless specially authorized by the mortgage the surplus proceeds of a sale of mortgaged land, which surplus belongs to a subsequent judgment creditor, is not subject to an attorney's fee paid by the mortgagee for drawing the deed executed by the mortgagor to the purchaser.

SMITH, appellant v. JOHNSON. From Alexander. Error.

A proceeding under chapter 22 acts 1903 to establish a boundary line between adjoining land owners, properly involves questions only as to ownership and the location of the line. The act did not intend that the proceeding should determine title; and occupancy by the plaintiff is sufficient evidence of ownership. Williams v. Hughes, 124 N. C. 3.

Therefore, where, in such proceeding, the defendant denies that plaintiff owns any land adjoining defendant, it is error on appeal from the clerk's judgment granting plaintiff's petition, to non-suit plaintiff, if there is any evidence tending to show that he occupies the adjoining land.

While non-suits are proper in many cases, it is better practice to submit the questions raised by the pleadings to the jury under proper instructions.

PLUMBING CO., appellant v. HALL From Mecklenburg. Affirmed.

In an action to recover alleged balance due on a contract to install a water system in defendant's house and construct a hydraulic ram in connection therewith, the defendant set up a counterclaim for damages by reason of incomplete work by plaintiff, and on cross examination of plaintiff's witness (who was its agent) he stated that the dam used in connection with the ram was built of trees rock and dirt, and plaintiff objected to the evidence on the ground of irrelevancy as the contract did not provide that plaintiff should build the dam.

Held that the evidence, even if irrelevant, was not injurious to plaintiff, as there was no evidence that the failure of the water was due to faulty construction of the dam.

Held further that evidence by a physicaan, admitted as expert, that persons living in the house with defendant, though not members of her family, had suffered from malaria, which the witness attributed to odors arising from the bath room and dampness in the house, was competent as substantive evidence to prove defective construction of the water system.

CANNADY, appellant v. CITY OF DURHAM. No error.

Where, in an action against a city for damages for personal injuries sustained by plaintiff's falling into a branch, which defendant permitted to run across its sidewalk, the alleged injury occurring on a dark night and there being no light at the place, defendant's answer denied that a sidewalk had been established at the place of the accident or the defendant had appropriated the land as a street or sidewalk, the trial judge in charging the jury properly made defendant's liability depend on the question whether it had established a sidewalk at the place of the accident or had exercised any control over the land for such purpose, and if so, whether it had permitted the branch to remain without a bridge and had provided no light at that place.

Where plaintiff in an action against a city to recover damages sustained by falling into a branch across the sidewalk in the night time, testified that he was accustomed to pass the dangerous place in the day time, but at such times he left the sidewalk just before reaching that point, as other people did, and that he had not passed the place at night before the night he was injured, at which time he did not leave the sidewalk as was his custom, he was not prejudiced by the charge on the issue of contributory negligence that if the jury believed the evidence of plaintiff he well knew of the dangerous place, and failure to use ordinary care in avoiding it would render him guilty of contributory negligence.

HEDRICK v. SO. RAILWAY CO., appellant. From Davidson. Affirmed.

It is competent for plaintiff, in an action against a railroad company for damages for death of his intestate caused by contact with a bridge over defendant's track, to introduce a portion of a paragraph of the answer which admitted intestate's death as alleged, without being compelled to introduce the remainder of the paragraph, immediately following and preceded by a comma, to the effect that the bridge across the track was properly constructed and that at a point on the track on each side of the bridge, and some distance therefrom, defendant had properly adjusted ropes for the purpose of warning employees of the approach to the bridge: Lewis v. Railroad, 132 N. C., 382; Stewart v. Railroad at this term.

In an action against a railroad company for damages for death of plaintiff's intestate caused by his coming in contact with an overhead bridge, there was evidence that defendant had ropes suspended vertically over the track at a sufficient distance from the bridge on each side, for the purpose of warning employees standing on the cars, but that this device could not be relied on as a sufficient warning, because the ropes sometimes became tangled and caught up above the brakeman's head, and that the bridge was not sufficiently high to prevent striking one standing erect on a car

Held proper to overrule defendant's exception to the charge that defendant was negligent if the jury found that the bridge was too low to prevent contact with one standing erect on the cars, unless the jury also found that defendant had provided "warning ropes" which proved sufficient protection to an ordinary careful and prudent man, that mere knowing by intestate that the bridge was too low would not render him guilty of contributory negligence, but it was his duty to exercise ordinary care with reference to the danger and the peculiar situation—the greater danger, the greater care,—and in determining whether intestate contributed to his injury the jury might consider the fact that he had served as flagman on that division of the road for three or four months immediately before his death.

WOOD v. FLEETWOOD, appellant. From Perquimans. Affirmed.

A condition of non-alienation, even for a limited time, annexed to a devise either in fee or for life, is void as against public policy.

Where a testator devised to his wife for life and appointed her executrix, and the will provided that at her death the heirs shall "select an administrator to manage the estate" and make settlement every year, and at the expiration of five years after the wife's death the testator's two children should make partition of the estate, "own and occupy the property during their natural lives" and at their death it "should go to their lawful heirs, and should they have no surviving heirs," then to the testator's heirs, it was held that under the rule in Shelly's case, a remainder in fee vested in the testator's children, and the wife having fully administered on the estate the provison in reference to the selection of an "administrator" upon her death was rendered invalid.

Held further that the ulterior limitation to the heirs of the testator upon failure of heirs of his children, does not render their estate contingent, as the testator's heirs are necessarily the heirs of his children.

The term "lawful heirs" in a devise is construed to mean the heirs designated by law to take from their ancestor.

When the words of a devise bring it within the rule in Shelly's case, the rule will be enforced—the devisee's contrary intention notwithstanding. But when the instrument indicates an intention not to use the word "heirs" in its technical sense but as descriptio personam, as by the term "heirs of the body" the testator meant children, the law will endeavor to effectuate his intention.

The rule in Shelly's case applies only when the same persons will take the same estate, whether they take by descent or purchase; in which case they are made to take by descent. But when the persons taking by purchase would be different or have other estates than they would take by descent from the first taker, the rule does not apply and the first taker is confined to an estate for life.

LONDON v. BYNUM, appellant. From Chatham. Error.

Where a corporation's assumption of individual indebtedness of two partners of a firm was a part consideration for conveyance by the firm of partnership property, the indebtedness of the two partners being secured by a deed of trust on the land conveyed to the corporation and also by a deed for land belonging individually to a third partner, it is held that there was an implied promise by the corporation to release the individual land from the burden of the debt.

A Russo-Japanese Alliance

(New York Times.)

Will Russia and Japan ultimately join hands in the Orient and take joint control of that vast rich undeveloped and mysterious region of the globe? According to the "indiscretion" of a Russian diplomatist that is what Russia contemplates and what Japan is supposed to be capable of. Naturally the caolition of these two great powers would be expected to carry with it the practical sway of China and if the Russian has his way, the exclusion of the Occidental powers from influence or trade, Russian frankly taking her stand with the Asiatics and openly adopting what she appears to think is the policy of the Asiatics as opposed to that of Europe and America. In other words what the Russian diplomatist seems to expect and hope is that his country and Japan shall act the parts of the two robbers quarreling over rich booty, who suddenly agree to divide it and drive away all that would share it with them.

No doubt the exact operation of the Japanese mind in the future may be difficult to forecast. It has given the word already a series of tremendous surprise, and it is open to any one who chooses to argue that it will give us still greater, and that they will be as abhorrent to the civilized world as her immediate past has been acceptable and admirable. But there is absolutely nothing in what Japan has done to justify the belief that she will engage in any such cynical and brutal undertaking as this Russian ventures to propose. His whole plan rests on the assumption that Japan seeks the same ends in China that Russia has appeared to seek, that she regards power there only as a means of exaction and extortion, as booty to be either selfishly grabbed or selfishly bargained away. As a matter of fact her idea, as disclosed in her practice, has been the complete opposite of this.

Canada and Reciprocity

(Chicago Record-Herald.)

The dominion parliament will assemble in January, and it is understood that the government will at once institute a searching inquiry into the alleged need of more adequate protection. Premier Laurier is bound to consult all interests and classes, however, and is doing that he cannot fail to run up against the demand of large classes of producers for reciprocity with the United States.

It appears from a letter in the Boston Transcript, based on an interview with Sir Wilfrid, that the Canadian government would gladly entertain a suggestion toward reassembling the "joint high commission" and making another attempt at evolving a reciprocity arrangement with the United States. It is not true, we are assured, that the people and government of the dominion are utterly indifferent. Rather are they perfectly willing to discuss reciprocity with us, though not on the old basis, still favored by men like Senator Lodge.

Canada could not be induced to lower duties on New England manufacturers in return for lower duties on her "naturals," but she would view with favor a scheme involving reciprocity in coal, ores, fish, lumber, fruit and raw materials generally. The liberal organs are now reviving the discussion along these lines and warning us that continued inaction will expose us to the operation of the treble tariff, which will contain maximum duties against countries levying high duties on Canadian products and "standing pat" on them.

His Order for Eggs

There is a certain lawyer in the town who devotes all his leisure time to the perpetuation of elaborate and solemn jokes. Nobody on earth is too august for him to tackle. He was in London last summer, and one morning he went into a restaurant with his most dignified air, and proceeded to order breakfast.

"I want two eggs," said he to the waiter. "I want one fried on one side, and the other fried on the other."

The waiter nodded and withdrew. A little later he returned.

"Beg pardon, sir," said he, "but I am afraid I didn't quite catch your order. Would you mind repeating it?"

"Not at all," said the American, solemnly. "I want two eggs, one of them fried on one side and the other on the other."

"Thank you, sir," said the waiter. "I thought that was what you said, but I wasn't quite sure, sir."

Five minutes later an apologetic waiter returned to the American's elbow.

"I beg pardon, sir," said he again, "but the cook and I have had some words. Would you mind having those eggs scrambled?"

Army Desersions

(Newark Advertiser.)

Desertions of enlisted men from the army are increasing doubtless the causes are many. All of them are not known, but some of them are. Lieutenant-general Chaffee reports that after investigation, which includes talks with many men in the guardhouses, the main trouble is not with the service, but with the men, who enlist without careful consideration and find army life different from their expectations. Since the abolition of the canteen, desertions, as well as intemperence, have increased and army officers are convinced that they bear the relation to one another of cause and effect. General Chaffee officially favors the restoration of the canteen, and there is little doubt that it would help in the prevention of desertions. In his annual report the chief of staff considers the subject of desertions and suggests efforts to check their spread by military methods have failed an effort be made through state laws. He would have loss of citizenship the penalty for desertion, to be restored only after the culprit has served the full term of enlistment and received an honorable discharge. Such laws, he believes, would empty the military prisons of two-thirds of their occupants. Such a measure, harsh as it seems is none too severe for the offense. In time of war the deserter is shot. In time of peace, imprisonment, when the man is caught, may serve the purpose of punishment, but nothing else. If the enlisted man knows that by deserting he loses his citizenship he will be less likely to run away.

Modest Benefactors of the Race

(From the New York World.)

An Iowa college professor by teaching the farmers the best way to select seed corn, has increased the Iowa corn crop 25 per cent. A Maine college professor is teaching the Maine farmers how to breed hens that will lay twice as many eggs as the ordinary fowl. Cornell professors are teaching dairy farmers how they can get more quarts of milk from their cows. A Minnesota college professor is introducing a hardy breed of wheat that will make better flour. A Nebraska college professor studied out a new system of cultivation which enables grain to be raised without irrigation on what was once called the arid belt.

What the German professors are doing for chemical products the professors of the American agricultural colleges are doing for farm products.

The increased value of the Iowa corn crop this year is about the same as the increase asked for in the navy appropriations. The college professor who studied out the improvement in seed corn gets a salary of $5,000 a year. All the agricultural colleges in the United States do not cost as much as one new battleship.

It must not be overlooked that all these improvements concern everybody in New York city. More corn means more beef, pork and poultry. More good wheat means cheaper flour. More productive hens and cows mean cheaper eggs and milk. The millions of consumers in the cities benefit as much as the farmers.

Miss Krupp's Huge Income

(From a Berlin Cable Dispatch.)

Bertha Krupp's income from the great Krupp Company, of which she owns nearly every share of the $40,000,000 capital stock, is $2,400,000 a year, $200,000 a month, about $6,600 a day.

The company has just declared a 6 per cent annual dividend.

But this great income does not measure the wealth of the richest young woman in the world. Miss Martha, the elder of his daughters, now 18 years of age, inherited from her father, the great gunmaster, the gun works at Essen, the ship works and wharves at Kiel, and all his iron and coal mines in Westphalia and Spain. Conservative estimates make the value of this property $75,000,000.

Miss Bertha will receive yet more money at her mother's death, for the great ironmaster left not less than $150,000,000, out of which will come a splendid fortune for his youngest daughter, Miss Barara.