Open Court

North Carolina Law Review

to the negligence of the pullman company. The jury rendered a verdict in plaintiff's favor for $1625.00. The defendant excepted to the refusal of the judge to instruct the jury that the defendant owed plaintiff only ordinary care. The court in overruling the exception said that the defendant owed plaintiff "the highest degree of care" and sustained the verdict.

There is no question as to the correctness of the decision, as the facts were admitted, and ordinary care on part of defendant would have prevented the injury; but the term "the highest degree of care" is misleading. There is really only one degree of care i. e., ordinary care, or due care under the circumstances; but the effort or acts necessary to meet the standard of ordinary care are proportionate to the existing danger. That is, very dangerous conditions require a great amount of effort or care, while less dangerous conditions require less effort or care; but under the circumstances of each particular case, the legal standard is ordinary care.

M. P. MYERS.

OPEN COURT

A PRACTICAL USE OF THE RULE-MAKING POWER

There is a very interesting discussion of the above subject by Judge Arthur Webster of Detroit, Michigan, in the February issue of the Journal of the American Judicature Society. As a device for improving our judicial machinery and for helping to relieve the congestion of court dockets, it is simple, direct and ready at hand. In North Carolina, the power to prescribe rules for trial courts (Superior courts and inferior courts) is vested in the Legislature by the Constitution,[1] but the Legislature has committed it to the Supreme Court.[2] This enables the Supreme Court to make rules for trial courts subject, in North Carolina, to legislative modification.[3] The following quotation from Judge Webster's article is an illustration of an effective use of the rule making power in Michigan.

"Probably the most important of the new rules was the adoption of the federal practice in the examination of jurors. The rule as adopted provides:

[1] N. C. Const., Art. 4, s. 12.

[2] C. S. 1421.

[3] *Calvert v. Carstarphen,* 133 N. C. 25, 45 S. E. 353. See McIntosh, *Jurisdiction of the North Carolina Supreme Court,* 5 N. C. L. Rev. 5, 27.

"'In the discretion of the judge, the voir dire examination of jurors in all cases may be conducted by the judge alone. If the examination is made by the judge, counsel on either side, desiring additional matters to be inquired into shall state the matter to the judge, and the judge, if the matter is proper, shall conduct such examination, or in his discretion permit counsel to do so.'

"All jurors in our court before being accepted for the panel are required to fill out written questionnaires under oath, giving a very complete history of their lives, and these questionnaires are available for examination by all attorneys.

"Our experience with the new method of examining jurors on their voir dire covers a period of about six months. During this period we feel that a fair test has been made in all classes of cases and as a result we are convinced that the new practice more than meets expectations. It takes, on an average, not to exceed five minutes to empanel a jury; very rarely as much as fifteen minutes may be required in some particular case where a number of peremptory challenges are exercised on each side. The jurors themselves very much prefer to be questioned by the judges, and are outspoken in favor of the present method.

"At first some of the practicing attorneys were dissatisfied, but if a judgment were to be based upon expressions to be heard in court of late, it is fair to assume that 80 per cent of the bar favor the innovation. The judges themselves estimate that the time saved each day by the present practice is equivalent to adding at least one judge (if not more) to the present bench. And from the standpoint of the litigant, just as fair and impartial a jury is secured as by the old time-consuming method.

"All in all, the adoption of this rule maks a distinct advance, and well illustrates the benfit of the courts' use of its rule making power."

The Better Way

A delegation of New York city judges and lawyers appeared before a legislative committee a few days ago, seeking relief for congested court dockets in the city. Figures were presented to show that in one court division thirty thousand cases awaited trial and the congestion was being augmented at the rate of five thousand cases per year. That condition would have brought North Carolina lawyers up shouting for a judicial district for each county, and two or three districts for each of the larger counties. But the New

York judges and lawyers didn't ask for more judges and state's attorneys. They asked for changes in court procedure designed to facilitate trials and prevent the bringing of frivolous actions. One bill that met with legislative favor was to increase court costs to keep out unnecessary cases, the increase bringing the amount to be paid to about half the actual cost to the taxpayers. Up to now the cost of bringing an action has been so inconsequential that actions were brought for entertainment, so to speak. Another bill favored should be the law in every state—trial without jury unless the parties to the action specifically request a jury. Whose business is it if the parties to a suit prefer that the judge settle it without a jury? It should be their right to say how they want their suits tried. Yet a provision like that appearing in the North Carolina legislature would raise a howl of protest that would shake the roof. The rights of the parties to the action would not be considered. It's the lawyers' rights that are always of first importance in legislation because the barristers dominate legislation.

Another measure asked by this delegation of judges and lawyers was a provision penalizing lawyers who bring a suit in the state court which should have been properly brought in the municipal or city court—going to the Superior court, as in North Carolina, when they had a case in a magistrate's jurisdiction. This was denied, naturally, but it will come later. When it comes in North Carolina magistrates will be provided that command respect. Another provision, also denied, would give the judge discretion in certain cases apparently brought for blackmail purposes—to compel somebody to do something rather than face a court trial. We have such cases in North Carolina, but they are not always recognized for what they are.

Greensboro Daily News, R. R. CLARK.
March 14, 1927.

THE LOWLY MULE

In *Rector v. Southern Coal Co.* (1926) 192 N. C. 804, 136 S. E. 113, the plaintiff's intestate was struck by a mule. Recovery was had in the lower court, but the Supreme Court held otherwise.

Brogden, J. The question of law presented by this case is, what duty does the owner of a mule owe to an employee who has charge of the mule and who goes into the stall where the mule is? A mule is a melancholy creature. It is a nullius filius in the animal kingdom.