

New Jersey Court of Errors and Appeals

Between

RUSSELL A. FLINT, *et al.*,
Complainants-Appellants,

and

MYRON E. FLINT, *et als.*,
Defendants-Respondents.

*On Appeal
from
Chancery.*

Brief for Complainants-Appellants.

This is an appeal from an order of the Court of Chancery striking out the bill of complaint on the ground that the allegations thereof are without equity and disclose no cause of action against the defendants.

Statement of the Case.

It appears from the bill of complaint that for approximately twenty years one Walter A. Flint and his brother, Myron E. Flint, were partners in business, under the firm name of M. E. and W. A. Flint, as extensive retail dealers in butter, eggs, poultry and dairy products. Their principal place of business was at 387 Orange Road, Montclair, New Jersey. The legal title to the lot of land, on which their business was located, was, and still is, in Myron E. Flint.

In the year 1908 the partnership caused this property to be improved at an expenditure of about \$9,000 by the erection thereon of a cement and concrete office and storage building, stable and wagon shed with an adequate roadway thereto. It does not appear that there was any express agreement with respect to the owner-

ship of this property, but the bill states that the improvements were made for the uses and purposes of the firm in the conduct of its business; the entire cost was paid by the partnership out of the partnership funds; and the improvements, after their completion, were used continuously by the firm for partnership purposes until its dissolution. (Case, p. 3.)

On October 27th, 1913, Walter A. Flint, one of the partners, died intestate, leaving as his heirs at law his widow, Lottie E. Flint, and two children, Russell A. Flint and Mildred E. Flint. His widow, Lottie E. Flint, was appointed administratrix of his estate.

In April, 1914, Lottie E. Flint, individually, and as administratrix of the estate of Walter A. Flint, agreed to sell to Myron E. Flint, the surviving partner, all her right, title and interest in and to the assets of the partnership of M. E. and W. A. Flint, and in May of that year the sale was consummated.,

The business of the firm of M. E. and W. A. Flint was a flourishing one. At the time of the agreement to sell, the partnership was liquidated and its assets, exclusive of the above mentioned real estate, and improvements and of good-will, were \$30,057.20; its liabilities were \$5,105.25; and its undivided profits were \$24,951.95, of which \$9,327.12 was in cash. The value of the Walter A. Flint estate's interest in the firm assets, *exclusive of the improvements and of good-will*, was, therefore, \$12,475.97. (Case, p. 4.)

The selling price agreed upon was \$14,000 plus one-half of the net profits from November 1, 1913, to April 1, 1914. (Schedule A, case p. 8.) The sum actually paid was \$15,705.62, so that after deducting \$75.00 per week for Myron E. Flint's services in conducting the partner-

ship, and the expenses and fees of the appraisers, as provided for in the agreement, one-half of the net profits for five months amounted to \$1,705.62. (Schedule A and B, case pp. 8 and 13.) This gives some idea of the value of the good-will of the business.

It is the contention of the respondents that, by virtue of the above mentioned sale, Myron E. Flint obtained title not only to the \$12,500 worth of personal assets of the firm, and the dower rights of Lottie E. Flint in one-half of the partnership realty, but also the good-will of the firm, and in addition to all this, the deceased partner's interest in the buildings and roadway which were built with partnership money at an expense of \$9,000. They contend that these improvements are personal property, and passed to Myron E. Flint by virtue of the sale to him by Lottie E. Flint, individually and as administratrix.

The debts, at the time of the filing of this bill, were all paid, and neither said lot of land nor the improvements thereon, are or will be needed to meet any of the obligations of the partnership. (Bill of complaint paragraphs 11, 12 and 13, Case pp. 4 and 5.)

The bill of complaint in this cause was filed by Russell A. Flint and Mildred E. Flint, the two children of the deceased partner, who were infants at the time of the sale by the administratrix. It prays that the surviving partner, Myron E. Flint, may be declared to hold the above mentioned premises and improvements, or an undivided interest therein, in trust for the complainants, and asks for a partition of the same.

The question at issue is whether the interest of Walter A. Flint in these improvements was

personal property which passed to Lottie E. Flint as his administratrix, or whether it was real property and descended to the complainants as his heirs at law.

Points.

I.

THE MOTION OF THE RESPONDENTS TO STRIKE OUT THE BILL OF COMPLAINT IS EQUIVALENT TO A DEMURRER. ALL OF THE ALLEGATIONS OF THE BILL MUST BE TREATED AS ADMITTED AND IF THE BILL IS SUSTAINABLE ON ANY LAWFUL THEORY THE MOTION SHOULD HAVE BEEN DENIED.

Scott v. Carter, 76 Atl., 1056.

II.

THE DEFENDANT, MYRON E. FLINT, HOLDS THE PREMISES IN QUESTION IN TRUST FOR THE PARTNERSHIP.

It is a well settled equitable principle that where title to real estate is taken in the name of one person, and the purchase money is paid by another, a trust results, and the real estate is held in trust for the party whose money is paid. There is a presumption that he who pays for property intends to become its owner.

39 *Cyc.*, 118.

2 *Washburn* (5th Ed.), 505, 511.

N. Y. Bank v. Cary, 39 N. J. Eq., 25.

Mershon v. Duer, 40 N. J. Eq., 333.

And so property bought with funds belonging to a partnership is presumed to be the property of the partnership, though the title to such property be taken in the individual name of one of the partners. The possessor of such legal title holds such property in trust for the partnership purposes.

22 *Am. & Eng. Encyc. of Law* (2nd Ed.), 91 and 93.

30 *Cyc.*, 428.

Buchan v. Sumner, 2 Barb. Ch., 165, 198, 199.

Fairchild v. Fairchild, 64 N. Y., 471.

Baldwin v. Johnson, 1 N. J. Eq., 441.

Uhler v. Semple, 20 N. J. Eq., 288, 294.

Upon the same principle, where a firm has expended labor or money in improving property, especially if the property is useful to the firm in its ordinary operations and is employed therein, the improvements made with partnership funds are treated as partnership property.

22 *Am. and Eng. Encyc. of Law* (2nd Ed.), 91.

30 *Cyc.*, 426.

Lyman v. Lyman, Fed. Cas. No. 8628 (2 Paine, 11).

Averill v. Loucks, 6 Barb., 19.

Lane v. Tyler, 49 Me., 252.

Harris v. Harris, 153 Mass., 439; 26 N. E., 1117.

Taber-Prang Art Co. v. Durant, 189 Mass., 173; 75 N. E., 221.

Deveney v. Mahoney, 23 N. J. Eq., 247.

Ballantine v. Frelinghuysen, 38 N. J. Eq., 266.

The two New Jersey cases of *Deveney v. Mahoney*, *supra*, and *Ballantine v. Frelinghuysen*,

supra, are in point. In *Deveney v. Mahoney* partnership funds were used to build a house on the lot of one of the partners. The Court of Chancery held that land bought with partnership funds, although the title be taken in the name of one of the partners, will be treated in equity as partnership property; and that the same principle applies to improvements made with partnership funds on the separate property of one of the partners.

In *Ballantine v. Frelinghuysen, supra*, this court held that land purchased with partnership funds, but title to which was taken in the name of Peter Ballantine, who was one of the partners, became in equity partnership property, and used language from which it is clear that the relationship of Peter Ballantine to the partnership was that of trustee and *cestui que trust*.

In that case it was further held (at page 273):

“As to the portion of the real estate standing in the name of Peter Ballantine, deceased, upon which a portion of the malt house called No. 4 was built by the firm of P. Ballantine & Sons, being about twelve feet on the southerly portion of the same, the building and improvements put thereon with the money of the firm greatly increasing its value, and devoting it to the business of the firm, show an intention at that time to make it partnership property. In making a division of the partnership property, the estate of Peter Ballantine should be allowed the value of the land at the time of its appropriation by building thereon, but the increased value will be divisible among the co-partners in proportion to their respective interests in the profits of the business from which the funds for the improvements were taken.”

In the present case, the nature of the right of a partnership in improvements made with partnership funds on the separate property of one of the partners was considered by the court below. The learned Vice-Chancellor concluded that it is a right *against*, not a right *in* the property; that the improvements are not partnership property, but that the right of the partnership is merely a lien against the property for the value put into it. This conclusion is clearly contrary to the decided cases. (See authorities hereinabove cited.)

In some of the cases above cited it is said that where improvements are made with partnership funds on the land of one of the partners such improvements are "partnership property." In others it is expressly stated that under such circumstances a trust results and that the right of one of the partners is "an equitable interest in such improvements." In none of them is it intimated that the partners have a mere lien against the property. The right is that of a *cestui que trust*, not that of a lienor.

III.

THE PROPERTY IN QUESTION IS REAL ESTATE.

The improvements which were made with partnership funds consist of a roadway and a cement and concrete building, stable and wagon shed.

That the roadway is real estate is too obvious to require comment. It is a part of the soil itself, and may have been built without adding to the land any personal property whatever.

Buildings, also, are *prima facie* part of the realty. 1 *Boone* (2nd Ed.), Sec. 7. They, under

all circumstances, meet the first two tests which this court has stated must be applied in ascertaining whether a chattel has been transmuted into realty. *Fedor v. Van Winkle*, 53 N. J. Eq., 370, 372. That is to say, they are always actually annexed to the real estate, and are always applied to the use to which that part of the realty with which they are connected is appropriated. The third test, as stated by this court, is that it must appear that they were annexed with the intention to make a permanent accession to the freehold. A building ordinarily meets this test also.

But where there is an agreement, express or implied, between the owner of real estate and the proprietor of materials or buildings which are about to be put upon it, that when annexed to the realty they shall remain the property of the person annexing them, the law gives effect to the agreement of the parties, and the chattels though fixed to the realty continue to be personal property. *Harris v. Harris*, 153 Mass., 439, 26 N. E., 1117. 32 Cyc. 666, *Curtis v. Hoyt*, 19 Conn. at 165. The existence of such an agreement rebuts the presumption of an intention to annex the building permanently to the freehold. The rule is stated in 1 *Washburn* (5th Ed.), 4, 5, as follows:

“The word ‘land’ includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage and water, or by the hand of man, as buildings and fences. * * *

“But if a man, by permission of another, erects a house upon the other’s land, it will, if the builder has no estate in the same, be the personal property of the builder, if such be his agreement with the land owner.”

Then below follows this note:

“The earlier cases are perhaps not sufficiently explicit as to this last requirement.

* * * A careful examination of the earlier cases will show that wherever the character of personalty has attached to a building erected on another’s land, there has been either no substantial annexation, or the relation of landlord and tenant existed, or there was in substance an agreement for the right of removal.”

In the present case the improvements cannot be brought within the exception to the rule that the term “land” includes all buildings standing thereon. Two of the requirements are wanting. *First*. They were built by a partnership, one of whose members had an estate in the land. *Second*. There was no agreement with the land owner.

On the other hand, the facts alleged in the bill show that the parties never intended that these buildings and roadway should remain personal property, liable to be removed by the owners. Their character is such that removal is impossible. *Harris v. Harris*, 153 Mass., 439, 26 N. E., 1117. The legal title to the lot of land here in question is in Myron E. Flint, but its value has been greatly increased by the improvements put thereon with the money of the firm of M. E. & W. A. Flint, and it has been devoted to the firm business continuously since that time. Such facts do not show an intention to annex the improvements temporarily, but, on the contrary, have been held to show an intention of making the land on which they have been placed partnership property.

Ballantine v. Frelinghuysen, 38 N. J. Eq., 265, 273.

Lyman v. Lyman, Fed. Cas. No. 8628 (2 Paine, 11).

IV.

THE PREMISES IN QUESTION WERE PARTNERSHIP REALTY, AND UPON THE DEATH OF ONE OF THE PARTNERS AN INTEREST THEREIN DESCENDED TO THE COMPLAINANTS AS HIS HEIRS AT LAW.

In England, upon the dissolution of a partnership, firm realty is considered as converted into personalty for all purposes, and this is also the rule in Canada. 30 *Cyc.*, 434. As Vice-Chancellor Pitney has suggested (*Craighead v. Pike*, 58 N. J. Eq., 23), probably the reason for this rule is the disposition of the English courts to avoid the injustice of the English canon of descent of real estate to the oldest son.

Shearer v. Shearer, 98 Mass., 107, is said to be the leading case in this country on the subject. 2 *Rowley's Modern Law of Partnership*, Sec. 624. It does not follow the English rule, but stands for the principle that partnership real estate, unless it is otherwise expressly or impliedly agreed, retains its character as realty between the partners themselves and also between a surviving partner and the representatives of a deceased partner, except to the extent that it may be required to pay partnership obligations or to pay any balance due from one partner to another. If there is any surplus which is not used for the purpose of winding up the firm affairs, it is to be divided as realty

between the heirs or devisees of the deceased partner and the surviving partner. This principle has been generally accepted in this country and is the prevailing American rule on the subject.

22 *Am. & Eng. Encyc. of Law* (2nd Ed.), 106, 108.

30 *Cyc.*, 434 and 627.

Bispham's Prin. of Equity, Sec. 512.

See also *Buchan v. Sumner*, 2 Barb. Ch., 165, 200, where the prior decisions are collected and reviewed.

In *Fairchild v. Fairchild*, 64 N. Y., 471, it was held that real estate purchased for and appropriated to partnership purposes and paid for out of partnership funds is partnership property, although the legal title is taken in the name of one of the partners; equity will hold him as trustee for the firm. And it was further held that for the purpose of paying debts and adjusting the equities between the co-partners, real estate belonging to a partnership is treated as personal property, and what remains is regarded as real estate descending to the heirs of the partners according to their several interests.

It will appear from an examination of the following cases that the prevailing American rule as above stated is, well established as the law of this state.

Uhler v. Semple, 20 N. J. Eq., 288.

Campbell v. Campbell, 30 N. J. Eq., 415.

Molineaux v. Reynolds, 54 N. J. Eq., 559.

Craighead v. Pike, 58 N. J. Eq., 15, affirmed by the Court of Errors and Appeals, 60 N. J. Eq., 443.

In *Uhler v. Semple* the court said (at p. 294):

“The land and buildings and machinery at Phillipsburg, bought with partnership funds for partnership uses, are partnership property and must be applied to partnership debts, as if personal estate, free from any claim of dower therein, *except in any excess over the part required for debts.*”

In *Campbell v. Campbell* the court held that the widow of a deceased partner was entitled to dower in her deceased husband's share of any real estate of the firm not required for the payment of partnership debts and the adjusting of equitable claims of the members of the firm. At page 417 of the opinion the rule is stated as follows:

“The real estate of a partnership, purchased with partnership funds, or for the use of the firm, is subject to the doctrine of equitable conversion, so far as necessary for the purposes of the partnership, but otherwise it retains its legal character and incidents. It is, in equity, chargeable with the debts of the co-partnership and any balance which may be due from one co-partner to another, in the winding up of the affairs of the firm, and as between the heirs at law and the personal representatives of a deceased partner, his share of the surplus of that real estate remaining, after paying the debts and adjusting all the equitable claims of the different members of the firm as between themselves is to be treated and considered as real estate. The widow of such deceased partner will be entitled to dower in his share of any real estate of the firm not required for the payment of such debts and the adjusting of such equitable claims.”

In *Molineaux v. Reynolds*, partnership land was held to be personal assets, so far only as it might be needed to pay firm creditors. At the bottom of page 562 of the opinion the court said:

“It is apparent, however, that inasmuch as the ground for refusing partition is that partner may be protected from future calls to pay firm debts, therefore, if it should be made to appear that the property (realty) involved in the application for partition will not be needed to meet such obligation, the objection to the distribution of the property disappears.”

In *Craighead v. Pike*, the Court said (at p. 22):

“The rule in this country is well settled that lands held for partnership purposes will be considered as converted into personalty only to the extent necessary to pay the partnership debts. All lands remaining after that purpose is served are liable to be divided in specie by partition proceedings.”

In the case now before the court the property in question is not and will not be needed to meet any obligations of the partnership. In 1914 the liabilities of the firm were only \$5,105.25, while its assets, exclusive of the property in question and of good will, were \$30,057.20, of which \$9,327.12 was in cash. At the time of the filing of the bill of complaint in this cause all of the debts of the partnership were paid. The surviving partner and the heirs of the deceased partner are, therefore, entitled to a partition of this partnership realty.

There are some misleading statements in certain of the earlier New Jersey cases, from which it might appear that in this state, as in England, partnership realty is in equity personal property for all purposes, and passes, upon death of one of the partners, to his personal representative, and not to his heirs or devisees.

Hill v. Beach, 12 N. J. Eq. 31, 43.

Deveney v. Mahoney, 23 N. J. Eq. 247, 249.

It will be noted, however, that in these cases the partnerships were dissolved during the life time of the partners, so that it was not necessary for the court to consider the question as to whether or not partnership realty should be treated as personalty for all purposes. That question was not involved in these cases and the court did not attempt to decide it. Those statements, at most, are *obiter dicta*, and have been overruled by the later decisions cited above.

In *Maddock v. Astbury*, 32 N. J. Eq. 181, partnership real property was treated as personalty for the reason that the partners had a written agreement that the surviving partner, in case of death, should be entitled to take the partnership property at a valuation. This agreement was held to work an equitable conversion of the realty into personalty.

Following the reasoning in *Maddock v. Astbury*, the court in *Patrick v. Patrick*, 71 N. J. Eq. 347, held that the rule as stated in *Campbell v. Campbell, supra*, and *Craighead v. Pike, supra*, does not apply where the only business of the partnership is the dealing in real estate, and the original contract contemplated and required its sale during and at the end of the partnership business—in other words, when real estate is the stock in trade of the partnership. It will

be noted that the opinion in *Patrick v. Patrick*, was written by the same learned Vice Chancellor who wrote the opinion in *Craighead v. Pike*; and that he took care to make it clear that he was not overruling the case of *Craighead v. Pike*, but was merely pointing out an exception to the rule as stated in that case.

In *Ballantine v. Frelinghuysen, supra*, the will of Peter Ballantine provided that his interest in the partnership property should be continued in the business. The question as to whether it was realty or personalty was therefore not presented.

The partnership in the case now before the court was engaged in the butter, eggs and poultry business. The real estate in question was not their stock in trade and there was no agreement which could work an equitable conversion. Hence the general New Jersey rule, as stated in *Campbell v. Campbell, supra*; *Molineaux v. Reynolds, supra*, and *Craighead v. Pike, supra*, should be applied.

V.

THE SAME RULE APPLIES TO PARTNERSHIP IMPROVEMENTS AS TO OTHER PARTNERSHIP REAL ESTATE.

In the court below the English doctrine of equitable conversion was applied. The court recognized the existence of the American rule, but distinguished this case on the ground that the property here in question is not land, but improvements made to land. Its reasoning was as follows (Case, p. 18):

“What the partnership used was money, personal property. This money was used to

purchase personal property. That personal property was put upon real estate and although its physical nature was not in any wise altered, it became, by virtue of a rule of convenience, real estate, but not I think the real estate of the partnership. By virtue of the relations existing between the parties a duty arose upon the part of the owner of the soil in this case to account to the partnership. The right to the partnership was a right to recover from the owner of the soil not real estate, but personal property, to wit, money."

How the learned Vice Chancellor reached the conclusion that a cement and concrete building does not differ in its physical nature from the heaps of crushed stone, the bags of cement and the buckets of water which are used in its construction, is not quite clear. As to the road, the bill does not specify how it was built. It may be that trees were felled, boulders removed and the ground graded and rolled. It may have been built by merely changing the character of the land without the addition of any personal property whatever.

The fact that some of the soil may have been removed from one part of the land to another, does not change its character as realty. *Lacustrine Fertilizer Co. v. Lake Guano, &c., Fertilizer Co.*, 82 N. Y. 476.

In the above cited cases (Point IV) holding that partnership realty is not treated in equity as personalty for all purposes, but retains its character as realty and descends as such to the heirs at law of a deceased partner, it was land which was bought with partnership funds and not, as in the present case, merely improvements

made upon land. But there is no distinction in principle. Improvements made with partnership funds are partnership property. (See Point II). Cement and concrete buildings and a roadway are as truly real estate in fact as is the land upon which they are located. It is only upon the theory of equitable conversion that they can be treated as personalty. And that theory is not applied to partnership realty in this state except in certain circumstances not here existing. (See Point IV.) The improvements are partnership property, they are realty, and the rules governing partnership realty should be applied to them.

The case of *Harris v. Harris*, 153 Mass. 439, 26 N. E. 1117, is directly in point.

In that case a factory owned by one partner was used for the partnership business. Funds of the firm were used to build an addition, and put on an additional story, the whole constituting one building. There was no agreement for removing the addition, or that it should be considered as personalty. There were sufficient assets, aside from the factory building, to pay all claims against the firm, and all balances due the partners. On this state of fact the court held that the interest of a deceased partner in such building was properly treated as realty, in the settlement of his estate.

This case cannot be distinguished from the case at bar. Its decision is logical and is in entire harmony with the existing decisions of this state.

VI.

IT APPEARS FROM THE OPINION OF THE COURT BELOW THAT IT WAS IN ERROR IN ITS UNDERSTANDING OF CERTAIN FACTS.

There are certain erroneous statements in the opinion of the Court of Chancery which reflect upon the merits of the complainants' case. It is there stated that Lottie E. Flint "individually and as administratrix entered into an agreement with Myron E. Flint for the sale to him of all of her, *and the estate's* interest in the assets of the partnership for the sum of \$14,000."

This statement is misleading. It appears from the bill of complaint that Lottie E. Flint, individually and as administratrix sold to Myron E. Flint all her right, title and interest in the assets of the partnership. She thereby conveyed the estate's interest in the personal property of the firm and also possibly her individual interest in the firm realty. Nowhere does it appear that she purported to sell any more than this.

It appears on the face of the bill that she could not have contemplated a sale of the estate's interest in the improvements here in question, for the consideration which she received, compared with the assets of the firm, would not justify such a sale. (See statement of the case, *supra*.)

In the opinion it is stated, "This sum (the \$14,000 for which she agreed to sell the assets of the firm) represented approximately one-half of the net assets of the partnership including the value of the improvements" (Case, p. 18). There is nothing in the bill to justify this statement.

On the contrary it is alleged in the bill (Case, p. 4):

“At the time of said agreement to sell, said partnership was liquidated and the assets thereof, *exclusive of said real estate, improvements and of good will*, were \$30,057.20; the liabilities thereof were \$5,105.25; and the undivided profits thereof were \$24,951.95, of which \$9,327.12 was in cash.”

* * *

“Said real estate, improvements and premises above described were not included in said sale by Lottie E. Flint to Myron E. Flint except possibly to the extent of the dower interest of said Lottie E. Flint therein.”

Upon consideration of the value of Walter A. Flint's interest in the partnership of M. E. & W. A. Flint as compared with the amount of money Mrs. Flint received, it becomes apparent that she was not paid for the improvements now in question and did not intend to convey them by the sale of her interest in the partnership assets.

VII.

THE COURT OF CHANCERY HAS JURISDICTION TO PARTITION THE PREMISES IN QUESTION.

In the opinion of the Court of Chancery it was intimated that the court might be without jurisdiction to give the relief prayed for in the bill. It said (Case, pp. 18 & 19), “Passing the question which arises upon the face of the bill whether it appearing that the legal title is in dispute there can be partition until the title is

settled, which was not raised on the motion to strike out in any way, I will consider the merits. *County Homes Land Co. v. DeGray*, 71 N. J. Eq. 283."

In the case cited by the Court it is said (at p. 285):

"It is entirely settled that if title to land is in dispute, and the validity or non-validity of the title claimed must be determined by the application of legal as contradistinguished from equitable rules. the complainant will be required to establish it at law before he can proceed here, but this court will, in general, retain the bill until he does so."

The answer to this is, that in the present case the legal title is not in dispute. In paragraph 4 of the bill (Case, p. 3, it is alleged, "The legal title in fee simple to said premises is in said Myron E. Flint. * * *") The only dispute is as to whether or not he should in equity be decreed to hold the legal title in trust.

VIII.

PARTITION IS NOT IMPRACTICABLE.

It has been suggested that partition under the circumstances would be practically impossible (Case, p. 21). It is true that actual partition is impossible. It always is when the *res* is a concrete building. But upon an equitable partition by a sale and division of the proceeds, the task becomes simply a problem in arithmetic. The rule to be applied upon such a division will be found in *Ballantine v. Frelinghuysen*, 38 N. J. Eq. at page 273.

The situation is the reverse of one where a widow applies for dower in lands sold by her husband to a stranger upon which improvements have been erected by the purchaser. In that case the widow is allowed dower in the land but not in the improvements. In this case the complainants are asking for a share of the improvements but not of the land.

See *Barnett v. Griffith*, 27 N. J. Eq. 201.

Respectfully submitted,

COLBY, WHITING & MOORE,
Solicitors for Complainants-Appellants.

BORDEN D. WHITING,
IRA C. MOORE, JR.,
Of Counsel.

The following is a list of the names of the persons who have been admitted to the membership of the Society since the last meeting. The names are given in alphabetical order of their surnames.

Mr. J. A. Smith
Mr. W. B. Jones
Mr. C. D. Brown
Mr. E. F. Green
Mr. G. H. White
Mr. I. K. Black
Mr. L. M. Grey
Mr. N. O. Blue
Mr. P. Q. Red
Mr. R. S. Yellow
Mr. T. U. Purple
Mr. V. W. Orange
Mr. X. Y. Pink
Mr. Z. A. Brown



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AVERMENTS OF THE BILL WHICH WERE STRUCK OUT.

Myron E. Flint and Walter A. Flint were partners. Upon lands solely owned by Myron, improvements were made with partnership funds. Later, Walter died. The firm was solvent, without recourse to realty. The administratrix of Walter sold by bill of sale all her right, title and interest "in and to the assets of the partnership" to Myron. Complainants, heirs of Walter, now seek partition of the land whereon those improvements were made, despite that bill of sale.

SYNOPSIS OF RESPONDENTS' POSITION.

The action is not based on fraud, mistake, collusion, or any other equitable ground invalidating the bill of sale. No attack is made thereon. Its efficacy to transfer all partnership assets to defendant, so far as they are personal property, is not challenged. The complaint is that the improvements were the real property of the firm and hence did not pass un-

der the bill of sale. Appellants are thus driven to contend not only that these improvements were partnership assets, but essentially that they are its real and not its personal assets.

Respondents admit that the improvements were firm assets. They deny that those assets were real as distinguished from personal assets of the firm. They contend that those assets therefore passed under the bill of sale.

POINTS.

I

THE IMPROVEMENTS WERE PERSONAL ASSETS OF THE PARTNERSHIP.

The land on which the improvements were made did not belong legally or equitably to the partnership. It was bought and paid for by Myron with his individual funds. Appellants' citations on resulting trusts therefore, do not apply.

If improvements had been made on that land by a stranger, those improvements would have become the property of Myron because he owned the land. *Quidquid plantatur solo, solo cedit*. What were chattels before annexation, became realty by annexation and the exclusive property of the soil owner.

Washburn v. Sproat, 16 Mass. 449.

Peirce v. Goddard, 22 Pick. 559.

Woodruff v. Adams, 37 Conn. 233.

Inhabitants of Sudbury v. Jones, 8 Cush. 184.

cf. *Ricketts v. Dorrel*, 55 Ind. 470.

cf. *Dorr v. Dudderar*, 88 Ill. 107.

cf. *Clary v. Owen*, 15 Gray 522.

cf. *James Leo Co. v. Jersey City Bill Posting Co.*, 78 N. J. L. 150.

A stranger who made such improvements on another's land, would have no redress at law or in equity. *Price v. Weehawken Ferry Co.*, 31 N. J. Eq. 31; *Inhabitants of Sudbury v. Jones*, 8 Cush. 184. Bigelow, *J.*, in the latter case says at page 189:

“Where there is no agreement to change the legal rights of the parties, materials, when used for building a house, become part of the freehold, and cannot be reclaimed by their original owner after annexation to the realty, as against the owner of the land to which they have been affixed. Buildings erected on land of another voluntarily and without any contract with the owner become part of the real estate, and belong to the owner of the soil. *Washburn v. Sproat*, 16 Mass. 449; *Leland v. Gassett*, 17 Verm. 403; *Peirce v. Goddard*, 22 Pick. 559.

“An exception is admitted to this general rule, where there is an agreement, express or implied, between the owner of the real estate and the proprietor of materials and buildings, that, when annexed to the realty, they shall not become parts of it, but shall still remain the property of the person annexing them. In such case the law gives effect to the agreement of the parties, and personal property, though affixed to the realty, retains its original characteristics, and belongs to its original owner. Within this exception are included not only cases where there is an express agreement between the parties, that personal property shall not become real estate by annexation to the soil, but also that large class of cases which arise between landlord and tenant, in which by agreement, either express, or implied from usage or otherwise, the ten-

ant is allowed to retain as his own property, if seasonably removed, fixtures erected by him for purposes of trade, ornament or ordinary use, upon leasehold premises during his tenancy.”

Since Myron was the sole owner of the soil, the improvements made thereon can only be saved from becoming his absolute real property by an agreement between him and the improver, or else by some status or relationship of equivalent effect.

We concede that the partnership relation between Myron and Walter sufficed to thus save the improvements. But this is but another method of admitting, as we have heretofore, that the improvements were partnership assets. The vital question is—what kind of assets?

Admittedly the improvements in question have become real property. But whose real property? If nothing appeared except that improvements had been erected on Myron's land, the normal rule would declare them his. The added feature of partnership prevents that harsh result, saves the improvements as partnership property. But it does not convert those chattels into firm realty; it merely preserves their character as chattels, as firm personalty, in spite of annexation to another's land. It does not metamorphose the improver into a tenant in common with the owner.

The partnership status, therefore, was a shield which prevented the improvements in question from becoming Myron's absolute property. It was not a sword to deprive him in whole or the least part of his own land.

The fatal defect in appellants' argument is his assumption that the improvements are partnership *real* property. This is instanced in his invocation of the doctrine of equitable conver-

sion. We have no quarrel therewith. It is not involved. That doctrine applies only to what is firm realty. It starts upon that premise. Appellants assume that the improvements were firm realty and therefore, being unnecessary to pay debts, &c., "remain" realty of the firm. That cannot "remain" which never "was."

Ballantine v. Frelinghuysen, 38 N. J. Eq. 266, was merely a will construction case, the intent of testator being the dominant factor, and has no application for the reason admitted by appellants' brief at page 15.

Harris v. Harris, 153 Mass. 439, is also relied on by appellant. A partnership consisting of Joseph and George Harris and another improved with firm funds a factory on the land of Joseph by erecting a permanent addition. George died and question arose upon settlement of the accounts of his executor and trustee whether his interest in this factory property was to be accountable as real or personal property. The Court held the former; that whatever claim the firm had by reason of the erection of the addition was an equitable interest in the real estate. It reached this result because (1) the addition was a permanent fixture; (2) there was no agreement on the part of Joseph Harris that the addition should be considered firm personalty with right of removal. It concluded:

"Upon these facts, there is nothing on which to found an implication of an agreement that the addition should be removable from the realty as personal property. It became a part of the real estate, the legal title to which stood in Joseph Harris; and the firm's interest in the property must be held to be an equitable right in real estate. *Ballantine v. Frelinghuysen*, 38 N. J. Eq. 266; *Lane v. Taylor*, 49 Me. 252."

We submit that

(a) The case is distinguishable. That controversy arose between the representatives of but one partner. The partner who owned the land was no party. The decision does not purport to determine or adjust the latter's rights as against those of the partnership. Hence the present question—the efficacy of a bill of sale to pass to the owner of the soil the partnership right in the improvements—was not involved.

(b) Neither case cited supports the result reached. The *Ballantine* case turned on the construction of a will. *Vide supra*. The decision in the *Lane* case merely holds that improvements made on land owned by the partners are partnership assets. Its dictum that this result would be true even if the land upon which they were made had belonged to one of the partners—is equally unavailing upon the point at issue which is, not whether the instant improvements are partnership assets, but whether they are real or personal property of that partnership. The cases cited in support of the *Lane* dictum show that this question was never considered.

(c) It is a *non sequitur* to premise improvements made with partnership funds on the lands of one partner, and conclude from the absence of an agreement for their removal that therefore they constitute the *real* property of the *improver*.

(d) The result is illogical and out of harmony with the body of the law. Instead of requiring the improver to establish an agreement in order to preserve his personal property it would penalize the owner by making him prove such agreement at the peril of a loss of a fractional estate in his own land. The absence of such agreement, instead of prejudicing the im-

prover, as the cases declare, is thus perverted into a damage to the soil owner and becomes equivalent to a conveyance by him of an undivided interest in his realty. The fallacy of this strange doctrine is emphasized when tested in the light of an analogous state of facts. Assume that A leases lands to B. B erects trade fixtures. B may remove them during his term, despite annexation to the freehold. *Penton v. Robart*, 2 East. 88; *Loughran v. Ross*, 45 N. Y. 792; *Torrey v. Burnett*, 38 N. J. L. 457. But if their removal cannot be effected without material injury to the freehold, then, notwithstanding they are trade fixtures, they cannot be removed. *Webb v. New Haven Theater Co.*, 87 Conn. 129; 87 Atl. Rep. 274. And see *Holmes v. Standard Pub. Co.*, 55 Atl. Rep. 1107. Suppose we have, then, the relation of landlord and tenant, analogous to the bare partnership status of the Massachusetts case. Shall we follow its doctrine and conclude that when there is a permanent annexation made by the leaseholder and the absence of any agreement that thereby the leaseholder becomes a tenant in common with the landlord? If so, then the decision of our own court of last resort in *West Shore R. R. Co. v. Wenner*, 75 N. J. L. 494—1907, must be overruled. For it was there held, because of the absence of agreement, that a building erected by a tenant on leasehold property became permanently the property of the landlord. Gummere, *C. J.*, said at page 496: "The rule with relation to the right of a tenant to remove trade fixtures at the expiration of his term has no application to a building erected by a tenant upon the land which he has leased. When so erected the building becomes a part of the freehold and the property of the landlord, in the absence of an agreement between the parties that it shall remain the property of the tenant."

II

THE NATURE OF THE PARTNERSHIP RIGHT IN RESPECT TO IMPROVEMENTS MADE BY IT UPON THE INDIVIDUAL LANDS OF ONE PARTNER IS A CLAIM TO COMPENSATION WHICH CLAIM IS SECURED TO THE EXTENT OF AN EQUITABLE LIEN ON THOSE LANDS.

This proposition is the direct resultant of the decision by Chancellor Zabriskie in *Deveney v. Mahoney*, 23 N. J. Eq. 247 (1872).

The New York cases cited by him hold that title to the land and improvements is in that partner who owns the land, but that the land is subject to an equitable claim in behalf of the partnership. Among them is *King v. Wilcomb*, 7 Barb. 263. In that case trees and shrubbery were planted by a firm of nurserymen on the lands of one partner. The latter sold those lands. The other partner filed bill to have these trees and shrubbery declared partnership property and accounted for. The claim was sustained against the non bona fide purchaser. Harris, J., said:

“There can be no doubt, I think, that as between the partnership and Wilcomb, the trees and shrubs, composing the nursery are to be regarded as personal chattels. The consent of Wilcomb that the partnership should occupy his land, for the purpose of its business, implies a license to remove the property planted there when the proper period of removal should arrive. The relation of landlord and tenant was created by the permission to occupy the land.”

See also notes in 27 L. R. A., at page 484, and 28 L. R. A., at page 102.

The right of the partnership is undoubtedly a claim to an accounting. Such a right is a chose in action. Every chose in action is personal property. Dicey, *Confl. Laws*, p. 313. Stock in a corporation, whose entire assets are invested in realty, is nevertheless personal estate. *Johns v. Johns*, 1 Ohio St. 350; *Russell v. Temple*, 3 Dana Abr. (Mass.) 108. A mortgage security for a bond, although it affords rights against or in realty is personalty. So is a mechanic's lien, although under it the realty may be sold. The vendor of land who has made a contract for its sale becomes the owner of a chose in action which on his death passes to his personal representative who becomes entitled, therefore, to the proceeds of its sale. The fact that the lien or the right or the claim is secured more or less against land, does not transpose that lien or right or claim into a real asset. Its nature remains as personalty.

One point as to licenses or tenancies mentioned by the New York court, *supra*. Assume that Walter was living and the partnership still existent. Admit that Walter would not be a trespasser, if he went into the building, one of the improvements. The reason is the implied license afforded by the partnership status. What is the nature of that license? It might in quantum be so great as to amount to a tenancy at will. But a tenancy at will is less than a freehold and every tenancy less than a freehold is merely personal property and goes not to the heir but to the next of kin. *Goodwin v. Goodwin*, 33 Conn. 314; *Brewster v. Hill*, 1 N. H. 350. *A fortiori* a mere license is personalty.

In short, as the learned Vice-Chancellor below said (Case, p. 20, ll. 12-17), the right of the partnership is not *in* but *against* the property;

not a right of ownership in the property but rather a lien against the property for the value put in it.

III

THE LIEN AGAINST THE PREMISES IN QUESTION HAS BEEN SATISFIED AND DISCHARGED.

The partner who owned the soil has paid \$14,000 to the personal representative of the other partner (Case, p. 4, ll. 15-30) and received a bill of sale for "all her right, title and interest in and to the assets of the partnership." (*Ibid*; also Case, p. 13, ll. 28-30.) Although in receipt of the agreed compensation for *all* the partnership assets, the technical point is now urged that this payment does not extinguish the claim to reimbursement or discharge the equitable lien therefor because the bill of sale by the personal representative is insufficient and a deed by the heirs is alleged to be requisite. Let us ascertain if it is sound that the buyer shall pay twice in this instance?

Assume that Walter was living and partnership still existent; that the partners agreed to dissolve; that the firm debts were paid out of cash in hand; that question arises as to settlement in respect to the improvements. Assume they agree upon their value as \$1,000; that Myron thereupon paid Walter \$500 in cash. Would not such payment even without written receipt or bill of sale, extinguish all claim of Walter? Or, if Walter did give a bill of sale, can it be maintained that it was insufficient, that a deed was necessary?

The answer to these questions readily appears. Revert to the case of the trade fixtures as heretofore put. Are those fixtures realty or person-

alty? If the latter, no emphasis need be placed upon their being trade fixtures. If personalty, ownership would not cease if they were not removed during the term. They must be realty. The cases so hold. *Hallen v. Runder*, 1 Crompt. M. & R., 266; *Mackintosh v. Trotter*, 3 M. & W., 184; *Freeman v. Dawson*, 110 U. S., 264; *Joliet Bank v. Adam*, 138, Ill., 483; *Bliss v. Whitney*, 9 Allen, 114. But, and this is the essential point to our present inquiry, while they are realty in fact, the tenant's right is not to the fixtures as realty, but a mere right to remove them, and, such right being a personal right, a sale of those fixtures by the tenant does not come within our 5th Section (the original 4th Section) of the Statute of Frauds, it being considered that he is selling not the fixtures but rather the right to remove them. *Hallen v. Runder*, *supra*; *Lee v. Gaskell*, 1 Q. B., 700; *South Baltimore Co. v. Muhlbach*, 69 Md., 395. We therefore submit that no writing was necessary, let alone a deed, as complainants are driven to contend. From the standpoint of the party who erected the improvements on the land of another, the improvements are his personal property. Thus in *Rogers v. Woodbury*, 15 Pick. 156, Putnam, J., speaking of a house erected on land not belonging to the improver, said it might or it might not be parcel of the realty. "If the owner of the land owned the building, it would be so. If he did not, and the owner of the building had no interest in the land, the building would be personal property."

Suppose, however, that Myron and Walter did not agree upon the valuation of the improvements and a bill is filed to settle the partnership affairs. The Court would determine that Walter as a member of the partnership had a claim or equitable lien upon the improvements and

would thereupon proceed to determine the value of that lien. This is exactly what Chancellor Zabriskie did in *Deveney v. Mahoney, supra*. The rights of partnership creditors are worked out exclusively upon the rights of the partners. And their rights in the land are no greater than the value of the lien in money. *Deveney v. Mahoney, supra*. So with the partner himself. Payment of money extinguishes the lien. He has no right in specie but a mere claim to reimbursement in money compensation, not restitution; a personal right, not real estate. For, if I own realty, then no lawful power, short of eminent domain, can compel me to accept money in lieu thereof, I am entitled to my realty in specie. But if my right is such that my claim is extinguished upon the payment of money, then my right whatever to, or whatever else it may be, is personalty. And if it is personalty, it passed by the bill of sale and the claim and its accompanying lien is gone.

IV

PARTITION WILL NOT LIE BECAUSE THE SOIL OWNER AND THE IMPROVER ARE NOT TENANTS IN COMMON.

In any event they are not tenants in common. The learned Vice-Chancellor below said (Case, pp. 20, 21):

“It is impossible or impracticable, of course, to sell the improvements apart from the soil. It is impossible to actually partition the improvements apart from the soil. The effect would be to create an interest of the partnership in the soil for he who can compel the sale of the soil as would be the result in this case, if complainants’ position is sound, has an interest in it. The rule

which had as one of its objects the protection of the owner of the soil would operate to his great disadvantage. It is suggested that an equitable result may be worked out by having the value of the soil appraised and the value of the improvements, then selling the whole and apportioning the proceeds upon the basis of proportions. This, I think, would be practically impossible and it would be inequitable to the owner of the soil. The duty of the owner of the soil is to pay money, not to give real estate or an interest therein."

The *Ballantine* case cited by appellants (their brief, p. 20) is not applicable because as heretofore mentioned, *that* was a mere problem in determination of the intent of the testator under words indicating his will that all his interest in the partnership property should be continued in the business.

If we assume they are tenants in common, what are the proportions? How much of the land tract shall be appropriated in computing those proportions—the entire tract or some fraction or merely that portion actually covered by the building? And, if perchance, that proportion should be once determined, is it constant or variable, as the building deteriorates and the land receives unearned increment in value with the efflux of time? Compare the *reductio ad absurdum* in the analogous contention as to tenancy in common of border trees (trunk on A's land, roots in both A's and B's land). *Lymam v. Hale*, 11 Conn., 177; *Skinner v. Wilder*, 38 Vt. 115.

V

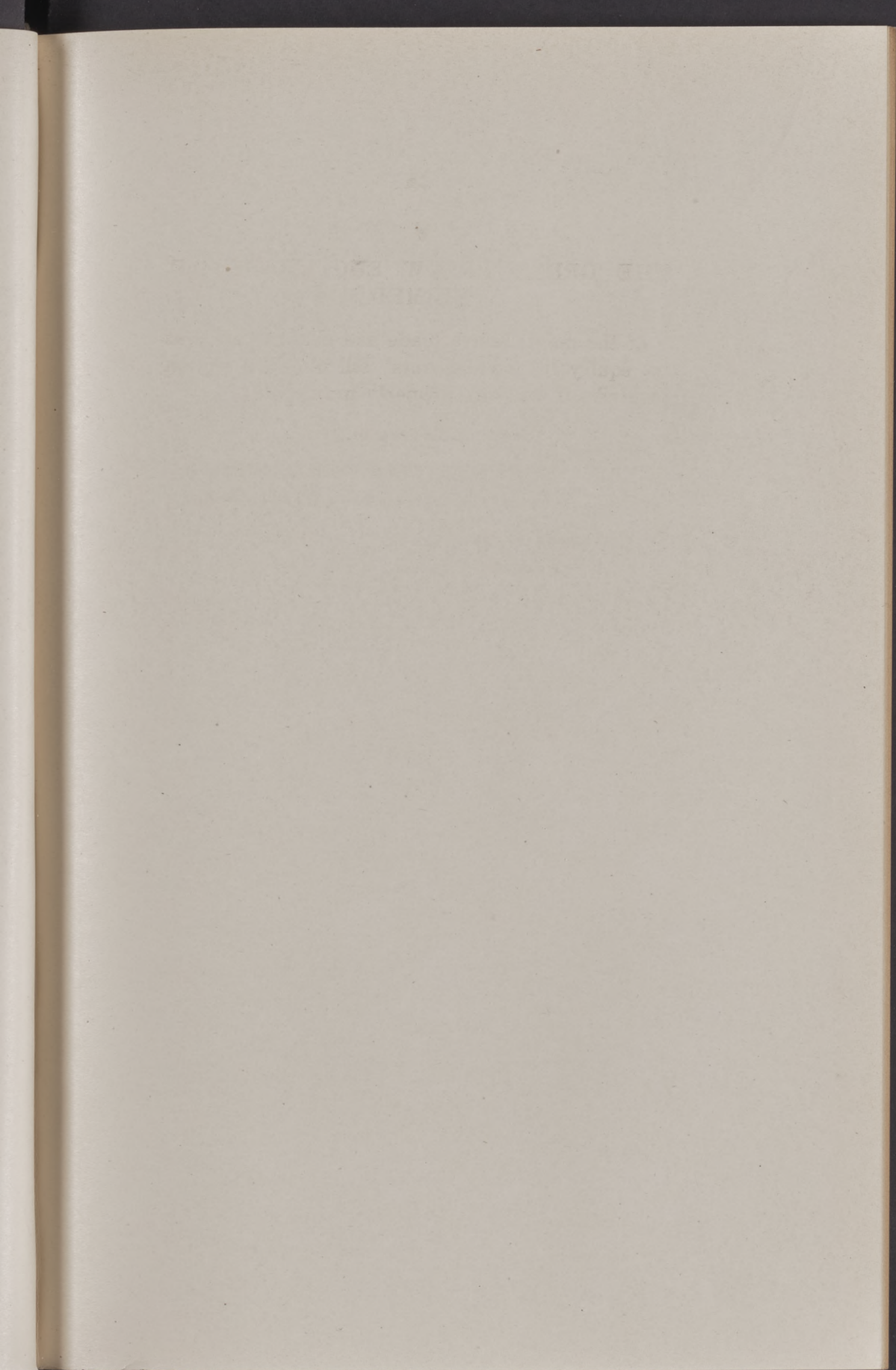
THE ORDER BELOW SHOULD BE AFFIRMED.

If the points above made are sound, there was no equity in complainants' bill and the motion to strike it out was properly granted.

Respectfully submitted,

BURNETT, CORNISH & SORG,
Solicitors of Defendants-Respondents.

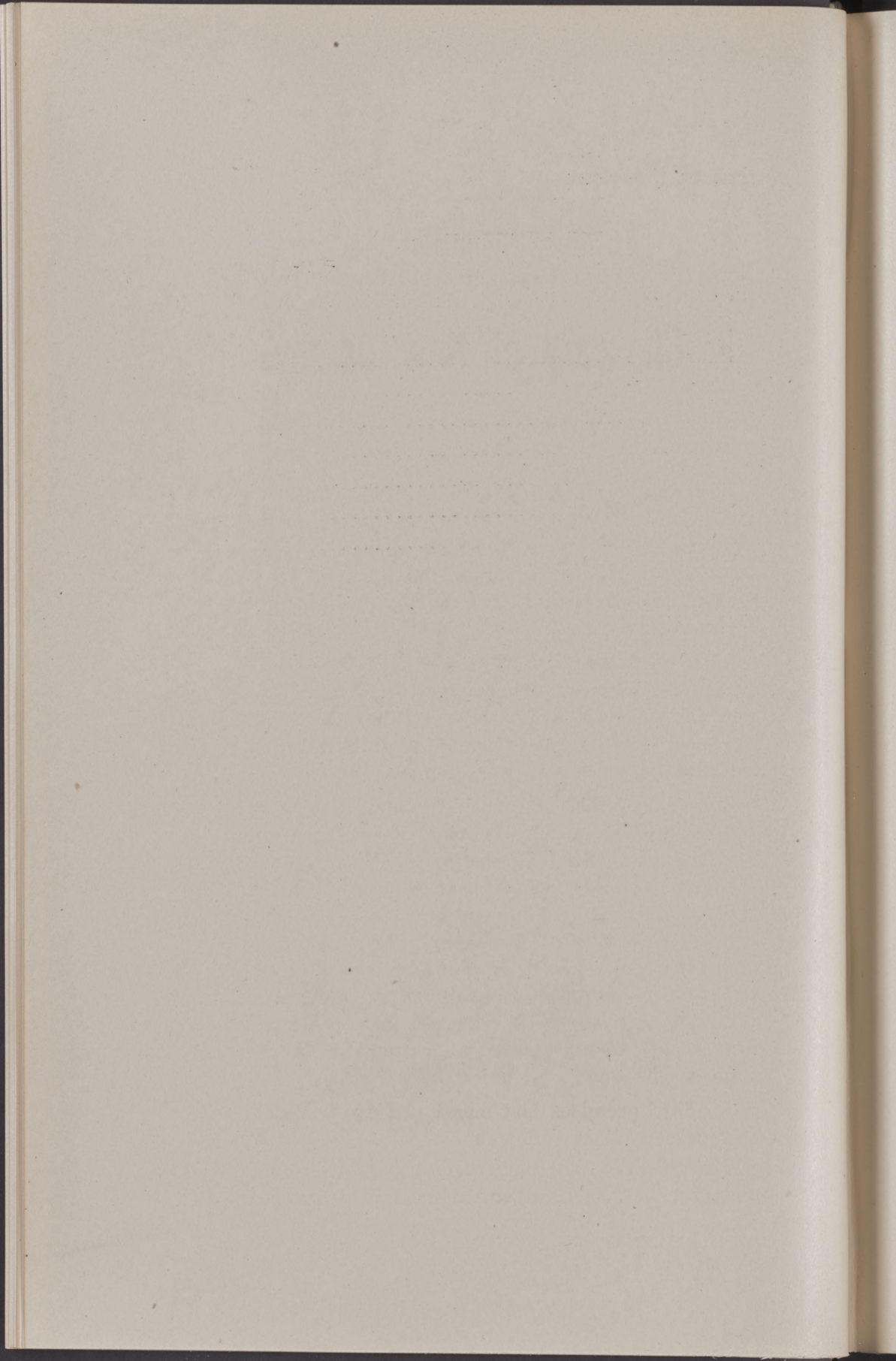
D. FREDERICK BURNETT,
Of Counsel.





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Bill of Complaint.

Bill of Complaint.

(Filed February 6, 1917.)

In Chancery of New Jersey.

10

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainants, Russell A. Flint, individually, and Mildred E. Flint, an infant under the age of twenty-one years, by Laura E. Herbert, her next friend, all of the town of West Orange, Essex county, New Jersey, respectfully show that:

1. Said Russell A. Flint and said Mildred E. Flint are respectively the son and daughter and the only heirs at law of Walter A. Flint, deceased, late of the town of West Orange, in the county of Essex, New Jersey. 20

2. On the 27th day of October, 1913, said Walter A. Flint and his brother, Myron E. Flint, who is one of the defendants to this suit, were then and for approximately twenty years prior thereto had been partners in business, each having a one-half interest therein, under the firm name of M. E. and W. A. Flint, as extensive retail dealers in butter, eggs, poultry and dairy products, having their principal place of business at 387 Orange road, in the town of Montclair, in the county of Essex, New Jersey. 30

3. Said premises last mentioned are bounded and described as follows:

First Tract. All that tract or parcel of land and premises, hereinafter particularly described, 40

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situate, lying and being in the township of Montclair, in the county of Essex and State of New Jersey, beginning on the east line of the public highway from Montclair to Orange, at the southwest corner of land conveyed to Samuel C. Ward on August 2nd, 1880 (said public highway
 10 being now called Orange road); thence on his line, south sixty-seven degrees forty-five minutes east, one hundred and sixty-nine feet and fifty-three hundredths of a foot; thence south twenty-two degrees and twenty-three minutes west, seventy-one feet and thirteen hundredths of a foot; thence north sixty-three degrees and twenty-two minutes west, one hundred and seventy feet to the said east line of said highway; thence on
 20 the east line of said highway, north twenty-two degrees and twenty-three minutes east, fifty-eight feet and fourteen hundredths of a foot to the place of beginning.

Second Tract. All that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the town of Montclair, in the county of Essex and State of New Jersey, to wit: Beginning at the northeasterly corner of land of the said Myron E. Flint which point is distant one hundred and
 30 sixty-nine feet and fifty-three hundredths of a foot on a course of south sixty-seven degrees forty-five minutes east from the easterly side of Orange road and running thence south sixty-seven degrees forty-five minutes east, five hundred and forty-eight and sixty-seven hundredths feet; thence south forty-five degrees west, sixty-two feet; thence south forty-five degrees east fifty feet; thence south forty-four degrees forty-one minutes west, two hundred and nine and
 40 fifty-three hundredths feet; thence north sixty-

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three degrees twenty-two minutes west, five hundred and four and eight-tenths feet; thence parallel with Orange road north twenty-nine degrees twenty-four minutes east ninety-five and seven hundredths feet; and thence north twenty-two degrees twenty-three minutes east one hundred and thirty-four feet, more or less to the place of beginning. 10

4. The legal title in fee simple to said premises is in said Myron E. Flint who purchased said property in two parcels, the first whereof having been deeded to him by The Orange Building and Loan Association, a corporation, by deed dated July 3rd, 1899, and recorded December 26th, 1899, in Book Z 32 of Deeds, at page 304 thereof, in the office of the Register of Deeds of said county of Essex; the second parcel thereof having been deeded to said Myron E. Flint by Isaac M. Williams and Harriet J. Williams, by deed dated November 16, 1905, and recorded March 10, 1906, in Book S 39 of Deeds, at page 510, in said register's office; and said Myron E. Flint ever since the dates of recording said respective deeds has held and still holds the legal title to said premises. 20

5. In the year 1908 or thereabout said partnership of M. E. and W. A. Flint caused said premises to be improved at an expenditure of \$9,000 or thereabout, by the erection thereon of a cement and concrete office and storage building, stable and wagon shed with an adequate roadway thereto for the uses and purposes of said firm in the conduct of said business. 30

6. The entire cost of said improvements was paid by said partnership out of the partnership funds. 40

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7. Said improvements, from and after their completion as aforesaid, were used continuously by said firm for the said partnership purposes until the dissolution of said firm by the death of said Walter A. Flint as hereinafter set forth.

10 8. On said 27th day of October, 1913, said Walter A. Flint was killed in an accident, and thereafter, on the 19th day of November, 1913, his widow, Lottie E. Flint, who is one of the defendants to this suit, was duly appointed his administratrix.

20 9. On the 22d day of April, 1914, said Lottie E. Flint, individually, and as administratrix of the estate of said Walter A. Flint, entered into an agreement with said Myron E. Flint for the sale to said Myron E. Flint of all her right, title and interest in and to the assets of the said partnership for the sum of \$14,000. Annexed hereto and made a part hereof is a true copy of said agreement marked Schedule A.

30 10. Said agreement was performed by the parties thereto, on to wit, the 11th day of May, 1914, and an instrument in writing was executed and delivered on that day, a true copy whereof is hereto annexed and made a part hereof, marked Schedule B.

11. At the time of said agreement to sell, said partnership was liquidated and the assets thereof, exclusive of said real estate, improvements and of good-will were \$30,057.20; the liabilities thereof were \$5,105.25; and the undivided profits thereof were \$24,951.95, of which \$9,327.12 was in cash.

40 12. The debts of said partnership, as complainants are informed and believe, are all paid,

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and at the time of the death of said Walter A. Flint and ever since then the assets of said partnership, exclusive of said real estate, improvements and said good-will will have been and still are more than ample to pay any outstanding debts, liabilities or obligations of any nature whatsoever of said partnership.

10

13. Neither said premises nor the said improvements thereon are or will be needed to meet any of the obligations of said partnership.

14. Upon the said purchase from defendant Lottie E. Flint of her right, title and interest in and to the assets of said partnership by defendant Myron E. Flint, said Myron E. Flint formed a new partnership to conduct the same business with his son, Willis E. Flint, one of the defendants to this suit, under the name of M. E. and W. E. Flint, and assigned to said new firm all the said assets acquired as aforesaid from said Lottie E. Flint, and said new partnership has from thence hitherto and now is conducting said business at the same place, and in the same manner, and dealing with and supplying butter, eggs, poultry and other dairy products to many of the customers of said old firm of M. E. and W. A. Flint, and occupying, using and enjoying the said premises together with the improvements thereon erected and paid for by said old firm out of its partnership funds as above set forth to the exclusion of the complainants.

20

30

15. At the time of said sale by Lottie E. Flint to Myron E. Flint, said complainant Russell A. Flint was an infant of the age of nineteen years, and said Mildred E. Flint, who sues by her next friend as aforesaid, was and still is an infant.

40

Bill of Complaint.

16. Said real estate, improvements and premises above described were not included in said sale by Lottie E. Flint to Myron E. Flint except possibly to the extent of the dower interest of said Lottie E. Flint therein.

10 17. An undivided interest in said premises and improvements, subject to said dower interest, descended to said Russell A. Flint and said Mildred E. Flint upon the death of said Walter A. Flint, and the aforesaid liquidation of said partnership of M. E. and W. A. Flint, which undivided interest said Myron E. Flint holds in trust for said Russell A. Flint and said Mildred E. Flint.

20 18. The defendants Myron E. Flint and Willis E. Flint dispute the title of said Russell A. Flint and Mildred E. Flint, and each of them, to said premises or improvements or any part thereof or interest therein, whether legal or equitable, and claim to be entitled to the exclusive possession and enjoyment of the said premises and of the rents, issues and profits thereof and exclude and since, to wit, the 27th day of October, 1913, have excluded the said complainants from the same.

30 19. Complainants are desirous that a partition or division of the said tract of land and premises should be made among the complainants and the several parties seized of and entitled thereto, according to their respective rights, estates and interests therein, or in case (as complainants believe and aver the fact to be), that the said tract of land and premises cannot be divided among the owners thereof without great prejudice to their interests, then
40 that the same may be sold, and the proceeds

Bill of Complaint.

thereof divided among complainants and the other parties entitled thereto as aforesaid, according to their respective rights and interests.

Complainants are advised that no valid or effectual partition, division or sale of the said premises can be effected without the aid and interposition of some competent court; and that this court has full and complete jurisdiction in the premises and therefore pray:

1. That Myron E. Flint, Willis E. Flint and Lottie E. Flint, individually and as administratrix of Walter A. Flint, deceased, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That the said Myron E. Flint may be declared to hold the land and premises above described or an undivided interest therein in trust for the complainants and that the nature, proportion and extent of the complainants' right, title and interest in said lands may be determined and declared.

3. That an account may be taken of the rents, issues and profits and the reasonable value of the use and occupation of said premises since October 27th, 1913, and that the defendants, or one of them, may be decreed to pay to complainants the share and proportion thereof to which they shall be entitled.

4. That a fair partition and division of the above-described premises may be made, according to the course and practice of this court, if the same be practicable and consistent with the rights of all the parties interested therein, among complainants and other persons entitled to

Bill of Complaint—Schedule A.

shares of the said premises according to their respective rights and interest therein.

5. In case such partition and division in fact of the said premises shall be found to be impracticable, or if it should appear that the same cannot be made without great prejudice to the owners of the said premises, then that the said tract of land and premises may be decreed by this court to be sold, including the inchoate right of dower of the defendant, Lottie E. Flint, and the proceeds thereof after paying the costs and charges of this suit, divided among the complainants and the several parties interested therein, according to their respective rights, shares and interests.

6. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

BORDEN D. WHITING,
Solicitor for and of Counsel
with the Complainants.

SCHEDULE A.

MEMORANDUM OF AGREEMENT, made this 22nd day of April, nineteen hundred and fourteen, between Lottie E. Flint, individually and as administratrix of the estate of Walter A. Flint, of the town of West Orange, Essex county, New Jersey, party of the first part, and Myron E. Flint, of the town of Montclair, county and State aforesaid, party of the second part;

WHEREAS, the late Walter A. Flint and the said Myron E. Flint, for a period of approximately twenty years prior to the death of the

Bill of Complaint—Schedule A.

said Walter A. Flint, on October twenty-seventh, nineteen hundred and thirteen, were equal partners in the butter and egg business in the town of Montclair aforesaid, trading under the firm name of M. E. and W. A. Flint; and,

WHEREAS, the said Myron E. Flint has been conducting said business since the date last aforesaid; and 10

WHEREAS, the parties hereto have agreed to liquidate said partnership and to settle all the matters in difference between them in connection therewith, and the party of the first part has agreed to sell and release and the party of the second part has agreed to purchase all the right, title and interest of the party of the first part in and to the assets of said partnership, and to assume all the debts and liabilities thereof: 20

NOW, THEREFORE, the parties hereto, in consideration of one dollar to each by the other in hand paid, the receipt whereof is hereby acknowledged, and in further consideration of the mutual covenants and agreements herein contained, mutually agree as follows:

First. The party of the first part hereby agrees to sell, assign, transfer and deliver unto the party of the second part all her right, title and interest in and to the assets of the said partnership estate, and to execute and deliver a bill of sale, or other instrument, transferring said title as aforesaid, and to execute and deliver to the said party of the second part a general release in usual form of any and all debts, claims, demands and actions against said party of the second part. 30

Second. Said party of the second part hereby agrees to pay said party of the first part the sum 40

Bill of Complaint—Schedule A.

of fourteen thousand dollars (\$14,000) in manner following:

The sum of one thousand dollars (\$1,000), in cash, upon the execution and delivery of this agreement, receipt whereof is hereby acknowledged; and

10 The sum of thirteen thousand dollars (\$13,000) in cash, on or before the tenth day of May, nineteen hundred and fourteen, and upon the execution and delivery of the bill of sale and release aforesaid.

Third. The said party of the second part further agrees to pay to the said party of the first part on or before the expiration of five days after the appraisal of said partnership business, as hereinafter provided, one-half of the net profits of said partnership business from the first day of November, nineteen hundred and thirteen, to the first day of April, nineteen hundred and fourteen, said profits to be determined by an inventory and account to be taken and stated by two appraisers, one to be appointed by each of the parties hereto. In the event of the failure of said appraisers to agree upon the amount of the net profits, an umpire shall be chosen by said appraisers and his determination of the net profits shall be final, it being understood and agreed that in computing the net profits as aforesaid, an allowance at the rate of seventy-five dollars (\$75) per week, from November first, nineteen hundred and thirteen, to April first, nineteen hundred and fourteen, shall be made to the said party of the second part for his services in conducting the partnership business during said period; and further that the expenses and reasonable fees of said appraisers shall be deducted and paid.

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Bill of Complaint—Schedule A:

Fourth. The said party of the second part further agrees to assume and pay all the debts and liabilities of said partnership, and within one year of the date thereof, to exhibit to the said party of the first part or her attorney satisfactory evidence of said payment, and to indemnify and save harmless the party of the first part from any and all debts, claims, demands and actions which have arisen or can or may arise out of said partnership business or the continuation thereof by said party of the second part; and give due notice to creditors and others of the termination of said partnership estate. 10

Fifth. It is mutually understood and agreed that the party of the second part may have the right, at his option, to use the designation "M. E. & W. A. Flint" upon his wagons, stationery, cartons, &c., providing, however, that on or before the first day of July, nineteen hundred and fourteen, he inserts before the same a prefix showing that he, or his assigns, are successors to the said M. E. & W. A. Flint; provided, nevertheless, that this shall not apply to the present stationery, cartons, and butter papers, now on hand, the present supply of which may be used by the party of the second part for a period not exceeding six months from the date hereof. 20 30

Sixth. The party of the first part further agrees in consideration of this sale, and of the agreements of the party of the second part herein contained, that she will not directly or indirectly, in anywise use or employ, or cause to be used or employed, the name "Walter A. Flint" or "W. A. Flint" in any collocation whatever, as a trade name, under which she may do business hereafter, or in any business in 40

Bill of Complaint—Schedule A.

which she may be interested, directly or indirectly, except that she is not barred from using the following names:

- Russell A. Flint, Inc.,
 R. A. Flint, Inc.,
 R. A. Flint Products Co.,
 10 R. A. Flint Butter & Eggs Co.,
 Flint Products Co.,
 R. A. Flint Company or Corporation,
 Russell A. Flint Company or Corporation,
 Lottie E. Flint, Inc.,
 L. E. Flint, Inc.,
 L. E. Flint Products Co.,
 L. E. Flint Butter & Eggs Co.,
 L. E. Flint Company or Corporation,
 Lottie E. Flint Company or Corporation,
 20 or such other name as may be submitted to and approved in writing by the party of the second part.

Seventh. The said party of the second part further agrees to execute and deliver to the said party of the first part a general release in usual form of any and all debts, claims, demands and actions against the said party of the first part.

- 30 Eighth. The conditions and agreements herein contained shall bind and inure to the benefit of the heirs, executors, administrators and assigns of the parties hereto.

IN WITNESS WHEREOF, the said parties hereto have caused this agreement to be executed in duplicate the date aforesaid.

LOTTIE E. FLINT,
 LOTTIE E. FLINT, Admx.
 Estate of Walter A. Flint.

Bill of Complaint—Schedule B.

Signed, sealed and delivered
in the presence of

C. A. CODDINGTON,
as to L. E. F.

SCHEDULE B.

10

KNOW ALL MEN BY THESE PRESENTS, That Lottie E. Flint, individually and as administratrix of the estate of Walter A. Flint, of the town of West Orange, county of Essex and State of New Jersey, of the first part, for and in consideration of the sum of fifteen thousand seven hundred and five dollars and sixty-two cents (\$15,705.62), lawful money of the United States, to her in hand paid, at or before the ensembling and delivery of these presents, by Myron E. Flint, of the town of Montclair, county and State aforesaid, of the second part, the receipt whereof is hereby acknowledged, has bargained and sold and by these presents does grant and convey, unto the said party of the second part, his executors, administrators and assigns, all her right, title and interest in and to the assets of the partnership lately conducted by Walter A. Flint, deceased, and the said Myron E. Flint, under the firm name of "M. E. and W. A. Flint" in the town of Montclair, and vicinity, except as limited and modified by a certain agreement between the parties hereto dated April 22, 1914.

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TO HAVE AND TO HOLD, the same unto the said party of the second part, his executors, administrators and assigns forever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the eleventh day of May, in the

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Bill of Complaint—Schedule B.

year of our Lord, one thousand nine hundred
and fourteen.

(L. s.)

LOTTIE E. FLINT,
*Individually and as Administratrix
of the Estate of Walter A. Flint.*

10 Sealed and delivered in
the presence of

C. A. CODDINGTON.

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Notice of Motion.

Notice of Motion.

IN CHANCERY OF NEW JERSEY

Between

RUSSELL A. FLINT, *et als.*,
Complainants,

and

MYRON E. FLINT, *et als.*,
Defendants.

On Bill.

Notice.

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*To Borden D. Whiting, Esquire, Solicitor for
Complainants:*

Please take notice that on Tuesday, the 20th
day of March, 1917, at 10 o'clock in the fore-
noon, or as soon thereafter as counsel can be
heard, at the Chancery Chambers in Newark,
before the Chancellor, we shall move in behalf
of the defendants, to strike out the bill of com-
plaint filed in the above entitled matter, upon the
ground that it discloses no cause of action
against the above named defendants.

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BURNETT, CORNISH & SORG,
Solicitors of Defendants.

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Consent to make said motion as within the
time allowed for defendants' pleading is hereby
granted. Service of within notice is hereby ac-
knowledged.

BORDEN D. WHITING,
Solicitor of Complainant.

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Order.

Order.

(Filed April 18, 1917.)

IN CHANCERY OF NEW JERSEY

10 *Between*

RUSSELL A. FLINT, *et als.*,
Complainants,

and

MYRON E. FLINT, *et als.*,
Defendants.

On Bill, etc.

*On Motion to
strike out
Bill.*

Order.

20 This matter coming on to be heard on motion of Burnett, Cornish & Sorg, solicitors for the defendants, Myron E. Flint and Willis E. Flint, to strike out the Bill of Complaint in the above entitled cause, and the arguments of counsel having been heard, and the court being of opinion that the allegations of the Bill of Complaint are without equity, and disclose no cause of action against the above named defendants,

30 It is on this 17th day of April, 1917, ORDERED, that said motion to strike out the Bill of Complaint be, and the same hereby is sustained, with costs to said defendants.

E. R. WALKER,

C.

Respectfully advised,

M. W. LANE,

V. C.

*Opinion.***Opinion.**

(Filed April 9, 1917.)

IN CHANCERY OF NEW JERSEY

*Between*RUSSELL A. FLINT, *et als.*,
Complainants,*and*MYRON E. FLINT, *et als.*,
Defendants.

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*On Motion to
strike out
Bill.**Opinion.*

Messrs. Burnett, Cornish & Sorg. (Mr. Burnett) for the motion.

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Mr. Borden D. Whiting, *contra.*

LANE, V. C.

This is a bill filed by the heirs at law of Walter A. Flint, deceased, (one of them is an infant) for the partition of certain property alleged to be real estate of a partnership which was composed of the deceased Walter and his brother Myron E. Flint, one of the defendants. The business of the partnership was the retail dealing in butter, eggs, poultry and dairy products. In 1908 or thereabouts it caused land and premises mentioned in the bill which were and are admittedly (if there is any other inference to be drawn from the bill the situation was made clear at the hearing) the sole property of the defendant Myron E. Flint, to be improved at an expenditure of some \$9,000, by the erection of a cement and concrete office and storage building, stable and wagon shed with roadway. The en-

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Opinion.

tire cost of the improvements was paid out of partnership funds and the improvements were used for partnership purposes until the dissolution of the firm by the death of Walter A. Flint. Lottie E. Flint, his wife, one of the defendants, was appointed administratrix, and on July 2,
10 1914, she individually and as administratrix entered into an agreement with Myron E. Flint for the sale to him of all of her, and the estate's interest in the assets of the partnership, for the sum of \$14,000. This sum represented approximately one half of the net assets of the partnership, including the value of the improvements. The sum was paid and a bill of sale delivered. The debts of the property have been paid and the value of the improvements will not be needed
20 to meet any of the obligations of the partnership. The complainants, heirs at law of the deceased partner, now claim that the improvements were and are real estate and as such their value not being necessary for the payment of partnership debts, descended to them as heirs at law of the deceased partner and that the agreement and bill of sale is ineffective as against them. The technical situation which would exist, if the complainants' position be sound, is that the legal
30 title of the soil will be in the defendant Myron Flint. The defendant Myron Flint will also have a half interest in the improvements. Each complainant will have a one-fourth interest in the improvements. The bill asks partition and other relief. The position of the defendant Myron Flint is that whatever right the partnership had in the improvements was from the beginning and continued to be, so far as the partnership and the individual parties are concerned, personally. Passing the question which arises
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Opinion.

upon the face of the bill whether it appearing that the legal title is in dispute there can be partition until the title is settled, which was not raised on the motion to strike out in any way, I will consider the merits. *County Homes Land Co. vs. DeGray*, 71 N. J. Eq., 283. The bill prays for other relief and it may well be argued that any relief that could be granted must, by reason of the relationship of the parties, be in this court. 10

The law is well settled that partnership real estate, not necessary for the payment of partnership debts, descends to heirs at law. *Craighead vs. Pike*, 58 N. J. Eq., 15; *Campbell vs. Campbell*, 30 Eq., 415. There are exceptions. *Patrick vs. Patrick*, 71 N. J. Eq., 347. That, so far as the owner of the soil is concerned, the improvements are real estate, admits of no question. *Leo Company vs. Jersey City Bill Posting Company*, 78 N. J. Law, 150. *Palmeteer vs. Robinson*, 60 N. J. Law, 433. They become real estate not because of a change of a physical nature, but because of annexation to the soil. The rule originally, I think, was based upon the practical impossibility of removal after annexation without great injury. One who voluntarily places improvements upon the land of another, with or without the consent of the owner of the soil, loses his right to the personal property unless there is an express agreement which takes the case out of the rule and even where such an agreement is present, which might be effective between the owner of the soil and the person making the improvements, it would be ineffective as against a subsequent purchaser without notice. The reason for this is stated by Justice Trenchard in *Leo Company vs. Jersey City Bill Posting Company*, 78 20 30 40

Opinion.

N. J. Law, 152. It is conceded by defendants that the fact that the land was the land of one of the partners and the improvements were made with partnership funds, operates to prevent the owner of the soil from asserting, as against the partnership and its representatives, the right to hold the improvements without some compensation. The question is, what is the right of the partnership? Is it a right *in* the property or a right *against* the property? Is it a right of ownership in the property or is it in the nature of a lien against the property for the value put into it? I think the latter. What the partnership used was money, personal property. This money was used to purchase personal property. That personal property was put upon real estate and although its physical nature was not in any wise altered, it became, by virtue of a rule of convenience, real estate, but not I think the real estate of the partnership. By virtue of the relations existing between the parties a duty arose upon the part of the owner of the soil in this case to account to the partnership. The right to the partnership was a right to recover from the owner of the soil not real estate, but personal property, to wit, money. *Deveney vs. Mahoney*, 23 N. J. Eq., 247. Such a right is a chose in action which is personal property. To hold otherwise would result in endless confusion. It is impossible or impracticable, of course, to sell the improvements apart from the soil. It is impossible to actually partition the improvements apart from the soil. The effect would be to create an interest of the partnership in the soil for he who can compel the sale of the soil as would be the result in this case, if complainant's position is sound, has an interest in it. The rule which

Opinion.

had as one of its objects the protection of the owner of the soil would operate to his great disadvantage. It is suggested that an equitable result may be worked out by having the value of the soil appraised and the value of the improvements, then selling the whole and apportioning the proceeds upon the basis of proportions. 10
 This, I think, would be practically impossible and it would be inequitable to the owner of soil. The duty of the owner of the soil is to pay money, not to give real estate or an interest therein.

Having concluded that the right of the partnership is personal property, the motion to strike out the bill must prevail.

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Notice of Appeal.

Notice of Appeal.

(Filed April 18, 1917.)

IN CHANCERY OF NEW JERSEY.

10 *Between*

RUSSELL A. FLINT, *et al.*,
Complainants,
and

MYRON E. FLINT, *et al.*,
Defendants.

On Bills, &c.
*Notice of Ap-
peal.*

20 The complainants hereby appeal from the order made on the 17th day of April, 1917, in this court in the above stated cause sustaining the motion to strike out the bill of complaint, and from the whole and every part thereof to the Court of Errors and Appeals, in the last resort in all causes.

Dated, April 17th, 1917.

BORDEN D. WHITING,
*Solicitors for and of Counsel
with Complainants.*

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I conceive there is good cause for appeal in the above stated cause.

BORDEN D. WHITING,
Of Counsel with Complainants.

Due and legal service of a copy of the within notice is hereby acknowledged this Twenty-third day of April, 1917.

BURNETT, CORNISH & SORG,
Solrs. of Defendants-Respondents.

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Petition of Appeal.

Petition of Appeal.

(Filed April 27, 1917.)

New Jersey Court of Errors and Appeals

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RUSSELL A. FLINT, *et al.*,
Complainants-Appellants,

and

MYRON E. FLINT, *et al.*,
Defendants-Respondents.

On Appeal,
Petition.

To the Honorable, the Court of Errors and Appeals in the last resort in all causes:

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The petition of Russell A. Flint and Mildred E. Flint, an infant under the age of twenty-one years, by Laura E. Herbert, her next friend, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by an order made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the 17th day of April, 1917, wherein the said Russell A. Flint and Mildred E. Flint, an infant under the age of twenty-one years, by Laura E. Herbert, her next friend, were complainants, and the said Myron E. Flint, Willis E. Flint and Lottie E. Flint, individually and as administratrix of Walter A. Flint, deceased, were defendants, in this respect, to wit:

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That the said order adjudges that the motion to strike out the bill of complainant be sustained with costs to said defendant.

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Petition of Appeal.

Your petitioners humbly appeal from the said order of the Chancellor upon the ground that the same is erroneous for that the bill of complaint discloses a cause of action against the said defendants and sets forth ground for equitable relief, and for that the said Court of Chancery should have denied the motion of the defendants to strike out the said bill of complaint and awarded costs to these appellants against the said defendants.

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Your petitioners therefore pray that the said order of the said Chancellor may be reversed, set aside and for nothing holden, and that your petitioners may have such further relief in the premises as to this honorable court shall seem meet.

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COLBY, WHITING & MOORE,
Solicitors for and of Counsel
with Petitioners.

Service of the within Petition is hereby acknowledged this 28th day of April, 1917.

BURNETT, CORNISH & SORG,
Solicitors of Defendants-Respondents.

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Answer to Petition of Appeal.

Answer to Petition of Appeal.

(Filed May 8, 1917.)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

<p>RUSSELL A. FLINT, <i>et al.</i>, <i>Plaintiffs-Appellants,</i> <i>and</i> MYRON E. FLINT, <i>et al.</i>, <i>Defendants-Respondents.</i></p>	}	<p><i>On Appeal.</i> <i>Answer.</i></p>	<p>10</p>
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The answer of the respondents, Myron E. Flint and Willis E. Flint, above named respondents, to the petition of appeal of the above named appellants. 20

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contended to be true, for answer thereto nevertheless say and admit that an Order was, on the 17th day of April last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said Order is agreeable to equity and they pray that the same may be affirmed with costs to be adjudged to these respondents. 30

BURNETT, CORNISH & SORG,
Solicitors for and of Counsel
with Respondents.

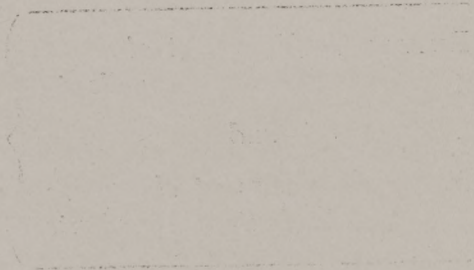
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