STATE OF NORTH CAROLINA—In the Supreme Court.

WM. R. PEPPER *Against* **A. W. SHAFFER.** } *Argument of A. W. TOURGEE, of Counsel for Defendant.*

Filed by leave of Court.

STATEMENT OF FACTS.

The facts necessary to be considered in determining the question raised by this appeal, are as follows:

1st. Previous to the sale of the personal property, which is the subject of the controversy, the plaintiff was the owner of a tract of land on Jones' Island, in the Roanoke River, on which the said personal property then was; which land was under the lien of an execution, and also a mortgage.

2nd. There had been some negotiation between the plaintiff and the defendant Shaffer in regard to the purchase of said land, and the interest of Pepper's wife in the equity of redemption was assigned to Shaffer for a *nominal consideration*. This negotiation was some ten months before the sale, and the proposed trade had fallen through before that time.

3d. After the sale of the personal property to Harris, Harris and Shaffer, *under an agreement with Pepper*, made a crop on the land as joint tenants, Harris putting in the stock and provisions, purchased from Pepper, and Shaffer furnishing other stock, tools and implements and supplies, to a much greater amount, the crop being equally divided after paying certain advances by Shaffer.

4th. Pending their occupancy of the premises the land was sold to satisfy the mortgage, and at the close of the crop season the remaining portion of the property was removed by Harris to a farm of Shaffer's, near the city of Raleigh, which Harris had engaged to cultivate, *on shares*, during the next ensuing year.

FIRST OBJECTION.

The plaintiff stated in his testimony that at the time of the sale to Harris he believed that Shaffer was interested in the purchase, and *in support of this allegation*, introduced in evidence a certain letter from Shaffer, addressed to him during the pendency of the negotiation, with regard to the land. To this there was no objection. He afterwards introduced other letters from Shaffer *to other parties, written several months before the sale of the personal property*, and during the pendency of the negotiation with regard to the land, to which the defendant objected, because *it did not appear that the plaintiff had any knowledge of such letters at the time of the sale of the personalty to Harris.*

This objection was overruled by the court, and the plaintiff's counsel was allowed to argue to the jury that he, the plaintiff, had a right to infer that Shaffer was interested in the purchase

tract and make the other party liable. It must, however, be *such* a use, and under *such* circumstances as justifies the belief of knowledge of the purchase, and not benefits derived from it, secondarily, through another person's use of it, *as his own, as in this case.*

A partnership entered into between one who has purchased goods and another, *after* the purchase, they constituting the stock in trade of the partner who holds them, cannot, of itself, fix the other *partner* with liability. Neither can the fact that one works land with stock for which he has not paid make the landlord liable, although he may receive a share of the crop. The property is no doubt "*used for the joint benefit of both,*" but it is not *such* a use as implies proprietorship or attaches liability.

Yet this is the tenor of his Honor's charge in this case. If it is "used on Shaffer's farm for the joint benefit of Shaffer (the landlord) and Harris (his cropper—one who worked the place on shares) Shaffer is liable with Harris."

Under this instruction the jury find that Shaffer "was a party to the contract." Whether they believe that he became such by previous privity with Harris or by subsequent participation in the fruits of his purchase, it is impossible to determine. It is fair to presume the latter for two reasons:

1. All privity or understanding between Shaffer and Harris previous to the trade in regard to it is *expressly denied by both of them.* The plaintiff did not claim that Shaffer ever said a word to him about it, nor did he mention it to Shaffer, though he was present when Shaffer drew the instrument for Harris, which was read to him and taken away by him to his own attorney and afterwards returned. The *only* evidence tending to show antecedent participation in the trade, was that Shaffer, during the Spring before, had written to Pepper, that *if he bought the place* he would want some of the stock. That trade was never consummated. Harris at least could have had no *interest* to misrepresent this, because he is insolvent, and if he were not, it would be his *interest* to involve Shaffer with himself. It is fair then, to presume that the jury did not find *against* the oath of two respectable and uncontradicted witnesses, in this respect, upon this shred of negative and inferential testimony.

2. Again, it is fair to presume that they found him a party to the contract from his subsequent acts and relations to the property, from the fact that his Honor, in his instructions, selected *one of those facts* as, in itself, sufficient to make him jointly liable with Harris, to wit: *the use of the property on Shaffer's farm*, which was the next year after making of the crop on Jones' Island. The special prominence given to this fact, by the Judge, it being the only circumstance referred to in his instructions with any directness, and one on which their whole finding might hinge, must have impressed the jury. He did not say that if he so conducted himself as to justify

belief in his joint ownership, he was liable, but "if the property *was used* on Shaffer's farm for the *joint* benefit of Shaffer and Harris, Shaffer is liable." What more natural than that the jury to say, "Of course it was used for their joint benefit. Harris worked the farm on shares. Both were '*benefited*' by the crop. So Shaffer is a party to the contract."

We, therefore, submit:

1st. That his Honor's charge in regard to a liability arising from the subsequent acts of the defendant Shaffer, *if taken by itself*, is bad in law, since the fact stated is not sufficient to establish liability.

2nd. That if it be taken in connection with his instructions upon the other condition of liability, to-wit, previous knowledge of, and interest in the purchase by Harris, it is so uncertain and obscure, so combines and commingles the two, that the court can readily see, not only, that it *may have misled the jury*, but almost of necessity, *must have done so.*

I am unable to refer to the pages of the record being allowed to file this argument after the hearing of the case and not having the transcript before me, and my copy is not paged exactly like it.

I do not cite any authorities as I do not know that there is any contest of law in the case. The question is, "Was the charge of the Judge such an one as might reasonably have misled the jury in their finding?" if considered in one view, or, "Was it bad in law?" if considered in another view. In either case the defendant is entitled to a new trial, according to *all* the authorities.

A. W. TOURGEE,
of counsel for defendant.

Argument of
Atty in Supreme
Court <u>case</u> on
Property.