

Summer 6-1-1974

## Contracts

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### Recommended Citation

Michael O. Johnson, *Contracts*, 26 S. C. L. Rev. 175 (1974).

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## CONTRACTS

### I. ACCORD AND SATISFACTION

In *La-Z-Boy Chair Co. v. Hinds*,<sup>1</sup> La-Z-Boy brought suit in diversity against Hinds to recover monies due on an account for the sale of chairs. Hinds answered that he had returned ninety chairs to La-Z-Boy, and that pursuant to an agreement between the parties, the acceptance of the chairs constituted an accord and satisfaction. Plaintiff moved for summary judgment under Rule 56,<sup>2</sup> but the district court found no genuine issue of fact, and held that as a matter of law the return of chairs did not operate as an accord and satisfaction.

La-Z-Boy Chair Company sold and delivered approximately \$60,000 worth of chairs to Hinds, who did business as Hinds Furniture Company from February 1972 until May 1973. Hinds alleged that after he had received the chairs, he and a salesman for La-Z-Boy had orally agreed that the return of ninety chairs valued at about \$10,000 would satisfy the entire debt.<sup>3</sup> The chairs were returned to La-Z-Boy but, as a result, Hinds had to close his business because his stock in trade was depleted below operational levels. Hinds claimed that the detriment to him in being forced to close his business was sufficient consideration to support the accord and satisfaction.

The court stated that two of the prerequisites to a valid accord and satisfaction are a dispute between the parties about their duties under the original contract<sup>4</sup> and a meeting of the minds concerning the substituted performance that would discharge their obligations.<sup>5</sup> Since Hinds admitted that prior to the return of the chairs there was no disagreement about the money owed La-Z-Boy, there was no issue of fact about a dispute between the parties. The court simply dismissed Hinds' claim that the burden on him in going out of business was consideration to La-Z-Boy by saying that his claim "would be true, and perhaps

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1. 364 F. Supp. 33 (D.S.C. 1973).

2. FED. R. CIV. P. 56.

3. No reasons were given in the opinion to explain why La-Z-Boy might accept \$10,000 worth of chairs in satisfaction of Hinds' \$60,000 debt.

4. The court found that there was no dispute over "the validity of any of the claims of the original demand, the liability of the debtor or the amount due." 364 F. Supp. 33, 35 (D.S.C. 1973).

5. *Id.* at 36-37.

apropos, if initially there were a dispute between the parties.”<sup>6</sup> Relying primarily on Hinds’ testimony concerning his conversations with the salesman,<sup>7</sup> the court further held there was no actual agreement that the returned chairs would satisfy Hinds’ debt.<sup>8</sup>

A close reading of the district court opinion reveals that the trial judge misinterpreted the South Carolina law on accord and satisfaction. Citing *Corpus Juris Secundum* as primary authority, the court concluded that a dispute or controversy between the litigants over their prior obligations is a necessary element to every accord and satisfaction.<sup>9</sup> However, an analysis of South Carolina case law and the historical background of accord and satisfaction does not support this conclusion.

According to the generally accepted common law doctrine, consideration is needed to support an accord and satisfaction.<sup>10</sup> The pre-existing duty rule states that performance of a duty owed to someone is not adequate consideration to make a contract with him enforceable.<sup>11</sup> Thus it became widely held that partial payment of a debt cannot be in satisfaction of the whole debt even if the parties had agreed that partial payment would release the debtor from his entire obligation.<sup>12</sup> Courts in South Carolina and some other jurisdictions, however, felt that this rule defeated fair dealing and honesty.<sup>13</sup> To enforce the creditor’s promise to receive

6. *Id.* at 36.

7. “The nebulous claim upon which defendant relies is obvious from the testimony of Hinds, emphasizing that there was no meeting of the minds: (p. 11 Tr.)

A. Well, he [salesman] told me that he would see to it that the debt was wiped out.

Q. Well, how was he going to do that, Mr. Hinds?

A. I don’t know that.”

*Id.* at 37.

8. The court also implied, but did not specifically find, that the salesman had no actual or apparent authority to make such an agreement. The court mentioned the fact that Hinds knew that the agent with whom he was dealing was “only a salesman.” *Id.*

9. *Id.* at 36.

10. A. CORBIN, *CONTRACTS* § 1276 (1 vol. ed. 1952) (hereinafter cited as CORBIN); 15 S. WILLISTON, *CONTRACTS* § 1851 (3d ed. 1957) (hereinafter cited as WILLISTON).

11. CORBIN § 171; *Marion Production Credit Ass’n v. Smith*, 221 S.C. 172, 69 S.E.2d 705 (1952); *Rabon v. State Finance Corp.*, 203 S.C. 183, 26 S.E.2d 501 (1943).

12. *See* CORBIN §§ 175, 1281; 1 WILLISTON § 120; *Ex parte Zeigler*, 83 S.C. 78, 80, 64 S.E. 513, 514 (1909); *Arnold v. Bailey*, 24 S.C. 493, 496 (1885); *Hope v. Johnston*, 11 Rich. 135, 137 (S.C. 1857).

13. *See Ex parte Zeigler*, 83 S.C. 78, 80, 64 S.E. 513, 514 (1909); *Riggs v. Home Mut. Fire Protection Ass’n*, 61 S.C. 448, 456-57, 39 S.E. 614, 617 (1901); *Bolt v. Dawkins*, 16 S.C. 198, 214-15 (1881); *Hope v. Johnston*, 11 Rich. 135, 138 (S.C. 1857) (dissenting opinion). *See also* CORBIN § 1284 at 1053-54; 1 WILLISTON § 120 at 502-05.

less than the amount due as satisfaction of the debtor's obligation, courts searched for differences between the actual performance rendered by the debtor and his pre-existing duty.<sup>14</sup> Consideration was found, for example, when there was payment of a lesser amount a day before the full obligation was due,<sup>15</sup> payment of a lesser amount at a place other than that agreed to in the contract,<sup>16</sup> or payment of an amount less than the debt to the creditor by a third party.<sup>17</sup> Courts also found consideration when the debtor did not pay the creditor money but gave him something else instead;<sup>18</sup> they did not inquire whether the substituted performance was equal in value to the original debt.<sup>19</sup> When the original debt or claim was disputed or unliquidated,<sup>20</sup> there was consideration in the debtor's payment of more than he felt was due.<sup>21</sup> Although the sum paid was less than the creditor claimed, the pre-existing duty rule did not defeat the debtor's plea of accord and satisfaction because the prior duty owed by the debtor was controverted or unclear.<sup>22</sup>

The district court was not correct in asserting that a dispute is always a prerequisite to an accord and satisfaction. A dispute merely made the pre-existing duty rule inapplicable to the facts in a given case.<sup>23</sup> If there was no dispute between the parties, the debtor could still avoid the effects of the rule by pointing to something else in his performance that differed from his pre-existing duty.<sup>24</sup> Even the authorities cited by the court do not

14. CORBIN § 1284; *Ex parte Zeigler*, 83 S.C. 78, 80, 64 S.E. 513, 514 (1909).

15. CORBIN § 1282. *See, e.g., Hope v. Johnston*, 11 Rich. 135, 138 (S.C. 1857); *Eve v. Mosely*, 2 Stro. 203, 205-06 (S.C. 1847).

16. CORBIN § 1282. *See, e.g., Hope v. Johnston*, 11 Rich. 135, 138 (S.C. 1857).

17. CORBIN § 1285; *Ex parte Zeigler*, 83 S.C. 78, 64 S.E. 513 (1909).

18. CORBIN § 1284. *See, e.g., Ex parte Zeigler*, 83 S.C. 78, 80, 64 S.E. 513, 514 (1909); *Bolt v. Dawkins*, 16 S.C. 198, 214-15 (1881); *Hope v. Johnston*, 11 Rich. 135, 137 (S.C. 1857); *Eve v. Mosely*, 2 Stro. 203, 205 (S.C. 1847).

19. CORBIN § 1284. *See, e.g., Ex parte Zeigler*, 83 S.C. 78, 80, 64 S.E. 513, 514 (1909); *Arnold v. Bailey*, 24 S.C. 493, 496 (1885); *Bolt v. Dawkins*, 16 S.C. 198, 214-15 (1881); *Pierce, Butler & Co. v. Jones & Son*, 8 S.C. 273, 279 (1876).

20. An unliquidated debt is one that has not been set by agreement or is not capable of being determined by the court. 1 WILLISTON § 128.

21. CORBIN § 187-88. *See, e.g., Taylor v. Palmetto State Life Ins. Co.*, 196 S.C. 195, 201-02, 12 S.E.2d 708, 710-11 (1940); *Riggs v. Home Mut. Fire Protection Ass'n*, 61 S.C. 448, 457, 39 S.E. 614, 617-18 (1900).

22. *See note 21 supra*; CORBIN § 1278. An accord and satisfaction is an agreement for the settlement of a previous claim by substituted performance and the actual rendering of the performance. When the prior claim is in doubt or in dispute, some courts label the transaction a "compromise and settlement." Many courts, including those of South Carolina, do not use a different label when the prior claim is disputed. *See CORBIN § 1278.*

23. *See notes 21-22 supra.*

24. *Compare CORBIN § 1278 with CORBIN § 1284.*

support its conclusion. The court quoted *Corpus Juris Secundum* for the “general and better rule.”<sup>25</sup> The quote, however, when read in context, does not stand for the proposition that a dispute is a necessary element of every accord and satisfaction.<sup>26</sup> In fact the sub-heading of the section quoted reads: “It is not essential to the validity of an accord and satisfaction that the claim be in dispute or controversy, except where there is no other or additional consideration to support the new agreement.”<sup>27</sup>

Furthermore, *Mixson v. Rossiter*<sup>28</sup> and *Dunaway v. United Insurance Co. of America*,<sup>29</sup> relied on by the court, do not imply that South Carolina is in agreement with the “general and better rule.” In *Mixson* the appellant claimed that the lower court was in error in not holding that there had been an accord and satisfaction in his payment to the respondent of a sum less than the amount which the respondent claimed was due.<sup>30</sup> The appellant contended that there was a dispute as to the original amount of the debt, but the court disposed of the appeal by finding that there had actually been no dispute over the amount due.<sup>31</sup> The appellant did not claim that there had been any consideration other than the settlement of the alleged dispute; therefore, the court did not have to address any further issues concerning consideration. In *Dunaway* the appellant claimed that the respondent’s payment of an amount less than that which was due did not operate as an accord and satisfaction.<sup>32</sup> The court, rejecting that claim without citing any authority or explaining in any detail the elements of an accord and satisfaction, stated that the

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25. The judge quoted the following from 1 C.J.S. *Accord and Satisfaction* § 2 at 467 (1936) (footnotes omitted).

Indeed, it is now sometimes laid down as a general rule that it is essential to the making of a valid accord and satisfaction that there be a bona fide dispute or controversy between the parties, an actual and substantial difference of opinions as to either the validity of the demand, the liability of the debtor, or the amount due from him, or at least that the claim or demand be unliquidated. Clearly this is true where the accord and satisfaction consists in the giving and acceptance of a less sum of money than claimed, nothing more, for in such case, as elsewhere appears in § 4 infra, the only consideration is the mutual concession of the parties.

364 F. Supp. 33, 34 (D.S.C. 1973).

26. 1 C.J.S. *Accord and Satisfaction* § 2 (1936).

27. *Id.* at 466.

28. 223 S.C. 47, 74 S.E.2d 46 (1953).

29. 239 S.C. 407, 123 S.E.2d 353 (1962).

30. 223 S.C. 47, 53, 74 S.E.2d 46, 48 (1953).

31. *Id.*

32. 239 S.C. 407, 414, 123 S.E.2d 353, 356 (1953).

principle relied on by the appellant applied only to undisputed claims, but that the amount due in the claim before the court had been disputed.<sup>33</sup> Read against the background of prior South Carolina case law, neither case can be said fairly to imply that a dispute over the prior claim or debt is a prerequisite to every accord and satisfaction.

Even correctly interpreted, however, the common law of accord and satisfaction should not have been applied to this case. A contract for the sale of chairs is a transaction within the purview of article two of the Uniform Commercial Code.<sup>34</sup> Nevertheless, neither attorney appears to have argued for application of the UCC and the court did not base its opinion on the Code. No section of the UCC is entitled "Accord and Satisfaction,"<sup>35</sup> but the provision relating to the modification of contracts<sup>36</sup> is section 10.2-209 of the South Carolina Code of Laws.<sup>37</sup> The purpose of this section is to remove the technicalities that hamper modification of sales contracts.<sup>38</sup> The drafters of the Code felt that one of these technicalities in particular, the pre-existing duty rule, created an

33. *Id.*

34. S.C. CODE ANN. § 10.2-102 (Spec. Supp. 1966) states that the Uniform Commercial Code—Sales applies to "transactions in goods." Goods are defined at S.C. CODE ANN. § 10.2-105(1) (Spec. Supp. 1966) as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action."

35. One of the purposes of the UCC was to "simplify, clarify and modernize" the law of commercial transactions and some of the familiar terms of common law contracts have not been included in the Code. S.C. CODE ANN. § 10.1-102(2)(a) (Spec. Supp. 1966).

36. An accord and satisfaction is in effect the same thing as an agreement to modify the contract (accord) and performance in compliance with the terms of the agreement (satisfaction). *See* CORBIN § 1276. In *Hinds* it was not disputed that the chairs had been returned as requested, but there was a dispute as to whether there had been a valid agreement to modify the contract.

37. S.C. CODE ANN. § 10.2-209 (Spec. Supp. 1966):

Modification, rescission and waiver.—(1) An agreement modifying a contract within this Title needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Title (§ 10.2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirement of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

38. Official Comment 1 to S.C. CODE ANN. § 10.2-209 (Spec. Supp. 1966).

especially harsh and uncommercial result in the setting of modern sales transactions.<sup>39</sup> The first provision of section 10.2-209 not only eliminates the detrimental effects of this rule but also eliminates entirely the consideration requirement for modification agreements.<sup>40</sup> Under present law any modification agreed to in good faith<sup>41</sup> would be enforceable.<sup>42</sup> Therefore in *Hinds* neither the court nor the defense attorneys should have been trying to find consideration for the modification or looking for a dispute between the parties; they should have inquired into the reasons that might have prompted the parties to make such an agreement.

Nevertheless, if the UCC had been consulted, the district court might not have decided the case differently. Section 10.2-209(1) does require that there be an “agreement” to modify the contract, and the court in *Hinds* specifically found that there was no meeting of the minds between Hinds and La-Z-Boy.<sup>43</sup> The required agreement is defined as “the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this act.”<sup>44</sup> In finding that there was no actual agreement, the court relied on the language of the parties<sup>45</sup> and no facts which could be helpful in determining

39. South Carolina Reporter’s Comment to S.C. CODE ANN. § 10.2-209 (Spec. Supp. 1966).

40. S.C. CODE ANN. § 10.2-209(1) (Spec. Supp. 1966). See also S.C. CODE ANN. § 10.1-107 (Spec. Supp. 1966) which provides: “Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by waiver or renunciation.”

41. S.C. CODE ANN. § 10.1-203 (Spec. Supp. 1966) imposes an obligation of good faith on the performance or enforcement of every contract or duty within the UCC. “Good faith” for merchants is defined as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” S.C. CODE ANN. § 10.2-103(1)(b) (Spec. Supp. 1966).

42. There are apparently no South Carolina cases applying S.C. CODE ANN. § 10.2-209 (Spec. Supp. 1966). As an example of a court upholding a good faith agreement to reduce the price of goods see *Gulf Chemical and Metallurgical Corp. v. Sylvan Chemical Corp.*, 122 N.J. Super. 499, 300 A.2d 878 (1973). See also Hawkland, *Major Changes Under the Uniform Commercial Code in the Formation and Terms of Sales Contracts*, 10 PRAC. LAW. 73, 76 (May 1964).

43. 364 F. Supp. 33, 36-37 (D.S.C. 1973).

44. S.C. CODE ANN. § 10.1-201(3) (Spec. Supp. 1966).

45. 364 F. Supp. 33, 37 (D.S.C. 1973). Section 10.2-209(3) does require that a modification agreement comply with the UCC statute of frauds provisions. S.C. CODE ANN. § 10.2-201(3)(1)(c) (Spec. Supp. 1966) provides that a contract not complying with the statute of frauds “but which is valid in other respects is enforceable . . . with respect to goods . . . which have been received and accepted.” Since suit was brought after Hinds had accepted the chairs from La-Z-Boy and after La-Z-Boy had accepted the returned chairs, the UCC’s statute of frauds provisions would not have been a bar to Hinds.

“other circumstances,” such as course of dealing or usage of trade, were mentioned in the opinion.<sup>46</sup> Without such additional information, speculation as to a difference in outcome is not possible.

## II. ACTION FOR FRAUD AND DECEIT

*Stevens v. Plantation Pipe Line Co.*<sup>47</sup> involves an action brought by Stevens for fraud and deceit in Plantation Pipe Line’s procurement of a right-of-way for a pipe line across plaintiff’s land. The lower court granted Plantation’s motion for nonsuit, holding that the evidence was not sufficient to raise a question for the jury. On appeal the South Carolina Supreme Court reversed and remanded for a new trial.

After negotiations between the parties, Plantation’s agent presented to Stevens for her signature mimeographed forms containing the grant of a right-of-way and a release. After reading the forms, plaintiff objected to the provision in the release relieving Plantation of any liability for damages that might occur to her land. The agent then inserted into the release a provision which made Plantation responsible for repairing any damage to Steven’s property.<sup>48</sup> Satisfied with the change, Stevens signed the grant and release. The agent, however, had her sign the copy of the release that did not contain the handwritten insertion. He left the unsigned modified release with Stevens and took the signed copy without the modification. After the work was in progress and Stevens objected to the manner in which it was being done, she realized that she had signed the wrong form.

In order to succeed in an action for fraud and deceit in South Carolina, the plaintiff must prove that:

[T]he agent [of defendant] . . . made a material misrepresentation; that it was false; that when it was made the agent knew it was false; that it was made with the intention that it should be acted upon by the [plaintiff] . . . ; that the [plaintiff] . . . was ignorant of its falsity; that he relied on its

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46. The court in *Hinds* did not make a finding concerning the authority of La-Z-Boy’s salesman; thus, lack of authority cannot be considered a basis for granting the summary judgment. *Id.* The law of agency, however, is still applicable to UCC transactions unless displaced by a specific UCC provision. S.C. CODE ANN. § 10.1-103 (Spec. Supp. 1966).

47. 260 S.C. 390, 196 S.E.2d 117 (1973).

48. “Timber will be cut and placed along R/W for owner use. Terraces & pastures will be replaced to present conditions as nearly as practicable after construction. This Release covers R/W herein granted only.” *Id.* at 393, 196 S.E.2d at 118.



truth; that he had a right to rely thereon; and that he thereby suffered injury.<sup>49</sup>

Fraud and deceit must be distinguished from a breach of contract or unfulfilled promises. Neither will support an action for fraud and deceit unless the promise or contract was made without the intention of performing.<sup>50</sup>

The circuit court granted Plantation's motion for nonsuit because it felt that the provisions of the modification were "mere future promises the breach of which would not support an action for fraud."<sup>51</sup> In reversing, the supreme court rejected the circuit court's view of the fraud. It held that the alleged fraud was in the agent's tricking Stevens into signing a release whose terms differed from those upon which the parties had agreed.

Adoption of this view of the fraud and deceit was not sufficient to dispose of the case; the court had to consider whether Stevens was barred from recovery because of failure to take steps to protect herself from fraud. The plaintiff in an action for fraud and deceit must prove that he had the right to rely on the misrepresentation of the defendant.<sup>52</sup> A part of this requirement is that the complainant must establish that he took advantage of available means to protect himself from fraud.<sup>53</sup> Requiring proof of a right to rely on a misrepresentation is to further a judicial policy of discouraging negligence by parties who enter into commercial transactions and protecting contracts by reducing the opportunity for fraud.<sup>54</sup> At the same time, however, courts do not want to protect someone who has defrauded another.<sup>55</sup> As an accommodation between these two competing interests, South Carolina has adopted a negligence standard that is applied to the defrauded party.<sup>56</sup> If the defrauded party's conduct in failing to look out for his own interests amounts to negligence, he is barred from recovery because he had no right to rely on the other party's misrepresentations.<sup>57</sup> In determining whether the person allegedly de-

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49. *Davis v. Upton*, 250 S.C. 288, 290-91, 157 S.E.2d 567, 568 (1967).

50. *Id.* at 291, 293, 157 S.E.2d at 568-69.

51. *Stevens v. Plantation Pipe Line Co.*, 260 S.C. 390, 394-95, 196 S.E.2d 117, 119 (1973).

52. *Davis v. Upton*, 250 S.C. 288, 290-91, 157 S.E.2d 567, 568 (1967).

53. *J.B. Colt Co. v. Britt*, 129 S.C. 226, 234-35, 123 S.E. 845, 848 (1924).

54. *Id.* at 232, 123 S.E. at 847.

55. *Id.*

56. *Id.* at 234-35, 123 S.E. at 848.

57. *Id.*

frauded is negligent, his conduct is compared to that of a person of the same intelligence, experience and age under similar circumstances.<sup>58</sup>

Normally a person who does not read the document which he signs is barred from recovery,<sup>59</sup> although failure to read the document is sometimes excused due to the low intelligence or lack of education of the individual.<sup>60</sup> In the present case, Stevens read the release after the pen changes had been made, but then the agent had her sign a copy of the release which did not contain the additions. Although she did not read the specific document she signed, the supreme court held that this failure did not prevent her from maintaining the suit. The court did not excuse the failure to read because of any disability of Stevens, but it evidently felt that she had exercised due care to ascertain the contents of the document she was to sign. The case was remanded for the jury to determine whether plaintiff had been justified in relying on the agent's representation that the paper she signed was the one that he had modified.

Another question in *Stevens* was whether the agent had authority to make changes to the mimeographed forms he presented to Stevens. The grant of right-of-way contained the following statement: "It is understood and acknowledged by the undersigned that the person securing this grant is without authority to make any agreement in regard to the subject matter hereof which is not expressed herein, and that no such agreement will be binding on the Grantee."<sup>61</sup>

This statement has two possible interpretations. It might mean that the agent had no authority to make any agreements for his principal other than those that the principal had printed on the documents. Alternatively, it could mean that the agent had authority to make agreements not printed on the documents, but to bind Plantation any additional agreements must have been written on the mimeographed forms. Evidently referring to the latter interpretation, the supreme court dismissed the issue raised by Plantation by stating: "The short answer is that there is no agreement to be varied until execution; and that any provision written into either of the two simultaneously executed in-

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58. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 467, 141 S.E.2d 129, 132 (1965).

59. *Id.*

60. *Id.*

61. Brief for Respondent at 12, *Stevens v. Plantation Pipe Line Co.*, 260 S.C. 390, 196 S.E.2d 117 (1973).

struments prior to execution would have become part of the integrated grant.”<sup>62</sup> With this interpretation, of course, the clause would not prevent Stevens’ recovery.

The implications of the court’s “short answer” for the new trial granted are not clear. The court might have meant that since there were two possible interpretations of the clause, one of which would not bar Stevens’ recovery, Plantation’s motion for nonsuit should not have been granted by the lower court and the jury should determine the correct interpretation at the new trial. On the other hand, the “short answer” might have meant that the court decided that the meaning it assigned to the clause was the correct one and that on this point there would be no issue to submit to the jury at the new trial. However, in view of the fact that the clause could have two plausible meanings and in view of the fact that Stevens did read the grant, a jury should determine whether the clause is a bar to Stevens’ recovery.

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62. 260 S.C. 390, 395, 196 S.E.2d 117, 119 (1973).