

Plaintiffs' statement of claim contained claims based upon the note and upon the original consideration.

*Held*, 1. reversing with costs the judgment of the County Court, that the claim based upon the original consideration was within the jurisdiction of the court.

2. That the defence that the note was not presented for payment, and that while it was current, the remedy upon the consideration was suspended must be pleaded.

3. That if defendant were allowed to amend by pleading such defence plaintiffs should also be allowed to amend by alleging that presentment was waived by subsequent promises in writing to pay.

*A. Whitman*, for appellant. *F. F. Mathers*, for respondent.

Full Court.]

McKEEN v. McKEEN.

[July 18, 1900.

*Will—Construction—Liability of party accepting legacy to perform conditions—Investment for support of beneficiary—Charge on land—Future payments—O. 25, R. 5, Power of court under, as to future rights.*

Testatrix, by her last will, bequeathed the balance of moneys remaining in the banks to her credit, after her death, after payment of certain specified charges, to M.M. and E.M., share and share alike. To her son, A., she bequeathed her half of the homestead property charged with the comfortable maintenance of M.M. and E.M. upon such homestead during their lives.

Per GRAHAM, E.J., WEATHERBE, J., concurring.

*Held*, 1. The maintenance of M.M. and E.M. under the terms of the will was made a charge upon the property and not upon A. personally.

2. A declaration made in the decree with the consent of plaintiff, the surviving beneficiary, restricting the liability of A. to a charge upon the land could not be varied by the Court of Appeal.

3. A sum of money having been set apart which would be sufficient for the support of plaintiff for the period of 13 years, and such maintenance being a charge upon the land, binding it as effectually as a mortgage, it was not necessary to provide for securing future payments.

4. No partition having been asked for in the statement of claim that the appeal from the decree, on the ground that partition had not been ordered, must be dismissed.

Per TOWNSEND, J.:—1. A. having accepted the bequest, and performed its condition during his lifetime, it was impossible for him or his estate to escape personal liability for the maintenance of plaintiff, and that, so far as the decree appealed from refused such relief, it was wrong and must be set aside.

2. The profits arising from the estate belonged to A., especially where, as here, he was held personally responsible for the plaintiff's maintenance.

3. While the court had power under O. 25, R. 5, to make a declaration as to future rights, it must depend upon the circumstances of the particular