

## New Jersey Court of Errors and Appeals.

FRANK C. TAYLOR,  
et al.

vs.

BENJAMIN F. WEBSTER,  
et al.

In Case, &c.

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### POINTS FOR PLAINTIFFS IN ERROR.

- 1.—General reputation is admissible to prove Partnership; and if not *in itself* sufficient, will be, if connected with *corroborating circumstances*.

*Whitney v. Sterling,* 20

14 Johns, 214.

*Gowan v. Jackson,*

20 Johns, 176.

- 2.—A foreign written law may be proved by parol evidence of a witness, learned in the law of that country.

1 *Gr. on Er. (12th Ed.) Sec. 487 and notes,*  
*and Sec. 489 and notes.*

*De Rothschild v. U. S., 6 Ct. of Cl.* 204. 30

*Dauphin v. U. S., Id* 221.

## BRIEF.

*As to First Point.—*

Much less strictness is required of plaintiffs in proving partnership of defendants than of their own, especially when the defendants live in another State or country. In  
10 this case the plaintiffs did business in Chicago, defendants in Montana.

The evidence shows two kinds of proof offered to prove partnership.

1.—*Reputation :*

Printed book, page 9, line 10, &c.

Printed book, page 11, line 20, &c., to page 12,  
20 line 10.

Printed book, page 12, line 10, &c.

2.—*Corroborating Proof :*

Printed book, page 11, line 30, to page 12,  
line 10.

This evidence clearly refers to the agreement  
copied in printed book, page 19, line 10.

The above evidence should have been submitted to the  
30 Jury, and the question of its sufficiency left with them.

*See authorities cited upon 1st point.*

*As to Second Point.—*

The Act of Congress regulating the mode of proof of laws of the various States is not regarded as exclusive.

*See Lothrop v. Blake,*

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3 Barr. 483.

In our State the point has been decided both ways.

*Hale v. Ross*, Penn. 590.

*Van Buskirk v. Mulock*, 3 Harr. 184.

No authorities were cited in either of the above cases.

The object of our Statute making printed laws of other States evidence of such laws (Revision pg. 272, sect. 22) is not restrictive of any old rules of evidence. It adds a <sup>10</sup> cumulative or additional rule to the previous rules.

In England great consideration has been given to this question, and it is now settled that a foreign written law may be proved by parol evidence of a witness learned in the law of that country.

In *Baron De Bode vs. Reginam*, 10 Jur. 217, the question turned on the point—Whether a general decree of the National Assembly of France abolished the feudal law in <sup>20</sup> Alsace; and an expert was called to disclose the contents of this decree. Objection was made to the admission of his testimony. Lord Denman, in admitting the testimony, said: “I think that credit must be given to the opinion of legal men who are bound to know the law of the country in which they practice, and that we must take from them the account of it, whether it be the unwritten law which they may collect from practice, or the written laws which they are also bound to know.” <sup>30</sup>

If such is the rule in regard to *foreign laws, a fortiori*, <sup>30</sup> should the same rule obtain in proving the laws of a sister State.

The parol testimony offered to prove the law of Illinois (pg. 23 printed book) should therefore have been allowed.

*See authorities on Second Point.*

STONE & JACKSON,

*Attorneys of Appellants.* 40



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# D. J. Court of Errors and Appeals.

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BENJAMIN F. WEBSTER,  
Impleaded, &c. }  
Adsm. } On Error.  
TAYLOR & WRIGHT.

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## POINTS FOR DEFENDANT IN ERROR.

It is a matter of very great consequence to this defendant, Webster, whether or not he shall be held liable to this claim of these plaintiffs. The claim is for \$5,345.08, which with interest at 10 per cent. for six years, will amount to about \$8,550.

It appears in evidence that Clough & Co. failed, and, of course, if judgment go against Webster, this sum of money must come out of him alone.

The agreement put in evidence shows that Mr. Webster advanced for this enterprise \$10,000. Of course, it is unnecessary to say that is all gone.

This is the first suit brought by the creditors of Clough & Co. against Webster. If this shall prove successful, doubtless others may be expected.

Let us look at the surroundings. Clough & Co. were doing business in Chicago. Mr. Taylor had known one of them 16 years. He knew all that was necessary to be known about them. He knew nothing about Webster. Webster, however, had been for 8 years in Chicago, a member of the firm of Webster, Marsh & Co., a clothing house.

Mr. Webster did not buy these goods; he did not authorize any one to buy them. He has never said or admitted that he was a member of the firm of Clough & Co., or of the Montana Hide and Fur Co., or admitted his liability for this debt.

Mr. Clough, it seems, represented him as such partner, and says he had contributed \$10,000 and would contribute more. Himself and Leonard had each contributed several thousand dollars, and finally the agreement is exhibited to Mr. Taylor by Mr. Clough, before the goods are purchased, to satisfy him beyond a doubt that Mr. Webster was liable, or would be liable, for the goods he wanted to buy of Taylor & Wright.

It seems to me to be unnecessary to consider all the four points raised by the plaintiff in error, because the case will be governed doubtless by the last, viz., the motion to non-suit.

If this Court affirms the action of the Justice below in that motion, it can make no difference what error upon other points he may have committed. If that be reversed, of course, the other assignments of error need not be considered.

I think the non-suit was right on several grounds.

## I.

This suit is brought against John Clough, Oliver B. Leonard and Webster, not as partners, but as joint debtors.

The proof is the goods were sold and charged to a company called The Montana Hide and Fur Company. They were ordered by John Clough, who admits he was a member of that company and declares that Oliver B. Leonard and Webster are also members. Mr. Leonard don't deny that allegation, but Mr. Webster does. Clough's allegations can not bind or charge Mr. Webster.

How, then, do the plaintiffs fix Mr. Webster's liability for this debt?

By calling him on the stand and proving the execution of the agreement of November 16th, 1868, and resting.

Where is the proof that this agreement constitutes the parties thereto "The Montana Hide and Fur Company?"

It not only is silent on the subject of these parties forming the The Montana Hide and Fur Company, but it is contradicted by Mr. Taylor's own testimony.

He says Clough told him that Leonard, Webster and himself constituted that company. But here is another party in this concern, Ziba H. Clough.

This, then, can not prove that Mr. Webster is or was a member of that company; and if this don't prove it, it is not proved. As a matter of fact, that organization was effected about April 1st, 1869. The agreement constituting that company was produced, or a copy of it, by Mr. Taylor in his cross-examination, as detailed on page 21, line 28.

Therefore, there was no proof that Mr. Webster was a member of The Montana Hide and Fur Company, except the declaration of Clough.

## II.

A second ground of non suit is, that if the agreement specified does constitute Mr. Webster a member of this company, it constitutes Ziba H Clough such member also, and he is not brought into court. The plaintiffs are bound to bring all the members of said company in court if they can be found, and the 131st section of the Practice Act don't apply to this case.

## III.

This agreement of November 16th, 1868, does not constitute Webster a partner, as between themselves, with the other parties to that agreement, and if it does not, then Webster is not liable for this debt.

In my judgment, this is an important element in this case.

The Court refused to let us prove what the intention of the parties was in the cross-examination of Mr. Webster himself;

we must therefore infer the intention from the instrument itself.

It is manifest that this buying hides and furs in Montana territory and bringing them to Chicago to sell was a kind of side venture of John Clough & Co., apart and independently of their ordinary and legitimate business; and that the money for carrying it on was furnished by Webster, and in lieu of the 10 per cent. interest allowed in Illinois, they agreed to pay him a certain share of the profits and return him his money the next July.

The buying, selling and handling was all to be done by the firm of Clough & Co. Webster was to be secured by insurance policies; and he was to have one-third of all the profits, deducting one-third of expenses of insurance and freight on stock.

There is one item in said agreement (Item 6) which looks towards his bearing a part of the losses; but that is annulled, I take it, by Item 10, requiring a return of all money loaned.

There are one or two points in the agreement which seem to squint towards a partnership, viz., Items 7 and 8, concerning the goods being shipped to him at Chicago, and a weekly statement sent, and also that the agreement should cover goods in Montana at that time.

But it is very evident that Clough & Co. were to handle and sell all the goods and that Webster had really no more control over the goods than any other creditor of John Clough & Co.; and the stipulation about the then present stock of hides meant evidently only that his share of the profits should be counted on that stock as well as on what goods might be subsequently purchased.

There are four points clearly apparent in this agreement, all perfectly consistent with the theory that none of the parties to that agreement considered Webster a partner:

1. That Webster should loan a then existing firm \$10,000, to be used in a certain adventure, and instead of interest he should receive a share of profits.

2. That it should be returned by July 1 next.

3. That he should be secured by policies of insurance.
4. That he should be advised weekly of the condition of the business.

I respectfully submit here two points :

1. That this agreement does not make Webster a partner in this enterprise with John Clough & Co , and
2. If it does not, he is not liable to these plaintiffs, however he might be liable to creditors who had no notice of the agreement.

Webster loaned this firm some money, and was entitled to a share of the profits, if any.

Does this make him a partner ?

He had no interest or proprietary right in the stock or merchandise of the concern.

He was not by his own consent held forth to the world as a partner. But they say he was to share in the profits.

I know it was formerly held that whoever participates in the profits becomes a partner as to third persons, because he takes from creditors a part of the fund on which they rely for payment.

But I respectfully insist that this doctrine is not law in New Jersey.

The modern text books and the current of recent American decisions are against it.

The subject is extensively examined in the American editor's notes on *Waugh v. Carver*, 1 Smith's Leading Cases, (5th Ed.) 983, citing among other cases :

*Rice v. Austin*, 17 Mass. 197.

*Gallop v. Newman*, 7 Peck 282.

*Sack v. Howland*, 5 Denio 69, and numerous other cases.

The point of these decisions seems to be that "contribution of money or labor towards prosecuting a business with a right to a corresponding return from the proceeds will not essentially constitute a partnership."

Stipulating for a compensation in proportion to the profits, or

out of the profits, will not give the rights, or impose the liabilities of a partner unless the stipulation amounts to a *jus ad rem*: or *in re*, and not merely to a chose in action.

*Conklin v. Barton*, 43 Barb. 435.

*Loomis v. Marshall*, 12 Conn. 69.

*Dewey v. Cabot*, 6 Metcalf, 92.

*Turner v. Bissell*, 14 Pick. 192.

In the second edition of Parsons on Partnership, he has an extremely valuable note, "c," beginning at page 74 and running through 20 pages, in which this subject is fully considered, and his conclusion is "that the doctrine taught in *Waugh v. Carver* is not established by the mass of either English or American cases, and that although there are dicta of immense weight, apparently, to the contrary, there are but two grounds upon which a man can be held liable as a partner to third persons, and that if a man has not been held out as a partner he can be chargeable as such only when he has some ownership in or of the profits as they accrue and are not yet ascertained or divided into portions."

Parsons says the true test is "did the supposed partner acquire by his bargain any property in, or control over the profits while they remain undivided. If so, he is liable to third persons and otherwise not."

Parsons on Partnership, marginal page 71.

This also seems to be the doctrine of the Courts of this State.

In *Hargrave v. Conroy*, the Chancellor says: "That although it is in general terms laid down by the authorities that a participation in the profits of any business or undertaking is sufficient to constitute one a partner yet it must be a general participation in the profits as such. But when one who is not a principal has no control over the business and no power as a partner in the firm, but is employed as a superintendent, receiving by way of

compensation a share of the profits, this does not constitute him a partner as between themselves or as to third persons."

*Hargrave v. Conroy*, 4 C. E. Green. 283.

In *Brundred v. Muzzy*, 1 Dutch., 278, Justice Elmer states the true rule thus :

"This effect is produced (that is, a partnership as to third persons) wherever such persons become entitled to an actual participation in the profits of a business as profits, so that they are entitled to an account and have a specific lien, or preference in payment over creditors, and thus have the full benefit of the profits of the business without any corresponding risk in case of loss."

Chancellor Kent's Commentaries, Book 3, Lecture 143, page 25, has a note, "b," to this effect : "To be a partner, one must have such an interest in the profits as will entitle him to an account and give him a specific lien, or preference in payment, over other creditors."

Parsons has also the very case of a loan of money to a firm, the lender to have a specific proportion of the profits; and he says the question will be : "Has the party lending or contributing the money acquired by his bargain a proprietary interest in the profits while they remain undivided. If he has, he is liable as a partner, otherwise he is not liable."

Parsons on Partnership, 142, top paging 149.

This question has been set at rest in England by an act, 28 and 29 Vict., 86, one clause of which provides, "That the advance of money by way of loan to a person engaged, or about to engage in any trade, or undertaking, upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits arising from carrying such trade or undertaking, shall not of itself constitute the lender a partner with such person or render him responsible as such," and Mr. Parsons expresses his belief that the Courts of this country will regard this statute rather as a declaratory of the common law than as

changing that law, and will apply to cases that come before them, the principal on which that statute is founded.

In this case Webster was by this contract entitled to a share of the profits, by way of interest on his loan, just as he might have been had he agreed to give his personal services instead of lending his money. He had no proprietary right in those profits before they should be divided; he was simply a creditor with only a creditor's rights. It is confidently submitted that there is no essential difference between a case of loaning money to a firm for a share of the profits and bestowing personal services or labor to be repaid by a share of the profits.

No one doubts that in the latter case there is no partnership, either *inter sese* or as to strangers, and I submit the cases are not distinguishable on principle.

The case of *Smith ads. Perry & Howell*, 5 Dutch. 74, also confirms this view of the law.

I submit, therefore, that this contract does not establish a partnership between Webster and John Clough & Co., neither as between themselves nor as to other persons.

#### IV.

If this agreement does not make these persons partners as between themselves, then this non suit was right. Because this agreement was exhibited to the plaintiffs before the purchase of the goods, and they then had notice that Webster was not a partner and that Clough could not bind him.

Partners even have the right to make any agreement among themselves, qualifying or limiting their responsibility.

Hence Webster is not liable if no partnership *inter sese* be thereby created. But

#### V.

Even if the Court take the extreme view of the case and

say that the contract aforesaid constitutes a partnership between themselves then Webster is not liable, for two reasons;

1. Webster has therein defined and limited his liability (if any he has) to one specific point, viz.: that the money he advanced must be used for the purpose of buying hides and furs in Montana Territory and for no other business or purpose whatever, and this was shown to the plaintiffs and they are bound by it.

How are they to escape the consequences of this?

Mr. Taylor testifies that this agreement was exhibited to him to prove that Webster was liable to pay this debt.

It seems to have satisfied him, notwithstanding it distinctly asserts that if any liability whatever is deduced from it as against him, it is for an entirely different matter than buying provisions in Chicago. It was for buying hides and furs in Montana Territory that he advanced his money, and these plaintiffs sue him for provisions and groceries bought in Chicago.

Surely these men might just as properly have bought cotton in New Orleans, gold in Wall street, or coffee in Rio Janeiro, as groceries in Chicago and attempt to bind Webster for the debt as to do it in this case.

This is the ground upon which the judge non suited these plaintiffs and the ground of such non suit seems to be solid.

2. That agreement essentially and substantially forbade J. Clough & Co. from buying goods of any kind *on credit* for the purposes of binding Webster.

He did not authorize them to use or pledge his credit at all.

He loaned them money and it was the disposition or use of that money that he tried to define and restrict.

They in fact had no right to use his credit to a penny's amount.

It stipulated that they should not with *that money* purchase any kind of goods but the kind named therein, much more did it stipulate that they should not buy any kind of goods on his

credit, and the plaintiffs knew all this for they saw this agreement.

The argument made below was that these goods, for which this suit is brought, were bought for the identical purpose of exchanging them in Montana Territory for hides, furs and skins, and the case is thus brought within the letter of Webster's agreement, the same as if the purchase had been of a bill of exchange.

The answer to that is, that every man has a right to put what qualifications or limitations he pleases to his bargain with another and that other is bound if he accepts it. The qualifications to Webster's contract of partnership, if this be such contract, was that John Clough & Co., to whom he lent his money, should use it (the money) in buying hides, pelts and furs in Montana Territory and for no other business or purpose whatever, and if it authorizes them to pledge his credit at all it is only for the merchandize and in the place mentioned.

He undoubtedly may insist on a strict construction of this agreement when a party who has seen it seeks to make him responsible on a contract differing from his specific directions.

## VI.

There is another point in this case that demands some attention, and that is this: These goods appear to have been bought in fact by this man Jacob Smith, (Mr. Wright says, p. 6, line 20) that he selected the goods and gave instructions about delivering them. Mr. Clough was not present when they were selected, as they call it.

The plaintiffs sold and delivered the goods and charged them to the Montana Hide and Fur Co.

They were sold on Webster's credit, Mr. Taylor says, and also that Clough & Co. were not entitled to any such credit.

This man Smith draws for the amount on these bills on John C. Clough & Co., and these plaintiffs go to John C. Clough & Co. and procure their acceptance of them.

What the plaintiffs mean by saying they received this paper conditionally, we are not informed. They did receive it and procure its acceptance by the drawees. They think the Montana Hide and Fur Company was not credited with the amount of them; but they tried to collect the acceptances however of John C Clough & Co, and after they failed Mr. Clough (as Mr. Taylor testifies) told them Webster was liable and he must pay the bill.

I submit here three points :

1. That this shows that the plaintiffs preferred the acceptances of John C. Clough & Co. for these goods to an open account against the Montana Hide and Fur Company.

2. That they had doubts about Mr. Webster's being responsible for the price of them.

3. We may infer that this acceptance of these drafts was a settlement of the account of the Montana Hide and Fur Company, and that then the plaintiffs were content to rely on John C. Clough & Co. and that Webster may be considered discharged.

E. W. RUNYON,

Att'y for Deft. in Error.

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# New Jersey Errors and Appeals.

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FRANK C. TAYLOR, et al,

vs.

BENJAMIN F. WEBSTER, et al.

} *Writ of Error.*

NEW JERSEY, SS.

SEAL.

The State of New Jersey to our Justices of our Supreme Court of Judicature of the State of New Jersey,

GREETING :

Forasmuch as in the record and proceedings, and also in the 10 giving of judgment of a plea which was in our Court before you, between Frank C. Taylor and others, of a plea of trespass on the case, on promises, as it is said, manifest error hath intervened to the great damage of the said Frank C. Taylor and others, plaintiffs, as we are by their complaint informed.

We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the party aforesaid in this behalf, do command you, that without delay you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things concerning the same, to our Court of Appeals in the last resort in all

causes as heretofore, on the third Tuesday of June, instant, wheresoever they shall be in the said State, together with this writ, that the record and proceedings aforesaid being inspected we may further cause to be done thereupon, what of right and according to law ought to be done.

Witness, Theodore Runyon, Esquire, Chancellor, at Trenton, this third day of June, A. D. eighteen hundred and seventy-four.

HENRY C. KELSEY, Clerk.

10 N. PERRY, Jr., Attorney of Plaintiff.

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#### JOINDER IN ERROR.

And the said Benjamin F. Webster, by E. W. Runyon, his attorney, comes here into Court and says, that there is no error either in the proceedings aforesaid or in giving the judgment aforesaid; and he prays that the said Court of Errors and Appeals now here, may proceed to examine as well the record and proceedings aforesaid, as the matter aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid  
20 given, may be in all things affirmed.

## NEW JERSEY SUPREME COURT.

UNION COUNTY.

FRANK C. TAYLOR et al,

*vs.*

BENJAMIN F. WEBSTER, et al.

*In Case on Prom.**On Postea, &c.*

UNION COUNTY, ss.—Frank C. Taylor and John M. Wright, the plaintiffs herein, put in their place N. Perry, Jr., their attorney, against Benjamin F. Webster, et al., in a plea of trespass on the case on promises.

UNION COUNTY, ss.—Benjamin F. Webster, one of the defendants herein, puts in his place Enos W. Runyon, his attorney, in a plea of trespass on the case on promises.

NEW JERSEY SUPREME COURT of the 22d day of April, A. D. 1870.

UNION COUNTY, ss.—Benjamin F. Webster, one of the defendants in this suit, was summoned to answer unto Frank C. Taylor and John M. Wright, the plaintiffs therein, of a plea of trespass on the case upon promises, and thereupon the plaintiffs, by N. Perry, Jr., their attorney, complain :

For that whereas Benjamin F. Webster, John Clough and 20 Oliver B. Leonard, co-partners, the defendants, heretofore, to wit, on the first day of April, 1870, at Elizabeth, in the county of Union, were indebted to the plaintiffs in the sum, &c.

\* \* \* \*

(Here follow the common counts in assumpsit.)

\* \* \* \*



2. What business were you engaged in during the year 1869, and where?

A. General grocery business, at Chicago.

3. State whether or not you are one of the plaintiffs in this suit?

A. I am.

3½. What was the firm name under which you were doing business, and who were the partners?

A. Taylor and Wright; Frank C. Taylor and John M. Wright. 10

4. Do you know the defendants in this suit, and if so, whom?

A. Personally I do not know them.

5. State whether or not the firm of Taylor and Wright ever had any dealings with the Montana Hide and Fur Company?

A. They had.

6. If so, state what those transactions were?

A. March 29th, 1869, we sold them a bill of groceries, amounting to \$5,235.37; March 31st, 1869, a bill of coffee, amounting to \$109.74.

7. Have you a statement of the items of said bill of groceries, 20 sold to the defendants, the Montana Hide and Fur Company, on March 29, 1869?

A. I have and now produce the same and request the Commissioner to attach the same as Exhibit, "A," to this my deposition.

8. Have you a statement of the items of the bill of goods sold to the defendants, the Montana Hide and Fur Company, by the plaintiffs on the 31st March, 1869?

A. I have, and produce it as exhibit "B" to this deposition.

9. State whether or not the defendants, or any one of them, 30 have ever paid the plaintiffs for the whole or any portion of the goods sold upon the said 29th and 31st days of March, 1869?

A. They have never paid any portion of it.

10. Where were the defendants engaged in business at the time the goods were sold to them?

A. The goods were marked and shipped to Helena, Montana Territory.

11. State the amount that is now due and owing the plain-

tiffs from the defendants on account of the goods which you have testified to as having been sold to the defendants by the plaintiffs ?

A. \$5,345.08, not including interest (five thousand three hundred and forty-five dollars and  $\frac{8}{100}$ ).

12. State whether or not the goods which you have testified to as having been sold by the plaintiffs to the defendants were sold on time, and if so, when the payment for the same became due ?

10 A. They were sold for cash or its equivalent ?

*Cross-examination.*

13. In interrogatory fifth you state that Taylor & Wright had dealings with the Montana Hide & Fur Company—will you now please state, who you mean by the Montana Hide and Fur Company ?

A. I do not know who comprise the company, as the original transaction was made with my partner, F. C. Taylor.

14. Do you know whether the Montana Hide & Fur Company was an incorporated company or an association of individuals ?

A. My impression was that it was an association of individuals.

15. If an association of individuals, will you please state for what purpose they were associated, what was the kind and scope of their business, and where did they conduct the same ?

A. I understood their business was to buy hides and furs in Montana Territory, and ship them to Mr. Clough of Chicago, who was of the association.

16. Will you please give the name of the person or persons who purchased the bill of goods referred to above, from the the firm of Taylor & Wright, and to what person or persons said goods were delivered ?

A. The goods were selected by Mr. Smith, who I understood to be in the employ of the Company. They were delivered to the North Western Railroad, by his instructions, and bills of lading taken for the same.

17. Do you know of your own knowledge whether the goods mentioned by you as sold to this Company ever went into their possession?

[Question objected to.]

A. I know they were delivered according to instructions. They went out of our possession into theirs.

18. State from whom you received your instructions as to delivery, and what those instructions were?

A. From Mr. Smith. The instructions were to mark them to the Montana Hide and Fur Company, ship by the North 10 Western Railroad, via Sioux city, and take the North Western Railroad Company's bill of lading for them.

19. Was the Mr. Smith whom you have mentioned a member of said Company?

A. Not to my knowledge.

20. To whom were the bills of goods, mentioned by you as sold, charged upon the books of Taylor & Wright?

A. To the Montana Hide and Fur Company.

21. You say the goods mentioned were sold for cash or its equivalent; what do you mean by its equivalent, and what if any 20 understanding did the firm of Taylor & Wright have with the purchasers with reference to the payment of said goods?

A. The arrangement for payment was made with my partner, and 10 per cent. interest per annum was to be added for any time they might agree upon to pay the same.

22. Was the arrangement you speak of made within your own knowledge, or do you speak of it as having heard of it from your partner.

A. I derived the information from my partner.

23. You state that John Clough & Co., of Chicago, were 30 members of this association or company; you will now state if you know what are their pecuniary circumstances?

[Question objected to.]

A. I have no knowledge of the same.

JOHN M. WRIGHT.

*Frank C. Taylor*, a witness produced before me, being duly

sworn, on his oath saith in reply to the interrogatories addressed to him, as follows :

*Inter.* 1. What is your name, age, occupation, business and place of residence ?

*Ans.* Frank C. Taylor ; 36 years ; banking ; residence, Chicago.

2. What business were you engaged in in the year 1869, and where, and if a firm, under what firm name and who constituted the firm ?

10 A. Wholesale grocery business, at 6 and 8 River street, Chicago, under the firm name of Taylor & Wright ; Frank C. Taylor and John M. Wright constituted the firm.

3. Are you one of the plaintiffs in this suit ?

A. I am.

4. Do you know the defendants or either of them ; if so, whom and how long have you known them ?

A. I know John C. Clough and Oliver B. Leonard. I have known John C. Clough 16 years ; I made the acquaintance of Mr. Leonard early in the year of 1869 ; I am not personally  
20 acquainted with Webster.

5. State whether or not your firm of Taylor & Wright ever had any dealings with the defendants, if so state when and where, and what those dealings were, and the conversations relating thereto ?

A. Taylor & Wright did have dealings with the defendants in the month of March, 1869, and were as follows : the dealings were at 6 and 8 River street, Chicago. Early in the month of March, Mr. Clough came to me and said that he had formed an association styled the Montana Hyde & Fur Com-  
30 pany, and that they intended to buy furs and hides in and near the Territory of Montana, that they wanted to buy a large amount of groceries, and trade those groceries for hides and furs, and that he wanted to buy for cash, or what we considered as its equivalent, and that the same would be paid for within four months from the date of the invoices ; that they had in their employ a man by the name of Jacob Smith, who was then living in Montana Territory, who would be in Chicago soon to

select the goods that the concern wanted. I replied to Clough that Taylor & Wright would sell the goods to the Montana Hide and Fur Company provided he could give me satisfactory evidence of the responsibility of said company. Mr. Clough explained that the Montana Hide and Fur Company had been doing this same business for a good while past, were well known in Chicago, and that I might make the usual inquiries in the usual way. I replied to Mr. Clough that in addition to such inquiries I wanted him to make a statement to me, showing the names of the partners of this company, and the amount 10 of capital each contributed thereto. Mr. Clough stated that the company consisted of John C. Clough of Chicago, Oliver B. Leonard of Chicago, and Benjamin F. Webster of Plainfield, New Jersey. That he, Clough, had put in several thousand dollars, the exact amount I cannot remember; that Oliver B. Leonard had put in several thousand dollars, I cannot remember the exact amount; that Benjamin F. Webster had put in (\$10,000) ten thousand dollars, and would put in more when required. I then made the inquiries, after this I told Mr. 20 Clough that Taylor & Wright would sell the said company the goods they needed to an amount not exceeding six thousand dollars: a few days after this Mr. Clough came into the store with Jacob Smith, of Montana Territory, to buy and select the goods. Mr. Clough, not knowing anything about the goods needed in Montana, allowed Mr. Smith to select the goods. The goods were soon after sent to the depot of the North Western Railroad Company, under the direction of Mr. Clough, and marked Montana Hide and Fur Company, Helena, Montana Territory. 30

Exhibit "A" attached to Mr. Wright's deposition is a correct statement of the goods and the prices agreed to be paid therefor, so sold and shipped by Taylor & Wright to the Montana Hide and Fur Company on the 29th day of March, 1869, and on the 31st day of March, 1869; we sold and so delivered to the said Montana Hide and Fur Company, the three bags of coffee mentioned in exhibit "B," attached to Mr. Wright's deposition.

[The defendant objects to that part of the answer relating to what Mr. Clough told him.]

6. State whether or not during those conversations anything was said by Mr. Clough as to the disposition of the goods by the Montana Hide and Fur Company?

A. Mr. Clough said to me that the said company intended to trade those for hides and furs in and near Montana Territory.

7. State whether or not the defendants, or any one for them, have ever paid for said goods or any portion of them?

10 A. They have not.

8. State whether or not you ever presented to the defendants or either of them your account for the goods so sold to them; if so, state when, to whom, and what was said.

A. The account was presented to Mr. Clough in the month of April, 1869, and from time to time after the month of April, during the spring and summer of 1869. Payment demanded of the same and refused by Mr. Clough, Mr. Clough acknowledging the correctness of the account and promising to pay the same as soon as he received the furs and hides which the said  
20 company had bought in Montana Territory to be shipped to the said Clough at Chicago.

Adjourned until January 27th, 1873.

HUNTINGTON W. JACKSON, Commissioner, &c.

*Cross examination* by R. M. Smith, Esq., attorney for defendants.

*Inter.* 1. You say in your answer to the fifth direct interrogatory that Clough told you that he and Leonard had each contributed several thousand dollars to the capital stock of the Montana Hide and Fur Company, but that you do not remember the amount he said that each contributed, but that you do  
30 remember that he told you that Webster had contributed the sum of \$10,000 to the capital stock of said company; will you now explain why it is that you remember Clough's statement as to the amount contributed by Webster and do not remember it as to the amount contributed by either Clough or Leonard?

*Ans.* The reason was that Webster was the only party that I made any inquiries about, that I supposed I knew all that was necessary about Clough and Leonard, and that the sum of \$10,000 being the exact amount contributed by Webster, was talked over and mentioned by all the partners that I talked with about the Montana Hide and Fur Company.

2. Where, if you know, did Mr. Webster reside at this time?

A. In New Jersey.

3. Did he not reside in Chicago at the time those goods were sold, and was he not then a member of the firm of Webster, 10 Marsh & Co., doing business in this city?

A. Never to my knowledge.

4. Did you ever know he resided in this city, and was a member of that firm?

A. Never.

5. Did you take any pains or make any effort to communicate with Mr. Webster about this company, or to ascertain his connection therewith?

A. I never communicated with Mr. Webster in any way.

6. Did Mr. Webster ever make known to your firm or to 20 either of the members thereof what his relations were, if any, to the Montana Hide and Fur Company?

A. Never to my knowledge.

7. Did you ever know from any source, and if so, what his relations were with said company, whether as general or as special partner?

A. At the time we sold the goods we had in addition to Mr. Clough's statement sufficient evidence for us to believe that he was a general partner; I cannot at this moment remember what that evidence was. 30

8. Did you ever receive any information upon that subject other than that you received from Mr. Clough?

A. I did.

9. From whom did you receive it, and what was it?

A. I cannot remember the names of the parties from whom we received such information, and cannot remember the nature and description of certain documents signed by Webster making him general partner of the Montana Hide and Fur Company.

10. State to what documents you refer, in whose possession were they, and how do you know they were signed by Webster?

A. To the best of my knowledge and belief, I will state they were in the hands of Clough, that I saw them, that I do not remember what they were.

11. Do you know of your own knowledge whether Mr. Webster contributed \$10,000, or any other sum, to the capital stock of the Montana Hide and Fur Company?

A. I do not.

10 12. Do you know of your own knowledge that at the time Taylor & Wright sold the goods named to the Montana Hide and Fur Company, B. F. Webster, one of the defendants in this suit was at that time a member of said company?

A. I do not.

13. Did you ever have any personal acquaintance with Mr. Webster, or any personal written interviews with him?

A. Never.

FRANK C. TAYLOR.

Plaintiff's counsel called *Frank C. Taylor*, sworn:

20 Q. You are one of the plaintiffs?

A. I am.

Q. Where were you engaged in business in 1869?

A. In Chicago.

Q. Had you a partner?

A. Yes.

Q. Who?

A. John M. Wright.

Q. What was the firm's name?

A. Taylor & Wright.

\* \* \*

30 Q. When was this interview with Mr. Clough, referred to in the deposition just read in your hearing?

A. Early in March, 1869.

Q. Have you had any interview with any representative of Mr. Webster?

A. I have.

Q. Who?

A. H. B. Hurd.

Q. Who is he ?

A. An attorney of Chicago.

Q. What did he profess to be ?

A. Mr. Webster's attorney.

Q. As such attorney, did he make any statement to you concerning Mr. Webster's connection with the Montana Hide & Fur Company ?

[Defendant's counsel objected.]

*Court.*—I am very clear that a partnership cannot be established by proof of general reputation ; nor is it competent to shift the onus of proof on the other party.

*Plaintiff's Counsel.*—I only contend that it makes out a prima facie case of partnership.

*Court.*—As at present advised I will exclude the evidence.

Exception prayed and granted, and this exception is hereby sealed accordingly.

DAVID A. DEPUE,

J. S. Ct.

SEAL.

Q. What knowledge, if any, had you of the responsibility of 20 John C. Clough and Oliver B. Leonard ?

A. From their own statement.

Q. Over what period of time did your knowledge of Clough & Co. extend, and what was your knowledge of them as to solvency ?

A. I have known Mr. Clough for 16 years ; I have known him to be straight forward and upright, and, as I believe, an honest business man, and that his statement was perfectly reliable ; I had known his business a great many years.

Q. In relation to his credit ?

A. And on my knowledge of the man his statement to me made his credit good,—the credit of this company he talked about to me.

Q. Was he in your opinion at that time entitled to credit to such an amount as here given to the Montana Hide & Fur Company ?

A. John Clough individually ?

Q. John Clough & Co., composed of John C. Clough and Oliver B. Leonard ?

A. No, they were not entitled to any such credit.

Q. On whose credit were those goods sold ?

A. Mr. Webster's.

*Cross-examined.*

Q. You say they were sold on Mr. Webster's credit, you mean they were sold on your understanding that Mr. Webster  
10 was one of the company ?

A. Yes.

Q. You never sought him ?

A. No.

*Witness.*—I did not answer the question correctly, for this reason: you asked me if they were sold on my understanding that Mr. Webster was one of the company; it was sold partially on that understanding, not wholly, because we obtained other information on which I sold the goods, which would be the best evidence I wanted, that Mr. Webster was liable for  
20 that bill of goods.

Q. You supposed he was liable ?

A. I supposed he was liable.

Q. Did your firm receive commercial paper for these bills ?

A. We received commercial paper conditionally.

Q. Whose paper ?

A. John C. Clough & Co. Acceptances of drafts drawn by Jacob Smith.

*By the Court.*

Q. The man by whom the goods were selected ?

20 A. Yes.

*Further examined.*

Q. And these drafts they accepted ?

A. Yes.

Q. For these goods in question here ?

A. Certainly.

Q. Tell us whether there was one or more acceptance of that kind?

A. I think several.

Q. Making up the gross amount in this suit?

A. I am not certain about that.

Q. How much did it make up?

A. They were to pay a certain amount of cash, and I think acceptances were taken for the amount, less the amount of cash they were to pay: I cannot remember the exact amount. 10

Q. When were they taken?

A. Either the latter part of the month of April or early in May.

Q. After the sale of these goods?

A. Yes.

Q. For what time?

A. The maturity of the paper was four months from the date of the bill, to the best of my knowledge and belief.

*By the Court.*

Q. A single draft?

20

A. No. I think there was more than one.

*Further cross-examined.*

Q. There were two bills of items?

A. Yes certainly, bills of coffee were not in the first lot of goods, and as soon as they reached us from New York a second bill was made up.

Q. Were those acceptances drawn by Mr. Smith in his individual name?

A. I don't remember.

Q. And accepted by Clough & Co. in their firm's name? 30

A. I think they were.

Q. Where are they?

A. Unless Mr. Perry has them, I think they were destroyed in the fire.

Q. Destroyed by the Chicago fire were they?

A. I did not consider them of any value.

Q. You continued to hold them after maturity?

*By the Court.*

Q. Did you surrender them to anybody?

A. Not to my recollection.

*Further cross-examined.*

Q. You continued to hold them after maturity?

A. I have no doubt about it.

Q. And unless your counsel has them they were probably  
10 destroyed by the fire?

A. I should say so.

Q. Were Montana Hide & Fur Co. credited with the amount  
of these acceptances?

A. I think not.

Q. Were they given on the account?

A. They were not taken in payment of the account, or any  
portion of the account.

Q. They were taken for this bill however?

A. They were taken for collection and the proceeds were to  
20 go for the payment of the account of Montana Hide & Fur  
Company.

Q. Did Clough & Co. fail?

A. Yes.

Q. Did they make an assignment to your firm?

A. They did not.

Q. To any member of it?

A. They did not.

Q. To one interested or acting for your firm?

A. They did not.

30 Q. They made an assignment to somebody?

A. I don't know.

Q. Did not you send somebody out to Montana under an as  
signment from Clough & Co.?

A. I did not.

*Re-examined.*

Q. Did Clough & Co. make an assignment of these goods—of these furs held by the company to the firm of Tillinghast & Co.

A. There was a large amount of furs coming to Chicago, which if sold would pay the bills: we were watching for them, we had a list of the amount: we were watching from day to day, and finally we discovered, by accident, their destination had been deviated and taken possession of by a firm named Tillinghast & Co., of Chicago, or their agents, and we never received any of these furs.

Q. Do you know whether Mr. Webster had anything to do with that deviation of the goods?

A. From intimation.

[Stopped by the Court.]

Q. Do you know of Mr. Webster having an agent in Sioux City stopping these goods in transit?

A. I don't.

Q. Do you know of Tillinghast & Co. doing it in connection with Mr. Webster? 20

A. I cannot say I do of my own knowledge.

Plaintiff's counsel also called *B. F. Webster*, sworn:

Q. You are the defendant?

A. Yes.

Q. Did you in connection with others execute that agreement?

A. I signed that.

Q. Were you present when the others signed it?

A. I was.

Plaintiff's counsel offered paper in evidence. 30

*Cross-examined.*

Q. Where did you live at the time this was signed?

A. At Chicago.

Q. How long had you been living there ?

A. 7 or 8 years.

Q. In business ?

A. Yes.

Q. In the firm of Webster, Marsh & Co. ?

A. Yes.

Q. This agreement was dated 16th November, 1868 ; when was it executed with reference to its date ?

10 A. I presume it was executed the same day, or about that time.

Q. By whom was it written ?

A. By myself.

Q. What was your business ?

A. Wholesale clothing.

Q. At the time you executed this paper, what was your intention and design with reference to it ?

[Objected to, and objection sustained.]

Q. At the time you executed this paper, did you intend to  
20 be a partner in any concern, or with the other parties named in that paper ?

[Objected to, and objection sustained.]

[Exception taken and granted.]

Q. Do you know or have you ever known any association called the Montana Hide and Fur Company—and if so, when did you first know it ?

A. I have heard of such an association.

Q. When did you hear of it ?

A. It was about, I think, the beginning of 1869.

30 Q. How long after the execution of the paper, dated November, 1868 ?

A. I could not say positively how long after that.

Q. Was it after ?

A. I am not certain whether it was after the first of January or latter part of 1868—it was along during that winter.

Q. Were you ever a member of that Company—the Montana Hide and Fur Co?

[Overruled, as not being cross-examination.]

Agreement of November, 1868, offered in evidence.

[Defendant's counsel objected.]

[Objection overruled.]

“A.” (Copy of agreement.)

Articles of agreement made and concluded this 16th day of 10 November, one thousand eight hundred and sixty-eight, by and between Benjamin F. Webster of the first part, and John Clough & Co. (consisting of John Clough, Ziba C. Clough, and Oliver B. Leonard,) of the second part, all of Chicago, county of Cook, and state of Illinois, for the purpose of buying hides, pelts and furs, in Montana Territory, and selling them in Chicago—this agreement to continue in force until July 1st, one thousand eight hundred and sixty-nine, or till all the stock bought there shall have been sold, proceeds collected and divided amongst the different parties as hereinafter stated. 20

1st. The said B. F. Webster agrees to furnish the said John Clough & Co., ten thousand dollars, as follows: three thousand dollars, Nov. 16th; one thousand dollars, Dec. 4th; fifteen hundred dollars, Jan. 4th, one thousand eight hundred and sixty-nine; fifteen hundred dollars, Feb. 4th; fifteen hundred dollars, March 4th; and fifteen hundred dollars, April 4th, for the sole purpose of buying hides, pelts and furs in Montana Ter., and to be used for no other purpose whatever.

2d. The stock to be shipped from Montana Ter. at just what is paid for it there, B. F. Webster to be subject to no other 30 expense except his proportion of the insurance and freight on the stock. And it is further agreed by John Clough & Co., that they will handle and sell all the goods in Chicago, without any charge for commissions, &c.

3d. John Clough agrees to furnish a good and reliable man to go to Montana Ter. and look after the interests of all until the stock is shipped.

4th. B. F. Webster to have placed in his hands policies of insurance for twelve thousand dollars, covering stock in Montana Ter.

5th. Stock to be fully insured in transit to Chicago.

6th. If there be any loss of the twelve thousand dollars furnished by B. F. Webster, John Clough & Co. agree to bear 10 two-thirds of it and B. F. Webster one-third.

7th. All the stock to be shipped to B. F. Webster & Co., and a weekly statement to be sent to same, giving an account of all stock on hand, and the cost of it.

8th. This agreement to cover all stock of hides, pelts and furs on hand in Montana Ter. at this time.

9th. B. F. Webster to have one-third of the profits and John Clough & Co. two-thirds, after deducting cost of goods in Montana Ter., and insurance and freight on same.

10th. John Clough & Co., agree to return B. F. Webster 20 ten thousand dollars on the first day of July, one thousand eight hundred and sixty nine.

In witness whereof we have hereunto set our hands and seals the day and year above written.

Sealed and delivered in  
presence of  
PETER SUTHERLAND.

BENJ. F. WEBSTER, [SEAL.]  
JOHN CLOUGH, [SEAL.]  
ZIBA C. CLOUGH, [SEAL.]  
OLIVER B. LEONARD, [SEAL.]

6c.  
Rev.  
S'p.

Plaintiff's counsel recalled *F. C. Taylor*.

Q. Did you ever see the agreement of which that is a copy?

A. I think I saw such an agreement as this, when Mr. Clough 30 first came to me.

Q. At what time?

A. Early in March, 1869.

Q. For what purpose did he show it to you ?

A. To show me conclusively that Mr. Webster was liable—  
would be liable for that bill of goods he wanted to buy of me.

*Cross-examined.*

Q. The paper handed to you there, have you seen that since  
the time Mr. Clough showed you some paper ?

A. That is only a copy.

Q. You say you think you saw such an agreement ; can you  
identify it at this length of time, the agreement you saw ?

A. That is the one he just read. 10

Q. Can you identify the paper you saw at this length of time ?

A. To the best of my knowledge and belief I think I can.

Q. Well now, can you tell now that is a copy ?

A. To the best of my knowledge and belief I can.

Q. What do you mean by the best of my knowledge and  
belief ?

A. It is so long ago I could not state positively.

Q. Where did you get that copy ?

A. Mr. Perry handed it to me.

Q. When ? 20

A. A few moments ago.

Q. Was that the first time you saw it since 1869 ?

A. I saw it yesterday.

Q. And now you say to the best of your knowledge and be-  
lief that is a copy of that agreement ?

A. Yes.

Q. Have you a copy of another agreement ?

A. Mr. Perry has.

Q. Will you produce that ?

A. It is on the table. 30

Q. Is that the one you said you had ? [Plaintiff's counsel  
handing defendant's counsel a paper ?

*By the Court.*

Q. Where did you get it ?

A. I really cannot say positively, I can state my impression: my impression is that after we found we could not collect any money of Clough & Co. and Mr. Clough said it was Mr. Webster that was liable, and that Mr. Webster must pay off that bill, and that he would do all he could to assist me in making him pay for it: he went to Mr. Hurd's office, Mr. Webster's attorney.

*Further cross-examined.*

- Q. How do you know he was his attorney?  
 10 A. Mr. Hurd told me so, and I think then Mr. Hurd produced that agreement.  
 Q. This was the agreement of the Montana Hide & Fur Co.?  
 A. I am not prepared to say.

*By the Court.*

- Q. Was it produced by Mr. Hurd at that time as a paper connected with the Montana Hide & Fur Co.?  
 A. Yes.

*Further cross-examined.*

- Q. Who fixed the prices for these goods?  
 20 A. I did.  
 Q. With whom?  
 A. Mr. Clough.

Plaintiff's counsel also called *Edward W. Russell*, sworn:

- Q. Where do you reside?  
 A. Chicago.  
 Q. What is your profession?  
 A. Attorney at law.  
 Q. How long have you been such there?  
 A. Ten years.  
 30 Q. Are you familiar with the laws of Illinois in relation to limited partnerships?  
 A. I am.

Q. Is there a law of limited partnership in Illinois?

A. Yes.

Q. Is this an abstract of the law of Illinois in relation to limited partnerships?

(Plaintiffs' counsel offering a manuscript copy of the law.)

[Objected to.]

Q. Will you state the law of Illinois in relation to limited partnerships?

*Court.*—The Court will overrule the evidence.

Exception prayed and granted and this exception is hereby 10 sealed accordingly.

DAVID A. DEPUE,

J. S. Ct.

SEAL.

[Plaintiff here rested.]

Whereupon the counsel for the said defendants did then and there insist, before the said Justice, that the several matters so produced and given in evidence, were not sufficient to entitle the said plaintiffs to have or maintain their aforesaid action against the said defendants, and that the said plaintiffs should be non-suit.

20

And thereupon the said Justice did non-suit the plaintiffs, and did then and there adjudge that the said several matters so given in evidence were not sufficient to entitle the said plaintiffs to have or maintain their aforesaid action, and that the said plaintiffs should be non-suit, and the said plaintiffs were thereupon, by said Justice, ordered to be called and non-suit. To which judgment and decision of the said Justice, the said plaintiffs by their counsel, did then and there except, and the same was allowed. And the said Justice hath to this bill of exceptions set his seal accordingly.

30

DAVID A. DEPUE,

J. S. Ct.

SEAL.

## NEW JERSEY ERRORS AND APPEALS.

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 FRANK C. TAYLOR, *et al.*,

*vs.*

 BENJAMIN F. WEBSTER, *et al.*


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*In Error.*
*Assignment of Error.*

The said Frank C. Taylor, et al., plaintiffs, by N. Perry, Jr., their attorney, come and say, that in the record and proceedings aforesaid, there is manifest error, and the said plaintiffs hereby assign the following causes of error:

- 10 I.—That said Justice erred in overruling plaintiff's testimony tending to prove general reputation of Webster's being a partner in the Montana Hide and Fur Co.
- II.—That said Justice erred in overruling plaintiff's testimony, proving the statements of defendant's attorney in Chicago, that defendant was a member of the said Company.
- III.—That said Justice erred in overruling plaintiff's testimony, proving the law of limited partnerships in Illinois.
- IV.—That said Justice erred in granting the defendant's motion to non-suit the plaintiffs.

20 And also there is error in this, that the judgment aforesaid was given for the defendants and against the plaintiffs; whereas by the law of the land the said judgment of non-suit ought not to have been given.

And the plaintiffs pray that the judgment aforesaid, for the errors aforesaid, and for other errors in said record and proceedings, may be reversed, annulled, and altogether holden for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

N. PERRY, JR.,

Att'y of Pl'ffs.