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EVIDENCE AS TO GENERAL REPUTATION—In the recent case of *State v. Steen*, the defendant, Steen, was prosecuted for selling liquor. The evidence against him was obtained by a private detective, Sapphire, of the Atlanta Agency, hired by the town and county commissioners of Rockingham County, who had formed a club for the purpose of breaking up the liquor traffic in that county. After the preliminary hearing of the case, and shortly before the trial in the Superior Court, the commissioners authorized one of their members, one Corpening, a highly esteemed citizen, to go to Atlanta and investigate the character of Sapphire.

On trial the following question was asked: "Mr. Corpening, have you made any investigation as to Mr. Sapphire's character?" Defendant objected; overruled; defendant excepted. To this question the witness replied: "I made a trip to Atlanta and made a personal investigation, and from my investigation I would say his character was good." On appeal to the Supreme Court it was held by a three to two decision, no error to allow Mr. Corpening's testimony.

When a witness is on the stand, the credibility of his testimony depends on his character, and he may be asked questions as to particular acts, impeaching his character. But if other witnesses are on the stand to sustain or impeach his character, it is only competent for them to testify as to the witness's general reputation and general character. It is usually stated that this evidence is admissible as an exception to the hearsay rule, but the actual situation is that general reputation is a fact, of which the character witness must have knowledge in order to prove the fact. How is this knowledge to be obtained and how are we to establish character? It must be proved by those who know what the community generally says about the man's character. "When the character of a party or of a witness is evidenced by reputation, the reputation itself must be proved by a witness qualified by an opportunity to obtain knowledge of it." Therefore the preliminary question is, "Do you know the general character or reputation of the party in question?" If the witness answers "No," he is not a competent witness. If he answers "Yes," then he is qualified to say what the general reputation of the party in question is in his community. This preliminary question has been held to be a necessary prerequisite or qualification to his right to testify. That this is the North Carolina rule is brought out by Justice Stacy in his dissenting opinion in the principal case, citing numerous authorities. Justice Adams agrees with the general rule in his concurring opinion, saying: "Our decisions have unquestionably settled the principle that a witness will not be allowed to testify as to general character until he shall have first qualified himself by saying that he knows the reputa-

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1 *State v. Steen* (1923) 185 N. C. 768, 117 S. E. 793.
2 Wigmore on Evidence, sec. 691.
3 *State v. Boswell* (1820) 13 N. C. 211; *State v. O'Neal* (1843) 26 N. C. 88; *State v. Parks* (1843) 25 N. C. 295. (The witness must profess to know the general reputation before testifying); *State v. Speight* (1873) 69 N. C. 72, 75; *State v. Coley* (1894) 114 N. C. 879, 883, 19 S. E. 705.
tion of the person whose character is in question, when objection is made on that ground." And Chief Justice Clark is in agreement on this general proposition. So that it is clear that the principal case is not intended to change the general rule as to the qualifications of a character witness.

In the principal case, the preliminary question as to the knowledge of the witness was not asked, and there was no objection on that account. The majority of the court hold that this is not a reversible error, unless there is a proper objection on that ground. But the dissenting judge argues that the preliminary question must be asked in every case. "No principle of evidence is more clearly settled in North Carolina, nor by a longer line of decisions, than that a witness will not be allowed to testify as to character until he shall have first qualified himself by stating that he knows the general reputation of the person in question." It appears that the principal case stands for the proposition that, while it is customary to ask the preliminary question, as stated above, it is not reversible error if this question is not asked, and no objection made on that ground.

Even if the preliminary question had been answered in the affirmative in the principal case, the witness, on cross-examination, would have been asked regarding his means of knowing the general reputation of the party in question. He would have answered that he made a personal investigation of the character of the witness. So that, in any case, the court would have been confronted with the question of whether evidence as to character, based on knowledge acquired by such investigation, is admissible. The principal case answers this affirmatively. In reaching this conclusion, Chief Justice Clark, writing the opinion of the court, presumes that there was a thorough investigation. But, as pointed out by Justice Stacy, the record is silent as to whether this investigation was long or short, made among friends and acquaintances or strangers, or whether the inquiries were few or many.

"It is not enough that the impeaching witness professes merely to state what he has heard others say; for those others may be but few. He must be able to state what is generally said of the persons by those among whom he dwells, or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character. And, ordinarily, the witness ought himself to come from the neighborhood of the person whose character is in question. If he is a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries." This quotation from Greenleaf accords with the following from Wigmore: "The admissible reputation is that which is built up in the neighborhood of a man's domicile or in the circle where his livelihood is followed, and it is of slow formation. It is the sum of all that is said or

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4 (1923) 185 N. C. 768, 774. (Italics ours.)
5 (1923) 185 N. C. 768, 777; State v. Coley (1894) 114 N. C. 879, 19 S. E. 705; and cases in note 3 supra.
6 (1923) 185 N. C. 768, 777.
7 Greenleaf on Evidence, sec. 461.
not said for or against him. Consequently, its tenor can be adequately learned only by a residence in the place, not by a mere visit of inquiry, or by a sojourn, or by a conversation with a resident who reports the reputation."

Justice Adams' argument to the contrary is that it is not necessary to live in the same community to have knowledge of general reputation, but that the witness must have the means of learning the community's estimate, must have the foundation for forming his opinion. And it is sufficient if the witness goes into a community for the purpose of investigating the character of a party, since the witness's knowledge must necessarily be derived in every case from intercourse with neighbors or associates. Therefore, since the witness had an opportunity to learn the community's estimate by a thorough investigation, he was properly qualified to testify. There is a possibility that the above rule leaves an opening for an attack on a man's character, by sending prejudiced investigators into his community. But in the trial of any case, there is always the danger of prejudiced and fraudulent witnesses, and this would not make conditions any worse. A practical objection, pointed out by Justice Adams, to refusing the testimony of a character witness who makes an investigation outside of the State, is that, in a criminal action, the State can neither compel the attendance nor take the deposition of a non-resident witness but the defendant may introduce the depositions of witnesses, resident and non-resident. The disadvantage to the State is clear.

Perhaps the opinion of the court was that, even if the detective's character was not good, yet there was sufficient evidence of defendant's guilt, so that the admission of the evidence in question would not have changed the result. The principal thing is that the citizens of Rockingham County acted in a most worthy manner in trying to enforce the law, and they should not be discouraged by giving a new trial to a violator of the law, who was clearly guilty. Justice Clarkson suggests that, if there was an error in admitting the evidence, in his opinion, it was a harmless error, and the defendant should not have a new trial.

A. E. C.

Co-operative Marketing in North Carolina—During the past few years the farmers of this country, seeing the defects in the system of marketing farm crops, have turned their attention to coöperative marketing. Following the slump in prices of farm crops in 1920, the North Carolina legislature of 1921 passed the Coöperative Marketing Act. The purpose of the Act is declared to be: "In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through coöperation, and to eliminate speculation and waste; and to make the distribution of agricultural products as direct as can be efficiently done between producer and consumer; and to stabilize the marketing

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8 Wigmore on Evidence, sec. 692.
9 (1923) 185 N. C. 768, 775.
1 Public Laws 1921, Chap. 87.
problems of agricultural products, this act is passed." Under the authority of this act the Tri-State Cotton and Tobacco Growers Coöperative Marketing Associations were organized.3

Before the associations were formed there was a standard agreement circulated in these three states and signed by each member. After the associations were formed, these agreements became the contracts between the growers and the associations. The contract provided that the member should sell and deliver to the association all the tobacco or cotton raised by him or acquired as landlord or lessor from 1922 to 1926 inclusive. It further provided that if the grower failed to sell and deliver to the Association his crop, he agreed to pay $.05 per pound as liquidated damages for all tobacco placed on the market in breach of his contract, and "in event of breach or threatened breach of any of the provisions regarding delivery of tobacco, the Association shall be entitled to an injunction to prevent the further breach thereof and to a decree for specific performance," costs and necessary expense of the litigation to be paid by the grower.

Most of the cases that have arisen have been for a breach of contract by the member. The first North Carolina case was The Tobacco Growers Coöperative Association v. Jones,4 discussed in a previous issue of the Law Review.5 The grower in that case, notwithstanding his agreement, sold part of his 1922 crop individually on the warehouse floor and announced that he would continue to do so. The Association brought an action to restrain him from breaking his contract. The defendant in contesting the action, set up as a defense, that the contract was void as against public policy, that it was in violation of the Constitution of North Carolina and that it was an unreasonable restraint of interstate and intra-state commerce. These contentions of defendant were denied by the Supreme Court, and the legality of the Act under which the Association was formed, and the validity of the contract were upheld. The court said it would never become a monopoly because its charter could be repealed by the legislature, and, as it had no capital stock, surplus or credit except as given by the statute, its charter may be withdrawn at any time.

In the case of Pittman v. Tobacco Growers Coöperative Association,6 the plaintiff asked that the contract be set aside because he was induced to sign the contract by the fraudulent representations of the defendants, and he also assailed its validity for insufficient number of signers.7 The facts were that the plaintiff was a merchant as well as a farmer and kept some of the blank contracts in his store and helped secure members. It was found by the jury that there was no fraud used in getting him to sign. It was held that he would be estopped to deny

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2 Ibid, sec. 1.
3 The Tri-State organization includes Virginia, North and South Carolina. On the Board of Directors is a man appointed by the Governor of each State. He is supposed to represent the interest of the public.
5 See note 4, supra.
6 See article by Edmund Brown, Coöperative Marketing of Tobacco, I N. C. Law Rev. 216. See also Ballantine, Coöperative Marketing Association, 8 Minn. L. R. 1; note in 37 Harv. L. Rev. 145.
7 (1924) 187 N. C. 339, 121 S. E. 634.
8 The Association proposed to secure signatures of tobacco farmers covering at least one-half of the aggregate production of tobacco in its territory.
that he knew what was in the contract. The plaintiff made a collateral attack on the Association, but the court said that the member could not attack the validity of the Association collaterally, as that was for the State in a *quo warranto* proceedings, nor could he avoid his contract because there was mismanagement on the part of the Association after its organization.

The opposition to the co-operative marketing associations is very strong in some sections, and there is much false propaganda circulated in regard to them, and, as a result, some of the members become dissatisfied. In order that they may evade delivery, some of them rent their farms. In the case of *Tobacco Growers Coöperative Marketing Association v. Bissett*, the question was raised as to whether the Association could force the landlord member to pay liquidated damages of $.05 per pound on the tobacco of the non-member tenant who sold on the open market. The court held that it could not. The tobacco had been divided in this case, and the landlord had delivered his share of the tobacco to the Association. Under the statutes in North Carolina, the landlord has a lien on the tenant's crops to the extent of rents due and advances made. In this case there was nothing due, and therefore the landlord was not entitled to the tenant's tobacco, and the Association could not get it.

In the case of *Tobacco Growers Coöperative Marketing Association v. Battle*, the court said that the remedy of injunction by the Association was available, made so by statute and upheld by the court, and further that specific performance is required for the proper enforcement of the contract. As an ordinary proposition specific performance is not allowed in contracts for the sale and delivery of personal property, but unless it is granted in these cases, the Association is without an adequate remedy, and it fails of its purpose. And when the defendant denies his membership, the restraining order will be continued where the plaintiff Association has an apparent right in the property.

The question of whether the crop mortgaged for supplies must be delivered was raised in the case of *Tobacco Growers Coöperative Marketing Association v. Patterson*. The defendant had mortgaged the 1923 crop for an amount that would more than absorb it. Something over half of this amount was for supplies, and the remainder was for a note. It was held that the defendant could place such a mortgage or lien on the crop for supplies to successfully cultivate and produce the same, and that the contract between the plaintiff and defendant contemplated such a mortgage, nor as a rule should the grower's rights to place a mortgage on his crops for the bona fide purpose of raising the same be in any way hindered or lightly interfered with. The restraining order was continued because the defendant had broken his contract, and the court found that he avowed his purpose of continuing to break it.

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1. (1924) 187 N. C. 180, 121 S. E. 446.
2. C. S. sec. 2355.
3. In Kentucky, the statute provides that the landlord shall be compelled to deliver all tobacco produced upon his lands by non-member tenants. This is omitted in the North Carolina Act. See reference in *Association v. Bissett* (1924) 187 N. C. 180, 183.
5. (1924) 187 N. C. 251, 121 S. E. 631.
Under the statutes of North Carolina if a person makes any advance of money or supplies to any person engaged in cultivating the soil, the person making the advance is entitled to a lien on the crops made during the year upon the land in the cultivation of which the advance has been expended. To be effective, this lien must be registered in thirty days. This may cause some difficulties for the Associations. Suppose a member gives a lien on his crop for advances or supplies to a person who is hostile to the Association? Such person, upon default, might foreclose his lien and sell the crop under execution. This could not be prevented in any way by the Association. Even if there is no default by the grower, yet, in the case of an agricultural lien or a mortgage on the crop, the Association would get a crop, subject to the lien or mortgage, and the lienholder would have to be satisfied. But this is not objectionable because what the Association wants is the crop of cotton or tobacco. The existence of the Association depends on its having the crops of its members to dispose of. In case of a crop, subject to liens, payments could be made to the grower depending upon his interest in the crop. It would seem that the lienholder or mortgagee could not follow the particular tobacco, subject to his claim, after it is mixed with tobacco of the same grade in the Association warehouse, though his claim would not thereby be lost. The Patterson case suggests another danger. A member might obtain advances far in excess of his needs, and thus create a lien which might absorb the crop, in effect, selling the crop to the lienholder or mortgagee before the crop is made.

The Supreme Court, in the case of Tobacco Growers Coöperative Marketing Association v. Bland, reverts to the maxim that "he who comes into equity must do so with clean hands." In that case the defendant delivered all of his 1922 crop and two-thirds of his 1923 crop to the Association, but, owing to the failure of the Association (plaintiff) to account for a balance due on his 1922 crop, amounting to about $800.00, the defendant sold the remaining third of his 1923 crop upon the open market to raise money for necessary supplies for his family. The lower court dissolved the injunction, and this was affirmed. In such a case, the court will consider the inconveniences of the parties and the damages that will result, and it was intimated that if the defendant was able to prove his charge he might be relieved from further performance.

In Tobacco Growers Coöperative Marketing Association v. Pollock et al, the plaintiff charged conspiracy among the defendants to defraud the Association and asked for an injunction, pending the action, to prevent the sale or other disposition of the crop to the end that the Association might get specific performance of the contract. The defendants contended, not only that they were fraudulently induced to execute the agreement, but that the plaintiff failed to comply with its contract, and they insisted on the right to rescind and to sell their tobacco without incurring liability to the plaintiff. Upon these issues of fact, the court

13 C. S. sec. 2480. This agricultural lien has priority except as to a landlord's or a laborer's lien.
14 (1924) 187 N. C. 355, 121 S. E. 636.
15 (1924) 187 N. C. 408, 121 S. E. 763.
declined to give an opinion. The defendants claimed that the plaintiff had an adequate remedy at law, and the judgment of the lower court dissolving the restraining order should be affirmed, but the Supreme Court declined to so rule. The court in its opinion said, "The very purpose of the organization is to stabilize the price of tobacco by promoting coöperation in selling, and its purpose would be defeated by granting to the members immunity from all liability beyond the payment of liquidated damages." The court referred to the opinion of Chief Justice Clark, in Coöperate Association v. Jones, in which he said, "Damages of course are of no real value. The Association must have crops to market or it will go out of business, therefore relief in equity is provided."

In the cases of Tobacco Growers Coöperate Marketing Association v. Moss, and also in Tobacco Growers Coöperate Association v. Spikes, the question raised is one of membership. In the former case the defendant admitted signing the agreement but contended that this was done on condition, and that the contract was not to take effect except upon a contingency which never happened. A condition to the effect that a contract is not to take effect until the happening of some contingent event, can be shown by parol evidence, but the burden of proving it is on the defendant. A new trial was granted for error in the trial judge's charge which put the burden of disproving the collateral agreement on the plaintiff.

In the Spikes case there was evidence that the defendant had signed the contract and broken it. The defendant denied that he was a member and disavowed any and all obligation to deliver his crop. The court held that as the question at issue depended upon the defendant's membership, the case comes under those previously decided as to injunctions, and the restraining order would be continued.

The right of the Coöperate Marketing Associations to exist has been given to them by the legislature and by the courts. Their continued existence will depend very largely upon the way in which they play the game. So far the court's decisions have, for the most part, been favorable to the Associations, but, in its struggle for existence, a false move now on the part of the Associations would most likely prove fatal to their future welfare and continued well being.

C. E. C.

Separation Agreements in North Carolina—In a recent North Carolina case, the facts show that, ten years after marriage, the wife, alleging cruelty, brought suit against the husband for alimony. The parties, thereupon, executed a separation agreement, and a non-suit was taken. But, while the parties were going home, a complete reconciliation was effected, and the wife returned more

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1 Supra 4.
2 (1924) 187 N. C. 420, 121 S. E. 738.
3 (1924) 187 N. C. 366, 121 S. E. 636.
than half of the cash consideration of $400, given to her for signing the agree-
ment. After a few months of cohabitation, the husband abandoned the plaintiff,
and, a little later, she brought suit for alimony without divorce, as provided by
statute.2 The defendant pleaded in bar of her recovery the separation agreement,
above mentioned, alleging that there must be an undenied living together as man
and wife to enable her to maintain the action, and that the existing separation
agreement destroys the normal marital relation. The lower court awarded alimony
pendente lite to the plaintiff, and this was affirmed by the Supreme Court, which
held that the subsequent cohabitation of the parties avoided the separation agree-
ment, and therefore, it could not bar this suit for alimony.

Separation deeds have been rare in this State, and, for a long period of time,
they were declared absolutely void in North Carolina, as they were in England.
This was the conclusion reached in Collins v. Collins,3 the decision being based
upon the intention expressed in the code to regard man and wife as one, upon the
decisions of the English courts regarding the marital bond as inseparable, and
upon the general ground of public policy in preserving the marriage bond.

After the case of Collins v. Collins,4 decided in 1866, and before the next
case5 involving separation agreements, decided twenty years later, the legislature
had enacted, in furtherance of the constitutional provisions guaranteeing married
women's rights, a law, providing in part that "Every woman who shall be living
separate from her husband, either under a judgment of divorce by a competent
court or under a deed of separation, executed by the husband and wife, and regis-
tered . . . shall be deemed a free trader."6 The court, in the latter case of
Sparks v. Sparks,7 said, "This act of the legislature . . . implies a possible
legal separation of the parties by voluntary agreement." This distinct modifica-
tion in the court's attitude toward separation agreements may be directly attributed
to the above statute. In the separation agreement in Sparks v. Sparks, the wife
had released her dower and all other claims on her husband and had joined in
certain conveyances. She sought to have the separation agreement declared void,
and all rights restored. It was held that the court would refuse to compel the
parties to execute the separation agreement at the instance of either party, and
likewise, it would refuse to relieve the parties from the position in which they
voluntarily put themselves in carrying out such agreement.

In Smith v. King,8 the court states that separation deeds are not regarded
with favor in North Carolina. In that case, the deed had been rescinded by a
subsequent cohabitation, and therefore the court did not decide what the effect of
that deed would have been, if not so rescinded. In a subsequent case,9 there is an
intimation that separation deeds are not looked upon with favor.

2 C. S. sec. 1667.
3 Collins v. Collins (1866) 64 N. C. 153.
4 Collins v. Collins (1866) 64 N. C. 153.
5 Sparks v. Sparks (1886) 94 N. C. 527.
6 C. S. sec. 2529.
7 Sparks v. Sparks (1886) 94 N. C. 527.
8 Smith v. King (1890) 107 N. C. 273, 12 S. E. 57.
The leading case in North Carolina, *Archbell v. Archbell*,10 was decided twelve years ago. In that case, the wife sued for a divorce from bed and board and for alimony. The defendant, among other things, set up as a bar to the granting of alimony that the plaintiff had entered into a separation deed, releasing all rights acquired by her against the defendant by reason of the marriage relation. The jury found that the deed was not procured through fraud or undue influence. The lower court adjudged the separation deed void and awarded alimony. On appeal, this was sustained by the Supreme court for the reason that, although there was a privy examination of the wife, there was no certificate of the probate officer stating that the agreement was “not unreasonable or injurious” to her, as required by statute.11 Although the separation deed in the *Archbell case* was held to be void, Justice Hoke said, that due to the “distinct recognition of deeds of this character . . . we are constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds are not void as a matter of law.”12

From these decisions, it clearly appears that separation deeds are valid “under certain conditions.” In North Carolina, there is no direct decision which would show these necessary “certain conditions.” However there is general agreement as to these requisites in practically all jurisdictions. As stated in the *Archbell case*, these requisites are as follows: (1) That there must be a separation already existing or immediately to follow the execution of the deed; (2) that the separation deed must be made for an adequate reason, of such a kind that it is necessary for the health or happiness of one or the other; (3) that it must be reasonable and fair to the wife, considering the condition of the parties. In North Carolina, in addition, the separation deed must conform to the statutory requirements, concerning deeds between husband and wife.13

Under the first requirement, if the agreement looks to a future separation, it is clearly void as against public policy.14 Also a future cohabitation, with the intention to live together as man and wife, will avoid the separation agreement, although an occasional visit together will not necessarily have this effect.

As to the second requirement, there is a difference of opinion as to whether a court can inquire into the adequacy of the reasons for entering into the agreement, as affecting its validity. The federal rule refuses to allow this to be done.15 In *Archbell v. Archbell*, Justice Hoke suggests, that, in view of our statutes requiring a privy examination of the wife, in all cases of contracts between husband and wife, and requiring the certificate of the probate officer that the contract is not unreasonable or injurious to her, the question would be resolved in favor of

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11 C. S. sec. 2515.
13 C. S. sec. 2515, 2516.
the federal decision.\textsuperscript{16} If this suggestion is followed, our courts will refuse to inquire into the adequacy of the reasons for entering into the agreement and will presume that it was not capriciously made.

The statute further provides that the certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated, but that it may be impeached for fraud as other judgments may be.\textsuperscript{17} What is the effect of this provision upon the third requirement above stated? It is submitted, that, in the absence of an allegation of fraud, the husband will not have to prove the reasonableness or fairness of the agreement. By the statute, a separation agreement, properly entered into, is conclusively presumed to be reasonable and fair to the wife. Therefore the courts will not go behind the separation agreement to change the status of property rights, which were fixed by it.\textsuperscript{18}

A. L. P.

\textbf{Estate by Entirety in Personal Property—}A and B, husband and wife, conveyed land, held by them in entirety, to a third person and received bonds from the purchaser. A, the husband, died intestate, and B, the wife, claimed the whole amount of the bonds by the doctrine of survivorship in tenancy by entireties. The plaintiff, the administrator of A's estate, contended that the defendant, B, was entitled to only one-half interest in the bonds, the other half to go to the estate. The question presented was whether the doctrine of survivorship, as in estates by entireties, shall obtain to personal property.

In an opinion that showed a decided distaste for this anomalous doctrine of the common law, the Supreme Court of North Carolina has refused to extend the doctrine to personal property and has held that there is no estate by entirety in personal property.\textsuperscript{1} It seems strange that this should be an open question in this State at such a late date. Justice Clarkson points out the split of authority, with such states as Pennsylvania, New Jersey and Massachusetts holding that tenancy by entireties with the right of survivorship does exist in personal property, while the courts in New York, Michigan, Connecticut, Ohio and Iowa hold to the contrary.\textsuperscript{2} In the opinion of the North Carolina court, it is said that, "In this State we have no decision holding that there is an estate by entirety in personalty, and there is no reason in this case, and at this late day, to extend it to personalty."

It is to be considered, in justification of the above decision, that the creditor does not have the benefit of any registration laws, as in real estate, to put him on notice of the ownership of personal property. Practical reasons make the registration of documents of title to personal property impossible, although there is

\textsuperscript{10} Archbell v. Archbell (1912) 158 N. C. 408, 415.

\textsuperscript{11} C. S. sec. 2515.

\textsuperscript{12} Bailey v. Bailey (1900) 127 N. C. 474, 37 S. E. 502.

\textsuperscript{1} Turlington v. Lucas (1923) 186 N. C. 283, 119 S. E. 366. Case discussed in 33 Yale L. Jour. 438.


\textsuperscript{3} Archbell v. Archbell (1912) 158 N. C. 408, 415.

\textsuperscript{4} Turlington v. Lucas (1923) 186 N. C. 283, at 287.
If tenancy by entirety were extended to personal property, there would be no sound basis for extending credit to either husband or wife. It would mean that the creditor would act at his peril. It would open the way for fraud and therefore would be bad from the standpoint of public policy. Suppose a husband and wife have a joint bank account. If the joint account were treated as an estate by entirety in land, the husband’s creditors could not reach the account so held, and, if either party died, the entire account would belong to the survivor. This is not the law, and a husband and wife are to be treated as joint owners of the joint bank account. They are regarded as owners of equal shares as far as any creditors are concerned, although either one has the power to check out the whole account, if the rights of third parties do not intervene: If one of the parties dies, his estate and the surviving party share equally.

Chief Justice Clark, in a concurring opinion, in Holton v. Holton, says, “It may not be improper to call attention, however, to the fact that the estate by entireties was not created in England by any statute, nor has it been enacted by any statute in this State. It was created solely by the holding of the courts of England at a time when there were no lawyers and when the judges were all either priests of the Catholic church or monks and a few laymen. The North Carolina Act of 1784, by which we abolished joint tenancy, naturally should have been held to abolish this, which was a joint tenancy.” Nevertheless Chief Justice Clark wrote the opinion in a case upholding the right of survivorship in case of a conveyance to husband and wife, following a long line of precedent.

Blackstone defines this estate as follows, “If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common, for husband and wife, being considered one person in law, they cannot take the estate by moieties, but both are seized of the entirety, per tout, et non per my, the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain in the survivor.”

The court’s argument against tenancy by entirety is based largely on the creditor’s viewpoint, that it gives an additional exemption to the homestead exemption already provided for by the Constitution. But it is submitted that there are other considerations. Take the case of a man and wife, who are poor, or even possess ordinary means. They may desire to own a home. If this home can be held by them as tenants by the entireties, there are certain practical advantages involved, which have a large social significance. The home is protected against the individual creditors of either the husband or the wife and can be reached only by joint creditors. The home can be conveyed only by the joinder of both parties.
Further, upon the death of either, the home goes to the survivor and is not regarded as part of the estate of the deceased, thus postponing the payment of inheritance taxes. This argument has greater weight when it is considered that the homestead exemption of $1,000.00, which was adequate in 1868, is entirely inadequate in 1924. By the registration laws, a creditor of either husband or wife is put on notice of the nature of their ownership of the home, and he can protect himself accordingly. If there has been fraud, it can be proved as in any other case of a fraudulent conveyance.

It is clear that the court will not now reverse the long line of precedent, which upholds estates by the entireties in real estate. If there is to be any change, it must be by the legislature. Perhaps the legislature will deem it important to retain this ancient doctrine, because of the social considerations mentioned. But whatever is done in regard to real estate, it seems that the North Carolina court has reached the correct decision in holding that the doctrine of survivorship in tenancy by the entireties does not obtain to personal property.

T. P. G.

NON-EXPERT OPINION AS TO SANITY—In State v. Journegan, the defendant was convicted of manufacturing whiskey. At the trial, one of the defendant's witnesses was asked the following question: "In your opinion, do you think that Journegan had sense enough to operate a blockade still?" The answer to this question was excluded by the trial judge. The question was then asked in this form, "Do you think that Journegan had sufficient mental capacity to operate a still and to know that it was wrong to run it?" The answer to this was also excluded. The defendant excepted and appealed. It was held that such testimony was incompetent and was properly excluded.

This case involves opinion evidence, and the general rule is stated by Chief Justice Clark as follows: "While an ordinary witness, who has peculiar opportunities to observe, may express an opinion upon the sanity or insanity of a person charged with a crime, or in other cases where such sanity or insanity is an issue, yet this expression of opinion goes only so far as to permit the witness to testify that in his opinion the defendant was insane or sane, but not whether he was guilty of this particular offense because of lack of capacity." Before a non-expert witness can testify as to the mental condition of another, he must be properly qualified by showing that he had sufficient means of observation. Even then he can testify only generally as to the sanity of the party concerned. There is no precedent for allowing a qualified non-expert witness to testify as to the mental capacity of a person to do a particular act. Any witness, who has had the proper means of observation, can therefore testify as to general mental condition. The general mental condition of the party in question is a fact within

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1 State v. Journegan (1923) 185 N. C. 700, 117 S. E. 27.
2 Ibid, at p. 701.
3 Wigmore on Evidence, secs. 1933-1938; Clary v. Clary (1841) 24 N. C. 78.
the knowledge of the witness. "There is nothing better settled than that a witness can ordinarily speak only of facts within his own knowledge, unless he is an expert, having special scientific knowledge, in which case he may give his opinion, but only upon the facts as they may be found by the jury. It is usual, therefore, to formulate what is called a hypothetical question, which should contain a recital of such facts as may have been testified to by the other witnesses. . . . Succinctly stated, the rule is that the expert must base his opinion upon facts within his own knowledge, or upon the hypothesis of the finding by the jury of certain facts recited in the question."4 State v. Journegan does not involve any question of expert testimony.

Besides criminal cases, most of the cases involving opinion evidence as to sanity are cases of wills and contracts. The rule as to wills has been stated as follows: "Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises. Hence it is improper to ask and obtain the opinion of even a physician as to the capacity of any one to make a will. Under our system, that question was addressed to the jury. All evidence which tended to shed light on his mental status, the clearness and soundness of his intellectual powers, should have gone before them. This being done, however, the witness should not have been made to invade the province of the jury."6

It is not competent for a witness, especially a non-expert, to give his opinion, for instance, as to whether a testator or a grantor in a deed had or had not sufficient mental capacity to execute a particular instrument in question. The question was decided in Crowell v. Kirk,6 where the witness was asked whether in his opinion the testator was capable of making a will. Upon objection the witness was not permitted to answer. This ruling was held to be correct by the Supreme Court, and Judge Ruffin, in a concurring opinion, said: "As far as we perceive any meaning, we suppose the attempt was to get the opinion of the witness, whether the supposed testator had capacity to make a will. . . . If this was the purpose of the inquiry, it was properly refused, for the witness is not to decide what constitutes mental capacity, or a disposing mind and memory; that being a matter of legal definition. He might state the degree of imbecility in the best way he could, so as to impart to the court and jury the knowledge of his meaning, that they might ascertain what was the state of the testator's mind and memory; but whether that was adequate to the disposition of his property by will, did not rest in the opinion of the witness."7

In Clary v. Clary,8 witnesses on both sides testified as to the sanity of Mary Clary at the date of the paper writing, and physicians were called upon to give their opinion as to her mental soundness. A deposition was offered in evidence,

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4Summerlin v. Railroad Co. (1903) 133 N. C. 550, 554, 45 S. E. 898, and cases cited.
7Ibid., at p. 358.
8Clary v. Clary (1841) 24 N. C. 78.
the last clause of which read, "But deponent was impressed with the belief that as to her mental capacities she was in that state called childish." Upon objection, the court rejected this part of the deposition, on the ground that it was the opinion of the deponent. On appeal, it was held that this should have been admitted. This is easily reconciled with Crowell v. Kirk, where the question had reference to mental capacity to do a particular act (whether the testator was capable of making a will), while in Clary v. Clary, the deposition had reference to general mental condition or soundness.

But in Whitaker v. Hamilton, this distinction was not observed. A witness, in that case, testified that he had opportunity of forming an opinion of the mental condition of the deceased at the time of making the contract, and that he had formed an opinion. Over objection, he was allowed to testify that he thought that the deceased was not capable of making a contract or of disposing of his property after his wife's death. The Supreme Court held that the opinion of the witness was competent, arguing from Clary v. Clary to support their decision, and saying it was there held that "A witness, who has had opportunities of knowing and observing a person whose sanity is impeached, may not only depose to the facts he knows but may also give his opinion or belief as to his sanity or insanity."

It is submitted that Clary v. Clary is no authority for admitting the testimony in Whitaker v. Hamilton, because, while it is true that an ordinary witness, with the proper opportunity for observation, may state his opinion as to the sanity or insanity of a party, yet that is no authority for allowing a witness to state whether, in his opinion, the party had mental capacity to do some particular act, as was allowed in Whitaker v. Hamilton.

Smith v. Smith was an action to set aside a deed on the grounds of fraud and undue influence. One of the witnesses testified concerning the grantor, "His mental capacity was good; he was a good business man—clear headed, and very accurate. He was a man of great will power." The witness was then asked whether or not the grantor could be influenced by others. Under objection, he was allowed to reply that "When the grantor made up his mind, he could not easily be moved. . . . No power on earth could influence him." There was no objection to the first question. The court held that the witness, a non-expert, was competent to express the opinion, founded upon association with the grantor, that his mental capacity was good, etc., but that he transcended the limits when he delivered an opinion, which, if concurred in by the jury, determined the very question of fact upon which the controversy depended, i.e., whether the deed was procured by undue influence. The following language is very clear: "It is the general rule that an ordinary witness, if not an expert, after stating the mental conditions, character or temper of a person, is incompetent to go further and give

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9 Whitaker v. Hamilton (1900) 126 N. C. 465, 35 S. E. 815.
10 Ibid, at p. 470, the language quoted being taken from the headnotes of Clary v. Clary and not from the text of the opinion.
expression to his belief that, in consequence of the state, character or temper as described, such person would or would not do an act attributed to him, and, upon his capacity or disposition to do which, the finding of the jury depends.\textsuperscript{12}

There is a wide difference between mental condition or soundness and mental capacity to do a particular act. If this distinction is carefully observed, the cases may be harmonized. By this test, \textit{Whitaker v. Hamilton} seems to have been erroneously decided, and it is suggested by the concurring judge in \textit{State v. Journegan} that it should be overruled.\textsuperscript{13} "A witness is no more competent to express an opinion as to the mental capacity of a testator to make a will, than he would to state that an act was negligently done, since both involve questions of law."\textsuperscript{14} If an inquiry refers to a condition not complicated with a question of law, a witness's opinion is competent to prove a mental state,\textsuperscript{15} or whether a person is a negro or not,\textsuperscript{16} or that his appearance indicates the presence of negro blood in his veins.\textsuperscript{17} But where the inquiry involves a question of law, the witness is incompetent to answer.\textsuperscript{18} This distinction is important if we are to separate incompetent opinion evidence from that which is competent. In \textit{State v. Journegan}, the testimony of the witness was properly excluded since it involved giving his opinion as to whether the defendant had mental capacity to do the act complained of. This question could only be answered by a jury.

B. S. G.

\textsuperscript{12} \textit{Ibid}, at p. 328.
\textsuperscript{13} \textit{State v. Journegan} (1923) 185 N. C. 700, 707.
\textsuperscript{14} \textit{Ibid}, at p. 707, citing \textit{Tillett v. E. R.} (1896) 118 N. C. 1031, 24 S. E. 111, where the court said, "When, therefore, the witness was asked to state whether a car was coupled in a negligent manner, the question was calculated to elicit an opinion upon one of the questions which the jury were impaneled to decide, and the objection to its competency, being made in apt time, was properly sustained."
\textsuperscript{15} \textit{McRae v. Malloy} (1885) 93 N. C. 154; \textit{Sherrill v. Telegraph Co.} (1895) 117 N. C. 353, 23 S. E. 277.
\textsuperscript{16} \textit{Hopkins v. Bowers} (1892) 111 N. C. 175, 16 S. E. 1.
\textsuperscript{17} \textit{Gilliland v. Board of Education} (1906) 141 N. C. 482, 54 S. E. 413.
\textsuperscript{18} \textit{State v. Journegan} (1923) 185 N. C. 700, 707.