1967

Intermountain Association of Credit Men v. F. C. Watterson et al. : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

INTERMOUNTAIN ASSOCIATION OF CREDIT MEN,
Plaintiff and Respondent,

vs.

F. C. WATTERSON et al,
Defendant and Appellant.

No. 10760

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court in and for Salt Lake County, Utah, against defendant F. C. Watterson Honorable Joseph G. Jeppson, Judge

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STATEMENT OF THE KIND OF CASE

The case which is the subject matter of this Appeal involves an action in the District Court of Salt Lake County, Utah, by the plaintiff and respondent, Intermountain Association of Credit Men, against the defendant and appellant, F. C. Watterson and his son-in-law, Rolfe Griffiths, to recover the balance purportedly due from the Silver Creek General Store in Picabo,

Idaho, to both Salt Lake Hardware Company and to Barwick and Company for goods, wares and merchandise sold and delivered to the Silver Creek General Store by said companies, and, which claims were assigned by said companies to the Intermountain Association of Credit Men.

DISPOSITION IN LOWER COURT

The case was tried in the District Court of Salt Lake County, Utah, before the Honorable Joseph G. Jeppson, District Judge, sitting without a jury on September 23, 1966. Judge Jeppson ruled that there was a partnership relationship between defendants Rolfe Griffiths and his father-in-law, defendant, F. C. Watterson, and, granted Judgment in favor of plaintiff and against defendant, F. C. Watterson. It is from this Judgment defendant F. C. Watterson appeals.

RELIEF SOUGHT ON APPEAL

Defendant-appellant F. C. Watterson seeks reversal of the Judgment against him and for Judgment in his favor.

STATEMENT OF FACTS

At the outset it should be pointed out that the designation in the Complaint of defendants Rolfe Griffiths and F. C. Watters as former partners doing business as the Silver Creek General Store is a misnomer

and completely misleading. This was one of the issues for the District Court to determine. They never were partners. Defendant Watterson only aided and assisted his daughter and son-in-law in the operation of the Silver Creek General Store as any loving, considerate parent would normally do.

Defendant Rolfe Griffiths is the husband of Mae Griffiths, who is the daughter of defendant F. C. Watterson. In the spring of 1960 Rolfe Griffiths and his wife, Mae Griffiths, took over and started operating the Silver Creek General Store in Picabo, Idaho. (R. 79). To enable them to get going in the business Rolfe and Mae Griffiths borrowed some cash and some bonds from defendant F. C. Watterson, their father and father-in-law. (R. 81). They, the Griffiths, operated the store for about a year. During the first six or seven months the Wattersons assisted them somewhat for which assistance Watterson was paid approximately $400.00 per month in merchandise. (R. 110). Arrangements were made to have F. C. Watterson sign the store checks since Rolfe Griffiths was away from the store part of the time. (R. 91). However, in 1960, F. C. Watterson and his wife left the State of Idaho and returned to Salt Lake City, Utah. (R. 107, 144, 172 & 193). Rolfe Griffiths and his wife, Mae Griffiths, continued to operate the store until about May of 1961. (R. 172).

The Silver Creek General Store got into financial difficulties. As a consequence of these financial diffi-

culties, in 1961, both Salt Lake Hardware Company and Barwick and Company sued defendants Rolfe Griffiths and F. C. Watterson in the District Court of the Fourth Judicial District Court of the State of Idaho in and for Blaine County designating them in those actions as co-partners doing business under the name and style of Silver Creek General Store. In those actions Salt Lake Hardware obtained Judgment against them on August 22, 1961, and, Barwick and Company obtained Judgment against them on September 1, 1961. The claims of these two companies were assigned to Intermountain Association of Credit Men, who, on May 9, 1962, filed an action against these defendants in the District Court of Salt Lake County, Utah, in a case entitled: Intermountain Association of Credit Men, Plaintiff, vs. Rolfe Griffiths and F. C. Watterson, f/d/b/a Silver Creek General Store, Defendants. Civil No. 136508. (Exhibit 11).

While the proceedings in Civil No. 136508 (Exhibit 11) in the District Court of Salt Lake County, Utah, were still pending, and, approximately a year and one-half after the filing of that case, the Intermountain Association of Credit Men filed another law suit against these same defendants, this cause, Civil No. 145459, in the District Court of Salt Lake County, Utah, which cause is the subject matter of this Appeal. Since two cases involving the very same relief were pending at the same time against these defendants, Motions to dismiss Civil No. 136508 (Exhibit 11) were made by both plaintiff and defendants, and, on March

27, 1964, Judge Aldon J. Anderson made and entered an Order dismissing Civil No. 136508 as to defendant R. C. Watterson, *with prejudice.* (Exhibit 11).

Subsequently, at the Pretrial of the case which is the subject matter of this Appeal, Civil No. 145459, Judge Stewart M. Hanson took under advisement defendant F. C. Watterson's Motion to dismiss Civil No. 145459, on the grounds of res judicata, since Civil No. 136508 had previously been dismissed with prejudice on March 27, 1964. (R. 12 & 13). Then on December 13, 1965, Judge Stewart M. Hanson made and entered his "Findings, Conclusions and Judgment" granting defendant F. C. Watterson Judgment in his favor against plaintiff, dismissing the said cause in Civil No. 145459 with prejudice as to defendant F. C. Watterson. (R. 14 & 15). On a Motion for a New Trial and in a Memorandum Decision dated January 20, 1966, Judge Hanson set aside the Judgment of December 13, 1965, and, the case which is the subject matter of this Appeal, Civil No. 145459, was set for Trial and thereafter tried before the Honorable Joseph G. Jeppson, District Judge, without a jury on September 23, 1966.

During the trial of this cause which is the subject matter of this Appeal and after plaintiff had rested, defendant F. C. Watterson made a Motion to dismiss the cause against him on the following grounds: (a) The Complaint failed to state a cause of action against him; (b) The matter was res judicata for the reason

the plaintiff previously filed an action in Civil No. 136508 (Exhibit 11) against him involving the same parties and the same accounts which was heard by the Court and dismissed with prejudice; and, (c) That there was not clear and convincing evidence to establish a partnership upon which the Court could grant a Judgment against defendant F. C. Watterson. (R. 76). Judge Jeppson denied this Motion.

Finally and at the conclusion of the Trial and after both parties had rested their cases and submitted and argued the matter, Judge Jeppson ruled that there was a partnership between defendants Rolfe Griffiths and his father-in-law, defendant F. C. Watterson, and, granted Judgment in favor of plaintiff and against defendant F. C. Watterson.

Defendant-appellant F. C. Watterson makes his Appeal to the Supreme Court of Utah and in connection therewith seeks reversal of the Judgment against him and for Judgment in his favor.

ARGUMENT

POINT I. THE CASE SHOULD HAVE BEEN DISMISSED AGAINST DEFENDANT F. C. WATTERSON ON THE GROUNDS OF "RES JUDICATA".

The only basis upon which Judgment legally could be rendered against defendant-appellant F. C. Watterson is that either there was an actual partnership or

a partnership by estoppel existing between F. C.Watterson and his son-in-law, defendant Rolfe Griffiths, in connection with the operation of the Silver Creek General Store in Picabo, Idaho.

Assuming that there was such a relationship, the case against defendant F. C. Watterson, which is the subject matter of this Appeal, should have been dismissed with prejudice.

Plaintiff's assignors, Salt Lake Hardware Company and Barwick and Company, had already sued said defendants Rolfe Griffiths and F. C. Watterson in the State of Idaho and obtained Judgments against them. Their claims, arising out of the operation of the Silver Creek General Store, were assigned to the Intermountain Association of Credit Men, the plaintiff-respondent herein. That company thereupon filed an action against both of said defendants in the District Court of Salt Lake County, Utah, in Civil No. 136508 (Exhibit 11). That action, involving the claims of Salt Lake Hardware Company and Barwick and Company, was dismissed as to defendant-appellant F. C. Watterson, *with prejudice,* on March 27, 1964. (Exhibit 11).

The doctrine of "res judicata" is a universal doctrine recognized by all jurisdictions. It is based on the fundamental proposition that *a party who has litigated or who has had an opportunity to litigate a matter* should not be permitted to litigate it again to the harrassment or vexation of his opponent. This doctrine is adhered to by the decisions in this jurisdic-

tion which prohibit the "splitting" of a cause of action. It is expressly recognized by the Utah Rules of Civil Procedure which provide in part in Rule 8 (a) as follows:

> " . . . Relief in the alternative or of several different types may be demanded."

The reasons and rationale which underlie this pervading rule of law are well set forth in 30A Am. Jur., Judgments, Sec. 376, p. 373, as follows:

> " . . . Public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of res judicata would be endless. The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, *or had an opportuunity* to litigate, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harrassment and vexation of his opponent. The doctrine of res judicata not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings." (Emphasis supplied).

The parties and cause of action set forth in Civil No. 136508 and Civil No. 145459 in the District Court of Salt Lake County, Utah, against defendants Rolfe Griffiths and F. C. Watterson were the same. In each instance the claims arose out of the operation of the Silver Creek General Store in Picabo, Idaho, by the said defendants as partners or as partners by estoppel

according to the allegations of plaintiff in the Complaints which it filed.

The doctrine of "res judicata" prohibits one from maintaining successive suits against the same defendant on different theories of relief. As set forth in Freeman on Judgments, 5th Ed. Sec. 684, pp. 1443-44:

> " . . . The application of the doctrine of res judicata to identical causes of action does not depend upon the identity or differences of the forms of the two actions. A Judgment upon the merit bars a subsequent suit upon the same cause, though brought in a different form of action, and a party therefore cannot, by varying the form of action or adopting a different method of presenting his care, escape the principle that one and the same cause of action shall not be twice litigated."

In Civil No. 136580 plaintiff-respondent did have an opportunity to litigate the claims of Salt Lake Hardware Company and Barwick and Company which had been assigned to it on any possible theory it wanted to present, including the theory it subsequently set forth in Civil No. 145459, the subject matter of this Appeal. Having chosen not to amend its complaint in Civil No. 136580, but, having chosen voluntarily to file an entirely new action almost a year and one half later in Civil No. 145459, it is bound by the doctrine of "res judicata" and the ruling made by the District Court on March 27, 1964, in Civil No. 136580, which ruling it chose not to appeal.

In applying the doctrine of "res judicata" it is sometimes proper to presume a judgment to have been rendered on the merits in the absence of words of qualification. See in this connection 30A Am. Jur., Judgments, Sec. 469, p. 511, wherein it is said:

> " . . . In some cases it is held proper to presume a judgment to have been rendered upon the merits where it is unaccompanied by words of qualification such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject."

However, it is conclusive and needs no presumption at all where the judgment of dismissal is "with prejudice" as was the case in the Order in Civil No. 136508. (Exhibit 11). This is particularly so when viewed in light of the Utah Rules of Civil Procedure which were in force and applicable at the time. When the Order of dismissal with prejudice was made and entered in Civil No. 136508 on March 27, 1964, Rule 41 (b) of the Utah Rules of Civil Procedure provided in the part particularly applicable to the situation before this Court as follows:

> " . . . *a dismissal* under this subdivision and *any dismissal not provided for in this rule,* other than a dismissal for lack of jurisdiction or for improper venue, *operates as an adjudication upon the merits.*" (Emphasis supplied).

Subsequently, both the District Court and the Supreme Court of Utah amended Rule 41 (b) to be effective

October 1, 1965, so as to make the applicable portion of that Rule read as follows:

> " . . . a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits."

The case which plaintiff-respondent filed against defendant appellant F. C. Watterson in Civil No. 136-508 was not dismissed *with prejudice* for "lack of jurisdiction", for "improper venue" or, for "lack of an indispensable party". Accordingly, in light of Rule 41 (b) as it read previously and as it recently has been amended to read by the District Court and by the Supreme Court of Utah, the *dismissal with prejudice* of Civil No. 136508 was "an adjudication upon the merits". Further action by plaintiff in Civil No. 145459, the subject matter of this Appeal, was and is precluded by the doctrine of "res judicata".

As set forth in 30A Am. Jur., Judgments, Sec. 363:

> " . . . The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; *the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action.* (Olwell vs. Hopkins, 28 Cal.

2d 147, 168 P2d 972; Colburn vs. Goodall, 72 Cal. 498, 14 P. 190). *This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and defense which could have been presented by the exercise of diligence.* There is authority that even where the causes of action are different, the prior determination of litigated issues is conclusive in a subsequent suit not only as to the issue itself, but also as to every matter that might have been urged for or against that issue in its determination. . . " (Emphasis supplied).

The rulings by the Supreme Court of Utah are entirely consistent with the foregoing general law and judicial decisions. The District Court of Salt Lake County should have dismissed the action which is the subject matter of this Appeal against defendant-appellant F. C. Watterson. See in this connection the following: Dorsett vs. Morse, ... Utah ....., 103 Pac. 969; Glen Allen Mining Co. vs. Park Galena, 77 Utah 362, 296 Pac. 321; East Mill Creek Water Co. vs. Salt Lake City, 108 Utah 315, 159 P2d 863; and, Ray vs. Consolidated Freightways, 4 Utah 2d 137, 289 P2d 196.

POINT II. THERE IS NO CLEAR AND CONVINCING EVIDENCE IN THE RECORD OF A PARTNERSHIP BETWEEN ROLFE GRIFFITHS AND F. C. WATTERSON IN THE OPERATION OF THE SILVER CREEK GENERAL STORE UPON WHICH THE COURT COULD GRANT A JUDGMENT AGAINST DEFENDANT-APPELLANT F. C. WATTERSON.

The Court's attention is respectfully invited to the Findings of Fact upon which the Judgment against defendant-appellant F. C. Watterson is based. The only finding made as to either an "actual" partnership or a partnership by estoppel is that set forth in Finding of Fact No. 1, reading as follows:

> "That there was a partnership between the Defendant F. C. Watterson and Rolfe Griffiths, doing business as Silver Creek General Store, at all times referred to in Plaintiff's Complaint".

It is respectfully submitted that this is not a "finding of fact" but merely a "conclusion of law" not based on any recited facts. Apparently the reason no facts were recited is that there are no facts constituting clear and convincing evidence upon which the legal conclusion of a partnership could be based.

It is interesting to observe in this connection that apparently counsel for plaintiff-respondent also recognized that there were no such facts. In his concluding argument to the District Court (not reported) he very strongly and almost exclusively urged that even if the facts did not show an actual partnership between Rolfe Griffiths and F. C. Watterson, Judgment nevertheless should be granted in favor of plaintiff and against F. C. Watt erson on the basis of a partnership by estoppel. A partnership by estoppel could not be relied upon, however, because in the first place it was not pleaded. Furthermore, defendant F. C. Watterson specifically denied that there was a partnership. (R. 10).

With reference to the matter of a partnership by estoppel it is set forth in 31 C.J.S., Estoppel, Sec. 153 (1), Necessity for Pleading, at page 743, that:

> "Estoppel ordinarily must be specially pleaded, whether it is relied on as a defense or as an element of a cause of action."

See also the rulings of this Court in the following cases: Campbell vs. Nunn, 78 Utah 316, 2 P2d 899; Tracy Loan & Trust Co. vs. Openshaw Inv. Co., 102 Utah 509, 132 P2d 388; Lagoon Co. vs. Utah State Fair Ass'n., 117 Utah 213, 214 P2d 614; and, Collett vs. Goodrich, 119 Utah 662, 231 P2d 730.

As to the evidence in the record concerning any actual partnership between Rolfe Griffiths and F. C. Watterson, both Rolfe Griffiths and F. C. Watterson denied that there was such a partnership. (R. 81, 95, 96 and 104). Mae Griffiths and Mae Waterson, the wives of the respective defendants, also denied that there was such a partnership. (R. 142, 143, 200, 201 and 202).

The strongest evidence in the record as to a purported actual partnership between Rolfe Griffiths and F. C. Watterson is the testimony of J. Heber Reese, the Treasurer of Salt Lake Hardware Company. His actual testimony and the other evidence in the record belies the claim that there ever was a partnership or that the question of a partnership relationship was ever relied upon in the extension of credit.

Mr. Reese testified that there was a meeting in the Salt Lake Hardware store in early 1960 when purportedly Mr. Watterson, his son-in-law, Rolfe Griffiths, and his daughter, came in to talk to them and make arrangements for credit at the store. (R. 33). He testified further that he extended credit to the Silver Creek General Store for and on behalf of Salt Lake Hardware based almost entirely upon the financial information furnished at that meeting and which he set down in his own handwriting in a document entitled "Credit Interview". (Exhibit 1). His testimony with reference to this as set forth in the Transcript at page 26 (R. 55) is as follows:

> Q. Can you tell us whose decision whether or not credit is extended?
>
> A. Mine.
>
> Q. In this case you did decide to have the company extend credit, in this case?
>
> A. Yes.
>
> Q. What facts did you rely on in making this decision?
>
> A. Almost entirely upon the financial information (which) was furnished to us.

Shortly after this testimony there was a five minute recess. During the recess Mr. Henriksen, one of the attorneys for plaintiff-respondent, discussed this testimony with him, and, when the Court reconvened, Mr. Reese then testified as follows: (See Transcript 28, 29 —R. 57, 58).

Q. Mr. Reese, I asked you upon what information you relied, you indicated the financial information received, and I asked you if you would list for us, or itemize for us the information you referred to.

MR. HENRIKSEN (should be MR. ALSTON): I object as repetitious.

THE COURT: Overruled. You may answer.

Q. (MR. MURDOCK): Would you answer the question?

A. What was the question?

Q. If you would list for us the information you are referring to whom you said you relied upon it.

THE COURT: What you relied on to extend credit.

A. The credit extension was given based upon the financial statement that I had made out by hand, plus the confirmation from Dun & Bradstreet, this was a partnership, which we cleared on each new account we open, plus, I think we tried to clear with Intermountain's report, but they did not have one. *It was based upon the financial statements given us, and the confirmation from Dun & Bradstreet that (it) was a partnership.* (Emphasis supplied).

F. C. Watterson denied that he was ever at that meeting as did his wife, Mae Watterson, and, so did Rolfe Griffiths and his wife, Mae Griffiths. (R. 80, 86, 100, 103, 121, 139, 172, 183 and 192).

The assets referred to in the financial statement which was testified to by Mr. Reese are solely those assets belonging to Rolfe Griffiths and Mae Griffiths, his wife, except an item of $1,600.00 in bonds and an item of $3,000.00 in cash, which said items it is uncontradicted were loaned to Rolfe Griffiths and Mae Griffiths by their father-in-law and father, defendant-appellant F. C. Watterson.

In connection with the aforesaid testimony of Mr. Reese, the Court's attention is specifically invited to the following: On the "Financial Statement," which is on the reverse of Exihbit 1, appears the following:

> "For the purpose of obtaining merchandise from you on credit, *I (we) make the following statement in writing, intending that you should rely thereon respecting my (our) financial condition as of (Date)* . . . 3-21-1960." (Emphasis supplied).

Rolfe Griffiths signed that statement but it was not signed by F. C. Watterson. Now if Mr. Watterson was in fact present at the meeting in question, surely Mr. Reese would have had him sign it. Furthermore, if there was any ambiguity at all about the statement it should be most strictly construed against Salt Lake Hardware and the plaintiff-respondent herein because it was the statement set forth on the form supplied by that company and filled out in the handwriting of its Treasurer, who had the responsibility of and the authority for extending credit. The said financial statement cannot be construed as the financial state-

ment of Rolfe Griffiths and F. C. Watterson under the circumstances because it was signed only by Rolfe Griffiths and recites unequivocally that "*I* (we) make the following statement *in writing,* intending that you should rely thereon respecting *my* (our) financial condition. . . . " (Emphasis supplied).

The Court's attention is also respectfully invited to the further testimony of Mr. Reese that the extension of credit to the Silver Creek General Store was based "upon the financial statements given us, *and the confirmation from Dun & Bradstreet that (it) was a partnership.*" (Emphasis supplied). (R. 57 and 58). With reference to the Dun & Bradstreet Report (Exhibit 3), it was admitted in evidence over the objection of defendant-appellant Watterson made at the time as follows: (See Transcript 42 and R. 71):

> MR. ALSTON: "We, for the record, object, on the grounds it is hearsay. That is data they have not shown this defendant had knowledge of having been sent out, that the original document was furnished with his signature on it, or had any anthorization for the use of this defendant's signature. And we do not even know from this defendant (witness) whether in fact it was an actual signature or facsimile signature."

Even though the Dun & Bradstreet Report was erroneously admitted in evidence as against defendant-appellant F. C. Watterson, the most significant part about this evidence is that it was not furnished Salt Lake Hardware Company for more than fifteen months

after the meeting of March 21, 1960, referred to in Exhibit 1, and the testimony of Mr. Reese relating thereto, more than a year after the Silver Creek General Store had folded up, and, more than eight months after the Wattersons had already left the State of Idaho and returned to Salt Lake City, Utah. The testimony of Verne C. Thacker, District Service Manager for Dun & Bradstreet, who was called as plaintiff's witness for the purpose of testifying about and identifying the said report, as set forth on page 43 of the Transcript (R. 72), is as follows:

> Q. Mr. Thacker, I believe you said copy of that report would have gone to Salt Lake Hardware June, 1961?
>
> A. Yes.
>
> Q. Would this be the first report they would have received?
>
> A. This is the only record I have requesting a credit report.
>
> Q. June 14, 1961?
>
> A. June 14—*let me check that. June* 14, 1961. (Emphasis supplied).

In writing about the account of Silver Creek General Store with Salt Lake Hardware the letters from Salt Lake Hardware were never addressed to F. C. Watterson, but only to Rolfe Griffiths. See Exhibits 12, 13, 14, 15, 16 and 17.

Also, even though the operation of the Silver Creek General Store was discussed on many occasions

with the only representative from Salt Lake Hardware who visited the store in Picabo, Idaho, a party by the name of Jim Nichols, he was not brought in by plaintiff to testify that in the operation of the store there was a partnership between Rolfe Griffiths and F. C. Watterson. The fact is and the evidence in the record demonstrates that there was no such partnership.

In connection with the competent and legally admissible evidence to establish the existence of a partnership, Section 14-1-4, Utah Code Annotated, 1953, provides as follows:

> "In determining whether a partnership exists these rules shall apply:
>
> (1) Except as provided by section 48-1-13, persons who are not partners as to each other are not partners as to third persons.
>
> (2) Joint tenancy, tenancy in common, tenancy by entireties, joint property, common property, or part ownership, does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.
>
> (3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.
>
> (4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise.

(b) As wages of an employee or rent to a landlord.

(c) As an annuity to a widow or representative of a deceased partner.

(d) As interest on a loan, though the amounts of payment vary with the profits of the business.

(e) As the consideration for the sale of the good will of a business or other property by installments or otherwise.

The exceptions referred to in Section 48-1-13 deal with a partnership by estoppel and are not applicable in this case because such a partnership was neither pleaded nor proved as required.

Mutual assent is necessary to a partnership. See 68 C.J.S., Partnership, Section 8, page 412. An agreement to share profits is an essential element of the partnership relationship. See 68 C.J.S., Partnership, Section 17, page 427. As to the sharing of both profits and losses, it is set forth at page 431, in C.J.S., Partnership, Section 19, that:

> " . . . an indispensable essential of the relationship, although not necessarily by express provision, is a mutual undertaking of the parties to share in both the profits of the business and the burden of making good the losses. . . . The absence of such a community of interest in profits and losses indicates that no partnership exists."

The burden of proving the existence of a partnership rests on the party having the affirmative of that issue. The existence of a partnership will not be presumed. The existence or non-existence of a partnership is not to be established by the opinions or the belief of parties to litigation or of their witnesses or by hearsay testimony.

In this case there was no mutual assent to a purported partnership between Rolfe Griffiths and F. C. Watterson. They did not share in the profits or losses. They denied that there was a partnership. There is no competent or clear and convincing evidence in the record that there was such a partnership. To sustain the Judgment in this case would be to enunciate a rule that whenever a father-in-law aids and assists his daughter and son-in-law and loans them money and other property, he thereby ipso facto becomes a partner with them. This is not the law and certainly should not be the law. To hold that such was the law would be a devastating and shattering blow to any family relationship.

CONCLUSION

For the reasons eluciated herein, and, based on the evidence in the record and the law applicable thereto, the Judgment against F. C. Watterson, the father-in-law of Rolfe Griffiths, should be reversed and Judgment entered in his favor.

Respectfully submitted,

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